A DISH BEST NOT SERVED AT ALL: HOW FOREIGN MILITARY WAR CRIMES SUSPECTS LACK PROTECTION UNDER UNITED STATES AND INTERNATIONAL LAW

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I. Introduction

One precarious position in wartime is to be a captured soldier accused of war crimes by the victorious state. Having fallen into enemy hands, accused military war criminals face the prospect of trials for acts sometimes done in the haste and confusion of combat. Depending on the severity of their acts and the laws of the prosecuting state, the penalty may be death. Under these circumstances, it would be proper to afford those soldiers as much procedural protection as possible so that their fate does not become a preordained conclusion arising from what one U.S. Supreme Court Justice called "judicial lynchings" and "revengeful blood purges."[2]

The existing system of war-crimes prosecutions, with its emphasis on national-level trials, exposes these defendants to procedurally unfair trials. Although captured military personnel accused of war crimes would be protected by the Third Geneva Convention[3] like any other prisoners of war (POW), the Convention's articles prefer the use of military, not civil, courts to try war crimes. Moreover, foreign military defendants, at least in the United States, do not enjoy the same array of constitutional protections as civilian defendants. The U.S. Supreme Court has held that the protections of the Bill of Rights, particularly the right to due process, do not apply to nonresident aliens. This includes non-Americans who commit war crimes overseas.[4] Even the proposed International Criminal Court

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2. Homma v. Patterson, 327 U.S. 759, 760 (1946) (Murphy, J., dissenting). Justice Murphy's position on this case is discussed in detail *infra* Part II(F).

3. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

4. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).

(ICC) would not protect the defendants, as its complementarity provisions would rely on national courts to handle most prosecutions.

Part II of this article describes the domestic war-crimes prosecution of one foreign soldier: the trial of Japanese General Masaharu Homma for his role in one of the more infamous war crimes of World War II, the deaths of thousands of American and Filipino prisoners of war (POWs) during the Bataan Death March. Homma's trial featured questionable procedural and evidentiary rules, which his victorious adversaries hastily had created and administered. The Supreme Court's approval of the U.S. Army's methods used to convict and condemn Homma led to his execution after trial.

Part III examines the sources of authority for prosecuting soldiers like Homma for war crimes such as the mistreatment of POWs. This part describes how the U.S. Constitution, supporting U.S. statutes, the Third Geneva Convention, and other international conventions on the rules of war provide a framework for defining and prosecuting war crimes.

Part IV examines the existing and proposed systems of U.S. and international law to show how the authority to prosecute would still be misused, and how Homma would have fared no better today. These systems include the Uniform Code of Military Justice (UCMJ), the procedural provisions of the Third Geneva Convention and Protocol I to the Geneva Conventions, and the ICC.

Part V reviews an example of the most effective war-crimes prosecution to date, the International Criminal Tribunal for the former Yugoslavia (ICTY), whose establishing statute provides primacy of jurisdiction over national courts. In conclusion, the article advocates that primacy must be included in all future international criminal tribunals to instill necessary procedural protections for foreign military war-crimes suspects. Such reform is required absent additional ratifications of Protocol I or amendments to the ICC statute.

II. Homma and the Bataan Death March

A. The Bataan Death March

Shortly after the attack on Pearl Harbor in December 1941, a Japanese army of 43,000 men, commanded by Lieutenant General Masaharu Homma, landed on Luzon, the largest of the islands comprising the Philip-

pines, then a U.S. commonwealth. This army moved south toward Manila, the Filipino capital.[5] The U.S. commander, General Douglas MacArthur, declared Manila an "open city"—one that was not to be defended or bombed—and soon abandoned it to the invaders. Meanwhile, most of the U.S. and Filipino soldiers retreated in January 1942 to the Bataan Peninsula.[6]

MacArthur incorrectly estimated that the Japanese force was larger than his own army, and he failed to realize that the amount of supplies previously stored on Bataan was insufficient to feed the Allied defenders.[7] As a result, MacArthur's troops starved and failed to launch any counteroffensives to beat back the Japanese.[8] President Franklin D. Roosevelt reassigned MacArthur to Australia in March, demoralizing the soldiers left behind to fight without their veteran commander.[9] On 9 April 1942, 76,000 Allied troops surrendered to the Japanese army after three months of heavy attacks, starvation rations, and epidemics of malaria, dysentery, and various diseases.[10]

Homma now needed to clear the peninsula of his captives so that his troops could use the area as a staging point to attack the Allied fortress on the nearby island of Corregidor.[11] Having anticipated the surrender of Bataan, Homma had previously ordered five staff officers to prepare a plan for evacuating the prisoners.[12] On 23 March 1942, two weeks before the surrender, the officers submitted their plan, which relied on an estimate of 40,000 prisoners. This was half the number of eventual Allied POWs.[13]

The evacuation plan called for the movement of the Allied troops, scattered across the peninsula, to the town of Balanga, where they would assemble and receive food.[14] Then the U.S. and Filipino prisoners would move thirty-one miles to San Fernando, where they would board trains and ride to another town twenty-five miles away. The prisoners were to finish

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5. STANLEY L. FALK, BATAAN: THE MARCH OF DEATH 27 (1962); LAWRENCE TAYLOR, A TRIAL OF GENERALS: HOMMA, YAMASHITA, MACARTHUR 52 (1981).

6. FALK, *supra* note 5, at 27-28; TAYLOR, *supra* note 5, at 64-65.

7. TAYLOR, *supra* note 5, at 65-66.

8. *Id*. at 66.

9. *Id*. at 76-79.

10. FALK, *supra* note 5, at 18-25.

11. *Id*. at 46.

12. *Id*. at 47.

13. *Id*. at 48, 58.

14. *Id*. at 48, 51.

with a nine-mile walk to Camp O'Donnell, a former military base that would serve as a converted POW camp.[15] The plan included several stops for food and medical treatment.[16] Most prisoners would go to San Fernando on foot because the Japanese had few vehicles, most of which the Allies had previously destroyed.[17] The Japanese evacuation plan generally conformed to the terms of the 1929 Geneva Convention for treatment of POWs.[18] Homma's order to carry out the evacuation plan specified that the Japanese troops were to treat all POWs "in a friendly way."[19]

The plan was doomed to failure for several reasons. It anticipated 40,000 relatively healthy and well-fed captives. The surrendering army, however, was twice as large, reduced to starvation rations, and so wracked with disease that, according to Colonel Harold W. Glattly, a U.S. Army doctor, they were "patients rather than prisoners."[20] The plan anticipated that Bataan would not fall until the end of April, and the food, medical services, and transportation would not have been ready until then.[21] Two senior officers shared responsibility for assembling and moving the prisoners, but they did not collaborate on the execution of the plan.[22] To make matters worse, the Japanese forces, which had been reinforced and now numbered 81,000 men, were chronically short of food and medical supplies for their own needs, let alone for those of their prisoners.[23]

Treatment of the Allied prisoners was inconsistent. Although some prisoners traveled in trucks or cars and suffered little, most were forced to march on foot and received little food, water, or medical aid.[24] Some groups received more food or time to rest; others received less.[25] Some guards treated their captives reasonably well, while others tortured the POWs or murdered them outright as punishment for surrender because the

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15. *Id.* at 53-54.
16. *Id.* at 52-53.
17. *Id.* at 53-54, 218.
18. *Id.* at 54; TAYLOR, *supra* note 5, at 93; *see* Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932 [hereinafter 1929 POW Convention].
19. TAYLOR, *supra* note 5, at 93.
20. FALK, *supra* note 5, at 57-61, 213.
21. *Id.* at 61-62.
22. *Id.* at 56-57.
23. *Id.* at 62-66.
24. *Id.* at 221.
25. *Id.*

Japanese military code considered surrender dishonorable.[26] The only constant presence on the march was death: by the end of the evacuation in early May 1942, an estimated 5000 to 10,000 POWs had died.[27] Another 18,000 prisoners died in the first six weeks of imprisonment at Camp O'Donnell.[28]

In his analysis of the Bataan tragedy and the legal aftermath, *A Trial of Generals*, historian Lawrence Taylor ascribed the guards' atrocities to three factors, each of which counteracted Homma's specific directive to treat the POWs humanely.[29] First was the morale of the low-ranking Japanese soldiers. Having suffered almost as much as their enemies during the fighting, having seen many of their comrades die in battle, and having been trained to regard surrender as dishonorable, the Japanese soldiers sought revenge upon their now-helpless foes.[30] The second factor was a shortage of Japanese officers. There were not enough officers to supervise properly all aspects of the prisoner movement.[31] Because a company of infantrymen might be spread out to guard a mile-long file of captives, its commander could not supervise carefully; therefore, the captors attacked their captives with impunity.[32] The third factor was moral contamination of the Japanese junior officers. Several Japanese staff officers sent from Tokyo to assist Homma incited many of Homma's subordinate officers to treat the fighting as a racial war against the United States.[33] The junior Japanese officers' newly instilled racial hatred further ensured poor treatment of the Allied prisoners because Homma entrusted his junior officers with the actual supervision of the prisoners.[34]

Homma claimed that he was so preoccupied with the plans for the Corregidor assault that he had forgotten about the prisoners' treatment, believing that his officers were properly handling the matter. He allegedly did not learn of the death toll until after the war.[35] Even Major General Yoshikate Kawane, whom Homma assigned to direct the main portion of the prisoners' march from Balanga to Camp O'Donnell, neither knew of

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26. *Id.* at 221, 226-32.
27. *Id.* at 194, 198.
28. *Id.* at 199.
29. TAYLOR, *supra* note 5, at 96.
30. *Id.*
31. *Id.* at 96-97.
32. *Id.* at 97.
33. *Id.*
34. *See id*. at 98.
35. *Id.*

the atrocities nor their partial origin in the visiting staff officers' campaign of hatred.[36]

Shortly after the end of the march to Camp O'Donnell, Homma's troops attacked Corregidor. Corregidor's defenders and General Jonathan Wainwright, MacArthur's replacement as Allied commander, surrendered on 8 May 1942. The remaining Allied armies in the Philippines capitulated soon thereafter.[37] Homma was relieved of command the following month and returned to Japan, where he spent the rest of the war on reserve duty and later as Minister of Information.[38]

News of what came to be called the "Bataan Death March" reached the American public in January 1944, when the U.S. War Department released accounts from several survivors who had escaped from prison and reached Allied territory with the aid of Filipino guerrillas.[39] Secretary of State Cordell Hull, congressional leaders, and newspaper editors throughout the United States expressed outrage and shock at the atrocity, and vowed revenge for the dead prisoners.[40]

B. Proceedings Against Homma

Shortly after Japan's official surrender on 2 September 1945, U.S. Army officers took Homma to a POW camp near Tokyo, where he was questioned about his role on Bataan.[41] As part of a plan to curry favor with the Allied occupiers of Japan and General MacArthur, now the Supreme Commander of the Allied Powers, the Japanese government stripped Homma of his rank and decorations.[42] In December 1945, the U.S. Army transferred Homma to the Philippines and placed him in another prison camp near Manila, where questioning continued.[43]

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36. *Id.* at 92-93, 98.
37. *Id.* at 99.
38. *Id.* at 100, 140.
39. FALK, *supra* note 5, at 205-08.
40. *Id.* at 208-10.
41. TAYLOR, *supra* note 5, at 140, 168.
42. *Id.* at 169.
43. *Id.* at 170.

A U.S. military commission arraigned Homma on 19 December 1945 for forty-seven specifications of the charge of violating the laws of war.[44] Most of the specifications concerned mistreatment of POWs on the Death March and in the prison camps afterward, while other specifications alleged the bombing of Manila in violation of the open-city declaration.[45] The commission also charged Homma with refusing to give quarter to—that is, to accept the surrender of—the Allied forces on Corregidor in May 1942.[46] Homma pleaded not guilty after the commission denied a request by Homma's chief counsel, Major John Skeen, for more details about the specifications.[47] The defense also requested a one month continuance for investigation, on the ground that three-fourths of the possible defense witnesses were in China, Japan, or Korea.[48] The prosecution stated that it would be ready for trial in two weeks, but would not oppose "any reasonable request for delay" because the defense needed time for preparation.[49] Nevertheless, the commission's presiding judge, Major General Leo Donovan, announced that the proceedings would resume on 3 January 1946, two weeks after the arraignment.[50]

To defend against these allegations, Homma would have the services of an all-military defense team, which had been chosen by the U.S. Army shortly before the arraignment and fewer than four weeks before the start of trial. Only one of the five Army officers assigned to defend him was from the Army Judge Advocate General's (JAG) office, although all of the defense officers were attorneys.[51] In contrast to the haphazard forming of the defense team, MacArthur had chosen an experienced staff of prosecu-

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44. John F. Hanson, The Trial of Lieutenant General Masaharu Homma 103 (1977) (unpublished Ph.D. dissertation, Mississippi State University) (on file with the University of California, San Diego); TAYLOR, *supra* note 5, at 171-72. The terms "military commission" and "military tribunal" are often used interchangeably, but this article uses the slightly more specific term, "military commission." *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, para. 2(b) (2000) [hereinafter MCM].

45. PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 63 (1979); TAYLOR, *supra* note 5, at 171-72, 175.

46. HANSON, *supra* note 44, at 48.

47. TAYLOR, *supra* note 5, at 172.

48. HANSON, *supra* note 44, at 104.

49. *Id.*

50. *Id.* at 101, 104.

51. TAYLOR, *supra* note 5, at 170-71 (listing Captain George Ott as Homma's lone JAG counsel).

tors, who had already spent several months gathering evidence against Homma.[52]

To make Homma's plight more desperate, his former military adversary, MacArthur, had authority as Supreme Commander of the Allied Powers (SCAP) to order his trial by a military commission.[53] MacArthur also had the authority to draft the criminal procedures and evidentiary rules for the war-crimes trials in the Philippines.[54] Issued on 5 December 1945, the SCAP procedural and evidentiary rules provoked great controversy.[55]

The SCAP procedural and evidentiary rules allowed courts to admit evidence that had objectively probative value.[56] The rules were to be used to ensure a speedy trial;[57] arguably, the rules were not meant to ensure full protection for defendants like Homma because there was no mention of prejudicial potential as a basis for excluding proffered evidence.[58] The military commission could admit documents without proof of signature or issuance if they appeared to have been signed or issued by any government agency or official.[59] The commission could also admit documents that appeared to have been signed or issued by the Red Cross, doctors, investigators, and intelligence officers.[60] Other admissible documents included affidavits, depositions, diaries, letters, and secondary evidence, provided the probative-value threshold was met.[61] The U.S. military commissions operating under the SCAP regulations thus permitted the use of virtually all evidence, including sworn or unsworn statements and hearsay.[62] Lawrence Taylor summarized the SCAP regulations by stating, "In essence, MacArthur's rules and procedures were simple—anything goes."[63]

In addition to choosing the rules and procedures, MacArthur had selected all five members of the military commission.[64] Three of the five

52. *Id.* at 170.
53. *Id.* at 129-31.
54. HANSON, *supra* note 44, at 100-01.
55. *Id.* at 101.
56. *Id.* at 110; PICCIGALLO, *supra* note 45, at 38.
57. PICCIGALLO, *supra* note 45, at 38.
58. HANSON, *supra* note 44, at 110; TAYLOR, *supra* note 5, at 137.
59. HANSON, *supra* note 44, at 109.
60. *Id.*
61. *Id.* at 110.
62. PICCIGALLO, *supra* note 45, at 38.
63. TAYLOR, *supra* note 5, at 137.
64. HANSON, *supra* note 44, at 100-01; TAYLOR, *supra* note 5, at 171.

generals who formed the commission had fought the Japanese during the war, and could have been challenged for conflict of interest.[65] The presiding judge, General Leo Donovan, was not a JAG officer.[66] General Donovan had recently presided over the military commission that had tried, convicted and condemned General Tomoyuki Yamashita, Homma's successor as Japanese commander in the Philippines.[67] All of the judges were career officers, probably loath to antagonize a general as powerful as MacArthur, and MacArthur commanded the prosecutors and defense attorneys through his other title, Commander of United States Army Forces, Pacific (AFPAC).[68] MacArthur also reviewed all appeals from convictions decided by those officers.[69]

Finally, MacArthur had the authority to "approve, mitigate, remit in whole or in part, commute, suspend, reduce or otherwise alter the sentence imposed, or remand the case for rehearing before a new commission."[70] The effect of this sentence-review power allowed MacArthur to ignore almost completely the commission's decision, if he did not like its verdict.[71] In short, MacArthur had near-total control over the entire course of the trial. Since MacArthur had also fought against Homma and lost, the issue of prejudice and conflict of interest was predominant for the defense.

On 3 January 1946, the commission reconvened, and the defendant introduced a motion to dismiss.[72] The motion alleged violations of Homma's due-process rights through the creation and application of the SCAP Rules of Procedure and Evidence, particularly the use of hearsay and lack of authentication of documents.[73] The motion also attacked the self-interest of General MacArthur in convening the commission because MacArthur had: commanded the army defeated by Homma in 1942, from which the Death March originated; commanded all of the officers participating in the trial; and possessed the authority to decide whether to carry out any death sentence imposed on Homma.[74] Lastly, the defense attacked

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65. HANSON, *supra* note 44, at 101, 201.

66. *Id.* at 101-02.

67. *Id.* at 98, 101; TAYLOR, *supra* note 5, at 171.

68. HANSON, *supra* note 44, at 101 (describing MacArthur's multiple titles); TAYLOR, *supra* note 5, at 137.

69. TAYLOR, *supra* note 5, at 138.

70. *Id.* at 171.

71. *Id.*

72. HANSON, *supra* note 44, at 105.

73. *Id.* at 109-10.

74. *Id.* at 111.

the list of specifications as too vague and indefinite. The list failed to charge an offense against the laws of war with the circumstances of particular crimes, the motion concluded, and it failed to state instances of Homma's disregard or failure to discharge his duties as the commanding general.[75]

The commission denied the defense motion without stating the reasons for its ruling.[76] On the same day, the commission also overruled another defense motion for a bill of particulars and dismissal of several vague specifications.[77] The commission then denied another defense request for a ten-day continuance to conduct investigation.[78]

C. Trial

The prosecution's case against Homma was simple: Japanese troops had committed widespread atrocities in the Philippines while Homma commanded them; Homma should have been aware of those crimes.[79] Upon a defense request sustained by General Donovan, the prosecution explained which specification would be covered through each witness's testimony.[80] Between 3 January and 21 January, the prosecution called 136 witnesses to testify to the violation of the open-city status of Manila, the executions of civilians, and the mistreatment of POWs during the Death March and in the prison camps.[81] The commission accepted over 300 prosecution exhibits, most of which were affidavits admitted over a continuous defense objection to admission of hearsay.[82] Although the commission did eliminate many documents as repetitious or immaterial,[83] it generally rejected documents as hearsay only when witnesses could testify about the matters contained in those documents,[84] and it allowed hearsay testimony on several occasions.[85] Also, the commission allowed the transcript of an earlier war-crimes trial into evidence against Homma,

75. *Id.* at 111-12.
76. *Id.* at 114.
77. *Id.* at 114-18.
78. *Id.* at 118-20.
79. *Id.* at 123.
80. *Id.*
81. *See id*. at 124-38.
82. *Id.* at 130, 134.
83. *Id.* at 131.
84. *Id.* at 132.
85. *Id.* at 133.

under a rule allowing prior trials' verdicts if the prior and subsequent trials' accused served in the same unit.[86]

The prosecution's case was noteworthy for the absence of Homma's physical presence during the atrocities and sufferings of the Bataan Death March. During the days of testimony on the horrific events at Bataan, Camp O'Donnell, and elsewhere, Homma's name was infrequently mentioned. Some witnesses claimed to know of visits by Homma, but did not actually see him.[87] The eyewitness testimony did not indicate that unusual events occurred when Homma was present.[88] Not one witness mentioned Homma in connection with any particular atrocity.[89] The commission struck several statements about Homma from the record,[90] but those would not be needed to prove the prosecution's case. The prosecution seemed content to parade tales of "the horrifying nature of the isolated instances of brutality."[91] It was the prosecution's position that Homma did nothing to stop his soldiers; therefore, he was responsible for the soldiers' crimes.[92]

On 21 January 1946, the defense presented several motions requesting findings of not guilty, for want of sufficient evidence, on thirteen of the specifications.[93] The thirteen specifications included charges of mistreating POWs and civilians, the open-city charges, and the charge of denying quarter to the Corregidor defenders.[94] After argument by the prosecution, the commission ruled that the specifications regarding the open-city status of Manila and the refusal to grant quarter at Corregidor, along with one specification regarding mistreatment of sick Allied soldiers, would remain.[95] The commission granted the motion to dismiss on the other specifications attacked by the defense.[96] Next, the commission heard

86. *Id.* at 211-12.
87. *Id.* at 135.
88. *See id.* at 135-36.
89. TAYLOR, *supra* note 5, at 177.
90. HANSON, *supra* note 44, at 136.
91. TAYLOR, *supra* note 5, at 177.
92. *Id.*
93. HANSON, *supra* note 44, at 138-42.
94. *Id.*
95. *Id.* at 142-43.
96. *Id.* at 143-44.

another defense request for a ten-day continuance, but granted only seven days.[97]

The defense's case was presented from 28 January to 7 February 1946. The defense sought to establish that Homma had neither ordered nor allowed atrocities to occur—indeed, that Homma never knew of the atrocities at all.[98] Homma had not been able to discipline his army, the defense suggested, because the visiting staff officers interfered by criticizing Homma to his subordinates.[99] Homma argued that the difficulties of the Bataan/Corregidor campaign forced him to rely on others so that he could handle the myriad difficulties of defeating the Allies, treating and supplying his troops, and caring for Filipino civilians.[100]

The first few defense witnesses, who had served on Homma's staff, testified to a lack of knowledge about conditions in the POW and civilian-internment camps.[101] Homma himself then testified that the Japanese Army's command structure did not allow him to appoint his own staff officers, and that he lacked authority to supervise the military police personnel who had committed executions of civilians.[102] Homma also testified that he had tried to maintain discipline through courts-martial, and denied that he had ordered the bombing of Manila in violation of the open-city declaration.[103] When questioned about the treatment of POWs, Homma said that his subordinates' reports made him confident that conditions were improving.[104] He said that he had not learned about the mistreatment of the POWs until he received notice of the charges against him.[105] Homma said that he considered the treatment of POWs to be an important matter, he explained that illness and his sudden recall to Tokyo had prevented him from inspecting the POW camps, and he denied that he had command of the Japanese Navy bombers used against Manila or of the military secret police who tortured civilians and POWs.[106] Several other witnesses testified that the poor condition of the POWs at Camp O'Don-

97. *Id.* at 144.
98. *Id.* at 147-48, 164.
99. *Id.* at 147.
100. *Id*. at 148.
101. *Id*. at 150.
102. *Id*. at 151.
103. *Id.*
104. *Id*. at 152.
105. *Id.* at 152-53.
106. *Id*. at 154-55.

nell and during the Death March was due to disease, not to Japanese brutality.[107]

The commission treated the defense evidence much as it had the prosecution evidence. The defense, as had the prosecution, elicited witnesses' opinions, and the commission occasionally allowed hearsay evidence that favored the defense.[108] The commission admitted all but one of the twenty-five exhibits that the defense offered.[109] Also, the commission allowed character testimony and affidavits attesting to Homma's humanity and kindness toward Filipinos and to his pro-British leanings.[110]

With the close of the defense presentation, both sides made closing arguments on 9 February 1946.[111] The commission then adjourned the proceedings until 11 February 1946, when it announced its verdict: guilty of the first charge of violating the laws of war by failing to discharge his duties as a commanding officer and thus allowing his troops to commit atrocities, but not guilty of the second charge of refusing to grant quarter to the Corregidor defenders.[112] The commission then sentenced Homma "to be shot to death with musketry."[113]

Before the commission's decision, Homma's attorneys prepared to attack the proceedings through appellate review. On 16 January 1946, the defense team filed a motion with the Supreme Court of the Philippines, but that court denied the motion one week later without argument or opinion.[114] Homma's attorneys then prepared to file a motion for leave to file a petition for writs of habeas corpus and prohibition with the U.S. Supreme Court, and also prepared a petition for writ of certiorari.[115] Before they

107. *Id.* at 157-58.
108. *Id*. at 161.
109. *Id*. at 163.
110. *Id.* at 164; TAYLOR, *supra* note 5, at 189-92 (describing character testimony by Homma's wife, Fujiko).
111. HANSON, *supra* note 44, at 165-84.
112. *Id.* at 57, 185.
113. *Id*. at 185.
114. *Id*. at 186.
115. *Id*.

could file, however, the Court issued its landmark decision of *In re Yamashita*.[116]

D. *Yamashita*

Yamashita's trial had begun shortly before Homma's trial. It also featured the use of vague specifications of war crimes committed by subordinates, heavy use of affidavits and hearsay evidence, many hours of testimony to murders and other atrocities, the absence of direct culpability on the part of the commander, and the use of negligence as the standard for the liability of commanders.[117] Following his conviction and announcement of a death sentence, Yamashita filed two petitions for writ of habeas corpus.[118]

The Court rejected Yamashita's petitions by a six-to-two vote, with Justice Jackson not participating.[119] After first finding that the military commission that tried Yamashita was properly constituted,[120] the Court then ruled that international law, as exemplified by the Annex to the Fourth Hague Convention of 1907 and the Geneva Red Cross Convention of 1929,[121] required Yamashita to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[122] The charge alleged that Yamashita had a duty to control his troops, and that he had breached that duty by failing to exercise control. According to the Court, that was enough to state a violation of the law of war; therefore, the commission could properly find Yamashita

116. 327 U.S. 1 (1946).

117. HANSON, *supra* note 44, at 98 (describing the *Yamashita* commission's acceptance of affidavits and hearsay); PICCIGALLO, *supra* note 45, at 51-52 (use of graphic testimony and negligence standard); TAYLOR, *supra* note 5, at 158-59 (absence of Yamashita's personal involvement, use of affidavits, hearsay and "parading victims of authorities"). *See generally* Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

118. *Yamashita*, 327 U.S. at 4-5.

119. *Id*. at 26.

120. *Id.* at 9-13.

121. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 2 Bevans 965, *superseded by* Convention for the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

122. *Yamashita*, 327 U.S. at 16.

guilty of that violation.[123] The Court's holding thus rested on the doctrine of command responsibility: that commanders have a duty to control their troops, that commanders should know what their troops are doing, and that commanders are liable for their troops' crimes regardless of whether the commanders knew of or ordered those crimes.

Having analyzed the issue of liability, the Court then examined other issues. It ruled that the charges against Yamashita did not have to "be stated with the precision of a common law indictment," and that the charges alleged both a violation of the law of war and the commission's authority to try and decide whether a violation had occurred.[124] Moreover, the Court wrote, the commission had admitted affidavits and hearsay testimony properly, even though that might have conflicted with standard U.S. military trial procedures, because those procedures did not protect foreign soldiers tried by military commissions for war crimes.[125]

The Court then turned to the applicability of the 1929 POW Convention. Article 63 of the Convention specified that a sentence "may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[126] Article 60, meanwhile, required the United States to notify the protecting power of Japanese POWs—in this case, Switzerland—of the trial.[127] Neither provision protected Yamashita, the Court held, because both applied only to acts committed during captivity, not to acts committed before capture.[128] Therefore, Yamashita had no protection under the 1929 POW Convention, even though the Court had admitted that he now was a POW and would be entitled to the same protections as any other POW.[129]

Justices Frank Murphy and Wiley Rutledge strongly dissented.[130] Murphy contended that the commission deprived Yamashita of due process entitled him as a defendant in a criminal proceeding under American jurisdiction, by rushing him to trial "under an improper charge," giving inadequate time for a defense, depriving him of evidentiary protections,

123. *Id*. at 17 n.4.
124. *Id*. at 17-18.
125. *Id.* at 18-20.
126. 1929 POW Convention, *supra* note 18, art. 63, 47 Stat. at 2021, 2052.
127. *Id*. art. 60, 47 Stat. at 2051.
128. *Yamashita*, 327 U.S. at 20-24.
129. *Id.* at 21.
130. *See id.* at 26 (Murphy, J., dissenting), 41 (Rutledge, J., dissenting).

and summarily condemning him.[131] Murphy alleged that "there was no serious attempt to charge or to prove that [Yamashita] committed a recognized violation of the laws of war" or that Yamashita had participated, condoned, or even known about the atrocities committed by his troops.[132] Murphy wrote that the chaos arising from the U.S. landings in the Philippines made effective command and discipline virtually impossible, and that this negated the charge that Yamashita had violated the rules of war by failing to control his troops.[133] International law was silent, Murphy mentioned, as to the liability of the commander of a defeated and disorganized army.[134] Murphy concluded that Yamashita's "rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification."[135]

Justice Rutledge focused his dissent on the commission's formation, its procedural and evidentiary rules, and the actual course of the trial, which constituted "deviations from the fundamental law" of the Constitution and supporting statutes and treaties, particularly the Due Process Clause of the Fifth Amendment.[136] Rutledge said that the commission had accorded to Yamashita only one "basic protection of our system"—representation "by able counsel" whose "difficult assignment has been done with extraordinary fidelity" in spite of the obstacles flung in their path by the commission and the operating rules.[137] Rutledge further objected to the commission's rulings that admitted virtually all evidence presented,[138] to the commission's rejection of the defense's evidentiary objections,[139] to the absence of proof of Yamashita's personal participation or ordering of atrocities,[140] and to the commission's vague findings.[141] Rutledge then deplored the commission's reliance on affidavits and its refusal to grant continuances to the defense.[142] Rutledge also argued that the proceedings violated the existing procedures of both the Articles of War—the U.S.

131. *Id.* at 27-28 (Murphy, J., dissenting).
132. *Id*. at 28.
133. *See id*. at 31-40.
134. *See id*. at 35-40.
135. *Id.* at 40.
136. *Id.* at 45, 78-81 (Rutledge, J., dissenting).
137. *Id*.
138. *Id*. at 48-50.
139. *Id*. at 49.
140. *Id*. at 50.
141. *Id.* at 50-54.
142. *Id*. at 54-60.

Army's legal code, created by Congress—and the 1929 POW Convention.[143]

E. Effect of *Yamashita* on Homma

The aspect of *Yamashita* most harmful to Homma's defense was the holding of the Supreme Court regarding command responsibility. The commission had condemned Yamashita for failing to prevent or halt his soldiers from mercilessly abusing and killing Filipino civilians and Allied POWs, even though he had never ordered such action to occur. The Court had affirmed Yamashita's conviction on this theory. Homma's position was more sympathetic; he had approved a plan that, on paper, conformed to the 1929 POW Convention.[144] Moreover, Homma had ordered his men to treat the captives humanely.[145] Nevertheless, Homma was the commanding general, and the command-responsibility doctrine of *Yamashita* allowed guilt by omission for commanders.[146] As Taylor described Homma's trial, "The point was simple—the atrocities had taken place, and Homma was the commanding officer."[147] Therefore, Homma was guilty of his soldiers' crimes.

F. Homma's Petition Before the U.S. Supreme Court

In the wake of *Yamashita*, Homma's motion for leave to file a petition for writ of habeas corpus and his petition for certiorari were both doomed before they even reached the Court. The Court received the motion and petition on 7 February 1946, and denied both in a *per curiam* decision on 11 February 1946, "on authority of" *Yamashita*.[148] Once again, Justices Murphy and Rutledge dissented.

Justice Murphy began with a stinging rebuke to the Court's reasoning and to the Army authorities:

> This nation's very honor . . . is at stake. Either we conduct a trial such as this in the noble spirit and atmosphere of our Constitu-

143. *See id*. at 61-78.
144. *See* 1929 POW Convention, *supra* note 18.
145. TAYLOR, *supra* note 5, at 93.
146. *Id.* at 98-99, 174, 187.
147. *Id*. at 187.
148. Homma v. Patterson, 327 U.S. 759 (1946) (per curiam).

> tion or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence.[149]

Justice Murphy then criticized the "undue haste" of the trial, and noted that the SCAP procedures amounted to approval of unconstitutional actions because they allowed coerced confessions and the use of evidence and findings of prior mass trials as proof of guilt.[150] In conclusion, Justice Murphy foretold a grim future for such precedent:

> Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here may be turned against others. A procession of judicial lynchings without due process of law may now follow.[151]

Justice Rutledge dissented on the same grounds as he had in *Yamashita*.[152] Exploring the relevant evidentiary procedures and trial chronology used against Homma, Justice Rutledge attacked the Court for its unprecedented decision to permit

> trial for a capital offense under a binding procedure which allows forced confessions to be received in evidence; makes proof in prior trials of groups for mass offenses "*prima facie* evidence that the accused likewise is guilty of that offense"; and requires that the findings and judgment in such a mass trial "be given full faith and credit" in any subsequent trial of an individual person charged as a member of the group.[153]

Homma had received fifteen days between his arraignment and the beginning of trial to prepare a defense, while Yamashita had received three weeks, and Homma's motions for continuances were denied.[154] Such questionable evidence and rapid haste only served "in my judgment [to] vitiate the entire proceeding," Justice Rutledge wrote. "I think the motion

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149. *Id.* at 759 (Murphy, J., dissenting).
150. *Id*. at 760.
151. *Id*.
152. *Id*. at 761 (Rutledge, J., dissenting).
153. *Id*. at 761-62 (internal citations omitted).
154. *Id*. at 762.

and petition respectively should be granted and determined on the merits."[155]

G. Homma's Execution

Following the Court's decision, Homma appealed for clemency.[156] MacArthur refused,[157] and issued a press release on 21 March 1946, which read in part: "If this defendant does not deserve his judicial fate, none in jurisdictional history ever did."[158] On 3 April 1946, Homma was executed by a firing squad.[159]

III. The Source of the Power to Punish

A. Constitutional Provisions

The power of Congress to prosecute foreign military war criminals derives from two sections of the Constitution. The first is the power to define and punish "[o]ffences against the Law of Nations."[160] This section enables Congress to ratify treaties and international conventions defining war crimes, to create statutes defining war crimes, and to create national-level tribunals and support international-level tribunals to prosecute those crimes.[161] The second is the power to "make Rules for the Government and Regulation of the land and naval Forces."[162] Such rules include carrying out the dictates of the Third Geneva Convention and other international agreements on the conduct of war to which the United States is a party, as well as establishing systems of military justice, such as the present UCMJ, that may be used to prosecute foreign military personnel accused of war crimes.[163]

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155. *Id*. at 762-63.
156. TAYLOR, *supra* note 5, at 217-18.
157. *Id.* at 219.
158. HANSON, *supra* note 44, at 198.
159. *Id*.
160. U.S. CONST. art. I, § 8, cl. 10.
161. *See Ex parte* Quirin, 317 U.S. 1, 26, 29-30 (1942).
162. U.S. CONST. art. I, § 8, cl. 14.
163. 10 U.S.C. §§ 801-946 (2001); *see also Quirin*, 317 U.S. at 26-27.

B. International Law and Universal Jurisdiction

Another source of national-level punishment power is found in international law. Generally, jurisdiction over foreign war criminals can be obtained through "universal jurisdiction," which allows individual nations "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as . . . war crimes."[164] United States courts can prosecute international offenses when codified in U.S. law through approval of treaties and, for non-self-executing treaties, passage of implementing legislation.[165] Also, Congress may define international crimes under its Article I power "to define and punish" by reference to international law. An example of this was the enactment of a law allowing U.S. military commissions to adjudicate prosecutions for violations of the laws of war as defined by international agreements, treatises, and other nations' laws.[166]

The four Geneva Conventions of 1949 require the use of national prosecutions for serious war crimes, or "grave breaches," committed against persons protected under those conventions.[167] For example, Article 129 of the Third Geneva Convention states that each signatory nation "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts," but must give accused persons a minimum standard of procedural protection at trial.[168] Thus, the jurisdiction for prosecution of war criminals, at

164. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF OHE UNITED STATES § 404 (1986) [hereinafter RESTATEMENT].

165. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (no federal common-law crimes); RESTATEMENT, *supra* note 164, § 422.

166. *Quirin*, 317 U.S. at 29-31, 35-36. *See generally* U.S. CONST. art. I, § 8, cl. 10.

167. Convention for the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for Amelioration of the Condition of Wounded Sick and Shipwrecked of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention, *supra* note 3, 6 U.S.T. at 3418, 3420; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3516, 3518, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

168. Third Geneva Convention, *supra* note 3, art. 129, 6 U.S.T. at 3418.

least with regard to the serious mistreatment of war victims, relies on international law.

In addition, international law generally requires national prosecution of war crimes. Therefore, national-level tribunals would be the benchmark for prosecutions of foreign military personnel accused of violating the Geneva Conventions. Although Article 129 of the Third Convention and the analogous articles of the First, Second, and Fourth Conventions are not self-executing, nothing in the other articles requires action, other than the Conventions' ratification by the United States, for those articles to take effect.[169] Congress put these articles into effect in 1996 through its passage of the War Crimes Act,[170] which defined "grave breaches" of any of the four Geneva Conventions of 1949 as war crimes, punishable by a prison term or a death sentence.[171]

IV. The Failings of Current and Proposed Systems of War-Crimes Prosecutions

A. The Bill of Rights: No Help from the Founding Fathers

1. Inapplicability of Bill of Rights to Nonresident Aliens

The casual observer of U.S. criminal prosecutions might ask: Why not give the accused foreign defendants the same rights as anyone else charged with a crime? One might think that the Constitution would protect all defendants tried by U.S. courts. Yet this is not the case. Since World War II, the Supreme Court has issued a variety of rulings that withhold the procedural and evidentiary protections of the Bill of Rights from nonresident alien defendants, both in wartime and in peacetime. Because of these restrictions, U.S. courts would not provide full protections for foreign military personnel who commit grave breaches of the Geneva Conventions. This article previously discussed *Yamashita*, one of the four major cases involving nonresident alien defendants.[172] This section focuses on the

169. United States v. Noriega, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (reviewing whether Third Geneva Convention was self-executing, which would allow a lawsuit by deposed Panamanian general for breaches resulting from confinement in U.S. prison for felony convictions).

170. War Crimes Act of 1996, Pub. L. No. 104-192, § 2(a), 110 Stat. 2104 (1996) (prior to 1997 amendment).

171. 18 U.S.C. § 2241(a), (c)(1) (2001).

172. *See supra* Part II. D.

other three cases: *Ex parte Quirin*,[173] *Johnson v. Eisentrager*,[174] and *United States v. Verdugo-Urquidez*.[175]

a. Quirin

Quirin,[176] the first case, began in June 1942 when eight German spies were arrested shortly after landing from submarines in New York and Florida with a mission to attack U.S. war industries.[177] The Federal Bureau of Investigation transferred the Germans to the military authorities for trial before a military commission.[178] Between arrest and trial, President Franklin D. Roosevelt had issued an executive order and proclamation denying access to civilian courts and requiring military commissions for the trial of captured spies. The order was based on Article 38 of the Articles of War, which allowed the President to prescribe the procedures for military commissions.[179] The order made spies subject to the rules of war, including the Articles of War.[180] Moreover, it provided, "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."[181]

President Roosevelt issued the order even though the regular state and federal courts in the eastern United States remained open throughout this period.[182] While the military trial progressed, the German prisoners applied to the federal district court for the District of Columbia for leave to file a petition for writ of habeas corpus. When the district court denied

173. 317 U.S. 1 (1942).

174. 339 U.S. 763 (1950).

175. 494 U.S. 259 (1990).

176. 317 U.S. 1 (1942).

177. *Id*. at 21.

178. *Id*. at 23; *see also* Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851, 854 n.10 (1999) ("In American practice a military commission was a military tribunal for the trial of persons who are not members of the armed forces of the United States . . . . A commission did not provide all the evidentiary and procedural rights accorded in a court-martial by the Articles of War.").

179. *Quirin*, 317 U.S. at 22-23, 27; CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER-IN-CHIEF 112-15 (2d ed. 1976) (describing President Roosevelt's role in *Quirin*).

180. *Quirin*, 317 U.S. at 22-23.

181. 7 Fed. Reg. 5,103 (July 2, 1942); *see also* Wallach, *supra* note 178, at 854 (noting how military commission's rules of procedure and evidence in *Quirin* served as an exemplar for Allied postwar tribunals, including Nuremberg).

182. *Quirin*, 317 U.S. at 23, 24.

the motions, the Germans petitioned the Supreme Court for leave to file petitions for habeas corpus.[183] The Court issued a *per curiam* decision denying their request.[184] It released a full opinion three months later, after the conviction of all eight Germans and the execution of six of them.[185]

Writing for the unanimous Court, Chief Justice Harlan Fiske Stone began the opinion by reviewing the constitutional powers of Congress and the President to wage war, to regulate the armed forces, and to define and punish international crimes and war crimes.[186] Congress enacted the Articles of War to provide "rules for the government of the Army," he wrote, including the formation of special military commissions whose procedures would be prescribed by the President.[187] The President could exercise such powers of establishing military commissions and their corresponding procedures under his constitutional authority as Commander-in-Chief.[188]

The Articles of War allowed for the trial of persons who were subject to military law under the law of war.[189] The law of war defined offenses that military commissions could prosecute, such as espionage, sabotage, and other acts committed by "unlawful combatants."[190] Such unlawful combatants had no status as POWs, who were to be detained but not tried.[191] Because the captured Germans had entered the United States to spy and commit sabotage, the Court wrote, they fell squarely within the law of war concerning the definition and punishment of unlawful combatants.[192]

Chief Justice Stone then addressed the petitioners' contention that they were entitled to an indictment by a grand jury under the Fifth Amendment and to a trial by a civil jury under Article III, section 2, of the Constitution and the Sixth Amendment.[193] He began by noting that the Court had held earlier that the Fifth[194] and Sixth Amendments did not extend to

183. *Id.* at 48.
184. *Id.*
185. *Id.*; ROSSITER, *supra* note 179, at 114.
186. *Quirin*, 317 U.S. at 25, 26.
187. *Id*. at 26-28.
188. *Id*. at 28.
189. *Id.* at 27.
190. *Id*. at 28-29, 31.
191. *Id*. at 31.
192. *Id*. at 36, 37.
193. *Id*. at 38, 39.

cases "arising in the land or naval forces," that is, those cases involving members of the armed forces.[195] He then rejected the petitioners' assertion that an exception would afford such protections to enemy belligerents tried by military commission.[196] Article III did not apply, moreover, because military commissions "are not courts in the sense of the Judiciary Article."[197] Therefore, although the Germans were not members of the U.S. armed forces, the Fifth and Sixth Amendments would not be extended to them.[198] To rule otherwise would mean that enemy aliens would have the right to civil jury trials for violations of the law of war otherwise tried by military commissions, while military personnel would remain deprived of that right.[199] Thus, the Court held, the military commission could try the Germans for violating the law of war through their plans to spy and sabotage.[200]

b. Johnson v. Eisentrager

Later war-crimes trials further restricted the rights of foreign war-crimes suspects. In *Johnson v. Eisentrager*,[201] the Court analyzed a petition for writ of habeas corpus filed by a group of German defendants whom a U.S. military commission in China had convicted of "violating the laws of war" by committing espionage after the surrender of Germany, but before the surrender of Japan.[202] The defendants claimed, *inter alia*, that their trial violated the Fifth Amendment.[203]

Justice Jackson, writing for a majority of six justices, stated, "We are cited to no instance where a court, in this or any other country where [habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its ter-

194. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .").

195. *Quirin*, 317 U.S. at 40 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138-39 (1866)).

196. *Id.* at 40-41.

197. *Id.* at 39.

198. *Id*. at 44.

199. *Id*.

200. *Id.* at 46.

201. 339 U.S. 763 (1950).

202. *Id.* at 765-66.

203. *Id*. at 767.

ritorial jurisdiction."[204] Aliens received a "generous and ascending scale of rights" as they increased their contacts with the United States.[205] Still, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[206] Upon the commencement of war, Jackson maintained, the alien of a nation-state at war with the United States became subject to disabilities "imposed temporarily as an incident of war and not as an incident of alienage."[207]

The Court cited its adoption of the common-law rule barring resident enemy-state aliens from maintaining actions in the resident nation-state's courts during wartime, and explained that resident aliens had only a privilege of litigation, and not a right of litigation, through their presence in the United States.[208] Because the defendants at bar were not within U.S. territory at any relevant time, and because they had been arrested, tried, and convicted in a foreign land for acts committed on foreign soil, they did not enjoy a privilege to litigate.[209] The Court further wrote that to require protections for nonresident enemy aliens before U.S. courts, particularly in wartime, would "hamper the war effort" by diverting resources to supervise and care for aliens before and during hearings on petitions for habeas corpus.[210] Since the writ of habeas corpus was generally unknown outside of the English-speaking common-law nations, Jackson added, U.S. citizens seeking relief from enemy nations' military-judicial action could not expect to invoke such a writ.[211]

Next, Justice Jackson analyzed the possible application of *Quirin* and *Yamashita*. He distinguished *Quirin* on the grounds that the petitioners there were already present in the United States when arrested by civil authorities, were held in custody in the United States, and were tried in the United States under the supervision of the Attorney General.[212] Jackson distinguished *Yamashita* on the grounds that the offenses occurred in the

204. *Id*. at 768.
205. *Id*. at 770-71.
206. *Id*. at 771.
207. *Id*. at 772.
208. *Id*. at 777-78.
209. *Id*. at 778.
210. *Id*. at 778-79.
211. *Id*. at 779.
212. *Id*. at 779-80.

Philippines when it was a U.S. territory, and that the resulting confinement and trial occurred within U.S. jurisdiction.[213]

The Court in *Eisentrager* then rejected the defendants' claim that they deserved the protection of the Fifth Amendment, given that its text referred to "any person." The Court remarked that the defendants' claim to Fifth Amendment protection "amounts to a right not to be tried at all for an offense against our armed forces."[214] If the Fifth Amendment protected the defendants from military trial, the Court wrote, "the Sixth Amendment as clearly prohibits their trial by civil courts" because the Sixth Amendment required trial by a jury of the state and district where the crime occurred.[215] Since the alleged offenses occurred on foreign soil and not within U.S. jurisdiction, presumably no state or district existed from which a jury could be drawn. The Sixth Amendment's blanket reference to the "accused" would also have to include the defendants if the Fifth Amendment's reference to "any person" applied to the defendants, Jackson reasoned.[216] Therefore, wrote Jackson, no constitutional method of trying the defendants for violating the rules of law would be available if a military commission could not try the defendants in the foreign territory where the offense occurred.[217]

The Court then wrote that if the *Eisentrager* defendants could escape trial by a military court, they would enjoy more protection than U.S. military personnel received because "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans."[218] The Court considered such a scenario disturbing, commenting that "it would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies."[219]

Finally, the Court rejected the defendants' claim that the military commission lacked jurisdiction. The military had a "well-established" power, it wrote, "to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents,

213. *Id*. at 780.
214. *Id*. at 782.
215. *Id*.
216. *Id*.
217. *Id*. at 783.
218. *Id*.
219. *Id*.

prisoners of war, or others charged with violating the laws of war."[220] The Court wrote that its earlier decisions in *Quirin* and *Yamashita* established that it was legal for military commissions to try "enemy offenses against the laws of war."[221] Because the defendants were accused of breaching the terms of the German surrender by continuing their espionage on behalf of Japan, the Court stated, they had violated international norms regarding scrupulous adherence to a truce or surrender; therefore, the defendants had violated of the laws of war.[222] The Court reversed the Court of Appeals and affirmed the district court's dismissal of the defendants' petition.[223]

c. Verdugo-Urquidez

Nonresident aliens, including war-crimes suspects, lost more procedural protections with the Court's decision in *United States v. Verdugo-Urquidez*.[224] United States law enforcement agents, acting with permission from the director of the Mexican federal police and joined by Mexican police officers, searched two houses in Mexico owned by the defendant, a Mexican citizen and resident suspected of smuggling illegal drugs into the United States.[225] The search, which was done without a warrant, revealed various documents allegedly implicating the defendant.[226] The defendant sought to suppress the evidence seized, claiming that the absence of a warrant violated the Fourth Amendment's ban on unreasonable searches and seizures.[227] The Court reversed the grant below of the defendant's motion to suppress.[228]

Chief Justice William H. Rehnquist's plurality opinion in *Verdugo-Urquidez* stated that the historical purpose of the Fourth Amendment was to restrict searches and seizures conducted by the United States in domestic matters.[229] The opinion further remarked that there "is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in

220. *Id*. at 786 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 312, 313-14 (1946)).
221. *Id*.
222. *Id*. at 787-88.
223. *Id*. at 791.
224. 494 U.S. 259 (1990).
225. *Id*. at 262-63.
226. *Id*.
227. *Id*. at 263.
228. *Id*. at 263, 275.
229. *Id*. at 266.

foreign territory or in international waters."[230] The Court then cited *Eisentrager* to support its statement that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[231]

Next, the Court rejected the defendant's claim that the plurality opinion in *Reid v. Covert*,[232] which had invalidated the trial of civilians by military courts on foreign territory, constrained U.S. agents to comply with the Fourth Amendment in all dealings overseas.[233] The Court distinguished *Reid* and several cases granting various constitutional rights to aliens on the ground that those cases only concerned citizens and resident aliens.[234] As the defendant was neither a citizen nor a resident alien within the borders of the United States, and as he had no "previous significant voluntary connection with the United States," *Reid* and the alien-rights cases did not apply to him.[235]

In concluding that the Fourth Amendment did not apply to the search, the plurality opinion stated that accepting the defendant's claim, as pointed out in *Eisentrager*, "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[236] Applying the Fourth Amendment to overseas activity, it reasoned, "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."[237] United States military and law enforcement personnel would be plunged "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures

230. *Id*. at 267.

231. *Id*. at 269.

232. 354 U.S. 1 (1957).

233. *Verdugo-Urquidez*, 494 U.S. at 269-70.

234. *Id*. at 270-71 (listing Plyler v. Doe, 457 U.S. 202, 211-12 (1982) (applying Fourteenth Amendment's Equal Protection Clause to illegal aliens); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (classifying resident alien as a "person" under Fifth Amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (decreeing that resident aliens have First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (applying Just Compensation Clause of Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (entitling resident aliens to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (applying Fourteenth Amendment to resident aliens)).

235. *Id*. at 271.

236. *Id*. at 273.

237. *Id.*

conducted abroad," it wrote.[238] Rather than risk such a result, the Court ruled against the defendant.[239]

d. Summary of Decisions

The holdings of *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez* make it virtually impossible to attain procedurally fair, U.S. war-crimes prosecutions of foreign soldiers. The rights necessary to ensure fairness to such foreign personnel have been snatched away and reserved only for those persons with a voluntary attachment to the United States—citizens and resident aliens. Thus, the modern-day successors to Homma would also fare poorly. They too would be deprived of trials before civilian courts and of adequate time to organize a defense, and they would be attacked with improperly seized evidence of questionable value and grave prejudicial potential.

2. Military Commissions

After World War II, Congress overhauled military law by replacing the old Articles of War with the Uniform Code of Military Justice (UCMJ).[240] Retired Colonel Frederick Bernays Wiener, a military law commentator and former Army prosecutor who had participated in the trials of Yamashita and Homma, stated in 1986 that the "lawyerized" procedures of the UCMJ, including appellate review, would prevent the claims of procedural irregularity from happening again.[241] Still, the restrictions on the application of the Bill of Rights to foreign military war-crimes suspects would allow *Homma*- and *Yamashita*-type breaches of justice to occur today, even if the system of military law under the UCMJ is superior to that of the Articles of War.

Perhaps the Supreme Court's strongest criticism of the previous military justice system appeared in its 1946 opinion in *Duncan v. Kahan-*

238. *Id*. at 274.

239. *Id*. at 275; *see id*. at 278 (Kennedy, J., concurring) ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

240. 10 U.S.C. §§ 801-946 (2001).

241. Frederick Bernays Wiener, Comment, *The Years of MacArthur, Volume III: MacArthur Unjustifiably Accused of Meting Out "Victor's Justice" in War Crimes Cases*, 113 MIL. L. REV. 203, 215 (1986).

amoku.[242] That case arose out of the Hawaii territorial governor's declaration of martial law and suspension of the writ of habeas corpus immediately after the attack on Pearl Harbor.[243] The civilian courts were closed, and the Army's commanding general established special military criminal courts that prosecuted civilian defendants for the remainder of World War II.[244] Because military commissions were not part of the judicial system, the resulting convictions and sentences were not subject to direct appellate review.[245] Moreover, military orders prohibited the filing of petitions for writ of habeas corpus, under pain of fine, imprisonment, or death.[246] Still, two civilians sought review of their convictions. The Supreme Court granted review and reversed the convictions.[247]

Justice Hugo Black's majority opinion in *Kahanamoku* stated:

> Courts and their procedural safeguards are indispensable to our system of government. . . . We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. Legislatures and courts are not merely cherished institutions; they are indispensable to our Government."[248]

Justice Black continued, "Military [commissions] have no such standing," and remarked, "The established principle of every free people is, that the law alone shall govern; and to it the military must always yield."[249] He concluded that the territorial law allowing the use of martial law did not authorize the substitution of military commissions for civilian courts.[250] Justice Murphy concurred, writing that the Founding Fathers of the United States had designed the Bill of Rights to prevent military oppression of the

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242. 327 U.S. 304 (1946).

243. *Id.* at 307-08.

244. *Id.*

245. *Id*. at 309.

246. *Id*. (Military orders "prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment or death.").

247. *Id*. at 324.

248. *Id.* at 322.

249. *Id.* at 322-23 (quoting Dow v. Johnson, 100 U.S. 158, 169 (1880)).

250. *Id.* at 324.

individual by guaranteeing "the observance of jury trials and other basic procedural rights foreign to military proceedings."[251]

a. The UCMJ

Since *Kahanamoku*, the military justice system has been remodeled to resemble civilian criminal procedure more closely, while preserving the traditional historical principles, distinctiveness, and autonomy of military criminal law.[252] The result was the UCMJ, which governs a military legal system that, according to Francis A. Gilligan, senior legal advisor to the U.S. Court of Appeals for the Armed Forces, "greatly mirrors the civilian federal one."[253] Under the UCMJ, the major procedural elements "parallel civilian law with substantial due process requirements" to create a system that Gilligan believes is "generally superior" to the civilian criminal law system.[254] Also, the Military Rules of Evidence are for the most part quite similar to the Federal Rules of Evidence.[255] Indeed, in the areas of general provisions, judicial notice, relevancy and prejudice, witnesses, expert testimony, hearsay, authentication, and secondary evidence, they are almost identical.[256]

Other similarities between civilian and military courts lie in the structure of the trial. The structure of a court-martial is similar to a civilian trial. One "military judge" and at least five members comprise the usual court-martial, although a bench trial may be granted under certain conditions.[257] The members serve as the jury, and the military judge must be an attorney.[258] The judge rules on questions of law, but does not vote with the members on questions of fact.[259] The members vote by secret written bal-

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251. *Id*. at 325.

252. FRANCIS A. GILLIGAN ET AL., COURT-MARTIAL PROCEDURE 1-2, 14-16 (2d ed. 1999).

253. *Id*. at 8.

254. *Id*. at 2, 34.

255. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL xi (4th ed. 1997).

256. *Id*. (comparing Articles I, II, IV, and VI through XI of the Federal Rules of Evidence with identically numbered sections of the Military Rules of Evidence).

257. 10 U.S.C. § 816(1) (2000).

258. *Id*. § 825 (describing who may serve as court-martial members); *id*. § 826(b) (qualifications of military judge).

259. *Id*. § 826(a), (e) (military judge as presiding officer without vote); *id*. § 851(b) (power and duty of military judge to rule on questions of law).

lot,[260] and a guilty verdict requires a vote of at least two-thirds of the members for noncapital offenses, with unanimity required for a capital offense.[261] The members also vote on sentencing, with unanimity required for death, three-quarters of the members for prison terms of at least ten years, and two-thirds for all other punishments.[262] Post-conviction appellate review includes review by a three-judge panel of the Court of Criminal Appeals, whose members may be civilians. Appeals from the Court of Criminal Appeals may go to the Court of Appeals for the Armed Forces (CAAF),[263] staffed entirely by civilian judges, and the Supreme Court may review the decisions of this highest military court by writ of certiorari.[264]

Ostensibly, foreign military war-crime suspects would receive the protections of the UCMJ if treated as prisoners of war under the Third Geneva Convention. In fact, the UCMJ specifically lists POWs as one group subject to its provisions.[265]

The UCMJ still leaves open the possibility of war-crimes trials by military commissions, however, which could return captured foreign soldiers to the problems of *Quirin* and its progeny. Article 21 of the UCMJ grants jurisdiction to military commissions "with respect to offenders or offenses that by statute or by the law of war may be tried" by such commissions.[266] Article 36 provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-martial, military commissions and other military tribunals . . . may be proscribed 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

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260. *Id*. § 851(a).

261. *Id*. § 852(a).

262. *Id*. § 852(b).

263. *Id*. § 866 (review powers, procedure, and composition of Court of Criminal Appeals); *id*. § 867 (review by CAAF, including discretionary powers and referral by Judge Advocate General).

264. *Id*. § 867a(a).

265. *Id*. § 802(a)(9). *See generally* Majors Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

266. 10 U.S.C. § 821.

> cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ].[267]

Moreover, the foreign soldier may not even receive the full procedural protections of the UCMJ.

> *Subject to . . . any regulations prescribed by the President or by other competent authority,* military commissions . . . shall be guided by the principles of law and rules of procedures and evidence prescribed for courts-martial.[268]

Thus, the possibility of modern military commissions with special procedures for war-crimes trials persists in the UCMJ, a half-century after commissions with procedures created pursuant to the Articles of War convicted Yamashita, Homma, and the German spies in *Quirin* and *Eisentrager.* Because the UCMJ retains broad authority for establishing military commissions that follow such abbreviated procedural and evidentiary rules, a procedurally unfair trial, like Homma's, could still occur for foreign military war-crimes suspects.

Since the opinions in *Quirin*, *Yamashita*, and *Eisentrager* effectively remove military commissions from Fifth and Sixth Amendment scrutiny, the UCMJ's allowance of military commissions and specialized rules for trials before these commissions could tempt commanders to use these provisions to try foreign soldiers for war crimes. Although the Supreme Court's opinions precede the enactment of the UCMJ, the cases have not been overruled. Many of the opinions' principles, particularly the inapplicability of the Fifth Amendment to nonresident aliens, have been reaffirmed since.[269]

b. Judicial Deference

To worsen the foreign military war-crimes suspect's situation, the civilian judiciary has historically refused to make a searching inquiry into the practices of military justice and regulations. Under the judicially cre-

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267. *Id*. § 836(a) (emphasis added).

268. MCM, *supra* note 44, pt. I, para. 2(b)(2).

269. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (reaffirming *Eisentrager*); Wright v. Markley, 351 F.2d 592, 593 (7th Cir. 1965) (citing *Quirin* to support holding that military tribunals, and specifically courts-martial, "are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments").

ated "military deference doctrine," civilian courts considering constitutional challenges to military laws "perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context."[270] Courts have used this doctrine to justify judicial deference to the military in areas ranging from restrictions on the free speech and religious freedoms of military personnel[271] to a refusal to apply the Sixth Amendment right to counsel in low-level military courts-martial.[272]

The military deference doctrine ensures that the general presumption regarding challenges to military trials leans in favor of Congress's exercise of its rulemaking powers for the armed forces. The Supreme Court wrote in a 1975 opinion that the congressional scheme reflected by the UCMJ contains an implicit view "that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights."[273]

To promote the congressional judgment, the standard of due process for military proceedings differs from the civilian standard. Although the Due Process Clause of the Fifth Amendment provides some protection to military defendants, courts use the military deference doctrine to limit due-process analysis to a balancing test: "whether the factors militating in favor of counsel at summary courts-martial," or in favor of another constitutional right, "are so extraordinarily weighty as to overcome the balance struck by Congress" in favor of the military.[274] Usually, deference "'is at its apogee,'" the Supreme Court has written, "when reviewing congressional decisionmaking in this area."[275]

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270. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (describing how application of doctrine in constitutional challenges to military regulations "often leads to results contrary to cases decided in the civilian context").

271. Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding Air Force's ban on wearing of yarmulke by Orthodox Jewish officer while in uniform); Parker v. Levy, 417 U.S. 733 (1974) (affirming conviction of Army captain for openly making remarks critical of Vietnam War).

272. Middendorf v. Henry, 425 U.S. 25 (1976) (finding no right to counsel before summary courts-martial).

273. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).

274. *Middendorf*, 425 U.S. at 44; *see also* Weiss v. United States, 510 U.S. 163 (1994) (applying *Middendorf* test to issue of fixed terms for military judges).

275. *See Weiss*, 510 U.S. at 176 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

Furthermore, the inability of nonresident aliens to receive protection under the Bill of Rights, a protection enjoyed by U.S. civilians, would render the procedures and safeguards largely irrelevant. As Justice Jackson noted in his majority opinion in *Eisentrager*, the absence of Fifth Amendment protection for U.S. soldiers would make extension of that protection to enemy nonresident aliens "a paradox indeed" because those aliens would then have more rights than U.S. citizens who had temporarily forfeited those rights through current military service.[276] Thus, the inapplicability of at least part of the Fifth and Sixth Amendments to military commissions,[277] and the absence of Fourth, Fifth and Sixth Amendment protections to nonresident aliens for acts committed and property maintained overseas,[278] would allow the U.S. armed forces to place foreign military war-crimes suspects on trial with only minimal procedural protections. The Supreme Court's rulings in *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez* constitute a seal of approval to do just that.

To illustrate further the importance of the Court's rulings to military trials in the modern era of military criminal law, one must examine the source of authority for the practices and procedures of the UCMJ and the subsequent evidentiary rules. The procedural protections of the UCMJ do not derive directly from the Bill of Rights, but from Congress's constitutional power to "make rules for the Government and Regulation of the land and naval Forces."[279] Also, there are questions about whether the Bill of Rights applies at all to the armed forces, or whether it applies in part, or how much.[280] The Court of Military Appeals has held that the Fourth, Fifth, and Sixth Amendments apply at least in part in courts-martial.[281] Yet the Supreme Court has not overruled *Quirin*, *Yamashita*, *Eisentrager* or *Verdugo-Urquidez*, so the application of the Bill of Rights by the Court of Military Appeals to military commissions trying foreign military war-

276. 339 U.S. 763, 783 (1950).

277. *See* Bryan William Horn, Note, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367, 371 n.38 (1992) (citing *Quirin* for the proposition that "neither the Fifth nor the Sixth Amendments applies in trials before a Military Commission").

278. *In re* Yamashita, 327 U.S. 1 (1946); *Eisentrager*, 339 U.S. 763; United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

279. U.S. CONST. art. I, § 8, cl. 14; GILLIGAN, *supra* note 252, at 24-25.

280. GILLIGAN, *supra* note 252, at 25.

281. *See* United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960) ("[T]he protections of the Bill of Rights, except those which are expressly, or by necessary implication inapplicable, are available to members of the armed forces."); GILLIGAN, *supra* note 252, at 26 (mentioning post-*Jacoby* application of Fourth, Fifth, and Sixth Amendments in "literally thousands of cases").

crimes suspects must be constrained by the holdings of these Supreme Court precedents.

c. Commanders' Control of Proceedings

Finally, the role of the commanding officer provides another way to misuse the military commission to produce a "judicial lynching," to use Justice Murphy's words in *Homma*. Under the UCMJ, the power to convene a general court-martial or military commission "is a function of command."[282] The power is personal, it cannot be delegated, and it can be exercised by the President, the Secretary of Defense, the Service Secretaries, and commanding officers of posts as small as an Army brigade, a Marine regiment, an Air Force wing, or a naval station.[283] The convening authority personally appoints the members of the court-martial, although convening officers cannot appoint the prosecutors or defense counsel or the military judge[284] detailed to each general court-martial.[285] Thus, the commanding officer's ability to control the military justice system remains what Gilligan recently called the "primary flaw" in the modern system of the UCMJ.[286] In theory, this would allow a modern-day MacArthur to manipulate the composition and practice of a military commission formed to try a modern-day Homma, once again producing an unfair trial controlled by the improper exercise of command influence.

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282. GILLIGAN, *supra* note 252, at 512-13.

283. *Id*.; *see also* 10 U.S.C. § 822(a) (2000).

284. Because military judges are regular officers subject to regular ratings and fitness reviews by higher-ranking officers, there is at least a potential for abuse by senior officers or the Service Secretaries in selection and continued posting of military judges. GILLIGAN, *supra* note 252, at 548-50 (describing attempt by U.S. Secretary of the Navy to fire military judge by issuing order to Judge Advocate General of the Navy, who refused to carry out the order). *But see* Weiss v. United States, 510 U.S. 163, 179 (1994) ("We believe the applicable provisions of the UCMJ [such as Article 26], and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.").

285. 10 U.S.C. § 825(d)(2) (appointment of court-martial); *id.* § 826 (appointment of military judge); *id.* § 827 (appointment of prosecutors and defense counsel).

286. GILLIGAN, *supra* note 252, at 36.

B. The Third Geneva Convention

1. History of the Development of the Convention

In the wake of World War II, the International Committee of the Red Cross (ICRC) decided to address inadequacies in the 1929 POW Convention.[287] Following the drafting of new conventions and their tentative adoption at an international Red Cross conference in Stockholm in 1948, delegates from fifty-nine nations convened in Geneva in the spring and summer of 1949 to revise the drafts.[288] Beginning on 12 August 1949, the delegates signed the four Geneva Conventions.[289] In addition to new or revised conventions for the protection of civilians and injured military personnel,[290] the 1949 Conventions included a revised Geneva Convention for the treatment of POWs. On 30 August 1955, the United States ratified the new Geneva Convention Relative to the Treatment of Prisoners of War, which went into effect for the United States on 2 February 1956 and remains in force today.[291]

2. Relevant Provisions of the Convention

The Third Convention retained almost all of the provisions of the 1929 POW Convention, and added a new article to address the status of captured soldiers who are suspected of war crimes. This was done as a response to *Yamashita* and other Allied court decisions, which held that soldiers who had committed war crimes before capture were not protected by the 1929 POW Convention, but that soldiers who had committed crimes after capture enjoyed full protection.[292] The distinction between acts committed before capture and after capture offended the ICRC as an arbitrary distinction, and the ICRC proposed at the 1948 Stockholm conference that war-crimes suspects receive full protection as POWs from the time of cap-

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287. INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 6 (J. Pictet et al. eds., 1960) [hereinafter COMMENTARY].

288. *Id*. at 6.

289. *Id*. at 9.

290. First Geneva Convention, *supra* note 167, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention, *supra* note 167, 6 U.S.T. 3217, 75 U.N.T.S. 85; Fourth Geneva Convention, *supra* note 167, 6 U.S.T. 3516, 75 U.N.T.S. 287.

291. Third Geneva Convention, *supra* note 3.

292. ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 168 (1976); COMMENTARY, *supra* note 287, at 413 (citing *Yamashita* and French, Dutch, and Italian war-crimes trials).

ture until the time of conviction.[293] The 1949 diplomatic conference expanded the proposal to protect war criminals as POWs after conviction.[294]

The result was Article 85, which states: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[295] Those POWs "enjoy all the safeguards which the Convention provides," namely, the rights of defense under Article 105.[296] They also retain post-conviction rights, such as the rights to submit complaints, receive relief parcels, and be visited by ICRC representatives.[297]

In addition to Article 85, the Third Geneva Convention contains other articles specifying which laws govern POWs' conduct, what form of tribunal will try POWs for misconduct, and what minimum guarantees of fair trial will be given to POWs. Article 82 states that POWs are subject to their captors' laws, as applied to the captor-nation's own soldiers.[298] Article 129 imposes a duty on signatory nations holding persons suspected of grave breaches of the Third Convention, as defined in Article 130, to try those POWs for war crimes.[299] Article 84 states that only military courts can try POWs, unless the detaining nation's laws permit military personnel to be tried by civilian courts.[300] Article 84 also requires the detaining nation to extend certain minimum procedural rights to POWs on trial.[301]

The certain minimum procedural rights that POWs retain under the Third Convention are listed in Article 105, which grants a prisoner the rights to counsel of the prisoner's own choosing, to the calling of witnesses, and to an interpreter.[302] The prisoner's counsel has a minimum of two weeks to prepare a defense, may interview the prisoner in private, and may confer with defense witnesses.[303] The prisoner also has a right to receive particulars of the charges, as well as "the documents which are

293. ROSAS, *supra* note 292, at 168.
294. *Id*.
295. Third Geneva Convention, *supra* note 3, art. 85, 6 U.S.T. at 3384.
296. COMMENTARY, *supra* note 287, at 423.
297. *Id*.
298. Third Geneva Convention, *supra* note 3, art. 82, 6 U.S.T. at 3382.
299. *Id*. arts. 129-130, 6 U.S.T. at 3418.
300. *Id*. art. 84, 6 U.S.T. at 3382, 3384.
301. *Id*.
302. *Id*. art. 105, para. 1, 6 U.S.T. at 3396.
303. *Id*. art. 105, para. 3, 6 U.S.T. at 3396.

generally communicated to the accused by the laws in force in the armed forces of the Detaining Power," in a language that the prisoner understands, within "good time before the opening of the trial."[304]

3. Weaknesses of the Convention

Article 4 of the Third Convention specifies, in part, "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict . . . ."[305] Since all captured foreign military personnel are POWs under Article 4, and since all POWs retain the protection of the Third Convention even when suspected of war crimes, foreign military war-crimes suspects would merit the full protection of the Third Convention.

In his analysis of *Yamashita* and *Homma*, Colonel Wiener cited the Third Convention's Article 85 as proof that "no cases like *Yamashita* or *Homma* can ever arise again" because Article 85 would require use of the "lawyerized" provisions of the UCMJ when trying future military war-crimes suspects.[306] Nevertheless, Article 85 does not protect foreign military personnel from procedurally unfair prosecutions. First, it refers to prosecution under "the laws of the Detaining Power." This would mean that foreign military personnel in U.S. custody would be tried in accordance with the Constitution, which has been interpreted by the Supreme Court in *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez* to deny the protections of the Bill of Rights to nonresident aliens, such as foreign war criminals.[307] Second, Articles 82, 84, and 129 of the Third Convention would return foreign soldiers to the mercies of municipal military prosecution, that is, to the army that defeated and captured them. Third, Article 105 of the Third Convention does not list or describe general or universal standards of procedure, evidence, or due process.

Article 82 of the Third Convention subjects POWs to the laws of their captors' armed forces.[308] This derives from the 1907 Hague Regulations and Article 45 of the 1929 POW Convention, which had allowed the application of the captor's military laws to POWs because prisoners of war are

304. *Id.* art. 105, para. 4, 6 U.S.T. at 3396.
305. *Id*. art. 4, 6 U.S.T. at 3320.
306. Wiener, *supra* note 241, at 214.
307. *See supra* Part IV(A)(1).
308. Third Geneva Convention, *supra* note 3, art. 82, 6 U.S.T. at 3382.

confined for military purposes and retain their status as military personnel.[309] In the case of foreign soldiers tried by the United States for war crimes, Article 82 would combine with the inapplicability of the Fifth and Sixth Amendments to military commissions, and the inapplicability of the Fourth, Fifth, and Sixth Amendments to nonresident aliens, to place these soldiers in a precarious position.[310] This would return foreign military personnel to the status quo of *Quirin*, *Yamashita*, *Eisentrager*, and *Verdugo-Urquidez*: they would have fewer rights than U.S. civilians, resident aliens, or even U.S. military personnel.

Article 84 of the Third Convention further restricts military war-crimes suspects' rights because it requires military trials for POWs, unless the captor-state's laws allow civil trial for the crimes committed by the POWs.[311] The ICRC's Commentary to Article 84 explained that, although POWs might derive an advantage from trial by "generally less severe" civilian courts, military courts could consider "infringements of the military laws and regulations to which prisoners of war are subject."[312] Therefore, it "was preferable to recognize the competence" of military courts.[313] The Commentary also stated that the civil-court exception of Article 84 derived from some states that confined certain offenses to civil tribunals alone, "whether or not committed by members of the armed forces to whom prisoners of war are assimilated."[314] Article 84's second paragraph, which provides that the procedural safeguards of Article 105 represent the minimum conditions to be fulfilled by any court that tried POWs, further enhances the flexibility of court choice.[315] Yet the preference for military courts in Article 84 would harm foreign military personnel by placing them before military courts-martial or commissions that lack the protective structures found in civilian courts. Thus, the Third Geneva Convention fails to aid the modern military war-crimes suspect, just as its 1929 predecessor failed to protect Homma and his contemporaries.

Article 105 of the Third Convention specifies a POW's minimum guarantees of defense. Nevertheless, Article 105 and the Third Convention in general are silent as to universal standards of procedure, admissibil-

309. COMMENTARY, *supra* note 287, at 406-07, 726 (comparing articles of 1929 POW Convention and Third Geneva Conventions).

310. *See supra* Part IV(A).

311. Third Geneva Convention, *supra* note 3, art. 84, 6 U.S.T. at 3382, 3384.

312. COMMENTARY, *supra* note 287, at 412.

313. *Id.*

314. *Id*.

315. *Id*.

ity of evidence, or due process in general, although the ICRC Commentary remarked that Article 105's list of rights was "in no way exhaustive and the Detaining Power may grant others."[316] Under these circumstances, captor nations would be within the letter of the Third Convention if they were to allow only those rights listed in Article 105, even if fundamental notions of fair play, justice, and an effective defense were not observed.

Article 129 requires signatory nations to bring persons suspected of "grave breaches" as defined in Article 130, including those accused of murdering or torturing POWs, into their own courts.[317] The only glimmer of hope for the accused military war criminal is that Article 129 apparently does not exclude extradition to an international tribunal. The ICRC Commentary maintained, "On that point, the Diplomatic Conference specially wished to reserve the future position and not impede the progress of international law."[318]

C. Protocol I to the Geneva Conventions

1. Development of the Protocol

Another international agreement that may protect the foreign military war-crimes suspect is Protocol I to the Geneva Conventions.[319] In 1977, a diplomatic conference at Geneva drafted two new protocols to the four Conventions of 1949. Protocol I concerned the application of the 1949 Conventions to international wars, while Protocol II dealt with internal armed conflicts.

2. Relevant Provisions of Protocol I

Article 75 of Protocol I is the most important provision for war-crimes trials, as it defines the "fundamental guarantees" for all "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Proto-

316. *Id.* at 491.

317. Third Geneva Convention, *supra* note 3, art. 129, 6 U.S.T. at 3418.

318. COMMENTARY, *supra* note 287, at 624.

319. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

col."[320] Part 4 of Article 75 lists various "generally recognized principles of regular judicial procedure."[321] These principles include a ban on *ex post facto* laws, presumption of innocence rebuttable only by proof beyond a reasonable doubt, protection against compelled self-incrimination, protection against double jeopardy, and a right to confront opposing witnesses and to summon defense witnesses.[322] Part 4 also states that the general procedures "shall afford the accused before and during his trial all necessary rights and means of defence."[323] Part 6 of Article 75 provides, "Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict."[324] Part 2 of Article 75 further describes the accused military war criminal's status as a POW:

> While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of an adverse Party, of his right to be a prisoner of war.[325]

To further ensure that war-crimes suspects, including military personnel, receive full protection under the Third Convention, Part 7(b) of Article 75 specifies that those persons "who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article."[326]

3. Weaknesses of Protocol I

Protocol I provides more comprehensive guarantees of defense than the Third Geneva Convention provides. The international community has accepted those guarantees, at least in principle: as of 2002, 159 nations had ratified or acceded to Protocol I, including China, Germany, North Korea, Russia, and the United Kingdom.[327] Although Protocol I is considered customary international law, several states that have recently fought, or are

320. *Id*. art. 75, 1125 U.N.T.S. at 37.
321. *Id*. art. 75, pt. 4, 1125 U.N.T.S. at 37-38.
322. *Id*.
323. *Id*.
324. *Id*. art. 75, pt. 6, 1125 U.N.T.S. at 38.
325. *Id*. art. 75, pt. 2, 1125 U.N.T.S. at 23.
326. *Id*. art. 75, pt. 7(b), 1125 U.N.T.S. at 38.

likely to fight, international wars have not ratified Protocol I. These warring yet nonratifying countries include France, India, Iran, Iraq, Israel, Pakistan, and the United States.[328] Because these states have not ratified Protocol I and may not consider themselves constrained by it, Article 75 of the Protocol may not be followed when the nonratifying states fight international wars and try foreign military personnel for war crimes. The status of Protocol I as customary international law, however, could cause other states to apply moral and diplomatic pressure to compel the nonratifying states to follow Protocol I in fact if not in law.

D. The International Criminal Court: Is It the Answer?

Given the failings of existing national-level prosecutions of war criminals in general and military war criminals in particular, international prosecutions would appear to offer the best method for ensuring a lasting precedent of war-crime prosecution. An international tribunal, such as Nuremberg or its modern successor, the ICTY, carries a cachet of authority as one court speaking for all humanity. This cannot be said of the military commission in *Homma*, plagued as it was by the appearance of narrow-minded retribution. At first glance, the proposed ICC appears to provide a useful tool for prosecuting war-crimes suspects, and the permanent international tribunal would diminish the appearance of victor's justice. Yet the structure of the ICC, as spelled out in the 1998 Rome Statute (ICC Statute), does not fully meet the specialized needs of military personnel accused of war crimes.[329] To demonstrate this, *Homma* will be analyzed in the context of the modern world under the ICC Statute.

1. Relevant Features of the ICC

The ICC Statute provides several features of importance to defendants in military war-crimes trials. First, its jurisdiction would specifically include war crimes, defined by means of an exhaustive list of offenses.[330] These crimes include grave breaches of the Geneva Conventions and

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327. Int'l Comm. of the Red Cross, *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at* http://www.icrc.org/eng/party_gc (last visited May13, 2002).

328. *Id*.

329. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998) [hereinafter ICC Statute], *reprinted at* 37 I.L.M. 999.

330. *Id*. art. 8, para. 2, 37 I.L.M. at 1006-08.

twenty-six different crimes categorized within "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law."[331] The ICC Statute restricts jurisdiction to those "war crimes . . . committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[332]

The main jurisdictional component of the ICC Statute is its complementarity. Article 1 of the ICC Statute specifies that the court "shall be complementary to national criminal jurisdictions."[333] This means that national courts will continue to perform the bulk of prosecutions for war crimes, crimes against humanity, and genocide.

The ICC Statute creates three methods of obtaining jurisdiction over suspects: referral by the U.N. Security Council, referral by individual nations, and initiation by the ICC prosecutor.[334] Once jurisdiction is obtained, the next issue would be whether the case could be admitted to the ICC for prosecution. Article 17 of the ICC Statute bars the ICC from admitting a case that is being or has been investigated or prosecuted by a country with jurisdiction, unless that country is "unwilling or unable genuinely" to investigate or prosecute, or its decision not to prosecute results from that unwillingness or inability.[335] Articles 18 and 19 specify the procedure of notice and challenge to ICC admission and jurisdiction. The ICC prosecutor has to notify all state parties and nonparty states that would normally exercise jurisdiction when a case is referred to the ICC by a state party or by a prosecutor-instigated investigation.[336] Suspects and states can challenge admission and jurisdiction through an appeals process.[337] The Security Council can also halt a prosecution for twelve months by a resolution under Chapter VII of the U.N. Charter.[338]

The ICC Statute provides thorough trial procedures and rules of evidence. Article 67 of the ICC Statute lists the rights of defendants, including the right to an impartial and fair public hearing and to other "minimum

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331. *Id*.

332. *Id*.

333. *Id*. art. 1, 37 I.L.M. at 999, 1003. *See generally* Lieutenant Colonel Michael A. Newton, *Comparative Complimentarity: Domestic Jurisdiction Consistent with the Rome Statue of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

334. *Id*. art. 13, 37 I.L.M. at 1010-11.

335. *Id*. art. 17, para. 1(a)-(b), 37 I.L.M. at 1012.

336. *Id*. art. 18, 37 I.L.M. at 999, 1012-13.

337. *Id*. art. 19, 37 I.L.M. at 1013-14.

338. *Id*. art. 16, 37 I.L.M. at 1012.

guarantees."[339] Defendants have the right to prompt and detailed information of the charges.[340] They also have the right to adequate time and facilities for preparing a defense, and to choose attorneys or receive appointed counsel, or to represent themselves.[341] The attorney-client privilege also exists to protect communications with counsel.[342] Furthermore, defendants may confront opposing witnesses and subpoena defense witnesses and shall have protection from compelled self-incrimination.[343] Defendants can make a defense statement, and can receive free interpretation and translation of documents.[344] The defense also has the presumption of innocence, rebuttable only by proof beyond a reasonable doubt.[345]

2. Critique of the ICC Statute

The procedural and evidentiary protections of the ICC Statute mirror the protections of Protocol I to the Geneva Conventions and further reiterate that international law requires a high level of protection for defendants. Such protections would work to a modern-day Homma's advantage, and alleviate the dissenting concerns of Justices Murphy and Rutledge.

Nevertheless, only those defendants whom the ICC tries in the first place can receive these protections. This would present a problem for the foreign military war-crimes suspect. Article 8(2) of the ICC Statute contains a threshold requirement that individual war crimes be committed as part of a plan or policy, or as part of a large-scale commission of such crimes.[346] This provision excludes most individual war crimes, regardless of the number of victims or the rank and power of the person involved.

Applying Article 8 to the situation in *Homma* illustrates the ICC's limitations. It would allow jurisdiction if the Bataan Death March had been part of a plan of combat, or as part of a Japanese policy to violate or ignore the Geneva Conventions. Because there was no evidence that the Death March was part of the Japanese war plan for the Philippines, the

339. *Id*. art. 67, 37 I.L.M. at 1040.
340. *Id*.
341. *Id*.
342. *Id*.
343. *Id*.
344. *Id*.
345. *Id*.
346. *Id*. art. 8, para. 2, 37 I.L.M. at 1006.

ICC's first axis of war-crimes jurisdiction would not apply.[347] The other axis—large-scale commission of war crimes—might have applied to Homma, however. The Japanese universally mistreated POWs, as shown by the deaths of approximately twenty-seven percent of all American and British Commonwealth POWs confined by Japan, compared to a death rate of four percent of American and British POWs held by Germany.[348] The Allied and neutral nations protested such atrocities repeatedly, yet the deaths continued.[349] If these facts indicated the presence of a policy of intentional neglect of POWs, then ICC jurisdiction would apply to Homma.[350] Without such evidence of a conspiracy or plan that involved violations of the Third Geneva Convention, however, Homma would not qualify for ICC prosecution, but would be subject to national prosecution by the United States or the Philippines.

The second and most significant problem in a modern-day prosecution of Homma is complementarity. The ICC's prosecutions will be complementary to national courts. Various provisions of the ICC Statute suggest, in the words of British barrister and human rights law analyst Geoffrey Robertson, "that 'subordinate' would be a more accurate description of the legal relationship."[351] These provisions include the acquisition of jurisdiction, admissibility of investigation, and the mechanisms for challenging admissibility and jurisdiction.

Of the ICC's three methods of obtaining jurisdiction,[352] Robertson has described initiation by the ICC prosecutor a "clumsy procedure" that would be used infrequently.[353] Prosecutions under this method will have to rely on information volunteered by various states, organizations, U.N. organs, and "other reliable sources," and will have to win approval from the ICC Pre-Trial Chamber, after that chamber has examined evidence, heard objections to jurisdiction, and ruled that a prima facie case exists.[354]

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347. *See infra* Part II & nn. 12-35 (failure of Japanese prisoner-evacuation plan).

348. PICCIGALLO, *supra* note 45, at 27.

349. *Id.* at 209.

350. *See id.* ("While perhaps not the result of an organized governmental plan . . . these crimes were not 'stray incidents' either . . . .").

351. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 349 (2000).

352. ICC Statute, *supra* note 329, art. 13, 37 I.L.M. at 1010-11.

353. ROBERTSON, *supra* note 351, at 347.

354. ICC Statute, *supra* note 329, art. 15, 37 I.L.M. at 1011; ROBERTSON, *supra* note 351, at 347.

The vast majority of prosecutions, in Robertson's view, will therefore occur through Security Council referral or individual-state referral.[355]

Jurisdiction through Security Council referral would not pose a problem for foreign military war-crimes suspects because it would deliver them to the ICC on the Security Council's request and not to the courts of the state seeking to prosecute the suspects. Robertson has praised this method as rendering ad hoc tribunals obsolete.[356] This would be the fairest method for Homma because it would send him to the ICC seat at The Hague and not to wherever a U.S. military commission might convene.

Jurisdiction through individual state referral, to be used when the Security Council does not act, will defer the ICC's prosecution and give primacy of prosecution to the national courts.[357] The ICC cannot acquire jurisdiction unless the crimes occur inside a state that was a party to the ICC Statute or has accepted ICC jurisdiction, or was allegedly committed by a citizen of a state-party or accepting state.[358] This method poses the most problems for ICC prosecution. First, states engaged in the "vicious repression" that creates war crimes, crimes against humanity, and genocide likely would not ratify the ICC Statute.[359] Second, a nonparty state with jurisdiction over a suspect could reject the ICC's exercise of jurisdiction by refusing to lodge the required declaration of acceptance with the ICC registrar.

In *Homma*, the two relevant nations would have been Japan, the defendant's homeland, and the United States, where the crimes occurred, given that the Philippines were a U.S. territory in 1942. As of the date of this writing, Japan and the United States have not ratified the ICC Statute.[360] In fact, Japan has not signed the statute at all, although the United States has signed.[361] The failure of Japan and the United States to ratify the ICC Statute would strip the ICC of jurisdiction. Moreover, the deaths of U.S. soldiers on U.S. territory might give the United States an excuse

355. ROBERTSON, *supra* note 351, at 347.

356. *Id.* at 345.

357. ICC Statute, *supra* note 329, art. 13(a), 37 I.L.M. at 1010; ROBERTSON, *supra* note 351, at 345.

358. ICC Statute, *supra* note 329, art. 12, para. 2, 37 I.L.M. at 1010 (preconditions to exercise of jurisdiction); *id*. art. 14, 37 I.L.M. at 1011 (referral by state party); ROBERTSON, *supra* note 351, at 345-46.

359. ROBERTSON, *supra* note 351, at 346.

360. United Nations, *Rome Statute of the International Criminal Court*, *at* http://www.un.org/law/icc (Ratification Status) (last visited May 13, 2002).

not to surrender Homma, thus ensuring that U.S. courts administered swift justice.

Article 17 of the ICC Statute reinforces the problem of complementarity through its treatment of admissibility of cases. The ICC cannot admit cases that are the subject of good-faith investigation or prosecution by a country with jurisdiction.[362] Robertson has criticized this provision as "much too broad," on the ground that it "kow-tows to state sovereignty" because the ICC would not be able to investigate, let alone prosecute, any case that a national prosecutor has investigated.[363] The ICC prosecutors would then have to convince the ICC of the national authorities' unwillingness or inability genuinely to investigate a crime, which could be difficult to prove because ICC judges would be leery of questioning national judicial systems.[364] Article 17, as Robertson observes, gives states an incentive to "deny the ICC jurisdiction over their nationals by pretending to put them on trial."[365] In *Homma* and similar cases, the United States could thwart an ICC prosecution by investigating and prosecuting on its own, as with the war criminals who were outside the scope of the Nuremberg and Tokyo tribunals.

To compound these problems, the ICC Statute contains a detailed structure for challenging admissibility and jurisdiction that further aggravates complementarity and weakens the power of the ICC.[366] Once a case has been referred to the ICC, the ICC prosecutor will have to notify all state

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361. *Id. Editor's Note: Although the Rome Statute will enter into force on 2 July 2002, the United States retracted its signature after the author submitted this article in September 2001.*

> In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

Id.

362. ICC Statute, *supra* note 329, art. 17, para. 1(a)-(b), 37 I.L.M. at 1012.
363. ROBERTSON, *supra* note 351, at 350.
364. *Id*.
365. *Id*.
366. ICC Statute, *supra* note 329, arts. 18-19, 37 I.L.M. at 999, 1012-13.

parties and nonparty states that would normally exercise jurisdiction.[367] Robertson has attacked this provision, stating that the notice required in Article 18 would "serve to tip off criminals."[368] Also, Article 18 would allow hostile states to thwart prosecution by conducting their own investigation, which would lead to inadmissibility under Article 17. Article 19, moreover, would allow suspects and states—even nonparty states with jurisdiction over the suspects—to challenge admissibility and jurisdiction.[369] This, in Robertson's view, reinforces the complementarity problem by giving states "hostile to a prosecution" the opportunity to "derail a prosecution, or to delay it for years through appellate maneuvers."[370] Again, the United States' desire to prosecute General Homma would prevent the ICC from admissibility and jurisdiction because U.S. and Filipino prosecutors could challenge the ICC by offering evidence of a good-faith investigation and prosecution.

The Security Council could impose a further obstacle. It has the power not only to refer a case to the ICC, thus avoiding the issue of complementarity, but also to retard prosecution virtually indefinitely. Under Article 16 of the ICC Statute, the Security Council has power to issue a resolution that halts an investigation or prosecution for twelve months.[371] The Security Council may renew this no-investigation order, and Article 16 does not specify how often the renewals can continue.[372] Under these circumstances, the United States, as a Security Council member, could try to halt an ICC prosecutor's investigation of Homma, or of any suspect under U.S. jurisdiction, by convincing the other Security Council members to adopt a resolution that would halt the investigation. The only possible remedy for this situation would be for the ICC to reject such a request because it would not relate sufficiently to restoration of peace or security, the basis on which Chapter VII of the Charter authorizes the Security Council to take extraordinary measures.[373]

The creators of the ICC Statute did create a statute rich in procedural protections for foreign military war criminals. Yet the Statute did not go

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367. *Id.* art. 18, 37 I.L.M. at 999, 1012-13.

368. ROBERTSON, *supra* note 351, at 351.

369. ICC Statute, *supra* note 329, art. 19, 37 I.L.M. at 1013-14.

370. ROBERTSON, *supra* note 351, at 351.

371. ICC Statute, *supra* note 329, art. 16, 37 I.L.M. at 1012.

372. *Id.*; *see also* ROBERTSON, *supra* note 351, at 348 ("The effect of Article 16 is to give the Security Council ultimate control" by referring cases on its own and stopping other cases that it does not like.).

373. *Id.*

far enough to protect the rights of soldiers like Homma. The jurisdictional and admissibility problems of the ICC would mean that Homma would still be returned to his Allied captors for trial. In short, the ICC would not protect Homma at all.

V. Primacy of International Tribunals and Other Possible Solutions

A. Primacy and Procedures: From ICTY to ICC?

Since the existing schemes of national-level prosecutions do not provide adequate protections for foreign military war criminals, other means should be explored. The first would be to create international tribunals with primacy over national courts, rather than to rely on the complementarity of the ICC. The use of primacy-based jurisdiction would protect defendants like Homma from potentially unfair, national-level trials. The ICTY[374] serves as a model for future international criminal tribunals, primarily because of its statutory power of primacy over national courts.

1. ICTY Primacy Jurisdiction and Procedures

Some distinguishing features of the ICTY, when compared to the ICC, are the jurisdictional provisions set out in Article 9 of the ICTY Statute. The ICTY 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."[375] Moreover, the ICTY "shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."[376] The primacy of the ICTY receives

374. *See generally* Statute of the International Tribunal, Annex to Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., Supp. Apr.-June 1993, at 117, U.N. Doc. S/25704 (1993), *reprinted at* 32 I.L.M. 1159, 1192-1201 (1993) [hereinafter ICTY Statute], *as amended* by S.C. Res. 1166, U.N. SCOR, 53d Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998); S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/RES/1329 (2000). *See also* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/RES/827 (1993), *reprinted at* 32 I.L.M. 1203 (1993) (enacting Security Council resolution for ICTY Statute).

375. ICTY Statute, *supra* note 374, art. 9(1), 32 I.L.M. at 1194.

376. *Id*. art. 9(2), 32 I.L.M. at 1194.

further support from Article 29 of the Statute, which states that individual states shall cooperate with the ICTY in the investigation and prosecution of war-crimes suspects and mandates that nations "shall comply without undue delay with any request for assistance," including surrender or transfer of suspects to the ICTY.[377]

Another important feature of the ICTY is its Rules of Procedure and Evidence.[378] For example, defendants have the right to counsel, the right to an interpreter, and the right to remain silent.[379] Defendants also have the right to reciprocal disclosure of evidence, including exculpatory evidence.[380] The tribunal may admit evidence if it has probative value, as with the SCAP rules used in *Homma*, but with critical caveats. It may not admit evidence if the probative value is substantially outweighed by "the need to ensure a fair trial."[381] Furthermore, the tribunal may exclude evidence "obtained by methods which cast substantial doubt on its reliability" or if admission would violate "the integrity of the proceedings."[382] The tribunal may also admit written statements in lieu of oral testimony if a balancing of factors for and against admission so justifies, and if a sworn and verified declaration attesting to the truth and correctness of the statement is attached.[383]

2. Analysis of Primacy

The ICTY's Statute, with its jurisdictional decree of primacy, permits the ICTY to block the ex-Yugoslav nations and provinces, particularly Bosnia and Croatia, from subjecting captured enemy troops to trials such as the military commission in *Homma* or its counterpart in *Yamashita*.

377. *Id*. art. 29, 32 I.L.M. at 1189.

378. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.18 (2000) [hereinafter ICTY Rules], *available at* http://www.un.org/icty/basic/rpe/ IT32_rev18con.htm; *see also* United Nations, *ICTY Amendments to the Rules of Procedure and Evidence*, *at* http://www.un.org/icty/basic/rpe/IT183e.htm (last modified Dec. 13, 2000).

379. ICTY Rules, *supra* note 378, R. 42.

380. *Id*. R. 67, 68.

381. *Id*. R. 89(C), (D).

382. *Id*. R. 95.

383. *Id*. R. 92 *bis*.

This favorable result is attained because individual nations have to cooperate with the ICTY and surrender war-crimes suspects if requested.

In 1998, the U.N. Security Council emphasized the ICTY's statutory primacy through Resolution 1207.[384] In response to the Yugoslav government's failure to comply with the ICTY's requests for arrest and extradition of several suspects, Resolution 1207 reiterated the Security Council's decision "that all States shall cooperate fully" with the ICTY.[385] The Security Council affirmed "that a State may not invoke provisions of its domestic law as justification for its failure to perform binding obligations under international law."[386]

The concept of primacy received judicial reinforcement through the 1995 ICTY Appeals Chamber's decision on jurisdiction in *Prosecutor v. Tadic*.[387] In reviewing a Bosnian Serb defendant's interlocutory appeal and the Trial Chamber's denial of his pretrial motion on jurisdiction, the Appeals Chamber considered his claim that the ICTY lacked primacy over competent national courts.[388] Before the commencement of the ICTY proceedings, the defendant had been under investigation by a German court.[389] The German government then surrendered the defendant to the ICTY on request.[390] The defendant claimed that the assumption of jurisdiction by the ICTY would violate the sovereignty of individual states.[391] The ICTY prosecution, the defendant said, violated the doctrine of *jus de non evocando*, which requires that an accused be tried only by existing courts and not by special or extraordinary courts.[392]

The Appeals Chamber rejected both contentions. First, it rejected the defendant's sovereignty argument on the basis that individual states could voluntarily waive jurisdiction through cooperation with an international tribunal such as the ICTY, thereby openly accepting that tribunal's juris-

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384. S.C. Res. 1207, U.N. SCOR, 53d Sess., 3944th mtg., U.N. Doc. S/RES/1207 (1998), *available at* http://www.un.org/Docs/scres/1998/sres1207.htm.

385. *Id*.

386. *Id*.

387. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Chamber (1995), *reprinted at* 35 I.L.M. 32 (1996).

388. *Id*., 35 I.L.M. at 48.

389. *Id*., 35 I.L.M. at 49.

390. *Id*.

391. *Id*., 35 I.L.M. at 50.

392. *Id*., 35 I.L.M. at 52.

diction.[393] More importantly, it reasoned, norms concerning war crimes and crimes against humanity had a universal character because those crimes "shock the conscience of mankind" and constitute "acts which damage vital international interests."[394] The nature of war crimes and crimes against humanity required that "borders should not be raised as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity," the tribunal wrote.[395] Without endowing international tribunals like the ICTY with primacy over national courts, "there would be a perennial danger of international crimes being characterised as 'ordinary crimes,' or proceedings being 'designed to shield the accused,' or cases not being diligently prosecuted," the tribunal concluded.[396]

The Appeals Chamber then disposed of Tadic's *jus de non evocando* argument by stating that there was no universal acceptance of an exclusive right of trial before one's own national courts and under national laws.[397] "[O]ne cannot find it expressed," the tribunal wrote, "either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions."[398] The Appeals Chamber stated that the purpose of *jus de non evocando* was "to avoid the creation of special or extraordinary courts designed to try political offences in time of social unrest without guarantees of a fair trial."[399] Transferring jurisdiction "to an international tribunal created by the Security Council acting on behalf of the community of nations" would not infringe any of Tadic's rights, it maintained; "quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal."[400] Any inconvenience resulting from Tadic's removal from his national forum was outweighed by "a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming from all continents of the world."[401] Concluding that the ICTY's exercise of primacy would not vio-

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393. *Id.*, 35 I.L.M. at 50-51 (1995) (citing Bosnian legislative decree and letter from Bosnian President to U.N. Secretary-General).

394. *Id.*, 35 I.L.M. at 51 (quoting Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, 291-293 (Isr. Sup. Ct. 1962)).

395. *Id.*, 35 I.L.M. at 52.

396. *Id*. (quoting ICC Statute, *supra* note 329, art. 10(2)).

397. *Id*.

398. *Id.*

399. *Id*.

400. *Id*., 35 I.L.M. at 53.

401. *Id*.

late Tadic's rights, the Appeals Chamber dismissed his interlocutory appeal.[402]

3. The Model for Future Courts

The ICTY's statutory provision of primacy should be inserted in all permanent and ad hoc international courts with power to try foreign military war-crimes suspects. The impartiality of an international tribunal of judges exercising primacy over national courts eliminates the risk of "victor's justice." The winning side in a war would not be able to claim first right of prosecution of captured enemy soldiers, and it would not be able to try those captured soldiers before a panel of judges selected from the personnel of the victor's army. The rules of procedure and evidence would provide fairness to foreign soldiers, as they could challenge the use of improperly obtained evidence, prejudicial evidence, and evidence without sufficient indicia of reliability. The ICTY stands in direct contrast to *Homma* and its use of a trial by the victor's own army with admission of unverifiable evidence of low probative value and high risk of prejudice. In fact, the ICTY Rules provide a useful link between Protocol I to the Geneva Conventions and the ICC Statute, as the rules reiterate the guarantee of a proper defense and the necessary procedures to provide that defense.

To solve the ICC's problems with complementarity, the ICC Statute should be amended to replace complementarity with a system of primacy. Article 121 of the ICC Statute provides for proposal of amendments by any nation that is a party to the ICC Statute, provided at least seven years have elapsed from the Statute's entry into force.[403] The process of amending the ICC Statute requires two different supermajority votes for approval—first, from the "Assembly of States Parties," a representative oversight body of delegates from the "state party" nations, and second, from the individual states-parties.[404] Even though the ICC's method of amendment may appear untimely, it provides an opportunity for individual states and nongovernmental organizations to note the shortcomings of complementarity

402. *Id*.

403. ICC Statute, *supra* note 329, art. 121, para. 1, 37 I.L.M. at 1067.

404. *Id.* art. 121, 37 I.L.M. at 1067; *see id.* art. 112, 37 I.L.M. at 1064-65 (composition, duties and procedures of the Assembly of States Parties).

and suggest alteration or replacement with a primacy-jurisdiction amendment for military war-crimes trials.

B. Protocol I: Should More Nations Ratify It?

The option of including a power of primacy in international tribunals' statutes, whether ad hoc or permanent tribunals, is but one option that could be used to produce fair war-crimes prosecutions of foreign military personnel. Another option is to reform the existing structure of war-crimes trials through Protocol I of the Geneva Conventions. Protocol I further defines the status of military personnel as prisoners of war and how that protected status is not lost even when war crimes are committed.[405] Protocol I also specifies the minimum fundamental rights of due process under the Conventions. Unfortunately, many of the nations more recently embroiled in wars have yet to ratify Protocol I. To ensure that Protocol I has vitality as an explicit statement of international law, nonratifying nations—particularly the United States, France, Israel, and Iraq—should ratify Protocol I, or else other nations, including the allies of the nonratifying nations, should pressure them into de facto compliance.

VI. Conclusion

Since the 1940s, the United States has reorganized its laws in an attempt to ensure that foreign military war-crimes suspects receive trials that are fairer procedurally than those of Homma and many of his contemporaries. The international community, through the creation of the Geneva Conventions, the additional protocols to the Conventions, and the ICC Statute, has also sought to reform the system of trying those suspects. Yet the potential for mischief remains because the reforms of U.S. law, the Third Geneva Convention, and international criminal prosecutions have not gone far enough. Thus, it remains quite possible that vengeful prosecutions and overwhelming bias will plague prosecutions of soldiers like Homma, whether in Iraq, the former Yugoslavia, or wherever soldiers of different nations fight in future wars.

Further reforms need to be instituted. In the absence of universal ratification of Protocol I to the Geneva Conventions, all international tribunals must have their statutes amended to guarantee ICTY-style primacy

405. *See supra* Part IV(C).

jurisdiction, procedures, and rules of evidence that guarantee fair trials of foreign military war-crimes suspects. Otherwise, unfair trials will continue, leaving only a bitter taste of retribution with no value for improving the morality of international criminal law. The noted international law analyst, Sir Hersh Lauterpacht, identified this prospect near the end of World War II and warned that the desire for revenge must yield before the need for true justice.

> It is incumbent upon the victorious belligerent intent upon the maintenance and the restoration of international law, to make it abundantly clear by his actions that his claim to inflict punishment on war criminal[s] is in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the victor resolved to apply retroactively to the defeated enemy the rigours of a newly created rule.[406]

If revenge is a dish best served cold, then the existing system for trying foreign military war-crimes suspects is a dish best not served at all. Without further reforms, this system will continue to foster the practice of victor's justice.

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406. Hersh Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 80 (1944).