



MILITARY LAW REVIEW

ARTICLES

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REGULATE PRIVATE MILITARY COMPANIES

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PROSECUTION OF WAR CRIMINALS AND OTHER BAD ACTORS IN
POST-CONFLICT IRAQ AND BEYOND

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An Oral History of Major General Hugh R. Overholt,
United States Army (Retired) 1957-1989

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THE SIXTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW

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MILITARY LAW REVIEW

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OVERCOMING POST-COLONIAL MYOPIA: A CALL TO RECOGNIZE AND REGULATE PRIVATE MILITARY COMPANIES

MAJOR TODD S. MILLIARD¹

*These, in the day when heaven was falling,
The hour when earth's foundations fled,
Followed their mercenary calling
And took their wages and are dead.*

*Their shoulders held the sky suspended;
They stood, and earth's foundations stay;
What God abandoned these defended,
And saved the sum of things for pay.²*

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2. A.E. HOUSMAN, EPITAPH ON AN ARMY OF MERCENARIES (1917), *reprinted in* NORTON POETRY 15 (J. Paul Hunter ed., 1973). Howe, in quoting Housman's second stanza, noted that it was Kaiser Wilhelm who in World War I referred to the British disparagingly as "an army of mercenaries." HERBERT M. HOWE, AMBIGUOUS ORDER: MILITARY FORCES IN AFRICAN STATES 187 n.4 (2001). Mockler, in referring to the same stanza, remarked that "Housman was defending on grounds of motive what the Kaiser was attacking on grounds of status," that is, the motive of money versus the status of serving a foreign flag. ANTHONY MOCKLER, MERCENARIES 13 (1969). The modern international instruments designed to regulate mercenary activities continue this debate. *See infra* Part III.

I. Introduction

The sovereign's resort to mercenaries is as old as history itself. Ramses II led an army composed largely of Numidian mercenaries in the Battle for Kadesh in 1294 B.C.,³ and King David used mercenaries to drive the Philistines from Israel in 1000 B.C.⁴ From 800 to 400 B.C., mercenaries played a relatively minor role in the Greek hoplite armies,⁵ but by the time Alexander the Great crossed the Hellespont to invade Persia in 334 B.C., specialized mercenaries comprised almost one third of his army.⁶ In 50 B.C., Caesar relied almost entirely on mercenaries for his cavalry,⁷ and 600 years later, many of the *foederati* of Justinian's East Roman Army were mercenaries.⁸ Mercenary use continued unabated by William's army during the Norman Conquest,⁹ by Renaissance Italian city-states with their *condottieri*,¹⁰ and by Britain who resorted to Hessian mercenaries to fight American colonists during the Revolutionary War.¹¹ Indeed, the sovereign's use of mercenaries predates the national armies that arose only after

3. R. ERNEST DUPUY & TREVOR N. DUPUY, *THE ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT* 6 (2d ed. 1986) (outlining the 3200 year history of mercenaries, from Ramses' use of Numidian mercenaries at the Battle of Kadesh in 1294 B.C. to 1967 when Belgian and French mercenaries attempted to seize control of the Congo's Kitanga and Kivu provinces).

4. See H.W. PARKE, *GREEK MERCENARY SOLDIERS FROM THE EARLIEST TIMES TO THE BATTLE OF IPSUS* 3 (1933) (referring to the Cherithite and Pelethite mercenaries used during the reign of David, 1010-973 B.C., as well as the Shardana mercenaries of the Pharaohs). Parke's history focuses on early Greek mercenary use from 800 B.C. to 400 B.C. *Id. passim*.

5. G.T. GRIFFITH, *THE MERCENARIES OF THE HELLENISTIC WORLD* (Groningen 1968) (1935) (essentially picking up the history of Greek mercenary use where H.W. Parke concluded his history, in about 400 B.C.).

6. *Id.* at 12-13. Of the 11,900 mercenaries in Alexander's army, nearly all were foot soldiers, including Cretan archers and Agrianian skirmishers, although some 900 were light horse cavalry. *Id.* This number of mercenaries was consistent throughout most of Alexander's campaigns. *Id.* at 14. While the best foot soldiers of Darius's Persian army were said to be Greek mercenaries, Alexander's greatly outnumbered forces soundly defeated Darius at the Battle of Issus in 333 B.C., killing more than 50,000 Persian troops and losing no more than 500 of their own. DUPUY ET AL., *supra* note 3, at 48-49. Persian nobles murdered Darius two years later after Alexander defeated him at the Battle of Arbela (or Gaugamela) in which the Persians subsequently lost another 50,000 men to Alexander's pursuing forces. *Id.* at 49-50; LYNN MONTROSS, *WAR THROUGH THE AGES* 33-35 (3d ed. 1960).

7. DUPUY ET AL., *supra* note 3, at 98. Dupuy said that the "average Roman legionary [of 100 B.C.] was a tough, hard-bitten man, with values and interests—including a rough, heavy-handed sense of humor—comparable to those always found among professional private soldiers." *Id.* at 99.

8. MONTROSS, *supra* note 6, at 109.

the Treaty of Westphalia.¹² Despite the recent success of modern standing armies, however, the mercenary and the sovereign's resort to his services endures.

In the twentieth century's latter half, international law attempted to limit states' practice and individuals' conduct regarding mercenary activities. Regulation of state practice concerned primarily states' recruitment and use of mercenaries for intervention against "foreign"¹³ self-determination movements, raising questions of the *jus ad bellum*. Regulation of individual mercenaries concerned their status and conduct during foreign conflicts, raising questions of the *jus in bello*. Oftentimes, the drafters of international legal provisions affecting mercenaries confused the principles of *jus ad bellum* and *jus in bello*, thereby producing questionable and

9. E.A. FREEMAN, HISTORY OF THE NORMAN CONQUEST 232 (1876). "William of Normandy brought no great following to England. The army which defeated Harold near Hastings was no more than 6,000 or so, and of them many were mercenaries hired for adventure and dismissed in 1070" DORIS M. STANTON, ENGLISH SOCIETY IN THE EARLY MIDDLE AGES (1066-1307) 12-13 (3d ed. 1962). See generally JOHN SCHLIGHT, MONARCHS AND MERCENARIES: A REAPPRAISAL OF THE IMPORTANCE OF KNIGHT SERVICE IN NORMAN AND EARLY ANGEVIN ENGLAND (1968).

10. MOCKLER, *supra* note 2, at 43-73. *Condottieri* is defined as: "A professional military leader or captain, who raised a troop, and sold his service to states or princes at war; the leader of a troop of mercenaries. The name arose in Italy, but the system prevailed largely over Europe from the 14th to the 16th [centuries]." OXFORD ENGLISH DICTIONARY (2d ed. 1989), Oxford University Press, *Oxford English Dictionary Online*, <http://dictionary.oed.com>.

11. ANTHONY MOCKLER, THE NEW MERCENARIES 6 (1985). See 1 THOMAS JEFFERSON, WORKS 23 (1859) ("He [George III] is at this time transporting large armies of foreign mercenaries."). "[George] Washington warned that 'Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend'" Reid v. Covert, 354 U.S. 1, 24 n.43 (1955) (quoting 26 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 388 (John C. Fitzpatrick ed., 1944)). Mockler's 1985 text pertains mainly to mercenary activities in Africa through 1980, MOCKLER, *supra*, *passim*, whereas his 1969 work provides an exhaustive history of early mercenary use and an overview of mercenary activities in the Congo and Biafra during the 1960s, MOCKLER, *supra* note 2, *passim*.

12. Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, signed Oct. 24, 1648, reprinted in 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F. L. Israel ed., 1967), available at <http://www.yale.edu/lawweb/avalon/westphal.htm>. "[M]odern public international law traces its genesis to the period immediately preceding the formation of a community of sovereign states with the Treaty of Westphalia in 1648." William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L L. REV. 647, 652 n.12 (2001).

13. "Foreign" is used here in its literal sense to mean "in . . . a country . . . other than one's own." OXFORD DESK DICTIONARY 302 (1997).

ultimately tenuous attempts at international regulation.¹⁴ More often, the drafters struggled to define adequately the ancient profession.¹⁵

An underlying political component further complicated the mercenary issue. This pit First World, former colonial powers wherein most mercenaries originated against Third World, post-colonial African powers that undoubtedly bore the brunt—and occasional benefit—of twentieth century mercenary activities.¹⁶ The Cold War's ideological divisions only exacerbated the political taint expressed in the debate and resulting international provisions aimed at mercenaries.¹⁷ Unfortunately, the first attempts at mercenary regulation focused on eliminating but one type of mercenary, the indiscriminate hired gun who ran roughshod over African self-determination movements in the post-colonial period from 1960 to 1980.¹⁸ As mercenaries evolved, however, mercenary regulations did not.

The focus on post-colonial mercenary activity continued as attempts at mercenary regulation progressed from aspirational declarations by the United Nations (UN)¹⁹ and Organization of African Unity (OAU)²⁰ in the

14. See Françoise Hampson, *Mercenaries: Diagnosis Before Prescription*, in 3 NETH. Y.B. INT'L L. 1, 14-16 (1991).

15. See discussion *infra* Part III.A.4.

16. See, e.g., G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (1973) (“The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and mercenaries should accordingly be punished as criminals.”); Hampson, *supra* note 14, at 29 (“Pressure from Third World and Socialist States led to the adoption of Article 47 [of Geneva Protocol I].”); MOCKLER, *supra* note 11, at 212 (describing how Cubans in Angola persuaded the Angolans to stage a show trial for captured mercenaries—later known as the Luanda Trial—that would serve as “a virtuous example of solidarity among progressive nations”).

17. See, e.g., Kevin A. O'Brien, *Private Military Companies and African Security: 1990-98*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA 43, 48 (Abdel-Fatau Musah & J. Kayode Fayemi eds., 2000) (“It must be remembered that, throughout the 1970s and 1980s, the vast majority of conflicts in Africa were subsumed within the global bipolarity of the Cold War.”).

18. Although mercenary forces operated in Africa before 1960, they were hired primarily by De Beers “to conduct anti-smuggling activities” in Sierra Leone during the 1950s. UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 28, ann. A (2002) [hereinafter UK GREEN PAPER] (Mercenaries: Africa's Experience 1950s-1990s).

19. See, e.g., G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 (1968).

20. See, e.g., Organization of African Unity, Resolution on the Activities of Mercenaries, AHG/Res. 49 (IV) (1967) [hereinafter OAU Mercenary Resolution], *reprinted in* MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, app. III, at 281-82.

1960s; to defining and discouraging individual mercenaries in Article 47 of Protocol I in 1977;²¹ to articulating states' responsibilities in regards to mercenary activities when the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (UN Mercenary Convention) finally entered into force in 2001.²² As a result, today's international provisions aimed at mercenary regulation suffer from myopic analyses²³ because, in law and fact, they are still directed at controlling post-colonial mercenary activities in Africa. This flawed approach ignores mercenaries' long history,²⁴ their modern transformation into sophisticated private military companies (PMCs), and their increasing use by—not against—sovereign states engaged in the legitimate exercise of procuring foreign military services.

This article first presents a brief historical overview of mercenary activities. The primary analysis section then demonstrates that existing international law provisions were designed to regulate only one type of mercenary, the unaffiliated individual that acted counter to the interests of post-colonial African states. The article next summarizes the limited liability imposed by existing international provisions upon unaffiliated individuals, state actors, and states themselves. Concluding that these provisions are altogether inadequate to reach modern PMC activities, the article's final section proposes a draft international convention and accompanying domestic safeguards that will serve to recognize and regulate state-sanctioned PMCs, while further marginalizing the unaffiliated mer-

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, 1125 U.N.T.S. 3 [hereinafter Protocol I].

22. U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (1989) (entered into force Oct. 20, 2001) [hereinafter UN Mercenary Convention]. See *infra* Appendix B (reproducing Articles 1-7 of the UN Mercenary Convention).

23. This extends to legal commentators as well. See, e.g., David Kassebaum, *A Question of Facts: The Legal Use of Private Security Firms in Bosnia*, 38 COLUM. J. TRANSNAT'L L. 581, 588 n.42 (2000). "The role of mercenaries in international affairs has a very long history but it is one that need not be discussed here, since current international law reflects the experiences of the international community in the past few decades." *Id.*

24. See L.C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 175 (1985). Green observed that the uproar caused by post-colonial mercenaries in Africa "might well lead one to assume that the problem is new. To adopt such an attitude, however, not only indicates a lack of historical knowledge, but also an ignorance of classical international law." *Id.*

canary whose violence offends international law because it is exercised without state authority.

II. Background

A. Mercenaries in History

National armies with professional soldiers allegiant to their nation-state represent a surprisingly new phenomenon. Prior to the French Revolution, no dishonor followed the man who fought under a flag not his own.²⁵ Instead, leaders often turned to private soldiers during times of military necessity, and these men were equally willing to soldier for pay on someone else's behalf.²⁶ The oldest use of the term mercenary referred to a "hireling,"²⁷ and today the *Oxford English Dictionary* defines the term simply as "a professional soldier serving a foreign power."²⁸ Legal commentators typically merge these two ideas, describing the mercenary as someone who provides military services to a foreign power for some compensation.²⁹ From this premise, one might conclude that a mercenary will result only when three fundamental conditions occur: war or prospective war, a person or group willing to pay a foreigner to satisfy their domestic military needs, and an individual "willing to risk his life for a livelihood in a cause that means nothing to him."³⁰

Not until the Franco-German War of 1870 did the "nation-in-arms" concept gain predominance in the world's militaries.³¹ As Griffith observed, "[I]t is only comparatively recently that whole nations have been cajoled and coerced into arms."³² Mockler explained more delicately,

25. MOCKLER, *supra* note 2, at 15.

26. GRIFFITH, *supra* note 5, at 293 (remarking that early Greek mercenaries were paid less than their hoplite counterparts). Because pay was not forthcoming until a campaign was completed, "[a]ll casualties were thus a clear financial gain to the employer." *Id.*

27. OXFORD ENGLISH DICTIONARY (2d ed. 1989) (originating from the vulgar *mercenarius* found in Chapter XII of John), Oxford University Press, *Oxford English Dictionary Online*, <http://dictionary.oed.com>.

28. *Id.*

29. See, e.g., John R. Cotton, Comment, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143, 148 & n.26 (1977). "A mercenary is a volunteer, owing and claiming no national allegiance to the party for whom he is fighting, who acts in a military role for whatever remuneration by his own free will on a contract basis." *Id.*

30. GRIFFITH, *supra* note 5, at 1.

31. MOCKLER, *supra* note 2, at 15.

32. GRIFFITH, *supra* note 5, at 1.

“The idea, now so widely accepted that a man can be obliged to fight for his country could only be accepted when a man had a country that was more than a geographical expression to fight for.”³³ This is not to imply that mercenaries fighting for selfish purposes were widely revered before the advent of the modern army built on national loyalties. Even in ancient Greece, contemporary opinion held that having the polis pay for mercenaries was an “unmitigated evil.”³⁴ They were tacitly accepted before the twentieth century, however, if not by polite society,³⁵ then by most states, their armies, and international law.³⁶

Mockler separated the historical mercenaries into four classes: (1) the lone adventurer who often appears, but seldom exerts much influence in a single conflict; (2) the elite guards with which heads of state have always surrounded themselves, like the Swiss Guards and their modern-day descendants, the Papal Guards; (3) the bands of professional soldiers, temporarily united, that “reappear . . . in one form or another throughout history; usually at a time of the breakdown of empires, or political anarchy, and of civil war”;³⁷ and (4) the “semi-mercenaries” who make up a “respectable element hired out by major military powers to minor allies or client states.”³⁸ The second category’s close affiliation with the sovereign’s authority explains their widespread international acceptance, whether the highly capable Swiss mercenaries of the sixteenth century who were organized into the Swiss Guards,³⁹ the fierce Nepalese Gurkhas who once defeated and were later incorporated into British regiments,⁴⁰ or the displaced men of the French Foreign Legion who were organized for service “outside of France.”⁴¹ The first and third categories continue to gen-

33. MOCKLER, *supra* note 2, at 15.

34. GRIFFITH, *supra* note 5, at 1.

35. WILLIAM SHAKESPEARE, HENRY V, sc. 7, line 74 (“Many of our Princes . . . Lye drown’d and soak’d in mercenary blood.”); WILLIAM COWPER, HOPE (1781) (“His soul abhors a mercenary thought, And him as deeply who abhors it not.”).

36. GREEN, *supra* note 24, at 183. As late as the nineteenth century, “[t]he general view . . . seems to have been that the use and enlistment of foreign volunteers was legitimate . . .” *Id.* Moreover, “[t]he economic liberalism of the nineteenth century extended to a man’s freedom to contract out his services to fight.” Hampson, *supra* note 14, at 7.

37. MOCKLER, *supra* note 11, at 16.

38. *Id.*

39. *See id.* at 19-21; DUPUY ET AL., *supra* note 3, at 678-79 (relating that it was Swiss Guards that protected and died while defending Louis XVI at the time of the storming of the Tuileries by Parisian mobs on 10 August 1792). Mockler estimated that French kings employed some one million Swiss mercenaries from 1481 until 1792. MOCKLER, *supra* note 11, at 20.

40. *See* DUPUY ET AL., *supra* note 3, at 786, 860, 1292.

erate great controversy, most likely because they lack the second category's sovereign imprimatur. The fourth category, which encompasses many PMCs, rests somewhere in between.

B. The Rise of the Private Military Companies

Private military companies take on many labels today, including, among others, mercenary firms, private armies, privatized armies, private military corporations, private security companies or firms, private military contractors, military service providers, non-lethal service providers, and corporate security firms. Their corporate model can be traced to Harold Hardraade's Norse mercenaries, first offered in support of the Byzantine Empire in 1032.⁴² This group went on to form the mercenary Varangian Guard, whose Norse-Russian members became the most important component of the Byzantine army for the next 200 years.⁴³ By 1300, Byzantium hired Roger de Flor's small army of Catalan mercenaries,⁴⁴ known as the Grand Catalan Company, which was the first and longest-lived of the medieval "free companies."⁴⁵ For the next 150 years, other mercenary free companies arose and flourished in post-feudal Europe.⁴⁶

Like the free companies, similar corporate characteristics were found in the English Company of the Staple and Merchant Adventurers, first ascendant in 1354,⁴⁷ whose members rivaled the English nobility in wealth

41. MOCKLER, *supra* note 11, at 21; *see also id.* at 19-33 (describing the origins of the Legion in the Swiss Guards, its formation in 1831 and subsequent garrisoning in Sidi-bel-Abbes in the Sahara, and its influence on African politics after a 1961 coup attempt in Algiers by officers of its 1st Parachute Regiment, which led to the Regiment's disbandment and a flood of unemployed mercenaries). It was the Legion's 1st Regiment that lost 576 of its 700 men at Dien Bien Phu in Vietnam. *Id.* at 30. *See generally* ANTHONY CLAYTON, FRANCE, SOLDIERS AND AFRICA (1988) (discussing extensively the origins of *Légion Etrangère*, the French Foreign Legion).

42. DUPUY ET AL., *supra* note 3, at 303.

43. *See id.* at 304-06, 382. In later times, the Varangian Guard was composed primarily of Danish and English mercenaries, who were slaughtered by Crusaders and Venetians during the Conquest of Constantinople in 1204. *Id.* at 382.

44. *Id.* at 387-88.

45. MOCKLER, *supra* note 11, at 9-10. Their leader assassinated by the Byzantine emperor's son in 1305, the Grand Catalan Company's troops first rampaged through Thrace and Macedonia, DUPUY ET AL., *supra* note 3, at 387-88, and then set up their own Catalan duchy in Athens from 1311 to 1374. MOCKLER, *supra* note 11, at 10.

46. MOCKLER, *supra* note 11, at 9-15.

and influence until their demise in the late sixteenth century.⁴⁸ The free companies themselves were transformed in the fifteenth century.

The French solution to the problem of free companies . . . was to establish a standing army. . . . These companies [of the standing army] were quartered in various regions of France, and absorbed a great number of the free companies, both en masse and individually. Quickly they established law and order, the remaining mercenaries soon going elsewhere—mainly to the *condottiere* companies in Italy.⁴⁹

Whereas France made from the free companies the first modern, professional standing army,⁵⁰ Italy entrusted almost all of its military endeavors during the fifteenth century to its *condottieri*.⁵¹

The century of the *condottieri* marked the zenith of mercenary influence over states' affairs. Of the many types of *condotta* or contracts signed by the *condottieri* and their employers, they all shared one characteristic: "there was no pretense on either side of claim of loyalty or allegiance outside of the terms of the *condotta*, in contrast with the rules governing the behavior of the free companions in France."⁵² This distinction represented the beginning of the modern era's divergent allegiances, with state soldiers pledging loyalty to some central authority and mercenaries agreeing only to abide by their contracts' terms.

As the professional state army matured, mercenary use declined but never vanished. The able Swiss, who Mockler called the "Nation of Mercenaries," continued to provide specialized warriors to most developing Western European state armies.⁵³ From 1506 when Pope Julius II formed the Swiss Guards, later called the Papal Guards, until 1830 when France disbanded its last four Swiss Regiments, the European powers often turned

47. A.R. MYERS, *ENGLAND IN THE LATE MIDDLE AGES* 223 (8th ed. 1971). "In overseas trade London merchants were increasingly influential not only in the Company of the Staple but in that of the Merchant Adventurers—so called because they 'adventured' abroad, in contrast to the Staplers . . ." *Id.* at 225.

48. See S.T. BINDOFF, *TUDOR ENGLAND* 287 (1950).

49. DUPUY ET AL., *supra* note 3, at 409.

50. *Id.* at 424-25. This transformation of the free companies by France led to the "rise of military professionalism" from 1445-1450, which hailed the dawn of the modern military era, according to Dupuy. *Id.*

51. GRIFFITH, *supra* note 5, at 2-3. "Greek warfare never became, as did Italian warfare [in the fifteenth century,] almost entirely an affair of mercenary armies." *Id.* at 3. See also MOCKLER, *supra* note 11, at 42-43.

to mercenary forces.⁵⁴ But by the nineteenth century, the mercenary companies competed against strong national armies. Writing in *Parameters*, Eugene Smith posited:

The growth of bureaucratically mature states [in the nineteenth century] capable of organizing violence created increasingly strong competition for private military corporations. At the same time, states began to recognize that their inability to control the actions of these private organizations challenged state sovereignty and legitimacy. The result was that the utility of the private military corporation as a tool of state warfare disappeared . . . until recently.⁵⁵

Now 500 years after the demarcation between mercenary and standing armies, 700 years after the formation of the free companies, and 2300 years after Alexander employed mercenary Cretan archers, the international

52. MOCKLER, *supra* note 2, at 45. Dupuy commented that Italy's total reliance on mercenaries made its fifteenth century endeavors "the most sterile in military history." DUPUY ET AL., *supra* note 3, at 429. Because of this, he concluded, "for three subsequent centuries, Italy was to become the battleground of the great European powers." *Id.* at 430. A contemporary of the *condottieri*, Machiavelli cautioned Italian rulers against these unprincipled men who would inevitably overthrow the governments that hired them. NICCOLÒ MACHIAVELLI, *THE PRINCE* ch. 12 (George Bull trans., Penguin 1999) (1505) (How Many Kinds of Soldiery There Are, and Concerning Mercenaries). See generally WILLIAM CAFERRO, *MERCENARY COMPANIES AND THE DECLINE OF SIENA* (1998) (finding that the Italian city-state of Siena's exhaustive payments to mercenary companies in the fourteenth century contributed to her marked decline in relation to neighboring Florence); JANICE THOMSON, *MERCENARIES, PIRATES & SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1996).

53. See MOCKLER, *supra* note 2, at 74-104.

54. *Id.* at 20-21. French reliance also continued, as most of the Swiss from the disbanded regiment became leaders of the Foreign Legion upon its formation in 1831. *Id.* at 21.

55. Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, *PARAMETERS*, Winter 2002, at 107-08. Smith outlined the rise and demise of conflict privatization, including the accepted use of private soldiers by states and mercantile companies from the fourteenth to eighteenth centuries. Smith also offered an interesting discussion of privateers who acted with authority under international law because sovereign states granted them "letters of marque and reprisal," a concept that Smith proposed to revive to confer legitimacy to modern PMCs and to maintain congressional control over PMC use by the United States. *Id.* at 106, 113.

community again wrestles with the question of how to regulate mercenaries.

C. Modern Private Military Companies

Today's PMCs possess sophisticated military capabilities that historical mercenaries—and many modern state militaries—could only dream of.⁵⁶ As happened at the end of the Peloponnesian War,⁵⁷ the Cold War's conclusion produced a surplus of highly trained, professional soldiers in search of employment opportunities.⁵⁸ Therefore, most modern PMCs were formed by capable Cold War veterans from professional First World armies,⁵⁹ and their primary countries of origin include the United States, the United Kingdom, South Africa, and Israel.⁶⁰ These PMCs collectively offer to perform a full range of military services, from basic training to full-scale combat.⁶¹

The United Kingdom's Foreign and Commonwealth Office recently published a report entitled *Private Military Companies: Options for Regulation*,⁶² which examines the scope of PMC military services and the potential utility that PMCs offer to states and international organizations. While commenting on the breadth of modern PMC services, the report concludes that most services fall within the areas of military advice,⁶³ training,⁶⁴ logistic support,⁶⁵ demining,⁶⁶ and peace operations monitoring roles.⁶⁷ In contrast, the report finds few PMCs capable or willing to provide private military forces for combat operations.⁶⁸ The report cautions, however, that PMC services still encompass vital military functions because “[t]he distinction between combat and non-combat operations is often artificial.”⁶⁹

Examining PMC areas of expertise reinforces this blurred distinction. Military Professional Resources, Inc. (MPRI), perhaps the most dynamic U.S. PMC, advertises competency in a wide variety of skills, including air-

56. See, e.g., O'Brien, *supra* note 17, at 44-70 (detailing PMC operations in Africa since 1990, and looking specifically at the military specialties offered by Britain's Sandline and South Africa's now-defunct Executive Outcomes (EO)); Smith, *supra* note 55, at 108-11 (describing the post-Cold War resurgence of PMCs and discussing their functions and capabilities).

57. GRIFFITH, *supra* note 5, at 4.

58. HOWE, *supra* note 2, at 79-80 (“The Cold War and then its cessation facilitated the dumping of large amounts of military equipment and trained personnel upon the world market.”).

borne operations, civil affairs, close air support, counterinsurgency, force

59. For example, Military Professional Resources, Inc. (MPRI), of Alexandria, Virginia, is headed by President Carl Vuono, former U.S. Army Chief of Staff, and Senior Vice President Crosbie Saint, former commander of U.S. Army forces in Europe. MPRI, *Home Page*, at <http://www.mpri.com> (last visited Mar. 15, 2003) (Our Team/Corporate Organization Chart). On 30 June 2000, L-3 Communications Holding, Inc. acquired MPRI for \$39.6 million. L-3 Communications Holding, Inc. (LLL), Annual Report, SEC Form 10-K, item 7 (Mar. 13, 2003), <http://www.edgar-online.com>. Prospects for future growth at L-3 looked favorable.

[T]he DoD budgets have experienced increased focus on command, control, communications, intelligence, surveillance and reconnaissance (C3ISR), precision-guided weapons, unmanned aerial vehicles (UAVs), network-centric communications, Special Operations Forces (SOF) and missile defense. We believe L-3 is well positioned to benefit from increased spending in those areas. In addition, increased emphasis on homeland defense may increase demand for our capabilities in areas such as security systems, information security, crisis management, preparedness and prevention services, and civilian security operations.

Id. Neither L-3's most recent annual report, *id.*, nor its most recent quarterly report break out earnings for MPRI. See L-3 Communications Holding, Inc. (LLL), Quarterly Report, SEC Form 10-Q (Nov. 14, 2002), <http://www.edgar-online.com>. Quarterly net income for L-3, however, rose from \$27.39 million before L-3 acquired MPRI in June 2000, to \$61.76 million in the quarter ending 30 September 2002. Compare *id.*, with L-3 Communications Holding, Inc. (LLL), Quarterly Report, SEC Form 10-Q (Aug. 14, 2000), <http://www.edgar-online.com>.

60. UK GREEN PAPER, *supra* note 18, para. 23. A partial list of U.S. PMCs includes: Armor Holdings; Betac Corp.; Booz Allen Hamilton; Cubic Corp.; DFI International; DynCorp, Inc.; International Charter, Inc.; Brown & Root Services, a subsidiary of Halliburton; Logicon, a subsidiary of Northrop Grumman; MPRI, discussed *supra* note 59; Pacific Architects and Engineers; and Vinnell, a subsidiary of BDM, which is owned by the Carlyle Group, a merchant banking firm. In 1975, Vinnell contracted to train the Saudi Arabian National Guard, and this was regarded as the first use of a U.S. PMC. See *id.* tbl.1; David Isenberg, *Combat for Sale: The New Post-Cold War Mercenaries*, USA TODAY MAG., Mar. 1, 2000, at 10; DAVID ISENBERG, SOLDIERS OF FORTUNE LTD.: A PROFILE OF TODAY'S PRIVATE SECTOR CORPORATE MERCENARY FIRMS (Center for Defense Information Monograph, Nov. 1997), available at <http://www.ciaonet.org/wps/isd03>.

61. See generally KEN SILVERSTEIN, PRIVATE WARRIORS (2000). The Foreign Area Officer Association Web page details numerous PMC job opportunities, illustrating the diversity of modern PMC services. See Foreign Area Officer Association, *Job Prospects*, at <http://www.faoa.org/jobs.html> (last visited Mar. 27, 2003). See also Major Thomas J. Milton, *The New Mercenaries—Corporate Armies for Hire*, Dec. 1997, FOREIGN AREA OFFICER ASS'N J., at <http://www.faoa.org/journal/newmerc3.html>.

62. UK GREEN PAPER, *supra* note 18.

63. *Id.* para. 10. "[T]his may cover anything from advice on restructuring the armed forces, to advice on purchase of equipment or on operational planning." *Id.*

integration, foreign affairs, joint operations, intelligence (both strategic and tactical), leader development, legal services, ordnance, reconnaissance, recruiting, security assistance, special operations, surface warfare, training development, and weapons control.⁷⁰ Although MPRI's core

64. *Id.* "This is a major activity by PMCs. . . . For example, in the 1970s the UK company, Watchguard, trained forces in the Middle East including personal bodyguards of rulers. The U.S. company, Vinnell, is reported as training the Saudi Palace guard today." *Id.*

65. *Id.*

For example MPRI assisted the U.S. Government in delivering humanitarian aid in the former Soviet Union; [DynCorp Inc.] and Pacific [Architects and Engineers] provided logistic support for the UN force in Sierra Leone (UNAMSIL); [and] Brown & Root [Services] is said to provide U.S. forces in the Balkans with everything from water purification to the means of repatriating bodies.

Id.

66. *Id.* para. 10, ann. A. See O'Brien, *supra* note 17, at 55-56 (stating that the American company Ronco "supplied both demining expertise and technology, as well as limited training to the Rwandan forces" after the conclusion of the Rwandan civil war in 1994).

67. UK GREEN PAPER, *supra* note 18, para. 10, ann. A.

68. *Id.* paras. 9, 24. South Africa's EO was a notable exception that performed direct combatant functions in both Angola (1993-1994) and Sierra Leone (1995-1996). See DAVID SHEARER, PRIVATE ARMIES AND MILITARY INTERVENTION 47-55 (1998) (Adelphia Paper 316) (offering an objective look at the abilities and limitations of private military companies); see also David Shearer, *Outsourcing War*, FOREIGN POL'Y 112 (Fall 1998) (same). Writing in 2000, Khareen Pech speculated that former EO personnel were still engaged in mercenary combatant activities in Africa.

Many of the companies who provide military services to the armies involved in civil and regional conflicts in Africa are linked to one another and the former EO group. As such, South African, European and African mercenaries with links to the former EO group are presently in the service of both rebel and state armies in Angola, the [Democratic Republic of the Congo], Congo-Brazzaville and Sudan.

Khareen Pech, *The Hand of War: Mercenaries in the Former Zaire 1996-97*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, at 117, 148. According to the *UK Green Paper*, EO is still "closely related to other companies which remain extant, including Sandline International." UK GREEN PAPER, *supra* note 18, para. 22. See generally Tim McCormack, *The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict*, in 1 Y.B. INT'L HUMAN. L. 292 (1998).

69. UK GREEN PAPER, *supra* note 18, para. 11.

70. MPRI, *Home Page*, at <http://www.mpri.com> (last visited Mar. 15, 2003) (Our Team/MPRI Skills Competency Base). See *supra* note 59 (describing MPRI's senior management).

business involves military advice and training, some commentators credited MPRI for the success of the Croat offensive, Operation Storm, which soundly defeated Serb forces holding Krajina in August 1995.⁷¹ If this credit is due, it is most remarkable because MPRI's fourteen-man training team sent to perform the MPRI-Croatian government contract had less than eight months to train the Croat military leadership.⁷²

The company insisted that the training team led by retired Major General John Sewall had limited its training to classroom instruction regarding civil-military relations.⁷³ Nonetheless, "MPRI benefited from the suspicions of its role,"⁷⁴ and it continued to provide significant military services in the Balkans to both the Croatian and Bosnian governments.⁷⁵ Like most U.S. PMCs, MPRI typically provides military services to and within the United States.⁷⁶ As its mission statement reflects, however, it also provides military services to foreign governments and the private sector.

MPRI's mission is to provide the highest quality education, training, organizational expertise, and leader development around the world. We serve the needs of the U.S. government, of foreign governments, and of the private sector with the highest standards and cost effective solutions. Our focus areas are defense, public security, and leadership development.⁷⁷

Therefore, at the opening of the twenty-first century, multifaceted companies like MPRI will continue to offer military services to foreign entities in exchange for some compensation. To this extent, theirs is a mercenary profession.

D. Expanding the Role of Private Military Companies

Several commentators advocate expanding the scope of military services provided by PMCs such as MPRI.⁷⁸ Among other rationales offered, this would allow PMCs to transfer specialized military services to strug-

71. SHEARER, *supra* note 68, at 58.

72. *See id.*

73. *Id.* at 58-59.

74. *Id.* at 59.

75. *Id.* at 59-63.

76. UK GREEN PAPER, *supra* note 18, para. 12.

77. MPRI *Mission*, at <http://www.mpri.com/channels/mission.htm> (last visited Mar. 15, 2003).

gling states in the developing world on behalf of states like the United States and United Kingdom whose militaries are stretched to the limit in performing missions across their entire spectrum of operations.⁷⁹ The 2002 *National Security Strategy of the United States* foresees the necessity to adapt the U.S. armed forces to evolving security threats: “The major institutions of American national security were designed in a different era to meet different requirements. All of them must be transformed.”⁸⁰ As part of this transformation, the U.S. military must emphasize warfighting rather than “peace engagement operations,” according to the 2001 *Quadrennial Defense Review (QDR)*.⁸¹ Unlike its 1997 predecessor,⁸² the 2001 *QDR* “makes no reference to peacekeeping, peace enforcement,

78. See, e.g., *id.* para. 59 (“The United States has used DynCorp and subsequently Pacific A&E to recruit and manage monitors for it in the Balkans; so it is possible to imagine the UN as a whole adopting such a practice.”); O’Brien, *supra* note 17, at 45-46 (“Indeed it may be seen that, in some cases but not all, PMCs have been much more effective in resolving conflicts in many African countries than has the international community”); SHEARER, *supra* note 68, at 73-77; Smith, *supra* note 55, at 107. But see Steven Brayton, *Outsourcing War: Mercenaries and the Privatization of Peacekeeping*, 55 J. INT’L AFF. 303 (2002) (critiquing private military companies and their peacekeeping potential) (While identifying several problems with the current peacekeeping regime and summarizing the arguments against using private military companies, the author offers no solutions or alternatives.); Dena Montague, *The Business of War and the Prospects for Peace in Sierra Leone*, 9 BROWN J. WORLD AFF. 229 (2002) (criticizing state use of private military companies generally, and the now-defunct EO specifically). Despite the arguments against their very existence, PMC growth since 1990 is explained by other commentators in economic terms. “[The] PMCs continue to exist and grow in their operations simply because the demand is there. They often supply what the particular state cannot provide: security, whether for the citizens of the state or for international investment.” O’Brien, *supra* note 17, at 44.

79. Smith, *supra* note 55, at 113-14. State reliance on the private sector also offers economic advantages. See DEFENSE SCIENCE BOARD, *OUTSOURCING REPORT* (1995) (suggesting a \$6 billion annual Pentagon budget savings by outsourcing all U.S. military support functions); GENERAL ACCOUNTING OFFICE, *BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING*, REPORT NO. GAO/NSIAD-97-86, at 4 (1997) (“[T]wo areas of outsourcing appear to offer the potential for significant savings, but the extent to which the services are exploring them is mixed. They involve giving greater emphasis to (1) the use of omnibus contracts, rather than multiple contracts, for support services and (2) the conversion of military support positions to civilian or contractor positions.”).

80. NATIONAL SECURITY COUNCIL, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* ch. IX, at 29 (Sept. 2002) (The chapter is entitled “Transform America’s National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century.”). The changing nature of warfare is also expected to place an enormous strain on states’ armies organized primarily to fight a now distant Cold War. See generally MARTIN L. VAN CREVALD, *THE TRANSFORMATION OF WAR* (1991) (predicting a resurgence of low intensity conflict).

sanction enforcement, preventative deployments, disaster relief, or humanitarian operations.”⁸³ And yet the global need remains for professional military forces—whether public or private—to accomplish these missions.⁸⁴

In addition to the national security concerns confronting the United States, the larger international community increasingly demonstrates its unwillingness to intervene during the early stages of internal armed conflict due to cost, inadequate strategic interest, risk of casualties, or lack of national support and political will.⁸⁵ Despite this reluctance, Shawcross observed, “The lesson we learn from ruthless and vengeful warlords the world over is that [international] goodwill without strength can make things worse.”⁸⁶ In this way, timely military intervention during the early

81. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2001, at 13 (2001). See also Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at 3-1. “‘The main reason for using a contractor is that it saves you from having to use troops, so troops can focus on war fighting,’ said Col. Thomas W. Sweeney, a professor of strategic logistics at the Army War College in Carlisle, Pa.” *Id.* With this in mind, Smith offered four justifications for increased U.S. reliance on PMCs: (1) the increased military resource requirements needed to provide effective homeland defense; (2) a “national military strategy [that] requires a full-spectrum [of conflict] force . . . to achieve American strategic objectives in the world,” Smith, *supra* note 55, at 113; (3) the increasing strain placed on this full-spectrum force; and (4) the post-Cold War flood of “ethnic conflict, failing states, and transnational threats” leading to “new missions at the lower end of the conflict spectrum.” *Id.*

82. Cf. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 1997 § 3 (1997) (“At the other end of the spectrum is the argument that as the world’s only remaining superpower, the United States has significant obligations that go well beyond any traditional view of national interest, such as generally protecting peace and stability around the globe, relieving human suffering wherever it exists, and promoting a better way of life, not only for our own citizens but for others as well.”).

83. CARL CONETTA, THE PENTAGON’S NEW BUDGET, NEW STRATEGY, AND NEW WAR, COMMONWEALTH INSTITUTE PROJECT ON DEFENSE ALTERNATIVES, POLICY REPORT (2001), <http://www.comw.org/pda/0206newwar.html>.

84. Smith asserted that PMCs may help fulfill this need. “[M]ilitary means are not sufficient to allow full and efficient implementation of the U.S. national security strategy. If the risk is to be mitigated, the United States must find alternative approaches. One such approach is the increased use of PMCs.” Smith, *supra* note 55, at 113. *But see* David Hackworth, *Rent-a-Soldier Tactics Not Good for U.S.*, AUSTIN AM. STATESMAN, July 28, 1995, at A15 (arguing against the shift of military functions to private companies). Nevertheless, U.S. practice suggests its increased reliance on PMC military services. See U.S. DEP’T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, FOREIGN MILITARY TRAINING AND DOD ENGAGEMENT ACTIVITIES OF INTEREST (2002) [hereinafter FOREIGN MILITARY TRAINING REPORT] (published annually and compiled by the Departments of State and Defense, and demonstrating increasing use of private military companies by the United States), <http://www.state.gov/t/pm/rls/rpt/fmtrpt/2002>.

stages of internal armed conflict may offer the most effective means to prevent gross human rights violations. O'Hanlon argued:

Conventional wisdom holds that the use of force should be a last resort, used only after diplomacy and other measures have been attempted and found wanting. At the same time, it is highly desirable to intervene as soon as possible in a conflict that seems destined to be severe. The humanitarian benefits of doing so are often obvious. In addition, though it is sometimes said that civil wars must burn themselves out before peace is possible, they can accelerate as easily as they can reach some natural exhaustion point.⁸⁷

85. See, e.g., Michael Scharf & Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635 (1996) (discussing international hesitancy to avert the human catastrophe that occurred in the former Yugoslavia and in many other twentieth century internal armed conflicts, as well as the lack of an international "police force" to intervene in such conflicts). Referring to the former Yugoslavia, William Shawcross remarked:

What the administration did not or would not understand was that the Vance-Owen plan [for Yugoslavia] did not pretend to be a "just settlement." It was, in fact, designed as an imperfect alternative to war which reflected basic political realities, including the unwillingness of Western powers, above all the United States, to commit their forces to impose a settlement of which they approved.

WILLIAM SHAWCROSS, *DELIVER US FROM EVIL: PEACEKEEPERS, WARLORDS AND A WORLD OF ENDLESS CONFLICT* 91 (2000) (considering the efficacy of humanitarian intervention). Referring to U.S. intervention during internal ethnic conflicts, David Callahan stated:

Military intervention in ethnic conflicts is an intrinsically difficult proposition. Since the United States rarely will have vital interests at stake in an ethnic conflict, it will almost always be inclined to use military force on a limited scale, if at all. It will seek to keep casualties low and minimize the national prestige that it lays on the line—goals that are notoriously hard to achieve.

DAVID CALLAHAN, *UNWINNABLE WARS: AMERICAN POWER AND ETHNIC CONFLICT* 187-88 (1997).

86. SHAWCROSS, *supra* note 84, book jacket. Cf. Robert Turner, *Taking Aim at Regime Elite: Forward: Thinking Seriously About War and Peace*, 22 MD. J. INT'L L. & TRADE 279 (1999) ("The great wars of history have not resulted from the victims being too well prepared or from an out-of control arms race. Rather, they come from perceived weakness—from a lack of military power, or above all else a lack of apparent will to use power effectively—and a consequential absence of effective deterrence.").

Callahan reached a similar conclusion: “The decisive use of [military] force by an outside party might have altered the course of several recent ethnic conflicts and contained the scope of fighting.”⁸⁸

The Rwandan civil war of 1990-1994 provides the most poignant example. Third party states displayed overwhelming apprehension against deploying their armies to intervene, resulting in an ineffective UN peace enforcement operation.⁸⁹ This international indifference endured despite years of recurring Hutu and Tutsi ethnic massacres in Rwanda and Burundi,⁹⁰ a history replete with indicators of the likely outcome for Rwanda’s four-year civil war.⁹¹ It is highly unlikely that any modern PMC could have diffused the Rwandan crisis in mid-1994.⁹² Two of the seven genocide indicators identified by Keeler, however, bear mentioning: (1) “a group in power publishes messages of hate and the need to kill the other group,”⁹³ and (2) “genocide first occurs on a small scale, as if to see if the international community will intervene.”⁹⁴ A capable and willing PMC could have seized, disabled, or simply jammed the Hutu-controlled *Radio Mille Collines* early on to prevent further anti-Tutsi propaganda.⁹⁵ Moreover, properly equipped PMC peacekeepers could have intervened to prevent or at least discourage those responsible for the organized but small-

87. MICHAEL O’HANLON, *SAVING LIVES WITH FORCE: MILITARY CRITERIA FOR HUMANITARIAN INTERVENTION* 8 (1997). See generally T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1 (2002) (distinguishing between intervention as aggression and humanitarian intervention, and exploring the legal bases for such actions).

88. CALLAHAN, *supra* note 85, at 205.

89. See SHAWCROSS, *supra* note 85, at 124-29.

90. Ethnic massacres took place in 1959, 1962-1963, 1965, 1966, 1969, 1972, 1988, and 1991-1993. CALLAHAN, *supra* note 85, at 57-58; see also SHAWCROSS, *supra* note 85, at 124-45 (providing a brief history of Rwanda’s turmoil, from independence in 1959 to its 1997 refugee crises in which up to 200,000 may have been killed).

91. See Joseph A. Keeler, *Genocide: Prevention Through Nonmilitary Measures*, 171 MIL. L. REV. 135, 163-70 (2002) (identifying seven indicators of impending genocide). Keeler argued that a timely international response is critical to avert genocide, and he proposed a UN-monitored early warning system to respond to internal armed conflicts posing an imminent danger of genocide. *Id.* at 179-87.

92. See, e.g., UK GREEN PAPER, *supra* note 18, para. 24 (“Analysts have focused on the activities of Executive Outcomes in Angola and Sierra Leone; these were, however, exceptional operations and it is not clear if anything like them will be repeated . . .”).

93. Keeler, *supra* note 91, at 167-78.

94. *Id.* at 168-69.

95. In May 1994, “Boutros-Ghali asked Washington to jam the inflammatory broadcasts of *Radio Mille Collines*; he said he was told that it would be too expensive.” SHAWCROSS, *supra* note 85, at 139-40.

scale assaults, rapes, and murders that began in 1990.⁹⁶ With international recognition, therefore, such PMC humanitarian interventions could foreseeably diffuse the volatile conditions leading to genocide. If there is any reasonable possibility of averting humanitarian catastrophes like the Rwandan genocide, which claimed over 600,000 victims in less than 100 days,⁹⁷ the international community should explore the potential for this preventive application of PMC military services.⁹⁸

III. Analysis

A. Mercenaries and International Law

The previous section closed with a few of the compelling arguments in favor of expanding the scope of military services that PMCs provide. Before this can occur, however, an adequate legal footing must be established, one which recognizes the fine distinction between unaffiliated mercenaries and state-sanctioned PMCs.⁹⁹ Existing international provisions fail even to define mercenaries to most scholars' satisfaction, and they remain exceedingly ill-equipped to regulate effectively the full breadth of current PMC activities.¹⁰⁰

The following subsections examine in detail the international provisions that attempt to regulate mercenary activities, including the Hague Conventions of 1907,¹⁰¹ the Geneva Conventions of 1949,¹⁰² the UN Charter and related resolutions,¹⁰³ Article 47 of Protocol I,¹⁰⁴ the OAU's declarations and conventions,¹⁰⁵ and the UN Mercenary Convention.¹⁰⁶ The section concludes with a summary of potential liability under existing

96. Rwanda's "criminal code would surely have prohibited assault, rape, and murder. No Hutu was arrested, however, and no Hutu was tried for committing obvious criminal misconduct." Keeler, *supra* note 91, at 168.

97. *Id.* at 162-63.

98. After the Rwandan civil war's conclusion, the United States recognized the utility of PMCs in promoting post-conflict stability in Rwanda. Both BDM International and Betac Corporation have been hired since 1995 to assist U.S. Special Forces in training the nascent Rwandan army. See O'Brien, *supra* note 17, at 56.

99. Enrique Bernales Ballesteros, the UN Special Rapporteur on mercenary issues, spoke of "the thin line dividing the activities of private security companies and the use of mercenaries." *Report of the Second Meeting of Experts on Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, Economic and Social Council, 59th Sess., Agenda Item 5, at 8, U.N. Doc. E/CN.4/2003/4 (2002) [hereinafter *Report of the Second Meeting of Experts*].

international law for mercenary activities by unaffiliated individuals, state actors, and states themselves.¹⁰⁷

1. *Hague Conventions*

The Hague Conventions of 1907 represent the first international effort aimed at regulating mercenary activities. The Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)¹⁰⁸ aspires to “lay down more clearly the rights and duties of neutral Powers [toward belligerents] in case of war on land,”¹⁰⁹ thereby codifying customary international law to the satisfaction of the states’ plenipotentiaries attending the drafting conference. Therefore, the authors of Hague V incorporated customary international law then existing when they distinguished between “active participation or condon[ing] of [mercenary] recruitment by a state on its territory and the acts of individual citizens leaving to join a [mercenary] force of their own accord.”¹¹⁰

Article 4 of Hague V provides: “Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.”¹¹¹ Article 6 continues: “The responsibility of a

100. Mercenary regulation has always proved difficult, even when the mercenaries were loyal to the sovereign.

[The Western soldiers of the late middle ages] were professional soldiers, in both the Roman and modern sense of the term; they bore allegiance to the king, even though commanded and raised by the nobles, and they thought of themselves as English soldiers. They were, however, also mercenaries, who were not easily controlled or utilized in times of peace, when they often turned their unruly natures and military skills to plundering and terrorizing the civilian populace.

DUPUY ET AL., *supra* note 3, at 335.

101. *See* discussion *infra* Part III.A.1.

102. *See* discussion *infra* Part III.A.2.

103. *See* discussion *infra* Part III.A.3.

104. *See* discussion *infra* Part III.A.4.

105. *See* discussion *infra* Part III.A.5.

106. *See* discussion *infra* Part III.A.6.

107. *See* discussion *infra* Part III.A.8.

108. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention No. V), Oct. 18, 1907, 36 Stat. 2310-31; 1 Bevans 654-68 [hereinafter Hague V].

109. *Id.* pmbl.

neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.”¹¹² From Article 4 one may conclude that a neutral state must allow neither mercenary expeditions to be formed nor mercenary recruiting to take place on its territory.¹¹³ From Article 6, however, it is clear that the state’s regulatory obligation is limited because it has no duty to prevent individuals—whether its citizens or another state’s citizens—from crossing its borders to serve as mercenaries for a belligerent.¹¹⁴ Therefore, a neutral state must prevent domestic mercenary recruitment or staging activities under Hague V, but it is not required to outlaw the mercenary per se. In this way, “[t]he individual mercenary himself was only indirectly affected [through Hague V], by means of the implementation by a State of its obligations as a neutral.”¹¹⁵

2. Geneva Conventions

Some forty years later, the Geneva Convention Relative to the Treatment of Prisoners of War (POW) failed to mention mercenaries specifically, even in Article 4 which extends POW status to certain persons “who have fallen into the power of the enemy.”¹¹⁶ While the *Commentary on the Geneva Conventions*¹¹⁷ suggests by its silence that the drafters never considered mercenary status,¹¹⁸ scholars debate whether the drafters intended

110. H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT’L L. 37, 41 (1978). Burmester reached this conclusion after examining *opinio juris* from Suarez in 1621, F. SUAREZ, DE TRIPLICI VIRTUTE THEOLOGICA 832-35 (Classics of International Law ed. 1944), to Bynkershoek in 1737, C. VAN BYNKERSHOEK, QUASTIONUM JURIS PUBLICI LIBRI DUO 124 (Classics of International Law ed. 1944), to Lorimer in 1884, J. LORIMER, THE INSTITUTES OF THE LAW OF NATIONS 179 (1884). Burmester, *supra*. See also Hampson, *supra* note 14, at 7 (“By the early twentieth century a clear distinction was being drawn between the acts of individuals enlisting with foreign troops and the attitude shown by a State in allowing the organization of mercenaries within its territory.”).

111. Hague V, *supra* note 108, art. 4.

112. *Id.* art. 6.

113. See Burmester, *supra* note 110, at 42.

114. See *id.*

115. Hampson, *supra* note 14, at 7. A German proposal would have had belligerent states agree not to accept the service of foreigners, and neutral states would agree to prohibit such service by their citizens. The state representatives to the Hague Conference, however, rejected the proposal. *Id.* at 8 (citing A.S. de Bustamente, *The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare*, 2 AM. J. INT’L L. 95, 100 (1908)).

116. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

to deny POW status to mercenaries, thereby refusing to recognize mercenaries as lawful combatants.¹¹⁹ Most agree that the Conventions' drafters intended to treat mercenaries no differently than other combatants.¹²⁰ The protected status debate aside for the moment,¹²¹ it can be said with certainty that the Geneva Conventions in no way criminalize the fact of being a mercenary, although they do require states parties to hold mercenaries accountable for combatant actions amounting to grave breaches of the Conventions' provisions.¹²²

3. *The UN Charter and Principles of Non-Intervention*

Four years before the states parties signed the four Geneva Conventions, the drafters of the UN Charter recognized the sovereign equality of member states,¹²³ and they established a collective security mechanism for preventing and removing threats to international peace and security.¹²⁴ As a corollary, they required in Article 2(4) that all member states "refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the

117. See COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet et al. eds., 1960).

118. See Cotton, *supra* note 29, at 155.

119. Compare *id.* at 143, 155-60 (arguing that the Convention's protections were intended to be inclusive unless otherwise specified, thus extending protections to mercenaries), with Tahar Boumedra, *International Regulation of the Use of Mercenaries in Armed Conflicts*, 20 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 35, 54 (1981) (concluding that "the situation envisaged by the drafters of the Convention was probably that of normal conflicts between two or [more] national States[,] each side fighting with forces made up of its own nationals," thus excluding mercenaries from protection).

120. See *infra* notes 191-200 and accompanying text (discussing how Protocol I, Article 47, diverged from what had become an accepted principle of customary international law).

121. See Protocol I discussion *infra* Part III.A.4.

122. Alleged perpetrators of grave breaches, regardless of nationality, must be brought to trial by states parties to the Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III, *supra* note 116, arts. 129-130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146-147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

123. U.N. CHARTER art. 1(1).

124. *Id.* art. 2(1).

[p]urposes of the United Nations.”¹²⁵ Commentators refer to either “aggression” or “intervention” when referring to states’ “threat or use of force,” with the former term commonly used,¹²⁶ and the latter term reserved for discussing use of force relating to the development of neutrality law since the Hague Conventions.¹²⁷ Regardless of terminology, Article 2(4) of the UN Charter significantly limits when states may resort to use of force.¹²⁸ The Charter makes exceptions for individual or collective self-defense in the face of an armed attack¹²⁹ and for collective security measures involving use of military force authorized by the UN Security Council.¹³⁰ Several non-binding UN resolutions¹³¹ issued since 1965, however, may place additional restrictions on states’ authority to use force, to include states’ use of mercenaries.

In 1965, the UN General Assembly issued Resolution 2131, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, which 109 member states unanimously adopted.¹³² It states:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. . . .¹³³

. . . .

125. *Id.* art. 2(4).

126. *See, e.g.,* YORUM DINSTEIN, *WAR, AGRESSION AND SELF-DEFENSE* (2d ed. 1994) (discussing mercenary use as a form of state aggression).

127. *See, e.g.,* Burmester, *supra* note 110, at 43-44 (“The [state’s] right to resort to force and to provide assistance to another state under attack have been severely curtailed in the case of international conflicts. Use of mercenaries in such conflicts may reasonably be regarded as foreign intervention [in violation of the UN Charter.]”); Hampson, *supra* note 14, at 22.

128. *See* U.N. CHARTER art. 2(4). This may include dispatching mercenary forces. *See* John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT’L L. 43 (1986) (discussing UN Charter, Article 2(4), and the definition of aggression, which includes dispatching mercenary forces); David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT’L L. 45 (1994) (arguing that the Reagan Administration’s support to the Nicaraguan Contras amounted to dispatching a mercenary force against another nation). Some observers have argued that the Reagan Administration also dispatched mercenaries in violation of Article 2(4) when it trained Libyan mercenaries to overthrow the Gaddafi government. Hampson, *supra* note 14, at 5 n.9.

129. U.N. CHARTER art. 51.

Also, no State shall organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State or interfere in civil strife in another State.¹³⁴

While a strong defense of sovereignty, Resolution 2131 does not mention mercenaries. If one equates “armed activities” to mercenary incursions, this widely accepted resolution would seem to prohibit states from recruiting, organizing, financing, or sending mercenaries to intervene in foreign states. The term “tolerate” also implies that a state could not knowingly allow its citizens or others to undertake such activities on its territory when those activities were undertaken to affect another state’s regime change or interfere in matters related to its internal unrest. Although Resolution 2131 offers appealing potential for mercenary regulation, it fails to proscribe mercenary activities specifically. Moreover, no subsequent UN declaration and few scholars have cited the resolution as authority for this proposition.¹³⁵

In 1968, the General Assembly issued Resolution 2465, the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted fifty-three to eight with forty-three abstentions.¹³⁶ Significantly for purposes of mercenary regulation, the resolution states:

[T]he practice of using mercenaries against movements for national liberation and independence is punishable as a criminal

130. *Id.* arts. 39, 42. Regarding collective security measures, the UN Charter envisions a lawful resort to use of force, but only when the Security Council determines this “may be necessary.” *Id.* art. 42. The Charter requires member states to make available their military forces for this purpose.

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

Id. art. 43. Although a supranational authority, the UN undoubtedly represents a power “foreign” to the individual soldier or military technician that member states provide to the Security Council. *See supra* note 13. Therefore, one could argue legitimately that the UN employs these individuals in a mercenary endeavor consisting of “professional soldier[s] serving a foreign power.” *See supra* text accompanying note 28 (defining the term mercenary).

act and . . . mercenaries themselves are outlaws . . . [;] Governments of all countries [should] enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and [should prohibit] their nationals from serving as mercenaries.¹³⁷

With this language, the General Assembly for the first time pronounced mercenarism to be a crime, albeit in the limited circumstances when the

131. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987) [hereinafter RESTATEMENT THIRD].

c. Declaratory resolutions of international organizations. States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law. International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations [such as the UN], if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight. Such declaratory resolutions of international organizations are to be distinguished from those special “law-making resolutions” that, under the constitution of an organization, are legally binding on its members.

Id. § 103, cmt. c. In addition, consensus resolutions may evidence entry into customary international law. See *id.* § 103 (reporter’s note 2). Hampson remarked:

General Assembly resolutions, [while] not binding as such in [the area of resort to armed force], may nevertheless represent an encapsulation of customary international law. This is particularly likely to be the case where they are adopted by large majorities, especially if the majority includes the Security Council veto powers.

Hampson, *supra* note 14, at 20. See generally THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Sima ed., 2002).

132. G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) (adopted 109 to 0). See Hampson, *supra* note 14, at 20 (Resolution 2131 was “adopted without dissent on points of substance . . .”). The most obvious precursor to Resolution 2131 was the Declaration on the Granting of Independence to Colonial Countries and Peoples. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960). “All armed action or repressive measures against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.” *Id.* at 67.

133. G.A. Res. 2131, *supra* note 132, at 12, para. 1.

134. *Id.* para. 2 (emphasis added).

mercenary fights against a national liberation and independence movement.¹³⁸

The bold but non-binding Resolution 2465 reflected no existing international or domestic mercenarism crime. Instead, it was merely aspirational, a *de lege ferenda* principle encouraged by some UN member states out of hope that it might one day become customary international law.¹³⁹ It certainly did not reflect customary international law in 1968, and the novel resolution got no closer to becoming so when put to the vote.

Resolution 2465 received slightly more than half of the General Assembly members' votes, which suggests an international principle far short of widespread acceptance.¹⁴⁰ This explains why in the same provision the General Assembly called upon states' governments to enact legislation prohibiting their nationals from acting as mercenaries and

135. *But cf.* Hampson, *supra* note 14, at 20-21. Hampson argued that Resolution 2131's "principles were reiterated in 1970 in [General Assembly Resolution 2625,] the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States," *id.*, but Resolution 2625 is limited to states' organizing or encouraging mercenary activities, and it does not encompass states' toleration of mercenary (or "armed") activities by its citizens or others. *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970). Moreover, Resolution 2625 fails to reiterate, recall, or reaffirm the text or principles of Resolution 2131. *Id.* at 121. From these two resolutions and the principles of neutrality law, however, Hampson developed a construct that spells out states' responsibilities to prevent unlawful intervention, a construct that she called "intervention law." Hampson, *supra* note 14, at 20-23. While quite compelling in the way it merges neutrality law and principles of non-intervention, the analysis may be questioned for the assumption that Resolution 2625 "provides . . . that no State shall tolerate armed activities directed towards another State." *Id.* at 21 (reading in that language from Resolution 2131). Thirty years later, however, the UN Mercenary Convention arguably codified this principle, thereby lending authority to Hampson's intriguing intervention law paradigm. *See* UN Mercenary Convention, *supra* note 22, art. 6(a) (States parties shall take "all practicable measures to prevent [mercenary-related] preparation in their respective territories . . .").

136. G.A. Res. 2465, *supra* note 19.

137. *Id.* para. 8.

138. *See* Boumedra, *supra* note 119, at 56. In 1969, the General Assembly in Resolution 2548 reiterated that mercenaries were outlaws and, therefore, that state use of mercenaries against national liberation and independence movements was also criminal. G.A. Res. 2548, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (1969).

139. This is opposed to a *de lege lata* principle, which represents an emerging rule of customary international law. *See* Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 35 (1955).

140. *See supra* note 130.

prohibiting the “recruitment, financing and training of mercenaries in their territory,”¹⁴¹ a principle eventually addressed in the 1989 UN Mercenary Convention.¹⁴² Nevertheless, even if viewed in the best possible light, Resolution 2465 limits its application to mercenary activities against national liberation and independence movements.¹⁴³ As such, it is largely irrelevant when considered outside of the post-colonial context existing when it was written.

In 1970, the General Assembly issued Resolution 2625, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.¹⁴⁴ The General Assembly adopted the resolution by a consensus vote, but it differed from previous declarations in three material respects. First, it reflected international law because it did not refer to individual mercenaries as criminals *per se*.¹⁴⁵ Second, it was not limited to national independence and liberation movements, which limited Resolution 2465 to the post-colonial context.¹⁴⁶ Third, the resolution did not deplore state toleration of mercenary activities when it elaborated on states’ responsibilities: “[E]very state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”¹⁴⁷

Therefore, by Resolution 2625’s widely accepted terms, states should not organize or encourage mercenaries—whether or not the mercenaries are fighting against national liberation and independence movements—but states are not prohibited from knowingly tolerating mercenary activities that lead to incursions in other states.¹⁴⁸ This is consistent with the principles of neutrality law embodied in Hague V, which generally distinguishes between state versus individual actions and the corresponding responsibility for those actions.¹⁴⁹ Ultimately, Resolution 2625 stands out because of its consistency with international law and its lack of political overtones, two characteristics that may explain the resolution’s unanimous approval and its explicit incorporation into customary international law by a subsequent decision of the International Court of Justice.¹⁵⁰ The same cannot be

141. G.A. Res. 2465, *supra* note 19, para. 8.

142. UN Mercenary Convention, *supra* note 22, art. 5.

143. G.A. Res. 2465, *supra* note 19, para. 8.

144. G.A. Res. 2625, *supra* note 135.

145. *See supra* text accompanying notes 115, 122.

146. *See supra* note 143 and accompanying text.

said about the General Assembly's next resolution relevant to mercenary regulation.

In late 1973, the General Assembly returned to regulating mercenary activities in post-colonial regimes, a theme first articulated in 1968 by Resolution 2465.¹⁵¹ Resolution 3103, the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, met less than unanimous approval much like its 1968 topical predecessor.¹⁵² Arguably, international support was increasing because Resolution 2465 received fifty-three votes, with eight votes against and forty-three abstentions,¹⁵³ while Resolution 3103 received eighty-three votes, with thirteen votes against and nineteen abstentions.¹⁵⁴ The level of political rhetoric, though, markedly increased in Resolution 3103, which states: "The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for

147. G.A. Res. 2625, *supra* note 135, Annex, at 123. Resolution 2625 contains a separate provision related to terrorist activities and activities that further other states' civil strife. It also imposes a duty on states to refrain from acquiescing to such activities on their territory.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when [the acts] involve a threat or use of force.

Id. Unlike Resolution 2131 of 1965, however, Resolution 2625 does not say that states must not tolerate "armed activities," arguably including mercenary activities, which seek to overthrow foreign regimes or interfere in a state's internal strife. *See supra* notes 132-35 and accompanying text. Therefore, by its terms, Resolution 2625 is limited to states that encourage or organize mercenary activities, a higher threshold than mere toleration of such activities.

148. *But see* Hampson, *supra* note 14, at 21. Considering Resolutions 2131 and 2625 together, Hampson concludes: "Inaction is not sufficient. If there is any evidence of [mercenary] activities, the State must take positive action to prevent, deter, and punish it. Inaction amounts to [prohibited] toleration of the activities." *Id.* *See supra* note 135 (considering Hampson's conclusion).

149. *See* Hague V, *supra* note 108, arts. 4, 6.

150. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 187-92 (June 27) (Merits).

151. G.A. Res. 2465, *supra* note 19. *See supra* notes 136-42 and accompanying text.

152. G.A. Res. 3103, *supra* note 16.

153. G.A. Res. 2465, *supra* note 19.

154. G.A. Res. 3103, *supra* note 16.

their freedom and independence from the yoke of Colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.”¹⁵⁵

The language of Resolution 3103 returns the debate to mercenary activities directed against national liberation and independence movements. Like the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,¹⁵⁶ Resolution 3103 refers to states’ responsibilities regarding mercenaries. Whereas the 1970 resolution said that all states have a responsibility to refrain from organizing or encouraging mercenary incursions into other states, whether or not the mercenaries fought against national liberation or independence movements,¹⁵⁷ Resolution 3103 pertains only to “colonial and racist regimes.”¹⁵⁸ Resolution 3103 also goes beyond states’ responsibilities, declaring that it amounts to a criminal act when this select category of states uses mercenaries against national liberation and independence movements.¹⁵⁹

Like Resolution 2465 of 1968, Resolution 3103 again refers to mercenarism as criminal in nature. Unlike its 1968 predecessor, however, Resolution 3103 uses the phrase “should be punished as criminals,” rather than “mercenaries themselves are outlaws.” In contrast to the General Assembly’s novel and unsupported declaration that one category of states, the alien and racist regimes, commits a crime when they use mercenaries against a second category of states, those engaged in national liberation and independence movements, the General Assembly’s call for states to enact legislation to punish mercenaries as criminals better reflects international law, which in 1973 criminalized neither mercenarism itself, nor any state’s use of mercenaries.¹⁶⁰ This approach also acknowledges the generally non-binding nature of General Assembly resolutions, which do not

155. *Id.* art. 5.

156. G.A. Res. 2625, *supra* note 135.

157. *See supra* text accompanying note 147.

158. G.A. Res. 3103, *supra* note 16, arts. 2-3, 5.

159. *Id.* art. 5.

160. *See* Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 20 February – 29 March 1974*, in 5 NETH. Y.B. INT’L L. 3, 24 (1974) (concluding that Resolution 3103 was neither an accurate nor authoritative statement on the law). “[R]esolution 3103 (XXVII) cannot be accepted as an accurate, let alone as an authoritative, statement of the law; on the contrary, it provided a clear case of abuse of block voting power.” *Id.* at 24.

amount to customary international law unless approved by wide majorities and affirmed by subsequent state practice.¹⁶¹

This is not to say that the UN cannot legislate in effect regarding international peace and security generally, or use of force specifically. In 1974, the General Assembly released Resolution 3314, the Draft Definition of Aggression issued by the UN Special Committee on the Question of Defining Aggression.¹⁶² The resolution defined as an act of aggression state participation in the use of force by militarily organized unofficial groups, that is, “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state”¹⁶³ Resolution 3314 enjoyed widespread support and was adopted by consensus, suggesting states accepted it as customary international law.¹⁶⁴ By its terms, all states, and not just those labeled as colonial or racist regimes, engage in aggression—the “use of force against the territorial integrity or political independence of [another] state” in violation of Article 2(4) of the UN Charter¹⁶⁵—when they send mercenaries to use force against another state.¹⁶⁶

Looking at the cumulative effect of the General Assembly resolutions that most likely evidence customary international law,¹⁶⁷ Resolutions 2131, 2625, and 3314,¹⁶⁸ a concise restriction on mercenary activities

161. See RESTATEMENT THIRD, *supra* note 131, § 103 (reporter’s note 2).

A resolution purporting to state the law on a subject is some evidence of what the states voting for the resolution regard the law to be, although what states do is more weighty evidence than their declarations or the resolutions they vote for. The evidentiary value of such a resolution is high if it is adopted by consensus or by virtually unanimous vote of an organization of universal membership such as the United Nations or its Specialized Agencies.

Id. Regarding Resolution 3103, Verwey said: “Even among African circles doubt seems to prevail as to whether the claim formulated in this resolution has in the meantime developed into a rule of customary law.” Wil D. Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT’L L. 69, 81 (1981).

162. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974).

163. *Id.* para. 3(g).

164. See *supra* notes 131, 161.

165. U.N. CHARTER art. 2(4).

166. See G.A. Res. 3314, *supra* note 162, art. 1.

167. See *supra* notes 131, 161 and accompanying text.

emerges. States must not organize, encourage, or send mercenaries to use armed force against another state. This applies whether or not the organizing, encouraging, or sending state is a colonial or racist regime, and whether or not the mercenaries are organized, encouraged, or sent to fight against a national liberation and independence movement. Despite this restriction, however, the General Assembly resolutions do not in themselves prohibit states from knowingly tolerating mercenary activities that lead to a use of armed force in other states.

4. Protocol I

Continuing the General Assembly's endeavor to regulate mercenaries, the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts first attempted to define mercenaries when it met from 1974 to 1977. The Diplomatic Conference's ultimate achievement, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), provides the international community's definitive statement on mercenaries.¹⁶⁹ The Nigerian representative put forth the issue,¹⁷⁰ and his nation brought significant experience to the negotiations because Nigeria fought mercenary forces employed by Biafra during the nation's civil war from 1967-1969.¹⁷¹ The assembled representatives, however, found it difficult to reach consensus on defining mercenaries. This resulted in inevitable compromise, producing an international

168. G.A. Res. 2131, *supra* note 132; G.A. Res. 2625, *supra* note 135; G.A. Res. 3314, *supra* note 162.

169. Protocol I, *supra* note 21, art. 47 (defining mercenaries and denying them prisoner of war status).

170. 3 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977) 192 (Swiss Federal Political Department 1978) [hereinafter OFFICIAL RECORDS] (CDDH/III/GT/82, May 13, 1976). The proposed article 42 *quater* on mercenaries read:

1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol.
2. A mercenary includes any person not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or take part in armed conflict essentially for monetary payment, reward or other private gain.

Id.

provision designed to discourage rather than to regulate mercenary activities.¹⁷²

After the first meeting of the Committee III Working Group on Protocol I, which debated the proposed article on mercenaries, Mr. Baxter from the United States reported that “[t]he matter had been discussed at length in the Working Group and had proved to be much more complex than [it] appeared when the study of the topic began.”¹⁷³ A contemporary author summed up the group’s dilemma. “As with any label used in today’s multi-polar world,” he said, “the term ‘mercenary’ is subject to various interpretations by parties seeking to justify their own actions.”¹⁷⁴ The opinions expressed thus represented the existing Cold War dichotomy and the emerging North-South divide among states,¹⁷⁵ with the then-Soviet Union still identifying itself firmly with the Third World states of the South.¹⁷⁶

In general, the Third World representatives of the Working Group perceived mercenaries as simple criminals unworthy of any legal protections. Mr. Clark, the Nigerian representative, used the phrase “common criminals,”¹⁷⁷ Mr. Lukabu K’Habouji of Zaire referred to mercenaries as the

171. See GERRY S. THOMAS, *MERCENARY TROOPS IN MODERN AFRICA* 11, 16 (1984) (offering a thorough analysis of the ethnic and tribal composition of the opposing forces, as well as the composition, motivation, and tactics of mercenary forces). See generally Abdel-Fatau Musah & J. Kayode Fayemi, *Africa in Search of Security: Mercenaries and Conflicts—An Overview*, in *MERCENARIES: AN AFRICAN SECURITY DILEMMA*, *supra* note 17, at 13. Ironically, Nigeria also employed mercenaries during its civil war, see HOWE, *supra* note 2, at 49, and it continued employing mercenaries throughout the 1990s. See O’Brien, *supra* note 17, at 61-63. See generally JOHN DE ST. JORRE, *THE NIGERIAN CIVIL WAR* (1972). So did many other African states. See *infra* note 372.

172. See 15 OFFICIAL RECORDS, *supra* note 170, at 189-202, 481 (providing the historical documents of the committee considering the new article on mercenaries for Protocol I); see also 3 HOWARD S. LEVIE, *PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE GENEVA CONVENTIONS 27-55* (1980) (also compiling the documents of the 1974-1977 Geneva Diplomatic Conference). See generally COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987); George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 776-77 (1981) (providing an analysis of the Geneva Protocols and specifically Article 47, which defines mercenaries).

173. 15 OFFICIAL RECORDS, *supra* note 170, para. 24, at 107 (CDDH/III/SR.49, June 4, 1976).

174. Cotton, *supra* note 29, at 146. “The use of the term [mercenary] is fraught with enormous political, diplomatic and even moral overtones.” *Id.*

175. See generally NASSAU A. ADAMS, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* (1993).

176. See *infra* note 185 and accompanying text.

“odious ‘profession’ of paid killers,”¹⁷⁸ Mr. Abdul El Aziz of Libya called them “criminals guilty of crimes against humanity,”¹⁷⁹ and Mrs. Silvera of Cuba concluded simply, “the mercenaries themselves [are] criminals.”¹⁸⁰ As further illustration, Mr. Bachir Mourad of Syria voiced his country’s displeasure at the final article because his delegation “would have preferred a more stringent text giving no protection whatever to mercenaries,”¹⁸¹ apparently dissatisfied with Mr. Clark’s implication that mercenaries would still enjoy the fundamental guarantees of Protocol I, Article 75.¹⁸² No love was lost for the mercenaries, and no representative put forth a defense for their historic or contemporary constructive use. Their only spokesmen were the Holy See representative and some of the former colonial powers, who maintained that Article 75’s fundamental guarantees should still extend to these men, “whatever their faults and their moral destitution.”¹⁸³

After examining the *Official Records* of the Protocol I Diplomatic Conference, one senses that all Working Group and Committee III discussions referenced the example of mercenaries in Africa since 1960 and their corresponding effect upon post-colonial struggles for self-determination.¹⁸⁴ This context seems obvious after reading the Soviet Union representative’s statement following Committee III’s adoption of Protocol I, Article 47:

Faithful to its consistently-held [sic] principles and policy of supporting the legitimate struggle of the peoples for their national liberation, the Soviet Union from its inception and thereafter throughout the next sixty years has supported and will

177. 15 OFFICIAL RECORDS, *supra* note 170, para. 15, at 192 (CDDH/III/SR.57, Apr. 29, 1977).

178. 15 *id.* para. 19, at 193 (same).

179. 15 *id.* para. 38, at 198 (same).

180. 15 *id.* para. 32, at 196 (same).

181. 15 *id.* para. 34, at 196-97 (same).

182. *See* 6 *id.* para. 81, at 157 (CDDH/SR.41, May 26, 1977).

183. 6 *id.* para. 87, at 158 (same).

184. *See, e.g.*, 15 *id.* para. 33, at 196 (CDDH/III/SR.57, Apr. 29, 1977). “Mercenaries . . . had always fought against national liberation movements, as was attested by the experience of many countries of the third world.” *Id.* (statement of Mr. Alkaff, Yemen). The Mozambique delegation offered some insight into the myopic nature of the committee’s analysis when it stated: “The trial of mercenaries in Angola in 1976 shed new light on the scope and the criminal nature of the system of mercenaries, *hitherto considered a noble profession by those who procure them.*” 6 *id.* at 193 (CDDH/SR.41, Annex, May 26, 1977) (emphasis added).

continue to support every effort aimed at helping nations to put a speedier end to colonialism, racism, apartheid and other forms of oppression, and to strengthen their national independence.¹⁸⁵

In focusing on a problem then confronting the world for some seventeen years, however, the Diplomatic Conference failed to address the larger issues of effective mercenary regulation and the possible utility of mercenary forces. This ignored more than 3000 years of recorded state mercenary use, looking instead no farther than the relatively brief post-colonial period when self-determination was pitted against lingering colonial interests. One scholar placed events in perspective:

Since the end of the Second World War a certain disdain for soldiers of fortune has developed. Perhaps this attitude has developed because utilization of mercenaries has become less common, and has often been restricted to small, "third world" colonial wars where political judgments concerning legitimacy of the colonists' cause infect outsiders' perception of the hired soldiers.¹⁸⁶

Nevertheless, on 8 June 1977 the High Contracting Parties agreed to Protocol I,¹⁸⁷ the protections of which were intended to apply to international armed conflicts¹⁸⁸ and "armed conflicts [in] which peoples are fighting

185. 6 *id.* at 203 (CDDH/SR.41, Annex, May 26, 1977).

186. Cotton, *supra* note 29, at 152.

187. According to the *Official Records*, the text of Article 47 was adopted on 29 April 1977 by Committee III, which consisted of forty-three members, including thirteen Organization of African Unity members and eight Soviet Bloc members. See 15 OFFICIAL RECORDS, *supra* note 170, at 189-90 (CDDH/III/SR.57, Apr. 29, 1977). "Although the new article had not received the Working Group's unqualified acceptance, [the Rapporteur] would suggest that it be adopted by consensus, subject to any reservations that might be formulated after its adoption. . . . It was so agreed. The new article on mercenaries . . . was adopted by consensus." *Id.* at 190.

188. Protocol I, *supra* note 21, art. 1(3) ("This Protocol . . . shall apply in the situations referred to in Article 2 common to [the Geneva Conventions of 12 August 1946].").

against alien occupation and against racist regimes in the exercise of their right to self-determination.”¹⁸⁹

Part III of Protocol I, entitled *Methods and Means of Warfare[;] Combatant and Prisoner-Of-War Status*, includes Article 47, *Mercenaries*, which reads:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in hostilities;
 - (c) is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.¹⁹⁰

First and foremost, Article 47 of Protocol I deprives mercenaries of the privilege to serve as lawful combatants and the immunity to be treated as prisoners of war upon capture.¹⁹¹ This was a significant departure from customary international law, which traditionally gave “mercenaries the

189. *Id.* art. 1(4). This provision further illustrates the political environment in which Protocol I was adopted. Regarding the U.S. position towards Article 1(4), Michael J. Matheson remarked: “It probably goes without saying that [the United States] likewise do[es] not favor the provision of article 1(4) of Protocol I concerning wars of national liberation and do[es] not accept it as customary law.” Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y. 419, 425 (1987) (defining the portions of Protocol I considered customary international law by the United States). Mr. Matheson was the Deputy Legal Advisor, U.S. Department of State, and his analysis was accepted as the Reagan Administration’s only authoritative statement on Protocol I’s provisions. See Memorandum of Law, Major P.A. Seymour, subject: Additional Protocol I as Expressions of Customary International Law (n.d.) (on file with author).

190. Protocol I, *supra* note 21, art. 47.

same status as the members of the belligerent force for which they were fighting.”¹⁹²

Proponents of Article 47 argued this deprivation represented recent developments in customary international law,¹⁹³ specifically the disdain expressed for mercenaries by several UN General Assembly resolutions¹⁹⁴ and by the Organization for African Unity’s Convention for the Elimination of Mercenarism in Africa.¹⁹⁵ Most significantly, Mr. Clark, the Nigerian representative who first proposed what became Article 47, said immediately after its adoption on 26 May 1977:

[Nigeria] had taken the initiative in proposing the new article because it was convinced that the law on armed conflicts should correspond to present needs and aspirations. The [Diplomatic] Conference could not afford to ignore the several resolutions adopted by the United Nations and certain regional organizations, such as the Organization of African Unity, which over the years had condemned the evils of mercenaries and their activities, particularly in Africa . . . [Article 47], therefore, was fully in accordance with the dictates of public conscience, as embodied in the resolutions of the United Nations.¹⁹⁶

Mr. Clark ironically concluded his final statement to the Diplomatic Conference, one dedicated to extending humanitarian rights to unconventional combatants, by stating: “By adopting [Article 47], the Conference had once and for all denied to all mercenaries any such rights [as lawful com-

191. See Boumedra, *supra* note 119, at 35, 41. “As far as mercenaries are concerned, Protocol I constituted a renovation of Geneva Convention III (1949). Article 47 puts mercenaries in the category of unlawful combatants and deprives them of the protection afforded to lawful combatants and POWs.” *Id.*

192. See Burmester, *supra* note 110, at 55.

193. See Boumedra, *supra* note 119, at 55-67.

194. See, e.g., G.A. Res. 2465, *supra* note 19; G.A. Res. 3103, *supra* note 16. Regarding General Assembly Resolution 3103, Cotton remarked: “While such inflammatory rhetoric is not commendable in any attempt to develop a well reasoned and practical solution to the mercenary question, it does at least show some sentiment that mercenaries should be denied prisoner of war status and should be treated as brigands.” Cotton, *supra* note 29, at 161.

195. Organization of African Unity, Convention for the Elimination of Mercenarism in Africa, OAU Doc. CM/817 (XXIX), Annex II (3d rev. 1977) [hereinafter OAU Mercenary Convention].

196. 6 OFFICIAL RECORDS, *supra* note 170, para. 79, at 157 (CDDH/S.R.41, May 26, 1977).

batants or prisoners of war]. The new article [thus] represented an important new contribution to humanitarian law.”¹⁹⁷

Several observers took issue with the notion that Article 47 represented a natural evolution of customary international law.¹⁹⁸ In particular, the United States specifically rejected Article 47 as an expression of *jus gentium*. According to Michael J. Matheson, then Deputy Legal Advisor for the U.S. Department of State, the United States “[does] not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law”¹⁹⁹ Moreover, “[the United States does] not consider the provisions of article 47 to be part of current customary law.”²⁰⁰

Legal commentators echoed U.S. reservations to Article 47. Burmester appeared to dispute directly Mr. Clark’s analysis when he stated:

The exaggerated assertions of the UN [General Assembly] resolutions were not adopted at the Conference and do not appear to reflect the consensus of the international community. Nevertheless, the removal of even certain protections from combatants who would otherwise qualify for such protections must be viewed with some concern. At the same time one is extending protection under the laws of war to guerillas, it seems inconsistent to be taking it away from other combatants. . . . Once protection is denied to one class of persons[,] the way is left open

197. 6 *id.* para. 81, at 157-58.

198. *See, e.g.,* Hampson, *supra* note 14, at 9.

Historically . . . the mercenary was in the same position as any other fighter. He committed no offence in international law by taking part in a conflict[,] and during the hostilities he was to be treated in the same way as any other combatant. If he satisfied the requirements, he was entitled to be treated as a privileged belligerent. Equally, he was bound by the rules of international law governing the conduct of hostilities and the protection of the victims of war. He could be tried for breach of those rules. He could not, however, be tried for “being a mercenary.”

Id.

199. Matheson, *supra* note 189, at 426. Mr. Matheson’s analysis was accepted as the Reagan Administration’s only authoritative statement on Protocol I. *See supra* note 189. His intent was to “review the principles that [the United States] believe[d] should be observed and in due course recognized as customary law, even if they have not already achieved that status” Matheson, *supra* note 189, at 422.

200. *Id.* at 426.

for other classes to be similarly denied protection. If states consider foreign participation in national liberation struggles against colonial and racist regimes to be of such gravity as to require that certain protections not be accorded mercenaries, it seems only logical . . . that such protections should not be accorded to *any* private foreign participants.²⁰¹

Freymond also warned that “[t]he temptation to establish privileged categories of combatants who are fighting for a cause regarded as the only just cause, or as being more just than another, must be resisted.”²⁰² In addition, Cotton observed that “if guerillas and other classes of unconventional combatants are to be included in the [Geneva] Convention’s [Article 4] protections through the Protocols, then mercenaries should also be included.”²⁰³ This stands to reason if efforts to expand the Conventions’ protections through Protocol I were made out of objective humanitarian concerns.²⁰⁴

But Protocol I singled out mercenaries based on a seemingly visceral reaction towards their use during two decades in post-colonial Africa. They were branded as criminals, regardless of who employed them or on whose behalf they fought.²⁰⁵ Regarding moral legitimacy and foreign intervention, however, it may be unfair to characterize mercenaries as fighting with unclean hands vis-à-vis local guerillas and national armies. Experience has shown that lines often blur when one attempts to distin-

201. Burmester, *supra* note 110, at 55-56 (internal citations omitted). “[T]he exclusion of mercenaries from human rights protections while extending it to terrorists and guerillas is ‘another milestone on the high road to violence unlimited.’” *Id.* at 55 n.82 (quoting Schwarzenberger, *Terrorists, Hijackers, Guerrilleros and Mercenaries*, 24 CURRENT L. PROBLEMS 257, 282 (1971)). Burmester certainly appreciated the problems posed by mercenaries. He critiqued Article 47, however, because it focused on individuals’ motivations and not on the “essentially private, non-governmental nature of the intervention which seems to be the basic problem which is raised by the use of mercenaries.” *Id.* at 38. *Cf.* Hampson, *supra* note 14, *passim* (describing the mercenary problem as one of foreign intervention, whether private or governmental in nature).

202. Jacques Freymond, *Confronting Total War: A “Global” Humanitarian Policy*, 67 AM. J. INT’L L. 672, 687 (1973), *quoted in* Cotton, *supra* note 29, 163 n.98.

203. Cotton, *supra* note 29, at 164.

204. *Id.* at 164 n.99.

205. *See supra* notes 177-82 and accompanying text.

guish between indigenous and foreign forces partaking in wars of self-determination.

For example, after the Portuguese withdrew from Angola in 1974, three very determined indigenous factions battled for the nation's control.²⁰⁶ Jonas Savimbi's National Union for the Total Independence of Angola (UNITA) received South African military equipment, technical advisors, and—more discreetly—limited combatant forces.²⁰⁷ They also received covert U.S. funding, but no U.S. technical advisors or military combat troops.²⁰⁸ Holden Roberto's Front for National Liberation of Angola (FNLA) received,²⁰⁹ after a referral by the French Secret Service, U.S. funding and U.S.-funded mercenaries, specifically the famed French mercenary Bob Denard and the mercenary band that he assembled with the assistance of Britain's John Banks.²¹⁰ This was the hapless group²¹¹ that later gained mercenary infamy during Angola's Luanda Trials,²¹² which

206. See THOMAS, *supra* note 171, at 12; MOCKLER, *supra* note 11, at 164-65.

207. MOCKLER, *supra* note 11, at 165. Savimba apparently declined the Central Intelligence Agency's offer of white mercenaries for appearance's sake, although he freely accepted U.S. financial assistance. *Id.*

208. *Id.* at 167.

209. Musah and Fayemi assert that "no fewer than 200 Americans arrived at San Salvador in Northern Angola in 1975 [presumably to assist the FNLA, which operated in Northern Angola], with the implicit backing of the Central Intelligence Agency." Musah & Fayemi, *supra* note 171, at 21.

210. MOCKLER, *supra* note 11, at 162-64, 167-69. Bob Denard, a former French marine NCO who was once imprisoned for involvement in an assassination plot against French political leader Pierre Mendes-France, earned his reputation in the Congo as a mercenary leader fighting for Katangese secessionist forces. Denard fought, with some success, UN forces under the command of General Sean McKeown, sent to the Congo in 1961 to quell the Katangese revolt. *Id.* at 41-42, 48-51. After the UN withdrew in 1964, the on-again, off-again Katangese revolt against the government of General Mobutu continued for several years until ultimately crushed in 1968. Both Mobutu, who seized power in a military coup, and the Katangese secessionists employed mercenaries throughout this period. *See id.* at 56-116.

211. Of this misdirected band, Mockler said:

[E]ven given their small numbers and—in the case of the later recruits—their dubious and in some cases positively unmilitary backgrounds, they might have held the [Marxist Popular Movement for the Liberation of Angola] if they had been properly officered. But not one ex-officer of the British Army was ever in a position of authority over them; all the lieutenants, captains, and majors in the FNLA's white mercenary army from "Colonel" Callan downwards were former troopers and corporals, or at best sergeants and warrant officers.

Id. at 172.

resulted in several of their executions.²¹³ Finally, the Marxist Popular Movement for the Liberation of Angola (MPLA) received Soviet Bloc financial support and military equipment, to include T-54 tanks, 122 millimeter Katyusha rockets, and Soviet MiGs based out of nearby Brazzaville. The MPLA were also directly supported by several thousand black Cuban soldiers who deftly attempted to go unnoticed by wearing the MPLA's uniform.²¹⁴

The personnel associated with foreign intervention in Angola consisted of foreign technical advisors, foreign soldiers, and mercenaries. In the context of this Cold War battleground, it is difficult to discern which, if any, element of foreign intervention dominated the moral high ground and could thus claim justness or legitimacy at the outset of the Angolan civil war.²¹⁵ Based on numbers alone, however, the several thousand Cuban soldiers operating their sophisticated weapons systems arguably exerted the greatest influence over Angola's war of self-determination.²¹⁶ Next in influence would likely be the foreign technical advisors, highly skilled and acting with the financial backing of their sending states, both Soviet and South African. Least influential in Angola were the few hundred mercenaries who fought beside and attempted to lead into combat the indigenous fighters.²¹⁷ Regardless, Article 47 of Protocol I criminalizes mercenary activities while extending protections to indigenous guerillas

212. See Boumedra, *supra* note 119, at 70-73 (commenting on the mercenaries' trial before the People's Revolutionary Court of Angola).

213. See discussion *infra* note 284 and accompanying text.

214. MOCKLER, *supra* note 11, at 167-68. Notably, the "indigenous" MPLA, in a Cuban-led operation, overran the tiny, independent, oil-rich nation of Cabinda in November 1975. *Id.*

215. This presumes the underlying legitimacy of the three competing indigenous movements, of course, under the assumption that they were equally footed under international law to compete for dominance within Angola.

216. Indeed, the MPLA ultimately prevailed, only to later hire mercenaries themselves when it suited their needs. See O'Brien, *supra* note 17, at 51 ("In many senses, Angola has been the testing ground for the development and evolution of PMCs in Africa.").

217. Musah and Fuyemi referred to the "humiliation of American and British-inspired mercenaries in Angola," which should have led to the "demise of freelance soldiers in internal conflicts." Musah & Fayemi, *supra* note 171, at 22.

and preserving the rights of foreign military forces fighting on their behalf.²¹⁸ Or does it?

There can be no doubt that Article 47 condemns mercenary activities and deprives mercenaries of the protections afforded lawful combatants and prisoners of war. But does it make criminal the act of being a mercenary? The Indonesian representative summed up the Working Group's intent when she said: "The aim of the article was to *discourage* mercenary activity and prevent irresponsible elements from getting the rights due to a combatant or prisoner of war."²¹⁹ Boumedru interprets this statement and others made after the Working Group approved Article 47 as signifying that "at no stage of the [Diplomatic Conference] was the principle of criminalizing the *status* of mercenaries put into question."²²⁰ Undoubtedly, Article 47 deprives mercenaries of lawful combatant or prisoner of war status, thereby opening them to domestic prosecution provided that domestic legislation criminalizes their mercenary status or individual acts. "The mere fact of being a mercenary is not, however, made a criminal act [by Article 47]."²²¹ The Soviet Union's closing statement reinforces this conclusion: "We hope that this article . . . will provide an incentive to Governments to adopt domestic legislation prohibiting the criminal as well as anti-humanitarian institution of the use of mercenaries."²²²

Article 47 discourages individual mercenary activity by removing the protections afforded lawful combatants and prisoners of war, but it does not enumerate a specific crime of mercenarism. Article 47 also fails to make criminal mercenary recruiting, training, or financing, whether done by states or individuals. In addition, as U.S. Ambassador Aldrich surmised, the Diplomatic Conference struck a compromise that necessarily

218. See *supra* text accompanying note 190.

219. 6 OFFICIAL RECORDS, *supra* note 170, para. 94, at 159 (CDDH/SR.41, May 26, 1977) (statement of Mrs. Sudirdjo, Indonesia) (emphasis added).

220. Boumedra, *supra* note 119, at 58 & n.66 (citing 6 OFFICIAL RECORDS, *supra* note 170, at 156 (CDDH/SR.41, May 26, 1977)) (emphasis added).

221. Burmester, *supra* note 110, at 55. *But see* Musah & Fayemi, *supra* note 171, at 21. Remarkably, educated observers persist in asserting that Article 47 "outlawed" mercenarism and use of mercenaries. "African states also spearheaded the international campaign leading to the adoption of several resolutions condemning the use of mercenaries and to Article 47 of the Geneva Convention[, Protocol I], which *outlaws the use of mercenaries.*" *Id.* (emphasis added).

222. 6 OFFICIAL RECORDS, *supra* note 170, at 204 (CDDH/SR.41, May 26, 1977) (statement of the Union of Soviet Socialist Republics).

limited the definition of a mercenary and therefore the scope of Article 47's coverage. He said:

Certainly, there have been persons in recent conflicts, particularly in Africa, who might qualify as mercenaries under [the Article 47] text, but it would not seem difficult in the future for any party to a conflict to avoid its impact, most easily by making the persons involved members of its armed forces. While the negotiators of this provision were definitely aware of the possibilities for evasion, they were more concerned about the risks of abuse—the denial of [prisoner of war] status through charges that prisoners were mercenaries.²²³

As a final limitation, paragraph 2 of Article 47 imposes criteria as to a mercenary's motivation²²⁴ and relative compensation,²²⁵ elements which will be extremely difficult to prove, thus limiting a state's legal basis to deprive mercenaries of lawful combatant and prisoner of war status.²²⁶ This determination will by necessity include comparison to the motivations of individuals who join states' armies,²²⁷ many of whom join because of relatively attractive compensation and benefit packages.²²⁸ In recently considering Article 47's mercenary definition in its entirety, the United Kingdom's Foreign and Commonwealth Office concluded, "A number of governments including the British Government regard this definition as unworkable for practical purposes."²²⁹

Unfortunately, Article 47's shortcomings were later compounded when the General Assembly incorporated Protocol I's flawed mercenary definition into the UN Mercenary Convention.²³⁰ Before turning to the UN Mercenary Convention, the international community's most ambitious attempt at mercenary regulation, it is illustrative to consider its origins in the OAU Convention for the Elimination of Mercenarism in Africa.²³¹ Although instruments issued by regional organizations lack weight of authority in international law, excepting their value as evidence of state practices,²³² a comparative study reveals that the OAU single-handedly shaped the debate leading to the UN Mercenary Convention.

223. Aldrich, *supra* note 172, at 777.

224. Protocol I, *supra* note 21, art. 47(2)(c), cl. 1.

225. *Id.* art. 47(2)(c), cl. 2.

5. OAU Convention for the Elimination of Mercenarism in Africa

Newly independent and optimistic African states formed the OAU in 1963, at the time the world's largest regional organization.²³³ The OAU

226. REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES para. 7 (1976) (the "Diplock Report") ("Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it."), cited in Burmester, *supra* note 110, at 38 & n.1.

The distinction between *jus ad bellum* and *jus in bello* poses an additional concern, one which Article 47's drafters may have overlooked. Françoise Hampson believed that the *jus ad bellum* of foreign intervention represents the fundamental international legal issue when discussing mercenaries, as opposed to the *jus in bello* of mercenary conduct and corresponding status during a conflict. Hampson, *supra* note 14, at 14-15 ("If the issue is one of real or perceived intervention, this comes within the *jus ad bellum* and not the *jus in bello*.") Status is irrelevant, said Hampson, and so are the mercenaries' motivation and remuneration, two elements which Article 47 emphasizes. *Id.* at 37. Instead, it is the unlawfulness of resorting to force or participating in a conflict, whether by mercenaries or others, which offends concepts of neutrality and what Hampson called "intervention law." *Id.* at 28. Therefore, Hampson proposed an international convention that adequately controls foreign intervention, to include mercenary adventures, by defining states' regulation responsibilities under customary international law. *Id.* at 33-37. Nevertheless, the Article 47 Working Group limited its analysis to status, leading Hampson to comment wryly, "Since there is no place in a treaty regulating the *jus in bello* for a provision which properly concerns the *jus ad bellum*, one may welcome the fact that the offending Article [47] is unworkable." *Id.* at 30. See *supra* note 135. But see Boumedra, *supra* note 119, at 58 (arguing that the Diplomatic Conference considering Protocol I, Article 47, properly dealt with the *jus in bello* aspect of mercenarism, in light of a series of UN General Assembly and Security Council resolutions demonstrating that the United Nations "sees questions related to the [*jus in bello*] as a matter of international legislation").

227. Hampson, *supra* note 14, at 6 n.14.

228. MOCKLER, *supra* note 11, at 16 ("The professional too—the regular army officer or NCO in any army in the world—fights for money and, as a comparison between recruiting figures and wage increases show, often mainly for money . . .").

229. UK GREEN PAPER, *supra* note 18, para. 6. The *Green Paper* added that mercenary "[c]ontracts can also be drafted so that those employed under them fall outside the definitions in [Article 47 of] the convention." *Id.*

230. UN Mercenary Convention, *supra* note 22.

231. OAU Mercenary Convention, *supra* note 195.

232. See RESTATEMENT THIRD, *supra* note 131, § 103, cmt. c. "International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable." *Id.*

233. See P. Mwetl Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 538 (1999).

members sought a collective voice “to discourage armed neocolonialism or subversion among themselves.”²³⁴ The OAU Charter,²³⁵ much like the UN Charter that inspired its authors, elevates state sovereignty “by calling for the inviolability of national borders and denouncing any uninvited interference in a member state’s internal affairs.”²³⁶

The contemporaneous crises in the Congo underscored sovereignty’s value to the OAU members. By the mid-1960s, Belgium, the Belgian mining firm of Union Minière, Rhodesia, the Soviet Union, the United States, and a sizeable UN military force had all to some degree intervened in the Congo’s internal affairs.²³⁷ Meanwhile Belgian, British, French, German, and South African mercenaries were actively fighting on behalf of one side or the other during the Congo’s seemingly endless Katangese secessionist movement.²³⁸

From this background, it did not take long before the OAU looked for solutions to confront mercenaries’ destabilizing effect in Africa. Their first step was the 1967 OAU Resolution on the Activities of Mercenaries,²³⁹ signed in the newly dubbed Kinshasha.²⁴⁰ The resolution states that the OAU was determined to safeguard member state sovereignty in the face of a mercenary menace that constituted a “serious threat to the security” of OAU member states.²⁴¹ Therefore, the resolution strongly condemns mercenary aggression in the Congo, and it specifically demands the departure of mercenaries then operating in the eastern Congo’s Bukavu region.²⁴²

The 1967 OAU resolution next implores OAU member states to assist the Congo in putting “an end to the criminal acts perpetrated by these mer-

234. HOWE, *supra* note 2, at 47. See also Munya, *supra* note 233, at 540-43 (describing the OAU’s pan-African origins).

235. Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39.

236. HOWE, *supra* note 2, at 48.

237. See MOCKLER, *supra* note 11, at 37-116; THOMAS, *supra* note 171, at 9-18, 67-117.

238. The movement eventually ended in November 1967 after the unsuccessful “Mercenaries’ Revolt.” See MOCKLER, *supra* note 11, at 93-110.

239. OAU Mercenary Resolution, *supra* note 20, at 281-82.

240. General Mobutu had renamed what was the city of Leopoldville earlier in 1967. MOCKLER, *supra* note 11, at 38.

241. OAU Mercenary Resolution, *supra* note 20, at 281. The resolution also illustrates continuing post-colonial tensions, expressing the OAU’s awareness that “the presence of mercenaries would inevitably arouse strong and destructive feelings and put in jeopardy the lives of foreigners in the continent.” *Id.*

cenaries,” and “calls upon the UN to deplore and take immediate action to eradicate such illegal and immoral practices.”²⁴³ Finally, the resolution makes an appeal that extends beyond condemning mercenaries, going to what was the heart of the mercenary issue for the OAU: “[A]ll States of the world [are urged] to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and deterring their citizens from enlisting as mercenaries.”²⁴⁴ As previously discussed,²⁴⁵ in 1968 the UN General Assembly made a very similar appeal when it issued Resolution 2465, the Declaration on the Granting of Independence to Colonial Countries and Peoples.²⁴⁶ Examining the language of both resolutions, the General Assembly undoubtedly was responding to the OAU’s plea.

The OAU next met in Addis Ababa, Ethiopia, and in 1971 produced its Declaration on the Activities of Mercenaries in Africa.²⁴⁷ The declaration articulates an underlying theme that would resonate in subsequent UN General Assembly pronouncements. In short, continuing foreign domination in some African states enabled mercenaries to operate and, therefore, African states still under such domination had to be liberated, “as this is an essential factor in the final eradication of mercenaries from the African continent.”²⁴⁸ The declaration further implores states not to tolerate the “recruitment, training and equipping of mercenaries on their territory,”²⁴⁹

242. At the time, the “Mercenaries’ Revolt” was under way in the Congo. The term “revolt” was used because General Mobutu either employed or expected loyalty from many of the mercenaries and the military forces they led. Although this was a continuation of the Katangese secessionist movement that began in 1960, one must carefully study events to appreciate fully the competing powers, shifting loyalties, and underlying intrigue practiced by all sides. See MOCKLER, *supra* note 11, at 93-110. Government forces prevailed by November 1967, and although the last 150 or so mercenaries were allowed safe passage out of the Congo in 1968, General Mobutu was believed to have earlier ordered the executions of over thirty mercenaries in Leopoldville. The executed men, some employed by Mobutu, held mainly administrative and logistical positions. *Id.* at 100, 112-13. Some speculate that Mobutu may have also ordered the massacre of 3000 disarmed Katangese after their 1966 revolt, but others hold responsible mercenary Bob Denard and his men of Five Commando. *Id.* at 83.

243. OAU Mercenary Resolution, *supra* note 20, at 282.

244. *Id.*

245. See *supra* notes 136-39 and accompanying text.

246. G.A. Res. 2465, *supra* note 19.

247. Organization of African Unity, Declaration on the Activities of Mercenaries in Africa, June 23, 1971, reprinted in MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, app. IV, at 283-85.

248. *Id.* at 285.

249. *Id.* at 284.

and it calls on heads of state to “mobilize world opinion so as to ensure the adoption of appropriate measures for the eradication of mercenaries from Africa, once and for all.”²⁵⁰ Finally, the declaration laid the groundwork for a draft OAU convention on mercenaries.²⁵¹

In 1972, the OAU produced the Draft Convention for the Elimination of Mercenaries in Africa (OAU Draft Convention).²⁵² This pioneering effort defined mercenaries before the UN attempted to do so in Article 47 of Protocol I;²⁵³ it criminalizes mercenary recruitment and mercenarism, “a crime against the peace and security of Africa”;²⁵⁴ and it briefly details OAU member states’ duties regarding mercenaries.²⁵⁵ The OAU Draft Convention also “correctly identifies what needs to be proscribed”; it defines mercenarism without reference to motivation; it identifies both state and individual responsibilities; and, unlike Article 47 of Protocol I, it does not deal with mercenary status under the laws of war.²⁵⁶ The OAU premised the instrument on concern for “the grave threat which the activities of mercenaries represent to the independence, sovereignty, territorial integrity and harmonious development of Member States of OAU.”²⁵⁷

In 1973, the UN General Assembly again responded to the OAU’s concerns, this time with Resolution 3103, the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes.²⁵⁸ Resolution 3103 echoes the 1971 OAU declaration and the considerations underlying the 1972 OAU

250. *Id.*

251. Musah & Fayemi, *supra* note 171, at 21.

252. OAU Doc. CM/433/Rev. L, Annex 1 (1972) [hereinafter OAU Draft Mercenary Convention], *reprinted in* MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, app. V, at 286-88.

253. *Id.* art. 1. The OAU draft definition differed significantly from the Protocol I mercenary definition. *Compare id.* art. 1, with Protocol I, *supra* note 21, art. 47(2). The complexities of defining mercenaries are explored more fully *infra* notes 307-14 and accompanying text.

254. OAU Draft Mercenary Convention, *supra* note 252, art. 2.

255. *Id.* art. 3. The final OAU Mercenary Convention vastly increased these state obligations. *See* Kofi Oteng Kufuor, *The OAU Convention for the Elimination of Mercenarism and Civil Conflicts*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, at 198, 202.

256. Hampson, *supra* note 14, at 26-27. In this way, the OAU Draft Convention “defines mercenaries narrowly according to their purpose.” UK GREEN PAPER, *supra* note 18, para. 8.

257. OAU Draft Mercenary Convention, *supra* note 252, pmb., para. 2.

258. G.A. Res. 3103, *supra* note 16. *See* discussion *supra* notes 151-61 and accompanying text.

Draft Convention, although the resolution invokes stronger language. Resolution 3103 deplores “[t]he use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of Colonialism and alien domination.”²⁵⁹ This rhetoric-laden statement led at least one commentator to dismiss Resolution 3103 as “an evident attempt to prejudge the issues in question [of mercenary regulation] before the [Protocol I] Diplomatic Conference had even started.”²⁶⁰

In late June 1976, the International Commission of Inquiry on Mercenaries (International Commission) issued its Draft Convention on the Prevention and Suppression of Mercenarism, often called the “Luanda Convention.”²⁶¹ Serious scholars have dismissed this work for its presumed bias, describing it as “a political tract masquerading as a legal text.”²⁶² It is important, however, if for no other reason than for its remarkable influence upon subsequent international law provisions concerning mercenary activities, including the OAU Mercenary Convention.

The Marxist revolutionary government of Angola had empanelled the International Commission less than one month before the Luanda Convention’s release. This coincided, on 13 June 1976, with the opening in Luanda of the Angolan government’s case before the five-member Popular Revolutionary Tribunal. The thirteen defendants in the case, including their leader, Costas Giorgiou, have since become known as the world’s most notorious band of post-colonial mercenaries.²⁶³ The facts underlying the “Luanda Trial,” as it came to be known, bear repeating because of their unquestionable significance to the International Commission. The Commission’s fifty or so delegates attended the trial, drafted the Luanda Convention in the nearby National Science Museum while the trial was under

259. G.A. Res. 3103, *supra* note 16, art. 5.

260. Kalshoven, *supra* note 160, at 24 (Resolution 3103 was “rushed through the Sixth Committee without any opportunity for discussion or even serious consideration.”).

261. International Commission of Inquiry on Mercenaries, Draft Convention on the Prevention and Suppression of Mercenarism (1976) [hereinafter Luanda Convention], reprinted in Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT’L L. 589, 615 (1982), available at University of Pretoria, *Human Rights Database*, at <http://www.up.ac.za/chr> (last modified July 22, 2002).

262. Hampson, *supra* note 14, at 28.

263. See MOCKLER, *supra* note 11, at 209-31; see also Musah & Fayemi, *supra* note 171, at 22 (referring to “the notorious ‘Colonel’ Callan”).

way, and completed the Convention before the verdict was announced on 28 June 1976.²⁶⁴

Giorgiou, who called himself “Callan,” was by all accounts an audacious warrior. In numerous daring if tactically questionable ambushes, Callan single-handedly killed scores of Cuban and MPLA soldiers.²⁶⁵ At the same time, he was a mercenary leader without compunction who eventually became a homicidal rogue.²⁶⁶ He held a strange penchant for executing disloyal, unmotivated, or unlucky Angolan irregulars who also fought for Holden Roberto’s FNLA.²⁶⁷

Callan made no serious attempt to integrate the FNLA irregulars into an organized, mercenary-led force for area coordination and control. In fact, he seemed to work actively at alienating the [Angolan] population by firing indiscriminately at civilians and by conducting summary executions which even included a cousin of FNLA President Roberto himself.²⁶⁸

Not surprisingly, Callan’s conduct earned him few friends among indigenous Angolans.

Callan’s subordinate mercenaries also feared him, having witnessed his pistol executions, or “toppings,” on countless occasions.²⁶⁹ One group of newcomers, twenty-five in all, laid a nighttime ambush in which they fired Belgian FN machine guns and a 66 millimeter rocket-launcher into an oncoming, aluminum-bodied Land Rover. Tragically for all concerned,

264. See MOCKLER, *supra* note 11, at 213-14, 225.

265. See *id.* at 171, 199. *But cf.* THOMAS, *supra* note 171, at 89 (1984) (“Callan and his men never succeeded in employing guerilla tactics against the Cubans. . . . Ambush sites were uniformly untenable or improperly manned . . .”). See also *supra* notes 206-17 and accompanying text (describing the warring factions in post-colonial Angola).

266. Callan was a former enlisted man dishonorably discharged from Britain’s First Parachute Regiment. THOMAS, *supra* note 171, at 26. Of mercenary “Colonel” Callan’s military leadership style, Thomas writes, “[Callan was] perhaps the most extreme modern example of misplaced leadership.” *Id.* at 56.

267. See MOCKLER, *supra* note 11, at 171-210.

268. THOMAS, *supra* note 171, at 89 (citing CHRIS DEMPSTER & DAVE TOMKINS, FIRE-POWER 401 (1980)). Thomas’s citation is noteworthy because, according to Mockler, Dempster and Tomkins fought alongside Callan in Angola, and Dempster may have participated in the killings for which Callan was tried and executed. See MOCKLER, *supra* note 11, at 187, 195-96.

269. By Mockler’s count, Callan must have personally executed at least fifteen men, most of whom were FNLA irregulars. See MOCKLER, *supra* note 11, at 182-84.

the vehicle carried four of Callan's most seasoned men who barely escaped with their lives. Soon realizing what they had done, and fearing Callan's legendary temper, the newcomers fled north towards the relative safety of the Congo.²⁷⁰

By the next morning, Callan and the more senior mercenaries learned of the newcomer's ambush and attempted desertion. After swiftly apprehending, disarming, and questioning twenty-four of the deserters, the killing of the junior mercenaries began.²⁷¹ When the man who fired the rocket into the Land Rover cautiously stepped out of formation and admitted his mistake, Callan held up his pistol, said, "This is the only law here," and shot the man three times in the head.²⁷² Ten of the remaining deserters were allowed to return to duty, but Callan ordered the executions of the remaining thirteen. Within the hour, seven of the seasoned mercenaries—three of whom were in the Land Rover ambushed the night before—drove the unfortunate thirteen a short distance outside of town and carried out Callan's execution order.²⁷³ More rough justice was to follow.

Soon thereafter, the FNLA collapsed into disarray in northern Angola, UNITA and its supporters fled from southern Uganda, and the MPLA consolidated its power. While most of the FNLA's mercenaries fled the country, MPLA forces captured Callan and twelve others.²⁷⁴ The thirteen mercenaries then stood in judgment before the Popular Revolutionary Tribunal in the capital city of Luanda. Oddly enough, the only damning evidence against the thirteen accused mercenaries concerned the executions of their thirteen fellow mercenaries, a crime which Callan and only one other of the accused participated in.²⁷⁵

Founded in 1956, the MPLA had attracted its support "by preaching a doctrine of anti-colonial class struggle which appealed to the elite urban *mestizo* and leftist white elements,"²⁷⁶ a theme which the Angolan revolu-

270. *Id.* at 190-92.

271. *Id.* at 192-94. The mercenaries were indeed junior. They had flown out of Britain only a few days earlier, believing that they would be serving as combat support personnel for the FNLA in Angola. At the time of the ambush, they had been in-country for less than twenty-four hours. *Id.* at 185-88.

272. *Id.* at 194.

273. *Id.* at 195-96.

274. *Id.* at 206-11.

275. *Id.* at 194-95, 214-23. Callan also admitted to executing the fourteenth mercenary. "I have killed one English soldier; the reason being I was told that he fired the rocket at my men which were in the Land Rover" *Id.* at 227 (quoting Callan's statement before sentencing).

tionary government continued. The MPLA had gained victory earlier in 1976 only through the overwhelming military support provided by Cuba and the Soviet Union,²⁷⁷ two countries that played instrumental roles in the post-war, communist government of the People's Republic of Angola. As for the decision to try the mercenaries, "It was the Cubans who insisted on a show trial for all thirteen."²⁷⁸

Six days before the trial opened, Angola's Director of Information and Security proclaimed, unremarkably, that "the mercenaries were guilty, that the Angolan government had only to decide how much to punish them, and that British and American imperialism were really on trial, not the [thirteen] mercenaries."²⁷⁹ The very same government empanelled the International Commission whose delegates came mainly from Third World and Eastern Bloc states.²⁸⁰ While observers agreed that the merits phase of the trial was well-managed and procedurally fair,²⁸¹ at sentencing the presiding judge "read through a text that bore no relation whatsoever to the trial or the evidence, a text that might well have been prepared months in advance."²⁸² Callan and three others were sentenced to death, their nationalities all British, save one unfortunate mercenary who the Angolans chose simply because he was an American.²⁸³ The remaining nine mercenaries received sentences ranging from sixteen to thirty years' confinement and,

276. THOMAS, *supra* note 171, at 12.

277. *Id.* at 3-4, 23, 67, 89.

278. MOCKLER, *supra* note 11, at 211.

279. Hampson, *supra* note 14, at 27; *see also* MOCKLER, *supra* note 11, at 213 (It soon became clear to Mockler, who attended the entire trial, that this "was not to be so much a trial of the thirteen accused themselves as of the Western powers who permitted and indeed had encouraged and financed *mercenarismo* throughout the African continent . . .").

280. MOCKLER, *supra* note 11, at 213-14. The Commission also included a handful of Western delegates, most either openly communist or "discreetly radical." *Id.* at 213.

281. *See id.* at 214-28 (describing the able defense provided by Callan's Cuban defense counsel, Maria Teresinha); Hampson, *supra* note 14, at 27 ("The trial itself appears to have been fair, procedurally speaking.").

282. MOCKLER, *supra* note 11, at 229.

283. *Id.* at 229-31. Daniel Gearhart, the American, had never even fired a shot during his one week in Angola before his capture. *Id.* at 230. Mockler relates, "[I]t was unthinkable [to the revolutionary government] that three British mercenaries should be sentenced to death, and not a single American." *Id.* Excepting Gearhart's case, Mockler finds a "certain rough justice" in the other sentences because Callan and one other condemned man participated in the mercenaries' executions, while all three British men had served the longest period out of the mercenaries, although no one was in Angola for more than two months. *Id.* at 170, 181, 229-30.

twelve days after the tribunal adjudged the sentences, an MPLA firing squad carried out the four death sentences.²⁸⁴

The International Commission forged the Luanda Convention in the politically charged environment surrounding the Luanda Trial. The Convention condemns mercenarism as “part of a process of perpetuating by force of arms racist colonial or neo-colonial domination over a people or State.”²⁸⁵ It also identifies the emergence of peremptory norms imposing new obligations under international law, referring specifically to *inter alia* General Assembly Resolutions 2465 and 3103.²⁸⁶ “[T]he resolutions of the UN and the OAU and the statements of attitude and the practice of a growing number of States are indicative of the development of new rules of international law making mercenarism an international crime.”²⁸⁷ As previously discussed, these two questionable resolutions carried limited, if any, weight of authority in international law.²⁸⁸

While the Luanda Trial was criticized for “breaching the principle of *nulla crimen sine lege*,”²⁸⁹ that is, no crime without corresponding law, the International Commission, perhaps in response, proposed the elements for a novel crime: mercenarism, “a term hitherto unknown to the law.”²⁹⁰

The crime of mercenarism is committed by the individual, group or association, representatives of state and the State itself which, with the aim of opposing by armed violence a process of self-determination, practices any of the following acts:

- (a) organizes, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense;
- (b) enlists, enrolls or tries to enroll [sic] in the said forces;

284. *Id.* at 230-31.

285. Luanda Convention, *supra* note 261, pmb., para. 2.

286. *Id.* pmb., para. 3 (citing General Assembly Resolutions 3103, 2548, 2465, and 2395).

287. *Id.* pmb., para. 4.

288. *See supra* notes 160-61 and accompanying text.

289. Hampson, *supra* note 14, at 27; *see also* Mourning, *supra* note 261, at 601-03 (discussing the legal arguments premised on domestic and international law that were made during the Luanda Trial).

290. Hampson, *supra* note 14, at 27.

(c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the abovementioned forces.²⁹¹

The Luanda Convention's authors made no attempt to define a mercenary.²⁹² As if justifying Callan's death sentence, however, Article Two of the Convention adds, "The fact of assuming command over mercenaries or giving orders may be considered as an aggravating circumstance."²⁹³

One year later, on 3 July 1977, the OAU issued its Convention for the Elimination of Mercenarism in Africa (OAU Mercenary Convention).²⁹⁴ Here, the OAU abandoned the measured language used in the OAU Draft Convention and adopted instead the polemic phraseology favored by the Luanda Convention and General Assembly Resolutions 2465 and 3103, referring to "colonial and racist domination"²⁹⁵ that was perpetuated by the "scourge" of mercenarism.²⁹⁶ More than mere happenstance, similar language appeared in the general provisions of Protocol I, which the High Contracting Parties signed on 8 June 1977.²⁹⁷

In several material respects, the OAU Mercenary Convention mirrors Article 47 of Protocol I. It defines mercenaries using nearly identical language:

1. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does in fact take a direct part in the hostilities;

291. Luanda Convention, *supra* note 261, art. 1.

292. *Cf.* Hampson, *supra* note 14, at 27 (arguing that the Convention's silence on this point may simply demonstrate that it intended the crime itself to define the mercenary; that is, anyone committing the crime of mercenarism would therefore be a mercenary).

293. Luanda Convention, *supra* note 261, art. 2.

294. OAU Mercenary Convention, *supra* note 195, pmbl.

295. *Id.* para. 2.

296. *Id.* pmbl., para. 5.

297. *See* Protocol I, *supra* note 21, art. 1(4) (extending the protections of Article 2 common to the Geneva Conventions to wars for national liberation, and specifically to persons "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"). On a related note, Mr. Clark of Nigeria proposed Protocol I's draft Article 47 on 13 May 1976, three months after Callan's capture, and one month before the beginning of the Luanda Trial. *See supra* note 170 and accompanying text.

- (c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
- (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (e) is not a member of the armed forces of a party to the conflict; and
- (f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.²⁹⁸

The OAU Mercenary Convention similarly denies mercenaries the status of lawful combatants and prisoners of war when it states, “Mercenaries shall not enjoy the status of combatants and shall not be entitled to prisoner of war status.”²⁹⁹ In other respects, however, the OAU Mercenary Convention represents the most ambitious international instrument of its kind to attempt mercenary regulation.³⁰⁰ The drafters responded to concerns first raised in the 1967 OAU Resolution on the Activities of Mercenaries,³⁰¹ and they expanded mercenary proscriptions into areas that OAU member state delegates advanced before the Diplomatic Conference considering Protocol I.³⁰² Weakened by relying on Article 47’s flawed mercenary definition, however, the OAU Mercenary Convention suffers further

298. OAU Mercenary Convention, *supra* note 195, art. 1(1). Most importantly, Article 1(1)(c) of the OAU Mercenary Convention only requires that the mercenary is promised “material compensation,” whereas Protocol I, *supra* note 21, art. 47(2)(c), requires “material compensation substantially in excess of that promised combatants of similar ranks and functions” This change reflects the term “material recompense” found in the Luanda Convention. *See* Luanda Convention, *supra* note 261, art. 1(a).

Another minor variation in language between the OAU Mercenary Convention and Article 47 is found in subparagraph “f” of both provisions. *Compare* OAU Mercenary Convention, *supra* note 195, art. 1(1)(f) (“is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state”), *with* Protocol I, *supra* note 21, art. 47(2) (“has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”).

299. OAU Mercenary Convention, *supra* note 195, art. 3. *Cf.* Protocol I, *supra* note 21, art. 47(1) (“A mercenary shall not have the right to be a combatant or prisoner of war.”). Likewise, Article 4 of the Luanda Convention reads: “Mercenaries are not lawful combatants. If captured they are not entitled to prisoner of war status.” Luanda Convention, *supra* note 261, art. 4.

300. The OAU represented a legitimate regional organization, unlike the politicized International Commission. *See supra* note 262 and accompanying text.

301. OAU Mercenary Resolution, *supra* note 20, at 281-82. *See supra* notes 239-46 and accompanying text.

injury by adopting nearly verbatim the suspect International Commission's crime of mercenarism.

Article 1(2) of the OAU Mercenary Convention reads:

The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practi[c]es any of the following acts:

- (a) Shelters, organi[z]es, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
- (b) Enlists, enrolls or tries to enrol [sic] in the said bands; [or]
- (c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.³⁰³

Even casual readers will notice striking similarities to the Luanda Convention's Article 1.³⁰⁴ The only distinctions are in subparagraph (a). First, the OAU Convention adds the term "shelters" in place of the Luanda Convention's "supplies."³⁰⁵ Second, the subparagraph drops the Luanda Convention's phrase "military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense."³⁰⁶ This was necessary to avoid redundancy with the mercenary definition found in the OAU Mercenary Convention's Article 1(1).

Putting aside for the moment the International Commissions's potential influence, the crime of mercenarism deserves closer scrutiny. The crime's description seems exhaustive, and the OAU Mercenary Convention broadens the scope of criminal responsibility by holding the merce-

302. See, e.g., 15 OFFICIAL RECORDS, *supra* note 170, at 193 (CDDH/III/SR.57, Apr. 29, 1977). The delegate from Zaire called for "more stringent regional instruments" that would detail states' obligations, including those that recruit mercenaries. *Id.* He also called generally for stricter "provisions to prohibit the odious 'profession' of paid killers." *Id.*

303. OAU Mercenary Convention, *supra* note 195, art. 1(2).

304. See *supra* note 261 and accompanying text.

305. Compare OAU Mercenary Convention, *supra* note 195, art. 1(2)(a), with Luanda Convention, *supra* note 261, art. 1(a).

306. See Luanda Convention, *supra* note 261, art. 1(a).

nary responsible “both for the crime of mercenarism and all related offenses, without prejudice to any other offense for which he may be prosecuted.”³⁰⁷ The disparity between the mercenary definition and the crime of mercenarism, however, creates an obvious dilemma. One could be termed a mercenary yet fail to satisfy the elements of the crime of mercenarism. Likewise, one could engage in mercenary activities yet fail to satisfy either the mercenary definition or the elements of the crime of mercenarism provided by the OAU Mercenary Definition.

Consider the example of a French adventurer and former Legionnaire, one motivated by profit and equipped with a light assault weapon who offers his services to a rebel faction indigenous to the Ivory Coast. The rebels never attempted to recruit him, however, and they express no interest in procuring his services. To prove his battlefield prowess and potential value to rebel operations—and in hopes of being hired—the Frenchman then engages in combat alongside rebel forces fighting to pressure the central government to hold a referendum election on an issue of local political import. The rebels are not fighting to control territory or to overthrow or destabilize the government, which is no longer in a period of post-colonial self-determination.

Upon capture by government forces, the French adventurer is not a mercenary because he was not promised “material compensation” by the rebels, as required by Article 1(c) of the OAU Mercenary Convention.³⁰⁸ Moreover, he cannot be prosecuted for mercenarism because: (1) he tried to enlist with the rebels, but as residents of the territory, the rebels cannot be considered a “mercenary band”; and (2) neither he nor the rebels had “the aim of opposing by armed violence a process of self-determination, stability or . . . territorial integrity.”³⁰⁹

Changing the facts slightly reveals the OAU Mercenary Convention’s greatest shortcoming, one which illustrates the legacy of the myopic focus upon regulating mercenary activities in post-colonial Africa. Instead of offering to fight alongside a rebel group that never sought his services, consider the situation where an official of the Ivory Coast’s Ministry of Defense recruits and then enters into a lengthy contract with the Frenchman and with several other foreigners.³¹⁰ In exchange for his combatant

307. OAU Mercenary Convention, *supra* note 195, art. 4. *Cf.* Luanda Convention, *supra* note 261, art. 5 (“A mercenary bears responsibility both for being a mercenary and for any other crime committed by him as such.”).

308. This is identical to Protocol I, *supra* note 21, art. 47(2)(c).

309. OAU Mercenary Convention, *supra* note 195, art. 2.

services, the adventurer is motivated by and will be paid a significant sum in a stable currency. He is not a resident of the Ivory Coast, he is not a member of the Ivory Coast's military, and he was not sent by any other state on an official mission as a member of that state's armed forces. In short, he is a mercenary as defined by Article 47 of Protocol I³¹¹ and the OAU Mercenary Convention.³¹² And yet, he cannot be prosecuted for mercenarism.

The French mercenary escapes prosecution because he is not using armed violence against another OAU state, as required by the OAU crime of mercenarism's first element. Rather, he is contractually bound to fight *for* an OAU state.³¹³ Even though he serves for profit as a private soldier in a mercenary band, he commits no violation provided he does not direct his "armed violence" against "a process of self-determination, stability or the territorial integrity of another State."³¹⁴ Therefore, the government-hired mercenary goes unpunished by the OAU Mercenary Convention's terms.

This example demonstrates that provisions narrowly tailored to address mercenary activities in a post-colonial environment—provisions focusing on the sensational facts surrounding a single trial involving but a few post-colonial and criminal adventurers—must invariably fail once the post-colonial period ends. Moreover, by the early 1980s, Africa's "liberation struggle was over and most states had consolidated their independence."³¹⁵ Having drafted legal instruments that focused on politicizing and demonizing a small segment of mercenary activities, the OAU—like the drafters of Article 47 and the Luanda Convention before them—failed to recognize and regulate mercenaries' historical and, yes, pragmatic uses.

In this way, the OAU Mercenary Convention and Article 47 stand irrelevant and ill-equipped to deal with today's predominant mercenary issue, the government-hired PMC. Moreover, the international commu-

310. See MOCKLER, *supra* note 11, app. (reprinting a typical and remarkably detailed contract between the Democratic Republic of the Congo and a mercenary).

311. See *supra* text accompanying note 190.

312. See *supra* text accompanying note 298.

313. The OAU Mercenary Convention "hopes to ban only those soldiers who fight 'against any African state member of the Organization of African Unity.' Private soldiers fighting for a government receive implicit approval." HOWE, *supra* note 2, at 228 (quoting OAU Mercenary Convention, *supra* note 195, art. 6(c)).

314. OAU Mercenary Convention, *supra* note 195, art. 1(2).

315. Kufuor, *supra* note 255, at 200.

nity's latest attempt at mercenary regulation, the UN Mercenary Convention,³¹⁶ once again falls short of effective mercenary regulation because it essentially offers an amalgamation of legal concepts found in the OAU Mercenary Convention and Article 47.

6. *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*

In 1980, the UN confronted the mercenary dilemma head on in response to member states' dissatisfaction with Protocol I's limited curtailment of mercenary activities³¹⁷ and the similarly limited regional and domestic mercenary regulations.³¹⁸ The General Assembly thus created the Ad Hoc Committee charged with drafting an international mercenary convention,³¹⁹ and nine years of diplomatic, legal, and political wrangling ensued.³²⁰ The Ad Hoc Committee struggled to create a comprehensive instrument that would define mercenaries, enumerate specific mercenary crimes, and establish states' responsibilities regarding, among others, mercenary activities, implementing legislation, and extradition procedures.³²¹

316. UN Mercenary Convention, *supra* note 22.

317. See *Draft Resolution on Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 35th Sess., U.N. Doc. A/C.6/35/L.14 (1980).

318. See *List of Relevant Legislation of Member States and Conventions and Protocols Additional Thereto of International and Regional Organizations on Mercenaries*, U.N. GAOR, 36th Sess., U.N. Doc. A/AC.207/L.2 (1981).

319. GA Res. 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/RES/35/48 (1980).

320. The Ad Hoc Committee had to reconcile "the views of those who would have produced a political document, offensive to those States whose nationals most commonly take part in extra-territorial fighting and resulting in an unratified convention, and of those who were prepared to accept a convention consonant with legal principle." Hampson, *supra* note 14, at 30.

321. See, e.g., *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 36th Sess., Supp. No. 43, U.N. Doc. A/36/43 (1981); *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 36th Sess., U.N. Doc. A/36/727 (1981); *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 37th Sess., U.N. Doc. A/C.6/37/L.9 (1982); *Amendment to the Draft Resolution Contained in Document A/C.6/37/L.9*, United States of America, U.N. GAOR, 37th Sess., U.N. Doc. A/C.6/37/L.15 (1982). Hampson observes, "The Reports of the negotiating sessions show the degree to which the attitude of the participants evolved." Hampson, *supra* note 14, at 30.

It was an ambitious undertaking. Finally in 1989, the General Assembly adopted and opened for signature the UN Mercenary Convention.³²²

The UN Mercenary Convention³²³ provides an elaborate hybrid of a mercenary definition, albeit one borrowed from predecessors of questionable legal lineage. It relies on the six cumulative requirements of Protocol I, Article 47,³²⁴ for its primary mercenary definition.³²⁵ It then creates a secondary, complementary definition taken in part from the crime of mercenarism found in the OAU Mercenary Convention and its ideological predecessor, the Luanda Convention. Because Article 47 and its shortcomings were previously detailed,³²⁶ this discussion focuses on the UN Mercenary Convention's secondary mercenary definition. The primary mercenary definition, however, extends Article 47's mercenary definition, which previously applied only to international armed conflicts governed by Protocol I, to all conflicts, no matter how characterized.³²⁷

The secondary mercenary definition found in Article 1(2) of the UN Mercenary Convention states:

A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;

322. UN Mercenary Convention, *supra* note 22.

323. Appendix B provides the full text of the UN Mercenary Convention, *id.*, articles 1-7.

324. *See supra* text accompanying note 190.

325. The UN Mercenary Convention, however, removes one of the requirements of Protocol I, *supra* note 21, art. 47(2)(b) ("does, in fact, take a direct part in hostilities"), from the mercenary definition, and makes it instead an element of one of the three enumerated mercenary offenses in Articles 2 through 4. UN Mercenary Convention, *supra* note 22, art. 3 ("A mercenary . . . who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offense for purposes of this Convention."). This "need for participation in the acts of violence prevents the crime from being a status offense." Hampson, *supra* note 14, at 31.

326. *See supra* Part III.A.4.

327. *See* UN Mercenary Convention, *supra* note 22, art. 16(b) ("The present Convention shall be applied without prejudice to . . . [t]he law of armed conflict and international humanitarian law . . .").

- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.³²⁸

Article 1(2)(a) parallels Article 1(2) of the OAU Mercenary Convention, which prohibits individuals from engaging in “armed violence” directed towards “the stability or the territorial integrity of another state.”³²⁹ While the OAU Mercenary Convention also prohibits individuals from engaging in armed violence against a “process of self-determination,”³³⁰ the UN Mercenary Convention only specifically prohibits states from opposing self-determination movements through recruiting, using, financing, or training mercenaries.³³¹

Drawing pay that is “higher and above those of native counterparts” is one of the recurrent themes used to define mercenaries.³³² The UN Mercenary Convention establishes a lower threshold for the mercenary’s required compensation. Article 1(2)(b) of the UN Mercenary Convention rejects Article 47’s requirement that mercenaries be motivated by a promise of “material compensation substantially in excess of that promised or paid to combatants of similar rank or function.”³³³ Instead, it favors the OAU Mercenary Convention’s slightly lowered requirement of “motivated to take part in hostilities essentially by the desire for private gain and is . . . promised . . . material compensation.”³³⁴ Nevertheless, the UN Mercenary Convention repeats the same subjective test—complete with corre-

328. *Id.* art. 1(2).

329. *Cf.* OAU Mercenary Convention, *supra* note 195, art. 1(2), para. 1. *See supra* text accompanying note 298.

330. OAU Mercenary Convention, *supra* note 195, art. 1(2), para. 1.

331. *See* UN Mercenary Convention, *supra* note 22, art. 5(2).

332. Musah & Fayemi, *supra* note 171, at 16. Musah and Fayemi offered an interesting mercenary definition that relied on the compensation element: “Mercenarism—the practice of professional soldiers freelancing their labour and skills to a party in foreign conflicts for fees higher and above those of native counterparts—is as old as conflict itself.” *Id.*

333. Protocol I, *supra* note 21, art. 47(c).

334. OAU Mercenary Convention, *supra* note 195, art. 1(1)(c).

sponding problems of proof—found in both Article 47 and the OAU Mercenary Convention: the mercenary’s motivation.³³⁵

Conventional wisdom has it that mercenaries do not kill for the polis or for political principle or for any other noble cause.³³⁶ They kill for, and are thus motivated by, money. For this reason, legislators confronting mercenaries cannot help but repeatedly point out this inherent evil.³³⁷ Yet this will create insurmountable evidentiary problems for the unfortunate prosecutor tasked with proving illicit motivation—if indeed the world ever wit-

335. On 24 June 2002, the Second Meeting of Experts debating the mercenary issue proposed an amendment to the UN Mercenary Convention that would eliminate the motivation subparagraphs of both the primary and secondary mercenary definitions. Motivation would be reduced to a matter in aggravation for consideration at sentencing. *Report of the Second Meeting of Experts, supra* note 99, Annex, at 12-13.

336. *Compare, e.g.*, 15 OFFICIAL RECORDS, *supra* note 170, at 193 (CDDH/III/SR.57, Apr. 29, 1977) (statement of Mr. K’Habouji, Zaire) (referring to the “odious ‘profession’ of paid killer[s]”), *and id.* at 196 (statement of Mr. Alkaff, Yemen) (“Mercenaries [have] always been attracted by the hope of gain . . .”), *with Mourning, supra* note 261, at 589 n.1 (The mercenary “is motivated by monetary gain rather than national sentiment or political conviction.”), *and* NORTON POETRY 15 n.3 (J. Paul Hunter ed., 1973) (quoting the Roman poet Horace) (“*Dulce et decorum est pro patria mori* (‘It is sweet and proper to die for one’s country.’)”). *See also* FREDERICK FORSYTH, DOGS OF WAR 86 (1975) (“So for the last six years he had lived as a mercenary, often an outlaw, at best regarded as a soldier for hire, at worst a paid killer.”).

337. Samuel Johnson did not limit money’s corrupting influence to private soldiers:

But scarce observ’d the knowing and the bold
Fall in the gen’ral massacre of gold;
Wide-wasting pest! that rages unconfin’d,
And crowds with crimes the records of mankind;
For gold his sword the hireling ruffian draws,
For gold the hireling judge distorts the laws;
Wealth heap’d on wealth, nor truth safety buys,
The dangers gather as the treasures rise.

SAMUEL JOHNSON, THE VANITY OF HUMAN WISHES (THE TENTH SATIRE OF JUVENAL IMITATED) 21-28 (1749), *reprinted in* SAMUAL JOHNSON: SELECTED WRITINGS (Patrick Cruttwell ed., 1968).

nesses charges brought for a violation of the UN Mercenary Convention or corresponding state implementing legislation.³³⁸

The motivation requirement may also produce unforeseen results. Consider a volunteer whose ideological goals conflict with an indigenous forces' struggle for self-determination. According to the *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions*, the motivation requirement of Protocol I, Article 47, was "intended to exclude volunteers[] who fight alongside an armed force for ideological . . . rather than financial motivation."³³⁹ If the volunteer fights alongside the armed forces to further ideals that are blatantly racist or otherwise favoring alien domination, he cannot be labeled a mercenary unless compensation motivates him. In this way, the motivation requirement would clearly conflict with the Convention's purpose of safeguarding "the legitimate exercise of the inalienable right of peoples to self-determination."³⁴⁰

Beyond the question of motivation, the UN Mercenary Convention's secondary mercenary definition expands the term's scope beyond Article 47 in one significant respect: instances where an individual fights on behalf of an armed force that intends to overthrow a state's government or undermine the state's territorial integrity. The UN Mercenary Convention's primary mercenary definition would not include this individual if he was incorporated as "a member of the armed forces of a party to the conflict,"³⁴¹ whether state forces or irregular forces. Under the secondary definition, however, the same person incorporated into irregular forces would be labeled a mercenary.³⁴² The drafters likely added this distinction to protect the fragile sovereignty of young African states facing constant chal-

338. Based on the author's research, an alleged mercenary has never been charged for a violation of the criminal provisions of the UN Mercenary Convention, *supra* note 22, arts. 2-4. Problems of proof provide the most likely explanation, but it could also be due to the Convention's relative youth, having entered into force in only October 2001.

339. Dino Kritsiotis, *The Privatization of International Affairs*, 22 FLETCHER F. WORLD AFF. 11, 18 n.32 (1998) (citing MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS 270 (1982)).

340. *See* UN Mercenary Convention, *supra* note 22, art. 5(2). Conversely, this would also protect those persons fighting as volunteers with pure motives. *See, e.g.*, MOCKLER, *supra* note 11, at 133-39 (describing Swedish idealist Count Carl Gustav Von Rosen who, pursuing the principle that Biafran civilians should be spared indiscriminate aerial bombings from Nigerian government forces, acted without compensation as a near one-man air force for secessionist Biafra).

341. *Compare* UN Mercenary Convention, *supra* note 22, art. 1(1)(d), with Protocol I, *supra* note 21, art. 47(2)(e).

lenges by insurgent irregular forces. The nod of favoritism demonstrates the growing legitimacy of the newly formed states, but comes at the expense of groups of irregular forces still vying for power within those states.³⁴³ Nevertheless, this international recognition of sovereign authority suggests that the post-colonial period was coming to a close, and that the groups of irregulars lacked legitimacy because they were not engaged in struggles of self-determination.

In addition to defining mercenaries, the UN Mercenary Convention imposes criminal liability on four categories of individuals: (1) anyone “who recruits, uses, finances or trains mercenaries”;³⁴⁴ (2) a mercenary “who participates directly in hostilities or in a concerted act of violence”;³⁴⁵ (3) anyone who attempts to commit the offenses in (1) or (2);³⁴⁶ and (4) anyone who is an accomplice of one who commits any of the offenses in (1) through (3).³⁴⁷ The first category responds to the original 1967 OAU declaration, which said: “[A]ll States of the world [are urged] to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and deterring their citizens from enlisting as mercenaries.”³⁴⁸ As previously discussed, the OAU saw this as the heart of the mercenary issue—controlling the states that sent the mercenaries to intervene in post-colonial African affairs.³⁴⁹

Open to debate, however, is whether or not a state agent may be held criminally liable under this first category—*anyone* recruiting, using, financing, or training mercenaries. Assuming the Ad Hoc Committee looked to the OAU Mercenary Convention for its secondary mercenary

342. See UN Mercenary Convention, *supra* note 22, art. 1(2)(e). A mercenary “is not a member of the armed forces of the State on whose territory the act is undertaken,” *id.* (emphasis added), but persons incorporated as members of the armed forces of a non-state party would still be considered mercenaries.

343. Cf. Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 125 (1998) (“The major concern for African countries at this point [upon adoption of the OAU Mercenary Convention in 1977] was that mercenaries not be used against OAU-recognized liberation movements.”).

344. UN Mercenary Convention, *supra* note 22, art. 2.

345. *Id.* art. 3(1).

346. *Id.* art. 4(a).

347. *Id.* art. 4(b).

348. OAU Mercenary Resolution, *supra* note 20, at 281.

349. As Hampson put it, “The Convention establishes that both the ‘whores of war’ and their clients commit an offence.” Hampson, *supra* note 14, at 32. One may wonder who takes more offense at the oft-used cliché, the prostitutes or the mercenaries?

definition, they probably intended to include states' agents. After all, the OAU Mercenary Convention makes its crime of mercenarism applicable to the "individual, group or association, representative of a State or the State itself."³⁵⁰

Having defined mercenaries and listed the mercenary crimes applicable to individuals, the UN Mercenary Convention next articulates states' responsibilities regarding mercenary activities. Article 5(1) provides that states "shall not recruit, use, finance or train mercenaries" for any purpose,³⁵¹ and specifically, according to the very next subparagraph, states shall not do so "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination."³⁵² Therefore, states now have an affirmative obligation to "prohibit" such activities, in general,³⁵³ and actually "prevent" them if they are intended to oppose a self-determination movement.³⁵⁴

It is unclear whether or not the duty to prevent imposes a greater obligation than simply prohibiting such activities through enacting³⁵⁵ and enforcing domestic enabling legislation, as already required by the Convention.³⁵⁶ Nevertheless, it seems to suggest that the drafters deemed mercenary activities as especially "nefarious"³⁵⁷ when directed against self-determination movements, which may justify heightened penalties in those cases.³⁵⁸ Despite these debatable subtleties, though, the UN Mercenary

350. OAU Mercenary Convention, *supra* note 195, art. 2. *See also* Luanda Convention, *supra* note 261, art. 1(a) ("The crime of mercenarism is committed by the individual, group or association, representatives of state and the State itself . . .").

351. UN Mercenary Convention, *supra* note 22, art. 5(1).

352. *Id.* art. 5(2).

353. *Id.* art. 5(1).

354. *Id.* art. 5(2).

355. *Id.* arts. 5(3), 9.

356. *Id.* art. 12 (In cases in which a person is suspected of committing one of the Convention's enumerated offenses, the state shall "submit the case to its competent authorities for the purpose of prosecution."). Even if a state does not prosecute the case, it may be required to extradite the suspect because it must make the Convention's offenses "extraditable offences in any extradition treaty existing between States Parties." *Id.* art. 15. In this way, "The Convention adopts the familiar legal principle of *aut dedere aut judicare*, that is, that a state must prosecute or extradite alleged offenders." Kritsiotis, *supra* note 339, at 21 n.49. In the event of disputes between states parties concerning states' responsibilities arising under the Convention, the states concerned must pursue the matter progressively by attempting negotiation and then arbitration before having recourse to litigation before the International Court of Justice. UN Mercenary Convention, *supra* note 22, art. 17.

357. UN Mercenary Convention, *supra* note 22, Annex, para. 6.

Convention makes an unmistakable distinction when it says, for the first time, that all states shall refrain from using mercenaries.³⁵⁹

The OAU Mercenary Convention imposes many of the same responsibilities on OAU states,³⁶⁰ but it stops short of restricting states' use of mercenaries. From the beginning, the OAU sought to prevent the former colonial powers from sending, or acquiescing in the sending of, mercenaries who then unlawfully intervened in African states' internal affairs. The OAU defined the mercenary issue in those terms since 1967.³⁶¹ And yet the OAU did not want to prevent an African state—or at least the ones that the OAU viewed as legitimate states—from hiring mercenaries when it suited the African state's national interests, such as for a necessary bolstering of its armed forces.³⁶² Without exception, however, the UN Mercenary Convention permits neither individual nor state use of mercenaries.³⁶³ This divergence of approaches to mercenary regulation has created an unlikely paradox: the OAU states that originally pressured the UN to take action to end state use of mercenaries no longer support the UN Mercenary Convention that resulted from their efforts.³⁶⁴ But then again, neither do most other states.

The UN Mercenary Convention required twenty-two states parties before it would enter into force,³⁶⁵ but by 1998, only twelve nations had acquiesced.³⁶⁶ Many commentators questioned whether the Convention would ever enter into force.³⁶⁷ On 20 September 2001, however, Costa

358. *Id.* art. 5(3). States “shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of the offenses.” *Id.*

359. *Id.* art. 5(1)-(2).

360. *See* OAU Mercenary Convention, *supra* note 195, art. 6.

361. OAU Mercenary Resolution, *supra* note 20, para. 5.

362. *See* HOWE, *supra* note 2, at 228.

363. UN Mercenary Convention, *supra* note 22, arts. 2, 5. The United Nations Special Rapporteur for Mercenaries disagreed with this implicit approval of mercenaries fighting for OAU governments, stating: “the mere fact that it is [a] government that recruits mercenaries or contracts companies that recruit mercenaries for its own defences or to provide reinforcements in armed conflict does not make such actions any less illegal or illegitimate.” HOWE, *supra* note 2, at 228 (quoting Report by the UN Special Rapporteur on the Use of Mercenaries, para. 36 (1998)).

364. *See infra* notes 371-77 and accompanying text.

365. UN Mercenary Convention, *supra* note 22, art. 19 (“The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.”).

366. HOWE, *supra* note 2, at 228.

367. *See, e.g.*, Kritsiotis, *supra* note 339, at 21.

Rica became the twenty-second state party, and the Convention entered into force the following month.³⁶⁸ Although Enrique Bernales Ballesteros, the Special Rapporteur on mercenary issues, said in October 2001 that “nine other States were about to ratify the Convention,”³⁶⁹ only Belgium and Mali have since acceded to its terms, bringing to twenty-four the total number of states that have “completed the formal process of expressing their willingness to be bound by the International Convention.”³⁷⁰

Of the six OAU states that urged and then signed the UN Mercenary Convention, only one, Cameroon, later became a state party.³⁷¹ “[A]t least two of those [original] signatories (Angola and [the Democratic Republic of the Congo]) subsequently hired mercenaries.”³⁷² Nigeria, the OAU state that originally proposed Article 47 of Protocol I³⁷³ and the UN Mercenary Convention itself,³⁷⁴ has not become a state party, although six other OAU states that did not sign the Convention have since become states parties.³⁷⁵ In total, only seven of the fifty-three OAU³⁷⁶ states have ratified or acceded to the Convention aimed specifically at controlling

368. Press Release, U.N. GAOR 3d Comm., 56th Sess., 3d mtg., U.N. Doc. GA/SHC/3650 (2001).

369. *Id.*

370. *Report of the Special Rapporteur on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. GAOR, 57th Sess., pt. VI, at 12-13, U.N. Doc. A/57/178 (2002) [hereinafter October 2002 Mercenary Report] (relating the status of the UN Mercenary Convention, *supra* note 22). The countries are Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Italy, Libya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay, and Uzbekistan. *Id.* at 13. Belgium filed a reservation stating that it would not be bound to extradite Belgian nationals, and Saudi Arabia had a reservation to Article 17 regarding states’ disputes procedures. United Nations, *Status of Multilateral Treaties Deposited with the Secretary General*, at <http://www.untreaty.un.org> (last modified Jan. 18, 2003).

371. United Nations, *Status of Multilateral Treaties Deposited with the Secretary General*, <http://www.untreaty.un.org> (last modified Jan. 18, 2003). The original signatories were Angola, Republic of the Congo (formerly Congo-Brazzaville), Democratic Republic of Congo (formerly Zaire and before that the Democratic Republic of the Congo), Cameroon, Morocco, and Nigeria. *Id.*

372. Howe, *supra* note 2, at 228. Numerous other African states have employed or received PMC military services since the 1960s. Examples include Kenya, Nigeria, Zambia, Tanzania, Malawi, Sierra Leone, Mozambique, Sudan, Cameroon, Botswana, Rwanda, Uganda, Ivory Coast, Ghana, Togo, and Namibia. O’Brien, *supra* note 17, at 46-48, 62-63.

373. *See supra* note 170 and accompanying text.

374. *See supra* note 317 and accompanying text.

375. The countries are Libya, Mali, Mauritania, Senegal, Seychelles, and Togo. October 2002 Mercenary Report, *supra* note 370, pt. VI, at 13.

mercenary activities in post-colonial Africa.³⁷⁷ Moreover, only twenty-four of the United Nations' 191 member states have become states parties. As an indication of states' practice, this is not a ringing endorsement for the UN Mercenary Convention or its legal predecessors.³⁷⁸

7. *The Rome Statute of the International Criminal Court*

The International Criminal Court (ICC) presents a final option for the international regulation of mercenary activities. The Rome Statute³⁷⁹ offers neither a definition nor a specific crime to address mercenaries. In time, however, the ICC could acquire jurisdiction over both individual³⁸⁰ and state actors³⁸¹ involved in mercenary activities. The Rome Statute establishing the ICC provides limited jurisdiction over four categories of crimes,³⁸² including the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.³⁸³ The Rome Statute fails to grant

376. More accurately, seven of the current fifty-four African states have become states parties to the Convention. Morocco—the fifty-fourth African state—left the OAU after the Western Sahara dispute in the 1980s. See African Union, *Home Page*, at <http://www.africa-union.org> (last visited Feb. 4, 2003). On 9 July 2002, the Organization of African Unity was renamed the African Union. *Id.* See generally Corinne A. A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365 (2002).

377. Twenty-two of the fifty-four African states have ratified the OAU Mercenary Convention, and it entered into force in 1985. Angola, the state that originally proposed the Luanda Convention, has not ratified the OAU Mercenary Convention. University of Pretoria, *Human Rights Database*, at <http://www.up.ac.za/chr> (last modified July 22, 2002) (Status of the Primary African Human Rights Treaties).

378. Carlos Zarate concluded that “[t]he use of [PMCs] by numerous countries, especially by Nigeria, Angola, and other African nations which have led the charge against the use of mercenaries, further demonstrates that [PMCs] are not illegal under international legal norms.” Zarate, *supra* note 343, at 114 (favoring use of the term “private security company”).

379. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 18, 1998, as amended through Jan. 16, 2002, entered into force July 1, 2002 [hereinafter Rome Statute].

380. *Id.* art. 25 (Individual Criminal Responsibility).

381. *Id.* art. 27 (Irrelevance of Official Capacity).

382. As a further restriction, the court will only exercise its limited jurisdiction consistent with the principles of comparative complementarity. See *id.* art. 20(3) (deferring to domestic prosecution unless procedurally flawed or designed to shield the accused). See generally Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

383. Rome Statute, *supra* note 379, art. 5(1).

jurisdiction over mercenary-related crimes specifically, and, strictly speaking, “a person shall not be criminally responsible under [the Rome] Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”³⁸⁴ Mercenary activities could be characterized conceivably as crimes against humanity, although this would likely require associated criminal acts.³⁸⁵ More foreseeable, however, mercenary activities could be characterized as a crime of aggression.³⁸⁶

Article 5(2) of the Rome Statute provides:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this

384. *Id.* art. 22(1) (“*Nullum crimen sine lege*”).

385. *See id.* art. 7(h) (“persecution . . . on . . . other grounds that are universally recognized as impermissible under international law, [such as the UN Mercenary Convention,] in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”), 7(j) (apartheid), 7(k) (other inhumane acts).

386. *See generally* Major Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 203-09 (considering the scope of the ICC’s jurisdiction over the crime of aggression); DINSTEN, *supra* note 126 (discussing mercenary use as a form of aggression and the Draft Code of Offenses Against the Peace and Security of Mankind).

This discussion does not consider the work of the International Law Commission (ILC), which in 1954 first considered an international criminal code. *See* Draft Code of Offenses Against the Peace and Security of Mankind art. 2(4), in *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/2673 (1954), reprinted in [1954] 2 Y.B. Int’l L. Comm’n 140, 151. In 1991 and 1996, the ILC followed its earlier work with further revisions to its Draft Code of Crimes Against the Peace and Security of Mankind, but these drafts never became international instruments. More importantly, the ILC considered but decided against including mercenary activities in the Draft Code. *See Report of the International Law Commission on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. (No. 10) at 14, U.N. Doc. A/51/10 (1996); *Report of the International Law Commission on the Work of Its Forty-Third Session*, 46 U.N. GAOR Supp. (No. 10) at 94, U.N. Doc. A/46/10 (1991). Like their predecessors, the ILC drafters found it nearly impossible to agree upon an acceptable mercenary definition. *See* L.H. McCormack & Gerry J. Simpson, *The International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1 (1994) (analyzing the Draft Code’s proposed Article 23, which attempted to define and regulate mercenary activity); Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind*, 8 CRIM. L.F. 43 (1997) (critiquing the development of the Draft Code, including the bases for not including mercenary activities as a listed crime).

crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.³⁸⁷

The Working Group on the Crime of Aggression of the Preparatory Commission of the International Criminal Court considered the crime of aggression, but the Rome Statute has not yet been amended to include an aggression provision.³⁸⁸ If an amendment is not forthcoming, the issue will likely be revisited when the Secretary General convenes a review conference to reconsider the Rome Statute in July 2009.³⁸⁹

In the meantime, General Assembly Resolution 3314³⁹⁰ offers the most useful guidance on the topic of aggression. As previously discussed,³⁹¹ the resolution included within its definition of aggression state—but not individual—participation in the use of force by militarily organized unofficial groups, such as mercenaries, “which carry out acts of armed force against another state”³⁹² This is significant because the ICC will apply, “where appropriate, applicable treaties and the principles and rules of international law”³⁹³ Therefore, in enforcing the crime of aggression, the court could look to Resolution 3314 defining aggression.

Once the door is opened to address one state’s aggressive use of mercenaries against another state, the court would likely look to the UN Mercenary Convention itself, which delineates states’ responsibilities and makes it a crime for any person to recruit, use, finance, or train “mercenaries, as defined.”³⁹⁴ “Any person” could include state actors because, like the Rome Statute, the UN Mercenary Convention does not shield individuals acting in an official capacity.³⁹⁵ Moreover, the phrase “mercenaries,

387. Rome Statute, *supra* note 379, art. 5(2).

388. *See id.* arts. 5, 121.

389. *See id.* art. 123.

390. G.A. Res. 3314, *supra* note 162, at 143.

391. *See supra* notes 162-65 and accompanying text.

392. G.A. Res. 3314, *supra* note 162, para. 3(g).

393. Rome Statute, *supra* note 379, art. 12(b).

394. UN Mercenary Convention, *supra* note 22, art. 2.

395. *Compare id.* arts. 1-2, with Rome Statute, *supra* note 379, arts. 25, 27.

as defined” will require the court to apply the Convention’s complimentary mercenary definitions, warts and all.³⁹⁶

B. Summary of International Law Provisions Regulating Mercenary Activities

Based on the foregoing analysis of applicable international law provisions, three paradigms emerge for assessing the legality of mercenary activities; one applies to individuals, one applies to state actors, and one applies to states themselves. This discussion defines the outer limits of international mercenary regulation because the underlying authorities—the principles of non-intervention, the relevant UN resolutions, the UN Mercenary Convention, and the Rome Statute³⁹⁷—are assumed, rightly or wrongly, to represent peremptory norms of international law. Despite their shortcomings, these authorities today provide the only international law limitations on mercenary activities.

1. *Liability of Unaffiliated Individuals*

Here, the term “unaffiliated individuals” refers to persons who are not state actors; they serve in no official capacity for any party to a conflict, and they are not working—as service members, government employees, or government-sanctioned contractors—for a third party, neutral state. Unlawful mercenary activities by these unaffiliated individuals may be enforced only by domestic courts in countries that enact legislation implementing the offenses contained in the UN Mercenary Convention.³⁹⁸ Domestic courts may also enforce existing domestic anti-mercenary legislation that is unrelated to the UN Mercenary Convention,³⁹⁹ but because

396. See discussion *supra* Part III.A.6.

397. Because Article 47 of Protocol I merely discourages rather than regulates mercenary activities, and then only during international armed conflicts, it has been excluded from this discussion. See *supra* Part III.A.4.

398. See UN Mercenary Convention, *supra* note 22, art. 5(3). See *infra* Appendix B (reproducing Articles 1-7 of the UN Mercenary Convention).

399. See, e.g., S. AFR. CONST. ch. 11, May 8, 1996 (Butterworths Statutes of South Africa, LEXIS through December 2002 update) (regulating South African domestic security services); Regulation of Foreign Military Assistance Act 15 of 1998 (Butterworths Statutes of South Africa, LEXIS through December 2002 update) (regulating “the rendering of foreign military assistance by South African . . . persons”).

this rarely occurs, this discussion focuses on violations of internationally derived provisions.

If personal jurisdiction over the unaffiliated individual is satisfied, several subject matter jurisdiction requirements must be met before prosecution. First, the individual must meet either the primary⁴⁰⁰ or the secondary⁴⁰¹ mercenary definition found in the UN Mercenary Convention. As previously detailed, the primary definition parallels Article 47 of Protocol I, and the secondary definition follows the more expansive model of the OAU Mercenary Convention, but it only applies when the individual is recruited to overthrow a government or to undermine the constitutional order or territorial integrity of a state. Both definitions require that the individual is recruited to participate in an armed conflict, and both are weakened by the same “motivation by material compensation” requirement.⁴⁰² Both definitions also apply to all armed conflicts, no matter how characterized.⁴⁰³ Neither definition considers the legitimacy of the sending state or of the receiving party on whose behalf the person is employed. The primary definition excludes unaffiliated individuals who are made a member of the armed forces of any party to the conflict, nationals of a state party to the conflict, and residents of territory controlled by any party to the conflict.⁴⁰⁴ The secondary definition excludes unaffiliated individuals who are made members of the armed forces of a state where the acts occur and nationals or residents of a state against which the acts are directed.⁴⁰⁵

Second, the individual must satisfy the elements of one of the UN Mercenary Convention’s two enumerated offenses found in Articles 2 and 3.⁴⁰⁶ Mercenary status alone is not an offense. That is, simply satisfying one of the two mercenary definitions is not enough; the individual must participate directly in hostilities or in a concerted act of violence,⁴⁰⁷ or the individual must recruit, use, finance, or train mercenaries.⁴⁰⁸ In the alternative, the unaffiliated individual must either attempt⁴⁰⁹ or serve as an

400. UN Mercenary Convention, *supra* note 22, art. 1(1).

401. *Id.* art. 1(2).

402. *Id.* art. 1(1)(b), (2)(b).

403. *Id.* art. 16(b).

404. *Id.* art. 1(1)(c)-(d).

405. *Id.* art. 1(2)(c), (e).

406. *Id.* arts. 2-3.

407. *Id.* art. 3.

408. *Id.* art. 2.

409. *Id.* art. 4(a).

accomplice of one who attempts or commits⁴¹⁰ one of the two enumerated offenses.

2. *Liability of State Actors*

State actors are individuals—whether service members, government employees, or government-sanctioned contractors—affiliated with a third party, neutral state. Unlawful mercenary activities by a state actor may be enforced by either domestic courts in countries that enact legislation implementing the offenses contained in the UN Mercenary Convention, or potentially by the ICC pursuant to its future jurisdiction over crimes of aggression, which will reach only state actors.⁴¹¹ Where domestic and ICC jurisdiction overlap, the ICC would accord deference to the domestic court consistent with the ICC’s principle of complementarity.⁴¹² Without implementing domestic legislation, however, there could be no domestic jurisdiction, and thus the ICC would exercise primary jurisdiction over the state actor.

As with unaffiliated individuals, the state actor must first satisfy either the primary or secondary mercenary definition of the UN Mercenary Convention. The common elements of the two definitions are similar for unaffiliated individuals and state actors; as before, neither definition considers the legitimacy of the sending state or of the receiving party on whose behalf the person is employed. The primary definition would exclude state actors sent by their home state (a third party, neutral state), but only if they were “on official duty as a member of [the sending state’s] armed forces.”⁴¹³ In addition to covering service members, this exclusion would likely extend to military technical advisors who were government employees or government-sanctioned contractors of the sending state.⁴¹⁴ The secondary definition would exclude state actors sent by their home state, provided they were on “official duty.” Unlike the primary definition, the secondary definition’s official duty exclusion is more expansive because it is not limited to members of the sending state’s armed forces.⁴¹⁵ There-

410. *Id.* art. 4(b).

411. *See* discussion *supra* notes 386-93 and accompanying text.

412. *See supra* note 382.

413. UN Mercenary Convention, *supra* note 22, art. 1(1)(e). It is assumed that state actors would not be made a member of the armed forces of a party to the conflict, nor would they be nationals of a state party to the conflict or residents of territory controlled by any party to the conflict. *See id.* art. 1(1)(c)-(d).

414. *See* Aldrich, *supra* note 172, at 776.

fore, this exclusion would cover any sending state government employee or government-sanctioned contractor, whether or not considered a member of the sending state's armed forces, in addition to the sending state's actual service members.⁴¹⁶

The state actor, like the unaffiliated individual, must commit one of the two mercenary offenses enumerated by the UN Mercenary Convention. The state actor must either participate directly in hostilities or a concerted act of violence,⁴¹⁷ or he must recruit, use, finance, or train mercenaries.⁴¹⁸ In the alternative, the state actor must either attempt⁴¹⁹ or serve as an accomplice of one who attempts or commits⁴²⁰ one of the two enumerated offenses. Although state actors satisfying one of the two mercenary definitions could be held individually liable for one of these offenses, the UN Mercenary Convention does not extend liability to state actors who fail to carry out one or more of their state's responsibilities imposed by the Convention.⁴²¹ This is significant because states' responsibilities go beyond merely recruiting, using, financing, or training mercenaries, and they include duties to prevent offenses under the Convention,⁴²² to notify the UN or affected states parties,⁴²³ to establish jurisdiction over the Convention's offenses,⁴²⁴ to apprehend suspects,⁴²⁵ to extradite suspects under certain circumstances,⁴²⁶ and, in cases where the state does not extradite the suspect, to "submit the case to its proper authorities for the purpose of prosecution."⁴²⁷

415. See UN Mercenary Convention, *supra* note 22, art. 1(2)(d). It is assumed that state actors would not be made a member of the armed forces of a state where the acts occur, nor would they be nationals or residents of a state against which the acts are directed. See *id.* art. 1(2)(c), (2)(e).

416. Compare *id.* art. 1(1)(e), with *id.* art. 1(2)(d).

417. *Id.* art. 3.

418. *Id.* art. 2.

419. *Id.* art. 4(a).

420. *Id.* art. 4(b).

421. Compare *id.* arts. 1-4, with *id.* arts. 5-15.

422. *Id.* art. 6.

423. *Id.* arts. 8, 10.

424. *Id.* art. 9.

425. *Id.* art. 10.

426. *Id.* arts. 10, 12, 15.

427. *Id.* art. 5.

3. *Liability of States*

A state that violates its international responsibilities in relation to mercenary activities may be held liable through the negotiation and arbitration procedures outlined in Article 17 of the UN Mercenary Convention,⁴²⁸ through the International Court of Justice,⁴²⁹ or in rare cases, through UN Security Council declarations.⁴³⁰ This discussion ignores the complex and varied diplomatic measures leading to Security Council action, and instead examines those cases where an aggrieved state must show that an offending state violated its obligations under international law. Whether a violation of an obligation of customary international law or the UN Mercenary Convention in particular, ultimate jurisdiction for these disputes between states would rest with the International Court of Justice.⁴³¹

Only states parties may refer a dispute to the International Court of Justice.⁴³² The court's jurisdiction "comprises all cases which the [states] parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."⁴³³ In determining a state's responsibilities in regards to mercenary activities, the court would likely look to the principles of neutrality found in the Hague Convention of 1907, the UN Charter, Articles 5 through 15 of the UN Mercenary Convention, states' practice as indications of customary international law, any

428. *Id.* art. 17.

429. *See, e.g.,* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits).

430. Typically, however, the Security Council measures amount to no more than stern condemnations. *See, e.g.,* S.C. Res. 405, U.N. SCOR, 32d Sess., U.N. Doc. S/INF/33 (1977) (condemning mercenary recruitment as it affected Benin).

431. *See* UN Mercenary Convention, *supra* note 22, art. 17(1). The UN Mercenary Convention requires that, before resorting to the International Court of Justice, states must first pursue negotiation and at least consider arbitration if requested by one of the states parties. *Id.* In theory, a state aggrieved by another state's violation of international law other than the UN Mercenary Convention could seek immediate redress from the International Court of Justice. *See* Statute of the International Court of Justice, art. 38(1)(b)-(c), June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute].

432. ICJ Statute, *supra* note 431, art. 34(1) ("Only states may be parties in cases before the Court."). The ICJ is open to UN member states; non-member states may still refer disputes to the court, but they must pay an administrative fee for the court's expenses. *Id.* art. 35. The ICJ would only have jurisdiction to hear disputes between states that one of the states parties referred to the court; it could not independently exercise jurisdiction. *See* UN Mercenary Convention, *supra* note 22, art. 17(1).

433. ICJ Statute, *supra* note 431, art. 36(1).

UN General Assembly resolutions that represent generally accepted principles of law, and relevant *opinio juris*.⁴³⁴

As previously discussed, international law imposes several mercenary-related obligations on states. A state must prevent domestic mercenary recruitment or staging activities on its territory, according to the Hague Convention.⁴³⁵ A state must refrain “from the threat or use of force against the territorial integrity or political independence of [another] state,” by Article 2(4) of the UN Charter.⁴³⁶ And by the widely accepted terms of General Assembly Resolutions 2131, 2625, and 3314,⁴³⁷ a state must not organize, encourage, or send mercenaries to use armed force against another state. This obligation applies whether or not the organizing, encouraging, or sending state is a colonial or racist regime, and whether or not the mercenaries are organized, encouraged, or sent to fight against a national liberation movement. Simply put, the Hague Convention, the UN Charter, and these General Assembly resolutions reiterate a state’s obligation to refrain from unlawful intervention in another state’s sovereign affairs. This *jus ad bellum* principle would not be violated, however, if the receiving state actually invited or hired the mercenaries from the sending state. From the standpoint of neutrality, the receiving state’s concurrence prevents the intervention from being unlawful.

In one respect, the UN Mercenary Convention imposes a similar state obligation of neutrality. According to Article 5(2), a “state shall not recruit, use, finance or train mercenaries [as defined in the Convention] for opposing the legitimate exercise of the inalienable right of peoples to self-determination, in conformity with international law.”⁴³⁸ This creates no new obligation, however, because as the previous paragraph indicated,

434. *See id.* art. 38(1). In deciding cases, the court shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

435. *See supra* Part III.A.1.

436. U.N. CHARTER art. 2(4).

437. *See supra* Part III.A.3.

states already had an obligation to refrain from intervention in another state's sovereign affairs for any purpose, including use of force against the political independence of any state, which appears to subsume self-determination movements occurring within the state. Nevertheless, while states previously could not organize, encourage, or send mercenaries for the purposes of any intervention, this provision of the UN Mercenary Convention merely modifies states' responsibilities to include refraining from recruiting, using, financing, or training mercenaries, but only if the mercenaries will oppose a self-determination movement.

In another respect, Article 5(1) of the UN Mercenary Convention reaches far beyond principles of states' neutrality obligations when it declares: "States parties shall not recruit, use, finance or train mercenaries [as defined in the Convention] and shall prohibit such activities in accordance with the provisions of the present Convention."⁴³⁹ This represents a radical departure from states' previous international law responsibilities because the restriction has no relation to an unlawful intervention in another state's affairs. Indeed, this novel responsibility has no international component whatsoever; it represents a flat proscription: states "shall not recruit, use, finance, or train mercenaries" for any purpose. This provision restricts receiving states rather than sending states, and it effectively prevents a sovereign state from hiring mercenaries, even in cases where the state determines that doing so is absolutely necessary to defend the state from an internal or external aggressor. More so than in any other area of international mercenary regulation, states' practice weighs heavily against this provision's ever being accepted as a peremptory norm.⁴⁴⁰

The preceding three paradigms represent the outermost limits of current international law restricting mercenary activities. Whether examining restrictions on unaffiliated individuals, state actors, or states themselves, the obvious weak regulatory link is the definition of a mercenary, whether the primary definition taken from Article 47 of Protocol I, or the secondary definition taken from the OAU Mercenary Convention. Tragically, the elusive mercenary definition struggles even to reach the unaffiliated individual mercenary for which it was intended: a post-colonial rogue like Callan operating in 1976 Angola. When stretched to reach the case where a responsible state sends a state-sanctioned, highly professional PMC to a

438. UN Mercenary Convention, *supra* note 22, art. 5(2). This essentially reiterates the aspirational declaration found in General Assembly Resolution 2465, *supra* note 19.

439. UN Mercenary Convention, *supra* note 22, art. 5(1).

440. See *supra* notes 371-78 and accompanying text.

requesting state or where a sovereign state independently attempts to hire similarly sanctioned and professional PMC services, the definition is nearly worthless. Even the UN Special Rapporteur agreed with this assessment. Reporting in June 2002, he stated: “The problem remains that there is no appropriate legal definition or legislation under which [mercenaries] can be prosecuted.”⁴⁴¹ This is further evidence that the mercenary definition is hopelessly outdated, and with it the entire international regulation regime aimed at mercenary activities.

IV. Resisting Rhetoric and Returning to Principles of International Law

Whereas the post-colonial approach to mercenary regulation has been marked by attempts to define and outlaw one type of mercenary specifically, the focus should be returned to principles of neutrality and non-intervention generally. In obsessing over the unaffiliated individual mercenary, especially those who prowled post-colonial Africa, current international law provisions have completely missed the larger danger posed by mercenary activities: the unregulated transfer of military services to foreign armed forces. Such transfers should be made unlawful unless they occur between two states or between a state and a foreign armed force that has been granted international recognition independent of its relation to a state. The keys to such lawful transfers of military services are legitimacy and consent, as applied to both the sending state and the receiving state.⁴⁴²

Sovereign states are assumed to possess legitimacy, and a consensual military transfer between two legitimate states violates none of the peremptory norms imposed by international legal principles of neutrality or non-intervention.⁴⁴³ In rare cases, the international community, speaking through the UN Security Council, may brand a state as a rogue regime that lacks legitimacy. Iraq, the former state of Rhodesia, and apartheid-era South Africa are three recent examples where states lost their legitimacy and some degree of sovereignty because they violated fundamental principles of the UN Charter, whether through intervention in the case of Iraq or

441. *Report of the Second Meeting of Experts*, *supra* note 99, at 4.

442. For purposes of this analysis, the term “receiving state” is used to represent a sovereign state—or a foreign armed force that has been granted international legitimacy—that receives a transfer of military services from a PMC. The term “sending state” is used in referring to the state from where the PMC originates.

443. *See* Hague V, *supra* note 108, pmb., arts. 4, 6; U.N. CHARTER art. 2(4); G.A. Res. 3314, *supra* note 162, art. 3(e).

opposition to equal rights and self-determination of peoples in the two African states.⁴⁴⁴

Recent UN declarations are replete with general references to “colonial and racist regimes” that oppose self-determination movements. If a particular state is specifically characterized that way by the Security Council, as happened to Rhodesia and apartheid-era South Africa, then those states lack legitimacy, to include legitimacy to send or receive a transfer of military services. If not specifically characterized as “colonial and racist” or “interventionist” or “violently opposed to internal self-determination movements”⁴⁴⁵ by the Security Council, a state is presumed to retain its legitimacy, along with all of the authorities attaching by virtue of sovereignty, to include sending or consenting to receive transfers of military services.

Private military companies and individual mercenaries will never possess the inherent legitimacy of sovereign states. It is possible, however, that a state could confer its legitimacy through effective domestic regulation of companies that aspire to transfer military services. Grotius observed in his *Law of War and Peace* that “if any possess the sovereign power in part, they may to that extent wage a lawful war.”⁴⁴⁶ In the case of PMCs, an imprimatur of state legitimacy could be imparted through a sending state’s strict licensing and oversight of its military service providers. As a corresponding requirement, the state would have to impose domestic sanctions against unaffiliated individuals⁴⁴⁷ and unlicensed PMCs that attempt to transfer military services to foreign armed forces outside of the state’s licensing regime. For without the state’s legitimacy, the unaffiliated individual or unlicensed PMC usurps the state’s monopoly on military violence,⁴⁴⁸ and so goes forth as an illegitimate international

444. See, e.g., S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991) (imposing disarmament requirements on Iraq); S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg. at 5, U.N. Doc. S/INF/33 (1977) (calling for an arms embargo against South Africa); S.C. Res. 217, U.N. SCOR, 20th Sess., 1265th mtg. at 8, U.N. Doc. S/PV.1265 (1965) (refusing to recognize Rhodesia’s statehood because of the “minority regime’s” presumed lack of legitimacy).

445. Obviously, there is a strong public policy interest against military transfers to regimes that use military force to suppress their own populations. See, e.g., S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991) (imposing a weapons embargo on the former Yugoslavia, including Bosnia, Croatia, Macedonia, and Slovenia).

446. HUGO GROTIUS, *DE JURE BELLI AC PACIS* 633 (Francis W. Kelsey trans., 1925) (1646) (The Law of War and Peace).

447. That is, an individual that is not a state actor or an employee of a licensed military service provider. See *supra* text accompanying note 398.

actor,⁴⁴⁹ lacking the state's obligation to refrain from unlawful intervention.⁴⁵⁰

A PMC regulation regime premised on legitimacy and consent would produce one very desirable byproduct. The likes of Callan would be punished for interfering with the sending state's sovereign authority to make determinations of the *jus ad bellum* of transfers of military services, as opposed to trying to reach his conduct by regulating post-intervention acts that may violate principles of the *jus in bello*.⁴⁵¹ For sending states should be most offended by the mercenary's status as one engaged in unlawful intervention that impugns the sending state's neutrality obligations.⁴⁵² Non-consenting receiving states, in contrast, suffer after the unlawful

448. See GROTIUS, *supra* note 446, at 91 ("Says Paul the jurist, 'Individuals must not be permitted to do that which the magistrate can do in the name of the state, in order that there may be no occasion for raising a greater disturbance.'").

449. *Id.* at 631 ("[A] gathering of pirates and brigands is not a state, even if they do perhaps mutually maintain a sort of equality, without which no association can exist.").

450. See Burmester, *supra* note 110, at 45.

Private actions of individuals can, in certain circumstances, have a major impact on interstate relations[,] and it no longer seems realistic not to impute responsibility to a state for the actions of persons under its jurisdiction and control in situations likely to endanger world peace and security. . . . [T]he modern state can, and must, exercise control over its nationals so as to prevent their involvement in activities contrary to international law and, in particular, so as to enable the state to fulfill its own obligations to respect the territorial integrity and political independence of other states.

Id.

451. Kritsiotis asked:

Or do all mercenaries, at base, unlawfully intervene in wars because these wars are not their own? If so, they should be prosecuted for this transgression of the *jus ad bellum* and their protection and conduct under the *jus in bello* stands to be considered as an entirely separate matter. That was the essence of the approach of the 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries, but spoiled by the dogmatic stand taken by the first paragraph of Article 47 of [Protocol I, which the Mercenary Convention incorporated as its primary mercenary definition].

Kritsiotis, *supra* note 339, at 21.

452. See *Report of the Second Meeting of Experts*, *supra* note 99, at 9. "The involvement of private military companies in internal armed conflicts may be perceived as representing intervention by the State of incorporation of the security company." *Id.*

intervention, and are harmed not by virtue of the mercenary's status, but rather by the mercenary's conduct. Therefore, it stands to reason that sending states should regulate the *jus ad bellum* while receiving states should regulate the *jus in bello*. In this proposed regime, the UN should perform an oversight function, monitoring sending states' regulations for accountability and transparency, acting through the ICJ when states violate their international obligations, and acting through the ICC to punish an individual's unlawful acts⁴⁵³—irrespective of mercenary status—committed after the individual's intervention and during the armed conflict.

V. Proposed International Convention

With the foregoing in mind, this article proposes the Draft International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces (Draft Convention).⁴⁵⁴ The Draft Convention attempts to codify states' international law responsibilities, to address concerns about PMC accountability and transparency,⁴⁵⁵ to marginalize the unaffiliated individual who attempts to transfer military services without state sanction, and to buttress legitimate states' sovereign authority to engage in transfers of military services. In detailing the proposed Draft Convention, the article illustrates that international regulation is but one component to regulate mercenary activities successfully.

While international provisions can provide oversight and coordination of efforts to regulate PMC activities, comprehensive domestic provi-

453. The bases for ICC jurisdiction would include acts that constitute "the crime of genocide, crimes against humanity, [or] war crimes," and not mercenary activities *per se*. See Rome Statute, *supra* note 379, art. 5(1).

454. See *infra* Appendix A. Hampson must be credited with first proposing in 1991 the idea of an international convention to compliment the UN Mercenary Convention. See Hampson, *supra* note 14, at 33-37. Hampson laid out several criteria for a proposed convention that would adequately control foreign intervention, to include mercenary adventures, by defining states' regulation responsibilities under customary international law. The one potential difficulty with her proposal, however, is the phrase "use of force for political ends," which may be no less subjective or impossible to prove than the motivation test of Article 47 and the UN Mercenary Convention. See *id.* at 33. Hampson today serves as one of the several Experts on the Traditional and New Forms of Mercenary Activities who are working on behalf of the UN Commission on Human Rights to resolve the mercenary regulation issue. *Report of the Second Meeting of Experts*, *supra* note 99, at 3.

455. See, e.g., Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1 (1999) (arguing against any state use of private military companies, which the author contends lack accountability and transparency).

sions will still be required, for without one the other will surely fail. Therefore, effective sending state regulation of PMC activities provides the Draft Convention's cornerstone. The United States⁴⁵⁶ and South Africa⁴⁵⁷ are widely regarded as providing the best domestic PMC regulations to date.⁴⁵⁸ These models should be refined and then emulated by other states intending to export military services through domestically licensed PMCs.

The Draft Convention uses several distinct terms, but it makes no attempt to define the mercenary.⁴⁵⁹ It uses the term "authorizing state" to describe a state that develops an effective licensing regime. An authorizing state is the state in whose territory the PMC has a substantial presence and is licensed to operate. The authorizing state enforces PMC accountability, and it is charged with regulating the PMC and all other providers of military services under effective domestic guidelines and criminal sanc-

456. While not specifically tailored to reach PMC activities, U.S. legislation has for years regulated the transfer of military services to foreign entities. *See* Arms Export Control Act of 1968, 22 U.S.C.S. § 2752 (LEXIS 2002) (as amended 1985) (regulating the export of military services and arms brokering by U.S. companies); International Traffic in Arms Regulations 22 C.F.R. pts. 120-130 (2002) (implementing the Arms Export Control Act, requiring U.S. companies to satisfy the export licensing requirements of the U.S. Department of State Office of Defense Trade Controls when providing military services to foreign nationals, and also requiring congressional notification when U.S. companies export more than \$50 million in defense services); *see also* Foreign Assistance Act, 22 U.S.C.S. § 2151 (preventing the United States from providing assistance "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights"); International Military Education and Training Accountability Act of 2001, S. 647, 107th Cong. (2001) (intending "to enable Congress to better monitor and evaluate the success of the international military education and training program in instilling democratic values and respect for internationally recognized human rights in foreign military and civilian personnel"). *See generally* FOREIGN MILITARY TRAINING REPORT, *supra* note 84. "Training events and engagement activities reported for fiscal 2001 and anticipated for 2002 will involve approximately 108,500 international military and civilian personnel from 176 countries around the world." *Id.* (Executive Summary).

457. For South African provisions on point, *see supra* note 399.

458. *See* UK GREEN PAPER, *supra* note 18, para. 69, ann. B (detailing and praising U.S. and South African domestic regulations); *Report of the Second Meeting of Experts*, *supra* note 99, at 9 (praising South Africa's Private Security Regulations Act of 2001). Of note, although "it was estimated that there were more than 90 private armies operating throughout Africa [during the 1990s], the majority of them in Angola," O'Brien, *supra* note 17, at 51, the U.S. Department of State refused to issue MPRI a license to operate in Angola during the same period, *id.* at 54.

459. The UN Meeting of Experts recently applauded Belgium's mercenary legislation, which "omits to define the term mercenaries, but its substance covers mercenaries in the context of military services given to foreign armies or irregular troops." *Report of the Second Meeting of Experts*, *supra* note 99, at 8.

tions. Criminal sanctions must proscribe all unaffiliated individuals from providing military services to a foreign armed force.⁴⁶⁰ Therefore, only persons employed by licensed military service providers would be eligible to transfer military services. The authorizing state would subject all other persons to criminal liability, regardless of whether or not the person satisfied one of the UN Mercenary Convention's two mercenary definitions.

The underlying purpose of the tandem domestic PMC regulations and corresponding criminal provisions would be to marginalize the unregulated freelance mercenary. The Draft Convention attempts to squeeze out the freelance mercenary by identifying what he is not. He is not a soldier of his native state. He is not considered a soldier of the foreign state that he temporarily serves because he makes more money than the state's soldiers, and he does not answer to the state's military criminal code; hence, he did not enlist on the same terms as everyone else.⁴⁶¹ Moreover, unlike the licensed military service provider, the freelance mercenary does not serve under the authorizing state's imprimatur of legitimacy.

The Draft Convention uses the term "military services" to encompass those functions traditionally performed by professional members of a state's armed forces.⁴⁶² This includes, but is not limited to, training or performance of military functions associated with: task organization, leadership, command and control, battlefield operating systems' operation and maintenance, combined arms integration, maneuver, logistics, information operations, and combatant activities. "Combatant activities" would include taking a direct part in hostilities or a concerted act of violence on behalf of a foreign armed force. The Draft Convention intentionally

460. *See, e.g.*, 18 U.S.C.S. §§ 958-960 (prohibiting "military . . . expeditions or enterprises" against foreign governments with which the United States is at peace, as well as enlisting or recruiting others for service in a foreign government under certain circumstances).

461. *Cf. Musah & Fayemi, supra* note 171, at 16 ("Mercenarism—the practice of professional soldiers freelancing their labour and skills to a party in a foreign conflicts for fees higher and above those of native counterparts—is as old as conflict itself.").

462. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY ch. 3 (14 June 2001) ("The primary functions of The Army . . . are to organize, equip, and train forces for the conduct of prompt and sustained combat operations on land."). U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 1.6 (14 June 2001) (describing full spectrum operations as "the range of operations Army forces conduct in war and military operations other than war," including offensive, defensive, stability, and support operations).

defines military services broadly because, as previously stated, “[t]he distinction between combat and non-combat operations is often artificial.”⁴⁶³

By the Draft Convention’s terms, both individuals and business entities may provide military services, but only a business entity can be a licensed military service provider. A “licensed military service provider,” therefore, would be a private, non-state business entity that contracts for and provides any military services to a foreign armed force. An authorizing state must license and regulate the military service provider. The Draft Convention would apply regardless of whether or not a state or non-state entity contracts for the services of the licensed military service provider; however, the Draft Convention would always require consent by both the sending state and the receiving state. This ensures legitimacy in the interstate transaction, even when a third party state or entity contracts to transfer military services from the sending state to the receiving state.

While the foregoing provisions of the Draft Convention ensure PMC accountability, other provisions are designed to add transparency to PMC operations, primarily through international coordination and oversight provided by the UN.⁴⁶⁴ Coordination would occur between the state’s highest diplomatic office⁴⁶⁵ and the Office of the UN High Commissioner for Human Rights (OHCHR), which the Draft Convention would charge with oversight responsibilities.⁴⁶⁶ A state could serve as an authorizing state that grants licenses to its military service providers unless the OHCHR formally questioned the effectiveness of the state’s domestic reg-

463. UK GREEN PAPER, *supra* note 18, para. 11. *See supra* note 69 and accompanying text.

464. Regional organizations offer another option for potential oversight of PMC operations because their primary function often involves collective security. *See* Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 255, 255 (1997) (“Collective security is joining forces to maintain peace and security within or near the group’s area of competence.”). *But cf.* Anthony Clark Arend, *Symposium: The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT’L L. 3, 28 (1996) (Introduction) (describing the occasional dilemma created when the UN and regional organizations differ over their assessment of a crisis).

465. Within the Authorizing State, coordination would occur between the country’s diplomatic, defense, and corporate regulation agencies, *e.g.*, in the United States, the Department of State, Department of Defense, Security and Exchange Commission, and perhaps states’ attorneys general.

ulation regime. If challenged, the authorizing state would be afforded full due process to defend its regulation regime.⁴⁶⁷

For its part in promoting transparency, the OHCHR would issue minimal guidelines, which a state's domestic regulatory regime must satisfy before the state is qualified to function as an authorizing state, that is, before the state can license PMCs to transfer military services lawfully.⁴⁶⁸ The authorizing state, in turn, must provide minimal advance notice to the OHCHR before a licensed military service provider's employee departs the authorizing state en route to the receiving state. At a minimum, this notice should include the PMC's name, the employee's name, the results of a background check verifying that no credible basis exists to believe the

466. The OHCHR should provide this oversight function because that office:

- (a) Promotes universal enjoyment of all human rights by giving practical effect to the will and resolve of the world community as expressed by the United Nations;
- (b) Plays the leading role on human rights issues and emphasizes the importance of human rights at the international and national levels;
- (c) Promotes international cooperation for human rights;
- (d) Stimulates and coordinates action for human rights throughout the United Nations system;
- (e) Promotes universal ratification and implementation of international standards;
- (f) Assists in the development of new norms;
- (g) Supports human rights organs and treaty monitoring bodies;
- (h) Responds to serious violations of human rights;
- (i) Undertakes preventive human rights action;
- (j) Promotes the establishment of national human rights infrastructures;
- (k) Undertakes human rights field activities and operations; [and]
- (l) Provides education, information advisory services and technical assistance in the field of human rights.

Bulletin on the Organization of the Office of the United Nations High Commissioner for Human Rights, U.N. Secretariat, U.N. Doc. ST/SGB/1997/10 (1997).

467. The author recognizes the political pitfalls that this system may fall victim to, but the oversight authority must hold some power to challenge the authorizing state's domestic regulation regime.

468. The Second Meeting of Experts debating the mercenary issue recently recommended that the

OHCHR consider establishing a system of information flow to facilitate access by states to existing national legislation and implementing mechanisms for regulating private military/security companies. Where possible, the High Commissioner might consider exercising her mandate to provide technical assistance and advisory services in the drafting of appropriate national legislation on private military/security companies to those States in need of such assistance.

Report of the Second Meeting of Experts, supra note 99, Annex, at 11.

employee has committed past human rights abuses or other serious crimes, the foreign armed force receiving the military services, and the general terms of the contract and scope of military services to be provided.

Continuous transparency would rely on the ongoing, two-way exchange of information between the authorizing state and the OHCHR. Article 2.1(b)(iii) of the Draft Convention adds that transfers of military services remain lawful only when: “The employee did not continue providing military services to foreign armed forces after the [OHCHR] notified the employee and the authorizing state of credible evidence concerning the employee’s human rights violations or other serious crimes.”⁴⁶⁹ The authorizing state also has a continuing notice obligation to the OHCHR in the event of any material change to the scope of the contract or any credible evidence of the employee’s human rights abuses or other serious crimes. In theory, the continuing transparency offered by international oversight will identify suspect PMC employees, allowing the authorizing state through its domestic regulation regime to hold accountable the PMC employee or the PMC itself.

While the proposed Draft Convention provisions cannot function without domestic regulation, the inverse of this proposition is also true. The United States or South Africa may individually go to great lengths to regulate PMC activities that provide military services to foreign armed forces, but there is little to prevent their PMCs from moving to a more hospitable regulatory environment, much like U.S. corporations gravitate to Delaware, or the shipping industry seeks registry in Panama. The same is true for any state that takes pains to enact stringent domestic PMC legislation. Therefore, without an international convention, PMCs may still escape regulation by operating from states with ineffective or nonexistent mercenary regulations.⁴⁷⁰

VI. Conclusion

This article and its proposed Draft Convention represent a single step toward influencing and answering the difficult issues being debated by the UN Meeting of Experts on Traditional and New Forms of Mercenary Activities.⁴⁷¹ To be certain, the existing international regime of mercenary regulation falls short of expectations. This article postulates that the failure resulted from a politicized process that overlooked the traditions of

469. Appendix A *infra*, art. 2.1(b)(iii).

international law and that ignored states' long history of mercenary use. The dangers posed by unregulated mercenaries acting without state sanction, however, cannot be ignored.

Freelance, unaffiliated mercenaries acting with no domestic or international oversight represent the greatest danger to state sovereignty and principles of non-intervention. Certainly, some freelance mercenaries may personally follow acceptable codes of conduct. But the murderous, post-colonial rogue-adventurer, best exemplified by Callan maniacally "topping" indigenous soldiers and fellow mercenaries alike in Angola, has justifiably brought regulation to the mercenaries' door. Today's private military companies, although professional and generally law-abiding, still live in the same house once occupied by unregulated criminals like Callan.⁴⁷² For this reason, they must submit to domestic regulation and international oversight in return for the legitimacy—not to mention the business opportunities—that a state-sanctioning regime will provide.

The question remains whether or not the international community can overlook the crimes of post-colonial mercenaries to confront the underlying

470. In the United States, the weak link in the current PMC regulation regime is a lack of effective oversight once a proposed transfer of military services gains U.S. approval. For example, the U.S. government has no idea the exact numbers, let alone individual names, of persons performing extra-territorial contracts outside of the United States on behalf of the United States. See Renae Merle, *More Civilians Accompanying U.S. Military: Pentagon Is Giving More Duties to Contractors*, WASH. POST, Jan. 22, 2003, at A10 ("The Defense Department does not keep track of the number of contractors overseas but recognizes that such assignments are part of a growing trend . . ."). Instead of this fire-and-forget system, transparency through effective, ongoing oversight should be incorporated through either domestic or international means. Enhanced domestic oversight may prove effective in the U.S. model where PMCs are less likely to move offshore because their primary income derives from the U.S. government. See UK GREEN PAPER, *supra* note 18, para. 12.

471. See *Report of the Second Meeting of Experts*, *supra* note 99, at 10-11.

The Commission on Human Rights request[s] the Sub-Commission to set up an in-session working group to consider the issues raised by the existence of private military/security companies and to consider how their activities could best be regulated, taking into account work which has been undertaken by the Special Rapporteur [on the question of the use of mercenaries] and in other forums on the question of mercenaries.

Id. at 11.

472. Kritsiotis, *supra* note 339, at 21 ("Mercenaries have no doubt been dogs of war in the past; their war record is by no means unassailable. They have much to account for, both in terms of their means and their end-game.").

ing intervention issue posed by all mercenary activities. If it decides to recognize and regulate PMCs, then the debate may proceed on expanding the scope of PMC military services, to include humanitarian intervention operations. If the international community persists in its myopic approach to mercenary activities, however, post-colonial contempt and suspicion will continue to follow the state-sanctioned PMC and unaffiliated mercenary alike.

Appendix A: Proposed Draft ConventionINTERNATIONAL CONVENTION TO PREVENT THE UNLAWFUL
TRANSFER OF MILITARY SERVICES TO FOREIGN ARMED
FORCES

The States Parties to the present Convention,

Considering the past difficulties associated with defining mercenary activities and regulating private individuals' unlawful transfer of military services to foreign armed forces;

Affirming the principles of international law stated in the Fifth Hague Convention and Articles 2(1) and 2(4) of the United Nations Charter, and reaffirmed in General Assembly Resolutions 2131, 2625, and 3314;

Concerned about the precedent set when unaffiliated individuals transfer military services without the imprimatur of a sovereign State or the international community;

Convinced of the necessity for an international convention to ensure meaningful oversight and regulation of private military service providers;

Cognizant that matters not regulated by such a convention continue to be governed by the rules and principles of international law;

Have agreed as follows:

Article 1

For the purposes of the present Convention,

1. An "Authorizing State" is the Sending State in whose territory the military service provider has a substantial presence and is licensed to operate. Only Authorized States can license military service providers. A State is deemed an Authorizing State that can grant licenses to military service providers unless the United Nations High Commissioner for Human

Rights formally calls into question the effectiveness of the State's domestic regulation regime.

2. A "foreign armed force" includes a State's military forces—or in rare cases, internationally recognized irregular forces fighting for self-determination—in which the person has not enlisted for service on terms substantially similar to terms applicable to similarly situated members of the foreign armed force, to include, but not restricted to, comparison of rank upon entry, pay and bonuses, criteria for promotion, obligated duration of service, and subjection to the foreign armed force's military justice provisions. In rare cases, "enlisted for service as members of the foreign armed force" may encompass volunteers or indigenous persons engaged in spontaneous uprisings.

3. A "licensed military service provider" is a private, non-State business entity that contracts for and provides military services to a foreign armed force. An Authorizing State must license and regulate the military service provider. Both individuals and business entities may provide military services, but only a business entity can be a licensed military service provider.

4. "Military services" are services traditionally provided by professional members of a State's armed forces, including, but not limited to, training or performance of military functions associated with: task organization, leadership, command and control, battlefield operating systems' operation and maintenance, combined arms integration, maneuver, logistics, information operations, and combatant activities.

5. "Military services involving combatant activities" include cases where the person takes a direct part in hostilities or a concerted act of violence on behalf of a foreign armed force. Engaging in direct combatant activities shall subject the licensed military service provider to the highest scrutiny by the Authorizing State and the United Nations High Commissioner for Human Rights, including, but not limited to, enhanced reporting requirements and deployment of monitoring teams from the Authorizing State, United Nations, or International Committee of the Red Cross.

6. "Minimal advance notice" requires the Authorizing State to notify the United Nations High Commissioner for Human Rights not less than forty-five days before the licensed military service provider's employee(s) departs the Authorizing State. At a minimum, this notice shall include: the identity of the foreign armed force receiving the transfer of military ser-

vices; a copy of the formal agreement between the Sending State and the Receiving State that evinces their consent to the transfer of military services; the company name of the licensed military service provider; the general terms of the contract and the scope of military services to be provided; the name of the licensed military service provider's employee(s) performing the contract; and the results of a background check on each employee performing the contract, verifying that no credible basis exists to believe that the employee has committed past human rights abuses or other serious crimes.

7. A "person" is any individual, including, but not limited to, Sending State personnel, licensed military service provider employees, and individuals unaffiliated with either a Sending State or a licensed military service provider.

8. A "Receiving State" is the recipient sovereign state—or the otherwise-recognized leadership of a foreign armed force—to whom military services are transferred.

9. A "Sending State" is the state from where the PMC originates.

Article 2

A person commits the crime of unlawful transfer of military services under the present Convention when:

1. The person provides military services to a foreign armed force, *unless*,

(a) In response to a formal agreement between the Sending State and the Receiving State (or the otherwise-recognized leadership of the foreign armed force), the person has been sent as a technical advisor on official duty as:

(i) A member of the Sending State's armed forces; or

(ii) An agent, in any capacity, of the Sending State; or

(b) In response to a formal agreement between the Sending State and the Receiving State (or the otherwise-recognized leadership of the for-

eign armed force), the person has been sent as an employee of a licensed military service provider where:

(i) An Authorizing State has licensed the military service provider;

(ii) The Authorizing State has given the United Nations High Commissioner for Human Rights minimal advance notice of the licensed military service provider's specific contract under which the employee will provide military services to a foreign armed force; and

(iii) The employee did not continue providing military services to a foreign armed force after the United Nations High Commissioner for Human Rights notified the employee or the Authorizing State of credible evidence concerning the employee's human rights violations or other serious crimes.

Article 3

The States Parties shall enact and enforce domestic legislation that effectively incorporates the crime of unlawful transfer of military services as enumerated in Article 2 of the present Convention.

Article 4

Consistent with the principle of complementarity, the States Parties intend that the International Criminal Court shall exercise original jurisdiction over the crime of unlawful transfer of military services in those cases when a State Party fails to enact or enforce effective domestic legislation as required by Article 3 of the present Convention.

Article 5

The present Convention shall apply regardless of whether or not a State or a non-State entity contracts for the transfer of military services. The present Convention shall also apply whether or not one of the parties to the contract for the transfer of military services includes the Receiving State (or the otherwise recognized leadership of the foreign armed force).

In all cases, the Sending State and the Receiving State must enter a formal agreement evincing their consent to the transfer of military services.

Article 6

Responsibilities of the Office of the United Nations High Commissioner for Human Rights (OHCHR): (1) the OHCHR shall exercise international oversight responsibilities over all lawful military transfers; (2) the OHCHR shall issue minimal guidelines for regulating lawful military transfers, which a State's domestic regulatory regime must satisfy before the State may serve as an Authorizing State that licenses its military service providers; (3) if the OHCHR should challenge an Authorizing State's domestic regulatory regime, the OHCHR shall afford the Authorizing State thorough due process to defend the challenge; (4) the OHCHR shall maintain a database of all licensed military service providers and all military service provider contracts submitted by Authorizing States; and (5) the OHCHR shall immediately notify the Authorizing State of any credible evidence concerning human rights violations or other serious crimes by an employee of one of the Authorizing State's licensed military service providers.

Article 7

Responsibilities of the Authorizing State: (1) the Authorizing State shall regulate all transfers of military services to foreign armed forces that originate in the territory of the Authorizing State, to include enacting legislation consistent with Article 3 of the present Convention; (2) the Authorizing State shall license and regulate all domestic military service providers under a regime that satisfies the minimal guidelines prescribed by the OHCHR; (3) the Authorizing State shall provide minimal advance notice to the OHCHR consistent with Article 1(6) of the present Convention; and (4) the Authorizing State shall provide continuing notice to the OHCHR if there is a material change to the scope of a military services contract previously reported, or if there is any credible evidence of human rights abuses or other serious crimes committed by a licensed military service provider's employee.

Appendix B: UN Mercenary Convention, Articles 1-7

A/RES/44/34, Annex
72nd plenary meeting
Opened for Signature 4 December 1989
Entered into Force 20 October 2001

International Convention against the Recruitment, Use,
Financing and Training of Mercenaries

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict;
and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

2. Nothing in this article limits the scope of application of article 4 of the present Convention.

Article 4

An offence is committed by any person who:

- (a) Attempts to commit one of the offences set forth in the present Convention;
- (b) Is the accomplice of a person who commits or attempts to commit any of the offences set forth in the present Convention.

Article 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.

2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.

3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences.

Article 6

States Parties shall co-operate in the prevention of the offences set forth in the present Convention, particularly by:

- (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including the prohibition of illegal activities of per-

sons, groups and organizations that encourage, instigate, organize or engage in the perpetration of such offences;

(b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.

Article 7

States Parties shall co-operate in taking the necessary measures for the implementation of the present Convention.

....

**SITTING IN THE DOCK OF THE DAY: APPLYING
LESSONS LEARNED FROM THE PROSECUTION OF
WAR CRIMINALS AND OTHER BAD ACTORS IN POST-
CONFLICT IRAQ AND BEYOND**

MAJOR JEFFREY L. SPEARS¹

*Among free peoples who possess equality before the law we
must cultivate an affable temper and what is called loftiness of
spirit.*²

I. Introduction

The history of Europe is a history of war. Mongols,³ Huns,⁴ Moors,⁵ Turks,⁶ Romans,⁷ and modern Europeans have fought and died throughout

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2. CICERO, ON DUTIES 35 (M.T. Griffith & E.M. Atkins trans., Cambridge 1991).

3. 1 J.F.C. FULLER, A MILITARY HISTORY OF THE WESTERN WORLD 283 (1954).

4. *Id.* at 282.

5. The Christian Spanish and the Muslim Moors of predominately Berber and Arabic descent battled for the control of Spain beginning in 912. The Moors held onto various amounts of Spain until their ultimate defeat at Grenada in 1492. GEORGE C. KOHN, DICTIONARY OF WARS 437-39 (1987).

6. A particularly bloody series of engagements occurred in Transylvania beginning in 1657 when the Transylvanians unsuccessfully attempted to throw off the rule of their Turkish overlords. *Id.* at 470.

Europe for control of the continent. Japan knew a similar culture in which war and its practitioners held a venerated position in a society antithetical to democratic principles and the rule of law. These societies gave birth to two of the most efficient war machines of history: Adolf Hitler's Germany and Emperor Hirohito's Imperial Japan. United, Germany and Japan, along with their lesser Axis Allies, waged a war of conquest that spread to all of the populated continents. The United States and her Allies found themselves in a struggle for national survival in the face of a powerful coalition bent on world conquest.⁸

Though all wars expose its participants to unique horrors, World War II brought the world atrocities of historic proportions. Jews were murdered by the millions throughout Europe in furtherance of Hitler's master plan of a Europe purged of what he deemed to be racially inferior stock. In addition, Japanese soldiers visited horrors upon captured soldiers that often included execution, decapitation of the dead, and cannibalism. The Japanese Government created corps of foreign sexual slaves for the wanton use of their armed forces.⁹

Yet, today it is difficult to imagine a modern war between the United States, Germany, and Japan. Western Europe has known its longest period of peace in its long and bloody history.¹⁰ Japan has transitioned to democracy, shed her militant culture, and notwithstanding her recent economic setbacks, remains one of the most efficient and robust economies on earth.¹¹ On the strategic front, Germany sits with the United States as an equal voting member at NATO,¹² and serves with American troops in com-

7. There are countless books written over the ages on various Roman conquests throughout Europe, and the signs of Roman conquest and occupation dot the landscapes of Europe. For a Roman account of some of the civilizations with which the Romans waged war, see Tacitus, *GERMANIA* (J.B. Rives trans., Clarendon 1999) (c. 69).

8. Harry S. Truman, Address Before the Governing Board of the Pan American Union (Apr. 15, 1946), available at <http://www.Trumanlibrary.org/trumanpapers/pppus/1946/83.htm>.

9. STEVEN KREIS, *THE HISTORY GUIDE: LECTURES ON TWENTIETH CENTURY EUROPE* (July 25, 2002), available at <http://www.historyguide.org/europe/lecture10.html>.

10. Elizabeth Pond, *Europe in the 21st Century*, 5 AM. DIPLOMACY No. 2 (2002), available at http://www.unc.edu/depts/diplomat/AD_Issues/15amdipl.html.

11. See *Competitiveness Rankings*, *THE ECONOMIST*, Nov. 16, 2002, at 98. Recent research has sought to identify the most competitive countries. The research focused upon factors such as their public institutions, macroeconomic environment, and level of technology. On this list, the United States holds the first position, but Japan comes in at thirteenth, close behind the United Kingdom and solidly ahead of Hong Kong. *Id.* As discussed *infra* notes 207-10 and accompanying text, much of the post-war successes of Japan can be attributed to the success of the goals of the occupation of Japan.

bat operations abroad.¹³ Japan is a significant American ally in the Pacific.¹⁴

This dramatic shift can provide lessons to help secure the successful resolution of hostilities in tomorrow's wars. Many factors set the stage for a series of successful transitions. These transitions were first from war to peace, followed by cooperation in the reconstruction, and ultimately a transition toward a political and economic alliance. The reestablishment and the development of respect for the rule of law and democracy in Germany and Japan was paramount to the reconciliation of the former belligerents and their transformation into future Allies.

Against this backdrop, this article examines the role the various systems of justice played in the ultimate reconciliation of the belligerents of World War II. From this standard, the article then evaluates modern jurisprudential trends for the prosecution of war criminals. Section II provides an overview of the goals of the traditional American justice system as compared to those of international and national systems of justice used to prosecute violators of the laws of war, other crimes susceptible to post-conflict prosecution by the international community, or both. Section III analyzes the goals, procedures, and effectiveness of the international military tribunals created for the prosecution of war criminals in the wake of World War II. Section IV provides a similar analysis for the use of national courts and commissions to try those who violate the laws of war. Sections III and IV also discuss the effectiveness of the studied systems and highlight lessons learned from the experience. Section V focuses on the important goal of reconciliation as an aspect that any system of justice established after the cessation of hostilities should incorporate.

Based on this background, section VI proposes a system of justice for the prosecution of Iraqi war criminals¹⁵ apprehended after the liberation of Iraq. This proposal leverages the lessons of the past to develop a system of justice for war criminals that contributes to the prospects for a lasting peace and the reconciliation of the various domestic and international par-

12. North Atlantic Treaty Organisation, *NATO Member Countries* (May 2, 2003), at <http://www.nato.int/structur/countries.htm>.

13. Chris O'Neal, *Germany/Bosnia* (VOA Broadcast, Dec. 23, 1996), available at <http://www.hri.org/news/usa/voa/96-12-23.html#6>.

14. Jane A. Morse, *Host Nation Support Vital to Maintaining Alliances, Fighting Threats: Overview of Host Nation Support in Asia-Pacific Region*, U.S. DEP'T OF STATE INFO. PROG. (2003), available at <http://www.usinfo.state.gov/regional/ea/easec/histover-view.htm>.

ties.¹⁶ This proposal is based upon a philosophy that any system of post-conflict justice for war criminals must serve the ultimate ends of peace and reconciliation. And though the process should include the punishment of the wrongdoer, the process used to achieve these ends must be carefully tailored to the situation. Further, efforts must be undertaken to establish legitimacy and transparency. Transparency serves to build confidence in the outcome and, critically, to provide the local population with immediate insight into the rule of law in action.

II. Justice for the Violators of the Laws of War

American jurisprudence recognizes numerous theories for bringing to justice those who violate criminal laws. These theories include: punishment of the wrongdoer,¹⁷ rehabilitation of the wrongdoer, protection of society from the wrongdoer, specific deterrence of the wrongdoer, and general deterrence of the class of wrongdoers in question.¹⁸ To this list of

15. This article presents a proposed solution for the punishment of those who committed acts that can be broadly defined as war crimes up until the moment of regime change. Crimes committed after the occupation would be prosecuted in occupation courts or Iraqi domestic courts as they are reopened after occupation. As discussed *infra* notes 399-400 and accompanying text, as the organs of occupation slowly turn authority back to the reconstructed domestic authorities, the systems may begin to merge to some degree with respect to actors who are not "major war criminals." The acts that define crimes under international law are most often cognizable in domestic courts as well. While killing thousands may be the crime of genocide under international law, such acts amount to a like number of counts of murder to a domestic court. The punishment is often the same.

16. For the purpose of this article, reconciliation is a social and political process that through various means reduces the hostilities that existed between the international belligerents and may exist between components of a diverse domestic population. This article illuminates the important contribution that the system of justice developed for war criminals in a post-conflict environment can make to the ultimate reconciliation of the belligerents.

17. Punishment of the wrongdoer as an appropriate basis for a goal of a criminal justice system has been developed by American philosopher Jeffrey Murphy, who advocates a "retributive punishment theory" that uses punishment as a method "to put burdens and benefits back into balance." MICHAEL TONRY, SENTENCING MATTERS 17 (1996).

18. ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING 18-2.1(a)(i-v) (3d ed. 1994).

motivations, military courts add the goal of the preservation of good order and discipline in the armed forces.¹⁹

These goals are equally important considerations when seeking the prosecution and punishment of those who violate the laws of war. Circumstances surrounding the prosecution of war criminals, however, may require the addition of goals that eclipse those sought by traditional systems of justice. These goals include complementing and encouraging respect for the rule of law, encouragement of democratization, and reconciliation of the belligerents. Consideration of these goals is crucial in developing the appropriate international forums for the prosecution of war criminals. In some cases, these ultimate goals may overshadow the traditional purposes of the criminal justice system.²⁰

“War criminal”²¹ is an imprecise term that became synonymous with a broad class of wrongdoers during the International Military Tribunals (IMTs)²² of World War II. Misconduct prosecuted before these tribunals fell into three broad categories: crimes against peace,²³ war crimes,²⁴ and crimes against humanity.²⁵ Personal jurisdiction, however, was severely limited by both the Tokyo and Nuremberg IMTs in that they were limited to only “major” violators.²⁶ As discussed herein, this limited scope con-

19. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 8-3-21 (1 Apr. 2001).

20. For example, as discussed *infra* text accompanying notes 401-06 and notes 403-06, it may at times be necessary to offer non-punitive resolutions to those who have committed serious violations of law to preserve the legitimacy of the justice system and to further the reconciliation of the former belligerents. An example is when the volume of potential accused far outweigh the ability of the system of justice to prosecute them all. This article argues that in such circumstances a non-punitive truth and reconciliation commission is preferable to process and fix accountability for those whose conduct is less severe than the major perpetrators of crime. This is preferable to a system that simply opts to prosecute some randomly while ignoring others when confronted with overwhelming criminal activity.

21. For the purpose of this article, unless otherwise specified, the term “war criminal” is used to refer to offenders whose conduct fell within the jurisdiction of the International Military Tribunal at Nuremberg.

22. In the aftermath of World War II, International Military Tribunals (IMTs) were established in Nuremberg and Tokyo. See *infra* notes 48-126 and accompanying text and *infra* notes 127-210 and accompanying text, respectively.

23. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. 6(a) [hereinafter IMT CHARTER], reprinted in U.S. DEP’T OF STATE, PUB. 2420, TRIAL OF WAR CRIMINALS 15 (1945).

24. *Id.* art. 6(b).

25. *Id.* art. 6(c).

26. See *infra* notes 60, 157 and accompanying text.

tributed to the effective contribution of the IMTs toward the overall post-war goals of the Allies.²⁷

By design, the limited scope of the IMTs left a vacuum that was to be filled by both national military commissions and domestic prosecutions through local civilian courts.²⁸ These courts and commissions afforded individual nations the opportunity to try cases important to their citizens, such as when their soldiers had been victimized by wrongdoers below the scope of the jurisdiction of an IMT. Likewise, national courts and commissions pursued war criminals and saboteurs in the country where the crimes were committed.²⁹

Opponents of *ad hoc* systems argue that such tribunals and military commissions are too inefficient for effective international justice.³⁰ They also note that some jurisdictions may fail to bring lesser war criminals to justice, though within their reach, because of political reasons or a poorly developed legal system.³¹ Due to such concerns, there has been a rise in the interest of standing tribunals with prospective jurisdiction leading to the International Criminal Court (ICC), and greater support for the concept of universal jurisdiction.³² These two approaches, however, do not provide for an effective solution for Iraq; and as discussed below, both of these movements should be rejected. Many of the arguments in favor of these methods of justice appear justified when analyzed within the limited framework of the traditional goals of a criminal justice system.³³ The ICC

27. See *infra* notes 157-58 and accompanying text.

28. See *infra* notes 60-66 and accompanying text. This vacuum was created by limiting the scope of the IMT to major war criminals, which in practice was limited to the highest civilian and military leaders of Nazi Germany. See *infra* note 64.

29. See, e.g., United States Initial Post-Surrender Policy for Japan (Aug. 29, 1945), reprinted in U.S. DEP'T OF STATE, PUB. 267, OCCUPATION OF JAPAN—POLICY AND PROGRESS, 1946, at 28. The policy specifically provided that the court was to be headquartered in Tokyo. *Id.*

30. See, e.g., Todd Howland & William Calathes, *The U.N.'s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135 (1998) (providing a general criticism of problems related to *ad hoc* tribunals with suggestions for improvement focused on the International Criminal Tribunal for Rwanda).

31. See, e.g., Walter Gary Sharp, Jr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411 (1997).

32. See *infra* notes 331-33 and accompanying text. Universal jurisdiction can be defined narrowly as that which "provides every nation with jurisdiction over certain crimes recognized universally, regardless of the place of the offense or of the nationalities of the offender or the victims." Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MSU-DCL J. INT'L L. 1, 3 (2000).

and the expansive use of universal jurisdiction, however, can undercut the overarching goals of restoration of peace and reconciliation of the belligerents in a post-armed conflict situation.³⁴

For practical and legal reasons, the ICC will not be available for the prosecution of war criminals apprehended in Iraq in the wake of a regime change.³⁵ Further, any efforts by third parties to rely on national courts outside of Iraq to prosecute wrongdoers under a theory of universal jurisdiction would provide an incomplete solution at best.³⁶ Post-conflict Iraq should include a system of international justice that uses an international military tribunal complemented by national commissions conducted in Iraq and eventually by reestablished Iraqi domestic forums.³⁷ This is a daunting task without an “off the shelf” solution. Any efforts in this area require a careful evaluation of the procedures of the past and consideration of the lessons learned.

III. The Seeds of International Justice—World War II International Military Tribunals

Iraq, unfortunately, is not the first country in the modern era to bring war to her neighbors and terror to her people. The Allied powers of World War II were confronted with atrocities of an unprecedented nature directed at soldiers, civilians, and the very fabric of society. Yet no court of an international composition existed to bring the wrongdoers to justice. Furthermore, whether such a tribunal was necessary or even legal was the subject of much debate. Prime Minister Winston Churchill questioned the

33. See *supra* notes 17-19 and accompanying text.

34. See *infra* notes 331-33 and accompanying text.

35. Iraq has not signed or ratified the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court July 17, 1998) [hereinafter *ROME STATUTE*], reprinted in 37 I.L.M. 998 (1998). A current list of signatories and ratifications of the Rome Statute is maintained by the Coalition for the ICC, a network of over 1000 nongovernmental organizations, on its Web page: <http://www.iccnw.org/countryinfo/worldsigsandratiications.html>.

36. Such exercise of jurisdiction by nations with little direct interest in the conflict could damage the reconstruction of Iraq by injecting an unnecessary political process into a destabilized environment. Practical problems, such as location of evidence and witnesses and competing needs for the same by courts operating within Iraq in a post-conflict environment, would further detract from any benefit that such extraterritorial forums might provide.

37. See *infra* notes 376-406 and accompanying text.

need to try any of the major war criminals, whom he referred to as “arch-criminals,” under the theory that summarily executing them upon identification was legally justified.³⁸ Others questioned the legitimacy of attempting to find criminal conduct behind the horrors and fog of war.³⁹ At Nuremberg, all defense counsel joined in a unified challenge of the underlying legitimacy of the International Military Tribunal by invoking the legal maxim *nulla poena sine lege*.⁴⁰

Rallying under this banner, these defense counsel attacked the legitimacy of the IMT and highlighted the irony of the use of what was perceived as an *ex post facto* scheme of justice. In the words of the defense:

The present Trial can, therefore, as far as Crimes against the Peace shall be avenged, not invoke existing international law, it is rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which by Hitler's Germany has been vehemently discountenanced outside and inside the Reich. This principle is to the effect that only he can be punished who offended against a law in existence at the time of the commission of the act This maxim is one of the great fundamental principles [of the Signatories to the Charter of the IMT].⁴¹

The Tribunal rejected this argument and ignored the defense request to seek guidance from “recognized authorities on international law.”⁴² In reaching its decision, the Tribunal found that the Charter was created under the “sovereign legislative power by the countries to which the German Reich unconditionally surrendered.”⁴³ The Tribunal relied on its status as an organ of the occupying powers as a basis for exercising sovereignty over the defendants, and not as a means to mete out arbitrarily punishment by “victorious Nations.”⁴⁴ The Tribunal held that the defense misapplied

38. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 34 (1992).

39. *See infra* notes 111-13 and accompanying text.

40. “No punishment without a law authorizing it.” *BLACK'S LAW DICTIONARY* 1095 (7th ed. 1999).

41. Motion Adopted by all Defense Counsel, 1 I.M.T. 168 (1945).

42. *Id.* at 170. Rather than moving the court to grant the relief requested, the defense requested the IMT to seek counsel from international law scholars before rendering an opinion. *Id.*

43. Judgment, 1 I.M.T. 171, 218 (1946).

44. *Id.*

the maxim *nullum crimen sine lege, nulla poena sine lege*⁴⁵ by misconstruing it as a restriction on “sovereignty.”⁴⁶ The Tribunal held that the acts were known to be unlawful at the time of the act and thus not *ex post facto*, and that the use of the Tribunal was a proper exercise of sovereignty in light of the unconditional surrender of the parties.⁴⁷

A. IMT

*Law is a common consciousness of obligation.*⁴⁸

As discussed above, the International Military Tribunal at Nuremberg (IMT) was the first international tribunal of its kind to punish wrongdoers for acts committed prior to the inception of the court.⁴⁹ To gauge its effectiveness, it is necessary to evaluate the goals of the Tribunal, its Charter, jurisdiction, composition, and the role the IMT played as part of the overall reconstruction plan of the Allies. Such a review reveals that the IMT provided a procedurally fair system of justice that served both the immediate needs of a criminal justice system while complementing the reconstruction plan of the Allies. Most importantly, the success of the IMT contributed greatly to the “package of justice” resources, which furthered the ends of ultimate reconciliation of the belligerents.

1. Stated Goals of the IMT

To enable the achievement of its goals, the IMT at Nuremberg first sought to establish its legitimacy amid broad diversity of opinion. This legitimacy rested on “the proposition that international penal law is judicially enforceable law, and that it therefore may and should be enforced by criminal process [This] basic proposition is not purely or even primarily American, but of rather cosmopolitan origin.”⁵⁰ Exercise of this

45. Though not included in *Black's Law Dictionary*, it translates to mean “[n]o crime without law, no punishment without a law authorizing it.” (author’s translation).

46. *Judgment*, 1 I.M.T. at 219.

47. *Id.* at 218-19.

48. KENZO TAKAYANAGI, *THE TOKYO TRIALS AND INTERNATIONAL LAW* 1 (1948). Kenzo Takayanagi was a defense counsel before the International Military Tribunal for the Far East (IMTFE) and delivered a response to the Prosecution’s arguments based upon international law at the Tribunal. *Id.*

49. *The Legacy of Nuremberg*, JUSTICE ON TRIAL (Minn. Pub. Radio broadcast, 2002), available at <http://www.americanradioworks.org/features/justiceontrial/nuremberg1.html>.

criminal process over the Nazis rested on the principle that the perpetrators of the “unjust” war would no longer be able to shield their combatants with “the mantle of protection around acts which otherwise would be crimes” except when pursued as part of a just war.⁵¹

The Allied powers announced two years before the end of World War II that Axis soldiers and leaders guilty of committing atrocities would be prosecuted, thus placing them on notice of the fate that might await them.⁵² Collectively, the embryonic group that would form the seeds of the United Nations announced that those who committed “war crimes should stand trial.”⁵³ Upon this platform of legitimacy, the IMT sought to consolidate the fragmented sources of international law that provided the bases for individual criminal responsibility.

The IMT sought to accomplish its stated goal of a “just and prompt trial and punishment of the major war criminals of the European Axis,”⁵⁴ but through this process, a higher goal was undertaken. In the words of Supreme Court Associate Justice Robert H. Jackson,⁵⁵ “Now we have the concrete application of these abstractions in a way which ought to make clear to the world that those who lead their nations into aggressive war face individual accountability for such acts.”⁵⁶ The framers of the Charter of the International Military Tribunal took measures to ensure that the proce-

50. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10, at 1 (1949) [hereinafter FINAL REPORT].

51. REPORT OF ROBERT H. JACKSON TO THE PRESIDENT (released by the White House on 7 June 1945), reprinted in TRIAL OF WAR CRIMINALS, *supra* note 23, at 8.

52. The Tripartite Conference at Moscow, Oct. 19-30, 1943, reprinted in INTERNATIONAL CONCILIATION, No. 395, at 599-605 (1943). The United States government made similar pronouncements in the days leading up to the beginning of hostilities in Iraq. Michael Kirkland, *U.S. Plans Iraqi Trials*, WASH. TIMES (Jan. 8, 2003), <http://www.wash-times.com/upi-breaking/20030108-011244-9167r.htm>.

53. TAYLOR, *supra* note 38, at 26.

54. IMT CHARTER, *supra* note 23, art. 1.

55. Associate Justice Robert Jackson was designated by President Harry Truman as the U.S. representative and Chief Counsel for the U.S. delegation to the IMT. In this capacity he directed the prosecution’s efforts and served as the Chief Prosecutor at the IMT for the United States. Scott W. Johnson & John H. Hinderaker, *Guidelines for Cross-Examination: Lessons Learned from the Cross-Examination of Hermann Goering*, 59 BENCH & B. OF MINN. (Oct. 2002), <http://www2.mnbar.org/benchandbar/2002/oct02/cross-exam.htm>.

56. Statement by Justice Jackson on War Trials Agreement (Aug. 12, 1945) [hereinafter Justice Jackson Statement on War Trials], available at <http://www.yale.edu/lawweb/avalon/imt/jack02.htm>.

dures would be perceived as fair, and thus serve to legitimize the outcomes of the trials.

In approaching the problem of developing a Charter that would meet these ends, the Allied powers pulled from multiple civilian and military legal traditions, including the United States, Great Britain, France, and the Soviet Union.⁵⁷ Those charged with developing the Charter and procedures of the IMT recognized the difficulty of blending the common law and continental legal systems of the Allied powers to reach a coherent product agreeable to the parties. Notwithstanding the difficulties, the drafters of the IMT Charter understood that the creation of a workable product was critical if legitimacy was to be established. Justice Jackson noted that he thought “that the world would be infinitely poorer if we were to confess that the nations which now dominate the western world hold ideas of justice so irreconcilable that no common procedure could be devised or carried out.”⁵⁸

2. Charter and Duration

When analyzing the fairness and effectiveness of the Charter of the IMT, considering its limited scope is critical. Unlike modern *ad hoc* tribunals that often purport to exercise jurisdiction over any war criminal of any stripe,⁵⁹ the IMT was strictly limited to bad actors that met two threshold requirements. First, they must have been members of the European Axis. Second, they must have been “major war criminals.”⁶⁰ Such a limited

57. These countries brought different concepts of the extent to which the use of military tribunals were deemed appropriate before World War II. For example, the United States had traditionally limited the scope and duration of military tribunals and commissions to periods when military operations effectively closed the civilian courts as established in *Ex parte Mulligan*, 71 U.S. (4 Wall.) 1, 2 (1866). Great Britain, however, upon entry into World War II had a legal tradition that permitted even the trial of civilians before military courts when the civilian courts were still open and functioning. FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 131 (1940). Notably, while Brigadier General Telford Taylor was concerned about ultimately shifting responsibility for trials of war criminals back to the German domestic courts, the Charter of the IMT was silent about this.

58. Justice Jackson Statement on War Trials, *supra* note 56.

59. The breadth of the International Criminal Tribunal for the former Yugoslavia charter has opened it up to continuing criticism as being a political organ as opposed to a fair system of justice. Surveys of Serbian public opinion indicate that they do not believe the Tribunal as just, but simply a “politically biased and anti-Serb court.” Peter Ford, *Serbs Still Ignore Role in Atrocity*, CHRISTIAN SCI. MONITOR (Feb. 11 2002), <http://www.csmonitor.com/2002/0211/p01s02-woeu.html>.

exercise of jurisdiction helped to minimize claims of selective prosecution, while providing the world community the opportunity to seek justice collectively from those most responsible for German atrocities. Lesser actors were not permitted to escape justice; instead, they were relegated to other forums, such as national military commissions or domestic courts.⁶¹

The Charter did not define the duration of the IMT. Article 22 refers to the Tribunal as having a “permanent seat”⁶² in Nuremberg, though it is clear that the parties did not intend to maintain a continuous presence even as some major war criminals remained at large.⁶³ The position of the United States was that the IMT would not be reactivated in the event of the future apprehension of a major war criminal, though the IMT Charter permitted reactivation.⁶⁴ The IMT was to function during the period of occupation of Germany, but as Germany demilitarized, it was envisioned that Germany’s domestic courts would begin to play a role in the prosecution of war criminals, to be supplemented by Allied military courts, as necessary.⁶⁵ In the words of Brigadier General Telford Taylor in his report to the Secretary of the Army: Minor actors “should be brought to trial on criminal charges before German tribunals.”⁶⁶ He cautioned President Truman

60. IMT CHARTER, *supra* note 23, art. 1.

61. Efforts to reduce the perception of a selective or inconsistent system of justice was also a key concern for planners of military commissions after World War II. *See infra* notes 288-91 and accompanying text.

62. IMT CHARTER, *supra* note 23, art. 22.

63. *See generally id.*

64. Though the French demonstrated a desire to have a second trial before the IMT, the United States rejected this proposition, finding that national commissions and occupation courts were sufficient for the remaining cases at hand. Therefore, no other cases were convened before the IMT. *See* FINAL REPORT, *supra* note 50, at 27.

65. It is important to note that before the end of World War II the British were concerned about the over expansion of the jurisdiction of what they referred to as “Mixed Military Tribunals” for the prosecution of war criminals. The British preferred the use of national courts, and considered the use of an International Military Tribunal “with cases which for one reason or another could not be tried in national courts . . . to include those cases where a person is accused of having committed war crimes against the nationals of several of the United Nations.” Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General (Jan. 22, 1945), *reprinted in* U.S. DEP’T OF STATE, PUB. 3080, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 3, at 8 [hereinafter INTERNATIONAL CONFERENCE REPORT].

66. FINAL REPORT, *supra* note 50, at 95.

against considering convening additional cases before the IMT “at this late stage.”⁶⁷

The decision to limit the time for the prosecution of war criminals before the IMT served important policy goals. First was the desire to reestablish the rule of law and legitimate domestic authority within Germany. As these systems were reestablished, the increased reliance on German courts furthered the overall goals of reconstruction. Second, it facilitated the reconciliation of the former belligerents by bringing an end to one of the final formal processes of Allied military activity in Germany. This process served as an important bridge from the final judicial extensions of war to the reemergence of civil society in Germany.

3. *Tribunal Composition and Procedures*

a. *Tribunal Composition*

The signatories that created the IMT—the United States, Great Britain, the Provisional Government of the French Republic, and the Soviet Union⁶⁸—were represented at the IMT at all times.⁶⁹ A nation’s appointed representative or his alternate was always present during the proceedings.⁷⁰ This enforced cross-sectional representation furthered the goal of establishing legitimacy, both in theory and in practice. The Judgment⁷¹ of the IMT revealed that the representatives brought their own independent notions of justice to the proceedings.

The diverging opinions of the IMT representatives can be seen in the twenty-three page dissent filed by the Soviet judge to the Judgment. This dissent represented a stark divide between the Soviet representative and the other Allied powers represented at the IMT. The split in opinion of the representatives stemmed from their willingness to extend the jurisdiction

67. General Taylor provided this advice to President Truman in 1949. *Id.*

68. AGREEMENT FOR THE ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL art. 7 (1945) [hereinafter IMT AGREEMENT], reprinted in TRIAL OF WAR CRIMINALS, *supra* note 23, at 13.

69. IMT CHARTER, *supra* note 23, art. 2. As discussed herein, this is one of the areas in which the IMT differed substantially from the IMTFE. See *infra* notes 170-72 and accompanying text.

70. IMT CHARTER, *supra* note 23, art. 4(a).

71. The IMT refers to the final verdict of guilt and the subsequent sentences announced as its “Judgment.”

of the Court and to punish those brought before it.⁷² It also echoed many of the debates surrounding the use of its purported retroactive jurisdiction.⁷³ Notably, the Soviet representative, Major General (Jurisprudence) I. T. Nikitchenko, was critical of the Tribunal's Judgment that passed down three acquittals, spared the life of Defendant Rudolf Hess, and refused to extend collective criminal responsibility to the Reich Cabinet or the General Staff.⁷⁴

This divergence of opinion among the jurists served to legitimize the procedures used by the Tribunal. First, it demonstrated that the Tribunal was more than "victor's justice" because it illuminated core divergences in international opinion over the scope of imputed criminal responsibility. While a tribunal focused upon meting out victor's justice would be expected to expand its substantive jurisdiction to the fullest extent possible, the debate and divergence of opinion reflect that this did not occur at the IMT. Second, this divergence ensured that the Judgment handed down at Nuremberg reflected a consensus among nations with vastly different legal systems. This consensus helped to ensure a more conservative evaluation of the state of international law with respect to criminal responsibility for actions taken on behalf of or at the direction of the sovereign during war.⁷⁵

This consensus required the reconciliation of competing legal systems as well as divergent political philosophies. These structural and philosophical differences complicated the development of the IMT, but ensured a check on the expansion of international criminal responsibility beyond legitimacy. The acquittal of defendant Hjalmar Schacht highlights such a point. Schacht's acquittal did not reflect a lack of consensus on the

72. See generally Dissenting Opinion of the Soviet Member of the International Military Tribunal, 1 I.M.T. 342, 343 (1946).

73. See *supra* notes 40-47 and accompanying text.

74. *Dissenting Opinion of the Soviet Member of the International Military Tribunal*, 1 I.M.T. at 343-43. The Soviet member described the acquittals as "unfounded," developing his argument for conviction on theories of guilt by association. For example, he felt that the uncontroverted evidence showed that Defendant Schacht "consciously and deliberately supported the Nazi Party and actively aided in the seizure of power in Germany." *Id.* at 343.

75. The dissent in the Judgment reflects a fundamental rift between the states represented on the Tribunal that had the greatest respect for individual rights and that of the Soviet Union that was by its nature and charter the most collectivist. Some modern historians see this as a rift between elements of Europe and the United States that began early in the twentieth century and continues today. See PAUL JOHNSON, *MODERN TIMES: FROM THE TWENTIES TO THE NINETIES* 271-76 (1991).

facts. His acquittal reflected a debate about the scope of international criminal responsibility and the degree that the actions of one could be tied to the actions of another absent strong evidence.⁷⁶

Defendant Schacht began his affiliation with the Nazi Party while he served as the Commissioner of Currency and as the President of the Reichsbank. After the Nazis came to power, Schacht enjoyed a period of favor through much of the pre-war period and held numerous key positions within the government. Of greatest note, he served as the Plenipotentiary General for War Economy from 1935 through 1937.⁷⁷ In this capacity, under the authority of a secret German law enacted on 21 May 1935, he held the power “to issue legal orders, deviating from existing laws . . . [, and was the] responsible head for financing wars through the Reich Ministry and the Reichsbank.”⁷⁸ Though Schacht held other positions of responsibility within the Reich after 1937, this was the highest position he held until imprisoned in 1944 under suspicion of involvement in an assassination attempt on Adolf Hitler.⁷⁹

In light of Schacht’s involvement in the central banking operations that provided the hard currency necessary for Hitler’s wartime aggression, he was indicted by the Tribunal as being part of the “Common Plan or Conspiracy” that “involved the common plan or conspiracy to commit . . . Crimes against Peace, War Crimes, and Crimes against Humanity . . .”⁸⁰ He was also indicted for crimes against the peace.⁸¹ The facts underlying

76. See *infra* notes 82-84 and accompanying text.

77. Judgment, 1 I.M.T. 171, 307 (1946).

78. *Dissenting Opinion of the Soviet Member of the International Military Tribunal*, 1 I.M.T. at 344.

79. Judgment, 1 I.M.T. at 310.

80. *Id.* at 29.

81. *Id.* at 42. Participation in a “common plan or conspiracy” related to the active participation in a plan to wage a war of aggression “in violation of international treaties, agreements or assurances.” *Id.* at 29. Similarly, “crimes against peace” were limited to “planning, preparation, initiation, and waging wars of aggression, which were also in violation of international treaties, agreements and assurances.” *Id.* at 42. The indictment specifically limited such actions further to Poland, the United Kingdom, and France in 1939; the Netherlands and Luxembourg in 1940; and Yugoslavia, Greece, the Soviet Union, and the United States in 1941. *Id.* “War crimes” focused on waging “total war” in a manner that included “methods of combat and of military occupation in direct conflict with the laws and customs of war, and the commission of crimes perpetrated [against] armies, prisoners of war, and . . . against civilians.” *Id.* at 43. “Crimes against humanity” primarily focused on murder and other acts of violence targeted at those “who were suspected of being hostile to the Nazi Party and all who were . . . opposed to the common plan [of the Nazis].” *Id.* at 65.

the findings of the Tribunal and the dissent of the Soviet representative were fundamentally the same. The key distinction, however, was the extent to which the majority was willing to impute knowledge “beyond a reasonable doubt” to an actor who at times appeared more concerned with the impact that Hitler’s procurement practices might have on monetary inflation than on the amount of materiel available to Hitler’s war machine.⁸² The Soviet dissent seems more willing to base a conviction on guilt by association⁸³ and being a bad man.⁸⁴

b. Tribunal Procedure

The development of the Charter of the IMT was fraught with difficulties. The source of these difficulties was the divergence of the legal and political philosophies of the countries represented. Prime Minister Churchill’s belief that major war criminals should be subject to summary execution upon identification⁸⁵ represents the thinnest of procedural protections for an accused and was the most extreme position considered by the Allies. As discussed below, there were also marked differences between the Soviet Union and the United States regarding significant provisions of the Charter. Of note is a comparison of how the final Soviet and American draft proposals addressed the Tribunal’s procedures regarding the rights of the accused.

Though never implemented, the proposed Soviet model for the rights of the accused was incorporated into Article 22 of the Last Draft of the Soviet Statute, styled “Rights of Defendants and Provisions for the

82. Though undoubtedly a bad actor, Schacht never seemed to get quite with the entire “conquer the world” program of the Third Reich. During 1939, when Hitler was concerned about waging a war on multiple fronts with some of the most powerful nations on Earth, Schacht submitted a detailed memorandum to Hitler urging him to “reduce expenditures for armaments” and strive for a “balanced budget as the only method of preventing inflation.” *Judgment*, 1 I.M.T. at 308-09.

83. See *Dissenting Opinion of the Soviet Member of the International Military Tribunal*, 1 I.M.T. at 342-48.

84. Though the crime of being a “bad man” was not recognized by the IMT as a basis for punishment, the “bad man” concept in one form or another as a basis of punishment did enjoy a renaissance in military justice circles during the nineteenth century for crimes committed during war. For an excellent discussion of the criminal jurisprudence of bad men, such as the “jayhawker,” “armed prowler,” and other wartime ruffians, see Major William E. Boyle, Jr., *Under the Black Flag: Execution and Retaliation in Mosby’s Confederacy*, 144 MIL. L. REV. 148 (1994).

85. See *supra* note 38 and accompanying text.

Promptness of Trial,”⁸⁶ and Article 24, entitled “Defense.”⁸⁷ Soviet Draft Article 22 in its entirety provides: “The trial while ensuring the rightful interests of the defendants must at the same time be based on principles which will ensure the prompt carrying out of justice. All attempts to use trial for Nazi propaganda and for attacks on the Allied countries should be decisively ruled out.”⁸⁸ These “rights” were followed by further imprecise guidance in Soviet Draft Article 24, which provides in its pertinent part that the “right of the defendant to defence shall be recognized. Duly authorized lawyers or other persons admitted by the Tribunal shall plead for the defendant at his request.”⁸⁹

The contemporaneous American Draft provides indication of a greater concern for the rights of the accused, and thus a better foundation for ultimate legitimacy. Specifically, that draft contains provisions that ensure: “[r]easonable notice . . . of the charges . . . and of the opportunity to defend;”⁹⁰ the receipt of all charging and related documents; a “fair opportunity to be heard . . . and to have the assistance of counsel;”⁹¹ a right to “full particulars;”⁹² the open presentation of evidence; and complete discovery of any written matter “to be introduced.”⁹³

The final procedures adopted by the parties in the IMT Charter reflect a greater concern for the procedural protections of the accused. The IMT Charter provided the accused with all of the rights proposed in the American Draft presented at the close of the International Conference on Military Trials held during the summer of 1945.⁹⁴ Additionally, these rights were expanded to include: translation of the trial into a language that was understood by the accused;⁹⁵ a clear right to “present evidence . . . in the support of his defense;”⁹⁶ and the right to “cross examine any witness called by the

86. Last Draft of Soviet Statute (1945), *reprinted in* INTERNATIONAL CONFERENCE REPORT, *supra* note 65, at 167, 178.

87. *Id.* at 179.

88. *Id.* at 178.

89. *Id.* at 179.

90. Last Draft of American Annex, para. 14(a) (1945) [hereinafter American Draft], *reprinted in* INTERNATIONAL CONFERENCE REPORT, *supra* note 65, at 167, 179.

91. *Id.* para. 14(b).

92. *Id.* para. 11.

93. *Id.*

94. Compare IMT CHARTER, *supra* note 23, art. 16, with American Draft, *supra* note 90, paras. 14, 16.

95. IMT CHARTER, *supra* note 23, art. 16(c).

96. *Id.* art. 16(e).

prosecution.”⁹⁷ The accused, however, did not enjoy the right against self-incrimination, and the Tribunal retained the power to “interrogate any defendant.”⁹⁸

The procedures developed to protect the rights of the accused major war criminals agreed upon by the principal Allies demonstrate a remarkable movement from the early notions of Winston Churchill.⁹⁹ In their final state, the procedures of the IMT were well planned to meet the needs of justice. Though confrontation of witnesses was guaranteed to the defense, the judges at the IMT were given great latitude in determining the admissibility of sworn and unsworn documents and to accept evidence that under British and American law violated the rule against hearsay.¹⁰⁰ The Tribunal was also given the authority to take judicial notice of a wide class of documents, including those prepared by Allied nations in preparation of and resulting from other national tribunals conducted by any of the members of the IMT.¹⁰¹

When closely examined, these procedures read in conjunction with the power to establish a “Committee for the Investigation and Prosecution of Major War Criminals”¹⁰² could have been used to permit the prosecutor to prepare a “paper case” followed by the presentation of any evidence by the defense. This, however, did not occur. And though the IMT relied heavily on the benefits of relaxed evidentiary rules, it did hear some testimony in support of all the indictments presented.¹⁰³

The procedures adopted served the IMT and the international community well in meeting the goal of legitimizing the verdicts handed down at Nuremberg. Although the procedures permitted a relaxed evidentiary

97. *Id.*

98. *Id.* art. 17(b).

99. *See supra* note 38 and accompanying text.

100. *See* IMT CHARTER, *supra* note 23, art. 19. Article 19 provides that the “Tribunal shall not be bound by technical rules of evidence . . . and shall admit any evidence which it deems to have probative value.” *Id.*

101. *Id.* art. 21. Article 21 permits judicial notice of a broad class of documentary material. Specifically, of “official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.” *Id.*

102. This committee was established under the provisions of the IMT Charter articles 14 and 15. *Id.* art. 14.

103. Judgment, 1 I.M.T. 171, 172 (1946). Thirty-three Prosecution witnesses and sixty-one defense witnesses testified in person before the IMT. *Id.*

norm, the Tribunal was composed of seasoned jurists from several well-developed legal systems.¹⁰⁴ The facts developed by the documents deemed admissible under the relaxed rules appear to have been well-established and corroborated in the record. Accordingly, the arguments of the defense often rested more on the legal theory upon which culpability was based, rather than a dispute over the underlying facts alleged.¹⁰⁵

4. *Perceived Fairness of the IMT at Nuremberg*

Modern writers often view tribunals such as the IMT as courts of victor's justice.¹⁰⁶ Scholars and lawyers of the day often had a different view of the IMT. Notably, German scholars and lawyers often commented on the extent to which the IMT went to ensure impartiality. One contemporary German legal scholar noted that "[n]obody dares to doubt that [the IMT] was guided by the search for truth and justice from the first to the last day of this tremendous trial."¹⁰⁷ Even the defense counsel for Alfred Jodl noted that while critical of what he perceived to be the *ex post facto* nature of the proceedings, his interactions with the Secretary General of the Tribunal had been "chivalrous" and had been of great assistance in providing "documents of a decisive nature and very important literature."¹⁰⁸ He further noted that such assistance would not have been otherwise possible before a domestic court in post-war Germany in light of the degraded conditions of government institutions.¹⁰⁹ Ironically, much of the greatest criticism of the IMT came from within the profession of arms of a variety of

104. See generally MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* 71-77 (1997).

105. This was a common occurrence in the two International Military Tribunals and the national commissions conducted in both the Pacific theater and Germany. See *infra* notes 242-43 and accompanying text.

106. See, e.g., David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protections Under United States and International Law*, 172 MIL. L. REV. 40 (2002) (criticizing victor's justice tribunals, and focusing upon weakness in trials such as that of Japanese General Masaharu Homma).

107. Ra. Th. Klefisch, *Thoughts About Purport and Effect of the Nuremberg Judgment*, 2 JURISTISCHE RUNDSCHAU 45 (1947), reprinted in *NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* 201, 201 (Wilbourne E. Benton ed., Georg Grimm trans., 1955).

108. Statement of Dr. Hermann Jahrreiss, 17 I.M.T. 458, 459 (Nuremberg 1948).

109. *Id.* at 458-94.

nations.¹¹⁰ But criticism also flowed from many jurists, lawyers, and politicians in the United States.

The esteemed jurist Judge Learned Hand regarded the prosecutions as “a step backward in international law” and “a precedent that will prove embarrassing, if not disastrous, in the future.”¹¹¹ Major General Ulysses S Grant III echoed many of the concerns of military officers on both sides of the conflict. General Grant noted that in his opinion the “trial of officers and even civilian officials was a most unfortunate . . . violation of international law [I]t [gives] a precedent for the victor to revenge itself on individuals after any future war.”¹¹²

These criticisms appear to have flowed from a blend of concern over the potential for criminal responsibility *ex post facto*, and a fear that future military leaders could be held accountable for their actions when they were following orders. General Matthew Ridgway commented that prosecutions of those in uniform who acted “under the orders or directives of their superiors . . . is unjustified and repugnant to the code of enlightened governments.”¹¹³

But the concern that these trials were based upon conduct criminalized *ex post facto* was not universally held. The IMT proponents and jurists rejected these concerns, noting that the major war criminals were on notice of what was considered to be unlawful acts in war and against peace.¹¹⁴ Scholars from Germany writing during the late 1940s noted that the German people after the collapse of the Third Reich supported the results of the Trials at Nuremberg. In the words of one German scholar:

[T]he entire German population feels [the Nuremberg offenses] merit the death penalty. These crimes would also have found their retribution by applying the penal codes in force in most nations, including Germany. It is also the conviction of the German people that the society of nations, if it wishes to survive . . . [,] may and must secure itself against such crimes also with the weapons of law.¹¹⁵

110. DOENITZ AT NUREMBERG: A REAPPRAISAL—WAR CRIMES AND THE MILITARY PROFESSIONAL (H.K. Thompson, Jr., et al. eds., 1976).

111. *Id.* at 1.

112. *Id.* at 9.

113. *Id.* at 181.

114. *See supra* notes 43-47 and accompanying text.

As with the German population, the American public overwhelmingly supported the Tribunal as a means to bring closure to the war in Europe. This support was broadly held in the journalistic and academic community, as well as with the general public. Overall public support for the Tribunal at its conclusion was at seventy-five percent, with nearly seventy percent of columnists, seventy-three percent of newspapers, and seventy-five percent of the scholarly periodicals reflecting a positive view of the process and the Judgment.¹¹⁶

5. Role of the Court as Part of a Larger Reconstruction Plan

The Allies began to develop plans on how to punish German war criminals before the end of World War II. Disagreement existed as to whether the most serious violators of the laws of war should be tried at all. As previously mentioned, Prime Minister Winston Churchill argued unsuccessfully that so-called “arch-criminals” should be summarily executed upon identification.¹¹⁷ Some within the United States War Department supported a “guilt by association” theory that provided proof of membership in organizations such as the Nazi party alone would establish guilt.¹¹⁸

The framers of the IMT Charter were concerned that the Tribunal maintain legitimacy in the eyes of the German population, and that it contribute to the overall restoration of the rule of law.¹¹⁹ By rejecting expedient theories of responsibility, such as a “Nazi party membership” standard of culpability, the Allies successfully made the IMT an instrument of positive reconstruction, as opposed to a court of vengeance.¹²⁰ In the end, the interests of justice were met and punishment meted out to those found

115. Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 3 *SUDDEUTSCHE JURISTEN-ZEITUNG* 353 (1948), reprinted in *NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* 76, 78 (Wilbourne E. Benton, ed., E.C. Jann trans., 1955).

116. MARRUS, *supra* note 104, at 243.

117. TAYLOR, *supra* note 38, at 34.

118. *Id.* at 36. Under this approach, it was proposed that punishment would then be based upon the extent to which one participated in the Party or had knowledge of its activities. *Id.*

119. FINAL REPORT, *supra* note 50, at 101. Brigadier General Telford Taylor felt the activities at Nuremberg and before the various commissions were critical to the reintroduction of the German people to democracy. For this reason, he recommended that the proceedings of the various forums be published and widely distributed. One of the three stated reasons of “leading importance” to this endeavor was “[t]o promote the interest of historical truth and to aid in the reestablishment of democracy in Germany.” *Id.*

deserving. As important, the IMT complemented the overall return of civil society to Germany, rather than serve solely as a quasi-judicial extension of war.

The IMT's emphasis on procedural protections for the accused, transparency in practice, and its demonstrated desire to act in accordance with the rule of law helped to "jump-start" the German civil society in the wake of a devastating war. Although a martial court by its nature, the IMT set the stage for the return of the civil courts by emphasizing the need for a methodical search for justice consistent with the rule of law. Its work helped to set a professional standard for the post-war German judiciary.

The IMT, along with other military commissions, served as part of the bridge from war to peace. The adherence to procedural requirements and the rule of law furthered the ends of reconciliation. The alternative—expedient process—would have furthered existing divides. The IMT was the cornerstone in the development of a lasting peace and the future friendship between Germany and her former foes.¹²¹

6. *Were the Stated Goals Accomplished?*

If the *efficient* administration of post-conflict justice was the sole standard by which to judge the IMT, it would be deemed a failure. The process was lengthy, cumbersome in its multilateral development,¹²² and was a source of frustration for its contemporary architects.¹²³ Though the

120. There were, however, some prosecutions based upon membership in organizations coupled with other subsequent crimes. No convictions were based solely upon membership before the IMT, but some convictions were based upon memberships in various organs of the Nazi establishment in which the accused was acquitted of the other substantive crimes. Thus, the "membership" crime was a stocking-stuffer charge added to the other crimes charged. Those simply determined to be members of organizations found criminal were processed through an administrative procedure called Spruchkammern, which was conducted outside of Control Law No. 10 and was a component of the German de-Nazification program. *Id.* at 16-17.

121. Scholars have argued that the process of German introspection brought about by the trials of war criminals played an important role in setting the stage for the successful implementation of the Marshall Plan and the subsequent transformation of Germany into an American ally. Wendy Toon, *Genocide on Trial* (2001) (book review), available at <http://www.ihrinfo.ac.uk/reviews/paper/toonW.html>.

122. This process required close negotiations with the Soviet Union, which could prove difficult because of language and cultural differences. With work these differences were successfully overcome. See FRANCIS BIDDLE, IN BRIEF AUTHORITY 427-28 (Doubleday 1962), reprinted in MARRUS, *supra* note 104, at 246-48.

writings of the day demonstrate that while efficiency was of concern to the planners, it was secondary to the need to establish the legitimacy of the court and to provide a method of accountability that served to further the restoration of peace and reconciliation.

From this standard, the IMT was a success. The IMT was not a system of post-conflict justice that was conducted alongside the reconstruction of Germany; it was a fundamental process in the restoration of peace in Germany. Though other methods of justice may have served the needs of punishment of the wrongdoer in a more efficient manner, many would have failed to complement the overall reconstruction efforts or may have been overly detrimental to the ultimate goal of reconciliation of the belligerents. While Winston Churchill's summary execution proposal would have been efficient, it would have set a poor standard for the future and damaged the fragile relationship that existed between the victor and the vanquished.¹²⁴ Other methods, such as secret procedures or sole reliance on national military commissions, would have lacked the signs of international cooperation that helped provide a thin layer of legitimacy to an otherwise novel approach to the trial of international war criminals.

The ultimate sign of success has come with the passage of time. Though modern writers are split on issues related to the fairness of the procedures and the overall efficiency of the process,¹²⁵ there can be no debate that the reconstruction of Germany after World War II established the

123. For a good discussion of the initial difficulties of getting the major Allied parties on board for a single judicial solution, see William J. Bosch, JUDGMENT ON NUREMBERG 26-27 (1970). Bosch discusses the range of approaches considered from "catch-identify-shoot," *id.* at 24, to "drumhead court-martials without any involved legal procedures," *id.*, to a "program of international trials," *id.* at 26.

124. The German people of the day were becoming increasingly acquainted with the brutality of America's World War II ally, and their ally in their invasion of Poland, the Soviet Union. Charles Lutton, *Stalin's War: Victims and Accomplices*, 20 J. OF HIST. REV. (2001) (reviewing NIKOLAI TOLSTOY, *STALIN'S SECRET WAR* (1981)), available at <http://www.vho.org/GB/Journals/JHR/5/1/Lutton84-94.html>. Although the Soviet Union participated in the IMT, the broader roles taken on by the United States in their zone of occupation and that of the Soviet Union marked a stark contrast even before the construction of the Berlin wall. Kurt L. Shell, *From "Point Zero" to the Blockade*, in *THE POLITICS OF POST-WAR GERMANY* 85, at 85-86 (Walter Stahl ed., 1963). Though perhaps impossible to quantify, there can be little doubt that the stark contrast in approach that the United States and Britain took toward a conquered Germany played a significant role in keeping the German people predominately behind the West during the Cold War with the Soviet Union.

125. See generally MARRUS, *supra* note 104.

foundation for the longest period of peace in the history of modern Europe.¹²⁶ The IMT was paramount to the formulation of this success.

The IMT met its goals in a difficult environment and was successful in both the short and long term in its contribution to a lasting peace. The establishment of the IMT also helped to forge the way for the creation of a similar tribunal in East Asia. Though many of the issues facing that Tribunal were similar to those faced by the IMT, the Tokyo tribunal also faced an exceedingly difficult cultural environment. While it was necessary for the IMT to establish its legitimacy among the German population, its ability to do so was enhanced by many common cultural attributes among the victors and the vanquished. The Tribunal sitting at Tokyo, however, had to establish its legitimacy within a governmental and legal order alien to Western conceptions of justice. Because of this important distinction, the International Military Tribunal for the Far East (IMTFE) yields very valuable lessons for today.

B. IMTFE¹²⁷

*[F]or a catalogue of depravity and wholesale violations of the law of war, one really should examine the Tokyo Trials.*¹²⁸

1. Stated Goals of the IMTFE

As with the IMT in Nuremberg, the IMTFE in Tokyo was one part of an overall program to reintegrate the conquered into civil society. Unlike

126. See, e.g., Toon, *supra* note 121.

127. The primary source material for the Tokyo Trials can be found in the transcripts of the International Japanese War Crimes Trial, which comprises 209 volumes of text plus exhibits. The Judge Advocate General's School, United States Army, in Charlottesville, Virginia, has a complete set. The transcripts, however, are intimidating and very difficult to navigate. When undertaking research into the area, one should locate a library with R. John Pritchard's *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East* (1998), or in the alternative, Pritchard's earlier work, *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East* (Garland 1981). The 1998 citation with its excellent annotation is a great resource for gaining access to the wealth of information contained in the transcripts of the IMTFE. Citations to the transcripts contained herein are to the primary source, however.

128. H. Wayne Elliott, *The Nuremberg War Crimes Trials CD-ROM*, 149 MIL. L. REV. 312, 316 (1995).

Germany, however, Japan had never developed many of the legal traditions found in other Axis countries before the outbreak of war. Lawyers were low-level functionaries in a legal hierarchy with little concern for individual liberties or civil rights.¹²⁹ A primary objective of American foreign policy after the surrender of Japan was to develop a respect for the rule of law and human rights among the citizens of Japan. The pacification of Japan was to include a complete disarmament and policies to encourage “a desire for individual liberties and respect for fundamental human rights.”¹³⁰

The scope of the IMTFE was broader than the IMT in that it had jurisdiction over atrocities committed during three distinct phases of Japanese aggression: the Manchurian Incident (1931); the “China Incident of 1937-1945”; and Japanese operations in the Pacific during World War II.¹³¹ Unlike the IMT, however, the hearings spanned years not months, and were a major consumer of post-war funds and resources. At its peak, the IMTFE employed about 230 translators, 237 lawyers, and consumed nearly twenty-five percent of all of the paper used by the Allies during the occupation of Japan.¹³² This unprecedented dedication of resources to post-conflict justice demonstrates the degree of importance that the Supreme Commander and the governments of the respective Allies placed on this aspect of societal reconstruction.

After the surrender of Japan, General of the Army Douglas MacArthur was designated as the Supreme Commander for the Allied Powers, and on 6 September 1945, the civilian leadership of the United States delegated to MacArthur very broad powers. MacArthur’s powers were clear: he was to be the head of the Japanese state during its occupation with “[t]he authority of the Emperor and the Japanese Government to rule the State . . . subordinate to [him] as Supreme Commander for the Allied Powers.”¹³³ Notwithstanding this great delegation of authority, there was also a profound concern for the immediate normalization of domestic governance within this new social paradigm imposed upon Japan. The architects of post war-Japan made it clear that General MacArthur was in law and fact

129. 1 POLITICAL REORIENTATION OF JAPAN 190 (1949).

130. United States Initial Post-Surrender Policy for Japan (Aug. 29, 1945), *reprinted in* OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 73-74.

131. 2 THE TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 127, at xxiv (1998).

132. *Id.* at xxv.

133. Authority of General MacArthur as Supreme Commander for the Allied Powers (Sept. 6, 1945), *reprinted in* OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 88-89.

the Supreme Commander, but they also directed that “[c]ontrol of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results.”¹³⁴

From the beginning of the occupation of Japan, Japanese officials and citizens were integrated into the operation of the Japanese occupation, which could be called “the Japanese experiment.” Although many of the procedures and goals for Japan reflected those being developed as part of Europe’s reconstruction, the challenges that faced General MacArthur eclipsed those faced in the European theater.¹³⁵ Specifically, Germany was forcibly reintroduced to the rule of law, democracy, and respect for individual rights. Germany was brought back onto a long path leading to the creation of modern liberal democracies that can be traced back to pre-Socratic thought.¹³⁶ For Japan, the path to liberal democracy began with the sound of atomic thunderclaps followed by the arrival of General Douglas MacArthur.

The key to the success of this experiment was the exposure of the Japanese population to the rule of law as exercised by regularly organized tribunals bound by rules of procedure and burdens of proof. Though the horrors that the Japanese visited upon uniformed prisoners of war eclipse those perpetrated by other Axis powers both in scope and savagery,¹³⁷ Japanese soldiers would nonetheless be given procedural protections similar to those of the IMT.¹³⁸ Contrary to the summary executions initially envisioned by Winston Churchill for major German war criminals,¹³⁹ they were to receive their day in court before the IMTFE as well as other national military commissions.¹⁴⁰

The willingness of the victors to adopt such procedures with an enemy that routinely tortured, maimed,¹⁴¹ and even ate their prisoners of war¹⁴² stood in stark contrast with the administration of executive authority previously known to Japanese imperial subjects.¹⁴³ This willingness to

134. *Id.*

135. *See supra* notes 50-58 and accompanying text.

136. William Thomas, *The Roots of the West* (n.d.), available at http://www.objectivistcenter.org/articles/wthomas_roots-west.asp (last visited June 3, 2003).

137. Elliott, *supra* note 128, at 316.

138. *Compare supra* notes 68-105 and accompanying text, *with infra* notes 156-87 and accompanying text.

139. *See supra* note 38 and accompanying text.

140. *Development of Policy Through Allied Cooperation*, reprinted in OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 28-29.

substitute a legal process for passionate vengeance brought the actions of the Supreme Commander in conformity with the new society that the United States and her Allies wished to create in Japan. General MacArthur saw his mission as no less than the establishment “upon Japanese soil a bastion to the democratic concept.”¹⁴⁴ The use of summary procedures would have compromised this unprecedented objective.

Though antithetical to the mission of the Allies, summary procedures and show trials were not alien to the Japanese criminal justice system in the years leading up to World War II. Japanese criminal defendants were provided hearings, but rather than providing the accused with due process of law, these trials served more to ratify confessions obtained by police investigators. In other cases, especially with “thought criminals,” trials were replaced by brutal summary executions.¹⁴⁵ When trial was necessary, however, police often would resort to cruel methods of torture to ensure confessions. These methods included inserting needles under the fingernails of suspects, crushing fingers, beating thighs, and piercing eardrums, to name a few.¹⁴⁶ Torture of female communists appeared to be at the hands of sexual sadists.¹⁴⁷ Such extreme measures were accepted by the government, as in the words of a police training book of 1930s Japan:

141. The techniques used by the Japanese to impose POW camp discipline seemed only to be limited by the creativity of their capturers. Techniques included: “exposing the victim to the hot tropical sun for long hours without headdress or other protection; suspension of the victim by his arms in such a manner as at times to force the arms from their sockets; binding the victim where he would be attacked by insects . . . [, or] forc[ing the victim] to run in a circle without shoes over broken glass while being spurred on by Japanese soldiers who beat the [victim] with rifle butts.” *United States and Ten Other Nations v. Araki and Twenty-Seven Other Defendants*, 203 *Trans. Int’l Jap. War Crimes Trial* 49,702-03 (1948) (extract from Tribunal’s Judgment). The Tribunal went on to find that the Japanese routinely included mass execution as collective punishment, often executing members from the same prisoner group as any POW that successfully escaped. *Id.* at 49,702-04.

142. A challenge for post-war prosecutors of the day was to find theories they could use to prosecute savagery of the nature that the Japanese inflicted upon others. The Australians included within their definition of “war crimes” two acts particularly unique to the Japanese in the modern history of war: cannibalism and “mutilation of a dead body.” PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST* 128-29 (1979). These crimes then were charged in the initial salvo of Australian military commissions. *Id.*

143. *The New Constitution of Japan*, in 1 *POLITICAL REORIENTATION OF JAPAN* 82, 82-84 (1949). The Japanese subjects were not exposed to notions of liberal democracy and experienced life in a totalitarian regime in which “rights and dignity of the individual, and economic freedom . . . [had] never before been known.” Brigadier General Courtney Whitney, *The Philosophy of Occupation, Introduction* to 1 *POLITICAL REORIENTATION OF JAPAN* xvii, xx (1949).

“Unlike a murderer, who kills only one or perhaps several people, and there it ends, thought criminals endanger the life of the entire nation.”¹⁴⁸

It is from this legal environment upon which the IMTFE was to be superimposed. It is also against this backdrop that one must consider modern criticism of the Tribunal itself.¹⁴⁹ Evaluating the effectiveness of the IMTFE is not possible without considering the legal landscape upon which it was grafted.

Thus, the importance of the process set into motion by the Allies cannot be understated because it harmonized several competing goals for the

144. General of the Army Douglas H. MacArthur, *Three Years, in* 1 POLITICAL REORIENTATION OF JAPAN v, v (1949). The words and philosophy of General MacArthur ring true today as the United States faces malignant regimes whose populations have significant underlying cultural differences from modern Western democracies. General MacArthur saw the creation of a democratic “bastion” in Japan as a substantive retort to the “fallacy of the oft-expressed dogma that the East and the West are separated by such impenetrable social, cultural and racial distinctions as to render impossible the absorption by the one of the ideas and concepts of the other.” *Id.* at vi. Those considering the fate of failed and failing states should evaluate the reconstruction of Japan and its success before rejecting similar efforts solely on the basis of impossibility. A minority of academic scholars of the Middle East argue that the United States should ignore the naysayers and impose modern reforms in Iraq, unilaterally if necessary. For an excellent discussion of this provocative and unapologetic approach to Iraq, see Fouad Ajami, *Iraq and the Arab's Future*, 82 FOREIGN AFF. 2 (2003). Professor Ajami, of Johns Hopkins University's School for Advanced International Studies, makes the point directly that Japan is the precedent for post-Saddam Hussein Iraq. Ajami argues that

the Japanese precedent is an important one It was victor's justice that drove the new monumental undertaking and powered the twin goals of demilitarization and democratization. The victors tinkered with the media, the educational system, and the textbooks. Those are some of the things that will have to be done if a military campaign in Iraq is to redeem itself in the process.

Id. at 15.

145. RICHARD H. MITCHELL, JANUS-FACED JUSTICE: POLITICAL CRIMINALS IN IMPERIAL JAPAN 88 (1992). One particular set of brutal summary executions occurred when a group of ten pro-labor radicals were jailed for singing “illegal revolutionary songs” from the top of the labor building. *Id.* at 41. When the men refused to stop making noise once jailed, a local military group was brought in to resolve the matter expediently. Their expedient action involved killing them by burning and decapitation. *Id.*

146. *Id.* at 55.

147. *Id.* at 82.

148. *Id.* at 88 (citation omitted).

149. See *infra* notes 189-97 and accompanying text.

reorganization and “political reorientation of Japan.”¹⁵⁰ This process ensured the trial of the wrongdoer¹⁵¹ before a regularly constituted tribunal.¹⁵² This process was steeped more in reason than passion and helped to further the reconciliation of the belligerents.¹⁵³ It also served as a crucial introduction to the role of courts as an instrument of accountability bound to respect the rights to procedural process of even the most vile accused.¹⁵⁴ Public trials in which publicity was not only authorized, but encouraged, ensured that the Japanese civilian population became aware of the atrocities committed by their government officials and soldiers.¹⁵⁵

2. Charter and Duration

As with the Charter of the IMT,¹⁵⁶ the Charter of the IMTFE limited its jurisdiction to only “major war criminals.”¹⁵⁷ This limited scope of

150. There is no phrase that better captures what the United States sought to accomplish in Japan. It has been lifted wholesale from *Political Reorientation of Japan*, volume 1, page i (1949).

151. This goal is common to any criminal court and also serves other traditional goals of the justice system to include retribution and deterrence. As discussed, *infra*, too much emphasis is placed upon these basic goals of a domestic justice system when seeking to develop and implement systems of international prospective criminal justice, as with the ICC. See *infra* notes 332-33 and accompanying text.

152. Development of Policy Through Allied Cooperation, *reprinted in* OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 28-29.

153. Although at least one leader of an Allied power, Winston Churchill, believed that summary execution was legal and appropriate with serious violators of the law of war, this method of justice was not used in Japan. See *supra* note 38 and accompanying text. The creation of a court to hold individuals accountable for their wrongdoing served to vent the vengeance of populations such as those in the United States and Australia who had their family members victimized brutally by the Japanese. It also reduced the level of passion and belligerency between the parties to the hostilities by holding open courts in which the evidence was presented and the defense was given an opportunity to present a case with the assistance of counsel. Rather than setting the stage for another round of violence, the method the trials were conducted served the interests of justice while legitimizing the actions of the victors in the eyes of the domestic Japanese population, thus helping to meet the goal of reconciliation.

154. This aspect of the IMTFE provided a cornerstone to the political reorientation of Japan that in less than a generation resulted in the complete transformation of a medieval society characterized by unquestioned, hereditary executive authority; militarism; and disregard for basic human rights into a modern liberal democracy.

155. PICCIGALLO, *supra* note 142, at 15.

156. See *supra* notes 60-67 and accompanying text.

157. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST art. 1 (Jan. 19, 1946) [hereinafter IMTFE CHARTER], *reprinted in* OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 147, 149.

jurisdiction ensured that the Tribunal could meet the needs of justice without being bogged down with the prosecution of second-tier criminals. It also provided some protection from claims that the Tribunal was exercising its jurisdiction inconsistently.

The IMTFE's limited jurisdiction over "major" war criminals was complemented by the clear intent of the Supreme Commander that other "international, national or occupation court[s or] commissions" would also be operating within the Far Eastern theater.¹⁵⁸ This complementary judicial regime maximized the reach of the justice system by creating lesser courts that could focus on lower-level criminals. It also provided forums for individual nations to prosecute war criminals of particular interest, such as those whom may have tortured their prisoners of war.¹⁵⁹

The IMTFE Charter is silent concerning its intended duration except for a statement that its "permanent" seat was to be in Tokyo.¹⁶⁰ Unlike the IMT Charter, however, the IMTFE Charter left unclear whether the IMTFE was to end its work after its first series of prosecutions, as was the case in Germany.¹⁶¹ Though in practice the IMTFE followed the same path as the IMT, it is not as clear that the drafters and participants were as confident that domestic courts in Japan could handle such cases if it became necessary at a later date.

3. *Tribunal Composition and Procedure*

The IMTFE built upon the same sources of law that formed the foundation of the IMT. The IMTFE, however, also cited the creation and use of international tribunals at Nuremberg as precedent,¹⁶² and the composition of the IMTFE was much broader than its cousin in Europe. The IMTFE brought together representatives from a collection of the victors, the formerly vanquished, and the tortured.¹⁶³

158. Establishment of an International Military Tribunal for the Far East, SCAP Special Proclamation (Jan. 19, 1946) [hereinafter SCAP Special Proclamation], *reprinted in* OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 31-32.

159. *See infra* notes 245-59 & 288-311 and accompanying text.

160. IMTFE CHARTER, *supra* note 157, art. 1.

161. *See supra* note 58 and accompanying text.

162. OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 28-29.

a. Tribunal Composition

The Supreme Allied Commander selected the Tribunal's membership from a list of nominations presented by the signatories of the Instrument of Surrender with Japan along with nominations from India and the Philippines.¹⁶⁴ The Supreme Commander could convene a Tribunal consisting of between six and eleven members selected from the nominees presented.¹⁶⁵ The Supreme Commander also had the power to designate the President of the Tribunal.¹⁶⁶ The President had the power not only to resolve evenly divided disputes over matters of procedure and evidence, but also to break any tie concerning guilt or innocence.¹⁶⁷ General MacArthur appointed an Australian, Sir William Webb, to serve in this important position.¹⁶⁸

Unlike the IMT,¹⁶⁹ the IMTFE did not require the continuous representation of all countries at the Tribunal to constitute a quorum.¹⁷⁰ Six members were required for a quorum, and absence did not disqualify a member from further service on the case unless he disqualified himself "by reason of insufficient familiarity with the proceedings which took place in the case."¹⁷¹ Such absence, however, had less impact upon a Tribunal member than might normally be suspected. Specifically, the difficulties in translation among the various witnesses often made it necessary for Tribunal members to review translated transcripts after the fact along with volumes of other documentary evidence.¹⁷²

163. IMTFE CHARTER, *supra* note 157, art. 2. For example, the Japanese subjected the residents of the Philippines to torture and other inhumane treatment. Major Lawrence M. Greenberg, *The Hukbalahap Insurrection*, HISTORICAL ANALYSIS SERIES (1987), available at <http://www.army.mil/cmh-pg/books/coldwar/huk/ch2.htm>.

164. IMTFE CHARTER, *supra* note 157, art. 2. The Allied parties to the Instrument of Surrender were the United States, the Republic of China, the United Kingdom, Australia, the Soviet Union, Canada, France, the Netherlands, and New Zealand. See *Multilateral Surrender by Japan*, Sept. 2, 1945, 1945 U.S.T. LEXIS 205, 3 Bevens 1251.

165. IMTFE CHARTER, *supra* note 157, art. 2.

166. *Id.* art. 3(a).

167. *Id.* art. 4(b).

168. PICCIGALLO, *supra* note 142, at 11.

169. See *supra* note 69 and accompanying text.

170. IMTFE CHARTER, *supra* note 157, art. 4(a).

171. *Id.* art. 4(c).

172. PICCIGALLO, *supra* note 142, at 18.

b. Tribunal Procedure

The jurisdiction of the IMTFE was limited to three classes of criminalized activity: “Crimes against Peace,”¹⁷³ “Conventional War Crimes,”¹⁷⁴ and “Crimes against Humanity.”¹⁷⁵ Personal jurisdiction was limited to “major war criminals,”¹⁷⁶ and the court maintained concurrent jurisdiction with any other “international, national or occupation court”¹⁷⁷ Notwithstanding the concurrent jurisdiction of national courts, the overall policy of the Allies was coordinated and refined by the Far Eastern Commission (FEC).¹⁷⁸ In April 1946, the FEC promulgated a “Policy Decision” coordinating and authorizing the trials of war criminals before national courts in conjunction with the IMTFE.¹⁷⁹

The determination of which defendants would stand trial before the IMTFE was placed in the hands of the International Prosecution Staff (IPS).¹⁸⁰ The IPS, composed of prosecutors from all of the countries represented in the FEC, was also responsible for preparing the indictment against the accused. Each indictment lodged with the IMTFE by the Chief Prosecutor reflected a blend of the approaches of “eleven legal systems” with ultimate concurrence from each member nation’s representative on

173. Crimes against peace were defined as those involving the “planning, preparation, initiation or waging of a declared, or undeclared war of aggression, or a war in violation of international law, [or agreement].” IMTFE CHARTER, *supra* note 157, art. 5(a).

174. “War crimes” were simply defined as “violations of the laws or customs of war.” *Id.* art. 5(b).

175. “Crimes against humanity” focused on atrocities committed against civilian populations, to include “murder, extermination, enslavement, deportation, and other inhumane acts” such as “persecutions on political or racial grounds.” *Id.* art. 5(c).

176. *Id.* art. 1.

177. SCAP Special Proclamation, *supra* note 158, reprinted in OCCUPATION OF JAPAN—POLICY AND PROGRESS, *supra* note 29, at 31-32.

178. PICCIGALLO, *supra* note 142, at 34.

179. George Kennan, *Recommendations with Respect to U.S. Policy Toward Japan*, in 6 FOREIGN RELATIONS OF THE UNITED STATES 691-719 (1948), available at <http://www.geocities.com/Athens/Forum/2496/future/kennan/pps28.html>. Originally part of a top secret report to General MacArthur, Kennan was concerned that as the number of cases before these lesser tribunals increased, American defense counsel would attempt to vindicate their clients by defending the actions of the Japanese Government during World War II. Kennan noted that “[t]he spectacle of American” defense counsel in such trials had already “undermine[d] the whole effect of these trials” by causing the Japanese to question American convictions about war crimes. *Id.* Kennan argued that the trials of war criminals should “take place as an act of war, not of justice; and it should not be surrounded with the hocus-pocus of a judicial procedure that belies its real nature.” *Id.*

180. *Id.* at 13.

the IPS.¹⁸¹ This process further legitimized the work of the IMTFE because a prosecution could only progress upon a broad concurrence of prosecutors from numerous backgrounds about the status of the evidence and the theory of criminality.

Once subject to indictment before the IMTFE, Japanese accused were provided a wide variety of procedural protections consistent with those available to Western common law jurisdictions. These protections ensured: the accused would be made aware of the charges against him in an “indictment . . . consist[ing] of a plain, concise, and adequate statement of each offense charged;”¹⁸² “adequate time for defense;”¹⁸³ to have access to translated proceedings and documents as “needed and requested;”¹⁸⁴ the right to be represented by counsel of his own request;¹⁸⁵ the right to reasonable examination of any witness; and broad authority to request the production of witnesses and documentation.¹⁸⁶ The Tribunal embraced these protections, and great efforts were undertaken to ensure that the accused were given access to superior counsel and any favorable evidence that they might reasonably desire.¹⁸⁷

4. *Perceived Fairness of the IMTFE*

Scholars vary in opinion over whether the IMTFE provided a fair forum for those in the dock.¹⁸⁸ Those critical of the proceedings cite weak due process protections, vague or non-existent bases for non-retrospective criminality,¹⁸⁹ and even disingenuous motivations on the part of the Allies

181. *Id.* at 14 (citation omitted).

182. IMTFE CHARTER, *supra* note 157, art. 9(a).

183. *Id.*

184. *Id.* art. 9(b).

185. *Id.* art. 9(c). The Tribunal could disapprove the request for individual counsel, and also was required to appoint an attorney to represent the accused if requested. The court also had the right to appoint counsel for an unrepresented accused *ab initio* “if necessary to provide for a fair trial.” *Id.*

186. *Id.* art. 9(e).

187. *See* Kennan, *supra* note 179 (noting that the various war crimes trials conducted by the IMTFE and commissions had been hailed as the “ultimate in international justice” and had involved a “parade of thousands of witnesses”). The right to have access to witnesses and documents was provided in the language of the IMTFE Charter itself. The Charter provided that the defense could request in writing the “production of witnesses or of documents.” IMTFE CHARTER, *supra* note 157, art. 9(e). This request was to state where the requested person or material was thought to be and state the relevancy of the material requested. *Id.*

to legitimize their war against and destruction of Japan while using a court to “barely disguise[] revenge.”¹⁹⁰ These criticisms echo those leveled by critics of the IMT.¹⁹¹

One sobering criticism of the IMTFE stems from the lack of any direct evidence of official orders to commit mass atrocities. Though there is ample circumstantial evidence that the supreme leadership either should have known, or did in fact know, of the atrocities carried out in the field by their subordinates, no evidence existed that they directed atrocities.¹⁹² In fact, the Tribunal in its Judgment conceded this point by noting that with respect to the mass commission of conventional war crimes, they must have either been “secretly ordered or willfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.”¹⁹³ Such critics note that former Japanese Prime Minister Hirota Koki was sentenced to death for failing proactively to prevent the

188. Compare RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971) (highly critical of the undertaking), with TIM MAGA, *JUDGMENT AT TOKYO* (Univ. of Kentucky Press 2001) (noting the positive contribution that the IMTFE made to the foundations of international justice).

189. Crimes against the peace is the category that is most troublesome to many concerned about criminal law being applied *ex post facto*. See Onuma Yasuaki, *The Tokyo Trial: Between Law and Politics*, in *THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* 45 (C. Hosoya, N. Ando, Y. Onuma & R. Minear eds., 1986) [hereinafter *TOKYO WAR CRIMES TRIAL SYMPOSIUM*]. Yasuaki also criticizes the inability of the IMTFE to take jurisdiction over what he considers to be Allied atrocities such as the use of atomic weapons and the violation of the Neutrality Pact by the USSR. *Id.* Another criticism of Yasuaki that might be of greater merit is the failure to consider more representation on the IMTFE from countries that bore the immediate thrust of Japan's violence, such as Korea and Malaysia. *Id.* at 46. As discussed herein, see *infra* notes 386-90 and accompanying text, future post-conflict tribunals should consider such broad representation.

190. MINEAR, *supra* note 188, at 19. This author is somewhat bemusing; he does not like others having the post-conflict justice cake after Tokyo, but he personally likes the cake, appears to want the cake, and will eat it too. Notwithstanding his critique that Tokyo was “disguised revenge,” *id.*, he notes in other areas of his book the certain need to try folks such as Lieutenant Calley as “essential to American honor,” *id.* at x (preface), with no mention of justice and more than a tinge of revenge. He goes on to elaborate and intimate that he “favors strongly” prosecuting “at least two American presidents” for their role in committing war crimes in Vietnam. *Id.* at xi. As with so many of the moral relativists that spring from the “Vietnam Genre” of scholars, his argument against one matter is undercut by his desire to do the same thing in another context. It appears that the “fairness” of the concept to Minear depends somewhat upon whether Tojo or Richard Nixon is sitting in the dock.

191. See *supra* notes 106-13 and accompanying text.

192. 1 *THE TOKYO JUDGMENT* xv (B.V.A. Roling & C.F. Ruter eds., 1977).

193. *Id.* at 385 (judgment regarding atrocities).

Rape of Nanking, though whether his position gave him any real power to do so was a significant question.¹⁹⁴

Some critics commented that the quality of the jurists selected for service both as judges and prosecutors was substandard, especially when compared to those tapped for similar service before the IMT. The President of the IMTFE, Australian Sir William Webb, has been described by one former member of the Tribunal, B.V.A. Roling, as “unsure of his power” and “dictatorial” in his relations with both his colleagues on the bench and the counsel before him.¹⁹⁵ This stands in stark contrast with the perception of the English Presiding Judge at Nuremberg, Sir Geoffrey Lawrence, who came “to personify Justice” even in the eyes of the defendants.¹⁹⁶ Though Roling identifies such contrasts for the benefit of future endeavors, he notes that he did not believe that the degree of any perceived unfairness warranted his resignation from the Tribunal.¹⁹⁷

Notwithstanding this criticism, some scholars recognize the IMTFE as a positive, though flawed, exercise in post-conflict justice. The IMTFE operated in a considerably more difficult environment than did the IMT. The language barrier was much more pronounced, and as discussed above, the cultural gap was significant. Though imperfect in execution, the IMTFE is recognized as contributing to important developments in international law.¹⁹⁸

University of Vermont Professor Howard Ball cites the arguments made by Associate Justice Robert Jackson of the IMT to defend against the

194. B.V.A. Roling, *Introduction to TOKYO WAR CRIMES TRIAL SYMPOSIUM*, *supra* note 189, at 15, 17. Roling’s thoughts are significant in that he was a jurist who sat on the IMTFE who cast several unsuccessful votes for acquittal. MINEAR, *supra* note 188, at 89-91.

195. *Id.* at 16-17.

196. *Id.* at 17 (quoting Ann & John Tusa).

197. *Id.* at 19. Roling notes that he disagreed with several convictions and filed a dissenting opinion addressing his concerns. He went on to note that he voted for the acquittal of five of the accused, and that with the passage of time, new evidence suggests to him that at least one of his votes for acquittal was in error. *Id.*

198. *See infra* notes 200-05 and accompanying text. One key manifestation of the “cultural gap” was the view that the Japanese had traditionally taken toward judges. Japanese judges were woefully underpaid, poorly trained, and held in low regard by government officials. 1 POLITICAL REORIENTATION OF JAPAN 236-37 (1949). Consequently, Japan had a shortage of competent jurists for her lower courts. The Occupation Government took measures to ensure that Japanese judges would be properly compensated in the future. *Id.* at 236.

claim that the IMTFE was simply victor's justice.¹⁹⁹ In the words of Justice Jackson, one must ask "whether law is so laggardly as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance."²⁰⁰ Notwithstanding the shortcomings of the IMTFE, Professor Ball notes that the contribution that the Tribunal made to the development and acceptance of "the principle of individual responsibility" was significant.²⁰¹

A recent account of the work of the IMTFE by Bradley University History Professor Tim Maga provides a significant counter-balance to the critics of the IMTFE.²⁰² Professor Maga directly notes that "[s]tanding in contrast to the concerns of its many critics, the Tokyo tribunal's commitment to justice and fair play continued to its ending days."²⁰³ He argues that much of the criticism surrounding the IMTFE was directed at its Chief Prosecutor, Joseph Keenan, who was often alleged to have used the prosecution as a means to grandstand for higher political ends. Maga effectively argues that Keenan was instead effectively building a record to preserve for history the atrocities committed by the Japanese.²⁰⁴ Though Professor Maga recognizes that the trials "were flawed," he notes that the IMTFE's commitment to the "pursuit of justice" was "too quickly forgotten."²⁰⁵

The wide variance of opinion on the fairness of the IMTFE is much more extensive and overall more negative than the perceptions surrounding the IMT. The reasons for this are not clear, but there are lessons to be learned from the critiques. These include the recognition that significant language and cultural barriers may translate into perceptual problems for the court. Though not insurmountable, planners should take this factor into consideration because it might diminish the transparency of the court, and thus undercut its legitimacy. Further, as much of the criticism of the IMTFE seems somewhat related to those selected for service on the Tribu-

199. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 85 (Univ. of Kansas Press 1999). It is not clear if Professor Ball shares Justice Jackson's support for the Tribunals. *See id.*

200. Associate Justice Robert H. Jackson, *quoted in* BALL, *supra* note 199, at 86.

201. *Id.*

202. MAGA, *supra* note 188.

203. *Id.* at 120.

204. *See id.* at 121. Professor Maga argues that earlier writers also supported this position, noting that many of its critics were "more concerned with minutia and procedural matters than with offenses against humanity." *Id.*

205. *Id.* at 138.

nal and as prosecutors,²⁰⁶ great care should be taken in the selection of individuals to fill these positions.

5. *Role of the Court as Part of a Larger Reconstruction Plan*

More so than the IMT in Germany, the IMTFE introduced Japan to procedures and processes consistent with the rule of law. The Tribunals were conducted in an environment in which Supreme Allied Commander Douglas MacArthur sought to inculcate the values of an open judicial system, even when recourse to the courts by the Japanese might result in the frustration of a particular policy of the occupation.²⁰⁷

The undertaking in Japan required a complete reorientation of society and touched a myriad of activities of the civilian population, often using the official organs of government to the extent possible. On 3 November 1946, the Japanese Diet under the seal of Emperor Hirohito brought to force a radical new Constitution that ensured fundamental human rights to the population.²⁰⁸ This document also established an independent judiciary,²⁰⁹ and espoused a radical notion that sovereignty was now vested with and flowing from “the will of the people.”²¹⁰

6. *Were the Stated Goals Accomplished?*

The IMTFE achieved a primary goal of a justice system by fairly punishing the wrongdoer. But the public display of trials of the principal Japanese war criminals served higher societal ends for the Japanese as well. In addition to punishment of the wrongdoer, the IMTFE also educated the Japanese people about the deeds of their government, while providing a glimpse into a judicial system governed more by process and facts than desired outcome. Broader goals such as encouraging democratization and respect for human rights cannot be developed in a judicial vacuum. An independent judiciary is crucial for any lasting respect for such rights and

206. *See, e.g.,* Roling, *supra* note 194, at 16-17. The President of the Tribunal, Australian Sir William Webb, was held in low regard by even his fellow jurists who regarded him as “dictatorial.” *Id.*

207. Whitney, *supra* note 143, at xx-xxi.

208. JAPAN CONST. ch. III, art. 10 (Nov. 3, 1946).

209. *Id.* ch. IV.

210. *Id.* ch. I, art. 1.

the rule of law. Imperfect though it may have been, the IMTFE was the spark for a new Japanese legal order that has grown and endures today.

In addition to the contributions the Tribunal made to the reestablishment of law, it was also part of a greater “political reorientation” of Japan that laid the foundation for a brighter future for Japan and her neighbors. The IMTFE was part of a comprehensive plan that brought justice and accountability to Japan, while developing democracy, encouraging respect for individual rights, and complementing the restoration of peace. A tremendous lesson learned from the work of the IMTFE is that a court of international justice can be a significant catalyst for justice and change. Japan was not only given the opportunity to have a judiciary constituted for it on paper in her Constitution, but was given a glimpse into a system governed by reason and process, not passion.

IV. The Use of National Military Commissions for the Prosecution of War Criminals

In addition to the International Military Tribunals, national military commissions have also been successful forums for the prosecution of war criminals. These military commissions played a significant role in the overall justice system as it related to war criminals during World War II.²¹¹ Similar to the International Tribunals, the national commissions met the ends of justice while also demonstrating the rule of law in action to the affected populations. By doing so, these courts served critical international objectives, such as the restoration of peace and a contribution to the reconciliation of the belligerents. The application of the rule of law furthers reconciliation because it helps to maximize the legitimacy and transparency of the process, while providing a forum for the prosecution of the instigators of unlawful war.

Trials conducted in the theater of operations by military commissions can meet similar national objectives. After World War II, the American,

211. BALL, *supra* note 199, at 56-57. The fundamental difference between an International Tribunal and a national military commission is that one is a creature of a multilateral international charter and the other is a creature of domestic law. Military commissions are courts of necessity that can meet the needs of justice in a variety of circumstances, to include meting out punishment to war criminals and serious crimes committed by POWs (subject to key limitations imposed under international law), and can also fill the role of occupation courts. *Id.* This article focuses on the use of military commissions for the punishment of war criminals.

British, Canadian, and Australian Courts, among others, successfully mounted prosecutions against war criminals before their own military commissions. As with International Military Tribunals, the exercise of this jurisdiction brings controversy. Where International Tribunals sought to bring major war criminals to justice and were integrated into a broader plan with goals such as democratization and the establishment of the rule of law, national commissions focused their wrath and that of their populations upon lesser actors who often had committed a crime against one of the nationals of the prosecuting jurisdiction. The goals of these venues are more narrow, and in the words of a Canadian legal scholar, illustrate that “there are restraints on warfare” and that “military excesses are morally unjustified and should be punished.”²¹²

The ability of these courts to provide a pressure valve for the civilian populations of the victors angered by war crimes committed against their soldiers does not necessarily reduce their effectiveness in facilitating the reconciliation of the former belligerents. To the contrary, when carefully constructed and properly executed, they can further the restoration of peace by fixing accountability on the wrongdoers, thus minimizing the depth of continued animosity directed toward the broader population. Wrath becomes focused on the perpetrators of the crime, thus reducing a more generalized anger toward the population of the former enemy at large.

These national military commissions also served important roles in the post-conflict environment by providing a forum to prosecute and punish war criminals whose conduct fell below the jurisdiction of the IMT and the IMTFE. This aspect of the use of military commissions serves an important function beyond those discussed above. Specifically, it extends the reach of justice far beyond the capabilities of a single international military tribunal. Thus, the International Tribunals were able to focus on their prosecution of the major war criminals while relying on a responsive forum for the prosecution of lesser bad actors. As such, the past practice in the use of these forums provides critical insight into the successful development of a tailored system of post-conflict justice.

This section focuses on the use of military commissions by the United States and Great Britain after World War II to meet these goals. Examples of cases reflective of the breadth of the subject matter that these forums

212. PATRICK BRODE, CASUAL SLAUGHTERS AND ACCIDENTAL JUDGMENTS: CANADIAN WAR CRIMES PROSECUTIONS, 1944-1948, at xv (1997).

undertook and the procedures that guided their work are evaluated, focusing upon whether their use met the ends of justice. Finally, this section evaluates whether the procedures developed were just in design and execution, along with lessons learned from their triumphs and shortcomings.

A. Effectiveness of U.S. Military Commissions for the Prosecution of War Criminals

The post-World War II prosecution of war criminals before United States military commissions was and remains controversial.²¹³ These commissions were convened under the authority of Allied Control Council Law No. 10²¹⁴ in the American sector of occupied Germany, and under regulations promulgated under the direction of Supreme Commander MacArthur in the Pacific theater.²¹⁵ Though similar in significant procedural aspects, their planning and execution reflect marked differences. These differences have led to a greater degree of criticism of the work of the commissions in the Pacific than upon those conducted in Germany.²¹⁶ The lessons learned by the United States in both theaters after World War

213. One of the most controversial of these cases was *Ex parte Quirin*, 317 U.S. 1 (1942) (involving the prosecution of Nazi saboteurs captured on United States soil by agents of the Federal Bureau of Investigation). Though *Quirin* is controversial, this article primarily covers war crimes trials that occurred outside of the United States because the focus of this article is on the development of a post-conflict system of justice within a defeated nation after the cessation of active hostilities.

214. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10 (Dec. 20, 1945) [hereinafter Control Council Law No. 10], reprinted in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 xviii (1952). The Control Council was an international organization composed of representatives of the Allied powers. Control Council Law No. 10 was designed to “give effect to the terms of the Moscow Declaration . . . and . . . to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.” *Id.*

215. RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 59-61 (1982). General MacArthur expected to receive guidance from his superiors on the procedures to conduct war crimes trials. Apparently preoccupied with developments in Germany, Washington failed to develop a coherent strategy for handling war criminals in the Far East that fell below the jurisdiction of the IMTFE. Ultimately, rather than develop regulations in Washington, MacArthur’s superiors directed him to develop the regulations locally. *Id.*

216. See *infra* notes 256-59 and accompanying text.

II, however, can provide a guide to improve the legitimacy of commissions to the world today and in the future.²¹⁷

1. United States Commissions in Germany

United States military commissions in the American Sector of Germany were authorized by Control Council Law No. 10,²¹⁸ but their procedures were governed by local military ordinance.²¹⁹ Though these courts were military commissions, they were officially known as “Military Tribunals.”²²⁰ And though these were national courts as evidenced by the way in which the cases were styled,²²¹ judge advocates at the time argued that they had an international character. Most notably, Colonel Edward Ham Young stated that “[t]he Nuernberg trials [conducted by the United States] were international in character. The Tribunals were not bound by technical rules of evidence as recognized by any jurisdiction of the United States of America”²²²

These military commissions in theory were not an extension or refinement of American court-martial practice as developed under the Articles of War, but an entirely self-contained set of procedural and evidentiary rules divorced entirely from any *controlling* body of American law apart from the rules developed by American lawyers under the auspices of Control Council Law No. 10.²²³ In practice, however, they were products of an Anglo-American system of justice in which large quantities of evidence

217. For a discussion of lessons learned from the American and British experience with military commissions after World War II, see *infra* notes 219-59 and accompanying text.

218. See Control Council Law No. 10, *supra* note 214.

219. Organization and Powers of Certain Military Tribunals, Military Government-Germany, United States Zone, Ordinance No. 7 (Oct. 18, 1946), reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at xxi (1949).

220. *Id.* art. II.

221. Courts convened under the authority of this ordinance were styled United States v. the pertinent defendant.

222. Colonel Edward H. Young, *Rules and Practice Concerning Various Types of Evidence*, in 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (PRACTICE AND PROCEDURE) 627, 627 (Colonel Edward H. Young ed., 1949).

223. This stands in stark contrast to the approach taken by the British, who conceived their commissions as an outgrowth of their military court-martial jurisprudence tailored to meet the exigencies of post-war prosecutions. See *infra* notes 260-67 and accompanying text.

were gathered to meet high standards of proof, but in an atmosphere of relaxed evidentiary standards. Many Germans were tried, many were acquitted, and some were hanged.²²⁴ But despite the pronouncement that the military commissions in Germany were outside the control of “any jurisdiction of the United States,”²²⁵ in practice the cases before these commissions were similar to courts-martial, with relaxed rules of evidence, but a strong commitment to procedural fairness and the establishment of proof beyond a reasonable doubt before conviction.

The case of *United States v. Brandt*²²⁶ provides a good example. The *Brandt* case, known collectively as *The Medical Cases*, involved the trial of important personnel within the Nazi medical establishment. This community was led by Professor Doctor Karl Brandt, who held the rank of Lieutenant General in the Waffen SS.²²⁷ He was also appointed “General Commissioner for Medical and Health matters” with the “highest Reich authority.”²²⁸ *The Medical Cases* involved the investigation and trial of Nazi physicians who had been tasked to conduct a wide range of medical experiments on human subjects. The experiments at the center of the trial can be broadly classed as follows: the sulfanilamide experiments;²²⁹ freezing; malaria; bone, muscle, and nerve regeneration; bone transplantation; sea water drinking; sterilization; typhus;²³⁰ jaundice vaccine experimentation; mustard gas protection medication experiments;²³¹ and medical euthanasia.²³²

The greatest criticism of the conduct of the American military commissions in Germany is similar to that often leveled against the IMT—the heavy reliance on the use of documentary evidence. In *The Medical Cases*,

224. BALL, *supra* note 199, at 56-57. For an exhaustive study of the use of documentary evidence at Nuremberg and a case by case list of convictions, acquittals, and punishments adjudged to include executions, see John Mendelsohn, TRIAL BY DOCUMENT: THE USE OF SEIZED RECORDS IN THE UNITED STATES PROCEEDINGS AT NUERNBERG (Garland 1988).

225. Young, *supra* note 222, at 627.

226. 1-2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1 (1947) [hereinafter *The Medical Cases*].

227. *Id.* at 190.

228. Decree of Adolf Hitler, Appointment of Dr. Karl Brandt (Aug. 25, 1944), *cited in* *The Medical Cases*, *supra* note 226, at 191.

229. These experiments involved injecting infection into test subjects to test the effectiveness of sulfanilamide drugs. At least three subjects died. *Id.* at 193 (1947) (findings of the court).

230. *Id.* at 195.

231. *Id.* at 194.

232. *Id.* at 196.

the prosecution introduced 570 exhibits, with the defense taking advantage of the relaxed rules to submit 904 of their own.²³³ The criticism cuts both ways, however. The prosecution may be able to introduce a large quantity of documents in support of the case, but the defense could also benefit because they generally will be in a better position to identify the location of documents and other material that may tend to exculpate them, while maintaining no duty to identify the location of inculpatory evidence for the prosecutors.

The cases before the United States commissions were also well defended in both their factual development and legal argument. Unlike the experience of defendants before most other commissions, those before the United States Tribunal at Nuernberg²³⁴ were individually represented in most cases by experienced German attorneys.²³⁵ The defense counsel before the Court were paramount in counterbalancing what may have become a show trial in light of the relaxed evidentiary standards. The defense counsel before these courts, however, were successful in sparing many clients from death, mitigating the punishment for others, and obtaining acquittals for a substantial number.²³⁶ Thus, while clearly helping their clients, they also served the important societal end of ensuring the legitimate execution of justice.

The defense also had success in shaping the legal battlefield. Defense counsel challenged the entire legal underpinning of the court's procedures and jurisdiction on various theories based on German and international law. For example, the defense representing Dr. Karl Brandt argued that the affidavits used against his client should be inadmissible to the extent that they were obtained from interrogations conducted by someone other than

233. MENDELSON, *supra* note 224, at 208.

234. Throughout this section various spellings of Nuremberg will appear in source materials and the text. This reflects the variations in spelling for this German city adopted by different scholars since World War II.

235. MENDELSON, *supra* note 224, at 194. For example, in one case more than ninety defense counsel were involved in the defense of twenty-one defendants with several other "Special Counsel" available for the accused. The sole non-German attorney was from the United States. *Id.* at 194-99.

236. BALL, *supra* note 199, at 56-57. In *The Medical Cases*, twenty-three defendants were in the dock. Of these, seven were sentenced to death, with a like number of acquittals. The remaining nine were sentenced to periods ranging from ten years to life. This was typical of the cases before the Court, with many cases resulting in no sentences of death and many acquittals. See MENDELSON, *supra* note 224, at 175-90 (providing an excellent statistical analysis of the results of the trials before this United States commission).

a Judge.²³⁷ He made similar mixed arguments based on restrictions arising from German law that had not been properly interfaced with the Control Council regulation,²³⁸ and argued that international law could not pierce what the state said should be done to its own citizens as part of medical experimentation for the greater good.²³⁹ The arguments were tightly reasoned and well constructed.²⁴⁰

Brandt's defense, however, is in some respect a tribute to the overall quality of the evidence presented. He put up a vigorous defense on the merits to many of the charges he was facing and was ultimately acquitted of many. The commission found that the evidence did "not show beyond a reasonable doubt" that he had the requisite criminal knowledge of some of the medical experiments being conducted in medical commands under his authority. Though he was acquitted of these charges, the commission found that "he certainly knew that medical experiments were carried out . . . [that] caused suffering, injury, and death."²⁴¹

Brandt, however, was convicted of numerous other charges, including some in which high level correspondence indicated that he had participated in activities that he denied.²⁴² Much of the defense, however, did not involve a denial of the underlying facts, which appeared to be accepted in the face of overwhelming evidence. This was the case with respect to Brandt's role in Germany's euthanasia program. His defense was simply that his conduct reflected bad political morals, not a crime, and perhaps that his conduct was in fact noble.²⁴³ The Court was not so moved, and returned a finding of guilty for a variety of offenses and a sentence of death.²⁴⁴

237. The Medical Cases, *supra* note 226, at 123-24 (argument of defense counsel Dr. Servatius).

238. *Id.* at 124.

239. *Id.* at 127-29.

240. Of course, as with all criminal cases, client control can become an issue. One would like to think this was the case when Dr. Poppendick gave his final statement. He stated that he joined the SS not because he wanted to do evil, but because he was an "idealist." *Id.* at 155. Poppendick thought his work at the "Main Race and Settlement Office" as positive work for the family. *Id.* His comments seem to reflect the series of events that brought ultimate destruction to Germany.

241. *Id.* at 195 (judgment of the court).

242. *See, e.g., id.* at 194 (findings related to the jaundice experiments in which the Court relied on letters penned by Brandt requesting prisoners for experimentation).

243. *Id.* at 134.

2. *United States Commissions in the Pacific*

As discussed above, General MacArthur's legal staff was left to its own devices to develop the regulations to govern the prosecution of war criminals before military commissions in the Far East. This undertaking, though done in haste, was carried out in a professional manner, with his Judge Advocates studying and borrowing from an eclectic body of law. These sources of law included British Regulations that governed war crimes prosecutions,²⁴⁵ the *Quirin* decision, and various Army regulations and field manuals.²⁴⁶

Consistent with the approach adopted by the International Military Tribunals and other United States and Allied commissions, the most striking deviation from traditional military practice of the day was in the evidentiary standards.²⁴⁷ The commission was directed to "admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of the reasonable man."²⁴⁸ From this general guidance, the applicable rules of evidence permitted the court to consider official documents,²⁴⁹ documents from the International Red Cross,²⁵⁰ "affidavits, depositions, or other statements" taken by proper military authority,²⁵¹ and

244. *Id.* at 189-98. *The Medical Cases* could play out again in modern times. Evidence exists to suggest that Iraq conducted experiments on prisoners to further their biological weapons program. Over 1600 prisoners participated in these experiments that resulted in the mass death of the prisoners. *Presentation of Secretary of State Colin Powell to the United Nations Security Council* (CNBC television broadcast, Feb. 5, 2003).

245. *See infra* notes 260-67 and accompanying text.

246. *See Ex parte Quirin*, 317 U.S. 1 (1942); LAEL, *supra* note 215, at 66.

247. For example, a study of legal issues reviewed arising from courts-martial during World War II reveals that while the procedures were similar, courts-martial were guided by traditional notions of evidence typical of common law jurisdictions. Legal issues identified in a series of rape cases are similar to those encountered today such as the use of prior inconsistent statements, multiplicity, character evidence, and hearsay. *See 2 DIGEST OF OPINIONS OF THE EUROPEAN THEATER OF OPERATIONS* 439-60 (1945).

248. *In re Yamashita*, 66 S. Ct. 340, 363 n.9 (1946) (Rutledge, J., dissenting) (citing section 16 of the Rules of Procedure).

249. *Id.* (quoting Rules of Procedure sec. 16(a)(1)).

250. *Id.* (quoting Rules of Procedure sec. 16(a)(2)).

251. *Id.* (quoting Rules of Procedure sec. 16(a)(3)).

diaries or any other document “appearing to the commission to contain information related to the charge.”²⁵²

As with Great Britain,²⁵³ the United States in the Pacific selected a case with import to an American possession—the Philippines—as the first case tried before military commission. The case of General Yamashita, immortalized before the United States Supreme Court in *In re Yamashita*,²⁵⁴ involved the prosecution of the commander of Japanese forces in the Philippines for war crimes. His highly criticized prosecution was based in part upon a theory of command responsibility in that he knew or should have known of the atrocities committed by soldiers under his command because of the scope of his troop’s activity.²⁵⁵

Though the underlying strength of the Supreme Court’s ruling that served to legitimize the prosecution’s efforts is beyond the scope of this article, the case is helpful in evaluating the conduct of the case by the commission itself. A close review of the matter reveals that the legitimacy of the outcome of the case is damaged less from the procedures ratified than from the method of execution. Specifically, the case was moved forward at a rapid pace, and efforts by the defense to challenge the evidence presented by the government were greatly restricted by the court.

By any standard, the trial of General Yamashita moved briskly. General Yamashita surrendered to Allied custody on 3 September 1945, and was served with war crimes charges on September 25. Thirteen days later he was arraigned, at which time he entered a plea of not guilty. After unsuccessful attempts to obtain delays, the case began in earnest on 29 October 1945, and continued until findings were announced on Pearl Harbor Day—7 December 1945. On that day, the Court returned a guilty finding and sentenced General Yamashita to death by hanging.²⁵⁶

The trial of General Yamashita highlights the potential frailty of any system of justice when the court fails to follow the spirit of the law in practice. As noted above, the problem with the trial of General Yamashita was less about weaknesses in the procedures than in their execution.²⁵⁷ When viewed with the benefit of history, *In re Yamashita* appears more about a

252. *Id.* (quoting Rules of Procedure sec. 16(a)(4)).

253. *See infra* note 295 and accompanying text.

254. 66 S. Ct. 340 (1946).

255. For a good discussion of the *Yamashita* case from the perspective of the defense, see Lael, *supra* note 215.

256. *In re Yamashita*, 66 S. Ct. at 343.

race to conclude a case before Pearl Harbor Day than a model for jurists seeking to oversee commissions.

Unfortunately, though many commissions followed that of General Yamashita, it became the symbol of American justice in the Pacific to the outside world.²⁵⁸ Thus, while the prosecution was upheld by the Supreme Court, it has fared less well over time in the minds of the public. This experience, coupled with those of the American commissions in Germany and the British experience discussed below, provide valuable insights into the future development and use of these forums.²⁵⁹

B. British Prosecutions Before Military Commissions

The British actively prosecuted war criminals—both military and civilian—before military commissions in Europe and the Asian-Pacific theater. The procedures that governed the conduct of war crimes trials were based heavily on their system of courts-martial. The regulations prescribing the conduct of a British court-martial were incorporated into the procedures for use in the trial of war criminals “[e]xcept in so far as herein otherwise provided expressly or by implication.”²⁶⁰ The greatest variance from the procedures employed for the trial of British soldiers came in the area of admissibility of evidence.

As with the procedures employed by the IMT and IMTFE, the British war crimes regulation relaxed evidentiary standards in the face of post-conflict realities. These relaxed rules permitted the admission of statements “made by or attributable” to someone dead or otherwise “unable to attend or give evidence.”²⁶¹ Likewise, official Allied and Axis government documents “signed or issued officially” were deemed self-authenticating without further proof,²⁶² as were reports made by a wide variety of nongovernmental actors, to include medical doctors and members of the International Red Cross.²⁶³ Other evidence deemed of sufficient quality

257. The procedures developed for use by American commissions were based in part upon the British regulations used successfully in both theaters of operation. *See supra* text accompanying notes 245-46 & note 246.

258. *See, e.g.,* LAEL, *supra* note 215, at 137-42.

259. *See infra* notes 260-72 and accompanying text.

260. Regulations for the Trial of War Criminals (United Kingdom), art. 3, June 18, 1945, *available at* <http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm>.

261. *Id.* art. 8(i)(a).

262. *Id.* art. 8(i)(b).

for a relaxed admission standard included transcripts from any other military court,²⁶⁴ and contents extracted from “any diary, letter or other document appearing to contain information relating to the charge.”²⁶⁵ Finally, if any documents had been seen by a witness but were subsequently lost, the commission could entertain testimony concerning the contents of any admissible original document that was otherwise unavailable.²⁶⁶

These relaxed evidentiary standards broadly expanded the ability of the court to receive evidence that would have otherwise been inadmissible under British rules. The regulations explicitly acknowledged this and cautioned the court of its “duty . . . to judge the weight to be attached to any evidence given in pursuance of this Regulation that would not otherwise be admissible.”²⁶⁷ Notwithstanding these relaxed rules, a review of the British commissions’ results reveals that they discharged their duties with due regard to process and the rights of accused brought before them.

The commissions were not show trials with seemingly predetermined results. To the contrary, the verdicts handed down by the British commissions reflect the willingness to apply high standards of proof in an environment characterized by relaxed standards of evidence. Accordingly, the courts served several often-competing interests in post-conflict justice. The British commissions fixed responsibility upon the wrongdoer, contributed to the reestablishment of the rule of law while de-legitimizing the horrendous conduct of the actors, and ultimately provided accountability necessary to transition from war to peace.

The trials of war criminals before British commissions concerned themselves in many cases with conduct that by international standards of then and now were *malum in se*.²⁶⁸ As one commentator noted with respect to one historic British commission: “the trial did not represent any drastic innovation [in international law],” but the perceived “novelty” of the trial was more a result of “extraordinary and unprecedented character

263. *Id.* art. 8(i)(c).

264. *Id.* art. 8(i)(d).

265. *Id.* art. 8(i)(e).

266. *Id.* art. 8(i)(f).

267. *Id.* art. 8(i).

268. “A crime or act that is inherently immoral, such as murder, arson, or rape.” BLACK’S LAW DICTIONARY 971 (7th ed. 1999).

of the offenses resulting from the conduct of war by the military and political leaders of National-Socialist Germany.”²⁶⁹

The crimes—murder, torture, kidnapping—were well-known in the individual and collective laws of nations, but they were conducted on a scale that seemed to transform them into a new type of conduct beyond the pale of the law. The British approach, as with others adopted nationally and internationally, forged new expansive procedures to capture and punish the wrongdoing of others committed as part of an internationalized criminal movement of unprecedented scale. In essence, they were cases of common, albeit serious, crimes perpetuated on a horrific scale.

An understanding of the British approach can be developed through looking at three cases with well-developed records from two different theaters of operations. From Europe, the case by the British against Heinrich Gerike and others, known as the *Velpke Baby Home Trial*,²⁷⁰ and from Asia, the trial of *Gozawa Sadaichi and Nine Others*²⁷¹ and the so-called *Double Tenth Trial*,²⁷² are instructive on the British approach to the trial of war criminals before national commissions.

1. British Commissions in Germany

The *Velpke Baby Home Trial* is interesting for two distinct reasons. First, the trial was principally concerned with civilian responsibility for war crimes committed on behalf of the state. Second, the case was an early attempt to define the nature and scope of universal jurisdiction since it included criminal conduct that extended beyond the borders of Germany proper.²⁷³ Though the trial was held in Brunswick, Germany, by the Brit-

269. H. Lauterpacht, *Foreword to 7 WAR CRIMES TRIALS SERIES* xiii (George Brand ed., London, William Hodge & Co. Ltd. 1950) (commenting on the *Velpke Baby Home Trial*).

270. *The King v. Heinrich Gerike*, 7 TRIAL OF WAR CRIMINALS 1 (1946) [hereinafter *Velpke Baby Home Trial*].

271. *The King v. Gozawa Sadaichi and Nine Others*, 3 TRIAL OF WAR CRIMINALS 1 (1946).

272. *In re Lt. Col. Sumida Haruzo and Twenty Others*, reported in THE DOUBLE TENTH TRIAL: WAR CRIMES COURT (Bashir A. Mallal ed., The Malayan Law Journal Office 1947).

273. Lauterpacht, *supra* note 269, at xiii. Professor Lauterpacht defines “universality of jurisdiction” as “jurisdiction independent of the locality of the crime or of the nationality of the offender or victims.” *Id.*

ish, it involved crimes committed in part in Poland while occupied by Germany.²⁷⁴

The *Velpke Baby Home Trial* developed out of a German operation in occupied Poland in 1944 and was related to the use of female Polish slave laborers in the German agricultural sector in Germany. The recipients of the slave laborers—German farmers charged with the difficult task of supporting the agricultural needs of the German war machine—began to complain that their Polish slaves were prone to pregnancy, and thus were “substantially interfering with the agricultural work output for the German war effort.”²⁷⁵ In response to these complaints, the NSDAP²⁷⁶ directed that Eastern slave women were prohibited from marriage or procreation, and that any offspring of such women were “rendered illegitimate by German law.”²⁷⁷ These children were then forcibly taken from their mothers and placed in the custody of a children’s home. The mothers were then returned to the fields, and the babies were sent to what became known as the “Velpke barracks.”²⁷⁸

The baby home proved woefully inadequate for the care of the children, with poor staffing and medical treatment. As a result, during an eight-month period ending in December 1944, ninety-six of 110 children sent to the home died of neglect and maltreatment.²⁷⁹ Upon death, the bodies of the children were secreted away and buried in unmarked graves. The prosecution contended that the mass neglect of these children demonstrated that “these children were never meant to live,” and as a result, were subjected to “willful neglect” calculated to result in their death.²⁸⁰

Though this commission focused on the individual criminal conduct of civilians, the case proceeded as a violation of the laws of war, not as a violation of domestic law. The indictment of the various defendants hinged upon a violation of international law in that their conduct was contrary to the Hague Rules of 1907, which prohibited, *inter alia*, inhumane

274. *Id.*

275. *Velpke Baby Home Trial*, *supra* note 270, at 3 (opening speech for the prosecution).

276. *Id.* at 4. The NSDAP is the German acronym for is the National German Socialist Workers’ Party.

277. *Id.*

278. *Id.* at 5.

279. *Id.* at 6.

280. *Id.* at 7. The prosecution noted that “medical attention” was generally limited to the “sign[ing] of death certificates.” *Id.*

treatment of populations living under occupation and crimes against the “family rights and private property rights of civilians in occupied countries.”²⁸¹ The prosecution also supported its indictment by arguing that customary international law forbade the deportation of slave labor or the intentional killing of innocent civilians.²⁸²

Thus, the indictment alleged that the defendants were “charged with committing a war crime . . . [by the] killing by willful neglect of a number of children, Polish nationals.”²⁸³ The indictment alleged violations against eight individuals that represented the planners, operators, and medical personnel of the home.²⁸⁴ Half were acquitted, with the others convicted and sentenced to punishments ranging from ten years to two sentences of death.²⁸⁵

While the *Velpke Baby Home Trial* represents the use of military commissions to try civilians for committing war crimes against non-nationals, the case against *Gozawa Sadaichi and Nine Others*²⁸⁶ demonstrates the use of such forum to bring accountability upon soldiers who abuse prisoners of war (POW) subject to their control. Though the *Gozawa* trial stems from activity within the Asian theater of operations, the regulations that governed its execution were the same as those used in Europe.²⁸⁷

2. *British Commissions in the Pacific*

The trial of war criminals by the British in Asia were subject to two significant local policies that restricted their use. First, no trial was to be pursued unless there was “irrefutable” proof of guilt and identity.²⁸⁸ The British command in Southeast Asia deemed this restriction critical to prevent the “diminish[ment] of our prestige [by] appear[ing] to be instigating vindictive trials against enemies of a beaten enemy nation”²⁸⁹ Second,

281. *Id.* at 8 (citing Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, arts. 45-46, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539).

282. *Id.* This concept of slave labor in violation of international law appears throughout the practice of the international tribunals and national commissions. *See, e.g.*, IMTFE CHARTER, *supra* note 157, art. 5(c) (prohibiting the “enslavement” of civilian populations).

283. *Velpke Baby Home Trial*, *supra* note 270, at 3 (citing the arraignment).

284. *Id.*

285. *Id.* at 342-43 (citing from the announcements of sentences).

286. *The King v. Gozawa Sadaichi and Nine Others*, 3 TRIAL OF WAR CRIMINALS 1 (1946).

287. *See supra* notes 260-67 and accompanying text.

to further minimize the appearance of opportunistic prosecutions, trials were only authorized when upon reflection it appeared that “a sentence of seven years or more was likely to be inflicted”²⁹⁰ Those whose cases upon evaluation appeared to warrant less punishment were released.²⁹¹ Further, the *Gozawa* case illustrates the extent to which the court and its scholarly contemporaries used the procedural backdrop of British law to fill the gaps left in the regulation governing the trial of war criminals.²⁹²

Gozawa Sadaichi was a company commander in charge of Indian prisoners of war and was responsible for their care and administration in a movement that began in Singapore and ended with their arrival and incarceration at Babelthuap.²⁹³ Upon arrival at Babelthuap, Captain Gozawa became responsible for the Indian prisoners interned in the island’s prisoner of war camp, to include establishing the methods of POW camp regulation and discipline. The regulations and their implementation were the focus of the *Gozawa* trial because they resulted in numerous deaths of Indian POWs as a result of malnutrition, torture, and execution.²⁹⁴

Cases such as these were unfortunately all too common, yet the *Gozawa* trial assumed significance in the history of international justice. The *Gozawa* trial was the first commission tried by the British in Asia.

288. Rear-Admiral the Rt. Hon. Earl Mountbatten of Burma, *Foreword* to 3 WAR CRIMES TRIALS SERIES, *supra* note 269, at xiii (commenting on the command philosophy with respect to the trial of war criminals before British military commissions). Notwithstanding the requirement of “irrefutable” proof as a prerequisite to the initiation of charges, commissions had no problem finding the lack of such proof on findings with respect to both guilt and identity. This reflected a great sensitivity to the perception of the commission in the eyes of the local population and the broader international community. Though the evidentiary standards of admissibility were greatly relaxed, cases such as the *Gozawa* trial indicate that these relaxed standards did not translate into a relaxed burden of proof. *See infra* notes 296-304 and accompanying text.

289. Mountbatten, *supra* note 288, at xiii-xiv.

290. *Id.* at xiv.

291. *Id.*

292. *See supra* notes 260-67 and accompanying text.

293. The period covered by this commission was from May 1943, when the transport of the POWs began, until September 1945, when the camp was liberated by the United States armed forces. *See Introduction* to 3 WAR CRIMES TRIALS SERIES, *supra* note 269, at xxxii.

294. *The King v. Gozawa Sadaichi and Nine Others*, 3 TRIAL OF WAR CRIMINALS 1, 203-05 (1946).

History provides an unsigned explanation in the introduction to the official report of why the British pursued this case first:

The real reason must be sought far from the crowded atmosphere of Singapore and indeed, far from the scene of Malaya itself. At the end of 1945 there were being conducted in far-away India, a number of trials of leaders of the Indian National Army, that force which had been encouraged and assisted by the Japanese to fight against British arms during the period of Japanese occupation. These trials were attended by demonstrations of disorder in a greater or less degree, and became enshrouded with that atmosphere of political significance which it seems to be inseparable, in India, from any trial of public interest. It was thought, therefore, that this was an excellent moment to launch upon the world a trial in which Indians were the victims, and to demonstrate once more the absolute equality before the law of the rights of all Imperial subjects, irrespective of nationality, race or colour.²⁹⁵

Thus the palpable interest of the British in pursuing the trial of Gozawa was of a domestic nature. It reflected the desire of the British government to both punish those who had committed law of war violations against their forces, while also seeking to satisfy domestic ends with their Indian subjects. But while this commission was convened in part to meet domestic political aims, it was not a show trial. Notwithstanding the local guidance that such trials could only go forward upon the existence of irrefutable proof,²⁹⁶ the commission found the failure of such proof with respect to one of the defendants and acquitted him.²⁹⁷

The evidence used to convict the remaining defendants appears to have met the local pretrial standard of irrefutable proof. In face of such proof, the main thrust of the defense was not based upon disputing the facts, but the legal basis of the procedure in question as well as other affirmative defenses.²⁹⁸ These defenses included arguments that it was impossible to better care for the Indian POWs under the circumstances,²⁹⁹ that the actors were obeying orders,³⁰⁰ that the Japanese were not bound to

295. *Introduction to 3 WAR CRIMES TRIALS SERIES*, *supra* note 269, at xlii.

296. *See supra* notes 288-91.

297. *The King v. Gozawa Sadaichi and Nine Others*, 3 TRIAL OF WAR CRIMINALS 1, 227 (1946). The court was not particularly impressed with Sergeant Major Ono Tadasu, whom they described as possessing a mind "steeped with blind and brutish obedience." *Id.* Yet the court informed him that the allegations had not "been proved to the necessity according to British Law." *Id.*

respect POWs because Japan was not a signatory to the International Convention Relative to the Treatment of Prisoners of War, 1929,³⁰¹ or in the alternative, that the Indians were not POWs.³⁰² The defense also argued that the court should use its power to consider the appropriate weight to give to the sworn affidavits submitted under the circumstances.³⁰³

The approach forged by the defense coupled with many key concessions, such as “the fact that Nakamura executed Shafi there can, of course, be no doubt . . . he has admitted it himself,”³⁰⁴ reflects the desire of the prosecution to bring only cases of irrefutable proof. But if the command made a misstep and moved a case forward without solid proof, the British commissions responded accordingly. Such cases reveal the willingness of the commissions to acquit when the court found that the prosecutors had failed to prove that particular defendants had committed “any particular act of ill-treatment against anybody.”³⁰⁵

Such was the case in the *Double Tenth Trial*, in which the court acquitted several of the co-accused for reasons of severe to slight failures of proof.³⁰⁶ The *Double Tenth Trial* was so named because it stemmed in

298. One significant exception to this observation is that the defense did make an argument that the charge of murdering one Sapoy Mohamed Shafi could not stand because of a failure of proof—namely, that his body was never produced. Though this argument was based upon a theory of factual insufficiency, at its core was a defense based upon law because the defense acknowledged that there was some evidence based on witnesses that a murder had occurred. *Id.* at 206-07.

299. *Id.* at 210.

300. *Id.* at 221.

301. *Id.* at 224.

302. *Id.* This argument flows from the position that these Indians were actually traitors against the British and had joined the Japanese forces. *Id.* This was a thinly developed defense.

303. *Id.* at 213.

304. *Id.* at 221. This concession is particularly interesting in light of the legal defense cited above that a conviction for the murder of Shafi could not be obtained because of lack of sufficient evidence of a body. *See supra* note 298.

305. *In re Lt. Col. Sumida Haruzo and Twenty Others, reported in THE DOUBLE TENTH TRIAL, supra* note 272, at 587.

306. This case reflects the great efforts that the British commissions would go to ensure that all convictions would be supported by the evidence. This was true even when it was clear that the court had nothing but disregard for the accused before the bar. Often the court would lecture the accused before announcing its acquittal. The speech to acquitted accused Sergeant Major Sugimoto is instructive. In the words of the court, “The Court heard the evidence which you gave in the witness box, and has come to the conclusion that you were lying from the beginning to the end, but lies do not make a man guilty of a war crime.” *Id.*

part from a mass atrocity committed against British civilians on 10 October 1943. These British civilians had been rounded up in Singapore and kept in the Changi Jail near Singapore Harbor. After a few transistor radio receivers were discovered and their British possessors tortured and executed, the Japanese became suspicious that the British civilians were secretly transmitting intelligence from the jail. Though untrue, these suspicions were “confirmed” when the Australians successfully raided a Japanese ship laying off the coast. This triggered a round of torture and execution of British civilians.³⁰⁷

One survivor of this roundup, The Honorable Mr. Justice N.A. Worley, recalls that they had been called to a routine formation punctuated by “the sudden and unexpected appearance of armed sentries and of repulsive looking men” who “were ‘acting on information received.’”³⁰⁸ Though the legal issues facing the court were similar to those faced by the cases cited above, this case particularly illustrates the extent these commissions would go to ensure that burdens of *proof* were not relaxed in an environment characterized by relaxed rules of evidence. Though the defendants were part of an organized activity of brutality and death, the court required that the evidence presented on individuals establish their guilt and that the evidence admitted through the relaxed evidentiary procedures be corroborated to ensure reliability.

Some of the acquittals resulted from the court finding mistaken identity.³⁰⁹ These cases were less a failure of proof and more an affirmative finding by the commission that the accused before it was factually not guilty. Others acquitted, however, appeared to be guilty, but not to the satisfaction of the court, who resolved conflicting evidence to the benefit of the accused. For example, the court acquitted Private Murata Yoshitaro because the prosecution relied on a single affidavit of a prisoner, with corroboration coming from what appeared to be an incriminating photograph.³¹⁰

The defense strategy was to call into question the identity of the person in the photograph to reduce the evidence against Murata to that of an uncorroborated affidavit. The strategy worked. The court, in announcing its findings with respect to Murata, appeared frustrated by its acquittal,

307. N.A. Worley, *Foreword* to THE DOUBLE TENTH TRIAL, *supra* note 272, at xi.

308. *Id.* (Justice Worley was not quoting a specific individual in his comments).

309. *See infra* notes 310-11 and accompanying text.

310. *In re* Lt. Col. Sumida Haruzo and Twenty Others, *reported in* THE DOUBLE TENTH TRIAL, *supra* note 272, at 587.

noting that it had “good reason to believe that it was [Murata]” in the photograph, but finding that the state of the evidence was “insufficient . . . to convict”³¹¹ Commissions such as the *Double Tenth Trial* stand for the proposition that the rule of law can and must carry the day even under difficult circumstances. It also demonstrates that seasoned jurists can conduct trials that permit relaxed evidentiary standards without compromising the required burden of proof—beyond a reasonable doubt.

C. Perceptions of Fairness and Lessons Learned from the World War II Commissions

Modern views of the fairness and effectiveness of the national commissions after World War II are mixed.³¹² Military commissions operate in a difficult environment and must balance many competing interests, to include: the needs of society to punish the wrongdoer; the needs of society to ensure compliance with the rule of law and the protection of those brought before the courts, and ultimately, the need for the justice system to further—not detract from—the reconciliation of the belligerents.

A study of the American and British commissions in Germany and the Pacific after World War II provides a wealth of insight and information. These experiences support the following conclusions: relaxed rules of evidence do not necessarily compromise the validity of results; corroboration of evidence of a traditionally inadmissible nature is important to ensuring legitimate results; and the best practicable evidence should be used, rather than permitting relaxed evidentiary standards to substitute for otherwise available evidence of a more traditional nature. Finally, superior defense counsel coupled with adequate time to prepare is critical for the development of a record that will withstand current and future scrutiny.

The relaxed rules of evidence authorized by the various regulations discussed above did not compromise the validity of the trials; it is clear that the jurists involved did not interpret this relaxed evidentiary standard as a departure from the traditional burdens of proof in a criminal trial. This can be seen in the British regulatory admonishment to weigh such evidence properly,³¹³ as well as the practice by their commissions to seek corroboration.

311. *Id.*

312. For various viewpoints on the subject, see Lael, *supra* note 215; Marrus, *supra* note 104; and Minear, *supra* note 188.

313. See *supra* note 267 and accompanying text.

rating evidence to support such evidence.³¹⁴ It is also important that the defense be provided the same ability to introduce such evidence as was clearly the case in law and practice before the United States commissions in Germany.³¹⁵

Perhaps the greatest lesson of these commissions, however, is the need for highly qualified and individual defense counsel for the accused. These counsel can come from the nation of the accused, the nation of the commission, or both. The court must ensure, however, that the representation is effective, and that it is given the time and resources necessary to present the best defense. This is crucial because these courts serve not only as a forum for the punishment of the wrongdoer, but also as an introduction of the rule of law and due process to societies historically plagued by the yoke of totalitarianism. These courts play a key initial role in the public inculcation of the value and importance of the individual—even criminals.

The World War II military commissions served important roles in meeting both their nations' need for justice and the need of the local civilian population to see the rule of law in action while learning of the atrocities that brought the war to their communities.³¹⁶ These forums can serve similar roles in the future. They should always be considered as a tool available to legal and government planners faced with the daunting task of developing a post-conflict judicial system capable of meeting both the traditional needs of justice and the overarching goals of societal reconstruction and reconciliation.

V. The Overarching Goals of Reconciliation and Restoration of Peace

This section analyzes how a system of post-conflict justice can aid or hinder the ultimate goal of reconciliation of the belligerents. Three areas are considered: First, the role that post-conflict justice can and should take in complementing the overall efforts to restore peace and provide order in the society, and as a process that serves the ends of reconciliation; second,

314. *See supra* notes 308-11 and accompanying text.

315. *See supra* note 233 and accompanying text.

316. Even in the era of cable television and the Internet, the mass civilian populations of totalitarian regimes often must rely solely on state-owned news organizations for news. For example, before the regime change in Iraq, the state ensured that there was a news blackout to prevent coverage of key diplomatic releases that challenged the Iraqi regime's conduct. *Fox News Alert: Awaiting Powell Address to UN RE: Iraq Weapons* (Fox News Channel television broadcast, Feb. 5, 2003).

the lessons from modern truth and reconciliation commissions that can aid in the reconciliation of diverse domestic populations that have been subject to various sources of violence; and third, the effectiveness of modern models for fixing responsibility for war crimes, while simultaneously serving the ends of reconciliation and the restoration of peace.

A. Post-Conflict Reconciliation and the Long-Term Restoration of Peace

The trial of war criminals before various international, national, and domestic forums can further the interests of justice and complement the ultimate goal of the reconciliation of the belligerents and the restoration of peace.³¹⁷ Lessons from World War II indicate that these interests will be served if the procedures are open to public scrutiny and provide a full accounting of the state's criminal conduct as exercised through its agents. This full accounting can only be accomplished if the procedures adopted in practice ensure a full and complete defense by the accused.

These ends are not served by developing an "on the shelf" solution that can be deployed at the end of any conflict characterized by atrocities. To the contrary, a post-conflict system of justice must be tailored to meet the needs of the unique populations and constituencies that present themselves. Failure to do so will miss an opportunity to reconcile competing interests, while possibly setting the stage for future international armed conflict or civil war.

This aspect of a post-conflict system of justice can be best understood by the recognition that different forums for prosecution serve different and often competing ends. After World War II, the International Military Tribunals served several functions for the broader international community, the parties and victims of the belligerency, and the underlying domestic populations of the vanquished. For the international community, the Tribunals sent a message of deterrence that prosecutors of unlawful wars and instigators of crimes against humanity would be held accountable by the

317. The focus of this work will be in situations when the end of the belligerency results in the collapse or termination of the former regime followed by a period of occupation or other arrangement in which the vanquished is placed under interim management by a transnational governing body.

world community, while simultaneously providing a forum for bringing a final accountability of the defeated nation's crimes.³¹⁸

These tribunals also served the domestic needs of the victorious parties to the conflict by subjecting to justice the principals of an unlawful war characterized by mass atrocities. This process of accountability—as with a traditional criminal case—can reduce the animosity of the civilian populations harmed by the unlawful acts of the principals. By fixing responsibility at the leadership level, the injured populations can receive the psychological benefits of the justice system, while the process prevents the return of the bad actors to power.

Equally important, however, are the needs of the civilian populations of the vanquished. First, when conducted in an open forum calculated to develop a full accountability, the domestic population can understand the scope of the atrocities that played a part in the decision of the victors to go to war. Second, societies that have not known the rule of law can receive an introduction to a justice system governed by process rather than outcome. This can be particularly important in cases in which executive whim was substituted for respect for individual rights and the rule of law.³¹⁹

National commissions or courts-martial can also serve important interests as well. First, they can provide a forum to try war criminals who were the action officers of the principals tried before an IMT. This can relieve the pressure on the IMT, while permitting the conduct of more trials within a reasonable proximity of the conduct in question. Such commissions can also be the forum for the prosecution of individual actors who have violated the laws of war for which the nation which convenes the commission has a palpable interest. For example, if the Iraqi guards that beat a downed American pilot in the Persian Gulf War could be identified, the United States would have a palpable interest in the guard's prosecution. But in a nation where horrific atrocities are a daily occurrence, such an incident would fall below the appropriate jurisdiction of an International tribunal, and it would be of little interest to domestic courts, if any existed, faced with identifying and prosecuting others of greater interest to the local

318. This general-deterrent effect borders on the illusory in preventing hostility. This precedent, however, may in some circumstances end hostilities early as part of an amnesty deal. It may also deter other bad conduct if the state perpetrator perceives that the world may invade his borders to apprehend him for crimes against humanity if his conduct does not cease.

319. For example, Iraq.

population. Such cases should be within the purview of the victim's nation, and the prosecution should rest with them because such ends most serve the needs of justice for that nation, especially when other effective forums are not available.

Additionally, to the extent possible and at the earliest point, the domestic courts need to be reestablished and made available to the domestic population for the prosecution of those who committed atrocities against them. It is important, however, that these courts be monitored in the transitional period to ensure that they are providing forums for justice and not vengeance. This is particularly important if the society is composed of diverse populations that have never integrated into a coherent society.

B. Domestic Reconciliation: Lessons Learned from South Africa?

Though "domestic reconciliation" by definition, the experience gained by South Africans after the end of apartheid provides lessons beneficial to the role a post-conflict system of justice can play in the reconciliation of the belligerents. After years of bloodshed and political upheaval, culminating in the collapse of the apartheid system of government, South Africa sought out as a matter of state policy to acknowledge that "many people are in need of healing, and we need to heal our country if we are to build a nation which will guarantee peace and stability."³²⁰

A Truth and Reconciliation Commission was incorporated in the interim Constitution of South Africa. The Commission was part of a constitutional scheme to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."³²¹ The goal of the process included the strengthening of a democracy "committed to the building up of a human rights culture in our land."³²²

The Truth and Reconciliation Commission was in many respects a commission similar in nature to the Tribunals of World War II. While some of the offenses, such as murder, within the purview of the Commis-

320. Dullah Omar, *Introduction to JUSTICE IN TRANSITION, SOUTH AFRICA TRUTH AND RECONCILIATION COMMISSION* (1995), available at <http://www.doj.gov.za/trc/legal/justice.htm>.

321. S. AFR. CONST. (Constitution Act, 1993) ch. 1, pmb1.

322. Omar, *supra* note 320.

sion were crimes under *domestic* law at the time of the offense, others were not. Much like the Nuremberg Tribunals that sought to punish those who committed crimes against humanity, the Truth and Reconciliation Commission set out to investigate “gross violations of human rights” and to grant amnesty for “acts, omissions and offenses associated with political objectives committed in the course of the conflicts of the past.”³²³ The scope of the authority of the Commission extended to acts committed by state actors presumably under the color of law.³²⁴

The South Africans viewed truth as the path to reconciliation of the belligerents. The price for amnesty was truth.³²⁵ The focus was on the truth-telling process, as opposed to the heinous nature of the crime for which amnesty was sought. For example, a security police commander, Eugene de Kock, upon the submission of a petition for amnesty that was deemed by the Commission to be complete and truthful, was granted full amnesty, though his crimes were marked by cold-blooded brutality. De Kock admitted in his petition for amnesty to his involvement in kidnapping four activists and taking them “to different secluded places where each was killed and their bodies burned.”³²⁶ Others involved in the incident, whose petitions differed materially from that of de Kock, were not so fortunate.³²⁷

Though reconciliation is an important societal goal, the other traditional goals of the criminal justice system serve important societal interests that cannot be ignored. The process of punishment of the wrongdoer, to varying degrees, brings closure to victims of crime and their families. As truth brought amnesty from punishment to the wrongdoer in the name of reconciliation, procedures were developed in South Africa to help bring closure to the victims of crime, their families, and their broader communities. Victims in many cases became eligible for the payment of reparations from a government reparations fund.³²⁸ The Committee on Reparation and Rehabilitation of Victims of the Truth and Reconciliation Commission also

323. Promotion of National Unity and Reconciliation Act (Act No. 34, July 26, 1995).

324. Justice in Transition, *supra* note 320 (functions of the Commission).

325. Promotion of National Unity and Reconciliation Act sec. 16.

326. *De Kock Granted Amnesty for Cradock Four Murders*, S. AFR. PRESS ASS'N, Dec. 14, 1999.

327. *See id.*; *TRC Refuses Amnesty to 9 Former Security Police*, S. AFR. PRESS ASS'N, Dec. 13, 1999. Initially, de Kock was denied amnesty, but his version of the truth ultimately prevailed. *See id.*

328. SUMMARY OF REPARATION AND REHABILITATION POLICY, INCLUDING PROPOSALS TO BE CONSIDERED BY THE PRESIDENT SEC. 3 (n.d.), available at <http://www.doj.gov.za/trc/reparations/summary.htm>.

granted victims “an opportunity to relate their own accounts of the violations of which they are the victims”³²⁹

The lessons learned from the South African experience demonstrate that a truth and reconciliation process can provide some degree of accountability while preparing a history of the events surrounding the atrocities. The process can also contribute to reconciliation. What is less clear, however, is the extent to which such a process should be available to the leaders of nations, the nation’s key agents (such as officers of state police and military organizations), and the population in general. If the process is not to be one of general application, what factors should be considered in deciding whether to grant amnesty in exchange for truthful participation?

The answer to this question will depend upon the nature of the conflict and the character of the violence undertaken. Other factors include whether it involved international armed conflict and whether atrocities were primarily directed at discrete minorities as opposed to an environment in which the conduct devolved to street violence among the various factions. Practical considerations, such as the ability of domestic courts to process the volume of potential war criminals, should also be considered.

In developing a post-conflict system of justice after the collapse or military defeat of a totalitarian regime with an extreme degree of centralized power, two classes of individuals should be denied amnesty as a matter of policy because granting these perpetrators amnesty in any form could be construed as a ratification of their misconduct, while also damaging the reconciliation process by denying justice to the victims of the most brutal criminals. Those ineligible should include, first, any principals responsible for the purposeful use of weapons, conventional or otherwise, against civilian populations. Similarly, such an opportunity should be denied to those who direct illegal military operations against third party states or against minority or oppressed groups living within the borders of the country in question. Using Iraq as an example, the principal leaders of the nation responsible for directing, planning, or executing invasions of countries such as Kuwait and Iran, and attacking the civilian populations

329. JUSTICE IN TRANSITION, *supra* note 320 (Committee on Reparation and Rehabilitation of Victims).

of Israel and Saudi Arabia should be denied the opportunity to submit amnesty petitions.

The second category of individuals that should be ineligible for amnesty are those responsible for direct participation in state sponsored or directed activities calculated to terrorize the population of the country or engage in violations of the laws of war. For example, individuals involved in the use of rape and murder as tools for punishment and control of civilian dissidents should be ineligible. Likewise, those involved in the abuse of Allied POWs and similar misconduct should only be eligible for amnesty upon coordination and approval of the nation of the victim.³³⁰

As Great Britain quickly deduced during her post-World War II experience in the Pacific, the justice system may be incapable of handling all the serious offenders identified after a conflict, including elements of the classes identified above. In such cases, a consistent standard should be established for criminal conduct considered eligible for amnesty as part of a truth and reconciliation process. This line, however, would be very fact specific, and it would be directly related to the capacity of the post-conflict justice system and the number of potential defendants.

When developing such a system, considering the impact the system will have on the domestic population is equally important. It must further the reconciliation of the domestic population and the restoration of peace. Accordingly, to be effective, the local population must accept it as an equitable system.

C. Modern Trend: Universal Jurisdiction as a Legalistic Threat to Future Stability

While truth and reconciliation commissions by their nature are conducted close to the area where the crimes occurred, many modern trends in the prosecution of war criminals remove the court from its area of interest. This section looks at recent developments in international criminal practice and evaluates their effectiveness from the perspective of whether they serve post-conflict stability and peace. Specifically, this section looks at the increasing use of theories of universal jurisdiction to gain jurisdiction over perceived bad actors. Some governments have expanded the concept of universal jurisdiction to prosecute third party non-citizens living outside

330. *See infra* notes 404-06 and accompanying text.

of their boundaries they perceive as having violated international law. Modern trends toward this expansive concept of universal jurisdiction are disturbing in that the prosecutor need not be a member of a nation with a direct connection to the crime sought to be prosecuted. Thus, prosecutors attempting to exercise such jurisdiction will seek to use extradition treaties to affect process.³³¹

Such creative efforts to bring those perceived as violating international law before a court with no physical connection to the country where the crime occurred and no direct interest in the case itself sets the stage for destabilization. For example, assume country *A* has been involved in a war with country *B*, and assume that this conflict involved the commission of violations of the laws of war by one or more of the parties involved. If a third party nation unrelated to the conflict attempted to exercise jurisdiction, or was perceived to have that potential, it could facilitate the continuation of war. Under such circumstances, if country *A*'s leader directed an aggressive war against country *B*, and the parties now want to cease hostilities, country *A*'s leadership may have a disincentive to peace because no effective method would exist to negotiate amnesty from war crimes among the parties to the belligerency. Rather than being able to resolve the matter bilaterally, the offending nation may believe that continued hostilities are preferable to a peace in which other nations—including traditionally hostile ones—might attempt to bring allegations of war crimes after the cessation of hostilities.

Likewise, the recent attempts by third parties to seek the prosecution of General Augusto Pinochet sets a potentially destabilizing precedent. Pinochet, who gave up power in Chile peacefully after agreeing to return control to civilian authority through democratic elections, firmly held the reigns of power, and there are some who consider him as a leader of his people in a fight against communism.³³² Future dictators who might consider leaving their regimes under international pressure may refrain from doing so for fear of prosecution by a third party with no direct interest in the matter at hand.

There was some speculation that prior to military action to topple his regime, Saddam Hussein might have chosen to go into exile as part of a

331. Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 86-88 (2001).

332. Nick Caistor, *Pinochet Profile: Saviour or Tyrant*, BBC NEWS (July 9, 2001), http://www.news.bbc.co.uk/1/hi/special_report/1998/the_pinochet_file/198145.stm.

proposal put forward by various Gulf States to avert war.³³³ Dictators such as Hussein need not look further than recent developments with Pinochet to see that it might be a better idea to have their forces fight to the last man rather than to be humiliated before the dock of some far-off land that was not a party to the earlier discussions and with no direct interest in the outcome.

The same potential for instability can arise from reliance on a “cookie cutter” approach to international accountability through organs such as the International Criminal Court. Although Hussein, if alive, does not need to fear the ICC exercising jurisdiction over him because he did not launch operations into a territory of a contracting party of the Rome Statute,³³⁴ future tyrants will face decisions such as those discussed above. While some may argue that these systems deter the would-be tyrant from engaging in war crimes or crimes against humanity, it is noteworthy that the potential for prosecution for violations of international law did not deter Saddam Hussein. Such forums could very well deter or effectively prevent negotiations that provide varying degrees of amnesty in exchange for the prevention of war or the cessation of hostilities. As such, whether such forums can effectively deter war is questionable.

These schemes may work to prevent the cessation of hostilities, reconciliation, and the restoration of peace. The reasons for this potentiality are similar to those related to the unilateral exercise of universal jurisdiction by a nation untouched by the conflict. Much as the ability of the United Nations Security Council to act is affected by its rotating membership, so can one expect the judicial composition at a given point to shape the nature of the prosecutions brought before it. Thus, dictators may choose to continue to wage war against their neighbors and subjugate their people because of the inability to select an exile option in the face of a potential prosecution before the ICC.

D. Modern Trend: The Special Court of Sierra Leone—Positive Prequel for the Future

Rather than rely on far away courts or other forms of universal jurisdiction, the United Nations opted to build upon existing domestic law in its

333. David R. Sands, *Arab States Voice Support for Saddam's Exile*, WASH. TIMES (Jan. 4, 2003), <http://www.washtimes.com/world/20030104-24476360.htm>.

334. *See supra* note 32 and accompanying text.

development of a plan for post-conflict justice in Sierra Leone. United Nations Security Council Resolution 1315 explicitly recognizes the role the domestic courts, in upholding “international standards of justice, fairness and due process of law,” can play in the “process of national reconciliation and to the restoration of peace.”³³⁵ This acknowledgment was backed up by a request to the Secretary-General to “negotiate an agreement with the Government of Sierra Leone to create an independent special court.”³³⁶

The Security Council further recommended the Special Court have broad jurisdiction for punishing “crimes against humanity, war crimes and other serious violations of international humanitarian law.”³³⁷ Notably, the Security Council also recommended that the Special Court have subject matter jurisdiction over activities that constituted “crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;”³³⁸ a process that not only provides increased flexibility to the prosecutor in charging, but also injects a local jurisprudential flavor into the process.

While the subject matter jurisdiction recommended by the Security Council was broad enough to recognize virtually every internationally and domestically recognized theory of culpability, the personal jurisdiction recommended by the Security Council was far more restrictive. The Security Council’s recommendation was that personal jurisdiction attach “over persons who bear the greatest responsibility for the commission of the crimes [referenced herein].”³³⁹

Security Council Resolution 1315’s guidance was implemented less than two years later with the consummation of an agreement between the United Nations and the Government of Sierra Leone “On the Establishment of a Special Court for Sierra Leone.”³⁴⁰ The stated purpose of the Special Court echoed the personal jurisdiction recommended by the Security Council: “to prosecute persons who bear the greatest responsibility for

335. S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. Doc. S.2002.915 (2002), available at <http://www.specialcourt.org/documents/Agreement.htm>.

serious violations of international humanitarian law and Sierra Leonean law . . . since 30 November 1996.”³⁴¹

The Agreement provided for the creation of both a self-contained trial court and an appellate court.³⁴² The trial court is composed of three judges, with one appointed by the government of Sierra Leone and the other two selected by the United Nations Secretary-General. Though the jurists appointed by the Secretary-General could be selected from any country that submitted nominations, there was a stated preference for those nominees from the region.³⁴³

This agreement was followed by the Statute for the Special Court for Sierra Leone, which laid out the procedural framework and subject matter jurisdiction of the Special Court.³⁴⁴ The Court’s personal jurisdiction was further refined to define the class of potential defendants based upon the nature of their crimes. Specifically, the Court had jurisdiction over: those engaged in crimes against humanity as part of “a widespread or systematic attack against any civilian population;”³⁴⁵ acts committed or ordered by an individual that violate Common Article 3 of the Geneva Conventions and Additional Protocol II;³⁴⁶ and persons who committed other serious violations of international law, such as “directing attacks against the civilian population” or the conscription of children.³⁴⁷ While the scope of these individual articles seems to expand the potential personal jurisdiction of the court broadly, Article 5 restricts the body of Sierra Leonean law incorporated into the Special Court’s jurisdiction.³⁴⁸ Article 5 restricts the Spe-

341. *Id.* art. 1(1).

342. *Id.* art. 2(1).

343. Specifically, preference is given to “member States of the Economic Community of West African States and the Commonwealth.” *Id.* art. 2(2)(a).

344. STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE art. 12(1)(a) (2000) [hereinafter SPECIAL COURT STATUTE] (established pursuant to Security Council Resolution 1315, 14 Aug. 2000), available at <http://sierra.leone.com/org/specialcourtstatute.html>.

345. *Id.* art. 2. Article 2 lists several examples of such acts, to include murder, enslavement, deportation, rape and sexual slavery, political or racial based prosecutions, or any “[o]ther inhumane act[.]” *Id.* art. 2(a)-(i).

346. *Id.* art. 3. This provided a broad source of potential jurisdiction that on its face appears to go beyond that envisioned by the Security Council, essentially turning the Court into a body with jurisdiction over any person that might commit a violation of Common Article 3, regardless of the level of the perpetrator.

347. *Id.* art. 4(a)-(c).

cial Court's subject matter jurisdiction based upon domestic law to crimes related to the abuse of young girls and the burning of some buildings.³⁴⁹

The enabling statute also reflects concern with maintaining the supremacy of the Special Court while permitting concurrent jurisdiction with the domestic courts. The statute reflects the following competing concerns: that accused should not have to stand trial before both the Special Court and domestic courts;³⁵⁰ that the domestic courts not serve as a means to shield criminal responsibility; and that certain truth and reconciliation procedures adopted by the Government of Sierra Leone could not be used to grant amnesty to those who committed crimes against humanity³⁵¹ or "other serious violations of international law."³⁵²

To prevent the possibility of the accused standing trial before two forums, the statute includes a *non bis in idem* clause.³⁵³ This clause blocks all subsequent prosecution by a domestic court for offenses tried before the Special Court. It also greatly restricts the circumstances in which the Special Court could exercise jurisdiction after a domestic prosecution for a crime within the Special Court's jurisdiction. The Special Court could only pursue such a prosecution on evidence that the domestic court was not "impartial," or that the domestic prosecution was a sham.³⁵⁴

The statute also reflects the concern that amnesty granted by a domestic truth and reconciliation commission could frustrate the purposes of the Special Court. Accordingly, the statute prohibits the effective use of amnesty by domestic bodies when the crimes fall within the broad categories of activities described in Articles 2 and 4.³⁵⁵ The interaction of these two provisions provides an incomplete "fix" because the plain meaning of Article 2 seems to capture every individual actor caught up in the chaos that was Sierra Leone. It is difficult to envision the effective use of a truth

348. *See id.* art. 5. The policy of the Prosecutor's Office is to refrain from using this potential jurisdiction to the extent possible to avoid potential challenges to the exercise of such jurisdiction under legal theories based upon Sierra Leonean law. Interview with David Crane, Chief Prosecutor, Special Court of Sierra Leone (Feb. 13, 2003) (interview notes on file with author).

349. SPECIAL COURT STATUTE, *supra* note 344, art. 5(a)-(b).

350. *See id.* art. 9.

351. *See id.* art. 2.

352. *Id.* art. 4.

353. *Id.* art. 9.

354. *Id.* art. 9(2)(b).

355. *See id.* arts. 2, 4.

and reconciliation procedure that did not have the authority to grant honest participants immunity from prosecution.

As such, in theory this possibility greatly limits the potential effectiveness of the truth and reconciliation commission to process those that could become the target of a Special Court prosecution, but in practice it may not. Practical approaches to the problem undertaken by the Chief Prosecutor, David Crane, minimize this problem. One such factor that helps minimize a potential disconnect is that Mr. Crane views the Special Court as a forum for major criminals on the scale of those prosecuted before the IMT at Nuremberg.³⁵⁶ Nonetheless, many who could fall within the technical jurisdiction of the Special Court might reasonably be expected to refrain from appearing before a truth and reconciliation commission without a clear grant of immunity from the Special Prosecutor.³⁵⁷

The Special Court forged in Sierra Leone is a great modern model to consider when formulating a plan for a system of post-conflict justice, and as the work of the Court continues, so will the lessons learned. And though it is not the only modern *ad hoc* tribunal approaching the problem of meeting the ends of justice in a war-torn society, it appears to be the model currently in use that has the greatest likelihood of success.³⁵⁸ The strengths of the court, as well as its weaknesses, provide important guidance alongside the lessons learned from post-World War II prosecutions. These lessons can be applied to the problem of justice and accountability in the future, such as in post-conflict Iraq.

VI. Retooling the Past: A New Dock for Modern War Criminals

*No to war? What about no to tyranny?*³⁵⁹

When developing a system for the prosecution of war criminals in post-conflict Iraq, much can be learned from the international community's experience in the major theaters of operation after World War II, as well as from more recent undertakings such as those seen in South Africa

356. Jess Bravin, *Tribunal in Africa May Serve as Model for Trial of Hussein*, WALL STREET J., Feb. 12, 2003, at B1.

357. See *supra* notes 348, 355-56 and accompanying text.

358. See, e.g., Ford, *supra* note 59.

359. Barham A. Salih, *Give Us a Chance to Build a Democratic Iraq*, N.Y. TIMES, Feb. 5, 2003, at A31. Barham A. Salih is the Co-Prime Minister of the Kurdistan Regional Government, Iraq. *Id.*

and Sierra Leone. And since Iraq has not signed the Statute of Rome,³⁶⁰ the courts that prosecute the Iraqi war criminals will be *ad hoc* in nature. The greatest strength of *ad hoc* forums is their ability to adapt their procedures to changing circumstances while upholding a consistent approach to what is considered criminal. As such, *ad hoc* tribunals and commissions must learn from the past while not becoming a slave to it. The problem in Iraq bears great similarity to that faced in Japan, but is different in many significant respects. In developing an appropriate system, consideration must be given to the cultural, ethnic, and religious landscape of Iraq.

A. Iraq's Multicultural Face

Iraq is a multicultural society composed of a collection of diverse ethnic and religious groups. These groups include the Kurds, Shiite Arabs, Sunni Arabs, Turkmen, Assyrians, Yazidis, Jews, and Christians.³⁶¹ Many of these people were forcibly displaced by the Iraqi regime, to include the Shia Arabs, Kurds, Turkmen, and the Assyrians. As such, Iraq has the largest number of displaced people of any country in the Middle East, with totals potentially as high as one million.³⁶² The diversity and size of these displaced populations must be considered during all phases of reconstruction in Iraq to ensure that all populations share in the potential arising from the country's liberation from Saddam Hussein.

These groups have fared differently during the last few years under Saddam Hussein. The Kurds in the northern areas of Iraq have benefited under the protection of Allied fighters patrolling the northern no-fly zones. Out from under the yoke of the official Iraqi regime, the Kurds "plant[ed] the seeds of democracy in soil that has for too long been given over to tyranny."³⁶³ This embryonic oasis of freedom is, like Iraq, a multicultural area, with many ethnic minorities living voluntarily in the area controlled by the Kurdistan Regional Government.³⁶⁴

These minorities have elected to live in a developing democracy under the protection of Allied warplanes rather than live under the former tyranny of Saddam Hussein. This Kurdish microcosm has faced its own

360. See *supra* note 35 and accompanying text.

361. Salih, *supra* note 359, at A31.

362. *Secretary General's Representative on Internal Displacement Visits Turkey*, GLOBAL IDP WKLY. NEWS (June 12, 2002), http://www.idproject.org/weekly_news/2002/weekly_news_june02_2.htm.

363. Salih, *supra* note 359, at A31.

difficult internal problems,³⁶⁵ but the experience of the Kurds demonstrates that peace and democracy can take hold in the region when the conditions are right.

Iraq's motives for the displacement of the Kurds and other ethnic minorities flow from a complicated mix of political and financial reasons. On one level, Iraq's mass murder and deportation of Kurds was part of Hussein's pan-Arab nationalistic movement towards the Arabization of Iraq. These actions by the former Iraqi government have been described as "genocidal" by Human Rights Watch, and over the last twenty years have resulted in the destruction of thousands of Kurdish areas and the displacement of hundreds of thousands of Kurds.³⁶⁶

On another level, the actions of Iraq have removed the Kurds and other non-Arabs from oil rich areas near the northern city of Kirkuk. Though these populations were often given the opportunity to "correct" their nationality to Arab, those unwilling to convert were subjected to various forms of harassment, to include arrest and forced relocation. To add to this instability, Iraq relocated Arab Shia populations from the south to Kirkuk to frustrate Kurdish claims to land in the area and "to affirm the 'Arabic' character of the city."³⁶⁷

Though ostensibly these relocations of Shia Arabs to the north were part of the Arabization program, they were more a function of Hussein's desire to crush his Shiite opponents to the south.³⁶⁸ These groups who engaged in an unsuccessful uprising after the Persian Gulf War became a source of concern to the Iraqi regime. Further, many of these individuals

364. Scott Wilson, *Kurds' Influence in Kirkuk Rises Along with Discord*, WASH. POST (May 19, 2003), available at <http://www.washingtonpost.com/ac2/wp-dyn/A7535-2003May18?language=printer>. In addition to the beginning of representative democracy in Kurdistan, they also enjoy a press "with hundreds of newspapers, magazines and television stations." Salih, *supra* note 359, at A31.

365. Pam O'Toole, *Iraqi Kurds Face Uncertain Future*, BBC NEWS (Apr. 18, 2003), available at http://news.bbc.co.uk/1/hi/world/middle_east/2957941.stm.

366. *Secretary General's Representative on Internal Displacement Visits Turkey*, *supra* note 362.

367. *Id.*

368. Fergus Nicoll, *Iraqi Marsh Arabs Seek Aid*, BBC NEWS (May 21, 2001), available at http://news.bbc.co.uk/1/hi/world/middle_east/1342853.stm. This includes both the Marsh Arabs and the broader Shia communities in the south. Saddam Hussein perceived many of the Shia leaders as a threat and eliminated them. JOHN FAWCETT & VICTOR TANNER, *THE INTERNALLY DISPLACED PEOPLE OF IRAQ* 28 (The Brookings Institution-SAIS Project on Internal Displacement 2002).

lived in a marshland that provided a great deal of protection from land attack and benefited from the southern no-fly zone. This marshland was destroyed, however, by Saddam Hussein to starve out the Shiites and thus force their relocations to points north or out of Iraq.³⁶⁹

Thus, Hussein destroyed a 5000 year-old Marsh Arab culture and homeland to further his political aims. Before doing so, however, the Iraqi government launched a massive propaganda campaign to reinforce and amplify traditional Iraqi views of these Marsh Arabs as backward “monkey-faced people” who “were not real Iraqis.”³⁷⁰ These efforts not only resulted in a massive environmental catastrophe, but also helped legitimize and maximize Sunni hatred of the Shia Marsh Arabs. Iraq’s efforts to institutionalize hatred for this minority will further complicate the post-Saddam Hussein Iraq.

Assyrians also suffered under Saddam Hussein. The Assyrians are predominantly Christian, and until the 1970s lived in the area now occupied by the Kurdish Regional Government. After the destruction of 200 of their villages by the Iraqi government, they were relocated south to the city of Baghdad. Since the Persian Gulf War, the Assyrians also claim that they have been further displaced by the Kurds.³⁷¹

Before the termination of his regime by military action, Saddam Hussein created a difficult situation for the world community that must now struggle with the myriad of issues he has left behind as his legacy. With the termination of his regime, the stage is set for civil war as the various displaced groups seek to reclaim areas that they view as their own. In the North, land could become subject to simultaneous claims by Kurds, Turkmen, Assyrians, Shia, Sunni Arabs, and others.³⁷² Thus, it is now critical for the international community to develop institutions in Iraq that will

369. *See supra* notes 367-68 and accompanying text. Hussein accomplished this by building a series of dams to divert water away from the marshland. This plan to force the relocation of these Shia Arabs resulted in the destruction of the largest marshland in Iraq. *Secretary General’s Representative on Internal Displacement Visits Turkey, supra* note 362.

370. FAWCETT & TANNER, *supra* note 368, at 29.

371. *Id.* at 14.

372. *Id.* at 24-25. The Brookings Institution Report recommends that restitution be paid to those who have been disposed of their property and that the international community recognize and prosecute these forced dislocations. *Id.* at 48-49.

centralize control in the near term, while setting the stage for a peaceful transition to a new Iraqi government at the earliest opportunity.

In addition to the complexity and potential for hostility injected into Iraq by Hussein's active policies of displacement, the complicated religious landscape will also be a matter of concern. Iraq is composed of large populations of Sunni and Shia Muslims and significant populations of Christians and Jews.³⁷³ Iraq must therefore be placed squarely on a path toward a secular government that can meet the needs of this multicultural society.³⁷⁴ Such a path will prevent the rise of a theocracy with the inherent potential to oppress those outside of its faith. In keeping with this concern, all levels of courts established in the wake of Saddam Hussein should be of a secular nature.

This is not to suggest that the society that congeals in Iraq cannot borrow from the traditions of Islam and other religions; however, the courts available to the citizens of Iraq cannot be different for the various races, sects, and genders. Accordingly, the source of law must ultimately flow from a legislative body open to representatives of the various populations of Iraq. Religious courts by their nature often discriminate against non-believers and others. As one Muslim scholar notes:

An Islamic state is totalitarian in the philosophic sense. A closed politics or civics is a necessary corollary of a closed theology. In Islam, the concept of *ummah* dominates over the concept of man or mankind. So in a Muslim polity, only Muslims have full political rights in any sense of the term; non-Muslims, if they are allowed to exist at all as a result of various exigencies, are *zimmis*, second-class citizens.³⁷⁵

The development of a system of post-conflict justice in Iraq should rely in part upon domestic courts and traditions. Efforts must be undertaken, however, to resist and prevent the development of domestic theo-

373. Stephen Pelletiere, *The Society and Its Environment, in IRAQ: A COUNTRY STUDY* 67, 82-86 (1990).

374. This is one of the greatest challenges facing not only a post-conflict Iraq, but also modernization efforts throughout the Middle East. The use of sharia law derived directly from the Quran, as opposed to law codified by a legislative or government body, would create the foundation for an Islamic state. In the words of one prominent scholar: "An Islamic state is necessarily a theocracy." RAM SWARUP, *UNDERSTANDING THE HADITH: THE SACRED TRADITIONS OF ISLAM* 124 (Prometheus Books ed. 2002).

375. *Id.* at 124-25.

cratic courts that could become the vehicle of tyranny for believers and non-believers alike. The development of domestic courts can pull from the traditions of all of the nations within Iraq, to include the Sunni and Shia legal traditions. These traditions have a rich history of scholarship related to the concept of justice. This includes scholarly recognition that the “more advanced the[] procedural rules, the higher . . . the quality of formal justice revealed in that particular system of law.”³⁷⁶ The task for those reconstructing Iraq will be to ensure that the legal system treats *all* equally before it, rather than allow the system to adopt the narrow view that “[l]aw is to protect the interests of *believers* as a whole”³⁷⁷

B. Borrowing from the Past and Present—Justice in Post-Conflict Iraq

The brief discussion above of the complexities surrounding the ethnic and religious landscape of modern Iraq represents only a superficial sketch of the problems that will face those tasked with the awesome responsibility of reconstructing a society that has been plagued by decades of tyranny and war. It reveals, however, the need for the international community to remain heavily engaged in the development and execution of a system of justice to punish those responsible for bringing war and terror for generations in and near Iraq. The courts must be courts of justice, not tools of vengeance. They must in the end contribute to the reconciliation of this war-torn society and the foundation of a future peace. Any component of a system that does not further these goals should be rejected during the period of reconstruction.

The lessons from World War II and those that continue to be learned from progressive forums such as the Special Court of Sierra Leone provide a wealth of information for planners today. These lessons reveal that a system that leverages the resources of the international community, to include national commissions operating within an established framework and those of the domestic courts of the fallen nation, can best serve the interests of justice and peace. Such a multi-tiered system of justice permits the establishment of an International Tribunal that can focus solely on the thirty or forty top principals of Iraq.³⁷⁸ Other national commissions constituted under the auspices of a Control Council, similar to that established

376. MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 136 (Johns Hopkins Press 1984) (providing an excellent discussion on the development of the various schools of thought on what constitutes justice under Islamic Law).

377. *Id.* at 138.

by the international community in Germany after World War II, can then prosecute lesser international criminals. Domestic courts could further augment this system. Those whose criminality falls below the level of conduct that the post-conflict system can reasonably accommodate could be considered for processing by a truth and reconciliation commission.

Thus, international justice in Iraq should be meted out from several levels. These levels are: an International Military Tribunal, a broad collection of national commissions reflecting nations who have a palpable interest³⁷⁹ in the prosecution of Iraqi war criminals, domestic criminal courts to handle matters of isolated violence against individuals, and domestic civil courts to direct the investigation of claims of government action related to abusive policies. Finally, the Iraqi people should, with the assistance of the international community, establish a truth and reconciliation commission as an alternative to prosecution for the many individual acts of violence that will come to light that undoubtedly have touched all of the nations within Iraq. This system should be implemented under the oversight of a Control Council, whose charter the United Nations Security Council ideally would sanction. This proposed system is discussed in greater detail below and is depicted graphically at the appendix attached to this article.

This system would also serve as a framework on which to graft military commissions operating as occupation courts.³⁸⁰ The Tribunals and commissions in forms discussed above, however, would concern themselves with criminal conduct that occurred before the cessation of hostilities, while occupation courts would be concerned with a far broader range of criminal behavior that occurred after the liberation of Iraq. Over time the instrumentalities of these systems would collapse into the Iraqi domestic courts as Iraq slowly returns to a civil society capable of self-gover-

378. Currently, the Bush Administration publicly identified twelve individuals who could be tried for war crimes by an international tribunal after the liberation of Iraq. These individuals include President Saddam Hussein, his sons, and top supporters such as Ali "Chemical Ali" Hassan al-Majid. See Barry Schweid, *Bush Lists Iraqi War-Crimes Suspects*, WASH. TIMES (Mar. 17, 2003), <http://www.washtimes.com/world/20030317-81288520.htm>.

379. "Palpable interest" is used to mean interests that touch on the nation's sovereignty, such as seeking justice for the victimization of its citizens by the offending nation.

380. The operation of the "occupation courts" is beyond the scope of this article, but should be brought under the control of the proposed Control Council.

nance. As the domestic courts strengthen, they will form an important bridge from liberation to self-reliance.

This approach leverages the lessons of the past, and is also consistent with the goals of democratization and the establishment of the rule of law. In the words of President George W. Bush in describing his goals for American foreign policy: “We will defend the peace by fighting terrorists and tyrants. We will preserve the peace by building good relations among the great powers. We will extend the peace by encouraging free and open societies on every continent.”³⁸¹ With these goals in mind, the President hopes to give the various developing countries the power to “choose for themselves the rewards and challenges of political and economic freedom.”³⁸² This proposal contributes to the attainment of these goals by providing a framework for the prosecution of war criminals, alongside other reconstruction efforts, that can help place the possibility of a lasting peace in the hands of the citizens of Iraq.

1. The International Military Tribunal—Iraq

The model for an International Military Tribunal for Iraq should resemble the approach the Allies used in post-war Japan, as opposed to that of the IMT at Nuremberg, with inspiration for developing close relations with domestic institutions as forged by Sierra Leone’s Special Court. The Japanese model reflected a broad constituency of the victors and representatives of nations that had been victimized by the Japanese.³⁸³ Such a Tribunal is well-suited for the trial of major war criminals in Iraq.

The development of an IMT for Iraq should consider including several constituencies. Broadly, these constituencies should include representatives from the nations who provided the military might necessary to remove Hussein’s regime, representatives of nations victimized by Iraq, and representatives of the broader international community. The develop-

381. NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002) (introductory comments by President Bush).

382. *Id.*

383. *See supra* notes 163-68 and accompanying text.

ers of the Court could also consider including a representative of the Iraqi people.

At present, the United States, the United Kingdom, and Australia would be leading contenders for sending representatives to the Tribunal because of their service in removing the regime³⁸⁴ and their natural interest in ensuring that the subsequent legal actions are conducted in a manner consistent with international due process norms. The nations that have been victimized by Saddam Hussein include Kuwait, Israel, Saudi Arabia, and Iran.³⁸⁵ As such, these nations should also be considered as sources of jurists to sit in judgment of any captured survivors of Saddam Hussein and his crew.³⁸⁶ Finally, the representative of the Iraqi people should not necessarily be from a dissident group or a displaced people. The horrors revealed by such a tribunal will not require the potentially jaundiced eye of a dissident leader to decipher. The greatest legitimacy will be added if an Iraqi jurist can be identified from outside of Saddam Hussein's Ba'athist party, but who has managed to avoid direct victimization by the regime itself.

The final rules and procedures to govern the Tribunal should be developed under the direction of the jurists selected for service on the Tribunal. These jurists should be given broad latitude to develop procedural and evidentiary standards for the Tribunal. This latitude should not be without limits, however. The jurists should be required to develop these standards consistent with international norms, and they should be placed under the supervision of an interim authority or a Control Council similar to that operated by the allies in Germany after World War II.³⁸⁷ The final rules of

384. Craig Francis, *U.S. to Administer Iraq: Howard* (Mar 28, 2003) (referring to comments of Australian Prime Minister John Howard), available at <http://www.cnn.com/2003/WORLD/meast/03/28/sprj.irq.aust.howard>.

385. Israel Defense Forces, *The Iraqi Threat*, at <http://www.idf.il/iraq/english/default.stm> (last visited 6 June, 2003).

386. Integrating Persians, Sunni and Shia Arabs, Westerners, and Israelis into a post-conflict judicial system may be a political and cultural "bridge too far." But the concept, as daunting as it is, should be studied. Part of a plan of a broader peace in the Middle East necessitates that nations surrounding Iraq recognize the right of each other to exist. Though far beyond the scope of this article, requiring the various parties to recognize the legitimacy of one another in their actions could help further develop a platform for a lasting peace. This is a particularly important consideration in light of recent efforts by the Bush Administration to craft a lasting regional peace for the region. See, e.g., Guy Dinmore & Harvey Morris, *Powell Foresees Tough Going Ahead with Road Map*, FIN. TIMES, May 10, 2003, at 3.

387. See *infra* notes 407-18 and accompanying text.

the Tribunal should be subject to approval from the Control Council. Such required approval will alleviate the need to permit appeals based upon any theory that the rules promulgated by the Tribunal were inconsistent with the direction or limitations developed by the Control Council.

The Tribunal will enjoy the greatest degree of legitimacy among the Iraqis as well as with the broader international community if the jurists are permitted to develop the rules and procedures that will govern the International Tribunal subject to the limitations imposed upon it by the Control Council.³⁸⁸ Such an arrangement will serve two potentially conflicting goals: respect for due process of law; and the assimilation of key legal systems to further the legitimacy of the Tribunal.

First, through the auspices of the United Nations and the Iraqi Control Council, it will be possible to ensure that the Tribunal and other courts and commissions responsible for prosecuting international criminals maintain the due process standards required by modern notions of fundamental fairness. Second, it will force moderation within the Tribunal itself by the process of reconciling jurists trained under Common, Civil, and Islamic legal traditions. Though these traditions vary, the experience of World War II demonstrates that these differences can be harmonized, especially when developed under the ultimate auspices of a higher control council. Further, though the Tribunal must be secular, it can nonetheless draw from the Islamic legal tradition.³⁸⁹ For example, Islamic scholars have long recognized that it was criminal to wage an unjust war “motivated by the Ruler’s personal . . . lust for power, honor or glory” or “wars of conquest waged by the Ruler for the subordination of people other than the people of the city

388. The scope of the representation would be based upon practical considerations, such as how many jurists could sit effectively. The IMT was composed of four, *see supra* notes 68-71 and accompanying text, but the IMTFE was composed of eleven, *see supra* notes 162-72 and accompanying text. Regardless, no more than one member should be permitted from any particular country. The Office of the Chief Prosecutor would also be an appropriate forum for broad multinational representation, as was the case in both theaters after World War II. *See, e.g.*, JOHN A. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL LAW* ix (1954); MINEAR, *supra* note 188, at 20-21.

389. The Tribunal should not be purely shaped in an Islamic tradition, however. Like the Tribunals after World War II, it can take on procedures that reflect the harmonization of several systems of law to render justice before a multinational body. *See supra* notes 164-87 and accompanying text.

over which he presides.”³⁹⁰ These notions nest well with Western notions of the crime of aggression, for example.

The Office of the Chief Prosecutor before the International Military Tribunal for Iraq should be organized in a similar manner. At a minimum, prosecutors should represent the nations selected to represent the world community on the Tribunal itself. The prosecutor’s office, however, provides greater opportunity for representation of countries with a direct interest in the prosecution of key Iraqi war criminals.

As with the opportunity provided to the Tribunal for the development of its own rules, a multinational approach to the development of indictments against the major Iraqi war criminals will ensure a conservative approach to charging, and thus yield the greatest resulting domestic and international legitimacy. Ideally, prosecutors should strive to develop charges agreeable to all parties involved to maximize the perception of fairness surrounding the indictment. All national representatives should be required to concur or non-concur by endorsement with the final indictments.³⁹¹

The development of the rules governing the Tribunal and the indictments will take time.³⁹² History has taught, however, that these important undertakings must be pursued methodically, with less concern for efficiency than the perceptions the Tribunal will create in the minds of the domestic population and the world.³⁹³ With the eyes of the world on the process, “efficient” processing will harm the overall interests of justice in

390. KHADDURI, *supra* note 376, at 172. Note that under sharia law, wars against other peoples are considered just if conducted for the purpose of killing those who refused to convert to Islam after being offered the opportunity, *id.*, thus the need to divorce the court from any ties to a specific religion to ensure legitimacy.

391. The ratio of concurrences to non-concurrences necessary to go forward on a prosecution is a political decision; however, the greater the number, especially with respect to the theory of criminality, the greater the legitimacy that the process brings to the court. Prosecutors should strive to reach one-hundred percent concurrence, even if the rules established do not require it.

392. It will also take significant time to investigate properly the atrocities committed or directed by the major international criminals. Procedural rules can be developed while the Control Council directs the investigation of these crimes. In light of the breadth of atrocities committed under the Hussein regime, it is quite possible that the Tribunal could be prepared to begin its work before the investigators are completed with theirs.

393. Planners should strive to avoid what is perceived broadly as a rush to justice, as has been the case with *In re Yamashita*, 66 S. Ct. 340, 363 n.9 (1946). See *supra* text accompanying notes 255-59.

the developing world. The execution of a just process with due regard for the rights of the subject, carefully weighed against the need for appropriate evidentiary standards tailored to the exigencies of the circumstances, will strengthen the respect for the rule of law in transitional societies. Society's need to bring justice to key members of Saddam Hussein's former regime must also be considered.

The proceedings of the Tribunal should be broadly disseminated, and public viewing should be encouraged. Transparency of the Tribunal's actions will help legitimize its work in the eyes of the Iraqi people, the Middle Eastern community, and the world. Televised broadcasts distributed worldwide via the Internet and satellite would educate the world on the horrors visited upon Iraq.³⁹⁴ Such wide dissemination will also aid in the reduction of conspiracy theories and other rhetorical attacks on the work of the Tribunal that individuals or groups that have an interest in preventing the democratization of countries within the greater Middle East might perpetrate.³⁹⁵ An International Military Tribunal for Iraq will serve the ultimate goals of peace and reconciliation, but to meet these higher goals, the proceedings must be available to all who stand to benefit from the democratization of the region.

2. National Military Commissions

Nations with a palpable interest in crimes committed by Iraqi officials and agents should be permitted to establish national commissions within the borders of Iraq.³⁹⁶ Such a palpable interest could flow from nations whose POWs were tortured or subjected to unlawful acts of aggression by the Iraqi regime. As with the commissions conducted by nations in Ger-

394. The author generally does not support the broadcast of domestic court proceedings, but the broadcast of trials of such international concern will provide a rare opportunity to both educate the world about the actions of Hussein's Iraq, while also exposing the populations of other nations to the judicial institutions of modern democracies. The importance of such a process was foreshadowed by a comment in the *Frankfurter Allgemeine Zeitung* after Secretary of State Colin Powell made his case against Iraq before the United Nations Security Council. This German paper noted: "The performance was undeniably brilliant. In doing so, the American secretary of state turned the Security Council into a kind of world court; he himself played the role of prosecution. What was so impressive in the evidence was . . . its breadth." *Powell's Performance Earns Mixed Reviews*, N.Y. TIMES, Feb. 7, 2003, at A10 (quoting *Frankfurter Allgemeine Zeitung*) (no point source indicated).

395. There will need to be provisions for safeguarding classified information, although to what degree such information, even if available, would be necessary to obtain a conviction of Saddam Hussein and his close associates is not clear.

many after World War II, they should take on an international character³⁹⁷ by being subordinated to an international Control Council.³⁹⁸ These commissions, though governed to a great extent by local regulation promulgated by the nation involved, should be required to comply with certain minimum standards established by the multinational Control Council.

This international coordinating body can be used to ensure that the procedures adopted by national commissions meet minimum procedural and evidentiary requirements, while ensuring that the burdens of proof are consistent with criminal prosecutions. At a minimum, these regulations could prescribe that all national commissions ensure access to counsel and the ability to prepare a defense, that evidentiary standards apply equally to the prosecution and the defense, and that prosecutors be required to prove their case beyond a reasonable doubt to obtain a conviction. Such a Control Council could also define the scope of the jurisdiction of the national courts.

To ensure compliance with the minimum international norms established by the Control Council regulations, all appeals should be made directly to a multinational appeals chamber, as opposed to the appellate courts of the various nations involved. These appeals should be limited to the legal requirements specifically required by the Control Council regulations and to ensure factual sufficiency to support the underlying convictions. Convictions should receive final approval by the Control Council itself.

396. Nations should also be permitted to seek extradition of suspected Iraqi war criminals for acts contrary to the domestic laws of various nations. For example, if evidence demonstrates that a particular Iraqi had been involved in terrorist activities directed at the United States in violation of United States domestic law, petitions for extradition should be permitted. Before extradition, however, the accused should first be tried before the appropriate international forum if the international community desires such prosecution.

397. Nations conducting commissions in Germany after World War II considered them to have an international character that superceded their national character because of their creation under the auspices of the international Control Council. *See Young, supra* note 222, at 627.

398. For a discussion of how a proposed Control Council could operate in Iraq, see *infra* notes 407-19 and accompanying text.

3. Domestic Courts

Reconstruction efforts in Iraq should quickly focus on the redevelopment of the Iraqi domestic courts as part of broader efforts toward democratization. These courts should be built upon the existing structure of the domestic courts, while ensuring that necessary reforms are introduced to ensure compliance with fundamental norms. These courts should be relied upon to the greatest extent possible for prosecuting those who commit atrocities that fall below the jurisdiction of the International Military Tribunal and the interest of the national commissions.

During the reconstruction phase, however, the international community must ensure that the domestic justice system not be “captured” by one particular sect or ethnic group. To avoid this, these courts must be reconstituted as secular courts as opposed to religious tribunals. This is necessary to prevent perceptions that the domestic courts are instruments of any particular group.

The domestic courts should also be involved in the investigation and resolution of claims related to Iraq’s Arabization program.³⁹⁹ Because this program has, in effect, created multiple levels of claims with varying degrees of legitimacy to the same property, resolving such claims will require a complicated investigatory process that may reveal more than one law-abiding individual has developed interests in certain property. A domestic court or investigative body would be in the best position to investigate and evaluate these claims. Unfortunately, such a body also has great likelihood to be “captured” by a particular faction and turned into a system

399. Initially, this program should be under the direct management of the Control Council, with the members of the investigative bodies drawn from the various populations within Iraq. As the domestic courts become functional and in position to take on some of the responsibility, they should be used to resolve disputes to the extent possible. Events that transpired in the early days of post-Hussein Iraq, however, demonstrate the importance for a methodical and well-reasoned transfer of authority over to Iraqi courts. One of many examples of the level of hostilities that divide Iraqis along cultural and political lines is a recent declaration that Shia Muslims should kill Ba’athists who attempt to come out of hiding. James Drummond & Nicolas Pelham, *Shia Clerics Urge Faithful to Attack Returning Ba’athists*, FIN. TIMES, May 10, 2003, at 3.

of distributing spoils. Accordingly, the international community will need to scrutinize this aspect of the domestic system closely.⁴⁰⁰

As domestic courts begin functioning, they should be encouraged to investigate and prosecute Iraqis who violated domestic and international law within their borders. In addition, these courts should be given independent charging authority as soon as practicable. Such authority should be coordinated with the Control Council, however, if the domestic courts desire their actions to be final actions without the possibility of additional legal jeopardy. Thus, a framework should be established whereby the domestic courts request the release of primary jurisdiction from the international Control Council to the local court, regardless of who holds the defendant. This will aid in resolving competing requests for jurisdiction, while serving to permit the termination of international jurisdiction over the person and thus the possibility for duplicative trials. Once the Control Council releases jurisdiction, other forums operating under the auspices of the Control Council would be divested of jurisdiction. Learning from concepts developed for use in Sierra Leone, this divestiture could only be overcome if the Control Council subsequently determined that the domestic court conducted the prosecution in a manner designed to shield the perpetrator from punishment.

International oversight of the reestablishing domestic courts also helps to ensure that the local forums will be able to develop gradually without becoming overwhelmed. It also minimizes the likelihood that the courts will be permitted to operate independently until they can function consistent with the rule of law. Therefore, the international community, acting through the Control Council, should determine the extent and timing of the independence of the post-conflict Iraqi domestic courts.

4. *Truth and Reconciliation Commission*

The history of modern war has brought with it the desire to bring justice to those who commit grave breaches of international law. It has also brought the recognition that the extreme volume of potential defendants can overwhelm any traditional system of justice. At best, this provides the basis for subsequent claims that the system was inequitable for prosecuting some, while thousands who committed similar or more egregious offenses

400. See generally FAWCETT & TANNER, *supra* note 368, at 48-51 (providing an excellent discussion on this and other issues that will face those tasked with rebuilding Iraq).

were ultimately set free. At worst, it gives rise to a system that could resemble collective vengeance more than a quest for justice.

This concern is not new. For example, the British in the Pacific theater during World War II faced the problem of the sheer magnitude of those who had been actively involved in war crimes, especially with respect to the maltreatment of POWs. The British command in the Pacific was concerned that if they did not consider the massive number of defendants in organizing their commissions, they would ultimately be accused of inconsistency in prosecution or, perhaps worse, simply using the commissions as a tool to humiliate further a vanquished people. To combat this, any war criminals determined likely to receive less than seven years from a military commission were effectively given amnesty.⁴⁰¹

The problem with this approach is that it fails to provide any closure or accountability in cases that do not meet the established criteria. This void can be filled using a truth and reconciliation commission that builds upon the lessons learned in Sierra Leone.⁴⁰² The combined result offers a pragmatic system of justice that also facilitates closure for those involved, thus providing the best possibility for future peace and reconciliation. And like the British in World War II, it should establish a threshold standard below which the commission will consider petitions for amnesty.⁴⁰³

Such a commission should be domestic in character with broad representation by the various ethnic groups and religious sects within Iraq.⁴⁰⁴ Further, the process for obtaining amnesty should rest with the individual, not with the commission itself. Individuals who believe that they may be entitled to amnesty should be required to provide detailed descriptions of their misconduct, to include the names of any known victims and surviving family members. Their petitions should include statements that they are willing to provide further truthful testimony to the commission, if requested, and cooperate with any lawfully constituted court, commission, or tribunal operating under the auspices of the international community or

401. *See supra* notes 290-91 and accompanying text.

402. *See supra* notes 353-56 and accompanying text.

403. "Major war criminals" should not be able to perfect amnesty through this process, nor should individuals of significant concern to the international community that might be candidates for prosecution before a military commission.

404. Initially, such a body may need to be under the direct management and control of the Control Council. Nonetheless, it should be primarily composed of Iraqis from various groups and backgrounds.

domestic authority. There should be a very limited period during which individuals are given the opportunity to file such requests.

The initial review of the petition should be by the members of the commission itself. If the commission determines that the petition appears to meet the requirements for amnesty, it will forward the petition to the Control Council for ultimate approval.⁴⁰⁵ This process will ensure that an organ of the domestic government will not be in the position to grant a general amnesty to a person wanted by the broader international community. It will also ensure that individuals do not subject themselves to a process believing that they have obtained immunity from the various international forums in Iraq, when in fact they have not.

When the Control Council reviews an amnesty petition, it should be staffed through the various offices of the International Military Tribunal as well as the representatives of the various nations that may have an interest in the matter. This process will also facilitate the prosecution of other war criminals because the petitioners may be a source of direct testimony against other subjects further up the chain of command. The window of opportunity for suspects to petition the commission, therefore, should be aligned to the extent possible with the main war crimes investigative phase. After such multilateral coordination, the Control Council should either reject the petition or return it to the domestic authorities for final action. If at such time amnesty is granted, it would divest any forum operating under the auspices of the Control Council from jurisdiction over the matter.

This process will aid in the restoration of peace while providing accountability for wrongs committed. The integration of a truth and reconciliation component into a post-conflict system of justice will require the coordination of many domestic and international governmental and non-governmental organizations. This is the role of a Control Council located on the ground in Iraq. Maximizing the use of judicial processes within the territory of Iraq is crucial to success. Keeping the instruments of justice

405. It is not pragmatically possible to propose a viable list of proposed requirements without evaluating the situation on the ground after the liberation of Iraq. The criteria should be such that they permit amnesty for a consistent list of misconduct that facilitates consistency in outcome and legitimacy in the process. It will be crucial that the system developed not be perceived as favoring one ethnic or minority group in Iraq over another.

close to the affected population will maximize their exposure to one of the cornerstones of modern democracies—the rule of law.⁴⁰⁶

C. The International Control Council—Iraq

In the justice system of post-conflict Iraq, there will be roles for the international community operating through the International Military Tribunal, for individual nations operating under the direct supervision of an international body, and for Iraqi domestic courts and commissions. These roles must be harmonized, however, to ensure consistency and compliance with the rule of law. They also must be coordinated in a fashion to maximize efficiency in an inherently inefficient process. This is the role of a Control Council.

This Control Council will ideally be established under the auspices of the United Nations Security Council⁴⁰⁷ and given broad latitude to develop regulations governing both the reconstruction of Iraq and, more specifically, the oversight of a post-conflict system of justice. Such a system could be developed within the framework proposed by the United States to the Security Council, in which the United States and the United Kingdom would manage the occupation and reconstruction of Iraq under the authority established by a Security Council resolution.⁴⁰⁸ The Council membership should be selected, as such, from nominations submitted to representatives of the United States and Great Britain from member nations involved in the liberation of Iraq, as well as from member nations that have been subjected to Iraqi aggression. A chairman selected from the Council's membership should lead the Control Council. The chairman

406. Some may argue that the best forum for accountability would be to turn the suspected war criminals over to an international tribunal established in a far off land, such as The Hague. While the idea of setting up a single international body to try all such criminals is noble, it is doomed to provide, at best, an incomplete solution. While it could serve as a method in which to bring justice to a select few, it would fail to provide coordination among the various forums necessary to meet fully the ends of justice, peace, and reconciliation in a nation where atrocities were common and committed by many.

407. If malfeasance by various Security Council members blocks participation by the United Nations, then the Control Council could be executed under the broad participation of the nations who pledged support for Operation Iraqi Freedom.

408. Mark Turner, *Few Dissent as US Seeks Approval at the UN for Occupation*, FIN. TIMES, May 10, 2003, at 3. This proposal will provide for unity of command and also permit the process to continue as necessary in one-year blocks following "an initial period of 12 months." *Id.*

should be vested with executive authority and should be accountable to the Security Council itself.

As discussed above, the prosecution of war criminals by the International Military Tribunal at Nuremberg, as well as by national military commissions, was internationalized and placed under the ultimate control of the Control Council.⁴⁰⁹ This model, though expanded to meet the unique contingencies within Iraq, will provide the best forum from which to manage various matters, such as pretrial detention of suspected war criminals; the development of fundamental procedural and evidentiary norms of the various international courts, commissions, and tribunals; and the resolution of disputes by competing constituencies. The Control Council could also establish an appellate chamber for cases coming out of the International Military Tribunal and the various national commissions. In the early stages of the development of the Iraqi domestic courts, it could also oversee the development of their rules and procedures. Finally, the Control Council, or one of its subdivisions, could serve as the final approval authority for verdicts and sentences meted out by the IMT or any of the “internationalized” national military commissions.⁴¹⁰

1. The International Control Council and Prisoner of War Repatriation

Apart from developing the basic ground rules for the prosecution of war criminals by the international community, the Control Council should become heavily involved in the repatriation process of any POWs held by the Allied parties to the conflict. Because it is unlikely that the various nations involved in the conflict will be aware of who is a potential war criminal and who is simply a common soldier, coordination with the Control Council should be required as part of the repatriation process. This should be required of both suspected war criminals and those whose participation in war crimes is unknown to the nation detaining the POW. Sus-

409. *See supra* note 222 and accompanying text. The composition of the Tribunal and the office of the prosecutor should more closely resemble the IMTFE, however. *See supra* notes 162-87 and accompanying text.

410. This is not to suggest that the Control Council should review or approve cases arising from the domestic courts except to the extent that this would meet its coordinating function. Once a case is placed in the hands of a domestic court, it should remain there, except when it becomes apparent that the case was conducted as a sham to protect the wrongdoer from international accountability. The coordinating process discussed above, however, should minimize the likelihood of such action.

pected war criminals as well as the names of POWs should be reported to the Control Council for screening. The Control Council should promulgate regulations that permit the detainment of the POW, with custody and control transferring to the Control Council upon repatriation.

Under this proposed structure, even if the United States held a prisoner suspected to be a war criminal of specific interest to the United States, the Control Council would have the primary authority and responsibility to place a detainer on the person in question and take the prisoner under its control at repatriation. At that point, the Control Council would evaluate the various forums available for prosecution and entertain requests for jurisdiction. At all times, however, the United Nations, through its sanction of the Interim Authority managed by the United States and the United Kingdom and its organs, such as the Control Council, would maintain the responsibility for the control of the detainee.⁴¹¹ Such release to this organ of the United Nations would not be a sham because it would create a responsibility for the Control Council to care for the detainee while removing the detainee from the control of the nation from which he was repatriated. Thus, the detainee ceases to be a POW at the hands of an individual nation and becomes a repatriated Iraqi now subject to detention pending trial by a United Nations' sanctioned organ of the international community.

If the Control Council elects not to detain an individual, or the respective nation elects not to repatriate the suspect in question, then the nation that held the individual as a POW could elect to exercise jurisdiction over the suspected war criminal. Under these circumstances, such a prosecution would by definition fall outside the control of the United Nations and would be governed by domestic and international law as it relates to the prosecution of criminals charged while held as a prisoner of war.⁴¹² This

411. Once the POW is repatriated and detained by the United Nations through its organ in Iraq, the Control Council, the detainee would lose his status as a prisoner of war for the purposes of Geneva Convention III. For the purposes of this Convention, a POW is a person who meets certain requirements "who have fallen into the power of the enemy." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950). They cease to be POWs upon their "release and repatriation." *Id.* art. 5. Upon election of the United Nations to detain the individual, it would be difficult to conceptualize the individual as a prisoner of war held by the "enemy." Regardless, if the United States or another nation were subsequently to petition the Control Council for jurisdiction to prosecute before a national commission, the individual in question would not be a prisoner of the "enemy" at that time because he would be under the detained custody and control of the international community, not the United Nations.

412. *See generally id.*

is in contrast to prosecutions before national courts that have been internationalized by their relationship to the Control Council and thus functioning under the authority of the United Nations.

2. The International Control Council and the Implementation of International Norms

The Control Council will be the representative of the international community on the ground. It will ideally be an instrumentality of the Security Council or its designated representatives. As such, it will have as a primary responsibility the development of the essential guidelines for the development of the rules of procedure and evidence for international courts established in Iraq. These guidelines would govern both the International Military Tribunal and the various underlying national commissions undertaken to extend the reach of the international community. It is by this process of control by regulation of the appellate process and by the act of final review that the Control Council serves as a mechanism from which to internationalize the operation of otherwise national commissions.

Within this environment, the Control Council will enforce articulated international norms that it will codify for its purposes from existing positive and customary international law. It will not, however, regulate extensively the procedures used by the national courts to meet these basic norms. With respect to the procedures of the Court, the Control Council should ensure that all accused before the IMT in Iraq and various commissions have, at a minimum, the right to competent and conflict free counsel, access to evidence upon which the prosecution is based, the opportunity to interview before trial and to confront at trial witnesses presented against them, and a detailed bill of particulars.

One such source for international norms is the International Covenant on Civil and Political Rights (ICCPR).⁴¹³ The United Nations, through its agents such as the Control Council, should ensure that the systems developed for use in Iraq comply with its terms. For example, while many nations oppose the death penalty, it may be imposed consistent with the ICCPR "for the most serious crimes."⁴¹⁴ Therefore, if (1) the death penalty

413. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

414. *Id.* art. 6.

is used for only serious crimes, such as directing or committing murder; and (2) the trials are conducted within the territory of Iraq or another nation that has not ratified the Second Optional Protocol to the ICCPR, which prohibits executions “within the jurisdiction of a State Party,”⁴¹⁵ then an international court can carry out the death penalty consistent with existing treaty obligations.

Any attempt to divest the International Tribunal of the ability to impose the death penalty will set the stage for unjust consequences downstream. Iraq will most likely desire to continue imposing the death penalty, and nations such as the United States may have jurisdiction to try some potential war criminals in a court that could potentially render a death sentence. Therefore, an International Tribunal established to bring justice to the major war criminals should have the ability to provide punishments consistent with what lesser war criminals might face before national courts and commissions or the Iraqi domestic courts.

With respect to rules operating within the courtroom, strict adherence to traditional evidentiary rules developed in the common law tradition should not be required. Though the prosecutors should be permitted to relax these traditional rules, if such an election is made, the same relaxed standards should be made available to the defense. Finally, the Control Council should affirmatively state in its regulations that the relaxed rules of evidence do not relax the standards of proof in the case. It shall be up to the Tribunal and the lesser commissions to decide the weight they attribute to any particular evidence, if any. Before any conviction is returned, however, there must be a requirement that the evidence admitted prove guilt beyond a reasonable doubt.⁴¹⁶

415. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, art. 1, G.A. Res. 44/128, U.N. GAOR 3d Comm., 44th Sess., Annex, Agenda Item 98, U.N. Doc. A/RES/44/128 (1989) (currently not in force), available at http://www.unhchr.ch/html/menu3/b/a_opt2.htm.

416. The lessons from both the international tribunals and the military commissions after World War II provide that a just tribunal may use relaxed rules of evidence. The key to success is providing for proof beyond a reasonable doubt. See *supra* notes 245-316 and accompanying text. This will help to ensure the legitimacy of the forum's findings as well as the court's legitimacy. Even the horribly flawed International Criminal Court guarantees an individual the promise of conviction only upon the establishment of guilt beyond a reasonable doubt. See ROME STATUTE, *supra* note 35, art. 66(3).

3. *The International Control Council, Competing Jurisdictions, and Appeals*

As discussed above, the Control Council should be used as the final arbiter of disputes over the forum used in any given prosecution. The POW repatriation-detainer process that all national armies and international forces will be required to follow facilitates this control. Once the Control Council has the suspected war criminal in its custody, it will evaluate the suspect for possible prosecution before the International Military Tribunal. In most cases, however, such individuals will fall below the jurisdiction of the IMT. In such cases, the individual will be available for prosecution by other internationalized bodies, such as national courts operating under the auspices of the Control Council or by domestic courts, as appropriate. When confronted by competing requests, the Control Council will be responsible for determining which forum will have primary jurisdiction. In reaching its determination, the Control Council should weigh the competing interests of justice, the need to restore peace among the former belligerents, and reconciliation.

The Control Council can also use its position to identify suspects worthy of prosecution, but who fall below the jurisdiction of the IMT. In some cases, there may not be an individual nation with a palpable interest in the prosecution of the individual at hand. Under these circumstances, the Control Council could request the assistance of one of the national courts that might be suitable for such a prosecution. For example, Iraq appears to have used jailed individuals as test subjects for their biological weapons program. While there may be no particular nation with a specific interest in prosecuting the scientists involved, the Control Council could evaluate such cases and request that a specific nation investigate and prosecute the matter as appropriate. This procedure would allow the Control Council to make use of available forums with the necessary expertise to handle cases of varying complexity.⁴¹⁷

The Control Council should also be responsible for establishing the standards for an independent appellate court. The court should be the sole appellate authority from all of the internationalized commissions, as well as from the IMT in Iraq. Though the Control Council should be responsi-

417. For example, if the Iraqi government is determined to have conducted medical experiments, a national commission from a country with a well-developed criminal system accustomed to handling complicated forensic cases could be of great assistance. Also, lessons from past practice such as in *The Medical Cases*, *supra* note 226, may be helpful.

ble for establishing the procedures and scope of review for the Court, the jurists could be selected by the Secretary-General of the United Nations from a list of nominees provided by the Security Council or the Control Council itself. This appellate court should be limited in function to ensure factual sufficiency of the findings and compliance with the standards required of all internationalized courts operating under the auspices of the Control Council. After the conclusion of the appeal process, the Control Council will serve as the final approval authority, approving convictions and punishments unless a majority of Council members vote to set aside the conviction or mitigate the punishment.

Finally, the Control Council should establish a domestic commission under the oversight of the domestic courts and the ultimate supervision of the Control Council to aid in resolving disputes related to the Arabization program.⁴¹⁸ This body should be used to resolve the various property disputes that will arise after the fall of the Hussein regime as various repopulated peoples begin to return to their traditional homelands. Such a system should be empowered to fix property rights and pay restitution to others who lose their homes in the process.⁴¹⁹

VII. Conclusion

The twentieth century, like many before it, was a century shaped by war. Unlike earlier eras, however, the twentieth century learned the horrors of world wars waged in a manner in which compressed planning and mobilization times were followed by lethal and lightning-fast conflict. Civilians moved from being in the position of hearing the distant thunder of cannons on the battlefield to being the subject of atrocities by tyrants bent on genocide and world conquest. The wars of the last century have provided the basis for the international body of law aimed at discouraging the potential wars of the future.

War is inevitable. Civilized society, however, must be able to deter through collective force those who wish to wage illegal wars, while strengthening the institutions that can spring into existence to punish the wrongdoer. The ultimate goal of these institutions must be the restoration

418. *See supra* notes 361-74 and accompanying text.

419. People have been removed from their traditional homelands and moved all over Iraq by the Hussein government. As such, people are currently living in homes lived by others forced to move over the last decade. *See supra* notes 371-74.

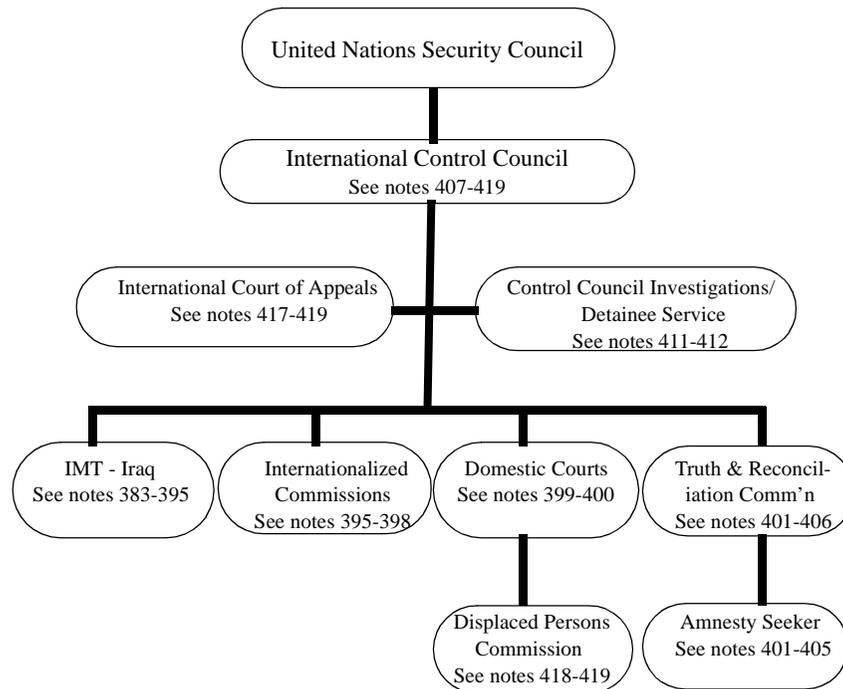
of peace and the reconciliation of parties to the hostilities. Deterrence is another laudable goal, but whether the fear of prosecution will ever deter the determined tyrant is questionable. Accordingly, the lessons of the past point to a model for the future. The model is one of flexibility and limited scope and duration.

All wars bring their distinct flavor of atrocities. Standing courts of international universal jurisdiction are inflexible and prone to politicization. An attempt by individual nations to exercise jurisdiction over those whom they perceive as war criminals, but with whom they have little or no direct relationship, sets the stage for the tyranny of the minority. Neither contributes substantially to the process of peace or reconciliation, and both have the potential for encouraging or extending hostilities.

An *ad hoc* system as the one discussed above for Iraq is a more appropriate model for Iraq and beyond. Rather than attempting to develop a “cookie cutter” approach, this system leverages the precedents of the past and the law of the day while providing a *system* tailored to meet the needs of reconciliation, peace, and justice. Such a system is inherently reflective in nature, and the jurists brought together from a variety of backgrounds will force a more conservative approach to resolving the legal issues presented. Such a system will strive for legitimacy in the cases at hand, knowing that their work is paramount to the reconciliation of the belligerents and a lasting peace. Such jurists will also be aware that history will judge the system based on their response to the facts and cases they confront. They will seek legitimacy, accountability, and justice, not the expansion of international law. International law will, therefore, inch forward at a pace tolerable to the international community, as opposed to racing forward like a runaway train, losing its respect and legitimacy as it goes.

The problems facing Iraq in the wake of the collapse of Hussein’s regime are myriad and complex. Their resolution will be difficult and at times painful. Nonetheless, if hope can be restored, the Iraqi people will be the primary beneficiaries. While the ultimate success in the reconstruction of Iraq will be in the hands of the Iraqi people, the international community can help shape the institutions that might bring the Iraqis peace and stability. The development of an equitable system of justice will further this goal, while adding another brick to the foundation of the rule of law for all to see.

Appendix



**DON'T TUG ON SUPERMAN'S CAPE:¹ IN DEFENSE OF
CONVENING AUTHORITY SELECTION AND
APPOINTMENT OF COURT-MARTIAL PANEL MEMBERS**

MAJOR CHRISTOPHER W. BEHAN²

An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence.³

Yet, when it is proposed that that same general, with those incalculable powers of life and death over his fellow citizens, be permitted to appoint a court for the trial of a soldier who has stolen a watch, oh, no, we can't have that And I say, if you trust him to command, if you trust him with only the lives and destinies of these millions of citizens under his command, that actually with the future of the country, because if he fails, things are going

1. "You don't tug on Superman's cape/You don't spit into the wind/You don't pull the mask off that old Lone Ranger/And you don't mess around with Jim." JIM CROCE, *You Don't Mess Around with Jim*, on YOU DON'T MESS AROUND WITH JIM (ABC Records 1972).

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3. General William Tecumseh Sherman, *quoted in Hearings on H.R. 2498 Before Subcomm. of the House Comm. on Armed Services*, 81st Cong. 789 (1949) (statement of Frederick Bernays Wiener), *reprinted in* INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000) [hereinafter *House Hearings*].

*to be rough, you can certainly trust him with the appointment of a court.*⁴

I. Introduction

From the earliest beginnings of our republic, military commanders have played a central role in the administration of military justice. The American military justice system, derived from its British predecessor, predates the Articles of Confederation and the Constitution.⁵ Although the system has evolved considerably over the years to its current state of statutory codification in the Uniform Code of Military Justice (UCMJ),⁶ one thing has remained constant: courts-martial in the United States military are, and always have been, ad hoc tribunals⁷ created and appointed by the order of a commander, called a convening authority,⁸ for the express purpose of considering a set of charges that the commander has referred to the court.⁹

In turn, the members of the court, who in nearly every case are under the command of the convening authority,¹⁰ take an oath to “faithfully and impartially try, according to the evidence, [their] conscience, and the laws applicable to trial by court-martial, the case of the accused” before their court.¹¹ By their oath, when they sit in judgment in a military courtroom, panel members leave behind the commander who appointed them.¹²

The modern American military justice system is a creature of statutes that draw their authority from Congress’s constitutional responsibility to

4. *Id.* at 800.

5. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 47 (2d ed. 1920 reprint). Colonel Winthrop notes that the English military tribunal was transplanted to the United States before the American Revolution, recognized and adopted by the Continental Congress, and continued in existence with the Constitution and congressional implementing legislation of 1789. *Id.*

6. 10 U.S.C. ch. 47 (2000).

7. See WINTHROP, *supra* note 5, at 49-50 (noting that a court-martial is “called into existence by a military order and by a similar order dissolved when its purpose is accomplished . . . [.] transient in its duration and summary in its action”).

8. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(a)* (2002) [hereinafter *MCM*] (“A court-martial is created by a convening order of the convening authority.”).

9. *Id.* R.C.M. 601(a) (“Referral is the order of a convening authority that the charges against an accused will be tried by a specified court-martial.”).

10. *Id.* R.C.M. 503(b)(3).

11. *Id.* R.C.M. 807(b)(2) discussion.

make “Rules for the Government and Regulation of the land and naval Forces.”¹³ Its ultimate purpose is to help ensure the security of the nation by means of a well-disciplined military.¹⁴ No other system of justice in our nation carries an equivalent burden.

The modern court-martial has been extensively civilianized and, in more ways than not, closely resembles trial in federal district court.¹⁵ A military judge presides over the court-martial, rules on evidentiary matters, and instructs the panel.¹⁶ The court-martial is an adversarial proceeding in which a trial counsel prosecutes the government’s case, and the accused is represented either by appointed military defense counsel, a civilian defense counsel, or a combination of the two.¹⁷ The accused in a court-martial, unlike a defendant in the federal system, has an absolute right to elect trial by judge alone or by a panel in non-capital cases.¹⁸ Although there are many functional differences between a court-martial panel and a

12. To a professional military officer or noncommissioned officer, taking an oath is no light thing. Herman Melville, no friend of military justice, observed, “But a true military officer is in one particular like a true monk. Not with more of self-abnegation will the latter keep his vows of monastic obedience than the former his vows of allegiance to martial duty.” HERMAN MELVILLE, *Billy Budd, Sailor* (1924), in *GREAT SHORT WORKS OF HERMAN MELVILLE* 481 (1969).

13. U.S. CONST., art. I, § 8, cl. 14.

14. See MCM, *supra* note 8, pt. I, ¶ 3. The Preamble to the *Manual for Courts-Martial* contains a statement defining the purposes of the military justice system: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” *Id.*

15. In fact, the UCMJ requires the President of the United States to prescribe rules of procedure and evidence at courts-martial “which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.” UCMJ art. 36(a) (2002).

16. See *id.* art. 26(a) (listing the requirements for military judges and also some of their duties).

17. See *id.* art. 38.

18. Compare *id.* art. 16 (noting that in general and special courts-martial, an accused may be tried either by members or, at his election and with the approval of the military judge, by the military judge alone), with FED. R. CRIM. P. 23(a) (requiring approval of the judge and the prosecutor before a defendant is permitted trial by judge alone). See also UCMJ art. 18 (stating that a general court-martial consisting of a military judge alone does not have jurisdiction to try capital cases).

jury,¹⁹ both perform the similar fact-finding role of listening to the evidence and determining guilt or innocence beyond a reasonable doubt.

But there is a fundamental difference that many scholars, observers, and critics of the military justice system find troubling: Under Article 25(d)(2) of the UCMJ, the convening authority personally selects members of the court who, “in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”²⁰ There are no voter-registration or driver’s license lists, no venire panels or jury wheels, and no random selection of a representative cross-section of the community required in a court-martial under the UCMJ. Members are selected at the will of their commander. The subjective nature of this statutory mandate to select court members according to the personal judgment of the convening authority is, in the words of a former Chief Judge of the United States Court of Appeals for the Armed Forces (CAAF), “the most vulnerable aspect of the court-martial system; the easiest for critics to attack.”²¹

And attack they have, on several fronts, in a campaign that began early in the twentieth century,²² pressed on through the legislative debates surrounding the passage of the UCMJ in 1950,²³ and continues today. The popular press,²⁴ numerous scholars,²⁵ and even an independent commission²⁶ have all waged relentless warfare against convening authority appointment of court members. The battles have not been confined to our shores. Two of the United States’ closest allies, Canada and Great Britain, whose systems were once very similar to America’s, have bowed to the

19. For example, a court-martial panel also performs the judicial function of sentencing the accused. *See* UCMJ art. 51(a) (setting out the procedure for voting on both findings and sentence); MCM, *supra* note 8, R.C.M. 1005(e)(4) (requiring the military judge to instruct the members that “they are solely responsible for selecting an appropriate sentence”). In addition, the UCMJ still provides for a special court-martial without a military judge, in which a panel of at least three members handles all judicial functions. *See* UCMJ art. 16(2). Procedurally, the court-martial panel interacts at trial in a manner virtually unknown to the modern American criminal justice system: the panel members are permitted to take notes, question the witnesses, and request witnesses of their own. *See infra* note 569 and accompanying text.

20. UCMJ art. 25(d)(2).

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

22. *See infra* note 165 and accompanying text.

23. *See infra* note 195 and accompanying text.

24. *See, e.g.*, Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19, 21 (claiming that the convening authority’s power to pick jurors is “the Achilles heel” of the system).

judgment of higher courts and removed commanders altogether from the process of convening courts-martial and personally appointing members.²⁷

25. See, e.g., Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendation to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (advocating substantial structural reforms of the military justice system, including removal of the commander from the panel member selection process); Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000) (suggesting a random selection system that would eliminate the need for UCMJ Article 25(d)(2) criteria); Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195 (2000) (discussing world-wide changes in various military justice systems and suggesting that the UCMJ fall in with major world trends); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 Sw. U. L. REV. 481 (1999) (pessimistically suggesting that nothing can be done to eliminate unlawful command influence, and recommending scrapping the UCMJ during peacetime); Matthew J. McCormack, Comment, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013 (1999) (arguing that the time has come to remove the convening authority from the panel selection process and substitute random selection); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998) (claiming that the statutory panel member selection process is unconstitutional and advocating random panel selection); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992) (recommending substantive changes to UCMJ Article 25(d)(2), the establishment of a neutral panel commissioner, and random selection of panel members); David M. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991) (observing that the practice of convening authority appointment at least looks bad, and noting that a computer-assisted random selection process should not be too difficult to implement); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 1978 A.F. L. REV. 343 (discussing the problems inherent with command selection of court-member appointment and recommending changes to panel size and a random selection scheme); Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972-1973) (recommending removal of the commander from the court-member appointment process and substituting a random selection scheme based on the then-current ABA Standards for Criminal Justice); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 143 (1972) (arguing that the panel selection system of the UCMJ is in conflict with the Constitution, and recommending random selection to solve the problem); Major Rex R. Brookshire II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972) (advocating a random selection system that fulfills the Article 25 “best-qualified” criteria). But see Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20x*, 156 MIL. L. REV. 1 (1998) (recognizing the perception problem with the court-member selection process, but opining that the current system produces better panels than any other system would, and asserting that a random selection system could be administratively cumbersome and disruptive of military operations).

26. See, e.g., HONORABLE WALTER T. COX III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001) [hereinafter COX COMMISSION].

An activist majority of the CAAF recently opened a new front in this war in the controversial case of *United States v. Wiesen*,²⁸ in which it held that a military judge had abused his discretion in denying a defense challenge for cause of a panel president who had a supervisory relationship over enough of the panel members to form the two-thirds majority necessary to convict.²⁹ Over the vigorous dissent of Chief Judge Crawford and Senior Judge Sullivan, the majority employed its own implied bias doctrine to limit significantly a commander's ability to select subordinate commanders to serve on panels who might otherwise meet the statutory criteria of age, education, training, experience, length of service, and judicial temperament.³⁰

Yet Congress has not seen fit to remove from the commander the duty to appoint court-martial members according to subjective criteria. The issue of command appointment of court members existed and was thoroughly debated when Congress created the UCMJ in the late 1940s and early 1950s. From time to time, Congress has re-visited the issue, most recently in 1999 when it directed the Joint Services Committee (JSC) on Military Justice to study random selection of court-martial panel members.³¹ The JSC recommended retaining the current system of discretion-

27. *See* R. v. Genereux, [1992] S.C.R. 259 (invalidating role of convening authority in Canadian military justice system as a violation of the Canadian Charter of Rights and Freedoms guarantee of an independent and impartial tribunal); *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997) (invalidating the role of the convening authority in the British military justice system as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantee of an independent and impartial tribunal).

28. 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2001).

29. *Id.* at 176. In *Wiesen*, the accused was convicted by a general court-martial of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice, and he was sentenced to twenty years' confinement, a dishonorable discharge, reduction to E-1, and total forfeitures of pay and allowances. The original court-martial panel president was a maneuver brigade commander at Fort Stewart, Georgia. He had either a direct command relationship or potential supervisory relationship over six of the nine court-martial panel members. The military judge conducted a thorough voir dire in which all parties agreed that they would not be influenced by this relationship. The defense counsel challenged the panel president based on the CAAF's implied bias doctrine, and the military judge denied the challenge. The defense counsel used a peremptory challenge to remove the panel president and preserve the issue for appeal. *Id.* at 173-74. Ironically, the panel that actually heard the case and rendered the verdict and sentence no longer included the original panel president.

30. *See id.* at 176 ("[I]n this case, the Government has failed to demonstrate that operational deployments or needs precluded other suitable officers from reasonably serving on this panel, thus necessitating the Brigade Commander's participation.") These factors are not in the text of UCMJ Article 25(d)(2) or any of the Rules for Courts-Martial.

ary command appointment,³² and Congress has not revisited the issue since.

Moreover, the Article III courts have shown great deference to the collective judgment of Congress on matters of military justice. On collateral review, lower federal courts have found no constitutional or due process infirmities in the UCMJ's statutory requirement for the convening authority to apply personal judgment—that skill most valued in a commander—to appoint court members.³³

Thus, even as critics assail the commander's role in selecting panel members, the statute remains intact, undisturbed by either Congress or the Article III courts. This article explores the historical, constitutional, and practical dimensions of the congressional decision to maintain command control over the court-member appointment process and concludes that the system meets the due process standards of an Article I court, while permitting Congress to achieve its goal of creating a fair, efficient, and practical system that works worldwide, in garrison or in a deployed environment, in time of peace or war. Command control of the court-member appointment process is vital to maintaining a system of military justice that balances the needs of the military institution with the rights of the individual.

Section II of this paper plumbs the historical underpinnings and constitutional framework of command control of the court-martial system. Section III addresses and defends against contemporary attacks on convening authority panel selection. Finally, section IV proposes a two-phase strategy to help ensure the preservation of convening authority panel selection.

31. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920.

32. U.S. DEP'T OF DEFENSE, JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (1999) [hereinafter JSC REPORT].

33. See, e.g., *McDonald v. United States*, 531 F.2d 490, 493 (Ct. Cl. 1976) (noting that Congress deliberately continued the historical scheme of convening authority panel member appointment over strong objections to the process).

II. Historical and Constitutional Foundations of Court-Martial Panel Selection

The statutory role of the convening authority in appointing court-martial panel members is built on a firm historical foundation that predates the Constitution. Military tradition alone, however, is not sufficient to justify the practice; the Constitution is the only source of power authorizing action by any branch of government.³⁴ It is an inescapable historical reality³⁵ that even as the Framers guaranteed the right of a jury trial both in the text of the Constitution³⁶ and in the Bill of Rights,³⁷ they denied it to those serving in the armed forces. And Congress, from the beginning, has retained the long-standing practice of a convening authority personally selecting the members of a court-martial panel.

This section first reviews the historical tradition of court-martial panel selection. It then examines the constitutional framework for the government of the military. Third, the section traces the history of congressional oversight of the panel member selection process. Finally, the section analyzes the statutory due process system of courts-martial in the context of congressionally created legislative court systems.

A. Historical Development of the American Court-Martial Panel

1. *Origins and Nature of Military Tribunals*

According to William Winthrop tribunals for the trial of military offenders have “coexisted with the early history of armies.”³⁸ The modern court-martial is deeply rooted in systems that predated written military

34. *Dorr v. United States*, 195 U.S. 138, 140 (1904) (noting that the Constitution is the only source of power authorizing action by any branch of government).

35. *But see* Glazier, *supra* note 25. Glazier insists that a military panel is actually a jury within the wider definition of the term that he advocates. *Id.* at 17-18. He also asserts that the Supreme Court’s long-standing position that neither the Article III nor the Sixth Amendment jury trial guarantees apply to the military is wrong. *See generally id.* at 14-31.

36. U.S. CONST. art. III, § 2, cl. 3.

37. *Id.* amend. VI.

38. WINTHROP, *supra* note 5, at 45.

codes and were designed to bring order and discipline to armed and sometimes barbarous fighting forces.³⁹

Both the Greeks and the Romans had military justice codes, although no written versions of them remain.⁴⁰ Justice in the Roman armies was administered by *magistri militum* or by legionary tribunes, who served either as sole judges or operated with the assistance of councils.⁴¹ Written military codes of various European societies, including Salians, Goths, Lombards, Burgundians, and Bavarians,⁴² date back to the fifth century and demonstrate the historical importance of codes and systems of justice in governing armies.

Nearly every form of military tribunal included a trial before a panel or members of some type.⁴³ During times of peace among the early Germans, the Counts, assisted by assemblages of freemen, conducted judicial proceedings; in time of war, the duty shifted to Dukes or military chiefs, who usually delegated the duty to the priests who accompanied the Army. Later, the Germanic system featured regimental courts in which both soldiers and officers were eligible as members. In special cases involving high commanders, the King would convene a court consisting of bishops and nobles.⁴⁴ The Emperor Frederick III instituted courts-martial proper, *militärgerichts*, in his Articles of 1487, including what Winthrop calls “the remarkable spear court,” in which “the assembled regiment passed judgment upon its offenders.”⁴⁵

39. Captain(P) David M. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

40. See Major Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 11 (1985); WINTHROP, *supra* note 5, at 17.

41. WINTHROP, *supra* note 5, at 45; see also Schlueter, *The Court-Martial*, *supra* note 39, at 131.

42. WINTHROP, *supra* note 5, at 17-18. Winthrop points out that these codes were all civil as well as military, “the civil and military jurisdictions being scarcely distinguished and the civil judges being also military commanders in war.” *Id.* at 18.

43. See generally *id.* at 45-47 (listing several examples of different tribunals and their membership).

44. *Id.* at 45.

45. *Id.* at 46.

2. *Development of the British Court-Martial System*

a. *Court of Chivalry and Code of King Gustavus Adolphus*

By far the greatest influence on the modern court-martial, however, came from two different systems, the Court of Chivalry in England and the military code of Sweden's King Gustavus Adolphus.⁴⁶ These courts both struck a balance between the demands of good order and discipline and concepts of due process,⁴⁷ thereby laying a foundation for modern systems of military justice that strive to do the same.

William the Conqueror brought the Supreme Court—the *Aula Regis*—with him from Normandy to England in the eleventh century.⁴⁸ The court was physically located with the king, and it had a broad jurisdictional mandate that included military matters. In the thirteenth century, under Edward I, the *Aula Regis* was subdivided to provide for a separate military justice forum.⁴⁹ This court, known as the Court of Chivalry, featured a panel in which the commander of the armies served as the lord high constable and presided over a court consisting of the earl marshal, three doctors of civil law, and a clerk-prosecutor.⁵⁰ When the constable did not preside over the court, the next-ranking member of the Army, the earl marshal, assumed this responsibility; in this guise, the court was considered a military court or court of honor. The court followed the Army into the field during wartime and served as a standing or permanent forum.⁵¹ By the eighteenth century, legislative restrictions caused the Court of Chivalry to fall into disuse; its broad jurisdiction into both civil and criminal matters had infringed too much on the common law courts.⁵² It did, however, play a significant role in the development of the British Articles of War.⁵³

The Swedish military code of King Gustavus Adolphus, promulgated in 1621, was also tremendously influential in the development of the Brit-

46. Schlueter, *The Court-Martial*, *supra* note 39, at 132.

47. *Id.* at 134.

48. WINTHROP, *supra* note 5, at 46.

49. Schlueter, *The Court-Martial*, *supra* note 39, at 136; *see also* WINTHROP, *supra* note 5, at 46

50. Schlueter, *The Court-Martial*, *supra* note 39, 136-37. The court had jurisdiction over civil and criminal matters involving both soldiers and camp followers. *See id.*

51. *Id.* at 137.

52. *Id.* at 137-38; *see also* WINTHROP, *supra* note 5, at 46.

53. *See* Schlueter, *The Court-Martial*, *supra* note 39, at 135 (stating that in its concern for honor and due process, the Court of Chivalry was a significant benchmark in the history of the court-martial).

ish Articles,⁵⁴ for the simple reason that large numbers of British subjects served as officers and soldiers in the armies of the Swedish king.⁵⁵ Many provisions of the British Articles evolved directly from the Gustavus Adolphus Code.⁵⁶

The Gustavus Adolphus Code contained explicit provisions concerning the membership of courts-martial, some vestiges of which remain in today's UCMJ.⁵⁷ There were two levels of courts-martial, the regimental court (referred to in the Code as the "lower Court")⁵⁸ and the standing court-martial (called the "high Court").⁵⁹

The Gustavus Adolphus Code explicitly set out the composition of the regimental court by rank and position. In the cavalry, the commander was president (in his absence, the Captain of the Life-Guards), and the court consisted of "three Captains[,] . . . three Lieutenants, three Cornets, and three Quarter-masters" to form a court-martial panel of thirteen.⁶⁰ In the infantry, the court consisted of either the commander or his deputy as

54. See Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970) (noting that the British Articles of War had evolved from the code promulgated by Gustavus Adolphus and not from the English common law).

55. See WINTHROP, *supra* note 5, at 19 n.15.

56. *Id.* at 19. Commenting on the Gustavus Adolphus Code, Winthrop stated:

In reading these (one hundred and sixty-seven in number), it is readily concluded that not a few of the articles of the English codes of a later date were shaped after this model or suggested by its provisions. In some instances, in our own present articles, there are retained quaint forms of expression identical with terms to be found in this early code as translated.

Id.

57. See, e.g., UCMJ art. 16 (2002) (establishing three levels of court-martial: the general court-martial, with a military judge and not less than five members or a military judge alone; the special court-martial, with either three members, a military judge and not less than three members, or a military judge alone; and a summary court-martial, consisting of one commissioned officer).

58. Code of Articles of King Gustavus Adolphus of Sweden, art. 138 [hereinafter Gustavus Adolphus Code], reprinted in WINTHROP, *supra* note 5, at 907. In directly quoting provisions of the Gustavus Adolphus Code, this article has preserved original spellings.

59. Schlueter, *The Court-Martial*, *supra* note 39, at 132-33.

60. Gustavus Adolphus Code, *supra* note 58, art. 140.

president and “two Captains[,] . . . two Lieutenants, two Ensigns, four Serjeants, and two Quarter-Masters,” again for a panel of thirteen.⁶¹

The high court likewise had explicit membership requirements. The General served as President of the Court, and members included the “Field-Marshal, . . . the Generall of the Ordinance, . . . Serjeant-Major-Generall[,] . . . Generall of the Horse, . . . Quarter-Master-Generall[,] . . . and the Muster-Master-Generall” as well as every regimental colonel, men in the Army of good understanding, and even “Colonells of strange Nations.”⁶²

The two courts differed in jurisdiction. The regimental court heard cases of theft, insubordination, minor offenses, and minor civil issues.⁶³ The high court handled matters affecting an officer’s life or honor,⁶⁴ as well as serious offenses, to include treason and conspiracy.⁶⁵ If an accused suspected “our lower Court to be partiall anyway,” he could appeal to the high court, which would then decide the matter.⁶⁶

Members of the court-martial were required to take an oath, by which they promised to

Judge uprightly in all things according to the Lawes of God, or our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty that I find guilty.⁶⁷

61. *Id.* art. 141.

62. *Id.* art. 143.

63. Schlueter, *The Court-Martial*, *supra* note 39, at 134.

64. *Id.* at 133.

65. *Id.* at 134.

66. Gustavus Adolphus Code, *supra* note 58, art. 151.

67. *Id.* art. 144.

With very few substantive modifications, this oath carried through the British Articles of War, the American Articles of War, and into the modern UCMJ.⁶⁸

Several aspects of the Gustavus Adolphus Code are significant to the historical development of panel member selection. First, the Code required direct involvement of the commander, both in serving as the president of the court-martial and in selecting the members of the court. Second, the Code established a system that limited the discretion of the commander, both in the size and in the composition of the court; for instance, in a regimental court of the infantry, the commander had to select two captains, two lieutenants, two ensigns, four sergeants, and two quartermasters. Third, the Code recognized that in some cases an accused might suspect a regimental court to be biased and, accordingly, granted the accused a right of appeal to the higher court on that basis.

b. The Mutiny Act and the Articles of War

The Court of Chivalry faded into history in the sixteenth century,⁶⁹ but the need for military justice did not. England's rulers still faced "the problem of maintaining military discipline in a widely dispersed army."⁷⁰ The solution was to form military courts by issuance of royal commissions or by including special enabling clauses in the commissions of high-ranking commanders.⁷¹ These tribunals eventually became known as courts-martial. These early courts-martial, like those under the Gustavus Adol-

68. See *supra* note 11 and accompanying text; *infra* notes 105, 126 and accompanying text.

69. See Schlueter, *The Court-Martial*, *supra* note 39, at 137 (noting that the Court of Chivalry survived until 1521). Interestingly, the Court of Chivalry still maintains jurisdiction over questions relating to the right to use armorial ensigns and bearings. It did not sit at all from 1737 to 1954. See James Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. REV. 478 (1969), reprinted in Bicentennial Issue, MIL. L. REV. 25, 28 (1975).

70. Schlueter, *The Court-Martial*, *supra* note 39, at 139. The problems posed by a widely dispersed military remain today. As of 30 September 2002, out of a total strength of 1,411,634 personnel, 230,484 were deployed or stationed overseas. See DIRECTORATE FOR INFORMATION OPERATIONS AND REPORTS, U.S. DEP'T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND COUNTRY (Sept. 30, 2002), available at <http://web1.whs.osd.mil/mmid/m05/hst0902.pdf>. Since the information for this report was gathered, the United States has deployed significant forces both to Afghanistan and to South-west Asia for combat.

71. Schlueter, *The Court-Martial*, *supra* note 39, at 139; cf. UCMJ arts. 22-24 (2002) (delineating who may convene general, special, and summary courts-martial).

phus Code, were convened by a commander who also sat on the court as its president.⁷² The courts had plenary jurisdiction and operated only in wartime.

The period between the Court of Chivalry and the passage of the initial Mutiny Act in 1689⁷³ was tumultuous, characterized by struggles between the monarchy, which sought to expand the jurisdiction of military tribunals against civilians, and Parliament, which desired to limit significantly the reach of military jurisdiction. In 1642, Parliament promulgated direct legislation authorizing the formation of military courts, appointing a commanding general and fifty-six other officers as commissioners to execute military law.⁷⁴ Twelve or more of these officers had to be present to form a quorum, and the tribunal was authorized to appoint a judge advocate, provost marshal, and other officers considered necessary.⁷⁵

Although it authorized the formation of courts-martial, Parliament never legislatively created them, fearing that by so doing it would obligate itself to support a standing army. Charles II, however, was permitted to maintain an army at his own expense. In recognition of the need to provide discipline for his troops, Charles II issued Articles of War in 1662.⁷⁶ The Articles of War were not acts of Parliament, but instead were issued by the monarch in his capacity as the executive.⁷⁷

These early Articles of War reflected a concern with due process⁷⁸ and panel member composition. Under the 1686 “English Military Discipline” of James II, for example, a court-martial had to consist of at least seven officers, including the president. There was a preference for officers in the rank of captain or above; the Code states that “if it so happen that there be not Captains enough to make up that Number, the inferiour Offic-

72. Schlueter, *The Court-Martial*, *supra* note 39, at 139.

73. 1 W. & M., c. 5 (1689) (Eng.).

74. Schlueter, *The Court-Martial*, *supra* note 39, at 138-40.

75. *Id.* at 141.

76. *Id.* at 141 n.38.

77. *See id.* at 143. The Articles of War had a long history in England. They were generally promulgated directly by the King as an exercise of his royal prerogative, although in some cases the generals commanding the armies of the King were authorized to promulgate their own Articles of War. *See* WINTHROP, *supra* note 5, at 18-19.

78. Schlueter, *The Court-Martial*, *supra* note 39, at 140 (observing that, over time, the Articles of War evolved and showed “an increased interest in military due process”).

ers may be called in.”⁷⁹ There was otherwise no limitation on the commander’s discretion in appointing the members of the court.

Following the mutiny and desertion of a group of Scottish troops who refused to obey orders to deploy to Holland, Parliament enacted the first Mutiny Act in 1689.⁸⁰ By the customs of war, the offenses were punishable by death. Domestic law at the time, however, forbade the executive (and the court-martial of the day was solely an instrument of the executive) from adjudging the death penalty in England during a time of peace,⁸¹ although courts-martial could adjudge the penalty abroad.⁸² Because of the mutiny, Parliament had little trouble enacting a provision that granted courts-martial the ability to adjudge the death penalty for mutiny or desertion domestically, provided that at least nine of thirteen officers present in the tribunal voted for it.⁸³ The initial Mutiny Act remained in force for seven months, but with only a relatively minor exception, was renewed annually until it was allowed to expire in 1879.⁸⁴

It became customary to publish the Articles of War, which were promulgated by the executive, alongside the annual Mutiny Act.⁸⁵ In 1712, the Act was extended to Ireland and the colonies. In 1717, Parliament extended the jurisdiction of the court-martial in England.⁸⁶ By 1803, Parliament gave a statutory basis to the Articles of War, providing that both the Articles and the Mutiny Act applied in England and abroad.⁸⁷

The Mutiny Act was significant in several respects. First, it provided for courts-martial to adjudge the death penalty in England under certain circumstances. Second, it demonstrated a concern for the composition of the court-martial panel in death penalty cases, requiring the concurrence of at least nine of thirteen officers present. Third, the Act neither superseded

79. KING JAMES II, ENGLISH MILITARY DISCIPLINE (1686), *extract reprinted in* WINTHROP, *supra* note 5, at 919.

80. *See* WINTHROP, *supra* note 5, at 19; *see also* Schlueter, *The Court-Martial*, *supra* note 39, at 142-43.

81. WINTHROP, *supra* note 5, at 19.

82. *Id.* at 20.

83. Schlueter, *The Court-Martial*, *supra* note 39, at 143; *see also* WINTHROP, *supra* note 5, at 20.

84. WINTHROP, *supra* note 5, at 20. During its nearly two-hundred year history, there were only two years and ten months, from 1698 to 1701, when the Act was not renewed. *Id.* at 20 n.22.

85. *Id.*

86. Schlueter, *The Court-Martial*, *supra* note 39, at 143.

87. *Id.*; *see also* WINTHROP, *supra* note 5, at 20.

the Articles of War nor abrogated the prerogative of the sovereign to create them.⁸⁸

c. The 1765 Articles of War: Direct Ancestor of the American System

When war broke out between the American colonists and their British masters in 1775, the British were operating under the 1765 version of the Articles of War.⁸⁹ This version eventually became the template for military justice in the Continental Army.

The British Articles of War formed a precise code⁹⁰ that governed the details of everyday life in the Army⁹¹ and provided a sound method for trying offenses at courts-martial. The Articles of War established two levels

88. Schlueter, *The Court-Martial*, *supra* note 39, at 143.

89. See Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 298 n.41 (1957) (noting that the 1765 version of the Articles of War was in force at the outbreak of the Revolutionary War); see also British Articles of War of 1765 [hereinafter 1765 Articles], reprinted in WINTHROP, *supra* note 5, at 931 (Winthrop includes a parenthetical explanation that this version of the Articles of War was in place at the outset of the Revolutionary War). But see Schlueter, *The Court-Martial*, *supra* note 39, at 145 (stating that a 1774 version of the Articles of War was in place at the outset of the war).

90. Speaking of the British Articles of War throughout the ages, a distinguished British jurist wrote:

These statutes are very remarkable. They form an elaborate code, minute in its details to a degree that might serve as a model to anyone drawing up a code of criminal law. . . . [A]nyone who has taken the trouble to look into the Articles of War by which the Army is governed must, I think, do those who framed them the justice to say that they are most elaborate and precise.

Cockburn L.C.J., *quoted in* Stuart-Smith, *supra* note 69, at 27.

91. See, e.g., 1765 Articles, *supra* note 89, § I, art. I (requiring all officers and soldiers to attend church services), § II, art. V (forbidding officers or soldiers from striking their superiors or disobeying orders, on pain of death or other punishment as directed by a court-martial), § IX, art. III (requiring officers to issue a public proclamation that the inhabitants of towns or villages where troops were quartered should not suffer noncommissioned officers or soldiers "to contract Debts beyond what their daily Subsistence will answer" or the debts would not be discharged).

of court-martial, the general court-martial⁹² and the regimental court-martial.⁹³

The general court-martial was convened by “the Commander in Chief or Governor of the Garrison”⁹⁴ and consisted of no less than thirteen commissioned officers.⁹⁵ In a change from the earlier tribunals under the Code of Gustavus Adolphus and the post-Court of Chivalry courts-martial,⁹⁶ the convening authority was no longer permitted to sit on the court as its president.⁹⁷ In courts-martial held in Great Britain and Ireland, the president of a general court-martial had to be a field grade officer.⁹⁸ Overseas, if “a Field Officer cannot be had,” the next officer in seniority to the commander, but no lower than a captain, could serve as the president.⁹⁹

There were further limitations on panel composition in a general court-martial. A field grade officer could not be tried by anyone under the rank of captain.¹⁰⁰ Servicemen were entitled to be tried by members of their own branch of service for purely internal disputes or breaches of discipline.¹⁰¹ Presumably, this provision recognized the principle that officers belonging to the same branch of service as the offender would have special insight or expertise that would lend a sense of context to the court-martial.

For cases involving disputes between members of the Horse Guards and the Foot Guards, the court-martial would be composed equally of officers belonging to both Corps, the presidency of the court-martial rotating between the Corps by turns.¹⁰² This provision helped ensure, at least

92. *Id.* § XV, arts. I-II.

93. *Id.* § XV, art. XII.

94. *Id.* § XV, arts. I-II; *cf.* UCMJ art. 22 (2002) (setting out the requirements for convening a general court-martial).

95. 1765 Articles, *supra* note 89, § XV, arts. I-II; *cf.* UCMJ art. 16 (establishing that a general court-martial with members must consist of a military judge and at least five members).

96. *See supra* notes 60-62 and accompanying text.

97. 1765 Articles, *supra* note 89, § XV, arts. I-II (stating that the court-martial president could not be either the commander in chief or governor of the garrison where the offender was tried).

98. *Id.* § XV, art. I.

99. *Id.* § XV, art. II. This is a significant provision in its tacit recognition that operational realities could trump the otherwise rigid panel composition requirements of the Articles of War.

100. *Id.* § XV, art. IX; *cf.* UCMJ, art. 25(d)(1) (“When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.”).

nominally, that there was no service-connected bias on the court; an infantryman who struck a cavalryman, for example, would never be tried by a court consisting entirely of either infantrymen (who might be too lenient) or cavalrymen (who might be too harsh).

The regimental court-martial, being a smaller court of more limited jurisdictional concern,¹⁰³ had fewer requirements. The regimental court-martial was composed of five officers, “excepting in Cases where that Number [could not] conveniently be assembled,” in which case three would suffice. The court was convened by the regimental commanding officer, who was prohibited from serving on the court-martial himself.¹⁰⁴

Other than rank and branch-of-service requirements, there were no other limits on the discretion of the court-martial convening authority in selecting panel members. As for the members themselves, they took an oath, as had their predecessors under the Gustavus Adolphus Code, to render fair and impartial justice:

I [Name] do swear, that I will duly administer Justice according to the Rules and Articles for the better Government of His Majesty’s Forces . . . without Partiality, Favour, or Affection; and if any doubt shall arise, which is not explained by the said Articles or Act of Parliament, according to my Conscience, the best of my Understanding, and the Custom of War in like cases.¹⁰⁵

The British system of military justice developed considerably over the seven hundred years of its existence.¹⁰⁶ Drawing on civil law sources

101. 1765 Articles, *supra* note 89, § XV, arts. III-IV. Although this type of provision is no longer a part of American court-martial practice, it does remain in Army administrative separation procedures for officers and enlisted personnel. *See, e.g.*, U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL SEPARATIONS para. 2-7b(2) (1 Nov. 2000) (guaranteeing that in separation boards for Reserve Component soldiers, at least one board member will be from a Reserve Component); U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-7 (3 Feb. 2003) (guaranteeing that Reserve Component officers will have at least one Reserve Component board member and also permitting, if reasonably available, special branch officers to have a member of their branch on the board).

102. 1765 Articles, *supra* note 89, art. IV.

103. The regimental court concerned itself with “inflicting corporal Punishments for small Offences.” *Id.* § XV, art. XII.

104. *Id.* § XV, art. XIII.

105. *Id.* § XV, art. VI.

106. *See* Schlueter, *supra* note 39, at 144.

dating back to the Roman Empire, it created a tradition of military due process in which an accused had the right to receive notice, present a defense, and argue his cause.¹⁰⁷ These rights developed as a system parallel to, and almost entirely outside of, the common law.¹⁰⁸ The court itself evolved from one in which the sovereign or convening authority selected the members and served on the court, to one in which the convening authority was barred from court membership and had certain rank and branch of service restrictions placed on him when appointing court members.

Although the British court-martial drew its authority from the sovereign, there had been a struggle between the executive and Parliament with respect to the power of courts-martial over the civilian populace.¹⁰⁹ By first denying capital punishment to the executive, then sanctioning it in a limited fashion through the annual Mutiny Acts, Parliament exerted some civilian control over military justice, giving it “a blessing, of sorts, from the populace,”¹¹⁰ while ensuring that the span of its jurisdiction was limited. Nevertheless, the Articles of War remained within the prerogative of the executive.

When the United States declared independence and fought the Revolutionary War, “it had a ready-made military justice system.”¹¹¹ It is, perhaps, ironic that even as the fledgling nation fought to free itself from the British political system, it recognized the intrinsic value of the British military justice system in providing good order and discipline to its own armed forces.

3. *Pre-Constitutional American Courts-Martial*

The Continental Congress did not wait long before legislatively implementing a code to govern the Continental Army. Significantly, military justice was not left to the executive; in the American system, the legislature undertook the government of the armed forces from the beginning. On 14 June 1775, before it had even appointed a Commander in Chief for the Army, Congress appointed a committee to prepare rules and regulations for the government of the Army.¹¹² The committee reported a set of

107. *Id.*

108. *Cf.* Sherman, *supra* note 54, at 3 (noting that the development of courts-martial occurred separately from the development of the common law).

109. *See supra* notes 73-74 and accompanying text.

110. Schlueter, *The Court-Martial*, *supra* note 39, at 144.

111. Rosen, *supra* note 40, at 18.

Articles to Congress on 28 June; on 30 June, Congress adopted the code.¹¹³ Many of these articles had been copied directly from the Articles of War that had been adopted by the State of Massachusetts for the governance of its troops;¹¹⁴ in turn, the Massachusetts articles had adapted from the British Articles of War, although the Massachusetts articles were not as complete.¹¹⁵

Within a year, George Washington asked his Judge Advocate General to inform Congress that the 1775 Articles were in need of revision because they were insufficient.¹¹⁶ John Adams drafted the new articles with the agreement of his fellow committee member, Thomas Jefferson; Congress adopted them on 20 September 1776.¹¹⁷ The new set of articles was more complete than the 1775 Articles,¹¹⁸ closely resembled the British Articles of War, and followed the same format and arrangement as the British Articles.¹¹⁹ John Adams believed that the Articles of War “laid the foundation of a discipline which, in time, brought our troops to a capacity of contending with British veterans, and a rivalry with the best troops of France.”¹²⁰

Both the general and regimental courts-martial were copies of their British counterparts. A general court-martial panel consisted of thirteen commissioned officers. The president could not be the convening authority and had to be a field grade officer;¹²¹ however, unlike the 1765 British Articles, there was no “military exigency” exception permitting captains as court-martial presidents.¹²² Field grade officers could not be tried by anyone lower in rank than a captain.¹²³ When soldiers in a dispute belonged

112. Henderson, *supra* note 89, at 297.

113. WINTHROP, *supra* note 5, at 21.

114. *Id.* at 22.

115. *See id.* The 1765 British Articles, for example, consisted of twenty sections and a total of 112 articles. *See generally* 1765 Articles, *supra* note 89. In contrast, the Massachusetts Articles consisted of fifty-two articles that were not arranged by sections. *See* The Massachusetts Articles of 1775, reprinted in WINTHROP, *supra* note 5, at 947.

116. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 670-71 n.2 (Worthington C. Ford et al. eds., 1904-1937) [hereinafter JOURNALS]. The Congress did not indicate in what respect General Washington and his Judge Advocate General considered the 1775 Articles of War insufficient. *See id.*; *see also* Henderson, *supra* note 89, at 298 (citing the *Journals*).

117. *See* JOURNALS, *supra* note 116, at 670-71 n.2. Adams wrote that he and Jefferson reported the British Articles in their entirety, and that they were “finally carried” by Congress. *Id.* *See also* Henderson, *supra* note 89, at 298.

118. The 1776 Articles consisted of eighteen sections and 101 Articles. *See generally* American Articles of War of 1776, § XIV, art. I [hereinafter 1776 Articles], reprinted in WINTHROP, *supra* note 5, at 961.

to different corps, the court-martial was required to be composed equally of members of both corps, with a rotating presidency between the corps.¹²⁴

The regimental court-martial was also nearly identical to its British counterpart. It consisted of five officers, unless that number could not conveniently be assembled, in which case three would do. The regimental commander—the convening authority—could not be a member of the court-martial.¹²⁵ In addition, the court members took an oath that did not differ appreciably from that in the British Articles of War, promising to “duly administer justice . . . without partiality, favor, or affection,” and to

119. WINTHROP, *supra* note 5, at 22. The adoption of the 1776 Articles of War has engendered some controversy. Brigadier General Samuel T. Ansell, in a 1919 article, stated that the American code of military justice was “thoroughly archaic,” a “vicious anachronism among our own institutions,” that came to us through “a witless adoption” from the British system. Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. (1919), *reprinted in* Bicentennial Issue, MIL. L. REV. 53, 67 (1975). In support of those conclusions, Ansell quoted John Adams, who reported the 1776 revisions to Congress:

There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British: for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British Articles of War totidem verbis ****. So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried. They were adopted, however, and they have governed our armies with little variation to this day.

Id. at 55-56 (quoting 3 JOHN ADAMS, HISTORY OF THE ADOPTION OF THE BRITISH ARTICLES OF 1774 BY THE CONTINENTAL CONGRESS: LIFE AND WORKS OF JOHN ADAMS 68-82 (n.d.)).

120. JOURNALS, *supra* note 116, at 671 n.2. Interestingly, this sentence is part of the material that General Ansell omitted when quoting the same letter in his 1919 *Cornell Law Quarterly* article. Perhaps it did not fit his theory of a “witless adoption” of a “vicious anachronism.” See Ansell, *supra* note 119, at 67.

121. 1776 Articles, *supra* note 118, § XIV, art. I.

122. See *supra* note 99 and accompanying text.

123. 1776 Articles, *supra* note 118, § XIV, art. 7.

124. *Id.* § XIV, art. 9.

125. *Id.* § XIV, art. 11.

use their “conscience, the best of [their] understanding, and the custom of war in like cases.”¹²⁶

The 1776 Articles remained in place for ten years before Congress made revisions to reflect the realities of military life in America. In an army that relied on small, independent detachments, it was not always possible to comply with the strict size requirements for courts-martial mandated by the 1776 Articles.¹²⁷ The minimum size of a court-martial panel shrunk dramatically, from thirteen to five.¹²⁸ The 1786 Articles provided that no officer could be tried by anything less than a general court-martial. The restriction against field grade officers being tried by anyone of a lower rank than captain disappeared, replaced by the aspirational requirement that “[n]o officer shall be tried by . . . officers of an inferior rank if it can be avoided.”¹²⁹ Regimental court-martial panels were reduced to three. In addition, a new category of court, the garrison court, was created, also consisting of a panel of three. The garrison court applied to all “garrisons, forts, barracks, or other place[s]” where the troops came from different corps.¹³⁰ The changes to panel size remain a part of the U.S. system to this day.¹³¹

The pre-constitutional American Articles of War drew heavily on the British Articles in both form and substance, but even before the Constitutional Convention, the American system had broken away from its British counterpart in significant ways. First, the American Articles of War, although borrowed almost directly from the British, were a legislative enactment and not an executive order. Second, Congress demonstrated its

126. *Id.* § XIV, art. 3.

127. American Articles of 1786, reprinted in WINTHROP, *supra* note 5, at 972. In the preamble to the revision, Congress noted that

crimes may be committed by officers and soldiers serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war, in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and the public service.

Id. pmbl.

128. *Id.* art. 1.

129. *Id.* art. 11.

130. *Id.* art. 3.

131. See UCMJ art. 16 (2002) (establishing the size of a general court-martial panel as not less than five members and a special court-martial panel as not less than three members).

flexibility and willingness to change the Articles as necessary. When the 1775 Articles proved inadequate, Congress acceded to a request from the commanding general of the Continental Army, George Washington, and changed them, resulting in the 1776 Articles. Ten years later, Congress evinced a willingness to revise the articles to reflect the reality of a small military that operated from a number of small, isolated detachments and garrisons. Independence having been obtained, the stage was set for the Framers to create a “more perfect Union”¹³² and to assign the military its proper place within it.

B. Constitutional Framework for the Government of the Military: An American Innovation

The Founding Fathers were well aware of the power struggle that had existed between Parliament and the King regarding the powers of the military. Likewise, many of the Framers were combat veterans who had served in the Continental Army and understood the demands of military life and the need for a well-disciplined fighting force. Their solution for the government of the armed forces was a classic balancing of constitutional interests and powers. Through a combination of structural grants of power and legislation, they assured that Congress—with its responsiveness to the population, its fact-finding ability, and its collective deliberative processes—would provide for the government of the armed forces.

1. The Articles of Confederation and Legislative Government of the Armed Forces

As previously discussed, one of the first acts of the Continental Congress was to provide rules and regulations, appointing a committee to prepare such rules on 14 June 1775.¹³³ The next day, Congress unanimously elected George Washington to be Commander in Chief of the Army.¹³⁴ George Washington’s commission as Commander in Chief required him to ensure “strict discipline and order to be observed in the army . . . and . . .

132. U.S. CONST. pmb1.

133. See Henderson, *supra* note 89, at 298.

134. *Id.*

to regulate [his] conduct, in every respect, by the rules and discipline of war, (as herewith given [him])”¹³⁵

In 1777, the Articles of Confederation were drafted. The Articles themselves would prove defective in forming a central government with sufficient authority to bind together a nation.¹³⁶ Nevertheless, the Articles formalized the powers that Congress had already exercised with respect to the military. Article IX granted Congress the “exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces, and directing their operations.”¹³⁷

Article IX had a substantive impact on history. The Continental Congress was heavily involved in the day-to-day operations of the Revolutionary War and, from time to time, directed that certain members of the Continental Army and Navy be tried by court-martial. Problems with desertion from the regular and militia forces required Congress continually to focus its attention on disciplinary matters.¹³⁸ By the end of the war, it could truly be said that the “leaders and participants in the American Revolution were no strangers to the articles of war and the court-martial.”¹³⁹

2. *The Constitutional Balance for Government of the Armed Forces*

One of the great defects of the Articles of Confederation was their failure to provide for the separate functions of the three basic branches of government—executive, legislative, and judicial.¹⁴⁰ The Constitutional Convention of 1787 set out to remedy this problem, creating a government in which the separate branches of power served as a check and balance on each other.¹⁴¹ Principles of separation of powers also applied to the military. In arranging for the command, control, funding, and government of the armed forces, the Framers vested power in the executive and legislative

135. 2 JOURNALS OF THE CONTINENTAL CONGRESS 85, 96 (1775), *quoted in* Henderson, *supra* note 89, at 298.

136. *See generally* RALPH MITCHELL, CONGRESSIONAL QUARTERLY, CQ’S GUIDE TO THE U.S. CONSTITUTION 5-7 (1986).

137. U.S. ARTS. OF CONFED. art. IX, para. 4 (1777), *quoted in* Henderson, *supra* note 89, at 298.

138. Eugene M. Van Loan III, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 383 (1971-1972).

139. *Id.* at 384.

140. *See* MITCHELL, *supra* note 136, at 14.

141. *Id.*

branches, but left the judiciary with only a collateral role in governing the armed forces.¹⁴²

The Constitution vested overall command of the armed forces in the President in Article II: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.”¹⁴³ The President did not, however, have plenary power over the armed forces; significant functions were delegated to the legislative branch.¹⁴⁴ Article I granted Congress the power “To make Rules for the Government and Regulation of the land and naval Forces.”¹⁴⁵ This provision was added, without debate, directly to the Constitution from the existing Articles of Confederation¹⁴⁶ and indicates an unbroken link of legislative control over the government of the armed forces from the beginnings of the republic.

By distributing power over the armed forces between the legislative and executive branches, the Framers nicely “avoided much of the political-military power struggle which typified so much of the early history of the British court-martial system.”¹⁴⁷ They made it clear that while overall command of the military rested with the executive, the military would be governed and regulated according to the law handed down by the legislative branch. Thus, government of the armed forces would always reflect the will of the people as expressed through their representatives in Congress.

Following ratification of the Constitution in 1789, the First Congress undertook legislative action to provide rules for the government and regulation of the armed forces. By an enactment of 29 September 1789, the

142. *See generally* U.S. CONST.

143. *Id.* art. II, § 2, cl. 1.

144. *See, e.g., id.* art. I, § 8 (granting Congress the power “[t]o raise and support Armies, . . . [t]o provide and maintain a Navy[, t]o call[] forth the Militia to . . . suppress Insurrections and repel Invasions[, t]o provide for organizing . . . and disciplining the Militia, . . . and to declare War”).

145. *Id.* art. I, § 8, cl. 14.

146. Van Loan, *supra* note 138, at 384.

147. Schlueter, *The Court-Martial*, *supra* note 39, at 149.

Congress expressly adopted the Articles of War that were already in force to govern the Army.¹⁴⁸ Thus, it can fairly be said that

Congress did not originally create the court-martial, but, by the operation of the Act . . . , continued it in existence as previously established. Thus, as already indicated, this court is perceived to be in fact older than the Constitution, and therefore older than any court of the United States instituted or authorized by that instrument.¹⁴⁹

The age and history of courts-martial in the United States, as well as the customs and traditions pertaining thereto, are of no small significance in weighing challenges to the practice of command control over the appointment of court-martial members.

Having established the historical roots of the court-martial, its place in pre-constitutional American history, and its firm basis in the legislative branch of government, this article now turns to congressional oversight of the practice of discretionary command appointment of court-martial panel members.

C. Congressional Oversight of Panel-Member Selection Process

In over two hundred and twenty-five years of congressional control over the court-martial system, the practice of discretionary command appointment of court-martial members—one of the salient features of military justice—has survived every attack. This section discusses congressional management of the court-member appointment process from the 1786 Articles of War to the present day. Over the years, Congress has statutorily limited the discretion of the convening authority and created a justice system that seeks to balance the legitimate needs of the military with the demands of due process.

1. 1789 to 1916: A Period of Limited Oversight

Congress revised the Articles of War in 1806, 1874, and 1916, but by and large the substantive laws and procedural rules of military justice

148. WINTHROP, *supra* note 5, at 23.

149. *See id.* at 47-48.

changed very little from the Articles of War passed by the Continental Congress in 1775 and adopted by Congress in 1789.¹⁵⁰ Nevertheless, Congress did exercise oversight over the process, making some changes to the system to reflect the needs of the service.

Congress made few substantive changes to court-martial composition in the 1806 Articles of War. The 1806 Articles, however, did contain a provision that officers of the Marine Corps and officers of the Army,¹⁵¹ “when convenient and necessary to the public service,” should be associated with each other for the purposes of trying courts-martial, and “the orders of the senior officer of either corps who may be present and duly authorized, shall be received and obeyed.”¹⁵² The 1806 Articles also granted the accused the right to challenge a member of the court, and the court was bound, “after due deliberation, [to] determine the relevancy or validity, and decide

150. Sherman, *supra* note 54, at 10. Sherman notes that although the Army and Navy justice systems differed at times in terminology, substantive law, and procedure, they each shared the following general characteristics: (1) Each contained a statement of crimes and punishments; (2) Each began with preferral of charges, and by the late nineteenth century, each required a nominal pretrial investigation; (3) The commander made the determination of whether to have a court-martial, appointed the court, oversaw the administration of the trial, and reviewed the decision and sentence; (4) The commander appointed court members from his command, with virtually no limits on his discretion; (5) There was no judge, so the court carried out its own judicial functions; (6) There was no right to defense counsel, although a non-lawyer officer was often appointed as a defense counsel in general courts-martial; (7) The court-martial tended to resemble an administrative proceeding more than a judicial proceeding in a court; and (8) The convening authority was also the final review authority post-trial, except in cases in which the sentence involved dismissal of an officer or death, or cases involving generals, in which case the sentence could not be executed without presidential confirmation. *Id.* at 10-14.

151. Winthrop explains that prior to legislation enacted in 1834, the Marine Corps occupied an undefined position. In 1834, the Marine Corps was assimilated to the Army with respect to rank, organization, discipline, and pay, but was permanently attached to the Navy for jurisdictional and disciplinary purposes. Winthrop cites occasions in which the Marines were detached for service with the Army, including considerable periods during the war in Mexico, and the taking of Fort Fisher during the Civil War. Given the potential for Marines to serve with the Army, it was deemed expedient to permit Marines and Army personnel to serve on courts-martial together. He also relates a case in which a Marine lieutenant colonel was court-martialed by the Army, and despite a holding by the Attorney General that the Marine could legally be tried by a court consisting entirely of Army officers, it was deemed prudent to put two Marines on the court-martial. *See* WINTHROP, *supra* note 5, at 74-75.

152. American Articles of War of 1806, art. 68 [hereinafter 1806 Articles], *reprinted in* WINTHROP, *supra* note 5, at 976. *Cf. supra* note 102 and accompanying text (discussing the British provision which provided that in disputes between members of the infantry and cavalry, the accused was entitled to equal representation by each on his court-martial panel).

accordingly.”¹⁵³ The right to challenge a member of the court individually had not previously existed.

The 1874 Articles added provisions pertaining to the authority to convene courts-martial¹⁵⁴ and created a new type of court-martial, the field officer court. In time of war, every regiment would detail a field officer as a one-man court to handle offenses by soldiers in the regiment. No regimental or garrison court-martial could be held when a field officer court could be convened.¹⁵⁵ The 1874 Articles retained the provision permitting Army officers and Marine Corps officers detached to Army service to serve together on courts-martial,¹⁵⁶ but added a provision that Regular Army officers would not otherwise be competent to sit on courts-martial to try the officers or soldiers of another force.¹⁵⁷

The 1916 changes were more sweeping. Congress provided general, special, and summary courts-martial, the three forms of courts-martial still in force today.¹⁵⁸ In addition, Congress revised the requirements to convene the different types of courts-martial.¹⁵⁹ As in the past, all Army officers and Marine officers detached for Army service were eligible to serve

153. 1806 Articles, *supra* note 152, art. 71.

154. *See* American Articles of War of 1874, arts. 72 (granting general court-martial convening authority to the commander of an army, Territorial Division, or department), 73 (granting general court-martial convening authority to commanders of divisions and separate brigades), *reprinted in* WINTHROP, *supra* note 5, at 986.

155. *Id.* art. 80.

156. *Id.* art. 78.

157. *Id.* art. 77.

158. American Articles of War of 1916, art. 3 [hereinafter 1916 Articles], *in* Army Appropriations Act of 1916, Pub. L. No. 64-242, § 3, 39 Stat. 619, 650-70. General courts-martial were to consist of between five and thirteen officers, special courts of three to five officers, and summary courts of one officer. *See id.* arts. 5-7. Compare today's UCMJ, which classifies the modern courts-martial and establishes their membership as follows: General courts-martial, a military judge alone or at least five members and a military judge; special courts-martial, a military judge alone, military judge with three members, or three members alone; summary courts-martial, one summary court officer. *See* UCMJ art. 16 (2002).

159. *See* 1916 Articles, *supra* note 158, arts. 8-10. General courts-martial could be convened by separate brigade or district commanders and higher commanders, including the President; special courts-martial could be convened by the commander of a detached battalion or other command; and summary courts-martial could be convened by the commander of a detached company or other command. *See id.*; *cf.* UCMJ arts. 22-24 (continuing virtually the same system of court-martial convening authorities).

on court-martial panels.¹⁶⁰ Otherwise, there were no limitations on the convening authority's discretion in selecting panel members.

2. Post-World-War I Revisions: Introduction of Statutory Selection Criteria

The 1916 Articles "did not wholly stand the testing fires"¹⁶¹ of World War I. The massive mobilizations of the war brought large numbers of soldiers and officers into the Army who had little experience with military justice. The officers, in particular, were prone as commanders to resort too readily to courts-martial; and as panel members they were prone to avoid responsibility by giving severe sentences accompanied with recommendations for clemency.¹⁶² When the troops returned home, they brought with them stories "of tyrannical oppression, arrant miscarriages of justice, and a complete absence of any means whereby the wronged individual could obtain recourse."¹⁶³ The public was outraged, and for the first time in U.S. history, there was a public movement to civilianize military law.¹⁶⁴

The controversy spawned the famous Ansell-Crowder dispute. Major General Enoch Crowder, The Judge Advocate General, weighed in on behalf of the status quo. Brigadier General Samuel T. Ansell, Acting The Judge Advocate General, espoused the view that the military justice system was un-American and needed to be changed.¹⁶⁵ Ansell sought a number of changes, including: (1) an independent military judge who would select the court members; (2) the right of the accused to have a portion of the panel chosen from his own rank; (3) definite limits on sentences; (4)

160. 1916 Articles, *supra* note 158, art. 4.

161. Schlueter, *The Court-Martial*, *supra* note 39, at 157.

162. *See* Young, *supra* note 25, at 100.

163. Arthur E. Farmer & Richard H. Wels, *Command Control—Or Military Justice?* 24 N.Y.U. L.Q. REV. 263, 264 (1949). The real irony of the movement for reform is that many of the abuses were likely committed not by career officers with a sound understanding of military justice and discipline, but by newly anointed civilian officers whose mistaken beliefs about military justice turned them into martinets.

164. Sherman, *supra* note 54, at 5.

165. *See* Farmer & Wels, *supra* note 163, at 264.

mandatory and binding pretrial investigations; (5) right to legal counsel; and (6) a civilian court of appeals.¹⁶⁶

After demobilization, the civilianization movement lost some of its momentum, and what began as an overhaul of the military justice system ended as merely a revision.¹⁶⁷ Congress enacted a new set of Articles of War on 4 June 1920.¹⁶⁸ The new articles permitted enlisted men to prefer charges,¹⁶⁹ required an impartial investigation prior to referring charges to trial,¹⁷⁰ provided for a law member to serve on courts-martial,¹⁷¹ guaranteed counsel for the accused,¹⁷² established the appointment of a judge advocate to serve as a prosecuting attorney,¹⁷³ and set up a system to review courts-martial.¹⁷⁴ In addition, both the prosecution and the defense were permitted one preemptory challenge of anyone except the law member.¹⁷⁵

For the first time, Congress established a set of personal criteria, as opposed to criteria of rank or branch-of-service, that the convening authority was required to use before appointing panel members:

When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.¹⁷⁶

166. Sherman, *supra* note 54, at 6.

167. Young, *supra* note 25, at 100.

168. 1920 Articles of War [hereinafter 1920 Articles], in Pub. L. No. 66-242, ch. II, 41 Stat. 759, 787-812 (1920). None of these changes affected the Articles for the Government of the Navy. See Farmer & Wels, *supra* note 163, at 264.

169. See 1920 Articles, *supra* note 168, art. 70 (providing that “[c]harges and specifications must be signed by a person subject to military law”).

170. *Id.*

171. *Id.* art. 8. A law member performed duties analogous to those of a modern-day military judge.

172. The 1920 Articles gave an accused the right to be represented by either civilian counsel at his own expense or by military counsel if reasonably available. There was not, however, a requirement that the military counsel be an attorney. See *id.* art. 17.

173. *Id.*

174. See *id.* art. 50 1/2.

175. *Id.* art. 18.

These criteria were adopted at the recommendation of Major General Crowder and the War Department.¹⁷⁷ One can argue that they represented a compromise between Ansell's proposal that an independent military judge select panel members and the historic discretionary role of the commander in choosing his own court members. Whether they were effective would remain to be seen.

3. *World War II and the Uniform Code of Military Justice: New Statutory Limitations on Convening Authority Discretion*

During World War II, the armed services conducted nearly two million courts-martial.¹⁷⁸ There had been over one hundred executions, and at war's end, some forty-five thousand service members were still incarcerated.¹⁷⁹ Some viewed the system as "an instrument of oppression by which officers fortify low-caliber leadership."¹⁸⁰ Concerns about sentence disparity, harsh treatment, and unlawful command influence over the court-martial system produced a strong reform movement that eventually resulted in the Uniform Code of Military Justice.

A post-war clemency board convened by the War Department to review the sentences of service members still in confinement remitted or reduced the sentence in over 85% of the twenty-seven thousand cases it reviewed.¹⁸¹ Secretary of War Patterson appointed an advisory commission to examine the system. The Vanderbilt Committee, as it was known, held full hearings in Washington, D.C, and regional public hearings in New York City, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle.¹⁸² It did not limit its fact-finding to "the ranks of the malcontent,"¹⁸³ but included general officers, enlisted men, volunteer witnesses, the Secretary and Undersecretary of the

176. *Id.* art. 4. Compare this to the modern-day standard, in which the convening authority must consider "age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2) (2002).

177. Lamb, *supra* note 25, at 120.

178. Compare Sherman, *supra* note 54, at 28 (citing a figure of 1.7 million), with Lamb, *supra* note 25, at 120 (stating that about two million courts-martial were conducted).

179. Sherman, *supra* note 54, at 27.

180. Major Gerald F. Crump, *A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. L. REV. 55, 60 (1975), quoted in Young, *supra* note 25, at 101.

181. Sherman, *supra* note 54, at 29.

182. Farmer & Wels, *supra* note 163, at 265-66.

183. *Id.* at 266.

Army, the Commander of Army Ground Forces, and both The Judge Advocate General and The Assistant Judge Advocate General. The Committee found that while the innocent were rarely punished and the guilty rarely set free,¹⁸⁴ there was a serious problem with command domination of the court-martial system.¹⁸⁵ Committees sponsored by the Department of the Navy reached similar conclusions.¹⁸⁶

Reform took place in stages. For the Army, Congress passed the Elston Act in 1948.¹⁸⁷ This Act created an independent Judge Advocate General's Corps, with a separate promotion list, its own assignment authority, and the guaranteed right for staff judge advocates to communicate to higher echelon staff judge advocates within technical channels.¹⁸⁸ The Elston Act also made changes to court-martial panel composition. For the first time, an enlisted accused was permitted to request trial by a panel consisting of at least one-third enlisted personnel.¹⁸⁹ The convening authority continued to exercise the discretionary authority to appoint court-martial panel members. In an attempt to solve the problem of unlawful command influence, Congress amended Article of War 88 to prohibit the convening authority and other commanders from censuring, reprimanding,

184. *Id.*

185. *See* Sherman, *supra* note 54, at 31. In fact, the Committee found that in many instances, the convening authority who appointed the court made a deliberate attempt to influence its decisions. Although not every commander participated in this practice, "its prevalence was not denied and indeed in some instances was freely admitted." REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 6-7 (1946), *quoted in* Farmer & Wels, *supra* note 163, at 268.

186. Farmer & Wels, *supra* note 163, at 266.

187. The Elston Act is the popular name for the portion of the Selective Service Act of 1948 that amended the Articles of War. *See* Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201-246, 62 Stat. 604, 627-44 [hereinafter Elston Act].

188. *See id.* §§ 246-249; *see also* Farmer & Wels, *supra* note 163, at 270.

189. Elston Act § 203 (amending Article 4 of the Articles of War to grant an enlisted accused the right to have at least one-third of a court-martial panel comprised of enlisted personnel at his written request).

manding, admonishing, coercing, or unlawfully influencing any member in reaching the findings or sentence in any case.¹⁹⁰

The Elston Act was short-lived. It had no effect on the Navy or Marine Corps, and its applicability to the Air Force, which had become an independent service in 1947, was unclear.¹⁹¹ In addition, it fell far short of many of the reforms that various advisory bodies and independent groups had recommended. Its main defect, according to bar associations, was that it was a reform in name only because the commander continued to exercise the power to appoint the court members, the prosecutor, and defense counsel; to refer cases for trial; and to review the findings and sentences of the courts.¹⁹²

Accordingly, the Eighty-First Congress set out to create a unified system of military justice that would apply to all the services, appointing a committee chaired by Harvard Law Professor Edmund Morgan to study military justice and draft appropriate legislation. The Committee made a full study of the law and practices of the different branches of service, the complaints that had been made against the structure and operation of military tribunals, the explanations and answers of service representatives to these complaints, suggestions for reform and service responses as to their practicability, and some provisions of foreign military justice systems.¹⁹³ According to Professor Morgan, the committee's task was to draft legislation that would ensure full protection of the rights of individuals subject to the Code without unduly interfering with either military discipline or the exercise of military functions. This would mean "complete repudiation of a system of military justice conceived of only as an instrument of command," but would also negate "a system designed to be administered as the criminal law is administered in a civilian criminal court."¹⁹⁴ Balancing all these factors, the committee produced a code that granted unprecedented

190. *See id.* The revised Article 88 prohibited any convening authority or any other commanding officer from censuring, reprimanding, or admonishing a court-martial or any member thereof, "with respect to the findings or sentence adjudged by the court," or with respect to any other exercise by the court or its members of their judicial responsibilities. *Id.* It also prohibited any person subject to military law from attempting "to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof," on the findings or sentence of a court-martial. *Id.*

191. Young, *supra* note 25, at 121-22. *But see id.* at 102 (stating that the Elston Act applied to the Army and the Air Force).

192. Farmer & Wels, *supra* note 163, at 273.

193. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173 (1952-1953).

194. *Id.* at 174.

rights to service members, while still retaining command control over the appointment of court-martial panels.

Both houses of Congress conducted extensive hearings on the Uniform Code of Military Justice.¹⁹⁵ Congress was well aware of the issue of command control, having thoroughly considered testimony on all aspects of the issue. Indeed, the House Committee on Armed Services wrestled considerably with this issue during the hearings, stating in its report that “[p]erhaps the most troublesome question which we have considered is the question of command control.”¹⁹⁶ Some witnesses suggested creating a system in which an independent Judge Advocate General’s department would appoint the court from panels submitted by convening authorities.¹⁹⁷ Other witnesses pointed out that a centralized selection process presupposed the constant availability of all members of a panel and could considerably handicap a commander in the discharge of his duties.¹⁹⁸ Mr. Robert W. Smart, a member of the professional staff of the Committee, cut to the heart of the matter when he observed that no matter the system, a clever convening authority who truly wanted to influence a court would find a way to do it in such a way that no one would easily discover it. Accordingly, “so far as the law is concerned and as far as the Congress can go effectively, all it can do is to express its opposition in good plain words, as here, to such practices.”¹⁹⁹

Ultimately, Congress found that the solution did not lie in removing from commanders the authority to convene courts-martial and appoint court members. According to the House Report,

We fully agree that such a provision [removing the commander from the process] might be desirable if it were practicable, but

195. See generally *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. (1949) [hereinafter *House Hearings*], reprinted in INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000); *Hearings Before a Subcomm. of the Senate Comm. of Armed Services on S. 857 and H.R. 4080*, 81st Cong. (1949), reprinted in INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000).

196. H.R. REP. NO. 81-491, at 7 (1949), reprinted in INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000).

197. *House Hearings*, supra note 195, at 648 (prepared statement of Mr. Arthur E. Farmer, Chairman, Committee on Military Law of the War Veterans Bar Association); see also *id.* at 728 (prepared statement of Mr. George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association).

198. *Id.* at 1124 (statement of Hon. John W. Kenney, Under Secretary of the Navy).

199. *Id.* at 1021.

we are of the opinion that it is not practicable. *We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace,* and regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.²⁰⁰

The solution, at least according to the House, was to retain the commander's traditional role in convening courts-martial and appointing panel members, while ensuring that appropriate statutory measures were put in place to provide constraints on his power.²⁰¹

Nevertheless, the UCMJ made several changes in the panel member selection process. First, Article 25 made any member of an armed force eligible to sit on the court-martial of a member of another armed service.²⁰² Second, warrant officers and enlisted personnel were granted the right to serve on court-martial panels, and enlisted personnel were guaranteed a panel consisting of at least one-third enlisted members upon written request.²⁰³ Third, the qualifications of court members were amended to include "age, education, training, experience, length of service, and judicial temperament."²⁰⁴ Fourth, UCMJ Article 29, in providing that members of a general or special court-martial could not be absent after arraignment without good cause,²⁰⁵ solved a practice that had existed in the shadowy penumbra of the Articles of War in which convening authorities

200. H.R. REP. NO. 81-491, at 8 (emphasis added).

201. *See id.* at 7-8. The House Report listed several provisions of the UCMJ, that in the Committee's opinion, limited the power of a convening authority: the convening authority could not refer charges for trial until they had been examined for legal sufficiency by the Staff Judge Advocate; the Staff Judge Advocate would be permitted direct communication with The Judge Advocate General; all counsel at general courts-martial were required to be either lawyers or law graduates, certified by The Judge Advocate General; a law officer would play a judicial role at the court-martial, and his rulings on interlocutory questions of law would be final; the Staff Judge Advocate would have to review the record of trial for legal sufficiency before the convening authority could take action on findings or sentence; the accused would have legally qualified appellate counsel before a board of review and the Court of Military Appeals; the Court of Military Appeals, a civilian appellate court, would preside over the military justice system; and finally, it would be a court-martial offense for any person subject to the Code to influence unlawfully the action of a court-martial. *Id.*

202. Uniform Code of Military Justice of 1950, art. 25(a), Pub. L. No. 81-506 (codified as amended at 10 U.S.C. §§ 801-946) [hereinafter 1950 UCMJ] ("Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.").

could reduce or add to the membership of court-martial panels *during the trial* in an effort to influence the court.²⁰⁶ Fifth, the UCMJ packed a punch concerning attempts to influence the court. Article 37 prohibited unlawful influence on a court by convening authorities, commanders, or anyone subject to the Code,²⁰⁷ while Article 98 made it a punitive offense to knowingly and intentionally violate Article 37.²⁰⁸

The UCMJ, then, represented a legislative compromise. It was not an ideal system of justice, but given its purpose of sustaining good order and discipline within the military without unduly impairing operations, it could not be. Over the protests of many individuals, organizations, and groups, Congress retained the commander as the central figure of the military justice system, yet significantly modified his powers and added statutory checks and balances to limit outright despotism.

203. *Id.* art. 25(b), (c)(1). Article 25 stated, in part:

(b) Any warrant officer on active duty with the armed forces shall be eligible to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be eligible to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall serve as a member of the court only if, prior to the convening of such a court, the accused personally has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies. When such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

Id.

204. *Id.* art. 25(d)(2). This slightly modified the previous requirements under the Articles of War to consider individuals on the basis of age, training, experience, and judicial temperament, with a preference for officers having more than two years' service. *See supra* note 176 and accompanying text.

205. 1950 UCMJ, *supra* note 202, art. 29.

206. *See Morgan, supra* note 193, at 175.

(a) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of challenge or by order of the convening authority for good cause.

(b) Whenever a general court-martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a special court-martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members have been sworn, the trial shall proceed as if no evidence had been previously introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

1950 UCMJ, *supra* note 202, art. 29.

207. 1950 UCMJ, *supra* note 202, art. 37. Article 37 provided:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court of any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Id.

208. *Id.* art. 98. Article 98 provided:

Any person subject to this code who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after the trial of an accused;

shall be punished as a court-martial may direct.

Id.

4. *1950 to Present: Continued Oversight and Consistent Rejection of Efforts to Remove Convening Authority from Selection Process*

Congress has continued to exercise oversight of the court-martial system. The UCMJ experienced major revisions in 1968²⁰⁹ and in 1983.²¹⁰ Neither of those revisions affected the panel member selection process.

There have been occasional legislative initiatives to change the panel member selection process, but Congress has not adopted them. In 1971, Senator Birch Bayh of Indiana introduced legislation that would have established an independent court-martial command, the Administrative Division of which would have appointed court-martial members by random selection.²¹¹ Other bills were introduced at about the same time that would have reformed the panel selection system by requiring the convening authority to employ random selection,²¹² or by requiring the military judge to select the panel using a random selection method.²¹³ Similar efforts occurred in 1973.²¹⁴ In 1983, the Association of the Bar of the City of New York launched a campaign to remove the convening authority from

209. *See generally* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. Under this Act, the law officer of the earlier code became a full-fledged military judge whose rulings on nearly all interlocutory matters were considered final. *See id.* § 2(9) (amending UCMJ Article 26 to create the position of military judge), 2(21) (amending UCMJ Article 51 to permit the military judge to rule on most interlocutory matters). Significantly, the accused was given the option to elect trial by military judge alone. *See id.* § 2(3) (amending UCMJ Article 16 to permit an accused to elect trial by military judge alone in general courts-martial and in special courts-martial to which a military judge had been detailed).

210. *See generally* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

211. *See* Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9, 13 (1971). He introduced Senate Bill 1127, 92d Cong. (1971), 117 CONG. REC. 2550-66 (1971).

212. The Hatfield Bill, S. 4169, 91st Cong., § 825 (1970), *cited in* Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971) [hereinafter Sherman, *Congressional Proposals*].

213. The Whalen-Price Bill, H.R. 6901, 92d Cong., § 825 (1971); H.R. 2196, 92d Cong., § 825 (1971), *cited in* Sherman, *Congressional Proposals*, *supra* note 212, at 46.

214. *See, e.g.*, Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973), *reprinted in* Bicentennial Issue, MIL. L. REV. 579, 582 (1975) (discussing bills introduced in the Ninety-Third Congress by Senator Bayh and Representative Bennett, and by Senator Hatfield).

panel selection and substitute a system such as random selection.²¹⁵ None of these efforts succeeded.

The most recent congressional action relating to panel member selection was in the 1999 National Defense Authorization Act. Section 552 of the Act required the Secretary of Defense to submit a report on the method of selection of members of the armed forces to serve on courts-martial.²¹⁶ The Secretary was directed to examine alternatives, including random selection, to the current system of convening authority selection that would be consistent with the “best-qualified” criteria of UCMJ Article 25(d)(2), and solicit input from the JSC.²¹⁷

In its report of 15 August 1999, the JSC explored a number of alternatives to the current selection system, including random nomination, random selection, a combination of random nomination and selection, expanding the source of potential court members, and using independent selection officials. The JSC concluded that the current system is most likely to obtain best-qualified members within the operational constraints of the military justice system.²¹⁸ Congress has taken no additional action on the matter.

History has shown that Congress has exercised firm control of the military justice system from the Revolution to the present day, before and after the enactment of the Constitution. Over the years, in response to the concerns of its constituents, Congress has made significant changes to the American military justice system. However, despite numerous reform initiatives and proposals, Congress has retained the convening authority’s

215. Lamb, *supra* note 25, at 124-25.

216. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920.

217. *Id.* The JSC consists of representatives from each of the following officials: The Judge Advocates General of the Army, Navy, and Air Force; the Staff Judge Advocate to the Commandant of the Marine Corps; and the Chief Counsel, United States Coast Guard. The JSC’s purpose is to assist the President in fulfilling his responsibilities under the UCMJ by conducting an annual review of the *MCM* and to propose appropriate amendments to the *Manual for Courts-Martial* and the UCMJ. See generally U.S. DEP’T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (8 May 1996).

218. JSC REPORT, *supra* note 32, at 3.

discretionary powers to appoint court-martial panel members according to statutorily required subjective criteria.

D. The Court-Martial in Context: Legislative Courts and Statutory Due Process

The final step in evaluating the historical and constitutional background of the court-martial is to place it within its proper context as a legislative (Article I) court. Accordingly, this section first discusses the constitutional basis for legislative courts. Next, the section examines Supreme Court jurisprudence on the constitutionality of the statutory due process systems Congress created for some of the other legislative courts. Finally, the section explores the judicial deference doctrine that the Article III courts apply to issues arising within courts-martial.

1. Introduction to Legislative Courts

Article III of the Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²¹⁹ The hallmark of these courts is the judicial independence provided by the life tenure and salary guarantees of Article III, section 1.²²⁰ Article III courts include the Supreme Court, the Circuit Courts of Appeal, and the United States District Courts.²²¹

The Article III courts, however, do not handle all the judicial business of the United States. For over two hundred years, Congress has used its enumerated powers under the Constitution in conjunction with the Necessary and Proper Clause²²² to create specialized tribunals,²²³ including courts-martial,²²⁴ that are free from the tenure and salary protections of

219. U.S. CONST. art. III, § 1.

220. *See id.* Section 1 provides that the judges “shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” *Id.*

221. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-5, at 43 (2d ed. 1988).

222. U.S. CONST. art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

Article III.²²⁵ Although these courts use the judicial process in adjudicating cases,²²⁶ they do not partake of the “judicial power of the United States” within the meaning of Article III.²²⁷ The Supreme Court has occasionally struggled to define the proper limits of legislative courts,²²⁸ but there is no constitutional infirmity in Congress’s creation and operation of them.²²⁹ In fact, there are sound pragmatic reasons for these courts—among them flexibility and ease of administration—and the Supreme Court has accorded considerable deference to Congress in “the choice of

223. Examples of these courts include the territorial courts, subject to congressional governance under Article IV of the Constitution; the District of Columbia court system, created pursuant to Congress’s Article I authority to “exercise exclusive Legislation” over the District of Columbia; the consular courts, which stemmed from Congress’s power over treaties and foreign commerce; the Tax Court, rooted in the power to “lay and collect taxes”; and, of course, the court-martial system, created pursuant to Congress’s authority to provide rules for the government of the land and naval forces. See Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 89-91 (1988). There have also been, over the years, a number of other tribunals formed for limited purposes, including the Court for China, the Court of Private Land Claims, the Choctaw & Chickasaw Citizenship Court, and the Court of Customs Appeals. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 450-58 (1929) (listing the various legislative courts).

224. See U.S. CONST. art. I, § 8, cl. 14; see also *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858) (stating that the power for Congress to provide for the trial and punishment of Army and Navy personnel “is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States”).

225. See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 235 (1990); see also 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 100.40 (3d ed. 1999).

226. See, e.g., Craig A. Stern, *What’s a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1055 (1998).

227. See, e.g., *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). In *Canter*, Chief Justice Marshall made a famous statement about the relationship of the legislative courts to the judicial power of the nation.

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress.

Id.

means it thought ‘necessary and proper’ to implement the powers explicitly delegated to it under the Constitution.”²³⁰

Legislative courts play a useful role in assisting Congress to carry out its enumerated powers efficiently, particularly when the use of “full-blown ‘national’ tribunals, with judges enjoying life tenure and restricted to a ‘judiciary’ power, has seemed awkward and inappropriate in the context of meeting certain other adjudicatory needs.”²³¹ Courts-martial are a prime example of a court system in which the protections, procedures, and inherent inefficiencies of the Article III courts would interfere with the military’s ability to use the system effectively to help maintain good order and discipline. “Thus, from the beginning,” wrote Paul Bator, a law professor at the University of Indiana, “soldiers and sailors have been tried by military tribunals administering a specialized military justice.”²³²

2. *Fundamental Rights, Statutory Due Process, and the Legislative Courts*

Even when life and liberty are at stake, legislative courts are not required to grant due process rights that are intrinsic to the Article III courts.²³³ The Supreme Court has, instead, employed an analysis that examines whether the statutory due process system of a given legislative court grants what it calls “fundamental rights.” This section analyzes the

228. See generally Stern, *supra* note 226 (reviewing legislative court doctrine, and suggesting that the text of the Constitution permits courts-martial, territorial courts, adjudication of public rights, and creation of judicial adjuncts without infringing on Article III); Bator, *supra* note 225 (discussing the Court’s legislative courts’ jurisprudence, criticizing it, and suggesting a framework in which Article III tribunals provide review of the legal and factual determinations of Article I courts); Saphire & Solimine, *supra* note 223 (discussing the Court’s jurisprudence on the matter, and criticizing the balancing test of *Commodity Futures Trading Co. v. Schor*, 478 U.S. 833 (1986)).

229. See Saphire & Solimine, *supra* note 223, at 89.

230. *Id.*

231. Bator, *supra* note 225, at 235.

232. *Id.*

233. See, e.g., *Curry v. Sec’y of the Army*, 595 F.2d 873 (D.C. Cir. 1979) (“We agree that the system established in the UCMJ would be inconsistent with due process if instituted in the context of a civilian criminal trial.”).

Supreme Court's treatment of statutory due process systems in the consular and territorial court systems.

a. Consular Courts

The consular courts arose from Congress's authority over treaties and commerce under Article I of the Constitution.²³⁴ Under this system, American ministers and consuls were granted extensive power over U.S. citizens pursuant to U.S. treaty obligations.²³⁵ Congress established a statutory system in which the minister and consuls of the United States in certain overseas locations²³⁶ were vested with judicial authority and could arraign and try all citizens of the United States charged with offenses of host-country law.²³⁷ The consular courts had neither grand juries nor petit juries.

The leading case on the consular courts is *In re Ross*.²³⁸ The appellant, a British seaman serving on an American merchant ship in Japan, was tried for murder and sentenced to death by a consular court consisting of the consul and four associates.²³⁹ The appellant filed a writ of habeas corpus in the Circuit Court for the Northern District of New York, alleging that he had been denied his Fifth Amendment right to grand jury presentment and his Sixth Amendment right to trial by petit jury. The Circuit Court denied the writ, and on appeal, the Supreme Court affirmed.²⁴⁰

In affirming the denial of the writ, the Court first noted the centuries-old existence of consular courts as a means by which nations could protect

234. U.S. CONST. art. I, § 8, cl. 1; *see also* Saphire & Solimine, *supra* note 223, at 90.

235. *See* MOORE, *supra* note 225, at § 100 app.02[7].

236. Japan, China, Siam, and Madagascar. *See In re Ross*, 140 U.S. 453 (1891).

237. REVISED STATUTES OF THE UNITED STATES §§ 4083-4096 (2d ed. 1878) [hereinafter REVISED STATUTES] (passed at the first session of the Forty-Third Congress).

238. 140 U.S. 453 (1891). The appellant in *In re Ross* was represented by counsel and filed several motions with the consular court, including a motion for grand jury presentment and a motion for a trial by petit jury. All of the motions were denied. His death sentence was approved by the United States minister in Japan, but it was commuted to life in prison by the President of the United States. *Id.* at 453-61.

239. *Id.* at 453-61. This was pursuant to Revised Statute § 4106, which required a consul to sit with a panel of four for capital cases. The method of selection was a modified form of random selection, in which the associates, as they were called, were "taken by lot from a list which had previously been submitted to and approved by the minister." REVISED STATUTES, *supra* note 237, § 4106. The only requirement was that they be "[p]ersons of good repute and competent for the duty." *Id.*

240. *In re Ross*, 140 U.S. at 480.

their citizens from the hostile and alien forms of justice practiced in the “non-Christian” nations.²⁴¹ It held that the statutory framework for the consular courts, despite its failure to provide for grand jury presentment or trial by petit jury, did not violate the Constitution because the Constitution did not have extraterritorial application.²⁴² Finally, it examined the due process rights actually afforded to the appellant and concluded that under the consular court system, the appellant had “the benefit of all the provisions necessary to secure a fair trial before the consul and his associates”: the opportunity to examine the complaint against him, the right to confront and cross-examine the witnesses against him, and representation by counsel.²⁴³

The *In re Ross* holding that the Constitution had no extraterritorial applicability was effectively overruled in *Reid v. Covert*,²⁴⁴ when the Court stated that *In re Ross* “rested, at least in substantial part, on a fundamental misconception” and “should be left as a relic from a different era.”²⁴⁵ Nonetheless, the *In re Ross* analysis of what constitutes a fair trial—notice, the right of confrontation, and the assistance of counsel—has never been overruled.²⁴⁶

b. *The Territorial Courts*

Article IV of the Constitution grants Congress the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”²⁴⁷ As part of this power, Congress has established legislative courts to handle both criminal and civil matters within the territories. The Supreme Court has upheld creation of these courts based on the perception “that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government.”²⁴⁸ In its role as a sovereign power over the territories, Congress assumes a role similar to a state or

241. *Id.* at 462-63.

242. *Id.* at 464.

243. *Id.* at 470.

244. 345 U.S. 1 (1957) (invalidating a statutory grant of court-martial jurisdiction over persons accompanying the armed forces overseas).

245. 345 U.S. 1, 12 (1957).

246. *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (noting that the Court has never overruled *In re Ross*).

247. U.S. CONST. art. IV, § 3.

248. *Northern Pipeline Constr. Co. v. Marathon Pipeline*, 458 U.S. 50, 64 (1982).

municipal government and is not bound by the tenure and salary restrictions of Article III. The same analysis applies to the District of Columbia, in which Congress “has entire control over the district for every purpose of government,”²⁴⁹ including the courts.

Doctrinally, the Supreme Court has divided the territories into two types: (1) incorporated territories and the District of Columbia; and (2) unincorporated territories such as Puerto Rico and the Virgin Islands.²⁵⁰ The extent to which due process rights apply depends on the status of the territory. In the incorporated territories and the District of Columbia, criminal defendants have no right to be tried before an independent judiciary with the tenure and salary protections of Article III.²⁵¹ The inhabitants of these areas are, however, entitled to grand jury presentment according to the Fifth Amendment and trial by petit jury according to the Sixth Amendment.²⁵²

The unincorporated territories are somewhat different. In a line of cases dating back to the early twentieth century, the Supreme Court has ruled that the full protections of the Constitution do not extend to these

249. *Kendall v. United States*, 12 Pet. 524, 619 (1838).

250. *See Dorr v. United States*, 195 U.S. 138, 143 (1904). An incorporated territory is one in which the treaty of cession or agreement by which the United States acquired the territory specifically manifests an intent to incorporate the territory in the United States. An unincorporated territory, in contrast, is one in which the treaty of cession or acquisition agreement does not manifest such an intent. *See id.* At the turn of the century, the Philippines and Puerto Rico were unincorporated territories that had been obtained by a treaty of cession from Spain. *See Carlos R. Soltero, The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 6 (2001). In 1917, the United States purchased the Virgin Islands from Denmark, and those islands became an unincorporated territory. *See Joycelyn Hewlett, The Virgin Islands: Grand Jury Denied*, 35 HOW. L.J. 263, 265 (1992). The Philippines are now an independent nation, but Puerto Rico and the Virgin Islands remain unincorporated territories of the United States.

251. *See* 1 RONALD J. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 3.11 (3d ed. 1999).

252. *See Callan v. Wilson*, 127 U.S. 540, 550 (1888). In *Callan v. Wilson*, the Court ruled on a challenge to a District of Columbia law that gave original jurisdiction of certain offenses to a police court. In striking down this provision, the Court stated that there was “nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases.” *Id.* In its analysis, the Court noted that the right of trial by jury had always been interpreted to apply to the occupants of the territories and stated, “We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States.” *Id.*

areas. In *Dorr v. United States*,²⁵³ the Court addressed the issue of whether Congress was constitutionally required to legislatively provide for trial by jury in the Philippines.²⁵⁴ Relying on the Insular cases,²⁵⁵ the Court held that because the Philippines was an unincorporated territory, the full protections of the Constitution did not apply to the inhabitants.²⁵⁶ Congress was bound by the specific limitations imposed by the Constitution on its power, such as the prohibition against *ex post facto* laws or bills of attainder, but otherwise had only to provide fundamental rights in the unincorporated territories.²⁵⁷ Citing prior decisions, the Court stated that trial by jury and presentment by grand jury were not fundamental rights.²⁵⁸

The Court then analyzed the Filipino statutory due process system, in which an accused was given the right of counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, and to confront the witnesses against him. The system also provided for compulsory process of witnesses, due process, prohibition against double jeopardy, the privilege against self-incrimination, and appellate rights. Writing for the majority, Justice Day stated, "It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings, which give full opportunity to be heard by competent tribunals before judgment can be pronounced."²⁵⁹

A few years later, the Court elaborated on the formula it had established in *Dorr* in another newspaper libel case, this time from Puerto Rico.

253. 195 U.S. 138 (1904). The petitioners in *Dorr* were newspaper editors accused of committing libel in the Philippines. At trial, they demanded indictment by grand jury and trial by petit jury, both of which were denied because they were not required under Filipino law. The petitioners appealed to the Supreme Court of the Philippines and from there to the United States Supreme Court. *Id.*

254. When the Philippines came under United States control, Congress established a criminal justice system based on the civil law that had governed the Philippines under Spanish rule for several hundred years. The system did not include trial by jury. *Id.* at 145.

255. The Insular cases developed the doctrine of territorial incorporation. They were not criminal cases, but rather were challenges based on the Uniformity Clause of the Constitution, U.S. CONST. art. 1, § 8, to duties imposed on commercial goods exchanged between the territories and the United States. *Downes v. Bidwell*, 182 U.S. 244 (1901), was the most important of these cases. It held that the Uniformity Clause did not apply to the territories. It also made the distinction between incorporated and unincorporated territories and the reach of the Constitution in both. *See Soltero, supra* note 250, at 150.

256. *Dorr*, 195 U.S. at 149.

257. *Id.* at 145-48.

258. *Id.* (citations omitted).

259. *Id.* at 145-46.

In *Balzac v. People of Porto Rico* [sic],²⁶⁰ the appellant had been tried for misdemeanor libel in a Puerto Rican court. The Puerto Rican code of criminal procedure at the time permitted jury trial for felony cases but not misdemeanor cases.²⁶¹ The appellant argued that the statute violated his constitutional right to trial by jury. The Court disagreed, ruling that Puerto Rico was not an incorporated territory within the meaning of its jurisprudence.²⁶² Thus, the full protections of the Constitution did not apply there as a matter of right; due process rights such as grand jury presentment or trial by petit jury could only be granted statutorily.²⁶³

The Court again applied its fundamental rights analysis from *Dorr*. It defined fundamental rights as “those . . . personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law,”²⁶⁴ but, quoting *Dorr*, stated that trial by jury was not a fundamental right. The Court focused on Congress’s power to govern the territories under Article IV, Section 3, and the fact that even as Congress provided a Bill of Rights for the Puerto Ricans, it excluded grand and petit juries.²⁶⁵

The holdings in *Dorr* and *Balzac* are still valid.²⁶⁶ While they do not apply *per se* to courts-martial, they do illustrate that the Court applies a different constitutional analysis to legislative courts than to Article III courts. Even in matters affecting life and liberty, no litigant in a legislative court

260. 258 U.S. 298 (1921).

261. *Id.* at 302-03.

262. *Id.* at 306-07. The appellant argued that he was entitled to the full protections of the Constitution because of the Jones Act of 1917, which granted United States citizenship to residents of Puerto Rico who did not opt out within six months. The Jones Act contained a section entitled the “Bill of Rights,” which gave every one of the constitutional guarantees to the Puerto Ricans *except* indictment by grand jury and trial by petit jury. *Id.* at 306-07. The Supreme Court disagreed with the appellant’s theory. Carefully parsing the Jones Act, the Court found nothing in it to demonstrate a congressional intent to incorporate Puerto Rico into the Union. *Id.* at 307-08.

263. *Id.* By the time the case reached the Supreme Court, the Puerto Rican legislature had amended its code to statutorily permit trial by jury in misdemeanor cases. *Id.* at 303.

264. *Id.* at 312-13.

265. *See id.* at 306-07, 312.

266. *See, e.g.,* Soltero, *supra* note 250, at 4 (noting that in recent decisions, the Rehnquist Court has upheld the validity of these cases); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (favorably discussing the Insular cases and their progeny as still-valid precedent); De La Rosa v. United States, 229 F.3d 80, 87 (3d Cir. 2000) (noting that the “fundamental rights” doctrine of *Balzac* and *Dorr* still applies to Puerto Rico today).

enjoys the benefits of an independent judiciary with tenure and salary protections. Furthermore, rights such as grand jury presentment and trial by petit jury that would be constitutionally required in Article III courts, may not be required in all legislative courts. Where Congress acts pursuant to its enumerated constitutional powers and in accordance with valid congressional aims, a statutory form of due process that guarantees a fair trial and fundamental rights is sufficient.

3. Courts-Martial and the Military Deference Doctrine

a. Introduction to the Doctrine

Of all the legislative courts created by Congress, courts-martial have received the most deference from the Article III courts. Under a standard of review known as the “separate community”²⁶⁷ or “military deference”²⁶⁸ doctrine, the courts have proclaimed the armed forces to be a distinct subculture with unique needs, “a specialized society separate from civilian society.”²⁶⁹ Where there is a conflict between the constitutional rights of the individual serviceman and an asserted military purpose, the courts have deferred to Congress’s ability—indeed, duty—to balance the appropriate factors and reach a necessary compromise.²⁷⁰

This doctrine is firmly rooted in the principle of separation of powers. The Supreme Court has stated that individual rights of service members “must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.”²⁷¹ In furtherance of that duty,

267. See generally James M. Hirshhorn, *The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (providing a theoretical framework and justification for the military deference doctrine).

268. See generally John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000). O’Connor notes that the doctrine has developed in three stages during our country’s history. During the first stage, which lasted until the mid-1950s, virtually no meaningful constitutional review of military regulations and procedures occurred. The second stage featured an activist court that sought to curtail what it viewed as Congress’s inappropriate attempts to extend court-martial jurisdiction; the stage ended with the *O’Callahan v. Parker* decision, 395 U.S. 258 (1969), which established the service-connection test. The third stage was the development of the military deference doctrine as known today, beginning in the mid 1970s. O’Connor, *supra*.

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

270. *Id.*

the Constitution does not impose limits on Congress, but rather empowers it.²⁷²

The Courts defer to congressional judgment on matters of good order and discipline because the military's mission to fight and win the nation's wars is different from any other activity of the government. For the military to carry out its duties properly, it must be subordinate to the political will, and it must be internally disciplined.²⁷³ The very survival of the nation is at stake. Therefore, the consequences of judicial error concerning the effect of a practice on military effectiveness are particularly serious.²⁷⁴

The modern service member, whether an infantryman engaged in direct combat or a rear-echelon administrative specialist, must be able to perform effectively while beyond the direct supervision of officers.²⁷⁵ Adherence to group standards is necessary for the fulfillment of unpleasant duties that the typical member of society does not have to face.²⁷⁶ The existence of formal disciplinary authority is critical in maintaining this

271. *Burns v. Wilson*, 346 U.S. 137, 140 (1953). In *Burns*, the petitioners were tried separately by Air Force courts-martial and convicted of murder and rape on the island of Guam. At trial, they raised a number of issues pertaining to their treatment by Guam authorities, their confessions, and the trial procedures at the courts-martial. They exhausted their remedies through the military court system and then applied for a writ of habeas corpus in the United States District Court for the District of Columbia. *Id.* at 138. The district court denied the writ, and both the Court of Appeal and the Supreme Court affirmed. *Id.* at 137. The Supreme Court held that because Congress had established a separate justice system for the military with its own system of review, the civil courts would limit their review of a habeas corpus petition to determining whether the military courts had given fair consideration to the petitioner's claims at trial. *Id.* at 144.

272. *See* Hirshhorn, *supra* note 267, at 211.

273. *See id.* at 219-21. Hirshhorn explains that good order and discipline is particularly significant in a system that subordinates the military to civilian leadership:

As long as the Constitution gives the President and Congress the authority to determine the ends for which military force will be used, civilian supremacy requires a system of military discipline that inculcates all ranks with an attitude of active subordination, i.e., the will to carry out the instructions of their civilian superiors despite their own disagreement.

Id. at 217.

274. *Id.* at 239. The consequences of insubordination or indiscipline can be devastating to national policies. Hirshhorn cites McClellan's attempt to control Lincoln's policy on slavery by threatening that his troops would not fight for emancipation, and the 1914 action of British officers in preventing Home Rule for Ireland by threatening to resign en masse rather than fight the Ulster Protestants. *Id.* at 217.

275. *Id.* at 221.

capability. As the Supreme Court stated in *Schlesinger v. Councilman*,²⁷⁷ “To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life.”²⁷⁸ In other words, service members must believe that the military has the power to detect and punish resistance or noncompliance with its standards.²⁷⁹

In discharging its constitutional function of making rules for the government of the armed forces, Congress has balanced the laws, interests, and traditions of the military with the rights of individual service members.²⁸⁰ Thus, the Article III courts are conscious of the consequences of judicial miscalculation concerning the effect of individual rights on military efficiency. Because the political branches have, in acting, already weighed the affected individual interests, any judicial decision that constitutionalizes the individual interests of the service member rejects the balance struck by Congress.²⁸¹

b. Application to the UCMJ’s Statutory Due Process Framework

The statutory due process system of the UCMJ is constitutionally acceptable within its context, although some of the same procedures (for example, the practice of a convening authority using subjective criteria to personally select members of the court) would be constitutionally infirm in an Article III court.²⁸² In his concurring opinion in *Weiss v. United States*,²⁸³ Justice Scalia captured the essence of the matter, observing that Congress had achieved due process within the meaning of the Due Process Clause²⁸⁴ when it set up a framework to give procedural protection to ser-

276. *Cf. id.* at 225-26 (discussing the importance of soldiers internalizing the values of their larger military group to carry out the unpleasant duties of combat, as well as less dangerous duties in rear-echelon areas).

277. 420 U.S. 738 (1975).

278. *Id.* at 757.

279. *See* Hirshhorn, *supra* note 267, at 224-27.

280. *Schlesinger*, 420 U.S. at 757.

281. *See* Hirshhorn, *supra* note 267, at 231.

282. *See* O’Connor, *supra* note 268, at 161 (“At the risk of oversimplification, the military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context.”).

vice members.²⁸⁵ “That is enough,” he wrote, “and to suggest otherwise arrogates to this Court a power it does not possess.”²⁸⁶

The statutory due-process framework of the court-martial system, as a legislative court, differs considerably from the Article III courts. As with all legislative courts, there is no requirement for an independent judiciary with tenure and salary protections; it is enough that the UCMJ and military regulations effectively insulate them from unlawful command influence.²⁸⁷ It has long been settled that the rights of grand jury presentment and trial by petit jury do not apply to courts-martial.²⁸⁸ The Sixth Amendment right to assistance of counsel is not required at summary courts-martial.²⁸⁹ As for actual court composition, the Supreme Court has stated that this is a matter appropriate for congressional action.²⁹⁰ Lower courts have rejected the idea that convening authority selection of panel members somehow violates due process, noting that Congress deliberately continued the historical scheme of convening authority panel member selection despite strong objections to the process.²⁹¹

The accused in a court-martial enjoys due process rights that are similar to the fundamental rights the Court recognized in the consular and

283. 510 U.S. 163 (1994). In *Weiss*, the Court addressed whether the appellant’s convictions violated due process because the military judge had been appointed in violation of the Appointments Clause and because the lack of a fixed term of office for military judges violated the Due Process Clause. The Court held that military judges, as officers, had already been properly appointed and did not require a separate appointment under the Appointments Clause. The Court noted that the Constitution does not require life tenure for Article I judges, but that the statutory and regulatory protections in place provided adequate due process protections for service members. *Id.* at 166-79.

284. “Nor shall [any person] . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

285. *See Weiss*, 510 U.S. at 197 (Scalia, J., concurring).

286. *Id.*

287. *See id.* at 176-77.

288. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 40 (1942) (stating that cases arising in the land and naval forces are excluded from grand jury indictment by the Fifth Amendment, and excluded by implication from the Sixth); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (stating that the Framers intended to limit the Sixth Amendment trial by jury to those subject to indictment by the Fifth Amendment).

289. *Middendorf v. Henry*, 425 U.S. 25 (1976). A summary court-martial is a one-man court in which neither the prosecution nor the defense is permitted representation by counsel. For certain grades of enlisted soldiers, the maximum penalty is up to thirty days’ incarceration. A soldier who objects to trial by summary court-martial may demand trial by a higher level of court-martial (with greater due process rights and greater punishment potential) as a matter of right. *See UCMJ art. 20* (2002).

Insular cases.²⁹² He has the right to assistance of counsel at all levels of court-martial except the summary court,²⁹³ to be informed of the charges against him,²⁹⁴ to a speedy trial,²⁹⁵ to compulsory process of witnesses and evidence,²⁹⁶ to the privilege against self-incrimination,²⁹⁷ and he has extensive appellate rights.²⁹⁸ In short, the UCMJ ensures that a military accused receives due process of law before a competent and impartial tribunal.²⁹⁹ When placed into its proper context as a legislative court formed in furtherance of a constitutionally enumerated congressional power, the statutory grant of due process in a court-martial compares quite favorably with what a criminal accused can demand as a matter of right in the other

290. *Whelchel v. McDonald*, 340 U.S. 122 (1950). The petitioner was convicted of raping a German woman. He argued that, although the Articles of War at the time did not permit enlisted men to serve on court-martial panels, he was entitled to have them. The Court stated that he could

gain no support from the analogy of trial by jury in the civil courts. The right to trial by jury guaranteed in the Sixth Amendment is not applicable to trials by courts-martial or military commissions. . . . The constitution of courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action.

Id. at 126-27 (citations omitted).

291. *McDonald v. United States*, 531 F.2d 490, 493 (Ct. Cl. 1976).

292. *See generally supra* Section II.D.2.

293. UCMJ art. 27 (providing for the detail of trial and defense counsel to general and special courts-martial).

294. *Id.* art. 35 (establishing procedures for serving the charges on an accused and guaranteeing that he cannot be tried for a certain period of time thereafter (five days for a general court-martial, and three days for a special court-martial) over his objection).

295. MCM, *supra* note 8, R.C.M. 707 (requiring that an accused be brought to trial within 120 days after preferral of charges, imposition of pretrial restraint, or entry on active duty for the purpose of trial).

296. UCMJ art. 46 (guaranteeing equal opportunity to obtain witnesses and evidence).

297. *Id.* art. 31.

298. *See generally id.* arts. 60 (empowering the convening authority to grant clemency on findings or sentence), 66 (establishing service courts of criminal appeals), 67 (providing for review by a civilian Court of Appeals for the Armed Forces), 67a (granting the right for an accused to seek review from the Supreme Court by writ of certiorari).

299. *See, e.g., United States v. Modesto*, 43 M.J. 315, 318 (1995) (stating that the “sine qua non for a fair court-martial” is impartial panel members, and noting the variety of procedural safeguards in the military justice system to ensure the impartiality of the members).

legislative courts. The balance that Congress has struck will not lightly be disturbed by an Article III court.³⁰⁰

III. Analysis of Attacks on Convening Authority Appointment of Panel Members

*The beginning of wisdom in the law is the ability to make distinctions, to withstand the reductionist pressure to say that one thing must necessarily lead to another.*³⁰¹

Current reform efforts attack the role of the convening authority on three broad theoretical fronts. The first front seeks to blur the distinction between court-martial panels and juries as a means to imposing random panel member selection on the military justice system.³⁰² The second front takes an internationalist bent, arguing that because Great Britain and Canada, whose military justice systems share a common heritage with the United States in the British Articles of War, have removed the convening authority from panel selection, so should the United States.³⁰³ The third front is fought in the courtroom by a bare majority of the CAAF, who have judicially legislated a significant modification to UCMJ Article 25(d)(2) using a weapon of their own creation: an implied bias doctrine that substitutes judicial speculation for the measured fact-finding and deliberation of Congress.³⁰⁴ This section examines each of these attacks in turn.

A. Random Selection and the Application of the Jury-Selection Template to Courts-Martial

300. *Cf.* *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) (noting, with respect to summary courts-martial, that Congress had twice entertained and rejected proposals to eliminate them; therefore, it would take extraordinarily weighty factors to upset the balance struck by Congress). On at least three occasions, Congress considered and rejected proposals to eliminate the convening authority's role in panel member selection, each time apparently concluding that retaining the process maintained a proper balance between individual rights and Congress's power to govern and regulate the armed forces. *See supra* Section II.C.4 (discussing congressional oversight of the UCMJ since 1950, and discussing reform proposals that would eliminate the convening authority from the panel selection process).

301. Bator, *supra* note 225, at 263.

302. *See infra* Section III.1.

303. *See infra* Section III.2.

304. *See infra* Section III.3.

1. *The Strategy: Blur the Lines Between Juries and Courts-Martial*

Reform efforts that have random selection as their ultimate goal often employ a strategy that blurs the lines between court-martial panel selection and jury selection. While nominally accepting the axiom that the Sixth Amendment jury trial right does not exist at courts-martial, these efforts nevertheless engraft the doctrines and principles of the Supreme Court's jury selection jurisprudence onto the court-martial system, claiming that random selection is a necessary antecedent to due process and the only way truly to avoid unlawful command influence.

A prime example of this strategy is an article, *Courts-Martial and the Commander*,³⁰⁵ published over thirty years ago by Major General Kenneth J. Hodson, a section of which is devoted to reforming the court-martial panel selection process. The underlying premise of General Hodson's argument is that convening authority selection of panel members is undesirable because it is either actually unfair or presents the appearance of evil.³⁰⁶ To solve the problem, he suggests using the Supreme Court's jury selection jurisprudence as a template for the military justice system.³⁰⁷

Terminology is the first thing to fall as the article loosely interchanges the nomenclature of the jury and the court-martial panel.³⁰⁸ Next, the article confounds the goals of the two systems. Citing seminal Supreme Court cases³⁰⁹ and the ABA Standards for Criminal Justice,³¹⁰ the article defines the goal of the jury system as "random selection from a cross-section of the

305. Hodson, *supra* note 25.

306. *See id.* at 64. Hodson recognizes that the UCMJ provides remedies for unlawful command influence but says it is not good enough: "The military system has the appearance of evil and the potential for abuse." *Id.*

307. *Id.*

308. *See, e.g., id.* at 60 ("the military jury differs from the civilian jury in that it almost always consists of less than twelve members"), 64 ("The members of a court-martial (the military jury) are selected by the commander.").

309. The article quotes *Williams v. Florida*, 399 U.S. 78, 100 (1970), for the idea that the essential feature of a jury is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence." Hodson, *supra* note 25, at 61. This is significantly different from the military tradition of a panel of professionals who judge an accused based on the facts and decide the case based not only on common sense, but also on the principles of military law and their shared sense of the demands of good order and discipline.

310. Hodson, *supra* note 25, at 62, 64 (quoting AMERICAN BAR ASSOCIATION, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 2.1(a), at 48-51 (1968)).

community,”³¹¹ an unexceptionable conclusion. The article next transfers this goal—lock, stock, and barrel—to the military justice system: “Given the goal of random selection from a cross-section of the community, the present law which allows the commander to select military jurors, and even to exclude enlisted men unless they are requested by the accused, should be changed.”³¹² The article suggests a form of random selection in which the military judge would solicit names from the units in his judicial district and use a jury wheel to draw names for trial.³¹³ Finally, the analysis of the proposed system almost entirely glosses over the effects random selection might have on the operational effectiveness of the military justice system in both peace and war.³¹⁴

With relatively minor exceptions, the various attacks on panel member selection for the past thirty years generally follow the analytical template established by Hodson’s article. The starting point is almost always the premise that command control of the court-martial selection process is either actually evil or presents the appearance thereof.³¹⁵ Next, the interchange of terminology and concepts³¹⁶ prepares the way for the interesting but inapposite historical discussion of the common law jury.³¹⁷ The interchange of terminology and concepts may seem like a small thing, but in its effect of blurring the distinctions between the two systems, it sets up a hol-

311. *Id.* at 64.

312. *Id.* It is interesting that the modern-day ABA standards relating to jury trials specifically note that they do not apply to the procedures of military justice tribunals. *See* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY standard 15-1.1(d) (3d ed. 1996) [hereinafter ABA STANDARDS], available at http://www.abanet.org/crimjust/standards/jurytrial_toc.html.

313. Hodson, *supra* note 25, at 64.

314. The article proposes presumptively disqualifying the lowest two or three enlisted grades, using a questionnaire to help streamline the voir dire process, and providing discretion for the judge to excuse those who are unavailable because of their duties. It does not discuss in any detail the process by which the commands within the proposed judicial districts would submit names to the military judge or how improper command influence would be avoided in that process. The article does not analyze the effect such a random selection system might have in a deployed or combat environment. *See generally id.* at 64-65.

315. *See, e.g.*, Barry, *supra* note 25, at 103 (“In the United States, however, this troublesome issue of the [convening authority] as prosecutor remains.”); Glazier, *supra* note 25, at 4 (“At best, military jury selection incorporates the varied individual biases of numerous convening authorities and their subordinates. At worst, it involves their affirmative misconduct. ‘Court-stacking’ is consistently achieved, suspected, or both.”); Young, *supra* note 25, at 106 (“Article 25(d)(2) . . . is the problem. . . . As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate.”).

low analogy. The reader becomes indignant that military panels are selected contrary to the constitutional provisions governing civil jury selection. Following these preparatory steps, it is a simple matter to transfer jury goals and jurisprudence to the court-martial system.³¹⁸ Various

316. For examples of the indiscriminate interchange of terminology, see, for example, Glazier, *supra* note 25, who consistently refers to military juries, and asserts that the panel always has been a jury; Lamb, *supra* note 25, who consistently switches between using the terms “jury” and “panel” to refer to a court-martial panel; and Rudloff, *supra* note 25, who uses the term “jury” almost exclusively to refer to court-martial panels. Surprisingly, the military appellate courts occasionally interchange the terms. See, e.g., *United States v. Upshaw*, 49 M.J. 111, 114 (1998) (“perhaps some of these cases which challenge the convening authority’s role and methods in selecting the members of the jury for the trial of appellant will be resolved if Congress passes legislation which will mandate random selection of jury members”) (Sullivan, J., concurring); *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978) (freely interchanging the terms “jury” and “jurors” with “panel” and “members”). Some commentators seeking to change the system, however, scrupulously maintain the difference in terminology. See, e.g., Young, *supra* note 25 (consistently using the appropriate court-martial terminology, but applying jury selection concepts and principles); McCormack, *supra* note 25 (carefully noting the differences between a military panel and a jury, but applying concepts and principles of the jury to the panel selection process).

317. The analysis of the civilian jury system has attained the status in military legal writing of certain stock characters in popular romances: just as no romance is complete without a tall, dark, handsome, and mysterious stranger, few articles on court-martial reform are complete without an analysis of the development of the civilian jury system. Three of the more recent examples include Glazier, *supra* note 25, at 6-44, who leads off his article with a thorough analysis of the development of the jury system and asserts that courts-martial were unconstitutionally left out of the process; Lamb, *supra* note 25, at 105-13, who begins with a review of jury development from antiquity; and McCormack, *supra* note 25, at 1016-27, who discusses the history and role of the jury system from ancient Greece to modern times.

318. The transfer of concepts takes several forms. Lamb directly compares the court-martial process with the ABA standards for jury selection in criminal trials and federal practice, concluding that the military system falls short in many areas. See Lamb, *supra* note 25, at 129-32. Glazier takes the more radical approach that the Supreme Court has been wrong for over one hundred and fifty years in interpreting the Sixth Amendment to exclude courts-martial from the jury trial guarantee; he would adopt a random selection system to the military structure and, in his words, exceed the constitutional standards. See Glazier, *supra* note 25, at 72-91. McCormack takes a principled look at the goals of the jury system, analogizes those goals to the panel selection process, and suggests random selection. See McCormack, *supra* note 25, at 1023-27, 1048-50. Young briefly discusses the parameters of the civilian system and spends most of the article focusing on random selection as a method that will eliminate the perceived shortcomings of the system. See Young, *supra* note 25, at 93-94, 106-08. The Cox Commission dispenses with analysis altogether in proclaiming that there is no aspect of military criminal procedure that diverges further from civilian practice than the convening authority selecting panel members and recommends random selection from lists provided by the commander. See COX COMMISSION, *supra* note 26, at 7.

solutions are then proposed, almost all offering a form of random selection coupled with appropriate revisions to UCMJ Article 25.³¹⁹ Many commentators are enamored by computers,³²⁰ which promise to simplify all tasks relating to panel administration and add a disinterested analytical purity to the system.

There are three basic problems with this line of attack. First, in blurring the lines between juries and court-martial panels, proponents of change either dismiss or fail to take cognizance of the considerable structural barriers between court-martial panels and petit jury trials. Second, the random selection solution offers illusory change that is more form than substance. Third, random selection adds additional complexity to court-martial administration and interferes with the systemic goals of efficiency, effectiveness, and utility under a wide variety of circumstances.

2. *Response: The Structural Barriers and Theoretical Inconsistencies of Applying the Jury-Selection Template to Courts-Martial*

a. *Article III and the Sixth Amendment as Structural Barriers*

In creating a new nation, the Framers had the opportunity to curb the powers of the government, guarantee individual rights and freedoms, and break from the customs and traditions of a system that had oppressed them. Through the Constitution, the Framers were able to remedy the ills caused by a sovereign who “affected to render the Military independent of and

319. See generally *supra* note 25.

320. Glazier, for example, envisions a “computer-maintained” database for court members, operated by the installation G-1 as an additional duty. Database fields would include name, rank, report date, and availability. In what would surely be a personnel officer’s nightmare, the availability field would require constant updating to account for leave, deployments, temporary duty, and so forth. During wartime, the senior in-theater commander would create “virtual installations” that would use this program to manage courts-martial that might take place in theater. See Glazier, *supra* note 25, at 68-72. In a lecture at The Judge Advocate General’s School of the Army, David Schlueter advocated random selection as an alternative, saying that a computer could be programmed with Article 25 criteria to produce a cross-section of officers and enlisted personnel. He said, “I cannot imagine that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a servicemember’s liberty and property interests are at stake.” Schlueter, *supra* note 25, at 20. Young establishes a broad random selection scheme and recommends the use of a computer program to manage it, but provides no details about how the program would work. See Young, *supra* note 25, at 118-20.

superior to the Civil Power”;³²¹ “made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries”;³²² and who “depriv[ed] us, in many Cases, of the Benefits of Trial by Jury.”³²³ As this article has already shown, the Framers ensured that the military would be dependent on and submissive to the civil power by making the President the Commander in Chief,³²⁴ but granting the Congress power over the purse.³²⁵ To remedy the lack of judicial independence, the Framers provided tenure and salary protections for Article III judges.³²⁶ And to ensure that the right to trial by jury could not be tampered with, they enshrined it in the basic text of the Constitution.³²⁷

There can be little doubt that the guarantee of trial by a jury of peers is one of the salutary civil rights enjoyed by a free people. Blackstone once responded to a critic of the British Empire who predicted its downfall by observing, “the writer should have recollected that Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury.”³²⁸ Yet, even as they provided for trial by petit jury both in the text of the Constitution itself³²⁹ and in the Bill of Rights,³³⁰ the Framers structurally denied it to military personnel being tried by courts-martial.

In analyzing the exclusion of courts-martial from the jury trial guarantee, this section examines three areas: first, the Framers’ first-hand familiarity with military justice; second, the probable reasons for the inapplicability of the Article III jury trial guarantee to courts-martial; and third,

321. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

322. *Id.* para. 11.

323. *Id.* para. 20.

324. U.S. CONST. art. II.

325. *Id.* art. I, § 8, cl. 12.

326. *Id.* art. III, § 1.

327. *See id.* art. III, § 2, cl. 3. Article III of the Constitution states in part:

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Id.

328. 2 WILLIAM BLACKSTONE, COMMENTARIES 379, *quoted in* United States v. Dorr, 195 U.S. 138, 157 (1904) (Harlan, J., dissenting).

329. U.S. CONST. art. III, § 2.

330. *Id.* amend. VI.

the constitutional impossibility of the Sixth Amendment jury trial right applying to courts-martial.

One cannot argue that the Framers excluded courts-martial from the constitutional petit jury trial guarantees out of ignorance. To the contrary, the men who gathered to write the Constitution had considerable military experience and well understood the place of the military in society. They also understood the importance of fundamental civil rights and knew how to balance the demands of civil society with the needs of the military. Eugene Van Loan has written, “Familiarity with the arts and ways of war was . . . a prominent part of the cultural heritage of the architects of the Constitution.”³³¹ Every one of the original colonies had been authorized, either explicitly or implicitly, to form local defense organizations to help combat the hostile environment of the new world. The colonies had enacted universal military training and rudimentary articles of war, and many colonists gained military experience both serving in and leading these militia units.³³² During the French and Indian War from 1754-1763, the British recruited regiments of colonial volunteers that were organized as quasi-regular units and were subject to the British Articles of War; many colonists also served in the British Navy during this period and were subject to British naval justice.³³³

Thus, by the time the Revolutionary War began, there was already a strong military tradition in the United States. Many of those responsible for the Constitution and the Bill of Rights served in the military during the Revolutionary War. For example, John Marshall, who figured prominently in the Virginia ratification convention and helped draft Virginia’s proposals for a federal bill of rights, had been the Army’s Deputy Judge Advocate during the war.³³⁴ When the Constitutional Convention convened in 1787, a number of delegates—including George Washington—had served in the Revolutionary War and subsequent Indian wars or had been otherwise involved in the military affairs of the United States.³³⁵

It is evident that the Framers were intimately familiar with the processes of military justice. They had been subject to it and had used it to help mold the Army that beat the British. They recognized its benefits—as John Adams said, the system had carried two empires to the head of civ-

331. Van Loan, *supra* note 138, at 379.

332. *See id.*

333. *See id.* at 379-80.

334. Henderson, *supra* note 89, at 299.

335. Van Loan, *supra* note 138, at 387.

ilization³³⁶—even as they were wary of its potential for excess.³³⁷ One must assume that even if the original decision to incorporate the British Articles of War had been “witless,”³³⁸ the subsequent integration of a separate, legislatively controlled military justice system into both the Articles of Confederation and the Constitution was deliberate and volitional.

Likewise, excluding the military from the right to trial by jury was a deliberate and volitional act. Trial by jury was one of the few guarantees adopted by the Convention in the text of the Constitution itself.³³⁹ There was little debate on this provision,³⁴⁰ and none at all relating to its applicability to courts-martial.³⁴¹ Nevertheless, it has always been generally accepted that the provision does not apply to courts-martial.³⁴² There are several reasons for this assumption, supported by sound logic or authoritative constitutional jurisprudence.

First, the silence of the Framers concerning courts-martial and the Article III jury trial right speaks volumes. The Framers had already specifically ensured the continuation of an established practice of legislative promulgation of rules for the government of the armed forces.³⁴³ They said nothing about jury trials in connection with courts-martial. On this issue of silence, Eugene Van Loan has elegantly written,

Neither the words themselves nor the recorded legislative history specifically reveal what relationship, if any, the jury was meant to have to the court-martial. Nevertheless, the documented familiarity of the convention delegates with the nature of each institution may indicate that their silence suggests that the jury

336. See JOURNALS, *supra* note 116, at 670-71 n.2.

337. For example, the Continental Congress declined to apply martial law to the new Northwest Territory to fill the gap until the civil government had established itself. See Van Loan, *supra* note 138, at 385.

338. See *supra* note 119 and accompanying text (comments of Brigadier General Samuel Ansell).

339. U.S. CONST. art. III, § 2; see also Van Loan, *supra* note 138, at 395 (discussing the constitutional guarantees adopted by the Convention).

340. Van Loan, *supra* note 138, at 395.

341. *Id.*; see also Henderson, *supra* note 89, at 300.

342. See, e.g., Henderson, *supra* note 89, at 300 (observing that it was clear the Framers did not intend the jury trial right to extend to courts-martial). *But see* Glazier, *supra* note 25, at 16 (asserting that because the text of Article III does not exclude courts-martial as it does cases in impeachment, the jury trial right necessarily extends to courts-martial).

343. See *supra* note 146 and accompanying text.

and the court-martial were contemplated to have no constitutional relationship whatever.³⁴⁴

Furthermore, there is a good argument that the Framers intended the Article III jury trial guarantee merely as a codification of a contemporary common law jury trial right that did not extend to trials by court-martial. Sound jurisprudence supports this point of view. In *Callan v. Wilson*,³⁴⁵ the Supreme Court stated its conviction that Article III “is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.”³⁴⁶ At common law, there was no right to a jury trial in a court-martial,³⁴⁷ the court-martial itself provided its own procedures and system of due process.

The Supreme Court recognized early on that the power to provide for the trial and punishment of service members is “given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States.”³⁴⁸ This does not mean that “courts-martial somehow are not courts, or that [they] somehow decide cases while avoiding ‘judicial’ behavior.”³⁴⁹ Rather, it means that when courts-martial perform judicial functions, they do not partake of “the judicial Power” embodied in Article III.³⁵⁰ Trial by jury as guaranteed in Article III does not, therefore, structurally exist as a constitutional right at courts-martial.

Nor does the jury trial guarantee of the Sixth Amendment apply to courts-martial. The Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”³⁵¹ This language does not expressly exclude courts-martial,

344. Van Loan, *supra* note 138, at 396.

345. 127 U.S. 540 (1888).

346. *Id.* at 549. The Court expressly found that the common law provided a jury trial for the offense of conspiracy. *Id.*

347. See *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (“Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals.”); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 10 (1958) (noting that at the time the Constitution was written, most military offenses were not even cognizable at common law, and observing that the jurisdiction of courts-martial has expanded considerably since then).

348. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858).

349. Stern, *supra* note 226, at 1055.

350. *Id.*

but as with Article III, the generally accepted view is that it does not apply to courts-martial.³⁵² Two main factors support this conclusion. First, analysis of the constitutional drafting process indicates that the Framers intended to exclude courts-martial from the Sixth Amendment petit jury guarantee. Second, authoritative jurisprudence has forever linked the military exclusion from grand jury presentment under the Fifth Amendment³⁵³ with the petit jury right under the Sixth Amendment.³⁵⁴

There is little question that in the drafts leading up to the final versions of the Fifth and Sixth Amendments, draftsmen intended to exclude the military both from the right of presentment before a grand jury and trial before a petit jury. Although both of these rights had been a part of the common law for centuries,³⁵⁵ they never had been a feature of the court-martial system, which developed independent of the common law. There appeared to be a common understanding among the states that these rights—and particularly the right to trial by petit jury—did not apply at courts-martial.³⁵⁶ Accordingly, the states that submitted proposed lan-

351. U.S. CONST. amend. VI.

352. *See, e.g.*, *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) (observing that “the right to trial by jury has no application to the appointment of members of courts-martial”). *But see* Glazier, *supra* note 25, at 15 (“The language of the Constitution and the process and history of its drafting support the opposite inference.”).

353. The applicable part of the Fifth Amendment reads thus: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend V.

354. *See infra* note 371 and accompanying text.

355. *See* Wiener, *supra* note 347, at 3.

356. *See generally* Henderson, *supra* note 89, at 305-09. In this section, Henderson reviews the provisions of several states’ bills of rights pertaining to jury trials and the military. He notes that even in states that did not expressly except the military from these guarantees (Maryland, North Carolina, Pennsylvania, Vermont, and Virginia), the states used courts-martial to govern their militia, “to which the jury trial guarantees were clearly not meant to apply.” *Id.* at 306.

guage for a bill of rights to Congress included provisions excepting the military from the jury guarantees.³⁵⁷

The Fifth and Sixth Amendments had a common ancestor in the amendments adopted by the House and sent to the Senate for confirmation. Article the Tenth, as the House proposal was called, read thus:

Tenth. The trial of all crimes (except in cases of impeachment, and in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherways [sic] crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the State.³⁵⁸

The Senate objected to the House version. Initially, the Senate stripped the House's Tenth Article of its petit jury guarantee and, a few days later, combined the grand jury provision (including the military exclusion) with another proposed amendment concerning double jeopardy and due process of law. This proposed amendment became our present Fifth Amendment.³⁵⁹

The Senate action stemmed from disagreements between the two legislative bodies concerning the nature and extent of the vicinage (locale)³⁶⁰ from which the jury was to be drawn. The Senate was initially willing to discard the jury trial guarantee rather than yield on the issue of vicinage.³⁶¹ Significantly, there is no evidence that the Senate's dispute with the

357. *See generally id.* at 306-10. Interestingly, some of the same states that failed expressly to exclude the military from their own bill of rights did so in the proposals they submitted to Congress. For example, Virginia, Maryland, and North Carolina all included similar provisions excluding the military from the jury trial guarantees. *Id.*

358. *Id.* at 312 (quoting S. JOUR., 1ST CONG., 1ST SESS. 114-19, 121-27, 129-31 (1789)).

359. *Id.* at 412-13.

360. The word "vicinage" means "vicinity" or "proximity" and is used to indicate "the locale from which the accused is entitled to have the jurors selected." BLACK'S LAW DICTIONARY 1561 (7th ed. 1999).

361. *See Van Loan, supra* note 138, at 409.

House's article had anything to do with excluding the military from the petit jury guarantee.³⁶²

Eventually, the two houses reached a compromise on the vicinage issue that guaranteed the jury would be at least drawn from the same state in which the crime was committed, but gave Congress the authority to define the vicinage later through the creation of judicial districts. The petit jury guarantee, however, was never recombined with the grand jury guarantee. Instead, it was placed with the Senate's Eighth Article after the guarantee of a speedy and public trial, and the military exclusion language was not duplicated; this amendment became the present Sixth Amendment.³⁶³ Thus, what started out as one common amendment was split into two by virtue of a disagreement that had nothing to do with military justice.

Nothing in the record indicates why the Senate did not simply recombine the compromise petit jury guarantee with the original grand jury language, thereby ensuring that the military exclusion would explicitly have applied to them both. The most likely possibility, according to Henderson and Van Loan, is that it was an oversight due to the exhaustion of the members of Congress.³⁶⁴ This theory makes sense when one considers the timing involved in the passage of the amendments. The Congress could not adjourn until the amendments were passed, and when the conference committee was appointed on 21 September 1789, the members of Congress were already tired and were eager to return home. The committee met in haste, finishing its work on September 24th; by September 29th, the amendments had passed both houses and Congress was adjourned.³⁶⁵

We are not left, however, simply with speculation on the matter. Further evidence of contemporary congressional intent is provided by an Act reported to the House on 17 September 1789, "to recognise, and adapt to the Constitution of the United States, the establishment of the troops raised under the resolves of the United States in Congress assembled."³⁶⁶ Section 4 of the Act prescribed that the Army would be governed by the rules and articles of war established by Congress, a "manifestation of Congress's recognition—during the very period in which it passed the Bill of Rights—that the army was to be continued to be governed by its traditional and sep-

362. See Henderson, *supra* note 89, at 313.

363. Van Loan, *supra* note 138, at 409.

364. See *id.* at 411-12; Henderson, *supra* note 89, at 305, 323.

365. See Van Loan, *supra* note 138, at 411.

366. See *id.* at 413.

arate system of courts-martial, unaffected by the proposed new amendment guaranteeing the right to trial by petit jury.”³⁶⁷

In addition to the evidence of congressional intent from the drafting process and contemporary legislation, the Supreme Court has also provided authoritative jurisprudence on the exclusion of courts-martial from the Sixth Amendment jury trial guarantee. In *Ex parte Milligan*,³⁶⁸ the Court addressed whether Lamdin P. Milligan, a U.S. citizen, had been properly tried by a military commission in Indiana during the Civil War. The Court held that the trial violated Milligan’s rights by subjecting him to a non-Article III tribunal and denying him the right to presentment by grand jury and trial before a petit jury during a time when the federal authority in Indiana was unopposed and the courts were open.³⁶⁹ In analyzing the case, the Court made a statement in dicta that has, over the years, evolved into the force of a holding: “the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.”³⁷⁰ This linkage has been consistently interpreted, not only by the Supreme Court, but also by the military appellate courts, to preclude courts-martial from the Sixth Amendment jury trial guarantee.³⁷¹

Efforts have been made to demonstrate that the Supreme Court’s refusal to apply the Article III or Sixth Amendment jury trial guarantees to courts-martial is wrong or even unconstitutional.³⁷² The fact remains, however, that in the structure and framework of the Constitution and its amendments, the Framers forever barred trial by jury at courts-martial as a matter of right. Inasmuch as Congress has not chosen to grant a jury trial at courts-martial statutorily, it is a mistake to mingle carelessly the juris-

367. *Id.* at 414.

368. 71 U.S. (4 Wall.) 2 (1866).

369. *Id.* at 121-23.

370. *Id.* at 123.

371. *See, e.g.,* *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (“The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. Courts-martial have been composed of officers both before and after the adoption of the Constitution.”); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (“[C]ases arising in the land or naval forces’ are deemed excepted by implication from the Sixth Amendment.”); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988) (“The right of trial by jury has no application to the appointment of members of courts-martial.”).

prudence of Sixth Amendment jury selection with the constitutionally and functionally different process of court-martial panel member selection.

b. Random Selection and the Illusion of Form over Substance

Attempts to reform the panel member selection process through random selection elevate form over substance. This is largely because the consequences of a pure random selection system are virtually inconceivable in a military setting. The majority of service members are in the junior enlisted ranks, young, and with relatively little military experience.³⁷³ In a pure random selection scheme—one that would actually embody the Supreme Court³⁷⁴ and ABA³⁷⁵ ideal of a randomly selected cross-section of the community—these junior members would most likely comprise a substantial percentage of any given court-martial panel. To be a purist—to meet the ideal—one would have to be willing to discard a number of venerable and practical military justice customs: the tradition that one's actions will never be judged by someone junior in rank or experience,³⁷⁶ the philosophy that those who judge will be sufficiently acquainted with the principles of good order and discipline to place alleged offenses in their

372. See, e.g., Glazier, *supra* note 25, at 8-22 (asserting that the Supreme Court's failure to apply the Article III and Sixth Amendment jury guarantees to courts-martial is an old and flawed judicial creation); Remcho, *supra* note 25, at 204 (claiming that there is "questionable precedential support" for the Supreme Court's analysis that Article III and the Sixth Amendment jury trial guarantees do not apply to courts-martial). But see O'Connor, *supra* note 268, at 178 n.76 ("Although the author agrees that the Court's statements in *Miligan* regarding servicemembers' Sixth Amendment jury right are technically dicta, the author simply cannot accept Major Glazier's ably-presented argument that the centuries-old practice of conducting courts-martial without a jury of the accused's peers somehow now runs afoul of the Constitution.").

373. See MILITARY FAMILY RESOURCE CENTER, U.S. DEP'T OF DEFENSE, PROFILE OF THE MILITARY COMMUNITY: 2001 DEMOGRAPHICS REPORT (2001) [hereinafter MFRC REPORT], available at <http://www.mfrc.calib.com/stat.cfm> (stating that about 62.5% of all service members in the Department of Defense are in the ranks E-5 and below, and that 46.8% of all active duty personnel are twenty-five years old or younger).

374. See *Williams v. Florida*, 399 U.S. 78, 100 (1970) (stating that a jury drawn from a representative cross-section of the community is an essential element of due process).

375. See ABA STANDARDS, *supra* note 312, standard 15.2.1(a) ("The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community.").

376. This tradition is embodied in UCMJ Article 25(d)(1) (2002) ("When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.").

proper context,³⁷⁷ and the statutory mandate to assure that those who serve on courts-martial are best qualified for the duty.³⁷⁸

Few are willing to abandon those unique benefits or essential characteristics of the military justice system, so reformers propose modifications of random selection: (1) let the commander choose a list of those whom he believes to be qualified, and randomly select from that list;³⁷⁹ (2) screen individuals for Article 25(d)(2) criteria, and then spit out a randomly generated list;³⁸⁰ (3) appoint an independent jury commissioner to make the selections;³⁸¹ (4) presumptively disqualify a major percentage of service members—those below the grade of E-3, for example—and randomly select from the rest;³⁸² (5) modify the Article 25(d)(2) criteria to make them more easily fit a computer database model and facilitate random selection;³⁸³ or (6) modify the random selection criteria to ensure that all panel members are senior to the accused and that the “random selection” produces a cross-section of rank.³⁸⁴ Do anything, in short, but accept the consequences of an actual random selection scheme.

In building the illusion that random selection solves the perceived problems of panel member selection, reformers tend to ignore or downplay

377. This harkens back to the earliest days of military justice tribunals. For example, under the Gustavus Adolphus Code, the membership of the higher court-martial included the top leadership of the Army, every regimental colonel, and even colonels from other nations. *See supra* note 62 and accompanying text.

378. UCMJ art. 25(d)(2).

379. COX COMMISSION, *supra* note 26, at 7.

380. *See, e.g.*, Brookshire, *supra* note 25, at 100-02 (establishing screening criteria to be used before random selection).

381. *See, e.g.*, Lamb, *supra* note 25, at 161-62.

382. *See, e.g.*, Hodson, *supra* note 25, at 64 (suggesting that soldiers in grades E-1 through E-3 should probably be presumptively disqualified); Young, *supra* note 25, at 119 (suggesting that all servicemembers, officer and enlisted, with less than two years' military service be excluded). The Court of Military Appeals has already sanctioned a modified version of this approach as consistent with UCMJ Article 25(d)(2), provided that the convening authority personally approves the results of the random selection. *See infra* notes 390-394 and accompanying text.

383. *See, e.g.*, Glazier, *supra* note 25, at 68 (recommending that Article 25 be abandoned); Lamb, *supra* note 25, at 160 (recommending that the subjective criteria of Article 25 be abandoned); Young, *supra* note 25, app. (deleting subjective criteria of Article 25 from proposed revision of Article 25); McCormack, *supra* 25, app. (same).

384. *See, e.g.*, Glazier, *supra* note 25, at 101-03 (maintaining the seniority requirement of Article 25(d)(1), and proposing rank-group restrictions on pure randomness to obtain a better cross-section); *see also* Young, *supra* note 25, at 120-21 (recommending that because military demographics are so weighted toward the young and inexperienced, the random selection program should guarantee a cross-section of the military by grade).

the inconvenient theoretical inconsistencies of their proposals. It is almost as if random selection is its own goal, no matter how removed the proposed modifications might take it from the justifications that were used to claim its necessity. Moreover, no one addresses how random selection would change anything but a perception; those commanders who truly desire to influence courts-martial unlawfully will find a way to do it regardless of the personnel or methods involved in panel member selection.³⁸⁵ As the JSC concluded, “[E]ven a completely random method of selection may not improve perceptions of command influence because members will still be subject to the orders, assignments, and evaluations of the superiors who refer charges to trial.”³⁸⁶ In essence, reformers have cried out, “The Emperor is naked!,” and then suggested clothing him with fig leaves.

c. Mandatory Random Selection Undermines the Unique Goals of the Military Justice System

Mandatory random selection, in removing the commander from the panel selection process, sends the message that the military justice system is more important than the military. At best, random selection confers no actual benefit on the military justice system. At worst, it adds additional administrative burdens that needlessly complicate the system, reduce its efficiency, and most critically, withdraw from commanders the ability to direct the disposition of their personnel. Random selection destroys the discretion of convening authorities to select specialized panels based on the unique needs of a case.³⁸⁷ In addition, random selection deprives the accused of the important benefit of knowing in advance the names and dispositions of those who will judge him, thus permitting him to decide intelligently whether it will be in his best interest to select trial before a panel or before a military judge sitting alone.³⁸⁸ Many mandatory random selec-

385. See Spak & Tomes, *supra* note 25, at 535:

Similarly, revamping the court-member selection process and renewing emphasis on the prohibition against retaliatory action against court members would not change the fact that commanders can easily harm the careers of court members by taking actions that stop short of violating Article 37(b). And court members know it. A poor convening authority can give a court member a bad efficiency report for his or her part in reaching a decision that the convening authority dislikes. A more savvy one would “damn with faint praise.”

Id.

386. JSC REPORT, *supra* note 32.

tion schemes would deprive the accused of his ability to choose between an officer and mixed officer-and-enlisted panel.³⁸⁹

However, if a convening authority chooses to use random selection to assist in narrowing the field of candidates from whom she will personally select a court-martial panel, that option is already available. The great, untold secret of random selection is that it has been legally available as a method of panel member selection for nearly a quarter-century.

In *United States v. Yager*,³⁹⁰ the accused was tried before a panel that had been randomly selected pursuant to a local regulation at Fort Riley, Kansas. The random selection program at Fort Riley was designed to dovetail with the requirements of UCMJ Article 25(d)(2). The installation used personnel data files and screening questionnaires to create a list of qualified panel members, from whose ranks the court-martial panels were randomly selected before final approval by the general court-martial convening authority.³⁹¹ The accused appealed on the basis that rank had impermissibly been used as a criteria to systematically exclude low-ranking personnel. The Court of Military Appeals (CMA) affirmed the conviction, holding that the exclusion of E-1s and E-2s was in accordance with

387. Under the current system, a convening authority is free to select panel members who have specialized knowledge or experience. *See, e.g.*, *United States v. Lynch*, 35 M.J. 579 (C.G.C.M.R. 1992). In *Lynch*, the accused was a commander who was tried for hazarding a vessel when his Coast Guard buoy tender ran aground. The general court-martial convening authority selected a panel in which all members had experience as commanders afloat. The accused complained of panel-stacking, but the Coast Guard court disagreed, holding that such a court, by virtue of its training and experience, would better be able to understand the evidence and apply it to the standard of care expected of a commanding officer. *Id.* at 587. *See also* *United States v. Simpson*, 55 M.J. 674, 691-92 (Army Ct. Crim. App. 2001) (upholding a convening authority's decision to exclude all members from the accused's unit from a panel in order to keep the panel free from individuals who might have been tainted by prior exposure to the investigation, the accused, the victims, and witnesses); *United States v. Brocks*, 55 M.J. 614, 616 (A.F. Ct. Crim. App. 2001), *aff'd*, 2002 CAAF LEXIS 1614 (Dec. 2, 2002) (upholding a convening authority's decision to exclude members of the Base Medical Group from a court-martial panel to have a fair trial because all four conspirators and many of the witnesses came from that group).

388. *Cf. Young, supra* note 25, at 117 (dismissing the importance of the ability to assess whether a known panel or judge will be more lenient).

389. Article 25(c)(1), UCMJ, permits an accused to select a panel consisting of at least one-third enlisted membership. The presumption is that if he does not make that request, the panel will consist of officers only. *See* UCMJ art. 25(c)(1) (2002). The random selection schemes proposed by Lamb and Young recommend eliminating this choice. *See* Lamb, *supra* note 25, at 160-61; Young, *supra* note 25, at 108.

390. 7 M.J. 171 (C.M.A. 1979).

391. *Id.* at 171.

the statutory criteria of Article 25(d)(2) because application of the criteria would have excluded most of them anyway.³⁹² The CMA also approved of the random selection method, provided that the convening authority made the final decision based on Article 25(d)(2) criteria.³⁹³

Yager did not initiate a stampede to try random selection, despite later CMA opinions intimating that random selection coupled with convening authority approval of the final panel would not run afoul of UCMJ Article 25(d)(2).³⁹⁴ Instead, *Yager* has been an anomaly of panel-selection jurisprudence.

Naturally enough, this leads to the question, why hasn't random selection been more popular in the military? In answering this question, it is worth taking a closer look at the system employed in *Yager*. The system, as already noted, was not pure random selection; the lower two enlisted ranks were presumptively disqualified, as were soldiers who were not U.S. citizens.³⁹⁵ Moreover, the convening authority had directed that each court-martial panel would contain at least two field grade officers, each special court-martial would contain at least three officers, and each general court-martial panel would include at least four officers.³⁹⁶ To obtain qualified panels, the installation Staff Judge Advocate sent detailed questionnaires to prospective court members. Those who did not return the questionnaires—and over one-quarter of the soldiers did not—were presumptively disqualified.³⁹⁷ Once the questionnaires arrived at the Staff Judge Advocate's office, they had to be screened to create a qualified panel.³⁹⁸ The administrative burden for both the SJA and the installation personnel office was enormous. A computer system would do little to

392. *Id.* at 173.

393. *Id.* at 171.

394. *See* United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988).

395. *Yager*, 7 M.J. at 171. The CMA did not address the issue of exclusion of citizens for two reasons: it was not raised at the trial level, and the accused was himself a U.S. citizen. *Id.* at 173.

396. *See* JSC REPORT, *supra* note 32, app. J, at 3.

397. *Id.* This process, in itself, would create interesting panel selection issues. In essence, panel members were permitted to self-select themselves either on or off the panel, depending on whether they completed the questionnaire. Thus, panels could potentially be skewed toward soldiers with an interest in military justice, soldiers with an agenda who hoped to serve on panels, and soldiers and officers with non-demanding jobs who felt they had enough leisure time to serve on courts. In contrast, some of the best-qualified potential panel members may have escaped consideration for service simply by failing to turn in the questionnaire.

398. *Id.*

speed up the process of mailing, tracking, opening, or entering data from questionnaires.

The results of the experiment were, in addition, somewhat unclear. Not many cases were actually tried before panels,³⁹⁹ and the military judge at Fort Riley felt that the panels failed to meet the best-qualified criteria. The judge noted, somewhat acerbically, "So far as I know, no one has ever contended that jurors should be immature, uneducated, inexperienced, have no familiarity with the military service, and have no judicial temperament."⁴⁰⁰ He also criticized the program because, to comply with the law, the convening authority still had to appoint the panel personally; all the program accomplished was to force him to select those who were not, in his opinion, necessarily the best qualified.⁴⁰¹

There are several lessons to be learned from this experience. First, a pure random selection system did not meet the needs of Article 25(d)(2) or the convening authority. The convening authority had to force a cross-section of ranks by mandating minimum numbers of officers and field grade officers on the panel. Second, the questionnaire method of determining qualifications permitted soldiers to self-select their participation in court-martial panels. Some of the best-qualified officers and soldiers on the installation may have declined to fill out a questionnaire, considering themselves too busy with other duties. Third, the system created an enormous administrative burden on the personnel office and Staff Judge Advocate's office at the installation. Fourth, and perhaps most important, the quality of the panels was degraded.

When rhetoric and inapposite comparisons with the jury system are replaced by examination of the actual effects random selection would have on the military, reason demonstrates that the current system best balances the varied needs of the individual services while still producing fair, impartial panels that meet the criteria of UCMJ Article 25(d)(2). Indeed, the JSC, at the direction of Congress, recently concluded as much in a detailed study of the effects random selection might have on the military.⁴⁰² Operating under the mandate that a random selection system would still have to produce best-qualified members according to the criteria of UCMJ Article

399. *Id.* at 4.

400. See Letter from Colonel Robert L. Wood, Military Judge, to Major Rex Brookshire, Deputy Staff Judge Advocate, Fort Riley, Kansas 6 (Dec. 13, 1974), *reprinted in* JSC REPORT, *supra* note 32, app. K.

401. *Id.*

402. See JSC REPORT, *supra* note 32, at 47.

25(d)(2), they examined six different alternatives: maintaining the current practice, random nomination of panel members, random selection of panel members, a combination of random nomination and selection, expanding the source of potential panel members, and creating an independent selection authority.⁴⁰³

In concluding that the current system best meets the needs of the military, the JSC did not simply “pencil-whip” its analysis to meet pre-conceived conclusions. The committee’s report is an honest, thorough, and balanced look at each of the alternatives in light of theory, actual practice, and workability. In view of the varied mission-related needs of the services, including the duty to engage in combat if called upon to do so, the JSC reached some conclusions that ought to give pause to reformers who apparently believe military needs should have no bearing on the military justice system. A selection system must possess certain characteristics to be useful in a military setting. It must be “sufficiently flexible to be applied in all units, locations, and operational conditions and across all armed forces.”⁴⁰⁴ It must recognize that competency and availability decisions are “critical command functions.”⁴⁰⁵ Random methods do not meet those ends because they are not uniformly operable in all units, locations, and conditions, and they would “present substantial difficulties during heightened military operations to include war or contingency operations.”⁴⁰⁶ A mandatory random selection scheme would increase administrative burdens, lower the overall level of competency of panels, and produce increased delays in the system.⁴⁰⁷ In short, mandatory random selection falls far short of its theoretical promise and could actually frustrate the unique goals of the military justice system.

B. Keeping up with the Joneses: Reform Based on British and Canadian Jurisprudence

1. The Strategy: Argue That American System Must Change to Keep Pace with Court-Mandated Overhaul of British and Canadian Systems

It has become fashionable to disparage the UCMJ in comparison with recent reforms in the British and Canadian systems that significantly mod-

403. *Id.* at 16.

404. *Id.* at 46.

405. *Id.*

406. *Id.*

407. *Id.* at 45.

ified the role of the court-martial convening authority. The Cox Commission, for example, claimed that “military justice in the United States has stagnated” in comparison with other countries around the world, particularly Great Britain and Canada.⁴⁰⁸ The Bar Association for the District of Columbia, in its submission to the Cox Commission, argued that the decisions invalidating the role of the convening authority in Great Britain and Canada are particularly significant because “[t]he Uniform Code of Military Justice . . . shares a common ancestry with the British system found insufficiently independent in *Findlay* and *Lane*. The Canadian system invalidated in *Genereux* shares that common ancestor as well.”⁴⁰⁹ Guy Glazier writes, “Canada, Great Britain, and the European Community all agree that member selection by the convening authority fails to meet minimum standards of independence and impartiality in practice and appearance,” and he calls it ironic that the United States, which fought for freedom from Great Britain, is alone in the free world in denying trial by jury to service members.⁴¹⁰

At first blush, these are persuasive arguments. If the country that created the Articles of War saw fit to abandon the practice of convening authority panel selection, why hasn’t the United States? If the United States’ closest neighbor has rejected the practice, why doesn’t the United States? Surely the U.S. system should meet their minimum standards of independence and impartiality. The United States must be remarkably obtuse if it has not seen the light and spontaneously changed its military justice system to meet the requirements imposed on Great Britain and Canada by, respectively, the European Court of Human Rights and the Canadian Supreme Court.

These arguments have a certain specious charm. In measuring the significance of the British and Canadian actions, however, making the simplistic argument that because they have changed, so should America, is not enough. The decisions must be placed in their proper contextual frame-

408. COX COMMISSION, *supra* note 26, at 3.

409. Memorandum from the Bar Association of the District of Columbia, to the Cox Commission, subject: Special Considerations Related to the “Final List of Topics” 11 (Mar. 13, 2001), *reprinted in* COX COMMISSION, *supra* note 26, app. C.

410. Glazier, *supra* note 25, at 88. Glazier’s statement about trial by jury is not quite accurate. The British system removed the convening authority from panel selection, but it did not appreciably change trial procedure. Now a Court-Martial Administration Officer (CMAO) handpicks the panel based on a list provided by the convening authority. *See infra* note 426 and accompanying text. Whatever benefits to freedom and independence this procedure may have, it is not a jury trial.

work. Furthermore, the practical effect of the changes bears examination as well. As will be seen, the British and Canadian changes were appropriate within a contextual and structural framework that has little, if any, actual relevance to the United States system.

2. *Response: A Structural and Contextual Analysis of the British and Canadian Changes*

a. *The British System and the European Convention for the Protection of Fundamental Rights and Human Freedoms*

In 1951, Great Britain ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴¹¹ Most European countries that adopted the Convention had to formally incorporate it into their domestic law under their individual constitutions. In Great Britain, however, the thought was that the rights and freedoms guaranteed by the Convention could be delivered under British common law.⁴¹² As the jurisprudence of the European Court of Human Rights developed, however, it became apparent that British common law was no longer sufficient to vindicate rights under the Convention and incorporation would be necessary.⁴¹³ Accordingly, the United Kingdom formally incorporated the Convention into its domestic law in the year 2000.⁴¹⁴

In the meantime, British citizens who felt the government was violating their human rights under the Convention had recourse to the European Commission of Human Rights and the European Court of Human Rights. Under the Convention, the Court of Human Rights is empowered to award money damages and declare that there has been a violation. In turn, the

411. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 [hereinafter European Convention], available at <http://www.pfc.org.uk/legal/chrtext.htm>. The Council of Europe's Treaty Office maintains an on-line table that lists the dates of signature, ratification, and entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms for all member states of the Council of Europe. See generally Council of Europe, Treaty Office, *Complete List of Council of Europe's Treaties*, <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

412. See HUMAN RIGHTS OFFICE, UNITED KINGDOM, SEC'Y OF STATE FOR THE HOME DEP'T, WHITE PAPER: RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL (1997) [hereinafter WHITE PAPER], available at <http://www.archive.official-documents.co.uk>.

413. *Id.*

414. See Wing Commander Simon P. Rowlinson, *The British System of Military Justice*, 52 A.F. L. REV. 17, 20 (2002).

signatory nations are obligated to rectify any noted violations in their internal laws.⁴¹⁵

Article Six of the Convention provides, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."⁴¹⁶ The celebrated case of *Findlay v. United Kingdom*⁴¹⁷ arose under this provision of the Convention. In 1991, Lance Sergeant Findlay pled guilty to charges of assault, conduct to the prejudice of good order and discipline, and threatening to kill.⁴¹⁸ He was sentenced by a court-martial to two years' confinement, reduction in rank, and dismissal.⁴¹⁹ His appeals through British military channels were denied, and in 1993, he filed a petition with the European Commission of Human Rights alleging that court-martial procedures under the Army Act 1955 and implementing regulations deprived him of an independent and impartial tribunal under Article 6(1) of the Convention. The Commission referred the case to the European Court of Human Rights.⁴²⁰

The Court found a violation of Article 6(1). In analyzing the independence of the court-martial, the Court looked to the manner of appointment of its members, their term of office, the existence of guarantees against outside pressure, and whether the body presented the appearance of impartiality. The test for impartiality employed a two-pronged analysis in which the court examined whether the tribunal was subjectively biased and whether it was impartial from an objective viewpoint. The court specifically stated that appearances were important in determining independence and impartiality.⁴²¹ Because the convening authority was superior in rank to all members of the panel and also acted as the confirming officer in reviewing the sentence, the Court found that the guarantees of independence and impartiality were not satisfied.⁴²² It is worth noting that the

415. WHITE PAPER, *supra* note 412.

416. European Convention, *supra* note 411, art. 6, § 1.

417. 24 Eur. H.R. Rep. 221 (1997).

418. *Id.* paras. 6-10.

419. *Id.* para. 23.

420. *Id.* paras. 26-28, 58.

421. *Id.* para. 73.

422. *Id.* paras. 76-80.

United Kingdom had already legislatively changed its court-martial system by the time this case went to court.⁴²³

One wonders if *Findlay* would ever have made it to the Court of Human Rights had the British military justice system contained meaningful appellate rights. In an address at the U.S. Army Judge Advocate General's School, The Judge Advocate General of the Armed Forces of the United Kingdom commented that the European Commission, which certified the case to the Court of Human Rights, might have taken a different view had "the servicemember been permitted full rights of appeal to a higher civilian court."⁴²⁴ The review system at the time had the following characteristics: no appeal to a judicial body if the accused pled guilty (as was the case in *Findlay*); the system of confirmation and reviews did not involve consideration by a legal body; the reviews were done in secret; the appellant could not participate in the reviews in any way; and there were no reasons given for denial of relief.⁴²⁵

Findlay did cause a change in British military justice. The convening authority no longer plays a role in the system. His former duties have been spread to three different bodies: a Prosecuting Authority, who determines whether to prosecute; a Court-Martial Administration Officer (CMAO), who sets the date and venue for the court-martial and personally selects the members using lists provided by various commanding officers; and Reviewing Officers, who now provide reasons for their decisions.⁴²⁶ These changes have not ended controversy with the British system, but rather seem to have opened a Pandora's box in which judicial challenges to the legitimacy of the system are the order of the day.⁴²⁷ In addition, the British military has experienced difficulty coping with the increased administrative burdens of the system and has had to adopt a centralized

423. *Id.* paras. 66-67.

424. Judge James W. Rant, *The British Courts-Martial System: It Ain't Broke, But It Needs Fixing*, 152 MIL. L. REV. 179, 183 (1996).

425. Ann Lyon, *After Findlay: A Consideration of Some Aspects of the Military Justice System*, 1998 CRIM. L. REV. 109, 113. For an interesting comparison of rights under the UCMJ with the rights *Findlay* had under the British system, see Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001)*—"The Cox Commission," 52 A.F. L. REV. 233, 266 (2002). The authors created a table that provides a side-by-side comparison of the British and UCMJ systems. The UCMJ contains a number of statutory safeguards that ensure independence and impartiality, none of which were available in the British system. See generally *id.*

426. Lyon, *supra* note 425, at 115-17.

system for trying cases.⁴²⁸ The British system tries about three hundred courts-martial per year compared to over 4500 in the American system.⁴²⁹

b. The Canadian System and the Canadian Charter of Rights and Freedoms

Canada's military justice system, like the United States system, had its roots in the British Articles of War.⁴³⁰ Until the adoption of the Militia Act of 1868, which organized the Canadian Army,⁴³¹ the British Army operated in Canada. The Militia Act, in essence, adopted the British Articles of War. The British military justice system had both a direct and indirect effect on Canadian military justice through World War II, a situation that created a "confusion of authorities" that was remedied with the 1950 National Defense Act (NDA).⁴³² The NDA created a unified Code of Service Discipline for Canada's different services. This Code, like the UCMJ, has continued in force, although it has been modified from time to time.⁴³³

In 1982, Canada experienced a significant change in its domestic law with the adoption of the Canadian Charter of Rights and Freedoms.⁴³⁴ Article 11(d) of the Charter guarantees that a person charged with an offense has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."⁴³⁵ The language is remarkably similar to that in the European Convention on Human Rights and Fundamental Freedoms, and as will be

427. See, e.g., Rowlinson, *supra* note 414, at 43 ("Indeed, it is accurate to say that the number of challenges to the reformed system have been greater in number than those to the system which existed prior to the reforms."). Rowlinson notes that many advocates are now attacking the changes as cosmetic only and failed to address the root causes of unfairness and bias in the system. *Id.* With respect to the particular issue of member selection, see John Mackenzie, *Who Really Runs the Court-Martial System*, 150 *NEW L.J.* 608 (2000). Mr. Mackenzie claims that the CMAO does not truly have the discretion to select court-martial members because he merely nominates the list provided to him by the chain of command. See *id.*

428. See JSC REPORT, *supra* note 32, app. M, at 7.

429. *Id.* at 43.

430. Brigadier-General Jerry S.T. Pitzul & Commander John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 *A.F. L. REV.* 1 (2002).

431. *Id.* at 3.

432. *Id.* at 4-5.

433. *Id.* at 7-8.

434. CAN. CONST. (Constitution Act, 1982), pt. I, Canadian Charter of Rights and Freedoms, c. 11 (LEXIS 2002) [hereinafter Canadian Charter].

435. *Id.* § 11(d).

seen, the Canadian Supreme Court adopted an analysis similar to the one later used by the European Court of Human Rights in *Findlay*.

The seminal case that changed the Canadian military justice system was *R. v. Genereux*,⁴³⁶ a 1992 case in which a corporal in the Canadian armed forces appealed his general court-martial conviction for drug trafficking and desertion. The main ground for appeal was that a military tribunal did not constitute an independent and impartial tribunal within the meaning of section 11(d) of the Charter.⁴³⁷

The Supreme Court of Canada took a broad look at the Canadian military justice system in concluding that it violated the Canadian Charter. The guarantees of independence and impartiality were, as in *Findlay*, analyzed not according to actual bias, but according to an objective standard that measured whether a reasonable person would perceive the tribunal as independent.⁴³⁸ There were three factors required for judicial independence: security of tenure, financial independence, and institutional independence.⁴³⁹ The Court found that the Canadian general court-martial of the day violated the Charter in several respects.⁴⁴⁰ The Court also found that certain aspects of the court-martial could cast into doubt the institutional independence of the proceedings, in particular the role of the convening authority, who decided when a court-martial would take place, appointed the members of the court, and appointed the prosecutor.⁴⁴¹

As a result of this opinion, Canada implemented a number of legislative changes to its system of military justice. The convening authority no longer has the authority to appoint judges and panel members.⁴⁴² The

436. [1992] S.C.R. 259.

437. *Id.* at 259.

438. *See id.* at 286.

439. *Id.* at 301.

440. *See id.* at 303-06. Most of the factors are not directly relevant to this article. The Court found that the structural position of The Judge Advocate General as an agent of the executive was troubling. He had the power to appoint military judges. Their security of tenure was affected by the ad hoc nature of the tribunal and the fact that their promotions, and hence, financial security, could be dependent on good performance evaluations. "A reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive." *Id.* Financial security was an issue both for the judge and the members of the court. At the time, there were no formal prohibitions against evaluating an officer on the basis of his performance at a court-martial. This could potentially result in negative evaluations, and therefore, lower promotion opportunities. *See id.* at 305-06.

441. *Id.* at 308-09.

prosecution function has been centralized and assigned exclusively to the Director of Military Prosecutions.⁴⁴³ Canada has adopted a modified random selection methodology for appointing court members based on rank, and panels are appointed centrally under the direction of the Chief Military Trial Judge. All officers meeting the rank criteria in the Canadian armed forces, with the exception of chaplains, legal officers, security officers, officers from the accused's unit, and witnesses, are eligible to serve.⁴⁴⁴

The very first use of the system demonstrated the potential difficulties of a centralized selection system when the computer selected the military attaché in Malaysia as the president of a general court-martial in eastern Canada.⁴⁴⁵ Centralized selection could hamstring the much larger United States system. The Canadian system does not deal with nearly the volume of the United States system. For example, Canada convened only twenty general courts-martial between 1994 and 1998.⁴⁴⁶

c. (In)Applicability of the British and Canadian Models to the U.S. Constitutional Framework

The changes to the British and Canadian systems have little bearing on military justice in the United States. Both countries modified their military justice systems only after making major changes in their domestic charters governing human rights and freedoms. Neither country changed its military justice system spontaneously; both countries waited until legal challenges made it clear their military justice systems did not meet the new charter obligations as interpreted by applicable jurisprudence.

Although the common ancestry of the three systems is the same, the United States took a radical departure from the Commonwealth system at the American Revolution. From the beginning, the court-martial system was placed under the firm control of the legislative branch, which was given the enumerated power to make regulations to govern the military.⁴⁴⁷ The structural placement of courts-martial within the U.S. system determines the degree of judicial independence they will receive and due process rights they will accord. As legislative courts, they must offer

442. Pitzul & Maguire, *supra* note 430, at 8.

443. *Id.* at 12.

444. JSC REPORT, *supra* note 32, app. M, at 2.

445. *Id.* at 3.

446. *Id.* at 1.

447. *See supra* notes 145-46 and accompanying text.

fundamental due process and such other protections as Congress may statutorily provide.⁴⁴⁸ Legislative courts are not constitutionally required to provide all the protections of an Article III court; indeed, such protections would be inimical to their existence, for, as one scholar has observed, “Article III litigation is a rather grand and very expensive affair,” cumbersome and inefficient.⁴⁴⁹ The very nature of a legislative court involves a compromise between individual rights and Congress’s ability to exercise its enumerated powers under the Constitution.

Thus, it is important to avoid the superficial appeal of changing the U.S. military justice system merely because America’s close allies have done so. Their governing charters require all criminal tribunals to use the same standards. In contrast, the U.S. constitutional structure of government places courts-martial on a different footing than civilian tribunals. So long as Congress continues to exercise its enumerated constitutional power to provide for the government of the armed forces, the military justice system will necessarily be subject to a different standard than that employed in the Article III federal courts.

C. Changing the Rules Through Judicial Activism

1. The Strategy: Use the Implied Bias Doctrine to Change the Rules for Panel Member Selection

In recent months, an activist majority of the CAAF has opened a new front in the war against discretionary convening authority selection of panel members. *United States v. Wiesen*⁴⁵⁰ demonstrates that the CAAF majority is willing to use the court’s implied bias doctrine in a way that effectively rewrites UCMJ Article 25(d)(2), burdening convening author-

448. *See supra* Section II.D.

449. Bator, *supra* note 225, at 262.

450. 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2001). The accused in *Wiesen* was convicted by a general court-martial comprised of officer and enlisted members of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice. He was sentenced to a dishonorable discharge, twenty years’ confinement, total forfeitures of pay and allowances, and reduction to the grade of E-1. *Id.* at 172.

ities with a requirement to consider actual and potential command and supervisory relationships when appointing panel members.

The issue in *Wiesen* involved a defense challenge for cause on the court-martial president, Colonel (COL) Williams, who commanded the 2d Brigade of the 3d Infantry Division (Mechanized) at Fort Stewart, Georgia. Voir dire revealed that COL Williams had either an actual or potential command relationship over six other members of the panel.⁴⁵¹ All together, those members and COL Williams formed the two-thirds majority necessary to convict the accused.⁴⁵² The military judge thoroughly explored the issue of potential bias on the record. The court-martial president and all other panel members stated on the record, under oath, that this senior/subordinate relationship would not affect their ability to deliberate and vote.⁴⁵³ The defense counsel challenged COL Williams for cause on the grounds of implied bias. Based on the answers to voir dire questions and, undoubtedly, his observation of the demeanor of the members, the military judge

451. *Id.* at 175. Colonel Williams had direct authority over four members of the panel who were part of his brigade: two battalion commanders, a battalion executive officer, and a company first sergeant. Two other members of the panel—a forward support battalion commander and his command sergeant major—were from his brigade combat team (BCT). In an Army division, major subordinate commands include maneuver brigades (such as armor or mechanized infantry brigades), a divisional artillery brigade, a brigade-size division support command, and other units. A maneuver brigade typically consists of three battalions. When a maneuver brigade deploys, other divisional units are attached, or “sliced” to it to form a BCT. Those units, which include artillery and forward support battalions, may train with the maneuver brigade, but are not part of its command structure in a garrison environment. Thus, in garrison, COL Williams would only directly command, supervise, and rate members of his maneuver brigade. The forward support battalion commander and sergeant major would be commanded and rated by the commander of the division support command. In its petition for reconsideration, the government alleged that the CAAF had not paid sufficient attention to the actual command and supervisory arrangements at Fort Stewart. In denying the petition for reconsideration, the majority seemed to suggest that it didn’t care: “Although our opinion did not comment on the specifics of each supervisory relationship or the operational status of each brigade at Fort Stewart, those particular facts were not critical to our finding that the military judge abused his discretion in denying the challenge for cause.” *United States v. Wiesen*, 57 M.J. 48, 49 (2002) [hereinafter *Wiesen II*] (emphasis added).

452. *Wiesen*, 56 M.J. at 175.

453. *Id.*

denied the challenge.⁴⁵⁴ The defense counsel used a peremptory challenge on the panel president to preserve the issue for appeal.⁴⁵⁵

On appeal, the Army Court of Criminal Appeals (ACCA) affirmed.⁴⁵⁶ Over vigorous dissents from Chief Judge Crawford and Senior Judge Sullivan,⁴⁵⁷ Judge Baker, writing for a bare majority of the CAAF, reversed, holding that the military judge had abused his discretion in denying the challenge for cause.⁴⁵⁸ The majority found that “where a panel member has a supervisory position over enough other members to make up the two-thirds majority necessary to convict, we are placing an intolerable strain on public perception of the military justice system.”⁴⁵⁹ Because of the potential impact on the military justice system, the government petitioned for reconsideration. In a per curiam opinion, the same majority denied the petition, again over the separate dissents of Judges Crawford and Sullivan.⁴⁶⁰

The foundation for the majority’s opinion was the CAAF’s implied-bias doctrine, derived from Rule for Courts-Martial (R.C.M.)

454. *Id.* at 174.

455. *Id.* Rule for Courts-Martial 912(f)(4) requires that the challenging party preserve denied challenges for cause by using a peremptory challenge against the denied individual:

[W]hen a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issues for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

MCM, *supra* note 8, R.C.M. 912(f)(4). The real irony of *Wiesen* is that the panel that eventually convicted and sentenced the accused to twenty years’ confinement no longer included COL Williams.

456. *Wiesen*, 56 M.J. at 177 (noting that the decision of the ACCA is reversed). There is no ACCA opinion available in *Wiesen*.

457. Judge Crawford’s dissent focused on two primary areas: (1) the disconnect between the CAAF’s implied bias doctrine and the fundamentally different implied bias doctrine in the federal courts; and (2) the weaknesses of the majority’s perception of the American public. *See id.* at 177-81 (Crawford, C.J., dissenting). Judge Sullivan’s dissent criticized the majority for invading the province of Congress and the President by, in effect, engaging in judicial legislation or judicial rulemaking. *See id.* at 181-85 (Sullivan, J., dissenting).

458. *Id.* at 174.

459. *Id.* at 175.

460. *Wiesen II*, 57 M.J. 48, 50 (2002).

912(f)(1)(N), which provides that a member shall be excused for cause “whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”⁴⁶¹ As developed by the CAAF’s case law over the years, the doctrine seeks to “view the situation [as to whether a member should sit] through the eyes of the public, focusing on the appearance of fairness.”⁴⁶² This is a nebulous standard at best, and one that in the *Wiesen* majority’s own words, the CAAF has “struggled to define . . . or just disagreed on what that scope should be.”⁴⁶³ *Wiesen* demonstrates that the struggle continues.

The *Wiesen* majority opinion fails to provide an objective, coherent analytical framework for analyzing implied bias. Without providing any standards for determining how to view the case “through the eyes of the public,” the majority simply strung together a series of speculative statements on its perceptions of public opinion. The majority believes that the public trusts the integrity of military officers to abide by their oaths, in and out of the deliberation room. The problem is that the public, which understands that military personnel lead, command, and follow each other, might wonder to what extent institutional military deference for senior officers would come into play in the deliberation room. When a senior officer supervises a high enough percentage of the panel, it establishes “the wrong atmosphere,” creating “simply too high a risk that the public will perceive that the accused received something less than a jury of ten equal members, although something more than a jury of one.”⁴⁶⁴ Nothing in the opinion assists military justice practitioners in determining how to measure public perception of the justice system; there is not, for example, a

461. MCM, *supra* note 8, R.C.M. 912(f)(1)(N).

462. *United States v. Rome*, 47 M.J. 467, 469 (1998).

463. *Wiesen*, 56 M.J. at 175.

464. *Id.* at 176.

“reasonable person” test of the kind so familiar in American appellate jurisprudence.⁴⁶⁵

The majority further complicated matters for the practitioner by shifting the burden of proof for causal challenges of panel members based on implied bias from the accused to the government. The normal burden of proof for causal challenges is on the party making the challenge.⁴⁶⁶ The majority in *Wiesen* adopted a standard requiring the government to demonstrate the necessity for the challenged member to serve on the panel because of “operational deployments or needs.”⁴⁶⁷

2. *Response: The Theoretical Shortcomings and Practical Drawbacks of Wiesen*

The *Wiesen* majority opinion reveals the limitations of an appellate court in determining public opinion. Without fact-finding ability, investigative resources, or a constituency to provide input,⁴⁶⁸ an appellate court is left to its imagination in trying to determine how the public might view a particular practice in the military justice system. Most critically, an appellate court has no way to measure the impact of its decisions on the military; this is one of the primary reasons for the military deference doctrine in the Article III courts.⁴⁶⁹ When an appellate court ventures into the

465. Indeed, Chief Judge Crawford made this point in her dissent in the denial of the government’s petition for reconsideration. She stated that implied bias should be measured by the “long-standing legal standard of the ‘reasonable person test.’ A ‘reasonable person’ is a person ‘knowing all the facts’ and circumstances surrounding the issue in the case, including the rationales of the UCMJ and the Manual for Courts-Martial.” *Wiesen II*, 57 M.J. at 54 (Crawford, C.J., dissenting). The public of the *Wiesen* majority’s opinion is ignorant, uninformed, opinionated, and reactionary.

466. See MCM, *supra* note 8, R.C.M. 912(f)(3).

467. *Wiesen*, 56 M.J. at 176. The majority’s language on the issue is quite clear: “Here, deployed units may have diminished the potential pool of members, but the Government failed to demonstrate that it was necessary for the Brigade Commander to serve on this panel.” *Id.* In its denial of the government’s petition for reconsideration, the majority stated it had never shifted the burden, but had merely suggested that the government could have used these factors in rebuttal to demonstrate the necessity of the Brigade Commander’s service. *Wiesen II*, 57 M.J. at 49. The majority undercut this assertion in the next paragraph, however, when it stated, “Notwithstanding the operational requirements at the time, there remained ample officers at Fort Stewart from which to select a member other than the Brigade Commander.” *Id.* at 50. While this might, perhaps, have been true, UCMJ Article 25(d)(2) leaves that decision to the convening authority, not the CAAF.

domain of the legislature, the consequences to the military can be particularly serious:

A mistaken judicial conclusion that servicemen's individual rights can be protected without impairing military efficiency has the court do inadvertently what it has no standard for doing deliberately. *Because the uses to which the armed forces are put cannot be judged by the principles of the legal system, mistaken balancing that impairs those uses is not offset by vindication of the hierarchy of values within the system.*⁴⁷⁰

Issues of court-martial panel composition fall squarely within the legislative purview of Congress and the rule-making authority of the President.⁴⁷¹ As Judge Crawford noted in her dissent to the CAAF's denial of reconsideration in *Wiesen*, Congress made all commissioned officers eligible to serve on court-martial panels, making no exclusion for officers rated by another member of the panel.⁴⁷² In his dissent, Judge Sullivan was even more specific:

Congress *could have provided* that a member shall be disqualified if he or she is a military commander of a significant number of the members of the panel. Congress has been aware that, for years, commanders have sat on panels with their subordinates. *Congress could have prohibited this situation by law but failed to do so.* A court should not judicially legislate when Congress, in its wisdom, does not.⁴⁷³

468. Cf. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 68-84 (1997). Mikva and Lane point out that three primary factors make the legislative process legitimate: (1) deliberativeness, or the structures and steps of the process that slow legislative decision-making and remove it from the passions, immediacy, and prevailing desires of legislators or constituencies; (2) representativeness, which requires legislators to stay in touch with the people they represent; and (3) accessibility, which guarantees an open legislative process. *Id.* Through the use of committees and hearings, the legislature is able to investigate and gather information from a wide variety of sources regarding the impact and scope of proposed legislation. *See id.* at 90-94. In addition, legislators have significant staff resources available to assist them. *See id.* at 95.

469. *See supra* note 271 and accompanying text.

470. Hirshhorn, *supra* note 267, at 238.

471. *See* UCMJ art. 36 (2002) (establishing presidential authority to make rules of procedure for courts-martial).

472. *See Wiesen II*, 57 M.J. at 53 (Crawford, C.J., dissenting).

473. *Id.* at 182 (Sullivan, J., dissenting) (emphasis added) (citations omitted).

What the CAAF majority accomplished in *Wiesen* was a judicial revision of UCMJ Article 25(d)(2). Article 25(d)(2) requires a convening authority to select best-qualified members by criteria of age, experience, education, training, length of service, and judicial temperament. In effect, *Wiesen* has rewritten Article 25(d)(2), adding a new clause that never existed before requiring convening authorities to consider, in addition to—or more likely in spite of—the statutory provisions of Article 25(d)(2), “all the potential command and supervisory relationships of panel members in conjunction with final panel size and numbers needed for conviction.” Furthermore, *Wiesen* has significantly changed the rules regarding challenges in implied bias cases, imposing new requirements on the government to be prepared to justify panel selections in the light of operational needs.

Thus, *Wiesen* has a debilitating effect on the convening authority’s discretion in panel selection. No longer may a convening authority select those whom he believes to be best qualified based on age, education, experience, training, length of service, and judicial temperament. Now he must consider the interrelationships among candidate panel members, particularly what potential command and supervisory arrangements may exist.⁴⁷⁴ This potentially destroys a commander’s authority to convene courts-martial in smaller commands, isolated installations, aboard ships, or in a deployed environment.⁴⁷⁵

There should be no doubt that the *Wiesen* majority intended to strike a blow at the convening authority’s discretionary ability to appoint court-martial panel members. In the penultimate sentence of its per curiam denial of the government’s petition for reconsideration, the majority wrote, “The issue is appropriately viewed in the context of public perceptions of a system in which the commander who exercises prosecutorial discretion is the official who selects and structures the panel that will hear the

474. As of yet, there is no empirical evidence on the impact of *Wiesen* on the field; however, in an information paper, the Criminal Law Division of the Army Office of The Judge Advocate General noted that with the increased operational tempo of the Army and other services (at present, the Armed Services are engaged in combat in Iraq and Afghanistan), *Wiesen* is a “crippling precedent.” Information Paper, Criminal Law Division, United States Army, Office of The Judge Advocate General, subject: Rationale for Rule Changes in Light of *Armstrong* and *Wiesen* (6 Dec. 2002) [hereinafter OTJAG Information Paper] (on file with author). An alternative view is that *Wiesen* is merely a voir dire case that primarily places the burden on counsel and the bench to ensure that a panel never contains a majority sufficient to convict from the same chain of command. See Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20, 37.

case.”⁴⁷⁶ The *Wiesen* majority’s true policy concern, then, hearkens back to the objections that Congress heard and considered when enacting the UCMJ over fifty years ago. Viewed in that context, *Wiesen* is a prime example of an activist appellate court arrogating to itself the power to change constitutionally sound legislation with which it does not agree.⁴⁷⁷

IV. Counterattack: A Proposal to Solve the Problems of *Wiesen* and Shape the Future Debate on Convening Authority Panel Selection

This section proposes a two-phase strategy to aggressively counter efforts to remove the convening authority from panel member selection. The first phase, the “close fight,”⁴⁷⁸ involves taking steps to solve the prob-

475. Judge Crawford pointed to the potential impact of *Wiesen* on operations:

The logical extension of the majority’s view will make it very difficult for a deployed convening authority of a detached brigade, separate battalion, or units of similar size to convene a court-martial. This not only defeats the flexibility for which the UCMJ has provided since its inception, but also undermines good order and discipline in the armed services. If the commander of a brigade, separate battalion, or units of similar size of soldiers currently deployed in Asia wanted to convene a court-martial, he or she may practically be precluded from doing so without going outside the unit or changing venue. Either may impact on the mission.

Wiesen II, 57 M.J. at 55 (Crawford, C.J., dissenting).

476. *Id.* at 50.

477. Indeed, the majority’s language also damns them in this matter. In an acid footnote responding to Judge Sullivan’s dissent in the original opinion, the majority dismissed his concerns, cited *Marbury v. Madison*, and tartly observed, “The duty of judges is to say what the law is.” *Wiesen*, 56 M.J. at 177 n.5. In fact, *Marbury* says, “It is, emphatically, the province and duty of the judicial department, to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). *Marbury* has never been a blank check to authorize appellate courts to rewrite statutes at their whim. Moreover, to paraphrase Lawrence Tribe, *Marbury* generally stands for the proposition that a federal court has power to refuse to give effect to congressional legislation if it is inconsistent with the Court’s interpretation of the Constitution. See TRIBE, *supra* note 221, § 3-2, at 23. It is highly unlikely that *Marbury* means an Article I court can “say what the law is” by, in effect, adding new requirements to congressional legislation when no constitutional issues have been raised.

478. According to U.S. Army doctrine, close operations, or the “close fight,” are those in which forces are “in immediate contact with the enemy and the fighting between the committed forces and the readily available tactical reserves of both combatants.” U.S. DEP’T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND GRAPHICS 1-28 (30 Sept. 1997) [hereinafter FM 101-5-1].

lems created by the CAAF in *United States v. Wiesen*. This can be done most effectively using the rule-making authority Congress granted the President in Article 36 of the UCMJ.⁴⁷⁹ The second phase, “the deep fight,”⁴⁸⁰ recognizes that defenders of the current system cannot hope to prevail in a public debate in which the military justice system is subjected to misleading and incomplete comparisons with the civilian criminal justice system. The solution is to change the terms of the debate, pointing out the purposes of military justice, its historical and constitutional validity, and most importantly, the benefits to the military and the accused of a system in which the convening authority uses his discretion to select a panel of the most highly qualified members of his command.

A. The Close Fight: Wrestling with *Wiesen*

As previously mentioned, the CAAF’s decision in *Wiesen* has been, thus far, the most effective contemporary attack against the convening authority’s role because the CAAF exercises an important supervisory role over the military justice system.⁴⁸¹ Its opinions are entitled to great deference, and history has demonstrated that commanders and Staff Judge Advocates will change their military justice practices to satisfy the standards handed down by the CAAF. But the CAAF exceeds its jurisdictional mandate when its decisions usurp functions that belong to other branches of government.⁴⁸² In this case, the effect of the CAAF’s decision is to

479. See UCMJ art. 36 (2002).

480. Deep operations, or “the deep fight,” “employ long-range fires, air and ground maneuver, and command and control warfare to defeat the enemy by denying him freedom of action; disrupting his preparation for battle and his support structure; and disrupting or destroying the coherence and tempo of his operations.” FM 101-5-1, *supra* note 478, at 1-47. The purpose of deep operations is to shape the battlefield for future operations. *Id.*

481. See *supra* Section III.C.

482. The CAAF has overreached before. A few years ago, the CAAF attempted to use the All Writs Act to enjoin the Secretary of the Air Force from dropping an Air Force officer from the rolls. The Supreme Court ruled that the CAAF did not have the authority under the All Writs Act to enjoin the Secretary of the Air Force from taking an administrative personnel action against an Air Force officer. The All Writs Act could not give the CAAF jurisdiction it did not have. See *Clinton v. Goldsmith*, 526 U.S. 529 (1999). Writing for the majority, Justice Souter noted that Congress had limited the CAAF’s jurisdiction to act only with respect to review of sentences imposed by courts-martial. *Id.* at 534.

impose a new statutory element on UCMJ Article 25(d)(2), a function that belongs not to an appellate court, but to Congress.

There are several potential responses to *Wiesen*. The first is simply to accept it, and either make appropriate modifications to panel selection procedures, or place the burden on trial counsel to avoid *Wiesen* problems during the voir dire and challenges phase of trial.⁴⁸³ The second is for the government to seek certiorari from the Supreme Court.⁴⁸⁴ A third option is for the President to use his rule-making authority under UCMJ Article 36 to amend R.C.M. 503(a) and R.C.M. 912(f)(1)(N), making clear his intent that command and supervisory relationships are no impediment to a convening authority's discretion in appointing panel members.⁴⁸⁵ This section discusses each of these options in turn.

1. Option One: Accept Wiesen and Its Effects on Military Justice System

Under this option, the military would accept the results of *Wiesen* and modify its practices accordingly. Some jurisdictions would read the case as limiting the convening authority's discretion in appointing panel members and create mechanisms to ensure no panels would suffer from a potential *Wiesen* problem. Other jurisdictions would make no changes to panel selection procedures, instead viewing *Wiesen* simply as a voir-dire-and-challenges case⁴⁸⁶ and placing the burden on trial counsel to be especially vigilant during the voir dire phase of a court-martial, joining in defense challenges for cause to ensure that the final composition of any panel would not violate the *Wiesen* rule that the two-thirds majority of the panel necessary to convict could not fall under the potential command or supervision of the panel president.

The fallacy of simply accepting *Wiesen* is that either of the above approaches will damage the military justice system. In jurisdictions that view *Wiesen* as applying to the selection and appointment of court-martial panels, similar issues may never arise at trial because the panels will already have been screened, shuffled, and sifted to comply with *Wiesen*.

483. See discussion *infra* Section IV.A.1.

484. See discussion *infra* Section IV.A.2.

485. See discussion *infra* Section IV.A.3.

486. Indeed, there is by no means universal agreement that *Wiesen* sounds the death knell for the commander's role in the military justice system. Some, in fact, view *Wiesen* primarily as a voir dire case. See Huestis, *supra* note 474, at 37.

However, the paucity of such issues will stem not from the inherent virtues of *Wiesen*, but because of the limiting effect the case has on a convening authority's discretion. The price to be paid is judicial evisceration of the UCMJ Article 25(d)(2) subjective selection criteria.

Jurisdictions that do not change panel selection procedures to comply with *Wiesen* will be vulnerable to creative defense strategies during voir dire and challenges. For example, taking advantage of the CAAF's mandate that trial judges should liberally grant challenges for cause,⁴⁸⁷ a defense counsel could selectively challenge panel members, shaping the panel so it violates *Wiesen* even as it approaches minimum quorum requirements.⁴⁸⁸ At that point, the defense could make an additional challenge for cause because of the *Wiesen* problem its earlier challenges created.⁴⁸⁹ If the granted challenge reduces the panel to its minimum for a quorum, the defense could potentially "bust" the panel by exercising a

487. See *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993) (instructing military judges to grant defense challenges for cause liberally).

488. This would not be especially difficult to do. The following hypothetical presents just one of many possible panel arrangements that would be potentially vulnerable to manipulation by defense counsel. Assume that Fort Hypothetical has two major subordinate commands, A Brigade and B Brigade, each commanded by an O-6. Suppose that the commanding general of Fort Hypothetical appoints a ten-member officer-and-enlisted general court-martial panel. For each rank represented on the panel, there is one member from A Brigade and one member from B Brigade. No members of the court-martial panel are from the same battalion. The panel consists of two O-6 brigade commanders, two O-5 battalion commanders, two O-4 battalion staff officers, two E-9 battalion command sergeants major, and two E-8 company first sergeants. At PFC Snuffy's general court-martial for several counts of barracks larceny, the defense counsel is aware of *Wiesen* and plans her strategy accordingly. She challenges the commander of A Brigade for cause because PFC Snuffy is a member of A Brigade and the commander had read the blotter report, appointed an Article 32 investigation, and forwarded the charges with a recommendation for disposition. She challenges the battalion commander from A Brigade because in past dealings with her, the commander had formed a negative opinion of her advocacy and had complained about her to the installation chief of justice. She challenges a sergeant major from A Brigade because he knew about the offense, had formed an opinion concerning the accused's guilt, and had sent an E-mail to the other sergeants major in the brigade warning them to watch out for barracks thieves. She challenges a first sergeant from B Brigade because of what she perceives as his inflexible attitude towards the offense of barracks larceny. Using the liberal grant mandate, the judge grants the four challenges, leaving a six-member panel. The panel president is the O-6 B Brigade commander. Also from B Brigade are an O-5 battalion commander, an O-4 battalion staff officer, and an E-9 battalion command sergeant major. The remaining members are an O-4 staff officer and an E-8 first sergeant from A Brigade. The B Brigade commander is in the rating chain for each of the B Brigade members (rater for the battalion commander, senior rater for the battalion staff officer and the command sergeant major). The panel now violates *Wiesen* because four of its six members (the two-thirds majority necessary to convict) are part of the panel president's rating chain.

peremptory challenge on one of the remaining members. If the challenge is denied, defense could preserve the issue for appellate review by exercising a peremptory challenge against the senior member of the panel.⁴⁹⁰ Either way, the government loses. Jurisdictions that ignore *Wiesen* when selecting and appointing panel members may well see it come back to haunt them later in the form of “busted” panels or, possibly, reversals and re-hearings. The cost to the system in terms of efficiency and utility to the command could prove onerous. At smaller installations or aboard ship, the system could grind to a halt.

In time, the CAAF itself could limit *Wiesen* to its facts or otherwise distance itself from the opinion. As the development of the CAAF’s implied bias doctrine demonstrates,⁴⁹¹ however, *Wiesen* will likely become the basis for further encroachments on a convening authority’s discretion. Implied bias based on potential rating schemes could morph into implied bias based on the position or seniority of panel members. For example, if a convening authority seeks to avoid *Wiesen* problems by appointing his chief of staff to panels in lieu of senior O-6 commanders,⁴⁹² one can easily imagine the court expanding the implied bias doctrine to include individuals who serve as the “alter ego” or right-hand-man to the commander. The

489. The R.C.M. specifically permits challenges for cause even after initial examination and challenges of the members, providing that “[a] challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.” MCM, *supra* note 8, R.C.M. 912(f)(2)(B). Thus, if a *Wiesen* problem arises only after the exercise of challenges for cause pursuant to R.C.M. 912(f)(2)(A), counsel would be able to raise the issue at that point.

Returning to the Fort Hypothetical case, *supra* note 488, the government’s problem becomes apparent. The defense counsel could now challenge the panel president for cause. The government, in fact, could join in the challenge for cause to avoid the *Wiesen* issue. If the challenge is successful, the panel now contains five members and the defense counsel, with her peremptory challenge intact, can “bust” the panel and force the convening authority to detail new members. MCM, *supra* note 8, R.C.M. 505(c)(2)(B). If she loses, the defense counsel can preserve the issue for appeal by using her peremptory challenge on the brigade commander.

490. See MCM, *supra* note 8, R.C.M. 912(f)(4) (quoted *supra* note 455).

491. Over the course of five years, the CAAF went from questioning whether its version of the implied bias doctrine even existed, see *United States v. Dinatale*, 44 M.J. 325, 329 (1996) (Cox, C.J., concurring) (“I write only to question if there is such a thing as ‘implied bias.’”), to enshrining it as a well-established principle of military jurisprudence, see *United States v. Rome*, 47 M.J. 467, 469 (1998) (stating that R.C.M. 912 includes both actual and implied bias), to using the doctrine to create the result in *Wiesen*.

492. Typically, an installation or division chief of staff would not be in the rating chain for officers and enlisted from the major subordinate commands.

court could also invalidate a panel that included too many O-6 commanders because of their tendency to outrank, take charge of, lead, and be granted deference to by lower-ranking members of the panel.⁴⁹³ Because *Wiesen* lacks a coherent analytical framework, its potential scope is limited only by the unique fact patterns arising in various jurisdictions and the creativity of defense counsel in raising novel challenges.

2. Option Two: Seek Certiorari from the Supreme Court

Article 67a of the UCMJ permits either the government or the accused to seek review of CAAF decisions by writ of certiorari.⁴⁹⁴ The government could apply for a writ of certiorari, seeking to invalidate the CAAF's implied bias doctrine as applied in *Wiesen*. If the government was successful both in obtaining the writ and on appeal, the authority and finality of a Supreme Court ruling invalidating the CAAF's implied bias doctrine would go a long way toward preserving the practice of discretionary convening authority appointment of court-martial panel members.

There are two potential drawbacks associated with this course of action. The first is that the Court could refuse, without explanation, to grant certiorari. Although this would not have the legal effect of affirming the CAAF's decision in *Wiesen*,⁴⁹⁵ as a practical matter, a denial of certiorari would help buttress the opinion. The government, having expended

493. This result would be entirely consistent with the *Wiesen* majority, which seemed concerned that an objective public might ask to what extent deference for senior leaders comes into play in the deliberation room. "The public perceives accurately that military commissioned and noncommissioned officers are expected to lead, not just manage; to command, not just direct; and to follow, not just get out of the way." *United States v. Wiesen*, 56 M.J. 172, 176 (2001).

494. UCMJ Article 67a (2002). Article 67a, UCMJ, states:

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of Title 28. The Supreme Court may not review by a writ of certiorari under this section any action by the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

Id.

495. Because a writ of certiorari is discretionary, a denial of certiorari generally carries no implication whatsoever regarding the Court's view of the merits of the case on which it has denied review. *TRIBE, supra* note 221, at 44 n.9 (quoting *Maryland v. Baltimore Radio Show, Inc.*, 333 U.S. 912, 917-19 (1950)).

the energy and political capital to petition for certiorari,⁴⁹⁶ would not likely try again on a similar issue absent an especially compelling set of facts. On the other hand, a denial of certiorari could serve to embolden the CAAF, ultimately leading to further expansion of the implied bias doctrine and additional judicially created limitations on the subjective selection criteria of UCMJ Article 25(d)(2).

The second problem is potentially the most dangerous: The Court could grant certiorari and affirm *Wiesen*. This could occur due to the Court's long-standing practice of settling issues on the narrowest grounds possible.⁴⁹⁷ Although *Wiesen* has a potentially deleterious effect on the commander's role in the military justice system, there is no developed record or empirical evidence to demonstrate that effect, and one could not be created merely for the sake of a Supreme Court appeal. All issues related to impact on the system or *Wiesen*'s practical effect of rewriting UCMJ Article 25(d)(2) would have to be presented as hypothetical problems and could run afoul of the Court's practice of avoiding advisory opinions.⁴⁹⁸

Furthermore, the CAAF has framed its implied bias doctrine not as an issue of statutory interpretation, but rather as a natural outgrowth of the Rules for Courts-Martial, which permit challenges if a member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."⁴⁹⁹ On the nar-

496. The services do not have direct access to the Supreme Court. They must first persuade the Solicitor General, by way of the Department of Defense General Counsel, to take the case. See ROTUNDA & NOWAK, *supra* note 251, § 2.2 (discussing the role of the Solicitor General). By law, only the Solicitor General or his designee can conduct and argue cases in which the United States has an interest before the Supreme Court. *Id.* (citing 28 U.S.C.A. § 518(a)). Consequently, the military does not lightly seek certiorari from the Court. Cf. E-mail from Major Bradley Huestis, Professor, The Judge Advocate General's School, U.S. Army, to author (25 Nov. 2002) [hereinafter Huestis E-mail] (containing a string of E-mail traffic in which the various participants in the process of trying to obtain certiorari discuss the *Wiesen* case) (on file with author).

497. See ROTUNDA & NOWAK, *supra* note 251, § 2.13 (discussing the Court's desire to settle issues on the narrowest possible grounds to avoid having to decide constitutional issues).

498. According to Rotunda and Nowak, the Court declines to give advisory opinions for four primary reasons. First, they may not be binding on the parties. Second, advisory opinions undermine the basic theory behind the adversary system. Third, advisory opinions unnecessarily force the Court to reach and decide complex constitutional issues. Fourth, the power to render advisory opinions is thought to be beyond the scope of what the Framers intended. See *id.*

499. MCM, *supra* note 8, R.C.M. 912(f)(1)(N).

row issue of whether the CAAF's implied bias doctrine effectuates the President's intent to hold fair and impartial courts-martial, it is quite possible that the Court could defer to the CAAF's judgment on the matter and affirm. Such an opinion would substantially limit the military's options for overcoming *Wiesen*.

Of the three possible outcomes of a petition for certiorari, the two most likely to occur are the least desirable from the government's point of view. The third—a grant of certiorari followed by a favorable ruling—is not worth risking the other two possibilities.

3. *Option Three: Change the Manual for Courts-Martial*

Because the CAAF has based its implied bias doctrine on the Rules for Courts-Martial rather than employing a statutory or constitutional analysis, the best option for overruling *Wiesen* is to change the Rules. If the President clearly expresses a policy that command and supervisory relationships neither disqualify members from sitting nor form the basis for a viable challenge for cause, the CAAF will be forced either to retreat from its implied bias doctrine or shift the basis of its analysis to a constitutional or statutory interpretation. Should that occur in a future case, the government would be in a better position to seek certiorari and prevail at the Supreme Court.

Congress has specifically granted the President the authority to promulgate procedural and evidentiary rules for courts-martial in Article 36 of the UCMJ.⁵⁰⁰ There is, furthermore, a strong argument that the President has the inherent power to promulgate such rules stemming from his constitutional authority as Commander in Chief of the armed forces.⁵⁰¹ In Articles 18 and 56 of the UCMJ, Congress has also authorized the Presi-

500. UCMJ art. 36(a) (2002). Article 36(a), UCMJ, provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

dent to set maximum punishment limits for violations of the punitive articles of the UCMJ.⁵⁰² The rules and punishment limitations prescribed by the President are contained in the *Manual for Courts-Martial (Manual)*.⁵⁰³

The *Manual* consists of five parts, including a Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles of the UCMJ, that have been created through executive orders in accordance with the President's Article 36 authority.⁵⁰⁴ These provisions of the *Manual* are binding on court-martial practice. In addition, the *Manual* contains a number of supplementary materials, including discussion paragraphs and sections analyzing the Rules for Courts-Martial and the Military Rules of Evidence, which have been prepared by the Departments of Defense and Transportation.⁵⁰⁵ The supplementary materials create no binding rights or responsibilities, but are a useful reference tool for practitioners and are helpful in determining the intended meaning or effect of a *Manual* provision.⁵⁰⁶

The process of amending the *Manual* is relatively simple. If the President desires to change or clarify the *Manual for Courts-Martial*, he does so by executive order.⁵⁰⁷ The President has, in fact, frequently amended

501. See U.S. CONST. art. II, § 2; see also Captain Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 100-01 (1999) (discussing the statutory and constitutional basis for presidential rule-making authority and observing that the President directed the conduct of courts-martial in the nineteenth century without specific statutory authority to do so).

502. See UCMJ arts. 18, 56. Article 18, UCMJ, states: “[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.” *Id.* art. 18. Article 56, UCMJ, states that “[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.” *Id.* art. 56.

503. See generally MCM, *supra* note 8.

504. See *id.* pt. I, ¶ 4 (“The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Part[s] I-V).”).

505. See *id.* pt. I discussion.

506. See Maggs, *supra* note 501, at 116-17. Maggs identifies three reasons that courts should not dismiss the supplementary materials in the *Manual* as irrelevant. First, the staff that prepared the materials has significant expertise in military law and actually drafted many of the rules in the *Manual*. Second, because of the sometimes limited access to research materials in the field, judge advocates often must rely on the supplementary materials to give advice to clients and commanders. Third, there is a long-standing judicial practice of deferring to an agency's own interpretation of the statutes it enforces. See *id.*

the *Manual* over the years.⁵⁰⁸ Nothing in the UCMJ or in the *Manual* itself prevents the President from amending the *Manual* to clarify his policy in a manner that also happens to overrule a decision of the CAAF. Indeed, the power to amend the *Manual* provides the President with the ability to reign in the CAAF should its opinions hinder the efforts of the armed forces to

507. In practice, of course, there is a deliberate process of amendment that ensures consensus among the services and other interested governmental agencies. In a treatise on court-martial procedure, Frances Gilligan and Fredric Lederer succinctly explain the process of *Manual* amendment:

The Manual is kept current by the Joint Service Committee on Military Justice. This is a committee consisting of the officers responsible for criminal law in the armed forces (including the Coast Guard), augmented by representatives from the Department of Defense General Counsel's Office and the Court of Military Appeals. This body serves primarily as a policy-making one. The actual drafting work is customarily done by the Joint Service Committee on Military Justice Working Group, consisting of subordinates of the Committee's members. Changes may be initiated by the Working Group or drafted in response to the Committee's direction. No amendment is usually possible, however, without Committee endorsement. Proposed Manual changes must be coordinated with the Department of Transportation (because of the Coast Guard), the Attorney General and OMB. The President of course has the final decision. Changes in the Manual are inherently political, and absent unusual political machination, no change is likely to be made that does not have substantial backing, if not full consensus.

1 FRANCES A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-54.00 n.137 (1991).

508. See generally MCM, *supra* note 8, app. 25 (containing executive orders dating from 1984 that modified various provisions of the *Manual*). Of course, as with other areas of military justice, some reformers object to the current process of amending the *Manual*. In recent years, the *Military Law Review* has published an interesting debate on the issue. Compare Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 166 MIL. L. REV. 237 (2000) (suggesting that the *Manual* amendment process is flawed because it does not include input from a broad enough base of participants, and suggesting adoption of a military judicial conference rule-making process), with Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000) (opining that Barry's suggested changes would yield little actual benefit to the rule-making process while imposing additional administrative burdens on the system) and Kevin J. Barry, *A Reply to Captain Gregory E. Maggs's "Cautious Skepticism Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process,"* 166 MIL. L. REV. 37 (2000) (questioning the basis for Maggs's assertion, and reiterating Barry's belief that the process must change).

make the military justice system work under actual conditions in the field. As one commentator has observed:

The President, as Commander in Chief, is primarily responsible for the maintenance of order, morale, and discipline in the armed forces and the system of military justice is one of the principal means of maintaining them. It is essential to national safety that the President have sufficient power to make the system of military justice work effectively under the conditions which actually exist in the forces⁵⁰⁹

The simplest way to clarify the President's policy, uphold the statutory panel-selection provisions of the UCMJ, and overrule *Wiesen* is to amend Rules 503(a) and 912(f)(1)(N) of the Rules for Courts-Martial.⁵¹⁰ Amending the *Manual* permits the President to ensure that the military justice system continues to operate efficiently in the field, while at the same time avoiding the potential drawbacks of seeking to overturn *Wiesen* in the

509. William R. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 868 (1959), quoted in Maggs, *supra* note 501, at 110.

510. The full text of the proposed rule changes, along with suggested discussion and analysis language, is at Appendix A, *infra*. The proposals at Appendix A are adapted from two different proposals that the JSC has considered for dealing with the problems created by *Wiesen*. The first proposal, from the DOD Office of the General Counsel, would have amended R.C.M. 912(f)(1)(N) and its discussion to clarify that the existence of a command or supervisory relationship between two or more members of a court-martial panel, even where such members constitute a majority sufficient to reach a finding of guilty, would not constitute grounds for a challenge for cause. Huestis E-mail, *supra* note 496.

The second proposal, from the Criminal Law Division of the Army Office of The Judge Advocate General, is more sweeping. It would amend R.C.M. 503(a) to clarify that supervisory and command relationships do not disqualify members detailed to a court-martial; modify R.C.M. 912(f)(1) to make actual bias the standard for granting challenges for cause, as well as removing the discretionary language of R.C.M. 912(f)(1)(N) and replacing it with a list of non-discretionary criteria; and change R.C.M. 912(f)(4) to conform military practice to the federal rules of procedure by eliminating the waiver rule that permits an accused to preserve a challenge issue for appeal by using a peremptory challenge against a member who was unsuccessfully challenged for cause and stating that the peremptory would have been used against another member. OTJAG Information Paper, *supra* note 474.

Supreme Court or forcing the military justice system to modify its practices in accordance with *Wiesen*.

Rule 503(a) provides the procedures for detailing members.⁵¹¹ A new paragraph, R.C.M. 503(a)(4), would make clear that command or supervisory relationships are not disqualifying: “(4) *Members with a Command or Supervisory Relationship*. The Convening Authority may detail members with a command or supervisory relationship with other members and such relationships shall not disqualify any member from service on a court-martial panel.”⁵¹² This revision reflects pre-*Wiesen* practice and long-standing jurisprudence of both the COMA and the CAAF that senior-subordinate relationships, in and of themselves, do not automatically disqualify members from sitting on a panel.⁵¹³

To further tighten up the provisions for challenging members, R.C.M. 912(f)(1)(N) should be amended by adding a second sentence: “The existence of a command or supervisory relationship between two or more members of a court-martial panel (even where such members constitute a majority sufficient to reach a finding of guilty) shall not constitute grounds for removal for cause.”⁵¹⁴ This sentence would specifically overrule *Wiesen*, support the subjective selection criteria of UCMJ Article 25(d)(2), and make clear a presidential policy that such relationships between panel members are an expected and accepted aspect of the military justice system. It would, moreover, support past rulings of the military appellate courts that senior-subordinate relationships, standing alone, are not a valid basis for a challenge for cause.⁵¹⁵ It would also preserve for trial and appellate courts the ability to exercise discretion and ensure that, within the

511. MCM, *supra* note 8, R.C.M. 503(a).

512. *See infra* Appendix (listing proposed rule changes in their entirety).

513. *See, e.g.*, United States v. Bannworth, 36 M.J. 265, 268 (C.M.A. 1994) (holding that a senior-subordinate relationship between court members did not automatically disqualify the senior member from sitting on the panel).

514. *See infra* Appendix.

515. *See, e.g.*, United States v. Blocker, 32 M.J. 281, 286-87 (C.M.A. 1991) (“The mere fact of a rating relationship between members, like a senior-subordinate relationship, does not generally give rise to a challenge for cause.”).

policy constraints set by Congress and the President, the court-martial is “free from substantial doubt as to legality, fairness, and impartiality.”⁵¹⁶

If the President amends the *Manual* to overrule *Wiesen*, sound policy and principles would constrain the CAAF from holding the new *Manual* provision invalid. When a *Manual* provision does not conflict with the Constitution or the statutory provisions of the UCMJ, the appellate courts have generally shown great deference to the President.⁵¹⁷ Moreover, a court creates separation-of-powers issues when it purports to invalidate a policy choice that the President personally has made or approved.⁵¹⁸ The President not only has statutory authority to create rules to govern courts-martial, but he also has his inherent constitutional powers as Commander in Chief. Thus, appellate courts should not lightly disturb clear expressions of presidential policy in the *Manual*.

In summary, amending the *Manual for Courts-Martial* presents the simplest and most effective method of solving the problems *Wiesen* has created for the military justice system.⁵¹⁹ The proposed rules are consistent with the UCMJ, past practice in the military, and the needs of a system that must be effective under a wide variety of conditions worldwide. Fur-

516. MCM, *supra* note 8, R.C.M. 912(f)(1)(N). A rule change that requires actual bias and establishes a set list of mandatory criteria goes too far and could create potential constitutional issues. Trial and appellate courts must retain a credible ability to watch over the military justice system and exercise discretion to ensure that the system meets contemporary standards of fairness and due process.

517. *See Maggs, supra* note 501, at 105 n.48 (citing several cases in which the military appellate courts have expressed the principle that they should attempt to follow the President’s intent in promulgating the *Manual*).

518. *See id.* at 108-10. According to Maggs, there are three primary reasons that separation of powers principles apply when the appellate courts invalidate provisions of the *Manual*. First, executive orders necessarily embody policy choices because the President has complete control over their contents. Second, Congress has assigned to the President the task of creating rules and has invested some discretion in him. Third, the President and his advisers have special knowledge about the needs and concerns of the military that is not available to appellate courts. *See id.*

519. Reformers have also recognized the utility of amending the *Manual* to affect the panel selection system. Kevin Barry, for instance, has suggested that the *Manual* might be amended to require random selection of court-martial panel members. *See Barry, A Reply to Captain Maggs’s “Cautious Skepticism,” supra* note 508, at 48-49 (“To suggest that improvements in the system of selection of court-members could not, or should not, or would not be expected to come by regulation, is to ignore what has seemed not only possible and plausible, but also necessary, to numerous commentators.”). There is certainly no harm in beating the reformers at their own game and amending the *Manual* to counteract the CAAF’s erosion of the constitutionally sound and eminently useful practice of discretionary convening authority panel selection.

thermore, they clearly articulate a presidential policy that appellate courts will find difficult to tamper with in future cases.

B. The Deep Fight: Changing the Terms of the Debate

The current debate on the role of the convening authority in the military justice system is cast in terms that place military justice in an unflattering light. The American military justice system has been depicted as the dinosaur of all modern civilian and military justice systems, an anachronism that stubbornly clings to the outmoded idea of personal command involvement in critical matters of justice at the expense of the individual.⁵²⁰ Ironically, proponents of change have not been able to mount successful attacks on the actual fairness of the system; indeed, the statutory protections of the UCMJ doom such attacks to failure. It is the perception of bias or unfairness they attack.⁵²¹ By framing the debate in terms of perception rather than reality, reformers avoid the inconvenience of empirical or factual support for their premise that the system “looks bad” and must change. Defenders of the system are therefore placed at a profound disadvantage—forced to fight on terms of the opposition’s choosing.

It is time to change the terms of the debate to include a discussion of how reforms match up with the constitutional framework and operational mission of the military justice system. Congress created the American military justice system as a legislative court system in furtherance of its enumerated constitutional power to make rules for the government of the military.⁵²² The modern UCMJ was designed as a legislative compromise to provide individual rights while still retaining the paramount role of the commander in administering military justice.⁵²³ In the Preamble to the *Manual for Courts-Martial*, the President has declared, “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in

520. See generally Barry, *supra* note 25 (claiming that the U.S. military justice system once led the world, but now has fallen sadly behind).

521. See, e.g., *supra* note 315 and accompanying text.

522. See *supra* Section II.D.

523. See *supra* Section II.C.3.

the military establishment, and thereby to strengthen the national security of the United States.”⁵²⁴

Instead of asking how the U.S. military justice system compares to the military justice systems from other political traditions or even the American civilian criminal jury system, the debate should be framed in terms of how proposed changes match the congressional values embodied in the UCMJ and the President’s declaration of the purposes for military justice. If a proposed change reduces efficiency, adds complexity, and degrades the ability of American commanders to promote good order and discipline in the armed forces, it matters little that the change brings the military justice system closer to an idealized concept of justice. Congress long ago rejected the idea that the “justice” element outweighs the “military” element of military justice.⁵²⁵

In furtherance of that end, this section addresses the theoretical and practical reasons that command involvement in the appointment of court members is critical to our military justice system. First, the section discusses the legal responsibilities shouldered by the commander and the effect that removing his authority over the military justice system would have. Closely related to this is the role of the military justice system in wartime and the necessity of retaining command involvement under conditions of combat or similar exigencies. Second, this section examines the benefits that service members enjoy as a result of command appointment of court members. When the debate on the practice of convening authority selection of panel members is framed in terms of its benefits to the military hierarchy and the individual service member, it becomes apparent that command involvement is critical in maintaining the distinctive military

524. MCM, *supra* note 8, pt. I, ¶ 3.

525. See H.R. REP. NO. 81-491, at 8 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000). In its report on the UCMJ, the House Committee on Armed Services specifically addressed the balance between an idealistic concept of justice and operational reality:

We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.

Id.

character of the military justice system and that current practices are superior to proposals for reform.

1. How Discretionary Selection of Panel Members Benefits the Command

As a threshold matter, it is important to recognize one of the hard truths about the military justice system that is often left unsaid: there is no point in its existence if it cannot meet the needs of military commanders. General of the Army Dwight D. Eisenhower testified to this effect before a meeting of the New York Lawyers' Club in 1948, in the midst of the debates on the Uniform Code of Military Justice:

I know that groups of lawyers in examining the legal procedures in the Army have believed that it would be very wise to observe, in the Army and in the Armed Services in general, that great distinction that is made in our Government organization, of a division of power. . . . But I should like to call your attention to one fact about the Army, about the Armed Services. *It was never set up to insure justice.* It is set up as a servant, a servant, of the civilian population of this country to do a job, to perform a particular function; and that function, in its successful performance, demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established. . . . *So this division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders cannot be as separate as it is in our own democratic government.*⁵²⁶

General Eisenhower, well versed in the realities of command, was not simply spouting a cliché. His statement reflected the responsibility and burden of command that remains a viable part of the system today.

526. General Dwight D. Eisenhower, Remarks to the New York Lawyer's Club (1948), *quoted in* Sherman, *supra* note 54, at 35 (quoting Letter from New York State Bar Association to Committee on Military Justice 4 (Jan. 29, 1949)) (emphasis added).

a. Total Responsibility, Authority, and Lawful Influence on the System

In civil society, there is no responsibility analogous to that of a commander. The Army doctrinal definition of the commander's role captures its encompassing nature: "Command is vested in an individual who has *total responsibility*. The essence of command is defined by the commander's competence, intuition, judgment, initiative, and character, and his ability to inspire and gain the trust of his unit. Commanders possess authority and responsibility and are accountable while in command."⁵²⁷

Some military justice reformers pay a condescending lip service to the responsibility of the commander even as they seek to take it away. For instance, the Cox Commission recognized that "[d]uring hostilities or emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed under their command."⁵²⁸ The Commission also affirmed that it "trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial."⁵²⁹ Yet the Commission recommended removing the commander, whom it trusts implicitly, from the military justice system.⁵³⁰

A paradox is at work here, the assumption that one can remove the commander from the system, while still retaining its efficacy, vitality, and utility to him. This hopeful aspiration clashes hard against the experiences of leaders such as General Eisenhower and General William Westmoreland, who have commanded large forces in combat and administered military justice systems. A major part of the military mission, what sets it apart from civilian life, is the "commitment to mission accomplishment in obedience to lawful authority."⁵³¹ The commander is, necessarily, the center of this world.

One might ask what any of this has to do with justice and the appointment of court members. The answer is not especially subtle, but no less

527. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 1-1 (31 May 1997) [hereinafter FM 101-5] (emphasis added).

528. COX COMMISSION, *supra* note 26, at 5.

529. *Id.* at 7.

530. *See id.*

531. General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 2, 44 (1980).

true because of that: Responsibility and authority must go hand in hand. Civil society recognizes the responsibility of commanders and holds them accountable even for the criminal actions of their subordinates.⁵³² Careers, lives, and international relations between nations can all be affected by the discipline or indiscipline of individual service members.⁵³³ To hold a commander responsible for good order and discipline, without a corresponding grant of authority over the system or the disposition of his personnel involved in it, places him and the system itself in an untenable position.⁵³⁴

Through his role in sending cases to courts-martial and selecting panel members, the commander is able to exert lawful control over the military justice system.⁵³⁵ The cases he refers to courts-martial communicate his sense of acceptable and unacceptable conduct. In appointing subordi-

532. See, e.g., James R. Carroll, *General's Promotion Opposed over Handling of Gay Soldier's Death at Fort Campbell*, COURIER J. (Louisville, Kentucky), Oct. 25, 2002, at 1A, LEXIS, Newsgroup File, All (discussing efforts to block Major General Robert T. Clark's nomination to Lieutenant General based on the murder of Barry Winchell at Fort Campbell during Clark's command); Calvin Sims, *General Bows to Show Remorse for Marine Held in Sex Offense*, THE PLAIN DEALER, July 27, 2000, at 5A, LEXIS, Newsgroup File, All (recounting how the commanding general of Marine forces personally apologized to the Governor of Okinawa for an incident in which one of his nineteen-year-old Marines fondled a fourteen-year-old Okinawan girl).

533. See Pamela Hess, *Army Extends Review of Kosovo Unit*, UNITED PRESS INT'L, Oct. 4, 2000, LEXIS Newsgroup File, All (reporting that senior Army officials had ordered a review of a command climate that allegedly tolerated misbehavior by soldiers in 3d Battalion, 504th Parachute Infantry Regiment, 82d Airborne Division, following the rape and murder of an eleven-year-old Kosovar girl by a noncommissioned officer in the unit); Chalmers Johnson, *U.S. Armed Forces Are on Tenterhooks in Okinawa; Military Island Residents Were Shocked by a Girl's Rape in 1995. What Would They Do if There Was a Serious Air Accident?*, L.A. TIMES, Sept. 3, 1999, at B7, LEXIS Newsgroup File, All (discussing the repercussions when several Marines gang-raped an Okinawan girl, and noting that the U.S. Marine 3d Division was almost forced to leave).

534. See, e.g., Written Comments of Walter Donovan, BrigGen USMC (ret.) to the Cox Commission (Feb. 28, 2001), reprinted in COX COMMISSION, *supra* note 26, app. C. General Donovan warned, with respect to removing commanders from the selection process, "Don't hobble them to administrative poohbahs, choosing their members for courts, officials who have zero operational responsibility." *Id.* General Donovan recounted some of his own experiences as a commanding officer of a line unit in which he faced "daily headaches on the issue of who was available to perform 'unexpected' tasks." *Id.*

535. Cf. Memorandum from John M. Economidy to Cox Commission, subject: Appointment of Court-Martial Members by Convening Authority 1 (Nov. 28, 2000), reprinted in COX COMMISSION, *supra* note 26, app. C. In answer to the Cox Commission's question, should court-martial members be appointed by a jury office rather than the convening authority, Mr. Economidy replied, "Absolutely not. The military mission is to fight and win wars. Maintaining discipline through the military justice system is a responsibility of the convening authority in conducting the overall military mission." *Id.*

nates to courts-martial, he fulfills several goals. He reinforces his priorities through the personnel he appoints to the court. If the courts-martial process is meaningful to him, he appoints his most trusted subordinates, using criteria similar to what he would employ in matching personnel with other missions; if the process means little to him, he sends the lazy and the expendable to judge his soldiers. Either way, he sends a message. In addition, he fulfills a training function through the operation of the military justice system, ensuring that the next generation of leaders is prepared to administer the system.

It is important to emphasize the difference between lawful influence over the military justice system, which involves carefully selecting the cases that go to trial and the members that sit in judgment of them, and unlawful command influence, which consists of attempting to exercise coercion or unauthorized influence over the action of a court-martial or its members as to findings and sentence.⁵³⁶ Lawful influence is a function of command, closely related to the core responsibilities of a commander to care for and discipline his troops. Unlawful influence is not only a crime, it is a poor management and command practice. The best commanders will avoid arbitrary and reckless meddling with the military justice system, as they would in any other aspect of command.⁵³⁷ Service members are, after all, their human capital.⁵³⁸

b. Combat and the Military Justice System

The ultimate test of the military justice system occurs in combat, of which there are two critical aspects: the role of military justice in control-

536. See UCMJ art. 37(a) (2002).

537. Justice Harry Blackmun wrote of the relationship between the statutory protections of the UCMJ and the incentive a commander has to avoid arbitrary treatment of his troops:

[T]he fearful specter of arbitrary enforcement of the articles, the engine of the dissent, is disabled, in my view, by the elaborate system of military justice that Congress has provided to servicemen, and by the self-evident, and self-selective, factor that commanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.

Parker v. Levy, 417 U.S. 733, 763-64 (1974) (Blackmun, J., concurring).

538. Cf. Pound, *supra* note 24, at 24 (quoting the chief Navy spokesman to the effect that no one relishes prosecuting service personnel because they are human capital).

ling the behavior of soldiers actually involved in combat, and its ability to operate effectively as a system under combat conditions. An effective system of military law can provide an additional motivating factor to prevent combat misconduct, which could include desertion, mistreatment of civilians, or crimes against humanity. The reality is that “[s]ervice members are frequently thrust into dirty and dangerous places, equipped with weapons of truly awesome destructive power,” where they have responsibility for their own lives and the well being of many others.⁵³⁹ According to Generals Westmoreland and Prugh,

The costs of misconduct in combat are truly incalculable. . . . Because of its effect on [other soldiers], because the military law may give just the additional strength at just the right moment to prevent disastrous disobedience or flight, because it distills a *habit* of obedience to lawful orders so that compliance is second nature, for all of these reasons military law does remain as a valuable military motivator.⁵⁴⁰

It is axiomatic that the commander, whose authority in combat must be unquestioned, should occupy a place at the apex of the military justice system.

Operating a military justice system under combat conditions requires flexibility, ingenuity, and the ability to control resources, particularly human capital. A World War II case, *Wade v. Hunter*,⁵⁴¹ illustrates that combat operations can have an impact on the administration of military justice. The accused in *Wade* had been tried by a general court-martial for the rape of a German woman.⁵⁴² After the court closed for deliberations, but before it announced findings, it requested a continuance to hear from critical witnesses who had not been able to attend the trial because of sickness.⁵⁴³ Before the court could reconvene, the accused’s parent unit, the 76th Infantry Division, advanced deep into Germany, far enough from the site of the offense to make it impracticable for the court-martial to reconvene. The commanding general of the 76th Infantry Division withdrew the charges and transferred them to Third Army, which in turn transferred them to Fifteenth Army, the unit that now had responsibility for the town in which the offense occurred. The Fifteenth Army commander convened

539. Westmoreland & Prugh, *supra* note 531, at 45 (1980).

540. *Id.* at 48.

541. 336 U.S. 684 (1949).

a new general court-martial, which convicted the accused of the rape and sentenced him to life in prison.⁵⁴⁴

On collateral attack, the accused sought a writ of habeas corpus, claiming he had been subjected to double jeopardy. The district court granted the writ, but the Court of Appeals for the Tenth Circuit reversed, and the Supreme Court affirmed.⁵⁴⁵ The Court recognized that the tactical situation, coupled with U.S. Army policy that offenses would be tried in

542. *Id.* at 686. The facts in *Wade* illustrate how the military justice system must cope with the fast-paced environment of combat. On 13 March 1945, the 76th Infantry Division entered Krov, Germany. The next afternoon, two German women were raped by men in American uniforms. Two soldiers from the division, including the petitioner, were arrested upon charges they had committed the offense. 76th Infantry Division continued its advance. Two weeks later, it had advanced twenty-two miles into Germany to a town called Pfalzfeld, where the trial was held. The court-martial heard evidence and argument of counsel and closed to consider the case. However, later that day the court re-opened and requested a continuance to hear from the parents of the victim and also the victim's sister-in-law, who was in the room when the rape occurred and could assist in identification of the assailants. *Id.* at 685-86. The 76th Infantry Division continued its advance. A week later, before the court had reconvened, the Commanding General withdrew the charges and ordered the court-martial to take no further action. He transferred the charges to his higher command, Third Army, explaining that the tactical situation had made it impossible for the division to try the case in the vicinity of the offense within a reasonable time. Third Army, meanwhile, had also advanced deeply enough into Germany that it was impracticable for any Third Army unit to try the case in the vicinity of the offense. Accordingly, the Third Army commander transferred the case to the Fifteenth Army commander, now responsible for the area in which the offense had occurred, who convened a court-martial. *Id.* at 687.

543. *Id.* at 686 n.2. This was a permissible proceeding under the Articles of War and *Manual for Courts-Martial* of the day. *See id.* at 691 n.7.

544. *Id.* at 692. At trial, the petitioner claimed double jeopardy because of the previous trial, but his motion was denied. It is unclear from the Supreme Court opinion whether the new court heard the evidence anew or relied on the record of trial. However, the court acquitted the co-accused and convicted the petitioner. *Id.* at 687. An Army board of review in Europe filed a unanimous opinion that the double jeopardy claim should have been sustained. The Assistant Judge Advocate General disagreed and filed a dissenting opinion. The Commanding General of the European Theater confirmed the sentence, thus leading to the petitioner filing a writ of habeas corpus in federal district court. *Id.* at 692-93 (Murphy, J., dissenting).

545. *Id.* at 684.

the vicinity where they occurred to facilitate the involvement of witnesses, made the unusual procedure necessary.⁵⁴⁶

A key factor in the Court's opinion was the recognition that the general court-martial convening authority required control over his personnel to carry out his tactical mission. If this meant dissolving the court-martial and transferring it to another command, so be it. "Momentous issues," wrote the Court, "hung on the invasion[,] and we cannot assume that these court-martial officers were not needed to perform their military functions."⁵⁴⁷ The order to dissolve the original court-martial was made by a commanding general who was "responsible for convening the court-martial and who was also responsible for the most effective military deployment of that Division in carrying out the plan for the invasion of Germany."⁵⁴⁸ The commander's responsibility to prosecute the war trumped his responsibility to prosecute the accused.

One should not assume that the days of courts-martial in a combat zone are over. Despite some doubt as to the vitality of the judicialized UCMJ under "military stress,"⁵⁴⁹ Operations Desert Shield and Desert Storm demonstrated that the system could still work under combat conditions. The 1st Armored Division conducted three general courts-martial, one special court-martial, and six summary courts during the four months that the division participated in Desert Shield and Desert Storm. Two of the general courts-martial and the special court-martial were held within days of the beginning of combat operations.⁵⁵⁰ Conducting the courts-martial required the dedication of resources available only to the command: a UH-60 Black Hawk helicopter to ferry the trial counsel, defense counsel, and military judge to field locations; generators; tents; and per-

546. *See id.* at 691-92. The Court relied on a long-standing rule that a trial could be discontinued "when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Id.* at 690.

547. *Id.* at 692.

548. *Id.* at 691-92.

549. *See, e.g.,* Westmoreland & Prugh, *supra* note 531, at 4 (based on over-judicialization of the UCMJ, the authors conclude that it is incapable of performing its intended role during time of military stress).

550. COLONEL FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 188 (2001).

sonnel.⁵⁵¹ A third general court-martial, fully contested, featured court proceedings held in three countries: Saudi Arabia, Iraq, and Kuwait.⁵⁵²

The 1st Armored Division commander was able to use the military justice system to reinforce discipline at a critical time. Soldiers in the Division were “surprised, if not shocked” upon learning that a court-martial would be held the night before the attack on Iraq was to begin, but it sent a message to them that high standards and military justice were important to their commander.⁵⁵³

A commander who has no control over the disposition of court-martial personnel will have little incentive to use the military justice system in a combat zone. In the Desert Storm example, a court-martial selection method that used random procedures, the edicts of a far-off “administrative poohbah,” or a central court-martial administrator would have interfered considerably with the commander’s judgment to employ the personnel under his command as he saw fit. With random selection, the commander could not have predicted which officers would be required for a court-martial panel. Because of the potential impact on operations, he might have resisted the decision or put off the court-martial until a later date, thereby losing the advantages of holding the proceedings in a combat zone on the eve of combat. He also might have resisted the idea of providing tents, generators, and helicopters to a central court-martial administrator from a far-off command. Conversely, a central court-martial administrator might not have shared the commander’s view of the seriousness of the offense or the necessity of trying it on location just before the commencement of operations.

In short, the military justice system must retain its martial roots and character to fulfill its varied missions. The commander must always have the flexibility and control over personnel or resources to ensure that the military justice system meets the needs of his command under a variety of circumstances. The current system offers such flexibility; the reforms, despite their assurances to the contrary, do not.

551. *See id.* at 188-90.

552. *Id.* at 189.

553. *Id.* at 190.

2. *How the Current System Benefits the Accused*

The JSC has recognized that “public perceptions of the court-martial member selection process are often based on limited information and misunderstanding.”⁵⁵⁴ Worse, legal commentators tend to feed on this, generally focusing their criticisms on misperceptions.⁵⁵⁵ In turn, these criticisms have spilled over to the popular press. A recent article in a national news magazine picks up the claim that the system is unfair because the convening authority wields prosecutorial discretion, hand-picks the jury, has the ability to approve findings and sentence, and exercises clemency power.⁵⁵⁶ The article cites the military’s courts-martial conviction rate as proof that the system is actually unfair and is stacked to convict.⁵⁵⁷ A public that bases its opinion of the military justice system on published misperceptions and misleading comparisons with the civilian criminal justice system cannot be expected to have either an accurate or favorable view of the military justice system.

If the frame of reference is changed, perhaps the system will not seem so one-sided and unfair. When evaluated in terms of the benefits it offers to the accused—particularly in comparison to the civilian jury system—discretionary convening authority selection of panel members appears to be a fair system that confers significant due process and tactical advantages to an accused.

So, let us posit the average, reasonable citizen—someone who knows little about the military justice system, but has an open mind and is willing to learn. It stands to reason that such a person would benefit from an accurate introduction to the court-martial panel process, from selection and appointment through trial.

a. Selection Process and Panel-Member Qualifications

Suppose this citizen learned how the actual assignment process took place. Would she find it shocking that a commander, using information

554. JSC REPORT, *supra* note 32, at 47.

555. *Id.*

556. *See* Pound, *supra* note 24, at 21-22.

557. *Id.* at 22 (claiming a 97% conviction rate for courts-martial in fiscal year 2001). Among its weaknesses, the article does not compare the military conviction rate with civilian conviction rates, fails to differentiate between convictions and guilty pleas, and neglects to break down the conviction rate by type of court-martial.

provided to him by subordinate staff specialists and subordinate commanders, selects members on a best-qualified basis using criteria of age, education, experience, training, length of service, and judicial temperament?⁵⁵⁸ Would it make a difference to the citizen if she understood that the commander has total responsibility for all operational aspects of command, including the disposition and assignment of personnel?⁵⁵⁹ How would she feel if she knew the accused would face a panel of individuals with considerable experience within military society and a higher education level than the typical civilian jury?⁵⁶⁰ What if she learned that a court-martial panel, unlike a civilian jury, is also charged with the judicial function to pass sentence on the accused?⁵⁶¹ The citizen might be favorably impressed with a system that produces “blue-ribbon panels,” particularly if she were aware that the civilian jury system has come under attack because random selection methods tend to produce juries with lower education levels and experience, thereby degrading the quality of justice in civilian courts.⁵⁶²

558. UCMJ art. 25(d)(2) (2002); *see also* Lamb, *supra* note 25, at 128-29 (discussing the common method for member selection by which a convening authority solicits nominations from subordinate commanders for his consideration based on the criteria of UCMJ Article 25(d)(2), and noting that historically, more than 87% of jurisdictions use this method); Young, *supra* note 25, at 104-05 (noting that most general court-martial convening authorities must rely on subordinates and special staff officers for nominations).

559. *See* FM 101-5, *supra* note 527, at 1-1.

560. As the Court of Military Appeals has observed, UCMJ Article 25(d)(2) criteria can tend to produce relatively senior panels. *See* United States v. Nixon, 33 M.J. 433, 434 (C.M.A. 1991). The military has a higher level of formal education than civilian society. Of the civilian population, 24.3% have a bachelor's degree or higher, whereas 89.9% of officers have a bachelor's degree or higher. In the enlisted ranks, more than 97.4% have at least a high school diploma/GED or higher, compared to 82.8% of the civilian population. *See* MFRC REPORT, *supra* note 373.

561. *See* UCMJ art. 51(a) (discussing voting procedures by members of a court-martial on findings and sentence). *See also* MCM, *supra* note 8, R.C.M. 1006 (establishing the procedures members must use in proposing and voting for sentences).

562. Some commentators believe that random selection methods tend to be skewed towards selection of less educated and experienced segments of society. The better-educated members of society are often able to escape jury duty, and during voir dire, lawyers tend to use peremptory challenges to strike educated jury members. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFTSTRA L. REV. 377, 458-469 (1996). A proposed solution is to select jurors using criteria such as education or previous trial experience. *Id.* at 457.

b. Forum Selection Rights

Suppose this citizen knew that the military accused, unlike his civilian counterpart, had the absolute right to select the type of forum that would hear his case—judge alone, officer panel, or in the case of enlisted personnel, a panel consisting of officers and at least one-third enlisted personnel?⁵⁶³ What if she learned that an accused could make his decision with prior knowledge of the identities of the military judge and the individuals who would be on the panel, and had access to portions of their personnel files and the ability to inquire into their reputations for justice and fairness?⁵⁶⁴ These procedures grant greater rights to a military accused than are available to his civilian counterpart.

c. The Panel at Trial

Suppose the citizen knew that an accused on trial for a serious offense would be fully acquitted and would not have to endure a hung jury and a re-trial if just one-third of the panel was not convinced beyond a reasonable doubt?⁵⁶⁵ What if she were aware that through the judicious use of challenges, the accused's counsel could actually stack the numbers statistically in his favor for acquittal?⁵⁶⁶ What if the citizen knew that at trial

563. Compare UCMJ art. 16 (classifying the types of courts-martial and granting the accused the right to choose trial by members or by judge alone) and *id.* art. 25(c)(1) (granting an enlisted accused the right to demand trial by general or special court-martial with a membership consisting of no less than one-third enlisted personnel), with FED. R. CRIM. P. 23(a) (granting a criminal defendant the right to trial by judge alone only if the judge and the prosecutor agree to it). In the federal criminal system, the prosecutor is the gatekeeper of the accused's forum rights; there is no constitutional right to a trial by judge alone. See *United States v. Singer*, 380 U.S. 24 (1965) (upholding the procedure of Federal Rule of Criminal Procedure 23(a), and noting that there is no constitutional right to trial by judge alone).

564. See Young, *supra* note 25, at 117-18 (noting that in practice, but not as a matter of right, convening authorities have permitted the accused to know the names of the court members before electing a forum).

565. UCMJ art. 52(a)(2) (two-thirds majority required for conviction); see also *id.* art. 60(e)(2) (forbidding reconsideration or revision of any finding of not guilty of any specification).

566. See Smallridge, *supra* note 25, at 375-79 (thoroughly explaining the "numbers game" and providing a statistical analysis of court membership that is favorable to the accused).

the members of the panel would listen to the evidence, take notes,⁵⁶⁷ question witnesses,⁵⁶⁸ and engage meaningfully in the process?⁵⁶⁹

What if the citizen understood the sanctity of oaths to the military mind and realized that integrity is a way of life to most service members?⁵⁷⁰ Suppose the citizen knew that the UCMJ absolutely forbids any attempts to influence the action of a court-martial in any way, including performance ratings of the court members or counsel?⁵⁷¹ As an additional protection to the accused, members in a court-martial vote by secret written ballot,⁵⁷² in contrast to the open voting in a civilian jury.

A citizen who knew all these things, but was aware of the conviction rate at military courts-martial, might nevertheless question a system in which the vast majority of accused were convicted. Wouldn't one expect her mind to change, however, if she knew that the conviction rate for con-

567. See MCM, *supra* note 8, R.C.M. 921 (explaining that members can take their notes, if any, with them into deliberations).

568. See *id.* MIL. R. EVID. 614 (granting all parties, including the members, the right to call, question, cross-examine, or recall witnesses at courts-martial).

569. Again, these are areas where military court-martial practice is superior to civilian practice. A jury that cannot question witnesses is hindered in its ability to function as a fact-finder. Civilian jurors typically are not permitted to take notes or question witnesses. Some commentators have suggested that permitting them to do so would improve the quality of justice because note-taking aids in recollection of the evidence, focuses the attention of the juror on the proceedings, and lessens the time for deliberation. See Smith, *supra* note 562, at 496-501.

570. An excellent example of this occurred in the trial of Lieutenant William Calley for the My Lai massacre. A member of the panel, Colonel Ford, received orders to refrain from any exposure to news accounts of the My Lai massacre nearly one year before the trial was actually held. During that year, whenever he saw a news flash about My Lai on the television, he left the room, and whenever he saw a newspaper headline about My Lai, he read no further. See *Calley v. Callaway*, 519 F.2d 184, 211 (5th Cir. 1975). This type of integrity and obedience to orders is by no means atypical in the military, and the accused benefits greatly from panel members who have taken an oath "to faithfully and impartially try, according to the evidence, their conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5 (1 May 2002).

571. See UCMJ art. 37 (2002). Article 37, UCMJ, forbids any person subject to the Code from trying to influence the action of a court-martial in any way. Furthermore, the article forbids any person subject to the Code from considering or evaluating a court member's duty on a court-martial as part of an effectiveness, fitness, or efficiency report. See *id.*

572. See *id.* art. 51(a) (providing for vote by secret written ballot on findings, sentence, and challenges when there is no military judge present).

tested courts-martial and contested jury cases was almost exactly the same?⁵⁷³

Now, suppose this citizen became aware that reformers wanted to change the military justice system to remove the commander from the process and introduce jury selection concepts such as random selection. Initially, one might expect her to view this favorably; most people accept the idea that juries are the bulwarks of freedom. But let us suppose she also learned the truth about reform efforts, that they offer only illusory change, that every single reform effort rigs the random selection system because the consequences of statistically honest random selection are inconceivable to reformers and incompatible with military needs. Moreover, reforms do double damage by increasing the administrative burden on the command and, in changing the criteria from “best qualified” to “merely available,” degrade the quality of the panels. Centralizing the court administrative functions, as has been done in Great Britain, brings with it delay and inefficiency. The result is a system whose usefulness to the commander has been greatly compromised.

One would expect that an informed citizen, aware of all the facts, would look favorably upon the rights offered by the military justice panel system to the accused. Selection of panel members is, like many other decisions a commander makes, simply another exercise of operational

573. In fact, the conviction rate for general courts-martial is actually slightly lower than for felonies in federal district courts or in the seventy-five largest metropolitan areas of the United States. The overall conviction rate for general courts-martial in fiscal year 2001 was 95% (1675 convictions out of 1756 total cases in the services combined). This figure was obtained by adding together the total reported general court-martial convictions from the Army, Navy (including the Marines), Air Force, and Coast Guard and dividing by the total reported number of general courts-martial held. See CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT (2001), available at <http://www.armfor.uscourts.gov/Annual.htm>. In the federal system, the conviction rate for felonies (including guilty pleas) that were not dismissed was 98.37% percent. This figure was obtained by dividing the total number of convictions in the federal system in fiscal year 2001 (68,156) by the total number of cases that were not dismissed (69,283). See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 414 (Ann L. Pastore & Kathleen Maguire eds., 2001), available at <http://www.albany.edu/sourcebook>. In the seventy-five largest metropolitan areas, the felony conviction rate was about 95%. See *id.* at 452.

In the early 1970s, General Hodson discussed the fallacy of arguments that the military justice system is unfair because of its conviction rates. He noted that the rate was nearly the same for the military (94%) as for the civilian system (96%) on cases that went to trial. A high acquittal rate, he observed, can indicate that improper cases are going to juries or that prosecutors are unprepared. See Hodson, *supra* note 25, at 52.

responsibilities. It provides a benefit to the commander because, by selecting his best-qualified subordinates, he ensures the quality of justice meted out to his soldiers is high, and it demonstrates his commitment and vision that justice is important to him. The system is fair and flexible, and it offers the military accused choices that are unavailable to civilian criminal defendants. The panels are well-educated, honest, and faithful to their oaths. The accused has a statistically similar likelihood of acquittal in a military court, but has the benefit of using the panel system and the two-thirds majority rule to structure the panel in his favor.

The system of command control of military justice meets the needs of the command and the nation, but just as important, it meets the needs of the accused. The statutory framework Congress created in the UCMJ strikes a balance that should not lightly be disturbed. At this point in history, it is fair to assume that the Framers and several generations of Congress knew what they were doing in retaining a system of command control over panel member appointment.

V. Conclusion

The practice of discretionary convening authority selection of court-martial panel members dates back centuries and has been an integral part of the American military justice system since the Revolution. It is deeply rooted in the earliest efforts of armies to employ military tribunals as a means of ensuring good order and discipline while providing due process and fundamental fairness to the accused. Congress, which has the constitutional responsibility to make rules for the government of the armed forces, has consistently rejected efforts to remove the convening authority from the process of selecting panel members. In promulgating the UCMJ in the late 1940s, Congress struck a fair and practical balance between individual rights and the power of commanders to administer the military justice system.

Modern-day reformers seek to upset that balance. The UCMJ has proven its worth as a fair system of justice that grants due process to individuals, while preserving the flexibility, efficiency, and ease of administration necessary in a military setting. No one seriously questions its actual fairness. Nevertheless, concerned that the role of the convening authority in selecting panel members presents the appearance of evil, many seek to remove the convening authority from the panel selection process, replacing him with either a central court-martial administrator or with modified

versions of the random selection system used in the federal courts. In *United States v. Wiesen*,⁵⁷⁴ a judicially activist majority of the CAAF demonstrated a willingness to place significant limits on the ability of commanders to select subordinate commanders to serve on court-martial panels. Because of *Wiesen*, commanders are no longer free to choose their best-qualified subordinates to serve on panels if a certain percentage of them are from the same chain of command.⁵⁷⁵

It is time to fight back in defense of a system that produces “better educated and more conscientious panels . . . than any other system would.”⁵⁷⁶ To counter the damage done by *Wiesen*, the President should use his rule-making authority under UCMJ Article 36(a) to amend the *Manual for Courts-Martial* and make clear his intent that command and supervisory arrangements are no impediment to service on court-martial panels. In the long term, proponents of the system must shift the terms of the debate. So long as reformers can fight on a ground of their own choosing, they will have the upper hand. Conversely, when the question of panel member selection is cast in terms of its proper constitutional context, its utility to commanders, its fairness to the soldier, and its relationship to the purposes of military justice, it becomes evident that Congress struck the proper balance in retaining the convening authority’s discretionary ability to select panel members.

Honor, integrity, and trustworthiness define the character of American military commanders, just as discipline and adherence to the rule of law form the backbone of the most effective military the world has ever known. Divesting convening authorities of the power to appoint panel members to attain a more idealistically pure system of justice exalts form over substance and the military justice system over the military. In the words of Generals William Westmoreland and George Prugh, “There is a fundamental anomaly that vests a commander with life-or-death authority over his troops in combat but does not trust that same commander to make a sound decision with respect to justice and fairness to the individual.”⁵⁷⁷

574. 56 M.J. 172 (2001).

575. See *supra* text accompanying notes 28-30.

576. Cooke, *supra* note 25.

577. Westmoreland & Prugh, *supra* note 531, at 58.

Appendix

Proposed Rule Changes⁵⁷⁸

R.C.M. 503(a)(4):

(4) Members with a command or supervisory relationship. The Convening Authority may detail members with a command or supervisory relationship with other members and such relationships are not disqualifying.

Analysis

This section is intended to clarify that the rules of procedure in trial by courts-martial do not disqualify members with command or supervisory relationships from serving on courts-martial. Specific grounds for challenge of members and related procedures are in RCM 912(f). The existence of command or supervisory relationships among members, including a number sufficient to convict, does not constitute grounds for challenge under RCM 912(f)(1)(N). *See* United States v. Greene, 43 C.M.R. 72, 78 (1970) (“Congress, in its wisdom, made all commissioned officers eligible for consideration to serve on courts-martial [subject to the limitations contained in Article 25, UCMJ].”). In 1968, Congress amended Article 37, UCMJ, by adding subparagraph (b), prohibiting anyone preparing an effectiveness, fitness, or efficiency report (or any other such document) from “(1) consider[ing] or evaluat[ing] the performance of duty of any such member as a member of a court-martial.” UCMJ art. 37(b) (2002). *See also* RCM 912(f), Analysis.

R.C.M. 912(f)(1)(N):

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. The existence of a command or supervisory relationship between two or more members of a court-martial panel (even when such members constitute a

578. Underlining indicates language added to or changed from the existing Rules.

majority sufficient to reach a finding of guilty) shall not constitute grounds for removal for cause.

Discussion

Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

The second sentence of subsection (N) is intended to clarify that factors to be considered under Rule 912(f) do not include the existence of command or supervisory relationships among the members of a court-martial panel. The existence of such relationships do not evidence “implied bias” or otherwise constitute a violation of this Rule. As such, the second sentence is intended to overrule the holding of the Court of Appeals for the Armed Forces in *United States v. Wiesen*, 56 M.J. 172 (2001).

Analysis

In light of the finding in *United States v. Wiesen*, 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2002), this section is intended to clarify the President’s position that command or supervisory relationships between members, even when such members constitute a majority sufficient for conviction, are not a basis for removals for cause. It is common for court-martial members to have command or supervisory relationships with other members. Such relationships between two or more members of a court-martial panel (even when such members constitute a number sufficient to reach a finding of guilty) are not grounds for challenge under this rule. *See, e.g.*, *United States v. Blocker*, 32 M.J. 281, 286-87 (C.M.A. 1991) (noting that the mere fact of a rating or senior-subordinate relationship between members does not generally give rise to a challenge for cause, and observing that “the omnipresence of these relationships suggests a sua sponte inquiry by the judge was not required”); *United States v. Murphy*, 26 M.J. 454, 455 (C.M.A. 1988) (“We hold that the Court of Military Review erred as a matter of law in applying a per se disqualification predicated solely on the fact that a senior member of the court-martial is involved in writing or endorsing the effectiveness reports of junior members.”); *United States v. Bannwarth*, 36 M.J. 265, 268 (C.M.A. 1984) (find-

ing that “a senior-subordinate relationship between court members does not automatically disqualify the senior member”); *United States v. Deain*, 17 C.M.R. 44, 52 (C.M.A. 1954) (“It may be conceded that the mere fact that the senior, or other member of the court, coincidentally has the duty to prepare and submit a fitness report on a junior member, in and of itself, does not affect the junior’s ‘sense of responsibility and individual integrity by which men judge men.’”) (citations omitted).

**SHOESHINE BOY TO MAJOR GENERAL: A SUMMARY AND ANALYSIS OF
An Oral History of Major General Hugh R. Overholt, United
States Army (Retired) (1957-1989)¹**

MAJOR GEORGE R. SMAWLEY²

Don't be careless about yourselves—on the other hand not too careful. Live well but do not flaunt it. Laugh a little and teach your men to laugh—good humour under fire—war is a game that's played with a smile. If you can't smile, grin. If you can't grin, keep out of the way until you can.

—Sir Winston S. Churchill.

1. Major Tania M. Antone and Major Randall J. Bagwell, *An Oral History of Major General Hugh R. Overholt, United States Army (Retired) (1957-1989)* (May 2000) [hereinafter *Oral History*] (unpublished manuscript, on file with The Judge Advocate General's School Library, United States Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at The Judge Advocate General's School, Charlottesville, Virginia. The oral history of Major General Overholt is one of about two dozen personal histories on file with The Judge Advocate General's School Library. They are available for viewing through coordination with the School Librarian, Daniel Lavering, and offer a fascinating perspective on key leaders whose indelible influence continues to this day. This article also contains additional collateral facts provided by Major General Overholt, incorporated during the review and editing process. Interview with Major General Hugh R. Overholt, (Retired), in New Bern, North Carolina (27 Feb. 2003) [hereinafter *Overholt Interview*] (on file with author). The author would like to thank Colonel David Graham (Retired) and Lieutenant Colonel Alan Cook for their thoughts and comments.

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I. Introduction

Humor, and the perseverance born of experience in rural Arkansas during the 1930s and 1940s, were hallmarks for Major General Hugh R. Overholt (Retired) during his life and education, from a roadless community in the depression-era South, to his rise in the United States military and service as the thirty-second The Judge Advocate General of the Army. It is a remarkable story, worthy, at times, of a Horatio Alger novel. Like an Alger protagonist, there is luck, pluck, altruism, honesty, and self-reliance that lead a young country lawyer to the pinnacle of military leadership in The Army Judge Advocate General's Corps.

It is also a story of the Army that existed between 1957 and 1989, during the period from the Korean War to the fall of the Iron Curtain, and Presidents Eisenhower to George H. W. Bush. Major General Overholt's military experience spans the Civil Rights struggles in Little Rock, through Eisenhower's reduction of the officer corps, the Cuban Missile crisis, and the institutional changes started during the Reagan administration. It was a far different Army than the modern, information-based, and technology driven organization currently in transition.

The changes in the Army were mirrored in The Judge Advocate General's Corps, which grew and developed with the needs of the Army. Major General Overholt served an extraordinary ten years as a general officer, eight of them as a major general, during which he increased the professionalism and role of the corps through organizational changes and the tireless pursuit of missions and responsibility for Army lawyers. He established the Masters in Military Law (LL.M.) program at The Judge Advocate General's School and dramatically expanded the school's facilities, automated the delivery of Army legal services, published a code of professional responsibility, modernized the U.S. Army Claims Service, and consolidated the U.S. Army Litigation Division with the U.S. Army Legal Services Agency. He moved Army legal services forward and demonstrated a leadership philosophy focused on morale, professionalism, and soldiering.

I had that much time, [ten years in the Pentagon], and I had that much authority, and nobody will ever have it again. It wasn't me, it was the circumstances with President Reagan, money for the military, and total confidence in the JAG Corps by the leadership of the Army and by the Secretary of the Army. So we were able to be the first to utilize computers, to establish the lit-

igation center, to get the LL.M. for the JAG School, to put the regimental system in place³

This article is a summary and analysis of interviews conducted in May 2000 with the former The Judge Advocate General of the Army, *An Oral History of Major General Hugh R. Overholt (Retired)*, on file with the library at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. The purpose is to introduce Major General Overholt to the reader, his professional experience and accomplishments, while identifying the unique leadership qualities that contributed to his success. In particular, this article attempts to highlight his experience during a period of transformation in Army culture, and the leadership techniques he developed to manage a professional officer corps increasingly focused on institutional change.

II. Arkansas: 1933-1957

"What you are now is what you were then."⁴ These words capture a core perspective that help define Hugh Overholt, the man, and the leadership philosophy he developed during his life and military service. He never forgot who he was, or where he came from: born in Beebe, Arkansas; the grandson of a businessman, Presbyterian missionary, and a mule-trader; the son of a schoolteacher. When his father, Harold, graduated from the College of the Ozarks during the Great Depression, "there were no jobs and no money and no roads in Arkansas."⁵ It was a faith-based, conservative environment enlightened by parents and family who treasured education and learning.

Like others of that generation, it was impossible for the Overholt family to escape the profound effects of the Great Depression. Relatives lost businesses and property; nothing was guaranteed. Life was never easy in rural Van Buren County, Arkansas; the Depression made it even harder. In the 1930s, the Overholts moved from Scotland to Higdon, Arkansas, where Harold Overholt secured a job as a high school principal and teacher. "Higdon was a little bitty town of about fifty people There were no school buses, so you either walked or rode a mule to get to school.

3. Oral History, *supra* note 1, at 131.

4. *Id.* at 1.

5. *Id.* "You can't imagine how remote that was at the time. No paved roads, no electricity, no running water." *Id.*

If you wanted to really go anywhere, like Little Rock, which nobody did, it was just unheard of.”⁶

Although modest, the school position and its \$12-15 a month stipend provided the family with a modicum of security.⁷ It was an experience characteristic of the times. In the Overholt home, one could find an icebox filled with twenty pounds of ice per week and kerosene cook stoves. There were hog killings and squirrel hunts,⁸ and other vestiges of rural American life.

Around 1938, the family packed up again from Higdon to Mount Pleasant, Arkansas, “out in the country, but a grade up.”⁹ The Overholts moved whenever Harold was able to secure a better teaching position,¹⁰ and gradually saw the close-knit family disperse in search of new and better opportunities elsewhere, “a kind of *Grapes of Wrath* type of deal, loading up and heading for better places like California, the Okies and Arkies.”¹¹ Harold eventually moved the family to Cove, Arkansas, where he was the superintendent of schools. For the first time, the family enjoyed running water and an electric light hanging from a single 25-watt bulb.

The relative comfort the Overholts experienced in Cove did not separate them from the plight of those still affected by dire conditions of the Great Depression.

[P]eople still looking for work . . . would come up and knock on the door and offer to work for food. Mother would have them go out and split wood or some make-do job that really didn't need doing just so they could keep their pride, and then she would give them two sandwiches. Some days as many as forty people would come by our house [W]e always found something to give them.¹²

6. *Id.* at 4.

7. *Id.* “I remember we lived on the high school stage. That’s where we lived. They put a curtain up and brought a cook stove in; we didn’t have electricity, we had lamps. We lived behind the curtain in the high school for free. We were very, very happy to have it.” *Id.* at 5.

8. *Id.* at 6-7.

9. *Id.* at 8. “There wasn’t much to Mount Pleasant. It was an old lumber town and by that time the Depression was really bad. It was sad to see some people unable to afford sugar or the staples of life.” *Id.* at 9.

10. *Id.* “[D]addy moved every time he could get a two-dollar raise.” *Id.* at 9.

11. *Id.* at 9.

12. *Id.* at 12-13.

It was a challenging time for Arkansans. The Overholts were avid readers, and they instilled this life-long passion in their son. From his earliest age, Hugh Overholt read everything he could get.¹³ Radio, for him, was more for sports than regular entertainment. It was also for the news, including the memorable announcement in 1942 that the Japanese had attacked Pearl Harbor.¹⁴

Harold Overholt registered for the draft, but was deferred on account of a shortage of schoolteachers. In 1945 the family moved again, to Berryville, Arkansas, a county seat with hints of the modern age, including running water and paved roads.¹⁵ A couple years later, after a falling out with the school board, the Overholts moved again to Huntsville, where Harold took a position with a state vocational school. The school was located in Madison County, the poorest county in the state, and was one of only two state-supported schools built by Arkansas because the counties were unable to support schools any other way.¹⁶

The position with the state brought financial security, but provided little excess. It was there that Hugh Overholt learned the virtue and value of work. “I started figuring out that you had to work if you were ever going to get anything yourself. So, I took a job down at the barbershop in Huntsville as the shoeshine boy. I shined shoes every day . . . for a quarter.”¹⁷

He used the money to buy a .22 rifle and a dozen steel traps, which he hoped would result in a “big bonanza” of fur-bearing wildlife. It didn’t. After a year, “I think I caught two rats I was totally inept at trapping. I never caught a fox, I never trapped a raccoon [F]rankly, I wouldn’t have known what to do with it if I had.”¹⁸ That same work ethic and creativity carried over to sports¹⁹ and other activities, including shining shoes,

13. *Id.* “One of the great purchases of my life was that I bought the first issue of the Superman comic book, action comics, when it came out for a dime at the general store.” *Id.* Years later it was lost during a military move. Overholt Interview, *supra* note 1.

14. Oral History, *supra* note 1, at 14.

15. *Id.* 16-17.

16. *Id.* at 20. “I mean if Huntsville wasn’t the end of the world, I don’t know where it was. No paved roads at all. Had a water system. Did not have a sewer system.” *Id.*

17. *Id.* at 22.

18. *Id.*

work as a drug store “soda jerk,” shooting pool,²⁰ and folding the newspapers for the Madison County Record.²¹

In 1948, the family moved again when Harold was hired to build a school in Westside, Arkansas, outside of Heber Springs, “in kind of the middle of some old cotton fields and scraggly low lands, backing up into the Ozarks.”²² It was largely an agricultural community, with a school year that included summer sessions and long breaks to accommodate cotton picking and planting season.²³ There was little money. Indeed, during Overholt’s senior year the school ran out of money and graduated the fourteen seniors after only four months.²⁴

Harold Overholt was concerned that his son was unprepared for college, so the next year he sent him to live with his grandmother’s brother, “Uncle Doc,” in Clinton, Arkansas, where Overholt enrolled as a senior in the local high school. Overholt assisted his uncle with his medical practice, driving him to house calls and assisting in the office. It was an

19. *Id.*

I also played basketball. I always was the last person cut from the team. I asked coach one year why I got cut and why I couldn’t go on the traveling squad. . . . [H]e said, “That’s all the uniforms we got, 10 uniforms.” So I said, “Well, if I make my own uniform, can I go?” He said, “Yeah.” So . . . my momma dyed, with Rit dye, my uniform. It was the most pitiful thing, seeing these guys with these nice uniforms, and I’d be playing with my little purple suit on. But, if we got really ahead in the game, they’d let me go in and play. That was the story of my life. But, I practiced, Lord knows I practiced.

Id. at 25.

20. *Id.* at 25.

I’d slip into the pool hall because the barbershop was right next to it. I’d get four or five dollars, I wasn’t very good to start with, but I played and I got to gambling playing a game called Kelly pool where you roll a bunch of dice, you get the numbers, you get the points, and I’d play nine ball. Then I started making money shooting pool, which was really great until somebody ratted on me to my parents and I was frozen out of it.

Id.

21. *Id.* at 28.

22. *Id.* at 30.

23. *Id.* at 33.

24. *Id.* at 34.

apprenticeship Overholt would never forget, and it convinced him that a career in medicine was not in the making.²⁵

Following graduation, Overholt entered the College of the Ozarks in Clarksville, Arkansas, where he received a \$25 work scholarship cleaning the college chapel. The student body was notable for the high number of older students who were World War II and Korean War veterans attending under the GI bill.²⁶ By his third year, in 1954, his father decided he should transfer to the University of Arkansas. There, Overholt began thinking about exactly what it was he wanted to do, and, after a short interview with University Dean Joe Covington, he was admitted as one of sixty students in the school's law program.²⁷

It was a rude awakening. "We had the meanest damn teachers that I ever [saw], you think *Paper Chase* is something. I mean, we had some

25. *Id.*

Lots of times we'd get a call to go up to Chocktaw Mountain. [There was a] mountain trail . . . [A] guy would pick you up . . . with a team of horses and a wagon, and take you up where the car couldn't go. We'd go up there. I learned how to be a doctor real quick. Penicillin had been invented, and that added twenty years to Uncle Doc's career. Because the first thing I did whenever anybody was sick was give them a shot of penicillin. I don't give a damn what it was. Gave everybody penicillin. He'd say, "Give 'em some of that penicillin stuff [to] make them feel better." [We] delivered babies. God almighty that was a deal. Pretty much put me off being a doctor. I sewed up people. [When there were car accidents, we would go to the scene of the wreck]. And that really got to me. We didn't have safety glass in automobiles back in those days, and nobody knew how to drive a damn car anyway. They'd run right into each other. I finally said enough.

Id. at 36.

26. *Id.* at 37.

27. *Id.*

Joe Covington was one of the great men of my life. He looked at things differently than a lot of law school deans do today, thank God. He said, "Why do you want to go to law school?" I said, "I don't have anything else to do." He said, "Well, why do you want to be a lawyer?" I said, "I think I can learn it if I get a chance." . . . He scared me sufficiently at that point. I got up to leave. [Then] he said, "Well, if you want to go to law school, you come on." That's all it took.

Id. at 43.

Yankee teachers that had come down just to practice on us.”²⁸ By the end of the first year, the original sixty had dropped to only twenty-two students, Overholt among them. But he ran out of money and announced to Dean Covington that he was finished. The Dean intervened, and he secured an assistant librarian’s job for Overholt that paid seventy-five cents an hour.²⁹

The following year, Overholt was invited to write for the Law Review, was accepted, and later sat on the publication’s editorial board. But money continued to be a problem. Here again, Covington played a role:

[A]ll of a sudden I started getting scholarships. They’d call me in and say, “We’re going to award you the Dr. Pepper scholarship.” That was the money from the Dr. Pepper machine . . . [T]hat’d be about \$50 and was real money. The miserable case note that I wrote was voted the best case note of the year and it got a \$60 prize. I’m not sure I really believed it was the best case note, but I sure took the [money]. That was how Covington took care of me and the real poor kids.³⁰

In his second summer in law school, Overholt sought employment wherever he could. He applied for a job as a mule train driver in Mount Lason National Park, California. “I’d never been particularly good around mules, but I knew mules and I figured somebody from Arkansas ought to be able to get a damn mule job. I got the job.”³¹ The trip was eventful, including a speeding ticket, desertion by his travel companions, and plenty of hitchhiking. In the end he found employment at the Imperial Hotel in Cripple Creek, Colorado, peeling potatoes and washing dishes.³² Later, through an odd confluence of events surrounding a large dinner party and an intoxicated chef, he was drafted to cook a meal and was subsequently

28. *Id.* at 44.

29. *Id.* at 49.

30. *Id.* at 50-51.

31. *Id.* at 54.

32. *Id.* at 57-58.

promoted to assistant chef at the rate of \$150 a month—a huge sum for the time.³³

The environment at the University of Arkansas mirrored the rest of the segregationist South during Overholt's time there, and earlier.

In my area of the state, the mountains, the grade school and high school had no black people whatsoever. The schools were still segregated at that time. This was pre-*Brown v. Board of Education*.³⁴ It was rumored that there were black people living out on a mountain in Van Buren County, but I never saw them. There was no question that Arkansas was old South in that regard.³⁵

There were no African Americans enrolled at the law school during this time, although one had graduated before Overholt's enrollment.³⁶ Nor was

33. *Id.*

The Holly Sugar Company . . . has rented the whole place out for all of their executives and their wives Well, the night before, the second chef gets Rocky Mountain spotted fever, and they have to medically evacuate [him]. All of sudden [the head chief] is stuck with having to either stay sober or cook. [The dinner] was fifty New York cut steaks. Now, . . . I had never in my life seen a New York cut steak. I had no idea what it was. The way we ate steak in Arkansas is you beat it with a hammer, put flour on it, and fried it. That was steak. [The head chief] gets drunk anyway. So I throw those steaks on, and the waiters are going, and everything is flying around. We put those steaks out, and I'm just guessing. I have no idea. Pretty soon a guy comes back and he says, "Here's a fifty-dollar tip for the guy that cooked the steaks." I am immediately promoted to second chef and get a raise to one hundred and fifty bucks a month.

Id. at 59-60.

34. 347 U.S. 483 (1954).

35. Oral History, *supra* note 1, at 62.

36. *Id.*

There had been one, and he had graduated before I got there, and that was to the credit of Dean Leffler. The story was that he was admitted to school but he couldn't sit with the other students. They had to build a phone booth kind of deal for him to sit in. Then the students themselves got upset by that thinking. . . . So, he was eventually integrated into the class, graduated, and by all accounts became a successful lawyer.

Id. at 62-63.

it the sort of thing average people did or aspired to do. “The chances for anybody getting the money together and getting to law school for anybody other than the scions of the established law firms . . . was very, very remote.”³⁷ He understood how fortunate he was for the opportunity.

III. Entry onto Active Duty in The Judge Advocate General’s Corps, 1957-1964

As he prepared to graduate from law school, Overholt was peppered with offers by towns in need of a lawyer, including Huntsville. “I think this one [offer] said, ‘The only lawyer we’ve got is a drunk most of the time; we need another lawyer. We’ll give you an office and loan you \$200 a month, which you have to repay.’”³⁸ After that was the military.

People ask me how did you plan your JAG career, how’d you pick it? It was very damn simple. I was going to get drafted. I had no choice. I was going to come in the Army, and I decided I’d rather do it as an officer. . . . I had another big reason. For most of my time in Fayetteville, . . . I suffered with bad tonsils. . . [T]he doctor told me that it was imperative that I have my tonsils taken out. We couldn’t really afford to have my tonsils taken out. I said, “This will be a great deal. I’ll get in the Army, and they’ll take my tonsils out, and I’ll get this free medical care.” So, I was driven by both the draft and my tonsils to join the Army.³⁹

There were other offers as well, including a respected Little Rock law firm. Dean Covington had also asked that Overholt return to the faculty of the University of Arkansas, but they would have to wait.

In 1957, Overholt entered The Judge Advocate General’s Corps at Fort Lee, Virginia, with about ninety other First Lieutenants; all of them white men. After three weeks, he and his peers traveled to Charlottesville, Virginia, for the ten-week Judge Advocate Officers Basic Course. The

37. *Id.* at 63.

38. *Id.* at 67.

39. *Id.*

town, small and rural, was still suffering from the character of its segregationist past:

[T]he schools, the restaurants, the whole bit was [segregated]. But the [*Brown* decision] had sunk in enough that there was tremendous pressure for that to change. You go back to look at the newspapers in those days, and the very progressive Charlottesville paper was arguing about how desegregation was wrong It was an eerie time, the same time Eisenhower called out the 101st Airborne Division to enforce desegregation in Arkansas.⁴⁰

At the time, The Judge Advocate General's School was located in Clark Hall, near the University of Virginia football stadium. The current facility, located next to the University of Virginia School of Law, was still only a dream.⁴¹ The course of instruction was much as it is now: a comprehensive academic program designed to prepare newly commissioned officers for military law practice. Although generally unimpressed by the vigor of the scholastic instruction,⁴² Overholt genuinely enjoyed the people he met through intramural sports and other activities. With a few minor exceptions, he had a positive introduction to the Army.⁴³

IV. Developmental Assignments: Fort Chaffee; Fort Rucker; 7th Army; 101st Airborne Division; 7th Infantry Division; The Judge Advocate General's School; and The Office of The Judge Advocate General, 1964-1975

In January 1958, Major General Overholt reported to his first assignment at Fort Chaffee, Arkansas. It was his first choice of many, and the decision to return to Arkansas delighted his family.⁴⁴ Notably, due to a shortage of Army lawyers, Overholt and several others were exempted from the Infantry or Armor Officer Basic Courses—something he dreaded.

And praise the lord, at the last minute they called down and said they were so short of lawyers in the field “[that] for this class we’re going to cancel your infantry basic training, and you are going to go directly to your assignments. We expect you . . . on your own to learn to do all the things we would expect you to

40. *Id.* at 79.

41. *Id.*

42. Major General Overholt finished in the top 10% of his class. *Id.* at 82.

43. *Id.* at 83. The exceptions involved a report of possession of alcohol in the BOQ, and a fistfight arising from a game of bridge. *Id.* at 81, 83.

know.” I think . . . the first watershed event of my career was missing infantry basic. I am still convinced had I gone, I would have gotten kicked out.⁴⁵

Fort Chaffee was a basic training installation, mostly for the field artillery. Young First Lieutenant Overholt was earning his first regular paycheck, \$242 a month, and lived with a roommate in the basic officer quarters.⁴⁶ The legal office was small, headed by Lieutenant Colonel Bob “Red” Reynolds, with five officers, most of them junior. Overholt’s initial duties included claims, legal assistance, criminal defense, and report of survey officer.⁴⁷

A critical mission of the Fort Chaffee legal office—of Captain Vick Harvey in particular—was the support they provided to General Walker, Commander of the 101st Airborne Division, sent by President Eisenhower to enforce integration of Central High School in Little Rock:

The riots, the suppression of the riots, the troops escorting the little children to school with bayonets, it sunk in big time. . . . General Walker had [received] a very unfavorable newspaper article about the brutality of his troops in the *Arkansas Gazette*, the main paper in Little Rock. He gave an order to one of his battalions to go seize the newspaper. Walker would have done it, I am sure, but [Captain] Harvey stepped in the door and said, “You can’t do that, you won’t do that, and if you do, I’ll report you.” That was pretty gutsy for a captain. . . . Walker was absolutely

44. *Id.* at 84.

When it came time for me to fill out my [assignment preference] list, I signed up for Fort Chaffee, Arkansas. . . . [N]obody else wanted it. Other guys were signing up for Paris. . . . We had a diversity of assignments. Heidelberg, all over the world. . . . I got what I wanted in Fort Chaffee. . . . [T]he real power in the JAG Corps as far as assignments went in that era was a lady named Eileen Burns, a civil servant. If Eileen liked you, you went A; if she didn’t like you, you went B; if she didn’t know you, you went C.

Id. at 82-83.

45. *Id.* at 84.

46. *Id.* at 86.

47. *Id.* at 87. At this time there was no established trial judiciary or a clear bifurcation of criminal defense and prosecution. The prosecutor, defense attorney, and law officer (judge) were co-located as peers in the same office.

crazy . . . , and that was proven true later in Germany when he was relieved.⁴⁸

On several occasions Overholt filled in for Harvey as General Walker's legal advisor, traveling to Little Rock to provide assistance. It was an eye opening experience. "General Walker was absolutely in charge, it was practically a martial law environment. . . . [I]t was an ugly situation. The feelings ran so high in that part of the state. . . . [T]he hatred was phenomenal. I can't put a label on it."⁴⁹

Another memorable and unfortunate experience for Overholt while at Fort Chaffee was witnessing the very real stories of officers separated or reduced under President Eisenhower's massive reduction in force (RIF) effort during the late 1950s. Fort Chaffee was a separation center as well as a basic training post, and they brought in officers for separation "by the bus load."⁵⁰ The RIF was another watershed event. As the Korean War cooled, the President decided to reduce the size and scope of the military, with particular emphasis upon its reserve officer corps—majors, lieutenant colonels, and colonels—many of whom had been serving on active duty since the Second World War, or earlier.

[They were either] mustered out with nothing, or if they had more than fifteen years service, and most of them did, they would be . . . mustered out as a colonel and reenlisted as a sergeant. They were given an opportunity to get their twenty years

48. *Id.* at 88

49. *Id.* at 110.

[It would have been] much better if the local law enforcement people would [have enforced the integration of the schools]. The Little Rock state patrol was very much behind the states rights people, the white supremacists. I think that was true later on in Alabama; as proven to be true, they just couldn't do it. So you had to have either troops or National Guard in the federal service to take care of it. We had no real guidance [on domestic operational law]. We were literally just flying by the seat of our pants, you know, is this right or is this wrong, rather than having any law book put together. . . . [The troopers] weren't the volunteer professionals that you have today. They were kind of "Jimmy looking at Billy" type situations. We had a few cases of soldiers refusing to do certain parts of the duty. They were immediately relieved; some were court-martialed.

Id. at 111-12.

50. *Id.* at 115.

to retire. They would retire at the highest grade held, [but serve out their remaining time at the lower grade]. . . . [I]t was so humiliating; I remember the Chief of Staff at Fort Chaffee was RIF'd. Here is the guy that is basically running the fort, and the next day he is a sergeant. That is a grateful government for you. [T]his was done without any conditioning, any counseling. There were hundreds and hundreds of officers treated that way. . . . I did a lot of handholding during that period of time, with these people and particularly the families. It caused a lot of divorces. It caused a lot of alcohol problems. It was, I thought, a tragedy⁵¹

The RIF was an experience that forever colored the way Overholt looked at personnel decisions, and influenced him toward the human aspect of promotions, separations, and assignments. "Quite frankly, it probably caused me to keep some people on far beyond when they should have been, because I thought that it was so cruel. To take someone that had soldiered as hard as they could, and then just put them on the street."⁵² He held Eisenhower responsible, and felt that "unless [Eisenhower] was running it and with a uniform on, [Eisenhower] felt it was going to hell . . . and probably contributed a lot to it."⁵³

The criminal defendants Major General Overholt was assigned to defend were generally housed in the local stockade, and often included a variety of young deserters from the Korean War who had been hiding in the hills of Arkansas and the Bad Lands of Oklahoma. "The FBI would probably bring a bus load of about fifteen in. The [agents] would go out and smoke them out. I mean the [FBI was] dogged about finding them.

51. *Id.* at 115-16.

52. *Id.* at 116.

53. *Id.*

The [FBI] would bring them in, and they would immediately go into the prison and were tried for desertion.”⁵⁴

One defendant, in particular, merits comment not so much for the crime, robbing a gas station, as the family he came from. During the initial stockade interview, Overholt asked the defendant whether there was anything he should know. His client responded, “Well, would it help me any if I told you that my uncle is on the Supreme Court?” Overholt responded, “The Supreme Court of Oklahoma?” “No,” the young man said, “the Supreme Court of the United States.” “Who is it?” asked Overholt. “Well, its Uncle Tom, Uncle Tom Clark, my mama’s brother.”⁵⁵

When asked if there were any other lawyers in the family who might be able to assist, the client responded that there was. The defendant’s cousin, Ramsey Clark, son of Supreme Court Justice Clark and future U.S. Attorney General,⁵⁶ answered the call, and drove directly from Dallas, Texas, to Fort Chaffee to help with the case.

[To make a] long story short, it was a general court-martial: the guy had been caught red handed holding up a filling station, . . . a terrible, heinous crime in those days. . . . Ramsey was a hell of a lawyer. He and I both made the closing arguments and we bonded right good. That took about a month. He stayed in Fort Smith a month. We ate together, ran around together, and investigated the case together. . . . Years later, when he was Attorney General of the United States, I ran into him again and he remembered every detail of that case.⁵⁷

54. *Id.* at 91-92.

[W]e weren’t into the high-gear type of crime [at Fort Chaffee] that I later ran into at Fort Rucker, Alabama, and certainly Europe. That is where I grew up as a criminal prosecutor and defense counsel. I thought I was getting pretty good doing these [cases], but a manikin could have done these damned desertion cases.

Id. at 94.

55. *Id.* at 117 (referring to Justice Thomas Campbell Clark (1949-1967)).

56. Ramsey Clark was the U.S. Attorney General from 1967-1969.

57. Oral History, *supra* note 1, at 118.

Judge advocates handled general courts-martial, while traditional line officers administered special courts.⁵⁸ UCMJ Article 15 punishment was negligible:

Article 15s were given out like candy, but nobody paid attention to [them]. . . . We had more miscreant dentists and doctors and whatever. It had not yet gotten into the culture of the Army at that time that an Article 15 was all that bad—that it would be a career ender. We knew it wasn't good, but it wasn't something that shocked you.⁵⁹

The social life for young officers at this time was something unrecognizable to today's Army. Officer clubs were a key focus of the culture, which actively encouraged the twenty-cent drinks and two for a quarter happy hours. Letters of reprimand for drunk driving rarely ended careers,⁶⁰ and a Staff Judge Advocate could encourage a social system based around the officers club.⁶¹ The commanding general, General Bullock, required all his officers to belong.⁶²

The general also required certain officers, Overholt among them, to date his twenty-one year-old stepdaughter. "They put together a list of eligible bachelors and there were four of us that made the final cut, unbeknown to us. We did not apply."⁶³ It was a type of duty roster. The general's aide would call, inform the officer that it was his turn to take out the general's daughter, and provide the details of the date. There were times when the general himself would go along for the ride. It was an admittedly bizarre situation that led Overholt to later wonder what the girl "must have felt having four ordered boyfriends."⁶⁴

When Fort Chaffee closed in 1959, Major General Overholt was reassigned to Fort Rucker, Alabama, known then and now as the home to Army aviation. There he took a turn at learning how to fly a plane, and enjoyed

58. *Id.* at 93.

59. *Id.* at 95.

60. *Id.* at 100.

61. *Id.* at 99-100. "[Lieutenant Colonel] Red Reynolds would say every day about five o'clock, 'What is the will of the group?' The will of the group is to go to the club, and we would all go. . . . Half the officer population that wasn't on duty would be there." *Id.* at 100.

62. *Id.* at 104.

63. *Id.* at 104-05.

64. *Id.* at 105.

the enormous leeway pilots had with army aircraft.⁶⁵ He was also the driver in a car accident that nearly ended his career, involving The Judge Advocate General, Major General George Hickman.⁶⁶

During this assignment he was promoted to captain, “the most respected grade in the Army at that time,”⁶⁷ and met and married his wife Ann.⁶⁸ Overholt met Ann on a blind date, arranged with the help of Ann’s

65. *Id.*

In those days a rated aviator could go out to [the] airfield where there was a line of L-19 aircraft, they were called Birddogs, little Piper Cub-type airplanes, very rudimentary, as far as you could see. So you could go pick your own airplane, fuel it up, sign for it, just on an honor signature, and fly anywhere you wanted to go. . . . The L-19 would fly up to the shirt factories in middle Alabama and land in pastures, and [everyone would] go in and buy shirts. We would fly to Birmingham and . . . to Montgomery. All the Air Force nurses were trained in Montgomery so we would fly up there a lot. . . . [I]t was a hell of a luxury having your own pilot and plane, and it didn’t cost a thing.

Id. at 124.

66. *Id.*

I am cursed with automobiles. . . . I am driving [the Staff Judge Advocate, Colonel Coward, and The Judge Advocate General, Major General George Hickman] back from the club. . . . I turn around to say something to General Hickman and run right into a ditch. I mean here he is bouncing around in that damn car, I swerve in and I swerve out. Colonel Coward says, “You idiot! . . . Your career is over. . . . You weren’t thinking about a career, were you?” I said, “I guess not.” . . . He then says, “You will probably get a letter asking you to resign.” The letter, which I anxiously awaited on, never came.

Id. at 123.

67. *Id.* at 114.

Making [captain] was a big deal. When we had our retirement ceremonies the last Friday of every month, . . . very seldom would you have a colonel or lieutenant colonel retiring. You would have twenty captains . . . very proud to have served twenty years They would be in their mid-forties, early fifties, [and] served all their careers as a captain. Most of them, if you go back and look, had [received] battlefield commissions or . . . OCS commissions later on, and had done their time, and made an enormous contribution.

Id. at 114-15.

68. *Id.* at 127.

sister, who was married to a highly decorated helicopter pilot. Overholt considers himself blessed by Ann and their children, who endured the many moves, separations, and challenges associated with military life. Ann, in particular, loved the sense of community she found on military posts, and from the date of their marriage onward, was actively committed to military families, her own as well as others.⁶⁹

At this point Overholt was truly enjoying the Army and the people he encountered. The work was challenging, and it offered some of the security he sought after observing the events of the Great Depression and Eisenhower's reduction in force. Because of this, and the fine work he had done, he was recommended for and accepted a commission in the Regular Army in 1961.⁷⁰ Several months later, following his wedding, he received orders reassigning him to the Seventh Army Support Command, located in Mannheim, Germany.

So the Overholts headed to Europe. They resided with a kindly German family for the first fifteen months while they waited for permanent housing. The German family spoke little or no English, but it worked. The owners rented out rooms to Americans in part out of gratitude for the Marshall Plan, and welcomed the young couple warmly. The extended time living on the economy, rather than on post, gave the Overholts a chance to see and experience Germany in a way most never would. At this time they also welcomed the birth of their daughter, Sharon, whom their German hosts simply adored.⁷¹

The difference between the small southern posts Overholt had experienced since 1957 and cold-war Germany, however, was stark: "We had an enormous force over there. Three hundred thousand troops, and I say this respectfully, all believing that the Russians were going to come down the Fulda Gap within the week. It was a high tempo environment . . ."⁷²

The Seventh Army Support Command judge advocate mission was, in large measure, to provide military justice support for far-flung units throughout Europe, including a few in Africa.⁷³ Overholt was assigned as

69. Overholt Interview, *supra* note 1.

70. Oral History, *supra* note 1, at 128-29.

71. *Id.* at 150.

72. *Id.* at 135.

73. *Id.* The operational chain of command started with the [European Combatant Commander in Chief] in Heidelberg, and went through the two corps, Fifth and Seventh Corps, to the combat units, including two armored and three infantry divisions. *Id.* at 145.

a trial defense attorney, just as the Army was fully integrating the military trial judiciary as the replacement to the earlier system of law officers. The new NATO Status of Forces Agreement also came into effect.⁷⁴

The criminal trial work was intense; trial attorneys averaged more than fifty general courts-martial a year.⁷⁵ In one special court-martial, in which judge advocates still had little or no formal prosecutorial or judicial role, Overholt observed the trial and conviction of the *wrong defendant*. “I could see the end of the special court-martial system coming and the Military Justice Act of 1968 looming on the horizon from that point on.”⁷⁶ Notably, there were no “routine” drug cases at the time, and those drug cases that did occur met with comparatively harsh penalties. Overholt’s last case involved simple possession of marijuana, resulting in a dishonorable discharge and five years confinement.⁷⁷

Overholt also observed his share of interesting characters, including Major General “Buffalo” Bill Harris, who traveled around unannounced at Thanksgiving with a turkey thermometer, testing mess hall turkeys. “If the turkey didn’t meet a certain standard, then he would relieve the battalion commander on the spot. . . . [I]f you can’t cook a turkey, you can’t win a war. That was his theory.”⁷⁸

It was a different Army. A command-wide midnight curfew was imposed which Overholt and a fellow JAG, Bill Bell, missed at least once: “I remember one night when we were just irretrievably caught. There was no way. So we got in the trunk of the car, and [our wives] drove us back to post to get us [in the house]”⁷⁹ The social obligations were also different. The commanding general’s wife at the time preferred to be referred

74. *Id.*

Going along with doing the courts-martial, . . . [the] NATO Status of Forces Agreement came into effect. It had not been there before. So we also became the liaison for those cases where the Germans wanted to take jurisdiction. Our mission was to go to the German prosecutors and get them to waive [the cases] back to us

Id. at 143.

75. Overholt Interview, *supra* note 1.

76. Oral History, *supra* note 1, at 152.

77. *Id.* at 169.

78. *Id.* at 154.

79. *Id.* at 155.

to by her husband's rank: "Mrs. Major General. It was Major General Harris and Mrs. Major General Harris. That was how you addressed her."⁸⁰

A social protocol among superior and subordinate officers was also present.

Ann got a message from Mrs. Davis, [the Staff Judge Advocate's wife], saying that she was disappointed that she and Colonel [Manly] Davis had not been properly entertained by us. I am looking at this as another career ender Ann sends a message back and says, "We acknowledge this. Please go to the officer's club and have dinner, and put it on our account."⁸¹

Such expectations would be unrecognizable in today's Army.

Germany was the first time Overholt became aware of the role of minority and female officers, something that had been sorely lacking at Fort Chaffee and Fort Rucker.

For the first time in my military career, the black officers became very much involved in the courts-martial system and in the leadership in Germany. We had a [significant] number of black majors, lieutenant colonels, and colonels that I had not seen at other posts . . . [sitting] on the general courts-martial panels we were convening.⁸²

The presence of minorities and women did not, however, transfer to the JAG Corps. "We did not have any black judge advocates; we did not have any female judge advocates. There was one black judge advocate on active duty that I knew of. . . . There were two lady judge advocates, both lieutenant colonels, and there were no successors in line."⁸³ Overholt later addressed this shortcoming when he was the Chief of the Personnel, Plans & Training Office for The Judge Advocate General, a position that allowed

80. *Id.* at 152.

81. *Id.* at 158.

82. *Id.* at 160.

83. *Id.* at 161.

him to create an institutional focus on recruiting minority and female attorneys into the Army.

In 1964 his tour in Germany was over, and the Overholts, with a new baby on the way, decided to stick with the Army for another year and headed off to the Officer Advance Course in Charlottesville, Virginia.⁸⁴ Leaning toward making the army a career, Overholt worked hard; he cared for the family and their new son, Scott; and he mostly kept to himself in the University of Virginia School of Law library. There were still no women or minorities, either on the faculty or among the student body. The university campus, however, had changed since his first experience there seven years earlier: “There were women now in graduate school, . . . a lot of them. There were black students, which there had not been before. All the real rebellious [segregationist] restaurant owners had been run out and closed down so there weren’t any problems like that.”⁸⁵

Overholt’s initial assignment out of the Advance Course was as the Staff Judge Advocate for Killeen Base, Texas, a nuclear weapons storage site, but the orders were subsequently amended for the 101st Airborne Infantry Division, Fort Campbell, Kentucky.⁸⁶ Still a captain, he was slated to be the Deputy Staff Judge Advocate.

Inherent in the assignment was the option to go to airborne school: to become a paratrooper. “[I was told] you ‘can either jump or not jump.’ Well, you don’t have to be a rocket scientist to figure out they are going to throw rocks at you if you don’t jump . . .”⁸⁷ So he got in shape, graduated from the Advance Course, and took his family to Kentucky. He later completed airborne school at Fort Benning, Georgia, bruised and sore, but otherwise fully qualified to join the airborne community.⁸⁸ Three weeks later, he was promoted to major.⁸⁹

Early on, Overholt served as the supervising attorney and Acting Staff Judge Advocate for the division—a tremendous responsibility. For the first time in his career, he was no longer working in criminal litigation, and

84. *Id.* “I didn’t know a lot about the Advance Course. I had remembered that when I was in the basic course [that] there was an Advance Course in session, of very old people.” *Id.* at 175. Overholt was about to become one of them.

85. *Id.* at 182.

86. *Id.* at 183. “I don’t know what would have happened to me if I’d gone to Killeen, Texas. I [would have] probably slashed my wrists. But, I didn’t have any more sense to say otherwise. . . . [W]e just didn’t argue much in those days.” *Id.*

87. *Id.* at 183-84.

while he missed the excitement of the courtroom, he found considerable satisfaction in working with junior officers. After about three months on the job, the incoming Staff Judge Advocate, Lieutenant Colonel Victor DeFiori,⁹⁰ finally arrived. The new SJA got along well with his young deputy, although at times he seemed puzzled by Overholt's humor and office antics.⁹¹

The legal practice at Fort Campbell was a reflection of the division's high operational tempo. Key issues involved labor strikes, procurement law, and only the most significant criminal cases. The widely used forum of summary courts-martial continued under the old system of trial and adjudication by non-lawyers. Summary courts were a fast and easy way to resolve disciplinary cases, and were popular with commanders.⁹²

In 1966-1967, the Vietnam War was an inescapable fact of life for the military, and was very much on the mind of Major General Overholt and his family. He was "apprehensive but excited" by the prospect.⁹³ Shortly before the division was scheduled to deploy, Overholt received a call from the Pentagon, reassigning him as the Staff Judge Advocate for the 7th Infantry Division, Korea.

Now that was the last thing on my mind. I mean it just never computed. I had just assumed that I'd go to Vietnam with the 101st. That was the only time I told them I did not want to go. I

88. *Id.* at 188-89.

We were flying these boxcars, C-117s, which were terrible airplanes. We start our incoming and it seems like I stand in the door for an hour just waiting to jump out. The soldier behind me said, "Look at him. Look how strong he stands there." Well, [what] they don't know is that I'm clinging on there. I do the jump, but somebody's forgotten to tell me some of the secrets, which really hacks me off. When I landed the first time I didn't do it the way you're supposed to. I just kind of crumple . . . Then we did another jump, and we did [an] equipment jump, and [then] a final jump, and they pinned the wings on and we're back to Fort Campbell.

Id. at 189.

89. *Id.* at 192.

90. General DeFiori was later promoted to brigadier general and served as the Assistant Judge Advocate General for Military Law and Operations.

91. Oral History, *supra* note 1, at 193.

92. *Id.* at 196.

93. *Id.* at 194.

wanted to go with the 101st even though they said, "It's kind of a promotion for you to be the Staff Judge Advocate of your own division." I told them I'd turn it down for now and go ahead with [the 101st]. They said, "You're not listening."⁹⁴

In June 1967, Overholt moved Ann and the kids to Ozarks, Alabama,⁹⁵ and headed to Camp Casey, Korea. It was an eye opening experience.

This damn place is primitive . . . ; third world all the way. . . . There are no cars you can recognize. . . . [F]or the most part, people are either pulling or pushing carts or walking with A-frames with tremendous loads of goods on their backs. There is no sanitation [I] look out and in the first village we come to all the houses have the straw thatched roofs as though it was the 1500s. . . . Very much a subsistence economy.⁹⁶

The daily life in Korea in 1967 was far different from the routine military personnel experience today. Officers were assigned their own personal houseboy, who provided valet and general services for about twelve dollars a month.⁹⁷ Heating fuel was rationed out for only six hours a day as decided by community vote.⁹⁸ The rest of the time people froze in the bitter Korean winter. Life revolved around the unit mess halls, which served all meals. Off-post restaurants were a limited option, if at all. Each mess had it own traditions and procedures, including the general officers' mess where Overholt dined.

You could have two drinks before dinner, if you so desired, then you lined up and marched to dinner. . . . You had a place at the table where you had to sit. There was a statue of an old Korean gentleman, and if it was in front of your place that meant you said grace that night. Each night the junior officer in the mess made the movie report. . . . [A]s soon as we had dinner, they broke the dining room down and showed the film on the wall. We were encouraged to stay for the film.⁹⁹

94. *Id.*

95. At that time, service members lost their government quarters when they deployed or were assigned to without-dependent billets.

96. Oral History, *supra* note 1, at 199.

97. *Id.* at 203-04.

98. *Id.* at 210.

99. *Id.* at 201.

Wearing civilian clothes north of Uijongbu was prohibited, and officers were forbidden from staying in the local villages past five p.m. The exceptions were the Commanding General, his deputy, the Chief of Staff, the Chaplain, and the Staff Judge Advocate. Overholt and the chaplain were part of the morality patrol that monitored the situation in the local communities, and there was plenty to monitor.¹⁰⁰

There was also the North Korean Army,

[a]nd we were very, very concerned about that. During my year there we were fighting a war on the 38th parallel. The 2d Infantry and the 7th Infantry Divisions, two active duty full strength divisions, were exchanging fire on a regular basis with the North Koreans. . . . That didn't get much press because the administration didn't want the American people to think that there was a second front opening in Korea; . . . one in Vietnam and one in Korea.¹⁰¹

The threat was real. During Overholt's tenure as the 7th Division Staff Judge Advocate, two key events thrust the Korean peninsula into the world spotlight, revealing the danger of the fragile standoff on the Korean peninsula. The first was the "Blue House Raid," in which thirty-two North Korean guerillas infiltrated Seoul in an unsuccessful assassination attempt on the South Korean President. The other was the Pueblo incident, when the North Koreans captured the *U.S.S. Pueblo* and imprisoned her crew.

100. *Id.* at 202.

Many, many of the enlisted soldiers—we'll divide this up and the Army may hate me for this, but it's a fact—had paid what were called rice bills. That is, they had a girl that they kept. In return for her pledge to only take care of that soldier, he would support her for the year that he was there. Hopefully, if he left, his replacement would inherit her and therefore she had kind of a revolving stream of care and income. Many of my enlisted soldiers had that arrangement, [and there] was nothing to prohibit it. Adultery was still a big offense so any of the married guys that were paying rice bills were very careful not to let you know about it; but the younger guys, the unmarried ones, . . . were all the time bragging about their girls. This was just the way it was. The [military] culture accepted it. . . . [T]he thought was, let the guys get out and do their things, but we'll be ready when the Communists come down from North Korea.

Id.

101. *Id.* at 203.

“We thought we were going to war over that. We were in a high state of alert and started getting bullets and things to go up and fight the [North] Koreans. I was absolutely sure that this time we were going to do it . . .”¹⁰²

This was also when the Status of Forces Agreement with South Korea came into effect. As in Germany, the civilian authorities received primary criminal jurisdiction of American personnel accused of crimes committed in the civilian community. The first case, involving a soldier accused of murdering a Korean prostitute, made headlines in both Korea and the United States.¹⁰³ Overholt sent his deputy to be the trial observer.

[T]hat court system was just miserable. It was a civil court system. They just dumped the evidence on the floor and kind of pawed through it. They even had some of the body parts there. We knew that sending an American soldier to a Korean prison would not be accepted. . . . [T]here would be outrage in the United States. So we built a Korean prison to our standards and manned it. [It was] very expensive, about two million dollars, located in Seoul. It’s still there today. So, if you were sentenced to prison [by Korean authorities], [you went] to [an] American-type prison in Seoul run by us.¹⁰⁴

By the late sixties, the military discipline was gradually slipping in Korea and elsewhere. “You could start to see the soldiers letting their hair grow a little longer. Marijuana use was becoming something to deal with. We had some drug cases. We had heroin for the first time.”¹⁰⁵ Overholt witnessed the change from the Army of the Korean conflict to the Army of the Vietnam War. The changes, while gradual, reflected the shift from one generation to another—from the “Greatest Generation” to the Baby Boom.

In the Spring of 1968, Overholt received word that he was one of four judge advocates selected for Command and General Staff College at Fort Leavenworth, Kansas. This would be his follow-on assignment after Korea, and a key milestone in his decision to make the Army a career. “I think that was the time I said, ‘Alright, let’s do twenty.’ . . . There wasn’t

102. *Id.* at 211.

103. *Id.* at 212.

104. *Id.* at 213 (subsequently changed by amendments to the SOFA).

105. *Id.* at 214.

anything wrong with retiring as a major. Many of my friends had retired as captains, so I was comfortable enough [with the idea].”¹⁰⁶

As he left Korea and his first Staff Judge Advocate assignment, Major General Overholt began to consider the traits that would help shape his leadership philosophy for the future. “I learned to be tolerant of people. [To] recognize that you are going to make mistakes, and so are they. . . . I learned that morale is more important overseas, in a place like Korea or Vietnam, than it might be in Germany or the United States.” He came to understand the challenges of men and women separated from family and living in dangerous and austere conditions, and of how it can bring out both the worst and the best in people.¹⁰⁷

Overholt, reunited with his wife and two young children, arrived in Fort Leavenworth in July 1968, where they were assigned on-post quarters. “The person we meet is our next door neighbor. As you look out our front door, their house was immediately on the left, and its Norm and Brenda Schwarzkopf, who was later a hero of the Gulf War.”¹⁰⁸ In addition to their developing personal friendship, Overholt was fortunate to be asked to join Schwarzkopf’s study group. “That is where we would pour over the maps and plot how to move divisions. We would go over to his house, and there were four other West Pointers in the group; I was the fifth. They took me on as a charity case.”¹⁰⁹ In later years, when they were both general

106. *Id.* at 215, 219.

107. *Id.* at 217-18.

Probably one of the most touching moments I’d ever had with a general officer was on Christmas Eve in Korea. A lot of the staff had gone back to the States to be with their famil[ies]. A lot of others had gone to bed. It ended up with just [Major General] Bill Enamark and me sitting at the bar. . . . [H]e was getting a little maudlin and I was getting a little maudlin and we were sitting there, not exactly feeling sorry for each other, but commiserating, and there came a knock on the door of the mess. This Korean with a kimono came in [bringing] the orphanage down to sing Christmas carols. Well, here comes . . . about twenty little boys and girls. Enamark and I start balling like babies. General Enamark says, “Hugh, how much money you got?” I said, “I don’t know but they can have all of it.” I think we gave them about three hundred dollars which is more than they’d ever gotten at one time in their life.

Id.

officers, Overholt and Schwarzkopf would regularly eat lunch together in the Secretary of the Army's Mess, located in the Pentagon.¹¹⁰

Overholt was promoted to lieutenant colonel in November 1968, and he graduated from Command and General Staff College the following May. His next assignment was at The Judge Advocate General's School, serving as the Chief of the Military Justice Department. It was an exciting time to be in the justice business, and he was at the center of it.

Remember, by now we have had the Military Justice Act of 1968, and it was just coming into force. We had to train military judges and associate military judges for special courts. We had added four hundred officers to the Corps for trial and defense counsel because you were now entitled to lawyers at special courts. It was the biggest plus-up the JAG Corps had ever had. . . . We [also] had started having all of these magazine articles written about military justice. You know, "Military justice is to justice as military music is to music." Front page of *Time* magazine and the front page of *Newsweek* about how atrocious military justice was. How unfair it was. Then we had the *O'Callahan v. Parker*¹¹¹ decision which was highly critical of

108. *Id.* at 220.

Ann and Brenda became very good friends. [Brenda] was flying for TWA as a stewardess. That's how Norm had met her. So, she still was flying when they were at Leavenworth. Because he was in school most of the time, Ann would take Brenda over to the Kansas City airport to work and sometimes would pick Brenda up and bring her back. The Schwarzkopfs, in turn, would look after our kids every now and then. Norm became particularly friendly with Scott, who was big enough now to run around, and taught him how to play bocchi. You could see they really loved children and, fortunately, within a few years they had three [of their own]. Norm had been to Vietnam. Well decorated over there. He was a major but below the zone promotion. . . . [W]e all looked up to him as being a guy that would really know this Command and General Staff stuff.

Id. at 221.

109. *Id.* at 222.

110. *Id.* at 376.

111. 395 U.S. 258 (1969). In *O'Callahan v. Parker*, the Court restricted the kinds of crimes that could be tried at court-martial to "service-connected" crimes, excluding from the military's jurisdiction criminal acts by service members that took place off of military grounds and involved neither military duties nor other service members. *See id.*

military justice. . . . There was doom and gloom [throughout] the military justice business . . . back channel criticisms by General Westmoreland . . . the My Lai cases. . . . A lot of that revolved around the instruction in criminal law at the JAG School. [It] took front and center.¹¹²

The Military Justice Department was filled with interesting and talented officers. There was Jan Horbaly, who later served as Chief Justice Berger's Chief of Staff and the Clerk of the Federal Circuit; Edward J. Imwinkelreid, who later became professor of law at University of California at Davis and one of the country's undisputed authors and authorities on the rules of evidence; Charley Rose, currently on faculty at Wake Forest University Law School; and Phil Suarez, author of the *Manual for Courts-Martial*.¹¹³ They reformulated the curriculum to focus on practical learning and presented wit, humor, and hands on application. They would make it fun, academically and socially.

[W]ith each one of these courses, we had a mandatory reception when they arrived. It was an upstairs with liquor deal. [Colonel] Ken Crawford would keep the liquor locked up in one of the rooms [in the JAG School]. He would get Rupe Hall, who was the school secretary, to unlock it. We had good bottles but we would fill them with cheap liquor, . . . trying to stretch the money as far as we could go.¹¹⁴

An important part of what Overholt and his talented staff accomplished included systemic legal education programs for commanders. Foremost among them was the Senior Officer Legal Orientation Course (SOLO). The idea was to bring senior Army leaders at the battalion and brigade command level to the school for intense legal training. The course continues to this day, and is a showpiece for the JAG Corps and a key for Army leaders who need to understand their command authority and the valuable contributions that Army lawyers can make.

For the first time, they learned what lawyers did. They learned what lawyers can do. They learned about command influence. They learned about their responsibilities as convening authorities and all the pitfalls with investigations and things like that.

112. Oral History, *supra* note 1, at 227.

113. *Id.* at 228, 230.

114. *Id.* at 232.

The Army had never done that before. . . We used real live cases. The time-honored Fort Lee Army Airfield case. The Anti-Deficiency Act. Things that still happen today with senior officers if they don't watch it. That started, more than anything else, I think, to turn that military justice crisis, or perceived crisis, around.¹¹⁵

Perhaps one of the greatest challenges for the JAG School faculty during the early 1970s was the vociferous anti-military environment at the University of Virginia. The conservative coat-and-tie culture of the 1950s and mid-1960s had given way to a student body that "had turned radical."¹¹⁶ Military members were the subject of vile and hostile gestures by university students, and despite consistent support by the administration, the feelings of unease were inescapable.¹¹⁷

Jerry Ruben and Kunstler came to the University to give an anti-war rally. It was attended by thousands. They burned the ROTC building. They came to the JAG school convinced we made germ warfare . . . and stole the cannons off the front of the building and dumped them over a mile away. It was really an unhealthy environment. We did not feel loved.¹¹⁸

This rising sense of distance from popular culture and the confrontational nature of the anti-war movement took its toll. The media carried the news of protests, and was an influential force in the way Americans perceived the war effort and the military. Casualty reports were a part of the daily news, and had a profound effect on soldiers and civilians alike. "The reports we got back from the field—universally—were that morale in the Army was extremely low and getting worse."¹¹⁹ Yet at certain levels it seemed the Army leadership either failed to recognize the declining morale or was at a loss to address it. "[T]he Army machinery would grind out that it was the best Army we'd ever had, the best soldiers we ever had, highest

115. *Id.* at 234.

116. *Id.* at 240.

117. *Id.* at 241. Overholt gives great credit to Colonel John Jay Douglass for leading many of these efforts. Overholt Interview, *supra* note 1.

118. Oral History, *supra* note 1, at 241. The cannons were recovered and currently reside at the entrance to the JAG School.

119. *Id.*

morale we'd ever had. [It] seemed to me like the Army staff was in denial; . . . totally out of touch."¹²⁰

In June 1973, Overholt left The Judge Advocate General's School for a Pentagon assignment as the Chief, Personnel, Plans & Training Office (PP&TO), Office of The Judge Advocate General. His primary responsibility was the management of personnel and policy for the Army JAG Corps, with particular emphasis on recruiting and retaining the military lawyers needed to support the Army's mission in Vietnam and elsewhere.¹²¹ Other responsibilities included officer assignments and traveling with The Judge Advocate General, Major General George Prugh.

Two noteworthy personnel policy initiatives came out of PP&TO and the JAG leadership during this time. The first concerned professional pay for Army lawyers, akin to the special pay doctors and certain other hard to fill billets were receiving—and continue to receive. The idea was to put judge advocates on par with those other professions, and to assist with retention and recruiting. While the idea had supporters, including Senator Strom Thurmond (South Carolina), it never made it through Congress.

120. *Id.* at 241-42.

121. *Id.* at 243. A few officers, however, did not merit retention, and Overholt developed a unique method for discharging them.

I remember one basic course student that came in. . . . He came to see me, and he walked in the office and he said, "I can't stand it." . . . I said, "Well, what's the matter?" He said, "Since I've gotten in the JAG Corp, I cut myself shaving all the time. . . . I'm going to bleed to death." I said, "And I take it you want out of the JAG Corps." He said, "Desperately." I was so mad that I picked up a tablet and I said, "What's your name?" He gave it to me. . . . I wrote, "Lieutenant Jones, you are discharged from the Judge Advocate General's Corps under my authority, this date, collect your pay and leave." I signed it as Chief, Personnel, Plans and Training. I said, "You take that over to the Hoffman Building and give it to the first personnel guy there and they'll give you a discharge." He went to his car, drove off, and ran down a personnel guy. [The personnel guy had] never seen anything like it. I put my phone number down there, and the guy called me up, and I said, "He's gone. He will never be in the JAG Corps. I don't give a damn what you do with him." [The personnel guy] said, "But you can't do this." I said, "It's done. He will not be back." . . . So they sent him . . . to Walter Reed, got him a physical, and the next day gave him a discharge. That became a pretty good trick. We used it three or four times. It [became known as] an Overholt discharge.

Id. at 243-44.

“We nearly got it but it was killed at the last moment by Senator Harry Byrd (Virginia).”¹²²

The second initiative was the Funded Legal Education Program (FLEP). Under this program, the government pays the law school tuition of a select group of active duty officers in exchange for an additional six-year commitment in the JAG Corps. Officers continue to collect their regular military pay and benefits while in law school. The authorizing statute¹²³ permits up to twenty-five officers per year to participate in the program, a response to a difficult recruiting and retention environment.

We decided that we really had to have this because I couldn’t recruit enough people to come in the Army, and we figured that would happen forever, and we were getting the wrong kind of person, unmotivated people that cut themselves shaving and wanted out. There was a great litany of those.¹²⁴

The story of the legislation is an interesting study in policy development.

The [Secretary of the Majority of the Senate] was a man named [J. Stanley Kimmitt], a very powerful man. . . . Stan had two sons who were West Point graduates and line officers, . . . both of whom wanted to go to law school. Once the bill was introduced, Mr. Kimmitt ran the bill right through. It is easy to get something authorized, but he was going to make sure it was funded. . . . [Bob Berry, the Army General Counsel], called me up as the Chief, PP&TO, and said, “Your FLEP bill is resting over there right now and it can either pass or fail.” I said, “Obviously there is something I can help to do to make it pass.” He said, “There is a Major Kimmitt who will be applying for this program and need I say more.” I said, “Nope, you need not say

122. *Id.* at 243. A similar effort failed several years earlier, in 1969, with legislation calling for \$50-\$200 a month professional pay for judge advocates. *See* 91 CONG. REC. H 439 (1969); 91 CONG. REC. S 8369, 8522 (1969); *see also* H.R. 4296, 91st Cong. (1969); S. 2674, 91st Cong. (1969); S. 2698, 91st Cong. (1969). Notably, the Navy opposed specific initiatives to establish a professional pay benefit for judge advocates. Memorandum from the Deputy Chief, Office of Legislative Affairs, Department of the Navy, to General Counsel, Department of Defense (21 Apr. 1969) (on file with Plans Branch, Personnel, Plans & Training Office, Office the The Judge Advocate General).

123. 10 U.S.C. § 2004 (2000).

124. Oral History, *supra* note 1, at 289.

more.” He said, “Can I tell Mr. Kimmitt that?” I said, “You can take it to the bank.” The bill passed.¹²⁵

But Overholt and his deputy had a plan. They would relinquish and delegate the selection process to an independent board, which would evaluate the applicants and make recommendations to the PP&TO and The Judge Advocate General.

We were going to do it straight up, and if Kimmitt doesn’t make it then Kimmitt doesn’t make it. . . . [T]hat’s the deal, I’m sorry and I will have broken my word to Mr. Kimmitt, but I will take the consequences which I am sure will be grim. . . . I did not sit on the board, but fortunately for Kimmitt, he had two wonderful sons who were brilliant. Bob Kimmitt’s file came out as the best, number one. . . . He was sent off to law school.¹²⁶

125. *Id.* at 290.

Kimmitt graduated from law school, . . . passed the bar, and then was selected to be a special assistant to the Secretary of Defense. I sent him a note and said, “When are you going to be able to get your branch transfer to the [Judge Advocate] basic course?” Then we would get a note back from whoever the Secretary of Defense’s [Executive Officer which said]: “We ask you to defer Major Kimmitt.” Then, “Defer Lieutenant Colonel Kimmitt;” you know, it went on and on. He never branch transferred. He never went to the basic course. Eventually, his last assignments as an Army officer were with the National Security bunch in the White House and he worked for Jim Baker, the Chief of Staff at the White House, and was very close to Baker and Reagan. Kimmitt followed Baker when he went to become Secretary of the Treasury and resigned his commission as an Artillery officer. . . . He went from being General Counsel of the Treasury Department to being Ambassador to West Germany.

Id. at 292-93.

126. *Id.*

Overholt's deputy at PP&TO was Lieutenant Colonel William Suter,¹²⁷ whose primary responsibility was the maintenance and creation of judge advocate authorizations.

Some people had been a little timid about asking for lawyers, but Bill was a genius at walking up the hall [at the Pentagon] and working the system to add two billets here and four billets there. That's where I got the idea later on as The Judge Advocate General . . . to add a lot of people to places where we'd never used lawyers before, like the special prosecutors in the federal court system¹²⁸

Part of their work was planning for the day the Vietnam War ended, and the impact the ensuing reduction in force would have on the JAG Corps. "[Y]ou didn't have to be very smart to figure out that once Vietnam was over, . . . there would be one of the biggest draw downs in the history of the United States Army."¹²⁹ The Army stood at about 1.5 million people at the time, and Overholt was preparing for a drop to 900,000 or less. There were over 2100 Army judge advocates on active duty during the war, and Overholt and Suter were committed to preserving as many authorizations as possible.¹³⁰

Overholt was also determined not to repeat what he witnessed at Fort Chafee, "where guys came in as colonels and left as privates. I didn't want any part of that so we kind of put a glide path together."¹³¹ This was part of his continuing focus on the treatment of people, and included regular efforts to treat "people right on assignments. Make them believe the promotion system was fair, and that all selections were fair."¹³² He tried to be an easy touch with officers when it came to assignments, "even when I was

127. Suter was later promoted to Major General and served as Acting The Judge Advocate General of the Army, 1989-1992. He is currently the Clerk of the Supreme Court of the United States.

128. Oral History, *supra* note 1, at 245.

129. *Id.*

130. Overholt Interview, *supra* note 1. The changes in military justice arising from the 1968 Military Justice Act facilitated hundreds of judge advocate authorizations, including at least 400 to support the new procedures for conducting special courts-martial. *Id.*

131. Oral History, *supra* note 1, at 246.

132. *Id.* at 255.

being conned” by officers angling for desk jobs in Washington or elsewhere.¹³³

Overholt was also active in expanding the role of women in the JAG Corps, and actively recruited them for service. “For one, we needed the lawyers. I believed that that was going to be our future. We were at five percent women at the time. I was trying to push that up to around ten percent.”¹³⁴ He also worked to ensure a strong balance of non-commissioned officers and adequate court-reporting personnel and equipment.¹³⁵

Also evident during the early 1970s was the creation of what is often referred to as the *Army of the Potomac*—military personnel homesteading in the Washington area.

At one time it was a badge of honor to avoid service in the Pentagon.¹³⁶ [T]hen you could see [spouses] starting to work as teachers . . . and getting jobs. Roots going down that had not been there before because most of us had never been able to afford houses before. It was the first start of the “I don’t want to leave Washington” syndrome. . . . We had more and more people that wanted to stay in the Washington area. . . . That worked for a while, but then careerism set in and the belief that you needed a tour in the Pentagon to excel. . . . So they started clambering to come to the Pentagon, . . . and they meant the Pentagon, not the legal services agency over at the Nassif building. That’s where people eventually went who didn’t want to leave Washington. It was like a holding pen over there.¹³⁷

In August 1975, Overholt’s tour at the Pentagon came to an end. He was ready to go.¹³⁸ After two busy years of assignments, policy, and travel, he was able to rest and settle down for a year at the Industrial College of the Armed Forces (ICAF) at Fort McNair in downtown Washington.

[ICAF] primarily dealt with going out and learning about the business base of the United States and the international business

133. Overholt Interview, *supra* note 1.

134. Oral History, *supra* note 1, at 250.

135. *Id.* at 253.

136. Overholt Interview, *supra* note 1.

137. Oral History, *supra* note 1, at 255.

138. *Id.* at 257. “I was ready. Two years at PP&TO is enough for anybody.” *Id.*

base, and how they interacted with the defense issues. . . . [T]he real worth of ICAF was the numbers and the quality of speakers [W]e had first call on just an enormous number of talented people. The Secretary of State. The Secretary of Defense, certainly. The Vice President. . . . Various and sundry experts in various matters, [including] petroleum, food, and the economy.¹³⁹

Overholt was promoted to colonel in early 1976, and was once again looking for a follow-up assignment. By this time he had seen the Army and the JAG Corps from nearly every important perspective: small training installations, Germany, large divisions, Korea, the JAG School, the Pentagon, and the macrovision offered by ICAF. He was ready and eager for a large installation or corps Staff Judge Advocate position. He would get his wish. I

V. Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, 1976-1978

In June 1976, Overholt assumed responsibility as the Staff Judge Advocate for the XVIII Airborne Corps and Fort Bragg, North Carolina—one of the largest combat organizations in the Army, if not the world. Fort Bragg was home to nearly 40,000 soldiers, the corps, the 82d Airborne Division, and Army special operations units, among others. It remains one of the most challenging and diverse judge advocate leadership assignments, and demands enormous things from the men and women who provide legal services.

As elsewhere in the Army, criminal justice and the challenges of downsizing following the withdrawal from Vietnam were in the forefront.

What we were dealing with was the aftermath of the Vietnam War. . . . We had semi-volunteer soldiers. We still had an enormous amount of criminal law problems, drug problems, a weakness in the NCO ranks, in my opinion, and probably in the middle officer ranks also. . . . My philosophy at the time was that they give you a package of people and you do the best you can

139. *Id.* at 258-59.

with them. You try to get the best out of them, and you do that by motivation, not threats.¹⁴⁰

Overholt believed deeply in the need to take care of the soldiers and their families, and in the professional and morale equities that come from soldier-centric programs. With the Corps Commanding General's support, he established far-reaching consumer education campaigns designed to protect military personnel from predatory salesmen, and directed soldiers to the Staff Judge Advocate Legal Assistance Office.¹⁴¹ Overholt was one of the first SJAs to take on the challenge of providing income tax assistance to all service members, and was the first to field-test electronic filing of returns. He also worked to provide transportation options for junior enlisted families living off post to give single-car families access to the commissary and Post Exchange.

I was a big fan . . . of legal assistance, and I felt we could always do more with those programs if they were proactive and we had imagination and did it. . . . We set up with the Attorney General of North Carolina . . . a kind of legal assistance to service personnel committee at the Attorney General's Office. . . . If a bunch of people came through that were ripping off the soldiers, the [Attorney General] would have the state bureau of investigation down into the area and have them scarfed up in a week and prosecuted.¹⁴²

Another key initiative was the development of what has become the Special Assistant United States Attorney Program, begun in response to unmanageable traffic offense enforcement and prosecution.

I had decided that we had so many vehicles on base and so many soldiers running red lights or stop signs or speeding and an occasional DWI, that the diversity of the various commanders in handling the cases either under Article 15, written reprimands, or oral reprimands, that there was no consistency in the way those offenses were being handled.¹⁴³

140. *Id.* at 264.

141. *Id.* at 298.

142. *Id.* at 302-03.

143. *Id.* at 268.

Overholt's idea was to remove jurisdiction over traffic offenses from commanders and cede it to the local civilian authorities. When the local U.S. Magistrate refused to take jurisdiction, Overholt took his case directly to the Honorable Frank Larkin, the federal judge for the Eastern District of North Carolina. He did so with the help of Malcolm "Mack" Howard, a Greenville lawyer and former judge advocate who had served with Overholt at the Judge Advocate General's School. Howard knew Judge Larkin. Overholt enlisted an Army plane, flew to Greenville to pick up Howard, and from there traveled to Trenton where Judge Larkin had chambers.¹⁴⁴

We went to Larkin's office. I'll never forget it. I guess we got there about one o'clock, and he said, "Gentlemen, the bar is open." He opened up a cabinet and brought out a bottle of Jack Daniels, and we talked and visited and drank until about three, three thirty, and then he said, "What you say makes sense. I don't see why [the Magistrate] doesn't try those cases." He called him up and said, "Stuart, you got any objections to trying those cases on Fort Bragg?" Stuart said, "Oh, no Sir, I've got none whatsoever." I promised that we'd do all the administration for cases. So, we brought in a bunch of special duty folks and I got one of our really great captains, Bill McGowan, to start that program, administer it, and actually try the cases if you had to. So, from that day on all our traffic offenses went to federal court.¹⁴⁵

Other issues included the high publicity discharge of soldiers trying to start a soldiers' union. "I'd rather have people on the outside suing to get back in than on the inside suing to get out."¹⁴⁶ Over the objection of the JAG Corps leadership, the Army General Counsel, Robert Barry, later opined that it was a violation of protected freedom of speech rights to prevent the union organizers from making their case. So they were permitted to set up a booth in the parking lot of the Fort Bragg Post Exchange to enlist members in their soldiers' union. "Well, it was pretty much the end of unionization because nobody showed up, . . . so they dispersed and went

144. Overholt Interview, *supra* note 1. Malcolm Howard is now a federal district judge for the Eastern District of North Carolina.

145. Oral History, *supra* note 1, at 268-69.

146. *Id.* at 272.

home. About that time Senator Strom Thurmond introduced and passed legislation to bar unions from the military.”¹⁴⁷

At Fort Bragg, Overholt also became increasingly aware of the generational change in the character of the Army culture. Of course, this had been going on throughout the sixties and early seventies, and was as much a product of changes in the Army as a reflection of America. The volunteer army had, by necessity, increased pay and broadened many basic liberties. Soldiers were marrying in greater numbers than ever before, in many cases to spouses who worked. Increased income meant increased opportunities for quality of life—for cars, off-post housing, and entertainment—outside the older close-knit military community.

Economics also played a role. Development and growth had moved military posts closer to the civilian community, and all that was available there. Media and marketing had reached military personnel and their families in the same ways it reached other Americans, and contributed to an awareness and desire for services and products unavailable on military installations. The ties that used to bind military personnel to the fabric of the on-post military community began to fray. This was a huge shift in the way officers and soldiers lived and interacted.

[T]he Army I had joined and participated in, kind of a closed society, the club systems, where we all lived together on basically the same income, we spent our time inside the gates, was rapidly changing. We had a lot of officers who bought homes in Fayetteville and lived off-post. . . . You didn't see much of that at all [at Rucker, Chaffee, or Campbell]. You just waited around or rented until you got on base and then you didn't go off post much. You congregated at least every Friday for happy hour after you were married. Had a big social event, stayed there for dinner, and then came home. That was changing.¹⁴⁸

By this time in his career, Overholt had begun to formulate the leadership tenets and management principles he employed at the XVIII Airborne Corps and emphasized in the professional development of his officers. Taken in sum, and with due credit to his own mentors, including Colonel John Jay Douglass and Major General Larry Williams, they dem-

147. *Id.* at 280-81.

148. *Id.* at 281.

onstrate a realistic and pragmatic approach to personnel leadership and the practice of military law.

1. *Be professionally competent in whatever you are doing.* “Fifteen minutes of research is worth an hour conversation.”¹⁴⁹
2. *“Delegate at every level, and train and be responsible for what you are doing.”*¹⁵⁰
3. *“Nobody is indispensable, so push the work down, supervise it, give good guidance.”*¹⁵¹
4. *“Once you make a decision, don’t worry about it. It is done and the lumber is cut, so go on.”*¹⁵²
5. *“Put everything into perspective whenever you get problems.* John Miller’s great phrase was, “Don’t worry about ants and fleas while elephants are running lose.”¹⁵³
6. *Look like a soldier.* “You get haircuts, you shine your shoes; . . . don’t look like you’ve slept in your uniform.”¹⁵⁴
7. *“Don’t have rigid work habits.* Be flexible with your people. Eight to five at the desk every minute doesn’t mean you are productive all the time.”¹⁵⁵

149. *Id.* at 295.

150. *Id.*

151. *Id.*

152. *Id.* at 303. “That has served me personally in great stead. I am blessed that I can make a decision. I am very concerned before I make [them], and I look at everything, I hope, and I hope I do right, but you just got to move on.” *Id.*

153. *Id.* “Many of us tend to worry about little things when there are more important things of impact. How does having a flat tire compare to lung cancer? I mean, whenever you put things into perspective, it makes a lot of difference.” *Id.*

154. *Id.* at 295.

I would often send people to get haircuts. I remember one of the bad captains I had at XVIII Airborne Corps. I sent him four times in one day to get a haircut. He was pushing me, you know. Then he told me he was out of money, and I gave him five dollars and sent him back again.

Id.

155. *Id.* at 296.

8. “*Don’t do busy work.* If there is nothing to do, don’t try to make something up.”¹⁵⁶
9. “*Don’t ever keep bad news from your boss. . . . Bad news is bad news and it doesn’t get better with time.*”¹⁵⁷
10. *Learn to prioritize.* Murder cases come before preparation of the constitution for the Commanding General’s wife’s poodle club.¹⁵⁸
11. “*Do what is right, look at the big picture.*”¹⁵⁹ Because something is legal doesn’t mean it is right. “Integrity is the hallmark of everything we do.”¹⁶⁰
12. *Don’t worry about what your peers are doing.* “Saw the wood in front of you. Do your own work and it will work out for the best. Don’t worry about someone else.”¹⁶¹
13. “*Do the best you can with the hand you are dealt.* You can’t change things beyond your control, and sitting around bitching about it isn’t going to change anything.”¹⁶²
14. “*Don’t hesitate to go forward with your ideas.*”¹⁶³
15. “*Never forget your loyalty; never forget your roots.*”¹⁶⁴
16. “*Treat people right.*”¹⁶⁵

In June 1978, Major General Overholt’s tour at XVIII Airborne Corps and Fort Bragg was unexpectedly cut short by word of a new Pentagon assignment, this time as the Special Assistant for Legal and Selected Policy Matters, Office of the Deputy Assistant Secretary of Defense (Military

156. *Id.*

157. *Id.* “I didn’t mind bad news. I didn’t welcome it, but I did mind bad news delayed, which meant it was harder and harder to cure.” *Id.*

158. *Id.* at 297.

159. *Id.*

160. *Id.* at 295.

161. *Id.* at 304.

162. *Id.* at 305.

163. *Id.* at 306.

164. *Id.* at 314.

165. *Id.* at 305.

Personnel Policy), in the Office of The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). Overholt was in a joint services office, working for an Air Force Lieutenant General.

Overholt was responsible for aspects of personnel policy related to Department of Defense POW/MIA issues, drug policy, the commissary and Post Exchange systems, and other defense personnel policies.¹⁶⁶ In this capacity he had a very close relationship with the Department of Defense General Counsel's Office.¹⁶⁷ Specific projects included settlement of a major federal lawsuit arising from the administrative procedures of discharge review boards,¹⁶⁸ and dealing with the congressional committees and subcommittees providing oversight and funding for the commissary and exchange systems.¹⁶⁹ The exposure to the workings of the Department of Defense was a valuable learning experience.

Number one, I learned a lot about power, which I had not known before. I learned about how DOD operated. I got to know the Department of Defense General Counsel and all the deputy general counsels who . . . were a lot of help to me and to the Army at a later time. . . . I found out the value of information and being able to go out and use that to help the Army.¹⁷⁰

These were lessons Overholt would put to good use. In the spring of 1979, there were hints that he would be moving on. He was recommended for the job of a retiring Department of the Army deputy legal counsel, but was discouraged from taking the job by Major General Larry Williams, the Assistant Judge Advocate General. "It would have been a big pay raise; . . . a life sentence to the Pentagon, but in a fair, interesting position."¹⁷¹

166. *Id.* at 308.

167. *Id.* at 309.

168. *Id.* (referring to *Urban Law Institute of Antioch College v. Sec'y of Defense*, No. 76-530 (D.D.C. Jan. 31, 1977)).

169. *Id.* at 312-13. Major General Overholt kept regular contact with the Army JAG leadership during this time, and provided routine briefings to The Assistant Judge Advocate General on issues affecting the Army. *Id.*

170. *Id.* at 315.

171. *Id.* at 317.

Shortly thereafter, Overholt learned he had been recommended for promotion to brigadier general.¹⁷²

VI. The Assistant to The Judge Advocate General for Military Law, 1979-1981

Overholt was promoted to brigadier general on 1 June 1979, and selected to serve as the Assistant to The Judge Advocate General (ATJAG) for Military Law.¹⁷³ The other brigadier generals at the time were located at the Army litigation center in Arlington, Virginia, and in Heidelberg, Germany. His responsibilities included oversight of various divisions within the Office of The Judge Advocate General, among them the Criminal Law Division, Administrative Law Division, Legal Assistance Division, and Labor Law Division. His initiation as a general officer included the generals' "charm course" that introduced all the new brigadiers to their new status, and each other.

[W]hat was great was that you got to meet a lot of other people that were now in your year group, one of which was Colin Powell. He was promoted to brigadier general the same time I was. Bill Suter had worked with him at Fort Campbell and knew him well when he was a brigade commander out there. So I paired up with Colin, and Ann got to know Alma well that two weeks.¹⁷⁴

During his short two years as the ATJAG for Military Law, Overholt took it upon himself to develop and expand upon the personal relationships between the JAG Corps and the Army General Counsel's Office. The Gen-

172. *Id.* at 319.

173. *Id.* at 321. Brigadier General William Persons helped promote Overholt, and before [Persons] retired, he ceded his general officer dress mess uniforms to the new brigadier general.

I inherited all of it. Those were my uniforms, and I wore them until the day I retired. . . . I had to buy a regular green uniform every now and then, but the dress uniforms I have now are General Persons' that he gave to me. They fit perfectly. He was a small man. I couldn't get in them now without cutting the back out of them, but if they bury me in them, I understand they can do that.

Id.

174. *Id.* at 322.

eral Counsel at the time was Jill Vollmer. While “other JAGs had always kind of kept their distance from the General Counsel,”¹⁷⁵ Overholt recognized the intrinsic value of the liaison and its importance to the JAG Corps.

As the personal legal advisor to the Secretary of the Army, the General Counsel is uniquely positioned to provide, and potentially expand, civilian legal services within the Army.

That is how the major acquisition policy advice was taken from The Judge Advocate General, . . . viewed as just a horrible event by General Prugh and the start of the denigration and disintegration of the Judge Advocate General’s Corps. And all of us viewed it with similar fear that pretty soon it would be military justice, and then it would be administrative law, and [eventually] there would be [nothing] other than the statutory position of The Judge Advocate General.¹⁷⁶

Major General Overholt readily admits that his short tenure as a brigadier general may have been too short to develop some of the perspective one might expect; but, he had an interesting edge in his neighborhood car pool that included Major General Al Harvey, The Judge Advocate General. They drove to work together every day.¹⁷⁷ In the small things that people talk about in casual conversation, in the bits of wisdom and anecdotal lessons, Overholt fine-tuned his earlier experiences in preparation for greater leadership. That opportunity came in early 1981 when he was selected for promotion to major general and appointment as The Assistant Judge Advocate General.

VII. The Assistant Judge Advocate General of the Army (TAJAG), 1981-1985

One of Major General Overholt’s first responsibilities as TAJAG was to serve as the designated liaison with the new Army General Counsel. Jill Vollmer’s replacement, Sara Lister, did not have the warmest relationship with the new TJAG, Major General Hugh Clausen.¹⁷⁸ Overholt’s job was to run interference on behalf of the JAG Corps, and to facilitate policy

175. *Id.* at 326.

176. *Id.* at 317.

177. *Id.* at 328.

178. *Id.* at 334.

solutions between the Army General Counsel and the Office of The Judge Advocate General.¹⁷⁹

General Overholt had many friends there, among them the Honorable Tom Taylor, a former judge advocate with experience in the Administrative Law Division, who currently serves as the Senior Deputy General Counsel in the Army General Counsel's Office. "Tom went up there and has proved over the years to save many very critical situations and to be a real good friend of the Corps and a personal friend to me."¹⁸⁰

The JAG Corps' relationship with the Army General Counsel became increasingly important. In 1979-1980, the Cuban boat lift imposed tremendous challenges on the government as it struggled to process and administer countless waves of Cuban refugees washing up on the Florida coast.

And boy did they come, by the thousands. Under President Carter's policy, we were going to open our arms and be the haven for all of these freedom-seeking people. Well, it didn't take long to figure out these weren't the freedom seekers. These were the psychopaths, the murderers, . . . the criminally insane. . . . Literally, Castro cleaned his prisons out, one after the other, put them on a boat, [and] brought them to [Florida] [W]e had to find a place to put them. So it was determined that the Army would re-open Fort Chaffee, Arkansas, in order to accommodate twelve thousand Cubans¹⁸¹

[T]he Army got the mission to run it. . . . We got all the Cubans out there, and in about two weeks they rioted and invaded Fort Smith, or tried to. We had to call out two battalions of MPs. . . . [T]here was a firefight, and [the MPs] ran [the Cubans] back on the base and put more concertina wire up. President Clinton, Governor Clinton at the time, is calling Carter up, saying, "What in the hell have you done to me here. I have accepted these people, and they are all criminals." It came down to [President Carter telling] the Secretary of the Army, "You straighten this out." As if he could.¹⁸²

179. *Id.* "I became kind of the designated guy to deal with the General Counsel. I spent a lot of time up there." *Id.*

180. *Id.* at 335.

181. *Id.* at 336.

182. *Id.*

Major General Overholt, Sara Lister, and Tom Taylor were dispatched to Arkansas to “straighten out” what they could. They were in good company. Other government agencies involved in the effort included the Immigration and Naturalization Service to sort personnel; the border patrol for additional security; and the FBI and CIA looking for spies. “In general, I would have to say it was a mess.”¹⁸³ Together they developed a report for the Secretary of the Army regarding the conditions they observed, with recommendations for how to deal with the many complicated legal issues associated with the influx of refugees.

The trouble with the Cuban refugees was only one of several problems haunting the Army and the country in the waning years of the Carter Administration. Years of double-digit inflation had critically eroded military pay, making it extraordinarily difficult for personnel to live on the local economy, especially the high-cost Washington area. “We really tried to stop [assigning captains to the capitol region] and tried to freeze those assignments as best we could. Housing loans were running fourteen to sixteen percent for a thirty-year loan. Our pay was in no way catching up with inflation.”¹⁸⁴

[President Carter’s] famous television talk where he came on and wore his sweater and told everyone that the White House thermostat had been turned down to sixty degrees in order to conserve energy was probably the low point of the whole deal. . . . He had the Pentagon . . . turn off two out of every three light bulbs to save energy. We had to turn the hot water off so there was no hot water in the restrooms, only cold water. All of that didn’t amount to a bucket of spit at the end of the day. We had had free parking at the Pentagon since time immemorial. He thought that it was time that everybody paid for parking [to encourage car pooling]. So we set up this terrible bureaucracy where you had to go down and buy a parking pass. . . . It was just horrible. . . . [T]here was a big sigh of relief [when Reagan was elected] because he had run on a ticket of building the military back up.¹⁸⁵

President Reagan’s election meant money for the Army, “just tons of it that we had never had before,”¹⁸⁶ and new leadership. Sara Lister, a

183. *Id.* at 337.

184. *Id.* at 340.

185. *Id.* at 339-41.

Carter appointee, was replaced by Dale Spurlock. “A lot of the real liberal policies that had hit the Army during the Carter Administration were immediately terminated by Reagan.”¹⁸⁷ The military’s operational tempo increased dramatically in response to the new President’s focus on fighting communism and his willingness to engage America in places like Nicaragua, Grenada, El Salvador, and elsewhere. “Our overt way of doing that was just by building more planes and bombs and building our forces up and to make the Russians go bankrupt trying to keep up, and it was spectacularly successful.”¹⁸⁸

Army special operations were maturing in this active operational environment, a community that, until now, had minimal judge advocate visibility. Conventional legal issues relating to misconduct, acquisitions, ethics, and federal law were often challenged by the necessities of unconventional missions and mission units.

There is always the ying and yang; are you willing to tolerate a certain amount of misconduct in order to keep an operation covert if it is doing the thing it is supposed to do for the country? I will tell you the answer in my mind is absolutely yes. You can do far more damage to the country by blowing one of those operations than you ever can by finding other ways to handle misconduct. Now, I would never do that with a murder or a rape or something like that, though I thought a time or two the murder part was going to get tested. It never was.¹⁸⁹

The result was a vastly increased oversight role for the Army General Counsel and the JAG Corps. The Department of Defense General Counsel wanted Major General Overholt and Tom Taylor read into every Army program. “So we got to hear some of the most fantastic things I have ever heard in my life.”¹⁹⁰ Much of what special operations did came under review, with particular emphasis on fiscal law and budget review, and a

186. *Id.* at 341.

187. *Id.* at 339.

188. *Id.* at 343.

189. *Id.* at 345.

190. *Id.* at 348.

pecially trained judge advocate was assigned to provide counsel for special operations mission units.¹⁹¹

About this time, in the early 1980s, computers and information technology were beginning to evolve into commercially viable management tools. Major General Overholt recognized the potential in the new technology, particularly as it might improve the massive undertaking of administering the Army claims system. This was possible, in large part, because of the flow of money available from the Reagan Administration and its eagerness to modernize the Army system.¹⁹² Automation of the JAG Corps would require a change in thinking on the part of Army lawyers, and plenty of education.

I went up to the second floor of the Claims Service in Mannheim and there was this mainframe IBM computer that was as big as a dumpster. And it was clear to me that there was nobody in the JAG Corps and nobody in the Department of the Army who had one clue as to what this could do and how to use it. I went over [to the Chief of Claims] and said, "What the hell is this thing? Give me my briefing." He said, "Well, we're not sure yet but it's our computer." Then I walked all the way around it, and it became very clear to me that it wasn't plugged in. . . . That computer was never plugged in. It was bought obsolete and dumped. I don't know how it got into the system. I don't know how we bought it. I don't know how we got rid of it. . . . We went back and started our computer office. I got a West Point FLEP officer named Bernie Carpenter who had a real interest in computers. I told him, "Bernie, find out how you get money to buy computers, find out what they can do for us, and then write a program, a plan. . . . I don't want big computers, just little ones, and lots of them."¹⁹³

The Chief of Staff for the Army at the time was General Edward Myer, who also had distinct ideas about modernizing the Army and moving it forward into a thoroughly current fighting force. He was a "visionary

191. *Id.* at 348-49.

192. *Id.* at 349.

193. *Id.* at 349-50.

and had really rock hard integrity,” and was clear in what he saw as the state of the Army, and how it should evolve.¹⁹⁴

Normally the Chiefs and the Chairman of the Joint Chiefs of Staff go over [to Congress] and say, “It’s the best military force we have ever had and we can make do with the money we’ve got. We are just in super shape and we love you all.” . . . [General Myer], to his credit, said, “We have a hollow Army. We have no Army. It is plagued with bad soldiers, drug issues, poor leadership, and I wouldn’t want to fight a war with them.” Everybody dropped their teeth. But he stuck to his guns. He said, “Here is what you can do to fix it.” That started the Army on the road of recovery from the loose discipline. . . . He wanted to develop the image of the Army [into] the old sharp fighting outfit it had been¹⁹⁵

Flush with the resources the Reagan Administration was providing the military, the JAG leadership looked for opportunities to institutionalize long-term investments in the training and fielding of Army lawyers. One of the first places they looked was The Judge Advocate General’s School. “We had moved into the new JAG School some years before, but with the Reagan deal in, with a lot of money around, [I took the recommendation of] Bill Suter . . . and I said, ‘Let’s add an auditorium and another bunch of rooms and build a big bar at the JAG School’”¹⁹⁶ The Judge Advocate General agreed.

[T]he guru for military construction was a congressman from California, who everybody thought hated the Army, but when he found out it was going to be for lawyers who defended soldiers, he thought it was an excellent idea and took it on as his cause, and the budget flew right through.¹⁹⁷

By the mid-1980s the JAG Corps was confidently evolving as a fully vested member of the revitalized Army. Automation was ongoing, the expansion of the JAG School was funded, and military personnel were

194. *Id.* at 351.

195. *Id.*

196. *Id.* at 354.

197. *Id.* The facility at The Judge Advocate General’s School was funded and built by the University of Virginia. The Army leases the property for the JAG Corps.

benefiting from the increased pay and benefits implemented by the Reagan Administration:

Now we are really starting to cook and recover from the Vietnam War. We are getting more favorable press. The military justice system isn't under attack. We are finding a lot of roles and missions for lawyers we haven't had before [T]o get ahead in environmental law, we establish the Environmental Law Division and a team of environmental litigators. . . . We're doing a lot of very sophisticated litigation. The Justice Department attorneys, [who] had been very disdainful of judge advocates, are embracing us because we have infiltrated so many judge advocates into the Justice Department. . . . [We also did this] in the White House. . . . Anytime we get an opportunity, I want an officer there, one of our officers, and I want them to be top notch.¹⁹⁸

With his background in personnel policy, Major General Overholt understood the value and mechanics of expanding the judge advocate role in other government agencies. He helped identify missions and manpower authorizations for judge advocates in the Department of Justice, Department of Defense,¹⁹⁹ Army hospitals,²⁰⁰ and the Special Assistant U.S. Attorney program.²⁰¹ Overholt believed deeply in the idea of leveraging the JAG Corps by integrating officers into a variety of billets where they would experience a diverse practice, bring value to the organization, and represent the Army's interests. Imbedding judge advocates in other organizations also makes it more difficult to cut the positions once they are cre-

198. *Id.* at 356.

199. *Id.* at 357.

200. *Id.* at 359.

Medical malpractice all of a sudden became a really, really big issue. It had always been there, but not with the ferociousness that happened in the late '70s and early '80s, . . . and we had to really put a lot of time and effort into establishing a health care practice. That's when we put the risk management lawyers into hospitals

Id.

201. *Id.*

ated. It is a credit to the general success of these initiatives that most remain part of the mission and character of the JAG Corps today.

VIII. The Judge Advocate General of the Army, 1985-1989

In July 1985, Major General Overholt was sworn in as the thirty-second The Judge Advocate General of the Army. His former deputy at PP&TO, Brigadier General William Suter, was promoted to major general and sworn in as The Assistant Judge Advocate General. They realized their time would be short—only four years—and were determined to continue to move the JAG Corps forward in the manner in which it prepared Army lawyers and delivered legal services to the Army.

One of their first projects involved the accreditation of the Officer Graduate Course for the grant of Masters of Military Law degree (LL.M.). This would recognize the difficulty of the program, broaden its curriculum, and draw resources from the Army and military attorneys from the other services. Accreditation would raise the profile of the school and the Army legal education program, making it the Defense Department's premier center for legal training. "I thought the time was ripe, and the way to do it was to get Congress to mandate it"²⁰²

Lieutenant Colonel David Graham, serving as the Chief of the International Law Division at The Judge Advocate General's School, was tasked with putting together and staffing the proposal, then finding a sympathetic sponsor in the House of Representatives. This sponsor was Representative Patricia Schroeder, chairperson of one of the subcommittees in the House Armed Services Committee. The Judge Advocate General's School had previously been accredited by the American Bar Association for purposes of certain continuing legal education. The new legislation specifically authorized the school to grant Masters of Military Law degrees, not unlike similar legislation authorizing the Navy Post-Graduate School at Monterey, California, to issue advanced management degrees.²⁰³

A second initiative concerned professional ethics for Army lawyers. "We were getting very heavy into ethics at this time, and one of the things we decided to do was write a Code of Professional Responsibility for The Army Judge Advocate General's Corps."²⁰⁴ The Air Force and Navy

202. *Id.* at 362.

203. *Id.* at 365.

Judge Advocates General opposed the idea, in part because they understood that if the Army had one, they would be forced to have one as well.²⁰⁵ Overholt sold General Wickham, the Chief of Staff, on the idea, and so it was done. A similar effort was underway to rewrite and update the *Manual for Courts-Martial*.

Until then, Army litigation services were dispersed in a decentralized organization spread across more than one office. There was a genuine desire to bring all the pieces together in a single location to create a common case management system. “They were in the Pentagon. They were in the Nassif Building. . . . We put them all together, and they were the first to move out to Ballston, Virginia, . . . and I think they’ve been pleased to be there.”²⁰⁶

At the same time, Major General Suter was busy working the case of creating and maintaining judge advocate authorizations throughout the Army, including a general officer billet for Europe.

Bill Suter is doing a wonderful job because he is so good at fighting the battle of [Army authorizations] [W]e are not only maintaining our strength, but we’re adding to it through these various programs, and he’s getting the billets squeezed out of them. . . . He was able, when we were at PP&TO together, to go down and find the [mid-grade civilian employee] who had the ability, the authority, to change the [personnel authorizations] to make a general officer billet. That guy’s car had been wrecked on the auto-train going to Disney World, Florida, and Bill agreed to settle the claim for [him] in exchange for the general officer billet, and many, many JAG brigadiers should be thankful²⁰⁷

A related initiative was the care and feeding of the Center for Law and Military Operations (CLAMO), located at The Judge Advocate General’s School. The Center has expanded substantially and continues to provide battle focused legal support to judge advocates around the world. This was in part a response to the high operational tempo that followed the military

204. *Id.* at 366.

205. *Id.*

206. *Id.*

207. *Id.* at 368.

intervention in Grenada. The Center was designed to support and supplement the JAG Corps' newly developed concept of operational law.

[Secretary of the Army] Jack Marsh had directed the creation of the Center. . . . I thought [operational law] was a neat idea, and I was looking at it as an opportunity, too, to get more JAG [authorizations]. We would give them a special designator as an operational lawyer. The Marines loved it when it was briefed. They were going to pile in on it. The Navy and Air Force were a little bit more, you know, "What the hell are y'all trying to do again" ²⁰⁸

On the lighter side, the JAG Corps was fully engaged in the new Army regimental system approved in 1986. Major General Overholt authorized a contest for the new Judge Advocate regimental crest, which is now worn by all judge advocates, and received approval for it by the Institute of Heraldry.²⁰⁹ There was also the new regimental march, regimental balladeer, pizza, chorus, fish, and cloak.²¹⁰

It was a good time for the JAG Corps because we had money, and we had a lot of respect. We had access to the Secretary of the Army . . . [and] to the Chief of Staff, and we had [The Vice Chief of Staff for the Army, General Max Thurmond,] looking after us.²¹¹

The appearance and make-up of the officer corps was also changing. Overholt and Suter, both PP&TO alumni, were keenly aware of the challenges of attracting and retaining women and minorities in the JAG Corps. It was as difficult as it was important, but the signs of success were everywhere. By the late 1980s women had entered the legal profession in large numbers, and were entering military service in ever growing numbers. "So we're getting a lot of super sharp women in the JAG Corps, and they're going all over the world, Europe, Japan, Korea. They're serving up on the DMZ. They're in all the divisions. They're everywhere, and they're form-

208. *Id.* at 377.

209. *Id.* at 369.

210. *Id.* at 369-70.

211. *Id.* at 370.

ing a good part of the Corps.”²¹² The trouble was they rarely stayed long enough to achieve real leadership status.

We had some ladies identified that were just burning up the world and would have been great, and then would break your heart and come in and say, “We’ve decided to get out,” at the grade of lieutenant colonel [O]ur biggest role model was [Colonel] Joyce Peters, . . . but right immediately behind her we didn’t have anybody. . . . I can name others, . . . but we just needed more of them.²¹³

Minority recruiting had its own challenges. “We very actively recruited them, but they had a lot of other opportunities, too; you have to realize that. We tried to get them in the FLEP program, . . . and [we] had some modest success there.”²¹⁴ The JAG Corps did succeed in recruiting more minority officers than ever before, and did a good job of accessing minority lawyers in numbers greater than their overall percentage in the legal profession. There were a number of highly successful minority colonels during this time, including Kenneth Gray, who would later become The Assistant Judge Advocate General.²¹⁵

Looking back, Major General Overholt accomplished much of what he set out to do. Had there been more time, he freely admits he would have breathed more life into the Army legal assistance program, where “we were not nearly as aggressive in helping soldiers and their families as we should have been.”²¹⁶ He would also have done more to integrate the Army National Guard and Army Reserve with the active duty army, and focused more on special professional skills development programs like the acquisition law program.²¹⁷

General Overholt has candidly stated that his tenure as The Judge Advocate General, while immensely rewarding, was also not without its difficult moments.²¹⁸ For example, he expressed his continuing disappointment over the outcome of a number of events related to several highly

212. *Id.*

213. *Id.* at 373.

214. *Id.* at 371.

215. *Id.*

216. Overholt Interview, *supra* note 1.

217. *Id.*

218. Oral History, *supra* note 1, at 371. “There were some grim things, there were some great things, a lot of things were done, a lot of mistakes were made.” *Id.*

publicized “command influence” cases that occurred during his time in office—and reaffirmed his view that incorrect decisions were made concerning several of the individuals caught up in the controversy surrounding these cases.²¹⁹ In the final analysis, however, at the end of his tour as The Judge Advocate General, he was able to look back on his tenure with measurable and justifiable pride.

IX. Private Citizen, 1989-Present

Major General Overholt returned to civilian life in June 1989. Following his departure from active duty, Overholt was offered a position with a prominent North Carolina law firm with a Washington, D.C. office, a judicial seat on the Court of Veterans Appeals, and an appointment as the chief of staff for Senator Strom Thurmond.

Senator Thurmond, the South Carolina senator, called me and told me that I was going to be his new chief of staff, and that he needed me over there by next Wednesday. . . . I told him I wasn't interested due to the Dual Compensation Law [offsetting military retirement income and government pay]. . . . He said, “Don't worry, I'll change it.” And he most certainly would have.²²⁰

He finally accepted a position as a partner with Maupen, Taylor, Ellis & Adams, a fairly prominent communications lobbying firm based in Raleigh, North Carolina, with an office in Washington.²²¹ The Overholts built their dream home in Mount Vernon, Virginia, and settled into what they believed would be their retirement years. But after three years, which included a promotion to managing partner, Overholt had tired of “the business of practicing law”²²² and of the hectic life in Washington.

After several false starts, in 1995 Major General Overholt joined two former associates at the firm of Ward & Smith, in New Bern, North Carolina. Leveraging his keen negotiation skills, his primary practice area now

219. See *United States v. Thomas*, 22 M.J. 388 (1986); *United States v. Treakle*, 18 M.J. 646 (1984); see also S. REP. NO. 102-1, REPORT ON THE INVESTIGATION OF ISSUES CONCERNING NOMINATIONS FOR GENERAL OFFICER POSITIONS IN THE JUDGE ADVOCATE GENERAL'S CORPS (1991).

220. Oral History, *supra* note 1, at 397.

221. *Id.* at 398.

222. *Id.* at 401.

involves lobbying, including on behalf of the State of North Carolina on military issues, and for an assortment of various commercial interests.²²³

Ward & Smith,²²⁴ a large firm by North Carolina standards, promotes and retains a collegial professional environment emphasizing excellence rather than the business of practicing law. Their focus is the client. Attorneys don't compete against one another. No one keeps track of who has the most billable hours. "The [closed compensation] model is totally different from any I know that exists. . . . We don't know how much money we collect. We don't know how much we bill. We don't compare [E]very case that comes is a firm case."²²⁵

As for the bright lights of Washington, Overholt doesn't miss them.

Not at all. Not one bit. . . . I never thought much of people who stayed in Washington and continued to hang around the Pentagon and go to the CG's mess. . . . I thought they aged too fast. I think you ought to always stay busy. I will work until I die in some capacity; I'm convinced of that.²²⁶

At the end of the day, the shoeshine boy from Arkansas had finally returned to the country, his remarkable military career behind him. The lessons of that experience, and of the evolution of Army culture from 1957-1989, are important for individuals interested in appreciating the Army of today, as they also look to the transformed Army of tomorrow.

223. *Id.* at 403.

224. For information on Ward & Smith, see their Web site, [http:// www.wardand-smith.com](http://www.wardand-smith.com).

225. Oral History, *supra* note 1, at 406.

226. *Id.* at 405.

**THE SIXTEENTH WALDEMAR A. SOLF LECTURE IN
INTERNATIONAL LAW¹**

MICHAEL N. SCHMITT²

1. This is an edited transcript of a lecture delivered on 28 February 2003 by Professor Michael N. Schmitt to the members of the staff and faculty, distinguished guests, and officers attending the 51st Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, United States Army, on 8 October 1982. The chair was named after Colonel Waldemar A. Solf. Colonel Solf (1913-1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; as the Staff Judge Advocate of both the Eighth U.S. Army/United States Forces Korea/United Nations Command and the United States Strategic Command; as the Chief Judicial Officer, United States Army Judiciary; and as the Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, Colonel Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as chairman of the U.S. delegation to the International Committee of the Red Cross Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, Colonel Solf again retired in August 1979.

In addition to teaching at American University, Colonel Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

2. Professor of International Law, George C. Marshall European Center for Security Studies. A retired United States Air Force judge advocate, Professor Schmitt was elected a Member of the International Institute of Humanitarian Law in 2002. LL.M., 1991, Yale Law School; M.A., 1996, Naval War College; J.D., 1984, University of Texas; M.A., 1983, and B.A., 1978, Southwest Texas State University.

***Bellum Americanum* Revisited: U.S. Security Strategy and the
*Jus ad Bellum***

I. Introduction

Five years ago, I published an article entitled *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*.³ Its premise was quite simple—the law of armed conflict is in a dependency relationship to conflict, one that is usually reactive. Although proactive examples of limiting conflict exist,⁴ normative reactions thereto are far more common.⁵ For instance, the International Committee of the Red Cross is currently campaigning for a new Conventional Weapons Convention protocol on explosive remnants of war.⁶ This effort responds to the fact that in (and after) certain conflicts,

3. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051 (1998).

4. For example, the bans on blinding lasers and biological weapons. Additional Protocol to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Blinding Laser Weapons, Oct. 13, 1995, 35 I.L.M. 1218; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 164.

5. The U.S. Civil War motivated adoption of Professor Francis Lieber's "set of regulations" (Lieber Code) as General Order No. 100, U.S. Dep't of Army, Instructions for the Government of Armies of the United States in the Field (Government Printing Office 1898) (1863), reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 3 (Dietrich Schindler & Jiří Toman eds., 1988); the Battle of Solferino during the Italian War of Liberation, and the resulting monograph *Souvenir de Solferino* by Henri Dunant (1862), led to creation of the International Committee of the Red Cross; the Russo-Japanese War of 1904-05 was followed by the Geneva Convention of 1906 and the Hague Conventions of 1907; World War I was followed by the 1925 Gas Protocol and the 1929 Geneva Convention; World War II was followed by the Geneva Conventions of 1949 and the 1954 Cultural Property Convention; and Korea, Vietnam, and the "wars of national liberation" were followed by the Additional Protocols to the 1949 Geneva Conventions, the Environmental Modification Convention, and the Conventional Weapons Convention. Each of the aforementioned conventions is available at the ICRC documents Web site, <http://www.icrc.org/ihl>.

such as that in Kosovo, explosive remnants present a greater danger to civilians than even anti-personnel mines.⁷

If law is typically reactive, by considering future conflict it might be possible to identify: (1) prospective lacuna in the law of armed conflict; (2) facets of that law that might be at risk; and (3) characteristics of future conflict that could potentially enhance the law's effectiveness. Such an

6. See International Committee of the Red Cross Official Statement, *Explosive Remnants of War: Negotiations on a New Instrument in 2003* (Jan. 16, 2003), at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList282/E80618B36E5F5C5E41256CBC002CC444>. The Second Review Conference of the Certain Conventional Weapons Convention established a Group of Governmental Experts to analyze the situation. That group ultimately recommended work on an additional protocol to the Convention. The proposal was accepted by States Parties, and negotiating sessions are to be held during 2003. This effort followed quickly on the heels of the successful effort to draft a convention banning anti-personnel landmines, *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction*, Sept. 18, 1997, 36 I.L.M. 1507. The United States is not a Party to the Convention.

7. The ICRC estimates that of the 429 people injured in unexploded ordinance incidents in the area, only one-third were injured by anti-personnel mines. Of the remaining injuries, unexploded bomblets (such as those contained in cluster bombs) caused one half, with other forms of unexploded ordinance causing the remainder. Reactive laws of armed conflict adopted since publication of original article include: the Rome Statute of the International Criminal Court, July 17, 1998, art. 85, U.N. Doc. A/CONF.183/9* (1998), 37 I.L.M. 999 (1998), revised by U.N. Doc. PCNICC/1999/INF/3* (1999), <http://www.un.org/law/icc>, which establishes the first permanent international tribunal to address war crimes, crimes against humanity, and genocide (and eventually aggression); the Second Protocol to the Hague Cultural Property Convention of 1954, Mar. 26, 1999, 38 I.L.M. 769 (1999), which enhances protection for cultural property and imposes individual criminal responsibility for certain violations; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/fc06c04cc5efa0014125693c004a45ab?OpenDocument>, which strengthens the prohibitions on the recruitment of children into armed forces and limits their participation in conflict; and Amended Article 1 to the Conventional Weapons Convention (December 2001), which extends application to non-international armed conflict, Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Final Document, U.N. Doc. CCW/CONF.II/2, at 4 (2001). For an excellent analysis of the conference by U.S. participants therein, see David Kaye & Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AM. J. INT'L L. 922 (2002).

analysis, so the theory went, could in turn suggest options for strengthening the international legal regime.

Cognizant of the difficulties inherent in any predictive analysis, *Bel-lum Americanum*, as the title suggests, narrowed the field of study to one possible alternative future, that posited by the United States in official documents such as President Clinton's 1997 *National Security Strategy for a New Century*⁸ and the Joint Chiefs of Staff's 1996 *Joint Vision 2010*.⁹ The U.S. vision was selected both because of its strategic maturity and due to the determinative influence the United States would likely wield over the course of conflict for the near future.

The inquiry immediately led to the *jus in bello*.¹⁰ This was only logical, for conflict studies at the time were dominated by consideration of a purported revolution in military affairs. We were obsessed with full spectrum dominance, information operations, cyber war, operating inside the enemy's OODA loop,¹¹ precision attack, stealth technologies, nanorobotics, unmanned aerial vehicles, civilianization and privatization, asymmetrical warfare, and so forth. The normative implications of this revolution in methods and means of warfare tended to bear most heavily on *jus in bello* principles such as discrimination.

Much has transpired since 1998. In 1999, the NATO Alliance conducted major combat operations for the first time in its history during Operation Allied Force, the air campaign against the Federal Republic of Yugoslavia. Two years later, al-Qa'ida mounted the single largest terrorist attack in history when it seized four airliners and flew them into the World Trade Center and Pentagon. Over 3000 citizens of nearly ninety nations perished. In response, a U.S.-led "coalition of the willing," after declaring a "Global War on Terrorism" (GWOT), launched a massive military operation, Operation Enduring Freedom, against the organization's bases in Afghanistan. It concurrently struck targets tied to al-Qa'ida and the Taliban, the de facto rulers of the country. Moreover, as this article is being

8. WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1997).

9. JOINT CHIEFS OF STAFF, JOINT VISION 2010 (1996). Other documents considered included JOINT CHIEFS OF STAFF, CONCEPT FOR FUTURE JOINT OPERATIONS: EXPANDING JOINT VISION 2010 (1997); JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY (1997); WILLIAM S. COHEN, THE REPORT OF THE QUADRENNIAL DEFENSE REVIEW (1997).

10. The *jus ad bellum* is that component of international law that governs when a State may resort to the use of force. By contrast, the *jus in bello* addresses how force may be applied in armed conflict, irrespective of the legality of the initial resort to force.

11. Observe, orient, decide, act.

finalized, United States and British forces are responding to Iraq's failure to disarm pursuant to UN Security Council resolutions with a military campaign against Iraq, Operation Iraqi Freedom.

Given the uniqueness of these events, it is a propitious moment to revisit *Bellum Americanum*. Each has presented significant challenges to the *jus in bello*. Consider the controversies over the term "military objective" during Operation Allied Force or the refusal to characterize detainees as "prisoners of war" during Enduring Freedom.¹² However, most normative disquiet during this period has surrounded the *jus ad bellum*; therefore, that body of law shall be the focus of this inquiry.

The methodology applied here tracks that used in *Bellum Americanum*. Since law tends to react to conflict, it is sensible to begin by considering the nature of future conflict and the strategies designed to address it. It might then be possible to identify where such strategies fit existing legal norms, where reinterpretation of those norms might be necessary, and where there is an overt mismatch between law and strategy.

The presumption underlying this effort is that law is both contextual and directional. It is contextual in the sense that it will inevitably adjust to meet the aspirations and expectations of the community in whose behalf it operates—in the case of international law, the global community. Simply put, law is dynamic, not static. At the same time, law tends to be directional. Rather than responding on a case-by-case basis to isolated events, it evidences movement in a general direction. This directional aspect makes predictive endeavors more reliable; by identifying the azimuth of change, it becomes possible to map out normative futures with greater confidence.

Obviously, this is a speculative undertaking. In the twentieth century, for instance, who would have anticipated the use in the twenty-first century

12. The former issue resulted in the Bankovic litigation before the European Court of Human Rights, which involved the April 1999 NATO bombing of the Radio Televizije Srbije (Radio-Television Serbia) headquarters in Belgrade. *Bankovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, Application No. 52207/99 (Eur. Ct. H.R. 1999). The ECHR dismissed the case for lack of jurisdiction. On the issue of the Guantanamo prisoners, see Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 475-83 (2002); George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002).

of commercial airliners as cruise missiles? Five years ago, strategists were concentrating on the possible emergence of a peer-State competitor, most likely China. Today, China as a threat is almost an afterthought in the face of attacks by transnational terrorist groups and the possibility that they may acquire weapons of mass destruction. And who could have imagined Germany, France, and Belgium joining forces to oppose efforts to secure NATO protection for Turkey during a U.S.-led military campaign to disarm Iraq?¹³

Despite this caveat, it remains useful to ask where strategies conflict with law, thereby necessitating a change in one or the other, or at least an acceptance of the costs of being labeled as lawless. The U.S. vision of future conflict, as well as the strategies articulated to deal with such conflict, has again been selected the point of departure. The United States enjoys determinative influence over the use of force in the global community. It has the most powerful military in the world, possesses military capabilities that the armed forces of other States rely on to conduct major operations beyond their borders, occupies a seat on the Security Council, dominates NATO, and, due to its political and economic wherewithal, has the greatest capability for bilateral influence. Like it or not, U.S. vision and U.S. strategies matter most in determining the future of conflict, and with it, international law. That being so, we shall begin with the current U.S. view of twenty-first century conflict.

II. The U.S. Vision of the Twenty-First Century Political-Military Environment

What is striking in the American view of the future political-military environment is the extent to which it is threat-based. This is true both as

13. Because of opposition in the North Atlantic Council, the issue was transferred to the Defence Planning Committee, on which France is not represented. The 10 February 2003 request from Turkey came pursuant to Article IV of the North Atlantic Treaty, which provides that the "Parties will consult whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened." North Atlantic Treaty, Aug. 24, 1959, art. 4, 63 Stat. 2241, 34 U.N.T.S. 243. The decision to provide support was made on 16 February 2003, see text at Decision Sheet of the Defense Planning Committee, at <http://www.nato.int/docu/pr/2003/p030216e.htm>, and resulted in Operation Display Deterrence, Regional Headquarters Allied Forces Southern Europe, *Operation Display Deterrence*, at <http://www.afsouth.nato.int/operations/NATOTurkey/DisplayDeterrence.htm> (last updated Mar. 20, 2003). As an illustration of the changing dynamics in the Alliance, note that Turkey's traditional opponent, Greece, voiced no objection to the Turkish request.

to the diversity of the threats faced and, perhaps more tellingly, with respect to the extent to which particular trends, such as globalization, are now characterized as potential vulnerabilities. The United States sees itself as entering what Richard Holbrooke has branded the “post-post Cold War era.” No longer does bipolar competition frame security, as it did in the Cold War. Likewise, the demise of bipolarity’s regulating effect on potential internal and external conflict has passed its prime as a security determinant. Although the negative consequences of this post-Cold War era still underlie many security concerns, particularly in the Balkans, there is a sense that these are residual in nature, that the dynamics which led to the collapse of Yugoslavia and generated tension between Russia and the West have nearly played themselves out.

Post-post Cold War security anxiety focuses on chaos, disorder, and criminal actions by rogue States and transnational groups. In a sense, a classic battle between good and evil is underway for the United States, one that is far more nefarious than either simple clashes of national interests or conflicts over self-determination within well-defined political space. The Bush *National Security Strategy (NSS)*, issued in September 2002, exemplifies this concern when it argues that “America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few.”¹⁴

Strikingly, President Bush’s *NSS* devotes far less attention to describing the global security condition than his predecessor’s did in 1997. Perhaps this is because the Administration believes that condition to be self-evident in the aftermath of 9/11. Moreover, in contrast to the somewhat vague Clinton version, the 2002 *NSS* sets forth an unambiguous U.S. strategy. Indeed, following the 9/11 attacks, the Administration delayed issuing the *NSS*, presumably to better address the dramatically altered threat environment, only releasing the strategy once the situation vis-à-vis Iraq had crystallized.

More descriptive of the security environment have been two other documents, one issued by the Joint Staff, the other by the Secretary of Defense. *Joint Vision (JV) 2020*, the Joint Staff’s “conceptual template” for guiding transformation of the U.S. armed forces, posits three factors

14. NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA ch. 1 (Sept. 2002) [hereinafter *NSS*], available at <http://www.whitehouse.gov/nsc/nss.pdf>.

most likely to determine the future security environment. First, the United States will remain a global power with global interests. Indeed, globalization, with its ever expanding transportation, communications, and information technology network, will require the United States to remain engaged internationally for both security and economic reasons. Consequently, the U.S. armed forces “must be prepared to ‘win’ across the full range of military operations in any part of the world, to operate with multinational forces, and to coordinate military operations, as necessary, with government agencies and international organizations.”¹⁵ The United States cannot simply withdraw into its borders and assume a defensive stance.

Second, current U.S. military advantages may begin to fade as technological and commercial globalization make militarily useful technology such as commercial satellites, digital communications, and the Internet available and affordable to opponents. This will allow them to be better organized, more elusive, and deadlier than ever before.¹⁶

The third factor cited by the Joint Staff is the adaptability of adversaries to U.S. capabilities. Clearly, the United States is the dominant military power by a great margin. However, its conventional and nuclear dominance drives opponents towards asymmetrical responses designed to circumvent U.S. strengths and exploit its weaknesses. *Joint Vision 2020* was issued over a year before the terrorist strikes of 9/11, one of the most effective asymmetrical attacks in the history of warfare. Yet, it was astonishingly prescient.

The potential of such asymmetric approaches is perhaps the most serious danger the United States faces in the immediate future—and this danger includes long-range ballistic missiles and other *direct threats to U.S. citizens and territory*. The asymmetric methods and objectives of an adversary are often far more important than the relative technological imbalance, and the psychological impact of an attack might far outweigh the actual physical damage inflicted. An adversary may pursue an asymmetric advantage on the tactical, operational, or strategic level

15. JOINT CHIEFS OF STAFF, JOINT VISION 2020, at 5 (2000) [hereinafter JV 2020], available at <http://www.dtic.mil/jv2020/jv2020.doc>. The individual services have also issued vision documents: U.S. DEP’T OF NAVY, FORWARD . . . FROM THE SEA (1994); U.S. DEP’T OF ARMY, THE ARMY VISION (1999); U.S. MARINE CORPS, STRATEGY 21 (2000); U.S. DEP’T OF AIR FORCE, VISION 2020 (n.d.).

16. JV 2020, *supra* note 15, at 5.

by identifying key vulnerabilities and devising asymmetric concepts and capabilities to strike or exploit them. To complicate matters, our adversaries may pursue a combination of asymmetries, or the United States may face a number of adversaries who, in combination, create an asymmetric threat.¹⁷

U.S. concerns regarding asymmetry have grown exponentially since *JV 2020*'s release; they pervade the new *NSS* and the novel strategy it articulates.

Secretary of Defense Donald Rumsfeld issued the *Quadrennial Defense Review (QDR)* the very month of the attacks. Designed to assess military capabilities against the threat environment, it represents an even more robust expression of the Administration's view of the security landscape.

Like the *NSS*, the *QDR* first highlights U.S. vulnerability in the new globalized environment. As noted by President Bush in his 2003 State of the Union Address, "America is no longer protected by vast oceans."¹⁸ In particular, the *QDR* cites travel and trade as facilitating direct attacks against the U.S. homeland.¹⁹ The interdependency and interconnectedness that undergird globalization render the United States perilously vulnerable because targets of significance are becoming ever more numerous and accessible. For instance, computer network attacks launched from abroad against our economic infrastructure could cause financial havoc; in fact, even attacks mounted against non-U.S. economic assets outside the country, such as oil production and transport facilities, could have dire consequences for the United States.

Although the *QDR* dismisses threats from a peer competitor as unlikely, regional powers are assessed as possibly threatening, particularly along the "arc of instability" which runs from the Middle East to Northeast Asia.²⁰ This arc includes the Bush "axis of evil"—Iraq, Iran, and North Korea—but would also include portions of the Caucasus's, Central Asia, and the Indian subcontinent. Sources of instability in this region include a

17. *Id.* at 7 (emphasis added).

18. President George W. Bush, State of the Union Address, Washington, D.C. (Jan. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

19. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2001, at 3-4 (2001) [hereinafter *QDR*], available at <http://www.defenselink.mil/pubs/qdr2001.pdf>.

20. *Id.* at 4.

“volatile mix of rising and declining powers” and vulnerability to “overthrow by radical or extremist internal political forces or movements.”²¹

Especially problematic is the Middle East, where “several states pose conventional military challenges and many seek to acquire—or have acquired—chemical, biological, radiological, nuclear, and enhanced high explosive (CBRNE) weapons.” These States “are developing ballistic missile capabilities, supporting international terrorism, and expanding their military means to coerce states friendly to the United States and to deny U.S. military forces access to the region.”²² They, together with transnational terrorists, comprise the key drivers to the new U.S. strategy.

Non-State actors are also a source of alarm for the Bush Administration. In the first place, the *QDR* points out that weak and failing States represent fertile ground for the activities of non-State actors, not only as terrorist sanctuaries (for example, pre-9/11 Afghanistan), but also for criminal activities such as drug trafficking. Moreover, while some of these groups enjoy State sponsorship, others are sufficiently organized and resourced to operate autonomously.²³ As is apparent from the current crisis over Iraq, the Administration is especially fearful that such groups have, or may acquire, CBRNE capabilities.

Militarily, the *QDR* notes numerous trends of significance. The first is the “rapid advancement of military technologies.”²⁴ Although technology had previously been regarded almost exclusively as a force multiplier for the United States, the *QDR* offers a different perspective. It perceptively notes that the rapid advance of “technologies for sensors, information processing, precision guidance, and many other areas . . . pose the danger that states hostile to the United States could significantly enhance their capabilities by integrating widely available off-the-shelf technologies into their weapons systems and armed forces.”²⁵ The technological proliferation and the growing expertise that result from globalization exacerbate this challenge, particularly ballistic missile proliferation and biotechnology expertise.²⁶ Additionally, space and cyberspace, and the control and exploitation thereof, are of growing military relevance. What is perhaps most important is the conclusion that these trends generate an “increasing

21. *Id.*

22. *Id.*

23. *Id.* at 5.

24. *Id.* at 6.

25. *Id.*

26. *Id.* at 6-7.

potential for miscalculation and surprise.”²⁷ Specifically, “[i]n the future, it is unlikely that the United States will be able accurately to predict how successfully other states will exploit the revolution in military affairs, how rapidly potential or actual adversaries will acquire CBRNE weapons and ballistic missiles, or how competitions in space and cyber space will develop.”²⁸ Concern over surprise and miscalculation in a security environment replete with CBRNE proliferation and transnational terrorism has, as will become apparent, dramatic strategic implications. Thus, far from being a panacea, technology may represent a Pandora’s box in an era of globalization.

The uncertainty explicit in the *Defense Review* drives the United States away from threat-based to capabilities-based defense planning. In other words, future U.S. armed forces must possess certain military capabilities to meet particular types of threats, such as transnational terrorist groups operating from diverse locations in weak States, possibly with the assistance of State sponsors, and armed with weapons of mass destruction. These capabilities include advanced C4ISR (command, control, communications, computers, intelligence, surveillance, reconnaissance), an ability to quickly deploy and sustain forces around the world, and global precision strike capability. They are indispensable in achieving the four U.S. defense policy aims: (1) assuring allies and friends; (2) dissuading future military competition; (3) deterring threats and coercion against U.S. interests; and (4) decisively defeating any adversary if deterrence fails.²⁹ Realizing these goals will require “transformation.” This term of art implies not only a shift in operational concepts, technologies, and organizations, but also “the emergence of new kinds of war, such as armed conflict in new dimensions of the battlespace.”³⁰

In the aggregate, the *NSS, JV 2020*, and the *QDR* describe a rapidly evolving international security environment. It is unquestioned that the United States will remain engaged in international affairs; isolationism, as distinguished from unilateralism, is simply not an option. Unfortunately, the world with which it will remain engaged is a dangerous one. Weak and failed States present fertile breeding grounds for transnational terrorists and criminals who may turn to destructive technologies in an asymmetrical struggle against the United States and other advanced States. Rogue States complicate matters by offering sanctuary and support for terrorists, includ-

27. *Id.* at 7.

28. *Id.*

29. *Id.* at 11.

ing the possible provision of CBRNE technology and weapons, while also posing a threat on their own. The U.S. response is to “transform” its military by leveraging technological wherewithal and fashioning doctrines to meet the changed threat. In the process, it is engaging in practices and adopting strategies that have enormous normative consequences. Four topics are of particular interest in this regard: terrorism, weapons of mass destruction, humanitarian intervention, and information operations.

III. Terrorism³¹

Terrorism is a core feature of virtually all security related documents emanating from the Administration since 9/11. President Bush expressed his feelings regarding the appropriate response to terrorism with great clarity during a memorial service at the National Cathedral on September 14th. Referring to the attacks that had just occurred, he proclaimed that

our responsibility is clear: to answer these attacks and rid the world of evil. War has been waged against us by stealth and deceit and murder. This nation is peaceful, but fierce when

30. *Id.* at 29. The *QDR* sets six operational goals that are conditions precedent to achieving meaningful transformation:

protecting critical bases of operations (U.S. homeland, forces abroad, allies, and friends) and defeating CBRNE weapons and their means of delivery; assuring information systems in the face of attack and conducting effective information operations; projecting and sustaining U.S. forces in distant anti-access or area-denial environments and defeating anti-access and area denial threats; denying enemies sanctuary by providing persistent surveillance, tracking, and rapid engagement with high-volume precision strike, through a combination of complementary air and ground capabilities, against critical mobile and fixed targets at various ranges and in all weather and terrains; enhancing the capability and survivability of space systems and supporting infrastructure; and leveraging information technology and innovative concepts to develop an interoperable, joint C4ISR architecture and capability that includes a tailorable joint operational picture.

Id. at 30.

31. The National Strategy for Combating Terrorism defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2003) [hereinafter NSCT], available at http://www.odci.gov/terrorism/publications/Counter_Terrorism_Strategy.pdf.

roused to anger. The conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing.³²

For the President, an “act of war” had been committed against the country,³³ and we were involved in an armed conflict; Congress responded accordingly by authorizing the President to employ force in response to the attacks.³⁴

The President included this very quotation in his *National Security Strategy*, issued one year later. That document describes an aggressive and unequivocal approach to terrorism. Specifically, it tasks the U.S. government to “disrupt and destroy terrorist organizations” by:

- direct and continuous action using all the elements of national and international power. Our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors;
- defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country; and
- denying further sponsorship, support, and sanctuary to terrorists by convincing or *compelling* states to accept their sovereign responsibilities.³⁵

32. NSS, *supra* note 14, ch. II (header).

33. Indeed, he characterized the attacks as an “act of war against our country” when addressing Congress. President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 2001) [hereinafter President Bush Response to Terrorist Acts].

34. The President was authorized to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The essential threads of this strategy are consistent with the military-political environment described above. By referencing “all” elements of national strategy, the President clearly envisages using the military against terrorists. Transnational terrorists receive priority, particularly the possibility of their access to weapons of mass destruction. The United States will seek to preempt actions, not simply deter or react to them, and that preemption will occur outside the United States whenever possible. It is willing to act alone when necessary, and will use force against other States in order to deny terrorists either support or sanctuary.

In February 2003, the President issued the *National Strategy for Combating Terrorism (NSCT)*.³⁶ The *NSCT* refines the *NSS*'s grand strategy for fighting terrorism. There are four foci: (1) defeating terrorists; (2) denying them sponsorship, support, and sanctuary; (3) working to diminish those conditions which lead individuals to turn to terrorism; and (4) defending against terrorists.³⁷

In setting out this strategy, the *NSCT* notes how the nature of terrorism has changed.³⁸ In the past, terrorism was a secular and nationalistic phenomenon, one heavily dependent on the support of State-sponsors. Over time, the United States successfully applied a variety of techniques, including diplomacy and economic sanctions/incentives, against terrorism. Collapse of one of terrorism's key sponsors, the Soviet Union, contributed immensely to the effectiveness of the U.S. counter-terrorism campaign.

Unfortunately, adaptation, rather than defeat, resulted. Leveraging advances in technology, communications, and travel, terrorism became truly transnational, as exhibited by al-Qa'ida operations from scores of countries. Although still tied to States in some cases, terrorist groups have often turned to criminal activities, such as drug trafficking, to finance their activities. Their methodologies have also evolved. For instance, the desire to create mass casualties, exemplified by the 9/11 attacks, heightens the likelihood they will eventually resort to weapons of mass destruction. As

35. *NSS*, *supra* note 14, ch. III (emphasis added).

36. *NSCT*, *supra* note 31.

37. *Id.* at 29.

38. *Id.* at 7.

the *NSCT* notes, “The new global environment, with its resultant terrorist interconnectivity, and WMD are changing the nature of terrorism.”³⁹

The *NSCT* expressly amplifies the strategic threads contained in the *NSS*. First, while law enforcement will continue to be used against suspected terrorists, “decisive military power and specialized intelligence resources” will also be employed.⁴⁰ The sole example of *decisive* military force against terrorists in the past is Operation Enduring Freedom itself. The *NSCT* makes clear that military operations are no longer the exception in counter-terrorism.

It also emphasizes a willingness to act unilaterally and/or preemptively. The asserted legal basis for doing so is self-defense.⁴¹ In citing self-defense, the *NSCT* echoes the *NSS*’s discussion of preemption in international law.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. . . .

39. *Id.* at 10.

40. *Id.* at 17.

41. The *NSCT* states:

The United States will constantly strive to enlist the support of the international community in this fight against a common foe. If necessary, however, we will not hesitate to act alone, to exercise our right to self-defense, including acting preemptively against terrorists to prevent them from doing harm to our people and our country.

Id. at 3.

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.⁴²

One of the primary reasons the United States has adopted a preemptive approach to terrorism is the possibility that terrorists might employ weapons of mass destruction. For the Administration, this prospect fundamentally transforms the nature of the terrorist threat, and, resultantly, the means necessary to respond to it. The danger is that “[s]ome irresponsible governments—or extremist factions within them—seeking to further their own agenda may provide terrorists access to WMD.”⁴³ Again, the United States is unambiguous in articulating its policy. Labeling such a possibility “unacceptable,” the strategy promises “swift, decisive action” to interdict either material support or WMD before reaching terrorists.⁴⁴

The strategy stresses a U.S. willingness to strike not only at terrorists, but also at those who support them or offer sanctuary when necessary. It notes that the permeable borders of the twenty-first century inure to the benefit of terrorists. But the *NSCT* also addresses the reality that terrorists will continue to require bases of operations and points out that “states around the world still offer havens—both physical (for example, safe houses, training grounds) and virtual (for example, reliable communications and financial networks)—that terrorists need to plan, organize, train and conduct their operations.”⁴⁵ In response, the United States will first seek to convince those States to comply with their obligations under international law. Where they do not, it “will act decisively to counter the threat they pose and, ultimately, to compel them to cease supporting terrorism.”⁴⁶

This strategy has numerous normative fault lines. In terms of *jus ad bellum*, the most important are: (1) the use of military force against non-State actors, such as terrorists; (2) the nature of the attack that allows for a military response; (3) crossing borders to conduct counter-terrorist opera-

42. NSS, *supra* note 14, at 15-16.

43. NSCT, *supra* note 31, at 21.

44. *Id.*

45. *Id.* at 6.

46. *Id.* at 12.

tions; (4) the use of preemptive force against either terrorists or their State-sponsors; and (5) the use of force against State-sponsors of terrorism.

1. The Use of Force Against Terrorists

For many centuries, war has been the nearly exclusive province of States. To the extent that non-State actors became involved in systematic violence, the appropriate paradigm was that of international and criminal law enforcement, not armed conflict. For instance, in 1988 terrorists blew up Pan American Flight 103 over Lockerbie, Scotland; 270 people died in the attack. However, President Bush chose not to respond militarily, instead preferring to allow a Scottish Court sitting in the Netherlands to try the suspects following intensive diplomatic efforts to secure their extradition from Libya.⁴⁷ Five years later, a terrorist attack against the World Trade Center killed six and injured over 1000. As with the Lockerbie case, the incident was dealt with exclusively through law enforcement channels, with legal issues centering on extradition and trial, most notably the indictment of Osama bin Laden.⁴⁸ Moreover, the United States has consistently supported tightening the law enforcement regime through strong support of such international agreements as the Terrorist Bombing Convention and Terrorist Financing Convention.⁴⁹

Consistent with this prevailing paradigm, the *jus ad bellum* governing the resort to armed military force by States has typically been interpreted restrictively. Consider Operation El Dorado Canyon in 1986, during which the United States launched attacks against targets in Libya (including terrorist bases and training facilities) following the bombing of a Berlin discothèque by a Libyan-supported group. International reaction to the

47. The accused bombers were tried in *Her Majesty's Advocate v. Al Megrahi*, Case No. 1475/99, at 1 (H.C.J. 2001) (Scot.), available at <http://www.scotcourts.gov.uk/download/lockerbiefjudgement.pdf>. Megrahi was found guilty and sentenced to life imprisonment in January 2001; the Court accepted the allegation that he was a member of Libya's Jamahariya Security Organization. In March 2002, Megrahi's appeal was denied. *Ali Mohamed v. Her Majesty's Advocate*, Appeal No: C104/01 (H.C.J. 2002) (Scot.).

48. Indictment, *United States v. Usama bin Laden*, S(9) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998), available at <http://www.terrorismcentral.com/Library/Incidents/USEmbassyKenyaBombing/Indictment/Start.html>.

49. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. GAOR 6th Comm., 52d Sess., Agenda Item 152, U.N. Doc. A/52/63 (1997), reprinted in 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR 6th Comm., 54th Sess., Agenda Item 160, U.N. Doc. A/54/615 (1999), reprinted in 39 I.L.M. 270 (2000).

U.S. strikes was generally condemnatory.⁵⁰ Although President Reagan justified the action based on self-defense pursuant to Article 51 of the UN Charter,⁵¹ support for this position came only from the closest U.S. allies, such as the United Kingdom and Israel. The General Assembly even passed a resolution “deploring” the operation.⁵²

Attitudes began to change in the late 1990s. After the 1998 bombings of the U.S. embassies in Nairobi and Dar es Salaam, which resulted in the deaths of 300, including twelve Americans, the United States launched cruise missile attacks against a terrorist facility in Afghanistan and a pharmaceutical plant in Khartoum.⁵³ The plant was allegedly involved in the production of chemical weapons that could be made available to terrorists.

Pursuant to Article 51 of the UN Charter, the United States announced that it had acted in self-defense.⁵⁴ International reaction to this justification is telling. Unsurprisingly, Iran, Iraq, Libya, Pakistan,⁵⁵ Russia, and Yemen condemned the strikes, while Australia, France, Germany, Japan, Spain, and the United Kingdom supported them.⁵⁶ This division illustrates that there was no clear consensus, as there had been in 1986, that crossing into a sovereign State to strike terrorists was necessarily illegal. On the contrary, as the line-up suggests, international politics drove reactions to

50. See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT'L L. 3, 33-34 (1999), for a summary of the international reaction to El Dorado Canyon. See also Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99 (1994).

51. The Administration initially seemed to base the operation on both anticipatory self-defense and retaliation. For example, in the President's national address, he noted, “Several weeks ago in New Orleans, I warned Colonel Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible . . .” President Ronald Reagan, Address to the Nation, Washington, D.C. (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 1-2. But the President ultimately focused on a classic self-defense justification: “Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the U.N. Charter.” *Id.* See also White House Statement, in DEP'T ST. BULL., June 1986, at 1. It is relevant that the United States also believed Libya was planning attacks on up to thirty diplomatic facilities worldwide. See Joint News Conference by Secretary Schultz and Secretary Weinberger, Washington, D.C. (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 3.

52. *Israelis Praise It While Arabs Vow to Avenge It*, CHI. TRIB., Apr. 16, 1986, at A9.

53. On the U.S. response, see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999); Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067 (2000); Reisman, *supra* note 50, at 54.

the operations. Further, the two target sets generated differing reactions. For instance, the League of Arab States' Secretariat only condemned the attacks against the plant.⁵⁷ Similarly, Sudan, the Group of African States, the Group of Islamic States, and the League of Arab States all demanded that the Security Council examine the destruction of the pharmaceutical plant by sending a fact-finding mission to Sudan, but made no such request regarding the Afghanistan component of the operation.⁵⁸

What is particularly significant is that most criticism of the Sudanese strike centered not on the fact that the United States had launched it, but rather on whether the target was actually involved in terrorism. In other words, the issue was one of evidentiary sufficiency, not legal authority to act. The international reaction aptly illustrates the extent to which commu-

54.

These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin Laden organization. That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self defence confirmed by Article 51 of the Charter of the United Nations.

Letter, Permanent Representative of the United States of America to the United Nations, to President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), <http://www.undp.org/missions/usa/s1998780.pdf>.

55. Pakistan protested the violation of its airspace. Letter, Permanent Representative of Pakistan to the United Nations, to President of the Security Council (Aug. 24, 1998), U.N. Doc. S/1998/794 (1998).

56. Murphy, *supra* note 12, at 164-65 (1999).

57. Letter, Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/789 (1998).

58. Letter, Permanent Representative of the Sudan to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/786, Annex (1998); Letter, Permanent Representative of Namibia to the United Nations, to President of the Security Council (Aug. 25, 1998), U.N. Doc. S/1998/802 (1998) (Group of African States request); Letter, Charge d'Affaires A.I. of the Permanent Mission of Qatar to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/790 (1998) (Group of Islamic States request); Letter, Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations, to President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/791 (1998) (League of Arab States request).

nity expectations regarding the direct use of force against terrorists had changed since 1986. But even in the case of these bombings, the military response was limited and the United States relied primarily on law enforcement. Ultimately, an international criminal investigation led to trial in U.S. federal court for a number of those involved.

The attacks of 11 September 2001, and the reaction thereto, clarified matters dramatically. It is indisputable that an on-the-spot military response in the face of the attacks would have been justifiable, but, tragically, by the time the United States could react, the four attacks were over. Instead, it launched an after-the-fact military operation against al-Qa'ida bases in Afghanistan. Upon doing so, it formally notified the Security Council that its legal basis for the operation was self-defense, as it had previously done in the East African cases.⁵⁹ So too did the United Kingdom, which participated in the initial strikes on 7 October 2001.⁶⁰ But does the law of self-defense apply to acts by non-State actors and, if so, under what circumstances?

Article 51 of the UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁶¹

Note that the text does not limit self-defense to attacks by States, even though at the time of drafting, State action was obviously, given the conflagration just ended, the intended subject. Similarly, Article 39, which

59. Letter, Permanent Representative of the United States of America to the United Nations, to President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/946 (2001), <http://www.un.int/usa/s-2001-946.htm>.

60. Letter, Charge d'Affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations, to President of the Security Council (Oct. 7, 2001), http://www.ukun.org/xq/asp/SarticleType.17/Article_ID.328/qx/articles_show.htm.

61. U.N. CHARTER art. 51.

provides the basis for Security Council authorization of a use of force in the face of a threat to the peace, breach of peace, or act of aggression, does not refer to the sources of such threats, breaches, or acts. By contrast, Article 2(4), which outlaws the use of force, specifically applies to Members (by definition, States).⁶²

Article 31.1 of the Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶³ The first purpose of the United Nations is

[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁶⁴

An interpretation extending the right of self-defense to attacks by non-State actors is therefore consistent with both the ordinary meaning of the text and the purposes of the United Nations. The text fails to mention States in Article 51, although doing so in 2(4), *and*, as evidenced by 9/11 and its aftermath, terrorism can do great violence to international peace and security.

The Vienna Convention also provides that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is relevant when interpreting an interna-

62. “*All Members* shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.* art. 2(4) (emphasis added). Quite aside from issues of treaty construction, the reference to States (members) in the prohibitory language of 2(4) makes sense, since violence by non-State actors is already criminalized in domestic and international penal law; a Charter prohibition would have been duplicative.

63. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, art. 31.1, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], *reprinted in* 8 I.L.M. 679 (1969).

64. U.N. CHARTER art. 1.1.

tional agreement.⁶⁵ This practice, both before the U.S./UK attacks of 7 October and thereafter, was revealing. In the immediate aftermath of 9/11, the UN Security Council passed a number of resolutions. Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the “inherent right of self-defense as recognized by the Charter of the United Nations.”⁶⁶ Two weeks later, the Council did so again in Resolution 1373.⁶⁷ Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State.

Other intergovernmental organizations also treated the attacks as implicating the right to self-defense. The North Atlantic Council invoked Article V of the North Atlantic Treaty, a provision expressly based on Article 51 of the Charter,⁶⁸ while the Organization of American States invoked Article 3.1 of the Inter-American Treaty of Reciprocal Assistance, its analogous provision.⁶⁹ Australia offered combat forces pursuant to the ANZUS Treaty’s collective self-defense article.⁷⁰ There were also many bilateral offers of combat forces or other forms of support for the prospec-

65. Vienna Convention, *supra* note 63, art. 31.3(b).

66. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., pmb., U.N. Doc. S/RES/1368 (2001). It is interesting that the Security Council did not reference self-defense in response to the 1998 attacks on the East African embassies even though the United States formally invoked Article 51. According to Article 39 of the UN Charter, the Security Council has cognizance over “any threat to the peace, breach of the peace, or act of aggression” and decides upon measures necessary to “maintain or restore international peace and security.” U.N. CHARTER art. 39. Therefore, labeling the acts as a threat to international peace and security is normatively significant in that it empowers the Council to act.

67. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., pmb., U.N. Doc. S/RES/1373 (2001). The General Assembly did not refer to the right to self-defense in its resolution on the topic. G.A. Res. 56/1, U.N. GAOR, 56th Sess., Agenda Item 8, U.N. Doc. A/56/L.1 (2001).

68. Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), <http://www.nato.int/docu/speech/2001/s011002a.htm>. Article V provides that

[t]he Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, *supra* note 13, art. 5.

tive U.S. military action that can only be interpreted as acknowledgements that a U.S. use of force against the non-State perpetrators was a legitimate exercise of the right of self-defense.⁷¹ Indeed, certain NATO States, as well as NATO itself, appeared somewhat miffed when the United States decided to act with a carefully crafted coalition of the willing of its own choosing. There is no doubt that by October 10, the overwhelming majority of the global community was comfortable with an interpretation of the law of self-defense that allows defensive actions against non-State actors.

Post-October 10 practice was no different. By now, it was clear that the United States was striking directly at terrorists in a well-planned military operation, action beyond simple law enforcement or on-the-spot defense. Nevertheless, in resolution after resolution, the Security Council continued to reaffirm the pre-10/10 resolutions that had referred to the right of self-defense. For instance, a week after the U.S./UK campaign began, the Security Council encouraged “international efforts to root out

69. Terrorist Threat to the Americas, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001). Article 3.1 provides:

The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 21 U.N.T.S. 77.

70. Prime Minister John Howard, Government Invokes ANZUS Treaty—Press Conference (Sept. 14, 2001), <http://australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml>; see also U.S. Dep’t of State, *Fact Sheet, White House: Operation Enduring Freedom Overview* (Oct. 1, 2001) [hereinafter *White House Fact Sheet*], at <http://www.state.gov/s/ct/rls/fs/2001/5194.htm> (last visited June 18, 2002). Article VI of the ANZUS Treaty provides: “Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.” Security Treaty (Australia, New Zealand, United States), Sept. 1, 1951, art. IV, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84.

71. Russia, China, and India shared intelligence, while Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights, and forty-six multilateral declarations of support were obtained. *White House Fact Sheet, supra* note 70.

terrorism, in keeping with the Charter of the United Nations” in Resolution 1378.⁷² Subsequent resolutions contained similar verbiage.⁷³ The European Union also expressed support for the counter-terrorist military campaign, while no significant intergovernmental organization objected.⁷⁴ Many States offered bilateral support, both moral and material.⁷⁵

International reaction to the attacks of 9/11 and the military response they engendered complete the trend towards acceptance of the use of force against terrorists as a form of self-defense. This aspect of the new *Bellum Americanum* now seems, over fifteen years after Operation El Dorado Canyon, to be uncontroversial.⁷⁶

2. *Terrorism as an Armed Attack*

While it has become plain that non-State actors can be the source of an “armed attack” under the law of self-defense, the issue of when an individual act of terrorism will rise to that level is murkier. No strategy document issued by the Administration has addressed this issue—with good reason. Setting any particular threshold of violence as an armed attack

72. S.C. Res. 1378, U.N. SCOR, 56th. Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001).

73. See, e.g., S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., U.N. Doc. S/RES/1386 (2001); S.C. Res. 1390, 57th Sess., U.N. SCOR, 4452d mtg., U.N. Doc. S/RES/1390 (2002).

74. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 49 (2002); Murphy, *supra* note 12, at 248. The European Council “confirm[ed] its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368.” Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2002, SN 4296/2/01 Rev. 2.

75. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered combat forces. Murphy, *supra* note 12, at 248.

76. But see, e.g., Antonio Cassese, *Terrorism Is also Disrupting Some Crucial Legal Categories of International Law*, European Journal of International Law Discussion Forum, at http://www.ejil.org/forum_WTC/ny-cassese.html. See also Giorgio Gaja, *In What Sense Was There an “Armed Attack”?*, European Journal of International Law Discussion Forum, http://www.ejil.org/forum_WTC/ny-gaja.html.

would tie the hands of those wishing to retain discretion as to when to respond militarily.

The U.S. approach to combating terrorism is very aggressive, one amounting to a global war on terrorism (GWOT). In other words, it is not simply a war on al-Qa'ida, but a war against terrorism generally. That said, not every isolated act of terrorism is an "armed attack" that legally justifies a robust military response pursuant to the law of self-defense. Where does the line lie?

The International Court of Justice (ICJ) addressed the meaning of "armed attack" in its landmark case, *Nicaragua*. In this case, the United States argued that it had the right to act in collective self-defense against Nicaragua on behalf of El Salvador because of the former's assistance to Salvadorian guerillas. The Court held that an armed attack must be of a "sufficient scale and effects," an action of "significant scale."⁷⁷ A simple border incident, for instance, was not enough to satisfy the Court that the "armed attack" line had been crossed.

"Significant" is an imprecise standard, but at least it clarifies that certain uses of force do not entitle the target State to respond forcefully pursuant to the law of self-defense. In seeking further clarification, it is useful to turn to that law itself. There are three criteria for the lawful defensive use of force derived from the celebrated nineteenth century case of the *Caroline*.⁷⁸ First, the use must be proportional, that is, no more than actually required to effectively mount a defense. This may be more or less force than used in the initial armed attack. Second, the defensive use of force may occur only in the face of an ongoing or imminent attack. We shall return to this subject in the context of preemption. Finally, it must be necessary, that is, the last viable alternative. Other avenues of resolving the situation satisfactorily, such as diplomacy, economic sanctions, or judi-

77. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04, para. 195 (June 27) (Merits).

78. The case is described in R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 32, 32-39 (1938). The *Caroline* standard, and the criteria it has been interpreted as representing, were spoken of approvingly by the Nuremberg Tribunal. See International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 205 (1947). The International Court of Justice has done likewise in both the *Nicaragua* case and the *Advisory Opinion on the Use of Nuclear Weapons. Military and Paramilitary Activities*, 1986 I.C.J. at 94, para. 176; *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. para. 41 (July 8); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 905 (1987).

cial remedies, should be either exhausted or reasonably certain not to succeed.

This requirement has enormous implications for the approach proffered in the U.S. strategies. As we are seeing in the case of the attack against Iraq, many States, groups, and individuals react quite negatively when it appears that options short of the use of military force remain open. Of course, States have a stake in preserving barriers to the use of force against States that they do not have with respect to terrorists. Even so, actions seen as precipitous, as demonstrated in the case of the 1998 Sudanese strikes, are unlikely to achieve widespread acceptance as legal.

The most likely situation involving a lack of necessity vis-à-vis terrorists is when law enforcement efforts could adequately address potential terrorism. If so, military operations to counter it would not be permissible under the law of self-defense. The expected terrorism would constitute criminal actions against which all forms of law enforcement could be applied, but it would not be an “armed attack,” as that term is used in the *jus ad bellum*.

Arguably, an assessment of the necessity criterion might appear unresponsive to the ICJ’s standard, for “significant” suggests a quantum of violence, not the range of options for responding to it. However, the underlying logic of the standard is that an armed attack is an action of a nature to necessitate a forceful response beyond the law enforcement paradigm. Thus, the necessity standard can serve as cognitive shorthand for the ill-defined term “significant.” In fact, it actually provides a closer fit with the community objective of fostering peace and security. Although the size of a terrorist attack certainly has bearing on the extent to which international peace and security is affected, the likelihood of it being successfully prevented without escalating the overall level of violence is much more determinative. In other words, a major attack that law enforcement can thwart is less threatening than a lesser one likely to elude authorities unless the military becomes involved. By failing to address this issue, the U.S. strategies create a lacuna that will only be filled as the GWOT continues and State reactions gel into an ascertainable community assessment of individual operations therein.

3. Crossing Borders

The U.S. strategies described above envision taking the fight to the terrorists by striking at them outside the borders of the United States. Without question, it may legally do so with the consent of the State on whose territory the operations occur. For instance, as part of its GWOT, in February 2003 the United States announced the deployment of troops to the Philippines to assist that country in its fight against Muslim extremists.⁷⁹ Such operations must comply with applicable U.S. law, the law of the Philippines, and international human rights law, but there is no significant *jus ad bellum* issue because they are occurring with the full acquiescence of the legitimate Philippine government.

Conducting counter-terrorist operations in a State without its consent, by contrast, is problematic because the existing State-centric international system accords great weight to territorial integrity. It is a customary international law right of *jus cogens* status codified in the UN Charter's prohibition on the use of force "against the territorial integrity . . . of any State."⁸⁰ Violation of that prohibition can amount to aggression, even an armed attack that empowers the "victim" State to respond in self-defense.⁸¹ The principle lies at the root of most objections to counter-terrorist operations of the past. For example, El Dorado Canyon evoked condemnation not because of sympathy for Libyan policies and practices, but rather because the United States was viewed as violating one of the core principles of international law, a principle which benefited all States, especially in a bipolar nuclear armed world.

The risk that extraterritorial military actions will escalate into a major superpower confrontation has faded away in the early twenty-first century. This does not mean that States no longer value the principle of territorial

79. Eric Schmitt, *U.S. to Send 1,700 Troops to Philippines*, INT'L HERALD TRIB., Feb. 22-23, 2003, at 2.

80. U.N. CHARTER art. 2(4). In the 1966 Commentary to the Final Draft Articles on the Law of Treaties (Article 50), the International Law Commission stated, in a comment later referred to in the *Nicaragua* judgment, "that the law of the Charter concerning the prohibition of the use of force in itself consists of a conspicuous example of a rule in international law having the character of *jus cogens*." SIR ARTHUR WATTS, II THE INTERNATIONAL LAW COMMISSION: 1949-1998, at 741 (1999). Such peremptory norms cannot be derogated from, even by treaty, and thus represent the most powerful genre of international law.

81. Aggression has been authoritatively defined as including the "use of armed force by a State against the . . . territorial integrity . . . of another State." G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, Annex, art. 1 (definition of aggression), U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974).

integrity, but rather that the global community is increasingly willing to countenance violation of a State's territory when countervailing principles of law are at stake. In the case of terrorism, that principle is the right of the State to defend itself. When conflicting rights clash in international law, the appropriate response is to balance them, seeking the best accommodation of both in a way that maximizes community interests.

In the case of terrorism, the State from which the terrorists operate has a duty to police its territory to keep it from being used to the detriment of others. John Basset Moore provided the classic enunciation of this principle nearly eight decades ago in his dissent in the *Lotus* case: "it is well settled that a State is bound to use due diligence to prevent commission within its dominions of criminal acts against another nation or its people."⁸² Since then, the principle has been repeated in the context of terrorism in such instruments as the 1970 Declaration on Friendly Relations,⁸³ 1994 Declaration on Measures to Eliminate Terrorism,⁸⁴ and multiple pre- and post-9/11 Security Council resolutions insisting the Taliban take action to keep terrorists from operating within Taliban-controlled territory.⁸⁵

The *Caroline* case, from which the core principles of the law of self-defense are drawn, was just such a situation. Canadian rebels were operating from within the United States, which, despite British demands, failed to prevent activities. Only when the United States failed to (or could not) comply with its duty to ensure its territory was not being used to the detriment of its neighbor did the British cross onto U.S. soil for the limited purpose of striking against the rebels. Their forces withdrew as soon as the mission was complete. In the ensuing exchange of diplomatic notes between the United States and United Kingdom, the issue was not the

82. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

83. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex, U.N. Doc. A/Res/2625 (1970), reprinted in 65 AM. J. INT'L L. 243 (1971).

84. Declaration on Measures to Eliminate Terrorism, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., Agenda Item 142, U.N. Doc. A/49/743 (1994); Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996).

85. See, e.g., S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1363, U.N. SCOR, 56th Sess., 4352d mtg., U.N. Doc. S/RES/1363 (2001); S.C. Res. 1378, *supra* note 72; S.C. Res. 1390, *supra* note 73.

appropriateness of the penetration, but whether the act was excessive or not.

Balancing these aforementioned rights and duties yields a number of conclusions. The right to self-defense, particularly in the face of potentially catastrophic terrorism, must allow States to defend themselves against terrorists wherever they are to be found. However, the principle of territorial integrity would logically grant the State where the terrorists are located an opportunity to put an end to the terrorist presence before the victim-State acts. Moreover, it is only reasonable to impose a duty on the victim-State to demand compliance, as the British did in *Caroline* and the United States did prior to striking Afghanistan,⁸⁶ before non-consensually entering another's territory. Finally, pursuant to the self-defense principle of proportionality, the operation must be limited to those actions necessary to put an end to the terrorists' ability to continue to mount attacks; as soon as this objective is attained, the forces must withdraw.

This analysis is supportive of the U.S. strategy of taking the fight to the terrorists . . . with the important caveats just cited. However, it only answers the question of whether such operations comport with emerging international law norms. It is also necessary to ask *when* they may be conducted.

4. Preemption

As noted, the new U.S. strategies are replete with references to preempting terrorist attacks, as well as the use or transfer of weapons of mass destruction. In the context of terrorism, preemption is most likely to sur-

86. For instance, in an address to Congress, the President insisted that the Taliban:

Deliver to United States authorities all the leaders of Al-Qa'ida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

President Bush Response to Terrorist Acts, *supra* note 33, at 1347. The demands were made through Pakistan as well.

face as a purported exercise of the right to self-defense. The specific legal issue raised by preemption is “imminency,” a criterion discussed by Hugo Grotius in the fifteenth century⁸⁷ and by Secretary of State Daniel Webster with respect to the nineteenth century *Caroline* incident. According to Webster, there must be a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation” and the defensive action cannot be “unreasonable or excessive.”⁸⁸

This standard is often mischaracterized as a temporal one, that is, that the act of anticipatory self-defense can only occur immediately preceding the anticipated armed attack. Such an interpretation would, at first glance, make sense, for it would allow the greatest opportunity for exhaustion of non-forceful options prior to the resort to force. Concerns about this purported construal may have motivated the *NSS* conclusion that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁸⁹ In particular, the *NSS* argues that the greater the

87. War in defense of life is permissible only when the danger is immediate and certain, not

when it is merely assumed The danger, again, must be immediate and imminent in point of time. . . . Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambush, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences

HUGO GROTIUS, *II DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. I, para. V (Carnegie Endowment trans. 1925) (1625).

88. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *reprinted in* 2 J. B. MOORE, *A DIGEST OF INTERNATIONAL LAW* 409, 412 (1906).

89. *NSS*, *supra* note 14, at 15 (emphasis added). The Secretary of Defense’s Annual Report makes the same point in a “lessons learned” section. “[D]efending the United States requires prevention and sometimes preemption. It is not possible to defend against every threat, in every place, at every conceivable time. The only defense against [sic] is to take the war to the enemy. The best defense is a good offense.” DONALD RUMSFELD, *ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS*, 2002, at 30, <http://www.defenselink.mil/exec-sec/adr2002/index.htm>.

risk posed by a potential terrorist act, the greater the acceptable level of uncertainty as to its time and place.⁹⁰

In fact, the temporal interpretation, although popularly held, is flawed. The purpose of the law of self-defense is to provide States an avenue for defending themselves, at least until the international community can address the situation.⁹¹ However, international law does not create meaningless rights, and waiting to defend oneself until moments before an attack may well be to wait too long. In modern warfare, a single blow can be instantaneous and devastating, particularly in an era of WMD proliferation. Additionally, despite the advances of C4ISR technology, the advent of transnational terrorist groups operating from diverse locations has actually thickened the Clausewitzian fog of war. Thus, as noted in the Bush strategies, twenty-first century conflict exacerbates both uncertainty and risk.

Given this fact, the only logical interpretation of imminency is one allowing for defensive actions during the last viable window of opportunity, the point at which any further delay would render a viable defense ineffectual. In some cases, this window may close long before the armed attack is to occur. For instance, a State may acquire intelligence about the location of a terrorist cell planning a future act of terrorism. Since terrorists are highly mobile, this may represent the last opportunity to prevent the attack. Assuming a law enforcement operation would be unlikely to avert it (the necessity criterion), a State may strike the cell in self-defense. Any other interpretation would gut the right of self-defense.

Thus, international law norms of self-defense are flexible enough to allow for preemptive strategies. However, somewhat more problematic is the assertion in the *NSS* that the level of risk should influence the level of certainty required as to when and where the terrorist attack will take place. This is a novel normative assertion. The greater the uncertainty as to time and place, the less confident one can be that an action in self-defense has occurred only after exhaustion of the alternative remedies (necessity) and

90. *NSS*, *supra* note 14, at 16.

91. The Article 51 reference to using self-defense “until the Security Council has taken measures necessary to maintain international peace and security” is subject to varying interpretations. The question is whether Security Council action can dispossess a State of the right to conduct defensive actions and, if so, how and when. There has been no example of the UN taking steps that purportedly had this effect.

during the last window of opportunity (imminency). Thus, the *NSS* proposal essentially lowers the bar for these two criteria.

In a world of WMD, terrorists, and rogue States, there is great appeal to evolution of the law in this direction. Moreover, support from some corners for the aggressive U.S. response to Iraq's failure to verifiably disarm suggests that there is a trend in this direction. However, a potentially slippery slope looms large. Should India, assessing the risk of Pakistani nuclear weapons, lower the threshold for a preemptive strike, or vice versa? What about North Korea? And so on.

While the approach makes some sense, one must not construe it as lowering the threshold of certainty regarding the *likelihood* of armed attack. This is a quite different matter, for whereas time and place bear on the timing of self-defense, likelihood bears on whether it is needed in the first place. Given that the resort to force is the most dramatic step a State may take in international relations, the only reasonable standard is one approaching the "beyond a reasonable doubt" standard employed in domestic law.⁹² If reasonable doubt exists about whether an armed attack might occur, then it would clearly be contrary to international law's purpose of maintaining international peace and security to allow a defensive resort to force.

The aforementioned logic generally supports the Administration's express intent to preempt attacks on the United States. It is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. This standard combines an exhaustion of remedies component with a requirement for a very high reasonable expectation of future attacks—an expectation that is much more than merely speculative.

Interestingly, much of the brouhaha over the preemption policy derives from a mischaracterization of terrorist attacks as isolated. It is

92. Yoram Dinstein has suggested a "beyond reasonable doubt" standard for determining when non-forceful remedies have been exhausted. Professor Dinstein was specifically addressing a situation in which terrorists or an armed band had already conducted an attack and there was fear of follow-on attacks. He notes that "[t]he absence of alternative means for putting an end to the operations of the armed bands or terrorists has to be demonstrated beyond reasonable doubt." YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 220 (3d ed. 2001). Although proposed here in a slightly different context, the logic of the standard fits.

more fitting to think of them as part and parcel of a single extended campaign. Consider al-Qa'ida. The group was involved in the 1993 World Trade Center bombing and has claimed responsibility for an attack against U.S. Special Forces in Somalia the same year. It was also implicated in the 1998 bombings of the U.S. embassies in East Africa and the 2000 attack on the *USS Cole*. Further, al-Qa'ida has been tied to a number of plots that did not come to fruition, such as a millennium celebration attack in Jordan, a plot to destroy multiple airliners, and assassination of President Clinton and the Pope.⁹³ Of course, it masterminded the 9/11 attacks. Today, the group remains active despite the massive international law enforcement and military coalition arrayed against it. Indeed, CIA Director George Tenet told the Senate Select Intelligence Committee in February 2003 that al-Qa'ida remains the greatest single threat against the United States; during 2002 alone, over 200 people died in al-Qa'ida attacks, nineteen of them American.⁹⁴

So, it is most logical to treat these events as a single campaign that is ongoing, much as a campaign in traditional warfare consists of a series of related tactical operations. In the same way that the conflict does not end upon a tactical pause between operations, a terrorist campaign continues despite hiatuses between attacks. Therefore, once the terrorist campaign is launched, the issue of preemption becomes moot because an operation already underway cannot, by definition, be preempted. Since the right to self-defense has matured fully, the sole issue is whether the campaign is going to continue or not. While this may be questionable after the first strike, it surely is not as the number of attacks climbs. In the case of al-Qa'ida, to even ask the question now approaches absurdity.

In sum, the Administration's preemptive strategies are far more consistent with existing notions of international law than they get credit for. The true test will be the extent to which the United States and other coun-

93. U.S. Dep't of State, *Patterns of Global Terrorism, app. B: Background Information on Terrorist Groups, al-Qa'ida* (Apr. 30, 2001), at <http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm>.

94. *The Worldwide Threat in 2003: Evolving Dangers in a Complex World, Hearing Before the Senate Select Intelligence Comm.*, 108th Cong. (2003) (testimony of George Tenet, Director, Central Intelligence Agency), quoted in U.S. Dep't of State, *Tenet Says Terror Threat Information "Most Specific We Have Seen"* (Feb. 11, 2003), at <http://usinfo.state.gov/topical/pol/terror/03021106.htm>.

tries carrying out such strategies will abide by the requirements of necessity, proportionality, and imminency.

5. *State-Sponsors of Terrorism*

The U.S. strategies unambiguously state that the United States will insist that States police their own territory. As seen, failure to do so, whether because of inability or unwillingness, allows the victim-State to engage in self-help operations against terrorists within the territory of those States. Yet, the United States also asserts a willingness to “compel” those who support or harbor terrorists to desist. Can the victim of terrorism by a non-State actor directly attack a State-sponsor of terrorism, and, if so, when?

Much attention has been paid since September 11th to the law of State responsibility; specifically, when can a State be held responsible for acts carried out from its territory or under its direction? This issue is a red herring in the context of using force directly against that State because the traditional remedies for a breach of State responsibility include restitution, compensation, and satisfaction.⁹⁵ Although countermeasures are also permissible,⁹⁶ Article 50 of the International Law Commission’s Articles on State Responsibility specifically provides that “[c]ountermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”⁹⁷ Therefore, any use of force in response to a breach of State responsibility must be consistent with one of the two Charter exceptions to the prohibition on the use of force—

95. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 77-85, arts. 34-37 (2002). Restitution is reestablishing “the situation which existed before the wrongful act was committed,” *id.* art. 35; compensation is covering any financially assessable damage not made good by restitution, *id.* art. 36; satisfaction is “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality” that responds to shortfalls in restitution and compensation when making good the injury caused, *id.* art. 37.

96. Countermeasures are “measures which would otherwise be contrary to the international obligations of the injured State vis-à-vis the responsible State if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.” *Id.* at 281.

authorization under Chapter VII (to be discussed in the context of WMD) and self-defense.

Since an “armed attack” is the condition precedent to self-defense, the question is when may terrorist acts be attributed to a State-sponsor such that it has constructively committed an armed attack meriting a defensive response directly against it. Again, the *Nicaragua* case provides guidance. Recall that the United States argued that Nicaragua’s support to guerillas fighting El Salvador amounted to an armed attack, thereby justifying operations against Nicaragua in the collective self-defense of El Salvador. The ICJ rejected this line of reasoning.

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.” This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314(XXIX), may be taken to reflect customary international law.

But the court does not believe that the concept . . . includes . . . assistance to the rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to an intervention in the internal affairs of other States.⁹⁸

97. *Id.* art. 50.1(a). The article is consistent with the International Court of Justice’s decision in *Corfu Channel*. The case involved an incident in which two British destroyers struck mines in Albanian waters while transiting the Corfu Strait in 1946. Though the evidence was insufficient to demonstrate that the Albanians laid the mines, the Court nevertheless held that they had the obligation to notify shipping of the danger posed by the mines. Albania’s failure to do so represented an internationally wrongful act entailing the international responsibility of Albania. But the Court also held that Albania’s failure to comply with its responsibility did not justify the British minesweeping of the Strait, an act that therefore constituted a violation of Albanian sovereignty. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (Merits).

By this standard, the U.S. strategies clearly overreach. They envisage military operations against a State for far less than “sending” terrorists or “substantial involvement” in their activities. On the other hand, they foresee no more than the actions taken against the Taliban; after all the Taliban were more dependent on al-Qa’ida than vice versa. Essentially, all the Taliban offered was safe harbor. Yet, when the United States and United Kingdom attacked on 10 October, Taliban targets were among the first struck. As a result, the attacks offer a unique opportunity to assess community reactions to the new U.S. strategy that they predated.

Strikingly, the reactions were almost uniformly supportive. As 10 October approached, it became clear that the United States had both al-Qa’ida and the Taliban in its crosshairs. However, with the exception of somewhat limited discourse within academia, no State or intergovernmental organization seemed to object.

The failure to distinguish between the Taliban and al-Qa’ida continued as the counter-terrorist operations unfolded. Support for the operations was extraordinarily high. In particular, the Security Council passed a number of normatively relevant resolutions after the attacks began. Resolution 1378, issued in mid-November, not only applauded the “international efforts to root out terrorism,” but also reaffirmed Resolutions 1368 and 1373 (which had referred to self-defense).⁹⁹ It specifically singled out the Taliban, condemning them for “allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qa’ida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qa’ida and others associated with them” and expressing support for the “efforts of the Afghan people to replace the Taliban.”¹⁰⁰ Subsequent resolutions likewise failed to distinguish between the legality of the operations against al-Qa’ida and those targeting the Taliban.¹⁰¹ Moreover, the bilateral support

98. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04, para. 195 (June 27) (Merits). Another judgment of relevance is that rendered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*. There the issue was whether acts of Bosnian Serb forces could be attributed to the Federal Republic of Yugoslavia. The Chamber held that the degree of control necessary for attribution varied based on circumstances. Refusing to apply the *Nicaragua* approach in its entirety, the Chamber adopted a standard of “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations” for acts by an “organized and hierarchically structured group.” *Prosecutor v. Tadić*, No. IT-94-1, 38 I.L.M. 1518, paras. 120, 145 (1999).

99. S.C. Res. 1378, *supra* note 72.

100. *Id.*

described earlier in the context of self-defense against non-State actors in no way distinguished between the Taliban and al-Qa'ida.

Suggesting that State-sponsors of terrorism may be directly attacked is a radical departure from traditional international law, particularly because the issue has already been addressed, and answered to the contrary, by the International Court of Justice. Thus, we are witnessing a dramatic evolution in the law of self-defense. In the future, States that might consider supporting terrorists, or turning a blind eye to their activities, should think twice. Although the extent and nature of support necessary to attribute a terrorist act to a State-sponsor remains unclear, there is little question that the threshold is dropping precipitously. Arguably, we now have an international *jus ad bellum* equivalent of criminal law's doctrine of accomplice liability. Specifically, States will be liable (deemed to have committed the armed attack) for an act of terrorism if they assist or encourage the act, or if they had a duty to stop it and failed to, intending to effectuate it. Indeed, "liability" may well lie when the State facilitates the crime, for example by providing safe haven or supplying weapons, even if it did not intend for the act to be committed, but knew that it would be.

Such dramatic evolution is explicable for a number of reasons. The international community has become painfully aware of the catastrophic consequences of terrorism. It is also finally grasping the potential of superterrorism, as well as its increasing likelihood in a time of WMD proliferation. This realization coincides with a period in which the possibility of armed conflict between superpowers is *de minimus*; there is far less danger of events spiraling out of control than during the Cold War. Thus, as it always does, law is conforming to the context in which it is to be applied. As the risks of terrorism increase, the risks of robust responses thereto are decreasing. Resultantly, we are witnessing the relaxation of international

101. Indeed, Resolution 1386, which (as with Resolution 1378) expressed support for rooting out terrorism in accordance with the Charter, reaffirmed the pre-October 10 resolutions (1368 and 1373). Thus, the fact that the United Kingdom and United States were now striking directly at the Taliban seemed to make no difference to the Council.

law limitations on State options for dealing with the terrorist threat. United States strategy statements lie at the forefront of this trend.¹⁰²

IV. Weapons of Mass Destruction

The United States is also at the cutting edge of strategy involving weapons of mass destruction. In December 2002, the Administration issued the *National Strategy to Combat Weapons of Mass Destruction (NSCWMD)*.¹⁰³ It echoes concerns about WMD expressed in the *National Security Strategy* and other policy statements and documents.¹⁰⁴ The most noteworthy of these was the President's 2002 State of the Union Address. Referring to Iran, Iraq, and North Korea, President Bush declared that

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic. . . . We'll be deliberate, yet time is not on our side. I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.¹⁰⁵

102. Note that although the United States and United Kingdom have asserted ties between Iraq and al-Qa'ida, many experts discount the allegations. See, e.g., Rohan Gunaratna, *No Evidence of Alliance*, INT'L HERALD TRIB., Feb. 19, 2003, at 6. This skepticism likely explains their emphasis on self-defense and enforcement of Security Council resolutions as the justification for their attack on Iraq.

103. WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002) [hereinafter NSCWMD], available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

104. Note that a state of emergency was declared in response to "the proliferation of weapons of mass destruction and their delivery systems" in 1994. Exec. Order No. 12,938, 30 WKLY. COMP. PRES. DOC. 2386 (Nov. 14, 1994). President Bush has continued this state. George W. Bush, Message to the Congress of the United States, Washington, D.C. (Nov. 6, 2002), <http://www.whitehouse.gov>.

105. President George W. Bush, State of the Union Address, Washington, D.C. (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

As with terrorism, it is U.S. policy to act early and decisively. In particular, the *NSCWMD* is based on “three pillars”: (1) counterproliferation to combat WMD use; (2) strengthened nonproliferation to preclude WMD proliferation; and (3) consequence management to respond to WMD use.¹⁰⁶

Of these, counterproliferation is relevant here. The United States seeks the capability to “respond with overwhelming force” to any use of WMD and to “disrupt an imminent attack or an attack in progress, and eliminate the threat of future attacks.”¹⁰⁷ Although the *NSCWMD* does not speak of preemption with the clarity of the other strategies, WMD preemption is implicit in the document and explicit in repeated policy statements from the Administration.¹⁰⁸ Moreover, both the *NSCWMD*¹⁰⁹ and *NSCT*¹¹⁰ call for interdiction of WMD before reaching terrorists. What are the legal implications of this strategy?

The law of self-defense discussed in the context of terrorism applies equally to State possession of weapons of mass destruction. Obviously, a State may defend itself against an ongoing armed attack involving WMD. As to defensive action before the armed attack occurs, recall the discussion of terrorism. Before defensive force may be employed, there must be evidence that establishes, arguably beyond a reasonable doubt, that the alleged aggressor-State intends to use WMD. That use may be either against the State that resorts to self-defense or, consistent with the law of collective self-defense, against any other State that seeks its assistance in defending itself. The defensive actions must be necessary, proportional, and take place only in the face of an imminent attack. Recall that necessity requires an exhaustion of alternatives to the use of force, proportionality limits the defensive force to that required to block the forthcoming armed attack, and imminency requires that the prospective victim wait until the last window of opportunity before defending itself.

The classic case study of self-defense against WMD is the 1981 Israeli air strike against the Osirak nuclear reactor outside Baghdad. Although the best ground for justifying the attack was the existence of an armed conflict between Israel and Iraq,¹¹¹ Israel also claimed that “in

106. *NSCWMD*, *supra* note 103, at 2.

107. *Id.* at 3.

108. The *National Security Strategy* devotes a chapter to the subject. *See NSS*, *supra* note 14, ch. V.

109. *NSCWMD*, *supra* note 103, at 2.

110. *NSCT*, *supra* note 31, at 21.

removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defense within the meaning of this term in international law and as preserved also under the United Nations Charter.”¹¹² After all, it had fought Iraq three times (1948, 1967, 1973) and Iraq denied the right of Israel to exist as a State. Israel understandably concluded that it was a future target of Iraqi nuclear capability, which it estimated would be operational by 1985.¹¹³

The Security Council unanimously rejected this assertion and “condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”¹¹⁴ The following month, the General Assembly overwhelmingly passed a resolution that included a “solemn warning” against any further attacks.¹¹⁵ Criticism centered less on the anticipatory nature of the attack, than on the basis Israel asserted for it. Although in retrospect probably incorrect, at the time many disbelieved Israel’s claims about the plant’s connection to the development of nuclear weapons. Consequently, the attack was unnecessary and occurred prior to emergence of any imminent threat.¹¹⁶

The risk posed by Iraq before the U.S./UK attack was far more aggravated than that it presented in 1981. Interestingly, the congressional joint resolution that authorized the President to order U.S. forces into battle against Iraq cites *both* self-defense and enforcement of UN Security Council resolutions as its bases under international law.¹¹⁷ So too did the President’s notification to Congress that he had acted pursuant to the resolution in ordering the attack.¹¹⁸ Nevertheless, the situation arguably failed to meet the criteria for self-defense, a fact that in part explains the Administration’s emphasis on the latter justification. There is no compelling substantiation that Iraq intended to use whatever weapons it might (or may in the future) have had against the United States or any other country, and no

111. See DINSTEIN, *supra* note 92, discussion, at 169.

112. Excerpts from Security Council Provisional Verbatim Record of June 15, 1981, 20 I.L.M. 996 (July 1981).

113. Letter, Israel, to Secretary-General of the United Nations (Oct. 19, 1981), U.N. Doc. A/36/610, S/14732 (1981).

114. S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. S/RES/487 (1981).

115. G.A. Res. 37/18, U.N. GAOR, 37th Sess. (1982).

116. For a discussion of the legal aspects of the attack, see Anthony D’Amato, *Israel’s Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584 (1983). The attack did, however, meet the proportionality criterion. The Israeli Air Force skillfully conducted the operation, discriminately targeted the source of a major threat to Israel, and violated Iraqi airspace with only a handful of aircraft for a very short period.

country had asked the United States to come to its assistance pursuant to the collective self-defense provisions of the Charter.¹¹⁹ Even if such evidence existed, other alternatives, most notably the UN inspection regime, remained active. Furthermore, there has been no evidence proffered that demonstrates the attack came during the final window of opportunity to disarm Iraq.

Instead, the dominant justification for acting against Iraq is that it failed to fully disarm as required by Security Council resolutions stretching back over a decade.¹²⁰ This failure was acknowledged by the Security Council in Resolution 1441 (November 2002), which found “Iraq’s non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles”¹²¹ a threat to international peace and

117. The resolution provides:

Whereas Iraq’s demonstrated capability and willingness to use weapons of mass destruction, the high risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its armed forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify the use of force by the United States in order to defend itself . . . [The President may] use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq; and . . . enforce all relevant United Nations Security Council resolutions regarding Iraq.

Authorization for the Use of Military Force Against Iraq, Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1499, 1501.

118. Letter from President George W. Bush to the Speaker of the House of Representatives and the President pro Tempore of the Senate (Mar. 21, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030321-5.html>. The British justification was more closely tied to Security Council resolutions—Iraq had breached the cease-fire that suspended hostilities in 1991 (Security Council Resolution 687), thereby reviving the use of force authority contained in Resolution 678 of 1990. United Kingdom Attorney General Lord Goldsmith, *Legal Basis for the Use of Force Against Iraq* (Mar. 17, 2003), <http://www.pmo.gov.uk/output/Page3287.asp>. Secretary Powell alluded to a similar justification immediately before the attack, although with less normative clarity. Secretary of State Colin L. Powell, Briefing on Situation with Iraq, Washington, D.C. (Mar. 17, 2003), <http://www.state.gov/secretary/rm/2003/18771.htm>. An interesting scholarly treatment of using force to enforce Security Council resolutions without an explicit Council mandate is Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124 (1999).

119. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04, para. 195 (June 27) (Merits).

security, and a material breach of its obligation under Resolution 687, the resolution that imposed cease-fire terms on Iraq following Operation Desert Storm. Additionally, 1441 reminded Iraq that it “will face serious consequences as a result of its continued violations of its obligations.”¹²²

This situation raises the question of the second exception to the UN Charter’s prohibition on the use of force—Security Council authorization to use force pursuant to Chapter VII. There are essentially two questions in this regard: (1) When may the Council authorize military action, in this case in the face of possession of WMD; and (2) Who has a right to enforce Security Council resolutions? It should be noted that the law regarding Security Council authorized actions applies equally to terrorism; however, in the vast majority of cases, States will act against terrorists in the exercise of their right of self-defense, instead of seeking a Council mandate.

The process for authorizing the use of force under Chapter VII is rather clear-cut. First, the Council must make a determination (pursuant to Article 39) that a particular situation amounts to a “threat to peace, breach of the peace, or act of aggression.”¹²³ This finding allows it to “decide what measures shall be taken . . . to maintain or restore international peace and security.”¹²⁴ One option consists of “measures not involving the use of armed force,”¹²⁵ such as an economic embargo, under Article 41. Once such measures have failed, or should the Security Council decide they are likely to, it may “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security” pursuant to Article 42.¹²⁶

The sole requirement for the exercise of Chapter VII authority is a threat to the peace, breach of the peace, or act of aggression. The Council is making such findings with increasing frequency.¹²⁷ Moreover, the discretion to label situations a threat and fashion an appropriate response has

120. Security Council Resolution 1441, that on which the United States and United Kingdom base their argument regarding legality, “recalls” Resolutions 661 (Aug. 6, 1990); 678 (Nov. 29, 1990); 686 (Mar. 2, 1991); 687 (Apr. 3, 1991); 688 (Apr. 5, 1991); 707 (Aug. 15, 1991); 715 (Oct. 11, 1991); 986 (Apr. 14, 1995); 1284 (Dec. 17, 1999); and 1382 (Nov. 29, 2001). See S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

121. *Id.*

122. *Id.* para. 13.

123. U.N. CHARTER ch. VII, art. 39.

124. *Id.*

125. *Id.* art. 41.

126. *Id.* art. 42.

been exercised quite creatively. For instance, in 1992, the Council characterized Libya's lack of cooperation in judicial proceedings regarding the bombing of Pan American 103 to be such a threat;¹²⁸ it has also used findings of a threat to create international tribunals¹²⁹ and no-fly zones.¹³⁰ There is absolutely no doubt that the Council may find virtually any circumstance related to WMD, including failure to disarm or cooperate with international weapons inspectors, to be a threat to the peace and mandate either Article 41 or 42 measures.

It is important to understand that the mere threat WMD poses to international peace and security is sufficient basis for doing so. In the current crisis, everyone agrees that the Council *could* have authorized the use of force; the sole issue is whether it *should* have taken that step. Along these lines, there has been a great deal of discussion about whether Iraq was in material breach of 1441. That discussion has no normative significance.

127. For instance, in 2002 the Council made such finding regarding, *inter alia*, events in Iraq, S.C. Res. 1441, *supra* note 120; Moscow, S.C. Res. 1440, U.N. SCOR, 57th Sess., 4632d mtg., S/RES/1440 (2002); Bali, S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg., U.N. Doc. S/RES/1438 (2002); Congo, S.C. Res. 1417, U.N. SCOR, 57th Sess., 4554th mtg., U.N. Doc. S/RES/1417 (2002); S.C. Res. 1399, U.N. SCOR, 57th Sess., 4495th mtg., U.N. Doc. S/RES/1399 (2002); Afghanistan, S.C. Res. 1413, U.N. SCOR, 57th Sess., 4541st mtg., U.N. Doc. S/RES/1413 (2002); S.C. Res. 1390, *supra* note 73; Liberia and the Surrounding States, S.C. Res. 1408, U.N. SCOR, 57th Sess., 4526d mtg., U.N. Doc. S/RES/1408 (2002); Angola, S.C. Res. 1404, U.N. SCOR, 57th Sess., 4514th mtg., U.N. Doc. S/RES/1404 (2002); Sierra Leone, S.C. Res. 1400, U.N. SCOR, 57th Sess., 4500th mtg., U.N. Doc. S/RES/1400 (2002).

128. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992).

129. *See, e.g.*, STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. Doc. S/25704, at 36, Annex (1993); S/25704/Add.1, U.N. Doc. S/RES/827 (1993) (established by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993)), <http://www.un.org/icty/index.html>; STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, 33 I.L.M. 1602 (1994) (established by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994)), <http://www.ictf.org>; STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE (established by S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000)), <http://www.sierra-leone.org/specialcourtstatute.html>. Note that the authority of the Council to establish such tribunals was unsuccessfully challenged in an interlocutory appeal before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. Prosecutor v. Tadić, No. IT-94-1-T (Aug. 10, 1995) (Decision on Jurisdiction); *see* George H. Aldrich, *Comment: Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

130. For example, NATO's Operation Deny Flight over Bosnia-Herzegovina pursuant to Security Council Resolution 816, U.N. SCOR, 3191st mtg. (1993).

“Material breach” is a legal concept of relevance to the law of cease-fires; when one party materially breaches the terms of a cease-fire, that breach releases the other side from its obligation to refrain from further use of force. However, there is no requirement for a breach, material or otherwise, of any term of a prior resolution before the Council may authorize a use of force under Article 42.

Thus, the authority of the Council to sanction the use of force to address threats to the peace caused by possession (or potential possession) of WMD is unfettered. The question then becomes who is authorized to enforce such a resolution. There are three possibilities.

First, the Council may grant the mandate to use force to a coalition of the willing, as it did in the 1991 Gulf War and as it has done with regard to the Interim Security Assistance Force in Afghanistan.¹³¹ Second, the Council may provide it to an intergovernmental organization. For instance, the Council authorized “Member States and relevant international organizations to establish the international security presence in Kosovo” following Operation Allied Force in 1999.¹³² The “international organizations” verbiage was clearly meant as a reference to NATO, but because the Council sought the participation of certain other States, especially the Russian Federation, it also extended the mandate to “Members.” KFOR resulted. Finally, the Council may mandate creation of a military force under UN command and control, as it has done for Sierra Leone with UNAMSIL.¹³³

131. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990) (Gulf War); S.C. Res. 1368, *supra* note 66 (Afghanistan).

132. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

133. The operation was initially authorized pursuant to Security Council Resolution 1270, U.N. SCOR, 54th Sess., 4054th mtg., U.N. Doc. S/RES/1270 (1999). Subsequent revisions of the mandate and operation occurred with Security Council Resolution 1289, U.N. SCOR, 55th Sess., 4099th mtg., U.N. Doc. S/RES/1289 (2000); Security Council Resolution 1346, U.N. SCOR, 56th Sess., 4306th mtg., U.N. Doc. S/RES/1346 (2001); and Security Council Resolution 1436, U.N. SCOR, 57th Sess., 4615th mtg., U.N. Doc. S/RES/1436 (2002).

A fourth option is purportedly action to counter WMD without Security Council sanction. Clearly, this would be appropriate if it met the requirements of self-defense. If not, can States nevertheless act?

In the current crisis, President Bush referred the matter to the Security Council and urged it to act.

We agree that Saddam Hussein continues to be in violation of U.N. Security Council Resolution 1441. We agree that the terms of that resolution must be fully respected. By Resolution 1441, the Security Council has taken a clear stand, and it now faces a clear choice. With all the world watching, the Council will now show whether it means what it says.¹³⁴

However, the President also unwaveringly maintained the position that “if the United Nations can’t act, and if Saddam Hussein won’t act, the United States will lead a coalition of nations to disarm Saddam Hussein.”¹³⁵

There is no basis in the UN Charter for the use of force absent either a Security Council mandate or a necessity for self-defense, a fact that explains the discomfort of many U.S. allies, including the British, over acting without a resolution beyond 1441. Indeed, even the statements supporting the U.S. position by the “Gang of Eight”¹³⁶ and the “Vilnius 10”¹³⁷

134. Remarks by President Bush and Spanish President Jose María Aznar, Crawford, Texas (Feb. 22, 2003), <http://www.whitehouse.gov/news/releases/2003/02/20030222-2.html>.

135. Remarks by President George W. Bush, Sioux Falls, South Dakota (Nov. 3, 2002), <http://www.whitehouse.gov/news/releases/2002/11/20021103-3.html>.

136.

The U.N. Charter charges the Security Council with the task of preserving international peace and security. To do so, the Security Council must maintain its credibility by ensuring full compliance with its resolutions. We cannot allow a dictator to systematically violate those resolutions. If they are not complied with, the Security Council will lose its credibility and world peace will suffer as a result. We are confident that the Security Council will face up to its responsibilities.

United We Stand, Statement by Jose María Aznar (Spain), Jose-Manuel Durao Barroso (Portugal), Silvio Berlusconi (Italy), Tony Blair (United Kingdom), Vaclav Havel (Czech Republic), Peter Medgyessy (Hungary), Leszek Miller (Poland), and Anders Fogh Rasmussen (Denmark) (Jan. 20, 2003), <http://www.hungaryemb.org/Media&Communication/Statements/UnitedWeStand.htm>. Each is the Prime Minister except for Mr. Havel, who is the Czech president.

emphasized that it was the Security Council's responsibility to enforce its resolutions. The delay in striking Iraq while seeking a follow-up resolution to 1441 illustrates, despite the saber rattling, the Administration's sensitivity to the discomfort even some of its closest supporters had about operating without Council sanction.

Thus, the announced U.S. strategy vis-à-vis action outside the Charter framework to address WMD exceeds the current boundaries of use of force law. Indeed, as a strict matter of law, such threats could be said to violate the UN Charter, Article 2(4), prohibition on threats of the use of force.¹³⁸ That said, law evolves through practice.¹³⁹ As Operation Iraqi Freedom proceeds, the extent of support it receives from the international community will indicate the degree to which the law regarding extra-Charter actions is, or is not, evolving. The limited support obtained thus far is not horribly suggestive of any noteworthy evolution.¹⁴⁰

V. Humanitarian Intervention

As discussed above, the Security Council's authority to mandate operations under Chapter VII is unfettered. This includes operations necessitating the use of force in order to protect and care for a population or group within the population. For instance, when the deteriorating situation in Somalia collapsed altogether in late 1992 despite the efforts of

137. "The clear and present danger posed by Saddam Hussein's regime requires a united response from the community of democracies. We call upon the U.N. Security Council to take the necessary and appropriate action in response to Iraq's continuing threat to international peace and security." Statement by the Foreign Ministers of Albania, Bulgaria, Croatia, Estonia, Latvia, Lithuania, Macedonia, Romania, Slovakia, and Slovenia (Feb. 5, 2003), http://www.mfa.government.bg/index_en.html.

138. Not all threats of the use of force are unlawful. For instance, threatening to employ force pursuant to a Security Council mandate is completely lawful. Thus, the legality of the threat depends on the legality of the threatened use. The International Court of Justice noted this point in *Legality of the Threat or Use of Nuclear Weapons*: "if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter." Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. para. 47 (July 8).

139. The practice may either serve to shape an existing norm by indicating the international community's present understanding of it or create an altogether new norm of customary international law. See *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, June 26, 1945, art. 38.1, 59 Stat. 1031, 1043, 1978 U.N.Y.B. 1185, 1197. Before the latter occurs, the practice must evidence *opinio juris sive necessitates*, a belief on the part of States engaging in it that the practice is legally obligatory. The requisite duration and scope of the practice is a matter of controversy.

UNOSOM I, the Security Council authorized “member States . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”¹⁴¹ The next day, President Bush authorized Operation Restore Hope, conducted by the multinational Unified Task Force (UNITAF).¹⁴² In 1993, UNOSOM II, endowed with Chapter VII powers by the Security Council, replaced UNITAF.¹⁴³ It is unquestioned that the mandates granted both UNITAF and UNOSOM II were appropriate exercises of the Council’s authority to meet a threat to the peace created by the internal situation in Somalia.

The more troublesome question is the legality of actions outside the Charter framework, for they appear to violate the prohibition on the use of force against the territorial integrity of other States. Although the U.S. strategies do not directly assert a right to humanitarian intervention, the

140. On 20 March 2003, the White House cited direct military participation, logistical and intelligence support, specialized chemical/biological response teams, overflight rights, humanitarian and reconstruction aid, and political support from the following countries: Afghanistan, Albania, Australia, Azerbaijan, Bulgaria, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Palau, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, United Kingdom, and Uzbekistan. It further asserted that the Coalition was growing. Press Release, White House, Coalition Members (Mar. 20, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030320-11.html>. Only Poland, the United Kingdom, and Australia had committed combat troops by 29 March 2003.

Opposition to Operation Iraqi Freedom was widely voiced. French President Chirac warned that the war would have “serious consequences,” German Chancellor Schroeder opined that thousands would “suffer terribly,” Russian President Putin labeled military action a “big political error,” Iran called the attack “unjustifiable and illegitimate,” the Arab League urged international efforts to stop the conflict, Belgian Prime Minister Verhofstadt claimed the Iraqis were “caught between the anvil and hammer,” Turkish President Sezer questioned the operation’s legitimacy, and the Vatican said it was “deeply pained.” *World Leaders Express Applause, Regret and Anger*, REUTERS, Mar. 20, 2003.

141. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992).

142. In addition to the United States, UNITAF included forces from Austria, Belgium, Botswana, Canada, Egypt, France, Germany, Greece, India, Italy, Kuwait, Morocco, New Zealand, Nigeria, Norway, Pakistan, Saudi Arabia, Sweden, Tunisia, Turkey, United Arab Emirates, United Kingdom, and Zimbabwe.

143. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993).

United States conducted exactly such an operation by leading NATO forces against the Federal Republic of Yugoslavia in 1999.

This was not the first time a regional organization had undertaken a humanitarian intervention. In 1990, ECOWAS, without UN approval, established the Cease-Fire Monitoring Group (ECOMOG) to address internal conflict in Liberia that had resulted in “a state of anarchy and total breakdown of law and order.”¹⁴⁴ In January 1991, despite the absence of a mandate, a Security Council Presidential Statement was issued that “commended the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia.”¹⁴⁵ When fighting broke out again in 1992, the Security Council commended ECOWAS for its role in addressing this “threat to international peace and security.”¹⁴⁶ The next year it created UNAMSIL to monitor ECOWAS activities.¹⁴⁷

In 1997, ECOWAS conducted another humanitarian intervention without Security Council sanction, this time in Sierra Leone.¹⁴⁸ A bloody civil war had been underway in the country since 1991, when in 1997 a military coup toppled the newly elected president of the country, Ahmed Kabbah. The Organization of African Unity urged ECOWAS to “restore the constitutional order”; it responded by sending troops into the country. At that point, the Security Council had merely asked ECOWAS to mediate. Following the intervention, though, the Council, as in the Liberia case, issued a Presidential Statement commending ECOWAS for the “important role” it was playing “towards the peaceful resolution of this crisis.”¹⁴⁹ When violence broke out again, the Council continued to praise ECOWAS and ECOMOG;¹⁵⁰ eventually, UNAMSIL replaced ECOMOG.¹⁵¹

144. See, e.g., REGIONAL PEACEKEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 73 (Mark Weller ed., 1994).

145. U.N. Doc. S/22133 (1991).

146. S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992).

147. S.C. Res. 856, U.N. SCOR, 48th Sess., 3263d mtg., U.N. Doc. S/RES/856 (1993); S.C. Res. 866, U.N. SCOR, 48th Sess., 3281st mtg., U.N. Doc. S/RES/866 (1993).

148. For an interesting discussion of the normative implications of this case, see Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1998).

149. U.N. Doc. SC/6481 (1998).

150. U.N. Doc. SC/6518 (1998); S.C. Res. 1260, U.N. SCOR, 54th Sess., 4035th mtg., U.N. Doc. S/RES/1260 (1999).

151. S.C. Res. 1289, *supra* note 133.

There are several commonalities between these cases. Perhaps, most important is the fact that a regional organization conducted them. Additionally, in neither case was there any opposition to the interventions in the Security Council, and the humanitarian situation in both Liberia and Sierra Leone had reached horrendous proportions. In each, the Security Council subsequently “approved” of the operations by commending them, eventually sending in “Blue Helmets.”

The crisis in Kosovo took humanitarian intervention a step further. What is normatively significant is that the intervention took place in the face of opposition from two of the Security Council’s permanent members, China and Russia, but was led by a third member of that body, the United States, with the cooperation of the remaining two, France and the United Kingdom. Moreover, as it involved the United States, it is at least an indication of U.S. views on the subject of humanitarian intervention.

The situation had been tense in Kosovo since 1989, when President Slobodan Milosevic revoked the autonomous status the province enjoyed since 1974. By early 1998, violence had erupted. The Security Council condemned the brutality on both sides¹⁵² and reimposed an arms embargo on the country.¹⁵³ In September, the Council threatened to “consider further action . . . to restore peace and stability” if the two sides did not resolve their problems and “avert the impending humanitarian catastrophe.”¹⁵⁴ Negotiations between the parties began, but in March 1999 Yugoslavia rejected an agreement proposed by France, Germany, Italy, the United Kingdom, and the United States (the Contact Group) at Rambouillet, France. Without seeking approval from the Security Council, NATO responded by launching an air campaign against Yugoslavia on March 24.

Unlike the Liberia and Sierra Leone cases, here NATO intentionally avoided going to the Security Council because of the likelihood of a veto. Moreover, this time there was vocal and important opposition to the operation. The Russians argued that Allied Force was in violation of the Charter and that “the unilateral use of force will lead precisely to a situation with truly devastating . . . consequences.”¹⁵⁵ China objected that the situation was a purely internal matter in which NATO was illegally interfer-

152. See, e.g., S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998).

153. S.C. Res. 1160, *supra* note 152.

154. S.C. Res. 1199, *supra* note 152.

155. U.N. SCOR, 54th Sess., 3988th mtg., at 2-3, U.N. Doc. S/PV.3988 (1999).

ing,¹⁵⁶ while India argued that even if the intervention was meant to prevent human rights abuses, “[t]wo wrongs do not make a right.”¹⁵⁷ Following Council debate, a resolution labeling NATO’s “unilateral use of force . . . a flagrant violation of the United Nations Charter” was defeated by a vote of three to twelve.¹⁵⁸ In May, an agreement brokered by Russian Prime Minister Chernomyrdin and Finnish President Ahtisaari terminated hostilities. The Security Council, acting under Chapter VII, then authorized deployment of an international civil and security presence, which implicitly included NATO, in Kosovo.¹⁵⁹

Although NATO defended its operation on humanitarian grounds, States, including the United States, have been reticent to explicitly advocate a right to humanitarian intervention. Even during the NATO intervention, individual Member States struggled to fashion a consistent legal argument for the operation. All that can be said at this point is that while humanitarian interventions cannot be deemed illegal *per se* (witness Liberia and Sierra Leone), the international community will continue to make case-by-case assessments whenever they occur.

Numerous efforts have been made to determine the standards that should be used in such assessments.¹⁶⁰ Among the best are two by Ved Nanda of the University of Denver. In 1992, Professor Nanda looked at interventions in Northern Iraq, Yugoslavia, Iraq, and Haiti, concluding that the international community will evaluate lawfulness against five criteria:

- (1) the necessity criterion, whether there was genocide or gross, persistent, and systematic violations of basic human rights;
- (2) the proportionality criterion, the duration and propriety of the force applied;

156. *Id.* at 12.

157. *Id.* at 16.

158. U.N. SCOR, 54th Sess., 3989th mtg., at 6, U.N. Doc. S/PV.3989 (1999) (China, Russia, Namibia v. Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United States, United Kingdom).

159. S.C. Res. 1244, *supra* note 132.

160. *See, e.g.*, Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF., Nov.-Dec. 2002, at 99; REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001).

- (3) the purpose criterion, whether the intervention was motivated by humanitarian consideration, self-interest, or mixed motivations;
- (4) whether the action was collective or unilateral; and
- (5) whether the intervention maximized the best outcome.¹⁶¹

In 1998, a subsequent study by Professor Nanda and colleagues considered Somalia, Bosnia, Haiti, Rwanda, and Liberia.¹⁶² The group exhibited greater liberality vis-à-vis actions conducted by regional organizations or individual States than in 1992, but essentially confirmed the criteria set forth in the earlier study.

Although both studies predated Operation Allied Force, the criteria enunciated reflect those on which debates about the legality of the operation focused. For instance, with regard to necessity, some argued that the operation was premature, that the suffering had not reached genocidal proportions. Indeed, at the time, there was discussion as to whether a new policy of anticipatory humanitarian intervention was emerging.¹⁶³ Others suggested that the operation was disproportionate because it triggered a massive displacement of the civilian population. Still others urged that far from being a humanitarian intervention, its true purpose was to demonstrate the relevance of NATO in the post-Cold War world. Finally, the core criticism was that although “collective,” it occurred outside the Charter framework and in the face of opposition from key members of the international community.

The law in this area is moving slowly, accompanied by much trepidation on the part of States. In the future, humanitarian interventions are likely to be deemed legitimate only when they comply with the Nanda criteria and evoke no significant opposition from key global and regional actors; hence, the failure to explicitly base operations against Iraq on this basis.¹⁶⁴ Nevertheless, the guarded espousal of a right of humanitarian

161. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 330 (1992).

162. Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998).

163. E.g., Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999).

intervention does represent some movement away from unyielding insistence on strict interpretation of the Charter scheme for the use of force. This being so, it may have some slight synergistic effect on other assertions, such as that discussed in the WMD context, of a right to act without Security Council authorization or a firm basis in the law of self-defense.

VI. Cyber War¹⁶⁵

In February 2003, the White House released its *National Strategy to Secure Cyberspace*,¹⁶⁶ one of the implementing strategies for the *National Strategy for Homeland Security* and the *National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*.¹⁶⁷ This document highlights the vulnerability of major sectors of the nation's infrastructure. Particularly attractive as a target is the economy, which relies on a "network of networks" for its efficient functioning.¹⁶⁸ The impact of a cyber attack on these and other networked systems can range from inconvenience to loss of life. Today, the United States is at the point of determining its options for handling cyber attacks, as well as its options for using them. It has the advantage of influencing the vector of the *jus ad bellum* from the

164. Although Administration officials have repeatedly spoken of the "liberation" of Iraq—indeed, the operation has been dubbed "Iraqi Freedom"—there is no basis for suggesting that the suffering of the Iraqi people had reached levels justifying humanitarian intervention *as a matter of international law*.

165. Information operations are "actions taken to affect adversary information and information systems while defending one's own information and information systems," whether during peacetime, crises, or "war," and at the strategic, operational, or tactical levels of armed conflict. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 203 (12 Apr. 2001). Information operations can include such diverse activities as operations security, psychological operations, military deception, electronic warfare, physical attack, and computer network attack.

A subcategory of information operations is information warfare (IW), that is, "information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries." *Id.* The defining aspect of IW is not what is affected (as a subset of IO, by definition the objective is affecting information, or the use thereof), but rather the circumstance in which it occurs—crisis or conflict. Cyber war is a term in common usage that generally refers to the computer network attack aspect of IW.

166. WHITE HOUSE, NATIONAL STRATEGY TO SECURE CYBERSPACE (2003) [hereinafter NSSC], available at <http://www.whitehouse.gov/pcipb>.

167. NATIONAL STRATEGY FOR HOMELAND SECURITY (2002); NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS (2003).

168. NSSC, *supra* note 166, at 5.

very inception of cyber war. Thus, the practice it engages in, and the legal positions it assumes, will have great weight in shaping this body of law.¹⁶⁹

Cyber attacks raise a number of complex legal issues.¹⁷⁰ The first is whether they violate the international law governing the resort to force. Article 2(4) is the touchstone. The question is whether a cyber attack, because it does not involve the use of kinetic force, is a prohibited use of force under the Charter and customary international law. This is a particularly appropriate topic in light of the fact that the U.S. mounted cyber operations in advance of the kinetic military operations against Iraq that began on 19 March 2003.¹⁷¹

The nature of the prohibition was addressed by the International Court of Justice in the *Nicaragua* case. Recall that the Court found that although the funding of guerrilla forces was not a use of force, arming and training them was. This finding supports a conclusion that a use of force need not be kinetic in nature.¹⁷²

On the other hand, the Charter drafting history sets a threshold below which a use of force does not lie. At the San Francisco Conference, there was discussion of including economic coercion within the meaning of the

169. For U.S. forces, information operations policy is set forth in, *inter alia*, U.S. DEP'T OF DEFENSE, DIR. S-3600.1, INFORMATION OPERATIONS (9 Dec. 1996); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS (9 Oct. 1998); JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, JOINT DOCTRINE FOR COMMAND AND CONTROL WARFARE (7 Feb. 1996); CHIEF OF NAVAL OPERATIONS, INSTR. 3430.26, IMPLEMENTING INSTRUCTION FOR INFORMATION WARFARE/COMMAND AND CONTROL (18 Jan. 1995); AIR FORCE DOCTRINE DOCUMENT, INFORMATION OPERATIONS 2-5 (5 Aug. 1998).

170. For surveys of the subject, see COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Naval War College International Law Studies, Michael N. Schmitt ed., 2002); THOMAS C. WINGFIELD, THE LAW OF INFORMATION CONFLICT 124-25 (Aegis Corp. 2000); Eric T. Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L. 207 (2002); Michael N. Schmitt, *Wired Warfare: Computer Network Attack and International Law*, 84 INT'L REV. RED CROSS 365-99 (2002); Christopher Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 EUR. J. INT'L L. 825 (2001); Michael N. Schmitt, *Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. TRANSNAT'L L. 885-937 (1999).

171. Thom Shanker & Eric Schmitt, *Threats and Responses: Hearts and Minds*, N.Y. TIMES, Feb. 24, 2003, at A1.

172. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 118-19, para. 228 (June 27) (Merits). For jurisdictional reasons the Court was not actually applying Article 2(4) *qua* 2(4), but instead the customary international law prohibition on the resort to force.

use of force prohibition; conferees roundly rejected this proposal.¹⁷³ Other treaties on the subject,¹⁷⁴ as well as the General Assembly's Declaration on Friendly Relations,¹⁷⁵ also fail to include economic (or political) coercion in the ambit of the term.

If these are known points on the continuum of the use of force, we can begin to develop criteria for assessing cyber operations. The key is to move from an instrument-based paradigm (economics, politics, kinetic military force) to one based on the consequences caused by the action. In other words, does the operation create consequences that are more like those caused by economic and political coercion or by physical coercion? In making this determination, which I have described in greater depth elsewhere,¹⁷⁶ seven criteria are useful: (1) severity of the consequences; (2) how immediately the consequences occur; (3) the directness of the attack and the consequences, i.e., the extent of the cause-effect relationship between them; (4) the invasiveness of the attack; (5) the measurability of the consequences; (6) the presumptive legitimacy of the action under both domestic and international legal regimes; and (7) the extent to which the State is responsible for the attack.¹⁷⁷

The criteria should not be applied mechanistically. Rather, the assessment is holistic. How many criteria are implicated? To what degree? In what geo-political context? And so forth. The goal is to anticipate the international community's likely appraisal of a particular action. In other words, the normative expectations of the community are what matter. Only through State practice (and the community reaction thereto) can better-defined normative standards emerge. Absent such practice, the best a

173. 6 U.N.I.O. Docs. 334, 609 (1945); Doc. 2, 617 (e)(4), 3 U.N.C.I.O. Docs. 251, 253-54 (1945).

174. Inter-American Treaty of Reciprocal Assistance, Sept. 7, 1947, art. 1, 1947 T.I.A.S. 1838, 21 U.N.T.S. 77 ("undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty"). See also Pact of the League of Arab States, art. 5, Mar. 22, 1945, 70 U.N.T.S. 238, which only speaks of force: "Any resort to force in order to resolve disputes arising between two or more member States of the League is prohibited." *Id.*

175. U.N. Doc. A/AC.125/SR.114 (1970). See also *Special Committee on Friendly Relations, Report*, 24 U.N. GAOR, 24th Sess., Supp. No. 19, U.N. Doc. A/7619, at 12 (1969); Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1 (1972).

176. See generally Schmitt, *Normative Framework*, *supra* note 170.

State considering a cyber operation can do is speculate as to the community's likely ex post facto legal assessment.

The second major *ad bellum* issue is when does cyber war amount to

177. Thomas Wingfield has very usefully set out examples of the types of queries that the various criteria would suggest:

Severity:

- How many people were killed?
- How large an area was attacked? (scope)
- How much damage was done within this area? (intensity)

Immediacy

- Over how long a period did the action take place? (duration)
- How soon were its effects felt?
- How soon until its effects abate?

Directness

- Was the action distinctly identifiable from parallel or competing actions?
- Was the action the proximate cause of the effects?

Invasiveness

- Did the action involve physically crossing the target country's borders?
- Was the locus of the action within the target country?

Measurability

- How can the effects of the action be quantified?
- Are the effects of the action distinct from the results of parallel or competing actions?
- What is the level of certainty?

Presumptive Legitimacy

- Has this type of action achieved a customary acceptance within the international community?
- Is the means qualitatively similar to others presumed legitimate under international law?

Responsibility

- Is the action directly or indirectly attributable to the acting state?
- But for the acting State's sake, would the action have occurred?

Overall Analysis

- Have enough of the qualities of a use of force been identified to characterize the information operation as a use of force?

an “armed attack” that allows a State (or other States acting in collective self-defense) to respond forcefully in self-defense. The analysis proposed above is inapplicable, for, as noted in the *Nicaragua* decision, “use of force” and “armed attack” are not synonymous terms. This distinction makes sense in light of the Charter’s central purpose, “[t]o maintain international peace and security.”¹⁷⁸ Essentially, this objective creates a rebuttable presumption against the resort by States to violence. Thus, it is logical to interpret the prohibition on the use of force expansively, but characterize exceptions that lie outside the community decisional architecture, such as self-defense, narrowly.

What then is an armed attack? Consequence-based analysis again provides the answer. The scope of the term “armed attack” cannot be limited to application of kinetic force. Consider CBRNE weaponry. Chemical, biological, and radiological attacks do not necessarily have to involve the application of kinetic force. For instance, chemical weapons can be spread by aerosol dispensers, released from crop dusting aircraft, or even, when in gaseous form, simply allowed to drift in the wind towards intended victims. Indeed, the biological attacks involving anthrax that killed five in 2001 were conducted through the U.S. postal system. Yet, it is undeniable that chemical, biological, and radiological attacks (of the requisite scale and effects) can constitute armed attacks permitting a defensive response by the victim-State. This is so, despite the absence of kinetic force, because their consequences can include serious suffering or death of human beings or physical damage to tangible objects.

Identical reasoning would apply to cyber operations. A cyber attack that causes significant human suffering or property damage is obviously an armed attack justifying a response under the law of self-defense. Appropriate responses may involve conventional weaponry as long as its use is proportionate and no viable non-forceful alternatives exist; there is no requirement that the defensive response be in kind. An attack falling short of this standard might amount to a prohibited use of force or other international wrong, but characterizing it as an armed attack would be questionable.

The approach tracks the “object and purpose”¹⁷⁹ of Article 51. States were not concerned about a particular modality of violence (kinetic force); instead, they were convinced of the need to allow States an avenue for

178. U.N. CHARTER art 1.1.

179. Vienna Convention, *supra* note 63, art. 31.1.

averting serious consequences should the Charter collective security mechanism fail. The formula “armed attack” simply offered an understandable “cognitive shorthand” which, given the state of warfare in 1945, achieved that aim. Including cyber operations that produce the requisite consequences, particularly in light of the fact that they did not exist when the Charter was adopted, is thus quite reasonable.

So, assuming a planned or ongoing cyber attack is an armed attack, when can the target State respond with the use of military force? Again, analysis tracks that outlined above in other contexts. First, a cyber attack is an armed attack justifying a forceful response in self-defense if it causes physical damage or human injury or is part of a larger operation that constitutes an armed attack. Second, self-defense is justified when a cyber attack is an irrevocable step in an imminent (near-term) and unavoidable attack (preparing the battlefield). Finally, a State may react defensively during the last possible window of opportunity available to effectively counter an armed attack when no reasonable doubt exists that the attack is forthcoming.

VII. Conclusion

At the outset, it was suggested that law is reactive, contextual, and directional. There is little doubt that events of the past five years are signalling a sea change in the *jus ad bellum*. Slowly but surely this body of law is becoming more permissive in response to the demise of nuclear-armed bipolar competition and the rise of both transnational terrorists and WMD proliferation. It is a permissiveness heralded in virtually all U.S. strategic pronouncements.

Today, it is clear that strikes by non-State actors may amount to “armed attacks” that allow victim-States to respond militarily over extended periods. Moreover, victim-States may conduct counter-terrorist operations in the territory of third States if those States do not effectively prevent their territory from being used as a base for terrorist operations, although there are certain hurdles that must first be surmounted. As to State-sponsors of terrorism, although the nature of support that justifies an attack directly against them is uncertain, the threshold is plummeting.

Less clear is the law regarding forceful responses to the possession of weapons of mass destruction. There is no doubt that a response pursuant to Security Council authorization is entirely appropriate. Similarly, a

defensive response, even an anticipatory one, is appropriate when necessary, immediate, and proportional. What remains ambiguous is the extent to which a State may act beyond a strict Charter regime, either preemptively or to enforce Security Council resolutions. International reaction to Operation Iraqi Freedom will prove normatively influential in this regard.

Likewise, despite NATO's 1999 humanitarian intervention in Yugoslavia, the precise line of legality for such endeavors remains very vague—except when authorized by the Security Council. They are likely to continue to be evaluated on a case-by-case basis by reference to such criteria as necessity, proportionality, purpose, inclusivity, and maximization of outcome. Although not a humanitarian intervention, the international community's normative assessment of Iraqi Freedom will, because it is an extra-Charter operation, have blow-back effect on the international law regarding interventions conducted without Security Council mandate.

Finally, cyber war constitutes a new dimension of warfare. Therefore, those States that have the capability and will to conduct cyber attacks have a unique opportunity to shape the law through practice. Whether they will do so in a manner that leads to a permissive or restrictive normative regime remains an open question. The dilemma is that the States most capable of conducting cyber attacks are precisely the ones most vulnerable to them. Until the law governing these operations matures, the characterization of a cyber attack as an Article 2(4) use of force will likely depend on a holistic evaluation employing such criteria as severity, immediacy, directness, invasiveness, measurability, presumptive legitimacy, and responsibility. However, if an attack causes physical damage or human injury it will almost certainly be characterized as an "armed attack" that justifies a forceful response pursuant to the law of self-defense.

The global community finds itself at the cusp of normative change regarding the use of force. International law has proven more malleable than even the most prescient observer would have anticipated five years ago. But powerful voices are being raised in alarm. This being so, whether *Bellum Americanum* becomes fact or fiction is yet to be seen.

THE THIRTIETH KENNETH J. HODSON LECTURE ON CRIMINAL LAW¹**THE HONORABLE MARC F. RACICOT, FORMER GOVERNOR OF
MONTANA²**

Thank you very much and good morning to all of you. I'm delighted to be here this morning, with a little trepidation, I would have to admit. It's my great hope that we might have an opportunity to have some conversation and discussion as we proceed through the morning so that I might be responsive to the issues or thoughts that you think are relevant and important.

As any good trial lawyer knows, of course, you need to set the record straight from the very beginning. In his introductory remarks, Lieutenant Colonel Garrett³ pointed out that I participated in basketball throughout my youth, and that on one occasion I set a record for the number of assists tabulated at the small school that I attended in Montana. I couldn't shoot, and as a consequence of that, I had no other options. My father was my basketball coach, both in high school and college. In fact, some people said that the only reason I played was because my father was the coach. He used to tell me, "Marc, just remember, you're not big, but you're slow."

My father was entirely correct. What he was suggesting was something that I had reaffirmed when I was here at The Judge Advocate General's School twenty-nine years ago, not in this particular building, but on the University of Virginia campus itself, attending the 69th Judge Advocate Basic Course. That is, in the end, teamwork, being a part of a mission

1. This article is an edited transcript of a lecture delivered on 11 April 2002 by the Honorable Marc F. Racicot, former Governor of Montana, to members of the staff and faculty, distinguished guests, and officers attending the 50th Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

with others, being engaged in conflicts that allow for the best instincts and efforts of those that you have the opportunity to share time and effort with, ultimately end up making a very critical difference in whether or not you're capable of achieving success.

I need to start with a preface this morning. The context within which remarks are offered to you, or thoughts or intuitions are provided, has a great deal to do with a person's personal history. Consequently, I want to share a little bit of that with all of you this morning so that you can place my thoughts in their proper context.

I need to tell you first of all that I consider it a very high privilege and great honor to be invited to participate in the Hodson Lecture series. I, of

2. Born in Thompson Falls, Montana, the Honorable Marc F. Racicot grew up first in Miles City and then in Libby, Montana, graduating from Libby High School in 1966. He received his B.A. in English from Carroll College in Helena, Montana, in 1970. He received his Juris Doctorate degree in 1973 from the University of Montana School of Law in Missoula, Montana.

As an Army ROTC graduate, Governor Racicot was assigned to the Judge Advocate General's Corps and entered active duty following his graduation from law school. His first assignment, after entering active duty at Fort Lewis, Washington, was as a trial counsel with the Theater Army Support Command in Worms, West Germany. He later became the Chief Trial Counsel at the 21st Support Brigade in Kaiserslautern, trying cases in the largest geographic military jurisdiction in Europe.

Upon his release from active duty, he returned to Montana in 1976 and served as a deputy county attorney for Missoula County. The following year he became a state assistant attorney general and Montana's first Special Prosecutor. From 1977 to 1988, he prosecuted criminal cases for county attorneys all across Montana.

Governor Racicot was elected as the attorney general for Montana in the fall of 1988. He served as Montana's attorney general until 1992 at which time he successfully ran for Governor. On 4 January 1993, he was sworn in as Montana's 20th Governor. He was re-elected to a second term in 1996.

In February 2001, he became a partner in the Washington, D.C. office of the Texas-based law firm Bracewell & Patterson, where his legal practice focuses on government relations and public policy resolution.

He currently serves on the Boards of Directors of Jobs for America's Graduates and the Corporation for National and Community Service. He is also a member of the Board of Visitors of the University of Montana School of Law, and is the immediate past chairman of America's Promise—The Alliance for Youth, which was founded and previously chaired by Secretary of State Colin Powell. Governor Racicot was nominated by the President and unanimously elected Chairman of the Republican National Committee in January 2002.

Governor Racicot has received honorary doctorate degrees from Luther College, Gonzaga University, Carroll College, and the University of Montana. He is married, has five children, and three grandchildren.

3. Lieutenant Colonel James Garrett, Department Chair, Criminal Law, The Judge Advocate General's School, Charlottesville, Virginia.

course, attended the second lecture in the fall of 1973. Colonel Squires⁴ and I were remembering earlier, although quite frankly we didn't have an independent recollection of everything that occurred during those days, that we were both a part of the same basic class, the 69th basic class from August to October 1973. That was almost twenty-nine years ago. How time flies when you're having fun!

Colonel John J. Douglass⁵ was the Commandant of the JAG School at that point. There are also others in attendance here today that were at the JAG School then. Major Gilligan⁶ was one of the professors, as were Captains Lederer⁷ and Imwinkleried,⁸ all part of a brilliant faculty that was preparing us before we were dispatched into our various different venues to engage in the practice of law in the United States Army. Their aim was to ensure that we became the best Army lawyers that we could possibly be. I must tell you that I have been grateful for that experience, for their patience and their scholarship, virtually every single day for the past twenty-nine years.

I was not always grateful, however, for the exercise of discretion by then Major William Suter,⁹ who was making all of the assignments and dispatching us to various parts of the world. I can remember graduating from law school, and two days later, orders were delivered to my home. I can remember with great clarity and precision my first conversation with Major Suter and asking him what I was supposed to do. He said, "Well, report for duty, of course." I responded, "But I wasn't scheduled to go until August." And he said, "Well, that's the way things work sometimes, isn't it?"

So I did, in fact, report for duty. Major Suter sent me to West Germany, and Colonel Charles Taylor, my first Staff Judge Advocate, assigned me to the Criminal Law Division, although that was not what I anticipated. Captain Daniel T. Brailsford, with whom I had a conversation just a few

4. Colonel (Retired) Malcolm "Mac" Squires.

5. Colonel (Retired) John J. Douglass served as the Commandant of the JAG School from 1970-1974.

6. Colonel (Retired) Francis A. Gilligan.

7. Francis I. Lederer, currently Chancellor Professor of Law, William and Mary School of Law.

8. Edward J. Imwinkelried, currently Professor of Law at the University of California, Davis.

9. Major General (Retired) William K. Suter ultimately served as Acting The Judge Advocate General from 1989-1991. He retired from active duty in 1991.

days ago, made me a prosecutor. Those experiences shaped my life profoundly and forever. I'm absolutely delighted that I get the opportunity to share with you some of the thoughts gathered throughout these last twenty-nine years, beginning with the opportunity and privilege of being exposed to the teaching and scholarship here at The Judge Advocate General's School.

I was raised in a very small town in northwestern Montana and never envisioned that I would be this far away from home. I've spent virtually all of my life, with the exception of my military service in West Germany, in the state of Montana, up until a year and a half ago. There were, and still are, seven children in my family. I was then, and as I realize now, still am, the oldest of those seven children. There were six boys and one girl. Two of them were adopted. My brother Philip was Korean, and the only girl of that brood, my sister Aimee, was also adopted. My father, as I mentioned, was a high school basketball coach, and my mother, without any military training whatsoever, was in command and control of the household from the very beginning.

We grew up in a small house on Larch Street, where it seemed as if there were parents virtually everywhere, throughout the entire neighborhood that we grew up in. We had the benefit, I think, of feeling very secure and very safe, growing up in what we perceived to be a very stable rural setting. I am the son of a Marine and World War II veteran. Although he never confessed to it, I'm certain that he was terribly disappointed that I ended up being an officer in the United States Army, rather than in the United States Marine Corps.

With that background, let me share a few thoughts with you. It's my hope that they are relevant, which was one of the things that Major Gilligan constantly focused upon when we were in his charge here at the JAG School.

I've learned these lessons of relevance so many different times. The most recent of which occurred the last week that I was serving in office in the State of Montana. I went to read to a third grade class, and there was a little girl who had been called upon to make a presentation on the human body. I arrived, uncharacteristically, early. This was a very serious assignment that she had received. You could tell by all the outward signs. She was dressed in, I believe, one of her finest dresses and she had her hair curled and with ribbons. She had a very stern countenance, a pointer, and

she had prepared, allegedly, a diagram of the human body, hanging right behind her.

She began her discussion by saying, “There are three parts of the human body. The first part is the head, and that’s where the brain is, if any,” which I took probably to be an editorial comment by one of her parents, at some point. Then she said, “The second part is the chest, and that’s where the heart is.” Finally she mentioned, “The third part is the stomach, and that’s where the bowels are, and there are five bowels, A, E, I, O, and U.” It made me realize once again, that it’s very important to have information, but it’s just as important to provide it in a relevant and connected context. It’s my hope to live up to those expectations this morning.

I reported for duty in West Germany, to be of service in a capacity unknown to me at the time, but would become the center focus of my life in very short order. I was assigned as a prosecutor immediately upon arrival. I don’t know if any of you had a similar feeling, but when I exited law school, it appeared to me that there was a certain presumption that almost every graduate of law school expected to serve as a defense lawyer at some point. Defending, of course, all of those grand and spectacularly important constitutional principles embedded, not only in the framing documents of this nation, but also within the psychological dynamics that all of us have come to recognize as being a part of our American society. When I informed CPT Brailsford that I hoped to provide defense services someday, he told me that was certainly possible, but before that time, if I was going to learn the skills necessary to provide an adequate defense, I needed to make absolutely certain that not one soul, not one innocent soldier was going to suffer as a result of my incapacity or inexperience.

It didn’t take long before I realized how I loved the prosecution function. I loved the courtroom, and I loved the process of investigating the mystery of a criminal case, and the competition that was borne out of the process of meting out justice. Although I know that was not supposed to be the main focus of our efforts, nonetheless, it certainly provided inspiration as I engaged in working with others to present a case before an impartial court or tribunal. It was not very long before I decided that I wanted to dedicate my life’s work to the prosecution function.

If you will remember, and I’m sure you will from your study of history, the Military Justice Act of 1968¹⁰ was not that old when I first entered

10. Pub. L. No. 90-632, 53 Stat. 1335 (1968).

into the arena as a prosecutor, and of course the *Manual for Courts-Martial* framed in 1969¹¹ was relatively new as well. Military justice had been through a rather tumultuous history and evolution, however, as we've moved from our practices and exposures during World War II to the creation of the first *Manual for Courts-Martial*; the Uniform Code of Military Justice in 1950¹² that became effective in 1951; and then after a vast amount of experience over the next several years, the efforts undertaken and ultimately the doctrines contained within the Military Justice Act of 1968, which was further defined by the *Manual for Courts-Martial* of 1969. All of this led to a very rapid evolution of military law over a relatively short period of time. So in many ways, I was involved with an entirely new practice of law as we were experiencing it around the world and throughout all of our military installations.

Being assigned in Germany, of course, meant that the same rules that pertained to the trial of military offenses did not pertain there because the Federal Republic of Germany provided waivers of jurisdiction that allowed for military investigative authorities and the prosecution function in our courts to, in essence, assume primary jurisdiction of virtually every offense committed by a service man or service woman. As a result, in a very short period time I was in the middle of trying everything from homicides to drug offenses.

You'll also recall, I'm certain from your memories of history, that this was a difficult time for the United States Army, for all of the Armed Forces. When I was first entering high school in 1962, I have to confess to you, I don't have a memory of Vietnam being a topic of discussion. It was shortly thereafter that Vietnam was the main topic of discussion. Throughout the time I was in college Vietnam became a matter of great consternation and mystery for virtually everyone in the United States. It became particularly difficult for the men and women who were serving us in uniform.

Growing up as the children of parents who lived through the Depression and World War II and imbued with the understandings and intuitions of what it meant to serve, we expected to be of service to this nation. It was a grand and glorious enterprise to be a man or woman serving in one of the branches of the Armed Forces. It was assumed that we would become a part of that effort as we grew older and became adults. All of

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969).

12. Pub. L. No. 81-506, 64 Stat. 108 (1950).

that, of course, was questioned in the late '60s and into the early '70s. This was a difficult period of time. I can remember when the first lottery was conducted. I was involved in the first lottery to determine who would report, at what points in time, rather than going through the traditional Selective Service process, to be one of those chosen for active duty service. And, of course, the all-volunteer Army came about during my period of service.

Richard Nixon resigned during my period of service. Watergate was the focal point of and the object of daily discussion. It seemed that we were on alert constantly and continually for some period of time. The battle theory at that moment, with the Cold War raging, was that the Fulda Gap in West Germany would be the first point of entry into the European Theatre by foreign troops. Consequently, a great many dynamics, that have not been repeated since, made it very challenging for the men and women in uniform during that time, which translated ultimately into a great deal of criminal conduct, particularly in West Germany.

We had in excess of 500,000 Americans living in West Germany then. Not all troops, but with families, the number rose to a very large number. Consequently, we had a very active trial calendar. My recollection is that we had between twenty and thirty trials a month in the command that I was serving in. So I was exposed very quickly in a very busy fashion to an evolving system of justice and to a number of very challenging dynamics. It was a very exciting time to be assigned those responsibilities.

I began my assignment in West Germany by writing pre-trial advices and post-trial reviews. I don't think any exercise taught me more than the discipline that came with being engaged in those particular assignments. I took great pride in trying to craft an initial draft that either Colonel Taylor or Colonel Culpepper did not mark up to the point that I couldn't recognize it when I got it back. Eventually, I was finally able to get to that particular record of achievement. But I can tell you plainly, that if one period or comma was out of place, in addition to one sentence framed incorrectly or the evidence improperly described, each of those Staff Judge Advocates would find out, and certainly would provide me an opportunity to learn how important it was to be thorough and complete and disciplined and to communicate effectively in oral as well as in written fashion.

Some would say that that experience has released a deleterious influence on the remainder of the planet because now I have every inclination and every desire to edit virtually anything ever submitted to me in the form

of a draft. I found, however, that the discipline that came with that exercise has served me exceptionally well.

Let me give you a couple of examples. When I became governor I found myself supervising thousands of employees, and although the government for the State of Montana is certainly not as large as others, I think in the relative context, management dynamics remain the same. When you receive correspondence, virtually from all over the planet, people expect that you're going to know and understand what is going on so that you might respond to them in an appropriate fashion. You want to make sure that you're competent and capable in every regard, and that you're thoughtful and sensitive in your response to the people who have entrusted you to serve them. You must know what is going on with all of the agencies under your command.

The simple writing exercises that I learned and was taught as a member of the Corps and had reinforced time and time again by my superior officers ended up serving me exceptionally well in ways that may not be spectacular in the minds of virtually everyone, but I can tell you have critical importance. Every letter I received, I read. Every letter that I received and read, I sent for a draft to be prepared by those working with me in the various different agencies. Every one of those letters I reviewed, edited, and crafted in a way that allowed me to feel a sense of pride about returning that letter to one of my fellow citizens who entrusted me for a short time to be in their service. I cannot tell you how frequently the person who had written that letter, ultimately, I would meet. We would have an opportunity to discuss the issue or object that was a matter of concern to him or her, and I would remember in detail exactly what had taken place.

I know this is a mundane recollection of sorts, but I need to share this particular lesson with you because I believe the way that I was trained, and the experience that I received in everything from the spectacular to the mundane while I was an officer in the United States Army Judge Advocate General's Corps, just profoundly and everlastingly influenced what I've done virtually every day of my career since then. I learned so many lessons. The persuasive capacity of scholarship and hard work is one of those lessons. Here at the JAG School and in my service I learned that lesson most profoundly.

I did not graduate at the top of my law school class. I didn't graduate in the middle of my law school class, so that doesn't take you long to realize where it was that I did graduate. But what I learned was that if I worked

hard, and if I set about to be prepared on every occasion, in every instance, that I could be as capable and as competitive as virtually anyone else. And I learned that here. I learned that during my period of service. I learned about the quality and character of justice most profoundly.

I have to confess to you, parenthetically, that I've been elevated and moved substantially by those who have offered critiques of the military justice system of late by those who have never been exposed to it and have never practiced in it. They don't realize how advanced and capable it is of meting out justice thoroughly and completely, almost without exception.

I learned about the quality and character of justice as an Army JAG officer. What does that mean? It means that I learned about the incredible power of the prosecution and of the government to bring charges. But in the United States Army, those charges and that investigative process were given serious scrutiny by a multiple number of different levels of review. First of all, very capable and competent people performed the investigative function; highly trained investigators. When I was in West Germany, I worked with the Federal Bureau of Investigation, the Drug Enforcement Agency, the Central Intelligence Agency, and the security and military police assigned to different installations. These were highly capable and skilled investigators who held themselves to an exceptionally high level of performance and who believed in the Constitution, as it was written, and in the protections provided therein.

Even without that level of review, another level of searing scrutiny was provided. When those charges ultimately came out of the investigative branch and before the criminal law division, they were again subjected to a very, very intense review. Thereafter, if an Article 32 investigation was initiated, another investigation occurred, and then another by the chief of the criminal law division and another by the Staff Judge Advocate before the case was presented to the convening authority. All of this occurred before any charge was referred for court-martial. In addition to that, although the civilian courts had just recently discovered *Miranda*,¹³

13. *Miranda v. Arizona*, 384 U.S. 436 (1966).

rights warnings had been a part of the fabric of military justice since 1951.¹⁴

What I learned, first at the JAG School and throughout my years of service, was about the quality and character of justice, and about the awesome power of a prosecutor. That led me to impose very high standards all of my years as a prosecutor. Requiring the police and the investigative agencies to do their job and to do it right, to observe the rules carefully, and to make absolutely certain that we were involved in the process of providing justice, not merely winning convictions.

I learned about the burden of proof here at the School; why it was needed and necessary. Colonel Taylor would require me to come in and explain the recommendation that I had made in his pre-trial advice. Why, in my judgment, there was sufficient evidence. This process required me to go through and break down, in subtle detail, every single fact that militated toward the conclusion that this particular soldier was guilty as charged. I cannot tell you the number of times that I have practiced what I was taught, and how many times it made a critical difference.

During my trial career I handled about fifty to sixty different murder cases. Over time, I tried from the selection of jury until a verdict probably seventy different very serious felony cases. Almost inevitably every single one of those cases turned on a subtle fact, something that I usually discovered in review of the evidence that had not been discovered upon first review. So being required by Colonel Taylor and Colonel Culpepper to explain in minute detail every single fact that militated toward the recommendation I made to them profoundly influenced my practice and the ability, ultimately in my view, to achieve justice.

I mentioned communicating in written form, but we were tested constantly and continually in oral form as well. So many different lessons. I can remember it was very easy to tell when Major Herbert Green had heard enough. What he required you to do was to work very hard. To be relevant, to be as brief as possible. When he had heard enough, he just simply withdrew his briefcase from under his desk and started putting his papers

14. See John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 9-10 (2000); see also UCMJ art. 31 (2002).

inside. Consequently, you received a signal and realized it was time to sum up what you wanted to offer in terms of your theory of the case.

I can remember the very first trial that I was exposed to—a murder case in West Germany. The trial counsel was a lawyer from Tennessee, a good old boy, who could spin a yarn like you can't imagine. His name was Jim Mogridge, and he was our Chief Trial Counsel at the time. I was his assistant, and I thought he could do no wrong. I wanted to be just like him. So, the very first time that I was given the privilege of proceeding in solo fashion, I decided that I would replicate the efforts of Captain Mogridge. I lost. I lost the very first trial that I presented, and I realized quickly that I was so distracted trying to emulate the manner and method and appearance of someone else that I'd forgotten what it was that I was supposed to be doing.

I realized very quickly that individual style doesn't matter in the end. Whether you can spin a yarn or talk at length is not the most important arrow in your quiver. The most important things to remember, as a trial lawyer, I realized were to work hard, be prepared, and be sincere about what it was that you were doing. To feel the rhythm of the case, to feel the passion of your convictions, to argue with sincerity, and setting about to do what you think is right after you've studied hard and listened carefully, leaving consequences to take care of themselves. So many lessons that I employed throughout the course of criminal trial career, I learned here.

It came to pass that in my career, after a significant period of trying cases, I decided that I should become something else. I decided that entry into the judiciary was probably a place that I would feel most comfortable. Because I liked writing and researching and I loved the law and the courtroom, and because I thought I'd had enough exposure and experience, that was an appropriate time to set about to seek judicial office. So I did. I lost my first election by a very substantial margin. Two years later, I set about to run again, believing that I possessed the requisite skills, and I lost again. Two years later, still believing that I possessed all of the requisite skills, I set about to run again, and I lost again.

So the first three times that I ran for judicial office, in fact all of the times I've run for judicial office, I was unsuccessful. But I learned a great deal about myself. I learned more, I'm absolutely certain, as a result of failure than as a result of success. I gained intuition into the understandings and expectations of the people I wanted to serve. Quite frankly, their judgment was right, I wasn't prepared to serve as a member of the judi-

ciary. I'm grateful that they exercised their discretion in the way that they did, although it was incredibly painful at the time. But out of that ultimately came the opportunity to think about running for Attorney General of the State of Montana. I was so infused into the fabric of our criminal justice system throughout this period that I hadn't the slightest inclination to move away from it because I felt it was one of the highest forms of public service. Consequently, I wanted to stay engaged in that capacity.

While I was a prosecutor in the Army, we had an all-volunteer force that had its beginnings when I was first stationed in Germany. Those were difficult days. We had a very difficult time addressing all of the problems that that volunteer force produced. I can recall days where Article 15s were imposed for heroin possession. That's how pervasive the use of dangerous drugs was with troops in the Federal Republic of Germany. Mandatory urinalysis first began during that period. I can remember going through those lines just like everybody else did.

I can also remember the sorrow I felt when I was required to deal with all of those young men and women serving in the United States Army ultimately convicted of drug offenses. Almost completely immobilized and paralyzed by the consumption of drugs. Almost once a week, we would end up with an overdose of one kind or another on one of the bases within our command. If you bought a kilo of heroin for \$25,000 on the streets of Amsterdam, by the time you went through the process of dilution you could end up making between \$750,000 and \$1,000,000 if you ultimately peddled that to the troops and the civilians just in the Federal Republic of Germany. It was a very competitive and dangerous enterprise.

When I returned to civilian life and became involved in the trial of cases, I was again exposed to bright young people who somehow had made a decision that consumption of some foreign substance was more important than anything else. I recall all of the experiences that I had been exposed to in the United States Army, and it was out of that experience as a prosecutor, I ultimately decided in conjunction with others that the formation of a drug-treatment facility was going to be a critical part of the array of services that my little community in the State of Montana needed to provide. Once again, it was in the United States Army that I learned lessons that I applied when I returned to civilian life.

When I ran for Attorney General, I barely won. I won by the smallest of margins—one percentage point. I enjoyed serving as Attorney General virtually every single day and intended to run for re-election. Then late in

the political season, the incumbent governor became ill and decided that he could no longer run. I was one of the few people in a position to assume the party mantle and proceed forward. I did, and I won again by a very, very narrow margin in 1992. In many ways, I'm an accident of history, not a purposeful production, and I didn't envision that I would end up where I have been.

I can tell you plainly, throughout my entire career, even to this day, the lessons that I was provided here and within the Corps continue to serve me every single moment of every day that I practice law or work in the public sector. Like just this morning as I was tying my tie and making certain that my gig line was straight. It never changes. But thank God. What a glorious privilege we have to serve the people in this nation in the Armed Forces. You should know, and I'm certain that you do, of their gratitude for your good service, for your sacrifice and the sacrifice of your families.

All of us have realized over these last several months just how delicate this form of association is that we share. I can remember feeling trepidation the day that Richard Nixon resigned. All of us hovered around Armed Forces Radio wondering what was going to happen next, being advised that we were on alert, families being readied to be moved from German soil. I thought to myself then just how delicate this miracle of democracy is.

I had a chance to be reminded of that feeling while in Florida during the recount when the President asked me to become engaged in that effort. I realized that even though we were electing the most powerful leader on the planet in very difficult and trying circumstances with great uncertainty, there were no missiles trained, there were no weapons drawn. Why? Because we choose to respect one another and accord dignity to one another and to abide by the law, with minor exceptions that we have to address on occasion. We have been able to live in freedom for 215 years. To me, that's a miracle, and it made me realize during the Florida recount just how much it depends on the vigilance, participation, and performance of duty of every responsible American. Since September 11, all of us have thought about the capacity to live in freedom and how terrorism can call that into question. Once again, we realized how delicate this form of association we call democracy is, how miraculous its survival, and how important our participation.

To me, there is no citizen of this nation whose service is more critical than those who serve in the Armed Forces of the United States. You have

my deepest admiration and my gratitude as one of your fellow citizens, and your families do as well, because I know the sacrifice that is a part of your daily lives. I am very, very, grateful that I had the opportunity to spend a small amount of time with you this morning to share some recollections and some remembrances. I initially thought I should set about to prepare a scholarly work because I had gone through past lectures and all of them that I reviewed were just exceptional pieces of work from which you could take many lessons. But I decided, at the end of the day, that it would be appropriate this morning to share some recollections and conversation that might be just as productive and just as useful. Thank you.

**THE PATH TO VICTORY: AMERICA'S ARMY AND THE
REVOLUTION IN HUMAN AFFAIRS¹**

REVIEWED BY MAJOR CHARLES C. POCHÉ²

*The present personnel system produces a willing servant in the bureaucracy, the wrong type of officer to be a troop leader at any echelon.*³

While Army leaders strive to transform the force, Donald Vandergriff trumpets the need to transform the leaders of the force. The predictability of the Cold War has long passed, and recent history demonstrates that new national threats will come from unexpected places. The changing world demands innovative thinking and bold responses. Vandergriff claims the Army fosters the exact opposite behavior in its officers. He asserts the Army's current culture produces officers who are pre-disposed to wait for orders, do everything by the book, and rely on textbook solutions as the best solution.⁴ In effect, Army officers think in exactly the wrong way for today's world. Vandergriff explores why this may be and suggests how to fix it.

In *The Path to Victory*, Vandergriff argues the Army's current officer personnel system encourages risk-averse behavior. The system produces officers who do not exercise or encourage innovative thinking and shy away from bold action. Vandergriff states his goal is to show how "current policies based on outdated assumptions" foster this mindset and "provide a blueprint for an effective twenty-first century army."⁵ He succeeds in accomplishing the first part of his goal. He clearly illustrates the origin and propagation of the personnel policies at issue. Vandergriff falls short, however, of meeting his goal's second part. His blueprint for the future of the Army is insightful, but raises obvious questions he does not adequately address. Problems with the book's documentation also detract from its

1. DONALD E. VANDERGRIFF, *THE PATH TO VICTORY: AMERICA'S ARMY AND THE REVOLUTION IN HUMAN AFFAIRS* (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. VANDERGRIFF, *supra* note 1, at 18.

4. *Id.*

5. *Id.* at xx.

overall effectiveness, especially in the chapters detailing Vandergriff's proposed changes.

Vandergriff begins by explaining how today's personnel system evolved. He traces the Army's historical cycle of rapid mobilization in the face of crisis followed by an equally rapid demobilization. Vandergriff blames this cycle on the American idealization of the minuteman concept. Since the Revolutionary War, the American ideal has always been the citizen-soldier who swiftly takes up arms during a crisis and just as swiftly returns to civilian life when the crisis passes. Vandergriff points out that the military clauses of the Constitution enshrine this national distrust of a professional standing army.⁶

Vandergriff's discussion of the mobilization cycle and public distrust of a standing army does not cover new ground. All students of American military history are familiar with the Army's cyclic pattern and the historical wariness of a large standing army. Vandergriff's contribution lies in his illustration of how this citizen-soldier mobilization concept has driven and continues to drive the Army's personnel policies. For example, Vandergriff points to the officer corps' inability to mobilize large numbers of volunteers during the Spanish-American War. The lesson learned at the time was not to place less reliance on mass mobilization, but to make the officer corps more efficient at mobilization. The reforms of this era created a centralized personnel management system that could create "one size fits all" officers who could mobilize and expand the Army rapidly in time of war.⁷ Centralized personnel management continues today. According to Vandergriff, the massive volunteer replacements required by World War I forced the Army to adopt an individual replacement system.⁸ The Army still uses an individual replacement system. World War II's requirement for large numbers of relatively untrained volunteer soldiers necessitated a top-down style of control.⁹ The doctrine of centralized control persists. The threat of the Cold War required "generalist" officers with a wide variety of experiences who could immediately lead millions of

6. *Id.* at 25.

7. *Id.* at 52.

8. *Id.* at 57.

9. *Id.* at 71.

mobilized troops against the Soviet Union.¹⁰ The generalist approach still dominates.

Vandergriff uses numerous such examples to illustrate the origin of the Army's current personnel policies. He ties the origins to the assumption that the Army will predominately fight its wars with non-professional soldiers called to arms in a mass mobilization. In doing so, he meets his stated goal of showing how an outdated assumption forms the basis of many current personnel policies. The assumption of mass mobilization clearly no longer applies. The Gulf War, the Balkan campaigns, and operations in Afghanistan did not result in the conscription of civilians. Even during the recent war with Iraq, no one seriously proposed turning civilians into soldiers. And, as it turned out, there would not have been time to do so. The country obviously now expects its full-time armed forces, augmented by Reserve and National Guard forces when necessary, to meet all external threats. Vandergriff is correct to point out that a system based upon mass mobilization is based upon an anachronism.

A change in an underlying assumption, however, does not necessarily invalidate a system. Vandergriff argues that it does so in the case of the Army personnel system. According to Vandergriff, the results of continuing to treat officers as an interchangeable cog for placement anywhere in a giant, mobilizing war machine are problematic.¹¹ A preference for generalists over specialists dominates.¹² The system rotates personnel in a futile attempt to expose them to everything.¹³ The rotations are rapid to ensure everyone has their fair chance to hold the "required" jobs.¹⁴ The jack-of-all trades approach, in turn, produces a "ticket-punching" mentality and a short-term outlook.¹⁵ Centralized selection boards reinforce this mentality

10. *Id.* at 80-81.

11. *Id.* at 57 (describing the individual replacement system as viewing "the individual as an identical component part that could be created on an assembly line").

12. *Id.* at 80 (describing the military after World War II as wanting "an excess of officers in the middle grades and senior levels . . . [who were] 'generalists' with experience in a wide variety of command and staff positions").

13. *Id.* at 17 (describing the Army as "dominated by a personnel system that does not allow units to become stabilized and does not leave officers in positions for a sufficiently long period of time to truly master the requisite skills").

14. *Id.* at 83 ("The practice of equity ensures that few officers spend enough time in positions related to decision making in combat to gain the experience needed to become truly good at it.").

15. *Id.* ("The army began to see that an emphasis on such specific military competencies was regarded as 'unfair' and impaired 'career equity' in order to meet the 'career gates' driven by the up-or-out system.").

when they reward those whose tickets bear the proper punches.¹⁶ Elevation of process over results is the outcome because standardized processes are easier for inexperienced officers to apply.¹⁷

The current Army personnel system does display these characteristics. According to Vandergriff, the thought ingrained in most officers is, "If you follow the process, you will succeed."¹⁸ The result, says Vandergriff, is the tendency for commanders and staffs to focus more on the charts and templates posted on the walls of their tactical operations centers than on the enemy's actions.¹⁹ The outcome of training exercises has become less important than the process used to fight them.²⁰ Clearly, this is dangerous in a profession whose outcome measurements include the loss of life. Other by-products of the system include officers who do not trust their subordinates and centralize decision-making to ensure nothing undesirable happens on their short watch.²¹ Centralization stifles learning and free thought. Officers cannot trust their peers because they all compete equally for the "required" jobs and "top-block" evaluations in those jobs.²² The lack of trust negatively affects unit cohesion. Additionally, frequent individual rotations further erode cohesion and prevent the development of expertise.²³

After pointing out these unintended flaws in the current personnel system, Vandergriff proposes a new force structure and personnel system capable of eliminating cohesion and expertise problems. Vandergriff envisions a force based upon a unit-replacement model that rotates entire units through a four-year unit life cycle. There would be no changes to the unit's personnel for the entire four-year period.²⁴ Vandergriff describes in paragraph format the various battalion types, numbers, and personnel he pro-

16. *Id.* at 98 ("The process of obtaining all the right career building blocks to get promoted and command became known as 'ticket-punching.' A list of these 'tickets' was included in the officer's official file and were the first thing seen by promotion, command, and school selection boards.").

17. *Id.* at 68-72.

18. *Id.* at 139.

19. *Id.*

20. *Id.* ("Mission accomplishment, or the final result, is not as important as how the commander, his staff, and the unit go about it.").

21. *See id.* at 13 (describing the officer corps as "risk-averse," prone to "micromanagement, checklist procedures, a zero-defects culture, and a lack of cohesion," and holding "the assumption that subordinates cannot be trusted to make their own decisions").

22. *Id.* at 235. ("Moral courage and trust . . . are undercut from the very beginning of an officer's career because of the competitive ethic and an obsession with statistics.").

23. *See supra* note 14 and accompanying text.

poses for this new force structure.²⁵ He, unfortunately, does not provide any type of chart or wire diagram to aid comprehension. An organizational wire diagram could have concisely illustrated his proposal. The lack of such a diagram made visualizing Vandergriff's concept more difficult than necessary. What is readily apparent, though, is that Vandergriff's structure would require significant changes to the current personnel system to stabilize officers of all different ranks in one unit for the unit's entire life cycle.

To meet the requirement for such stabilization, Vandergriff proposes a complete transformation of the officer personnel system. Central to his system is the replacement of the current "up-or-out" promotion system with an "up-or-stay" system.²⁶ Vandergriff's up-or-stay promotion system moves the "cut line" to the very beginning of an officer's career. Vandergriff hopes to eliminate "promotion anxiety" and its associated ills by making it more difficult to become an officer, but easier to remain one. The officer's desire for promotion drives Vandergriff's system. Every few years, an officer may choose to compete for promotion if an opening is available. There is no obligation to do so. Instead, the officer may choose to remain at his current grade with prorated pay. Consequently, a captain could serve for twenty years and retire as a "successful" officer. Periodic examinations and evaluations would ensure these officers remain mentally and physically competent.²⁷

Vandergriff's reliance on periodic evaluations and professionalism to keep the officer corps from growing old and stagnating in a grade or job,²⁸ however, is problematic. For example, Vandergriff does not address whether these periodic exams will remain at a static level of difficulty for a given rank or job, or whether they will get progressively more difficult over time. If they remain static, an officer is unlikely to become less able to pass the exam. Once the officer meets the requirement, he will continue to do so as he becomes even more expert in the job. If the difficulty of the

24. The Army appears to be in the process of adopting, in part, at least this portion of Vandergriff's suggestions. See, e.g., Sean D. Naylor, *Alaskan Brigade, the First Unit to Use Unit Manning Initiative*, ARMY TIMES, May 19, 2003, at 10-11 (describing the 172d Infantry Brigade's switch to a unit manning system).

25. See VANDERGRIFF, *supra* note 1, at 214-15.

26. *Id.* at 242-51.

27. *Id.*

28. See *id.* at 245.

exam does increase, does it not simply replace “promotion anxiety” with “retention anxiety”?

Vandergriff also proposes changing the current officer evaluation format. One of his proposed three parts of the new evaluation concerns the officer’s potential.²⁹ How is this relevant to an officer not planning to compete for a higher grade? Under Vandergriff’s system, it appears the officer need only be competent at his current job. Therefore, an evaluation is only relevant to the extent it indicates the officer is doing the job adequately. No incentive to perform beyond the adequate level exists.

Vandergriff is overly optimistic to rely upon professionalism to keep the officer corps moving ahead. Tales of mediocre performance from soldiers who are “retired on active duty” are commonplace under today’s system. Vandergriff’s proposal to vest retirement benefits at ten years and allow continuation in service for adequately doing your current job³⁰ will encourage this phenomenon. Vandergriff does provide the option for the senior rater to twice designate an officer as unfit for combat duty and remove him from the service,³¹ but the Army’s current system shows a widespread unwillingness to use such blunt assessments unless forced to do so. It is very rare for one of today’s officer evaluations to state “Satisfactory Performance, Promote” rather than “Outstanding Performance, Must Promote.”³² Short of criminal misconduct, the future possibility of receiving two “unfit” evaluations seems extremely remote.

Although Vandergriff fails to address obvious questions, his unorthodox proposals are thought provoking. He deserves commendation for encouraging bold new ideas in the area of personnel management. Less commendable, however, is Vandergriff’s documentation within the book. The form of the documentation is less than effective and there are significant problems with the documentation’s substance.

The work contains extensive citation placed as endnotes.³³ It is extremely distracting to have to flip back to the very end of the book to

29. *Id.* at 255.

30. *Id.* at 262.

31. *Id.* at 255.

32. E-mail from Lieutenant Colonel William D. Swisher, Chief, Officer Evaluation Reports Policy Section, U.S. Army Personnel Command, to author (Mar. 27, 2003, 01:18 EST) (stating “the vast majority of reports . . . have the [Must Promote] block checked”) (on file with author).

33. See VANDERGRIFF, *supra* note 1, at 273-349.

check the source for each citation. Footnotes would be more convenient. Given the large number of citations, however, footnotes might greatly increase the number of pages the book requires. If so, even endnotes at the close of each chapter would be more convenient than jamming them all together at the rear of the book.

As other commentators have suggested, the substance of Vandergriff's endnotes bear careful scrutiny.³⁴ Although the citations are extensive, several are puzzling. Some endnote material fails to attribute, illuminate, support, or even relate to the noted passage. For example, Vandergriff places an endnote reference after the following passage: "A military service adhering to these values by empowering its people with authority, respect, and responsibility will be better positioned to solve the problems described by hundreds of officers in recent surveys."³⁵ The reader's expectation is that the citation provides a source for the surveys or, at the very least, perhaps lists the problems. It does neither. The citation instead provides a Web site and list of articles for "[r]eaders interested in learning more about the basic ideas of maneuver warfare."³⁶

Concrete source identification is also a recurring problem. In one endnote, Vandergriff cites "one of several letters from talented officers opting to get out."³⁷ It is impossible to determine if Vandergriff and others were surveying or listening equally to officers who chose to remain in the service. The objectivity and authority of such unclear sources is suspect.

Vandergriff's frequent references to an "exodus" of officers from the Army also grew irksome. He presumes too much knowledge of this important fact on the part of the reader. Given the frequency that Vandergriff makes this assertion, he should immediately provide the statistics to support it. Vandergriff does not provide any actual numbers in support until the seventh chapter. In an endnote, the reader finally learns that 10.6% of captains are leaving the Army.³⁸ Similarly, Vandergriff never

34. See, e.g., Sean D. Naylor, *Secretary Pushes for Large-Scale Personnel Reform*, ARMY TIMES, Sept. 16, 2002, at 14 (quoting Lieutenant General Ben Griffin as deriding Vandergriff's work as long on emotion and short on facts); Lieutenant Colonel (Retired) Mike Burke, *Fascinating but Flawed Examination of the Officer Personnel System*, ARMY MAG., Sept. 2002, at 76 (book review) (commenting that what Vandergriff presents as facts in the text becomes thoughts in the footnotes).

35. VANDERGRIF, *supra* note 1, at 17.

36. *Id.* at 278 n.42.

37. *Id.* at 275 n.10.

38. *Id.* at 327 n.36.

associates an actual number with his statement that the Army “is seeing an all-time high number of its most successful officers turning down battalion and brigade commands.”³⁹

In spite of documentation flaws and a lack of depth in addressing the questions raised by its proposals, I found *The Path to Victory* well worth reading. While the blueprint suggested by Vandergriff may need adjustment, it deserves consideration. The “transformed” Army will require officers comfortable with change on the scale Vandergriff proposes. I highly recommend this book to anyone planning to be a part of that force. *The Path to Victory* may falter in mapping the actual path, but it does make the case that real change is necessary. The Army seems determined to transform its weapons and technology. Vandergriff correctly demands that the Army not overlook the need to transform equally its most valuable resource—its personnel.

39. *Id.* at 187.

WHY WE FIGHT: MORAL CLARITY AND THE WAR ON TERRORISM¹

REVIEWED BY MAJOR STACY E. FLIPPIN²

War is an ugly thing, but not the ugliest of things. The decayed and degraded state of a moral and patriotic feeling which thinks that nothing is worth war is much worse. A man who has nothing for which he is willing to fight—nothing he cares about more than his own safety—is a miserable creature who has no chance of being free, unless made and kept so by the exertions of better men than himself.³

In *Why We Fight: Moral Clarity and the War on Terrorism*, Bill Bennett makes a compelling, if at times overstated, case for why the United States in the aftermath of 11 September 2001 is a country worth fighting for and why the war on terrorism is a fight America must win. Mr. Bennett attempts in *Why We Fight* to provide moral underpinnings for America's current war against terrorism. Specifically, Mr. Bennett views the period after September 11th as "a moment of moral clarity" for the United States, in which Americans are unified as one people;⁴ however, he observes that a segment of American society was "skeptical, if not disdainful of American purposes in the world and reflexively unprepared to rally to America's side."⁵ Mr. Bennett is concerned with how widespread this skepticism is, and how this view may affect the war on terrorism.⁶ Thus, this book is Mr. Bennett's self-described "effort to answer the questions being asked about

1. WILLIAM J. BENNETT, *WHY WE FIGHT: MORAL CLARITY AND THE WAR ON TERRORISM* (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate's General School, United States Army, Charlottesville, Virginia.

3. BENNETT, *supra* note 1, at 43 (quoting John Stuart Mill).

4. *Id.* at 2.

5. *Id.* at 4.

6. *Id.* at 6.

this war” and to respond to what he views as an influential segment of American society critical of the war on terrorism.⁷

Obviously, the war on terrorism is a timely and relevant topic to all Americans. Mr. Bennett’s attempt to bring moral perspective to the war should be of particular interest to judges practicing international law who have to deal with the question: When is America justified in going to war?

With his background, Mr. Bennett brings a unique perspective and focus to the moral issues surrounding the war on terrorism. Mr. Bennett is a former Secretary of Education and Director of the Office of National Drug Control Policy, he has a Ph.D. in political philosophy from the University of Texas and a law degree from Harvard, and he has taught philosophy at a number of universities.⁸ Thus, he can speak with authority about the moral arguments surrounding the war on terrorism and provide interesting insight into the arguments occurring in the academic world.

Readers of Mr. Bennett’s other works may recognize familiar themes in *Why We Fight*. These themes include the idea that a segment of American society is attacking American values and ideals, a concern with the values that Americans are passing on to their children and the impact this will have on the children, and an argument against relativism—the notion that there is no right or wrong, good or evil.⁹ In particular, *Why We Fight* is very similar in organizational style and purpose to Mr. Bennett’s earlier work, *The Death of Outrage: Bill Clinton and the Assault on American Ideals*.¹⁰ Specifically, in *The Death of Outrage*, Mr. Bennett identifies what he considers the main positions of President Clinton’s supporters and spends a chapter examining the validity of each position.¹¹ Similarly, in *Why We Fight*, Mr. Bennett identifies what he believes to be the central

7. *Id.* at 12-13.

8. See WILLIAM J. BENNETT, *THE DE-VALUING OF AMERICA: THE FIGHT FOR OUR CULTURE AND OUR CHILDREN* 7, 20 (1992) (discussing Mr. Bennett’s background and his life in politics).

9. See *id.* (in which Mr. Bennett is concerned with what he views as a cultural battle between the beliefs of most Americans and the beliefs of a liberal elite that dominates our institutions, and the impact that this battle is having on American children); WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* (1998) (in which Mr. Bennett is concerned with what he perceives as an attack on traditional American values by the defenders of President Clinton).

10. *THE DEATH OF OUTRAGE*, *supra* note 9.

11. *Id.* at 11.

questions about the war on terrorism and devotes a chapter to answering each question.

Overall, *Why We Fight* is an intelligent and thought-provoking dissection of the moral issues surrounding the war on terrorism. The five central questions that Mr. Bennett explores regarding the war on terrorism are:

1. Was the United States justified in responding with force?;
2. Is American culture superior to others, and how can it be defended?;
3. Who are America's enemies, and why do they hate America?;
4. Was the United States brought into this war by its support for Israel?; and
5. Is there something morally wrong with patriotism?¹²

This review examines how effectively Mr. Bennett answers these questions in connection with his stated purpose of responding to that part of society critical of America in its war on terrorism.

The first issue Mr. Bennett addresses is whether the United States was morally justified in responding with force to the 11 September attack, or whether America should have used other means, such as criminal international law, or simply not responded at all. In other words, he examines the morality of force versus the morality of pacifism.¹³ After exploring the religious and historical origins of both pacifism and the just war theory,¹⁴ a theory familiar to judge advocates practicing international law,¹⁵ Mr. Bennett concludes that America's current campaign against terrorism satisfies the theory's three criteria for initiating war. Specifically, Mr. Bennett

12. BENNETT, *supra* note 1, at 12-13.

13. *Id.* at 20.

14. *See id.* at 22-28.

15. The just war theory, which has a very long history, deals with when it is morally justifiable to wage war. Saint Thomas Aquinas gave "the most systematic exposition [of this theory]." Internet Encyclopedia of Philosophy, *Just War Theory*, at <http://www.utm.edu/research/iep/j/justwar.htm> (last visited Mar. 25, 2003). Aquinas believed that a war was justified when the war was waged by a lawful authority, when it was undertaken with just cause, and when it was undertaken with the proper intention (either to achieve some good or to avoid some evil). Mark Edward DeForrest, *Let Thy Cause Be Just: Just War Theory and the Recent U.S. Air Strikes Against Iraq*, 1 *ACROSS BORDERS GONZ. INT'L L.J.* para. 11 (1997), available at <http://law.gonzaga.edu/borders/documents/deforres.htm>. Aquinas's views, together with the views of St. Augustine, "form the basic core of just war theory, and it is from their concepts that the theory of just war is adapted and expanded by later thinkers." *Id.*

argues that the war is being waged by a legitimate sovereign “in a just cause, against terrorists who sought and still seek to destroy [America], as well as to avoid future evil.”¹⁶ In all, through persuasive use of the just war theory and religious history, Mr. Bennett makes a convincing argument that the use of force is morally permissible under certain circumstances, and America’s war on terrorism meets these criteria.

Although Mr. Bennett makes a strong argument that al Qaeda’s actions warranted a military response, rather than simply some sort of criminal manhunt, his assertion that calling the 11 September attack a “crime against international law” trivializes the terrorists’ acts is overreaching. This argument seems to fly in the face of the Nuremberg trials conducted after World War II, in which many Nazis were put on trial for crimes against international law; for example, waging wars of aggression and crimes against humanity.¹⁷ Certainly, no general belief today exists that by holding those trials, the Allies were somehow diminishing or trivializing the Holocaust. Mr. Bennett’s argument that calling the September 11th attack an international crime somehow diminishes the attack falls short.

The second issue Mr. Bennett examines is whether American (or more broadly Western) culture is better than other cultures. In this regard, he gives a persuasive moral defense of American culture, making this section the strongest part of the book. Mr. Bennett obviously devoted a good deal of time and thought to this subject.

In making this cultural comparison, Mr. Bennett effectively takes aim at “relativism,” a concept that “implies that we have no basis for judging other peoples and other cultures, and certainly no basis for declaring some better than others, let alone ‘good’ or ‘evil.’”¹⁸ Through powerful use of examples and logic, he makes short work of the relativist argument. As Mr. Bennett succinctly points out:

Is the deliberate murder of innocent civilians the same thing, morally, as the deliberate *not*-killing of innocent civilians? Is a crying baby the same thing as a ringing telephone? That is the specious sort of question we are dealing with here, and *every-*

16. BENNETT, *supra* note 1, at 28.

17. See MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIALS 1945-46: A DOCUMENTARY HISTORY 57-70 (1997).

18. BENNETT, *supra* note 1, at 46.

body knows the answer. To pretend otherwise is not sophisticated, it is sophistry.¹⁹

Ultimately, Mr. Bennett argues that Western culture is superior because it has diversity and tolerance as its core values, such as respect for human rights and respect for religious and political differences, and that most Islamic countries do not share these values.²⁰

Unfortunately, Mr. Bennett delivers his argument regarding Islamic values without any significant support. For instance, he does not do any in-depth examination of the different Muslim countries and whether, or to what extent, they may share these values. Mr. Bennett may assume that the reader has a substantial knowledge of the culture of all Muslim countries, or that the failure of a majority of Islamic countries to share these views is self-evident; however, such assumptions are not necessarily warranted. Ultimately, he fails to expound on this argument sufficiently.

The third and fourth issues examined by Mr. Bennett concern the nature of the terrorists and their objectives, and whether U.S. support for Israel contributed to the attack. His responses on these two topics are more problematic and less compelling than his defense of American culture. These topics certainly comprise the most controversial aspect of the book, and need to be examined together.

First, Mr. Bennett explores who the enemy is and what the enemy represents. Specifically, he examines “whether the brand of radical Islam represented by Osama bin Laden [is] indeed an artificial outgrowth of Islam that ‘hijacked’ the classical faith,” or it is the result of something within the faith itself.²¹ He argues that classical Islam “is not without its deeply problematic aspects, particularly when it comes to relations with non-Muslims.”²² Further, he contends that “[t]he superiority of Islam to other religions, the idea that force is justified in defending and spreading the

19. *Id.* at 59.

20. *Id.* at 63.

21. *Id.* at 85.

22. *Id.*

faith . . . are authentic teachings.”²³ Thus, the September 11th attack and Muslim support for Osama bin Laden implicate Islam itself.²⁴

Next, Mr. Bennett addresses whether U.S. support of Israel provided the impetus for the attack. He argues that Osama bin Laden’s primary agenda “was really aimed at toppling the insufficiently radical Saudi monarchy and other deficient Muslim regimes, gaining access to nuclear weapons, and prosecuting a worldwide war against the ‘infidel’ and ‘decadent’ West.”²⁵ Thus, even if Israel did not exist, bin Laden would still hate the United States.²⁶

In discussing Muslim support for Bin Laden and the impact of the Israeli-Palestinian conflict, Mr. Bennett makes some interesting and provocative points. As with his assertion that Muslim countries do not share the values embodied in American culture, however, Mr. Bennett fails to provide support for his assertion that there is substantial support for Osama bin Laden in the Muslim world. Furthermore, the view of the Israeli-Palestinian conflict he puts forth seems overly simplistic. From Mr. Bennett’s perspective, it appears that the conflict is the Jewish “dream of peaceful integration” against the Arab “dream of Jewish extinction.”²⁷ He ignores or skims over issues such as Jewish settlements in disputed areas and treatment of Arabs in the occupied territories. By disregarding or discounting these difficult issues, Mr. Bennett fails to acknowledge the complexity of Israeli-Palestinian conflict.

The last issue examined by Mr. Bennett is whether patriotism, or love of country, is an acceptable and good moral value. He argues that educational institutions have distorted American history over the last several decades due to the dominance of a “secular, liberationist, anti-traditionalist” culture among the elite.²⁸ Thus, Mr. Bennett asserts that educational institutions need to do a better job providing students with “a thorough and honest study of our history, undistorted by the lens of political correctness and pseudosophisticated relativism.”²⁹ To support his position, Mr. Bennett relies primarily on writings and quotations from various educators and

23. *Id.*

24. *See id.* at 85-91.

25. *Id.* at 106.

26. *Id.* at 107.

27. *Id.* at 112.

28. *Id.* at 141, 145-47.

29. *Id.* at 149-50.

authors that, according to Bennett, connote distrust of patriotism, and on surveys showing that American students lack historical knowledge.³⁰

Mr. Bennett, however, fails to acknowledge the legitimate origin of some of his opponent's beliefs. For instance, he notes that many arguments people make against military action stem from the Vietnam War and its aftermath and the concomitant mistrust of government and the military developed during the 1960s and 1970s.³¹ Bennett does not, however, acknowledge that the actions of the government during Vietnam and Watergate were wrong or that they may have warranted the resulting distrust of government action. In other words, in describing how wonderful the United States is, he sometimes glosses over past problems.

In addition to the shortcomings regarding Mr. Bennett's individual arguments, some problems run throughout the book. First, Mr. Bennett has a tendency to overstate matters, sometimes making sweeping generalizations without providing any real authority for them. For example, Mr. Bennett asserts that after September 11th, "[i]n the national media, anger was discouraged, denigrated, even mocked."³² He cites no evidence or examples, however, to support this allegation.

Second, Mr. Bennett's tends to rely on anecdotal evidence to support his positions and arguments, which exacerbates his overgeneralizations. For instance, for his bold assertion that the view of the United States as an imperialist power "wreaking its evil will on hapless peoples of the third world" is "especially prevalent in our institutions of higher learning," Bennett relies solely on quotations from only a speaker at a University of North Carolina teach-in and a Rutgers professor.³³ In some places, such as the example cited above, he does not even attribute the purported quotation. In another instance, Mr. Bennett argues that Muslims sympathetic to the Muslim terrorists have been "authoritatively gauged in the hundreds of millions," but fails to identify the "authoritative" source.³⁴ While Mr. Bennett's moral arguments may not necessarily lend themselves to support with "hard" data, Mr. Bennett could have given such authority on many

30. *See id.* at 131-32, 145-46.

31. *See id.* at 136-39.

32. *Id.* at 9.

33. *Id.* at 40-41.

34. *Id.* at 77.

occasions in the book, such as his alleged estimate of Muslim sympathizers, but failed to do so.

A final shortcoming of *Why We Fight* is Mr. Bennett's bias likely evident due to writing so soon after the tragic events of September 11th. Undoubtedly, the attack deeply affected Mr. Bennett, and his emotional response appears to show through at times. For example, Mr. Bennett says he would not be surprised if "the Afghanistan campaign were to qualify as one of the most just wars ever fought."³⁵ He also talks about America's great military success in Afghanistan,³⁶ even though at this point in America's ongoing conflict, such an assessment is premature.

Overall, the strengths of *Why We Fight* outweigh its weaknesses. Mr. Bennett makes a forceful and cogent moral defense of the war on terrorism, and of the United States itself. In the end, he successfully achieves his objective of providing intelligent, considered, and effective responses to the critics of American government's reaction to the 11 September 2001 attack.

35. *Id.* at 30.

36. *Id.* at 167.

**THE LESSONS OF TERROR
A HISTORY OF WARFARE AGAINST CIVILIANS:
WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL
AGAIN¹**

REVIEWED BY MAJOR GREGORY L. BOWMAN²

*Warfare against civilians, whether inspired by hatred, revenge, greed, or political and psychological insecurity, has been one of the most ultimately self-defeating tactics in all of military history—indeed it would be difficult to think of one more inimical to its various practitioners' causes.*³

Since the horrific events of 11 September 2001, pundits, politicians, and journalists have written hundreds of books, articles, and commentaries on the appropriate means to counter international terrorism. To support their views, these authors typically analyze the political, religious, or social characteristics of current terrorist or extremism movements. In his latest book, *The Lessons of Terror*, novelist and historian Caleb Carr attempts to break this analytical mold by arguing that “military history alone can teach us the lessons that will solve the dilemma of modern international terrorism.”⁴

In support of this provocative, yet myopic, approach, Carr develops his “lessons of terror” through an extensive historical analysis of “deliberate warfare against civilians.”⁵ He then uses these lessons to advocate for the adoption of a new “progressive war” strategy that involves the classification of terrorists as soldiers; the use of government-sponsored assassination; and the use of unilateral, preemptive military strikes. Although this book has an enlightening historical analysis, readers will find Carr’s com-

1. CALEB CARR, *THE LESSONS OF TERROR, A HISTORY OF WARFARE AGAINST CIVILIANS: WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL AGAIN* (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia.

3. CARR, *supra* note 1, at 12.

4. *Id.* at 14.

5. *Id.* at 6.

parisons to terrorism shortsighted, the analysis of his new strategy disappointing, and his “history alone” approach questionable.

Historical Analysis

Carr provides readers with an impressive review and detailed analysis of the historic development of “deliberate warfare against civilians” as a military and political strategy. Carr’s extensive knowledge of history is readily apparent,⁶ and readers will find this aspect of his book useful and insightful. With gripping descriptions of infamous tactics such as Roman punitive raids, Sherman’s “March to the Sea,” and Palestinian suicide bombings, Carr vividly illustrates how intentionally targeting civilians galvanizes a nation’s populace, enhances support for resistance, and dooms the attacker to ultimate failure.

Yet, Carr’s analysis goes beyond a mere factual review of tactics. He also extensively discusses the numerous military doctrines and humanitarian theories that developed because of such warfare. From the principles of Fredrick the Great, Oliver Cromwell, and Napoleon, to the theories of St. Augustine, Grotius, and de Vattel, Carr guides the reader through the development of the total war, just war, and limited war concepts. He then analyzes the historical impact of these concepts on military discipline, training, and tactics, as well as upon religious and social institutions. By doing so, he not only supports his so-called lessons of terror, but he also provides a useful glimpse into the age-old struggle between the practical reasoning of warriors and the humanitarian goals of philosophers—a struggle which eventually yielded modern international law.

Thus, with this in-depth discussion of tactics and theory, Carr makes a convincing case for his lessons of terror: First, “the nation or faction that resorts to warfare against civilians most quickly, most often, and most viciously is the nation or faction most likely to see its interest frustrated and, in many cases, its existence terminated.”⁷ Second, “warfare against civilians must never be answered in kind.”⁸ And third, all nations must

6. “Caleb Carr is a contributing editor of *MHQ: The Quarterly Journal of Military History* and the series editor of the *Modern Library War Series*.” He is also the author of several historical books including *The Devil Soldier*, which details the historic military leadership and battle prowess of American Frederick Townsend Ward during China’s Taiping Rebellion.

7. CARR, *supra* note 1, at 6.

8. *Id.*

“have a uniform, forceful response to any and all unacceptable belligerent behavior during wartime.”⁹ Unfortunately, despite these perceptive conclusions, Carr’s overall analysis wanes as he attempts to flesh out the theoretical link between his historical review and his definition of modern international terrorism.

Terrorism Analysis

Readers will be disappointed with Carr’s terrorism analysis because it relies heavily upon an oversimplified definition of terrorism. Although military, political, and legal scholars have attempted in vain to develop a consensus regarding the definition of terrorism,¹⁰ Carr utterly ignores this debate. With no significant analysis, he simply defines terrorism as “warfare deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable.”¹¹ At first glance, this definition seems viable. Carr’s overzealous attempt to link *all* deliberate attacks against civilians to this definition, however, demonstrates that it is too broad in one sense and too narrow in another.

In the broad sense, Carr’s definition encompasses not only attacks by clandestine agents or factions during peacetime, but also civilian damage caused by nation states during international armed conflict.¹² For example, he asserts that the Allied strategic bombing of German industrial sites during World War II was nothing more than a variation “on the standard theme of terrorism.”¹³ He argues that Allied leaders either ignored the potential for civilian deaths or were “actively enthusiastic about the tactic’s punitive dimension.”¹⁴ Likewise, he contends that any civilian deaths caused by the famous “Doolittle Raid” (the first Allied attack on mainland

9. *Id.* at 95.

10. See United Nations Office on Drugs and Crime, *Definitions of Terrorism*, at www.undcp.org/odccp/terrorism_definitions.html (last visited Jan. 29, 2003). The United Nations notes that the definition has “haunted the debate among states for decades.” *Id.* Moreover, “The lack of agreement . . . has been a major obstacle to meaningful international countermeasures.” *Id.*

11. CARR, *supra* note 1, at 6.

12. See U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM—2000, at 1 (2000). The State Department defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by *subnational* groups or clandestine agents, usually intended to influence an audience.” *Id.* (emphasis added).

13. CARR, *supra* note 1, at 176.

14. *Id.*

Japan after Pearl Harbor) “fit the definition of terrorism precisely,” simply because one of the goals may have been to diminish Japanese public support for their war effort.¹⁵

Although Carr’s views could be viable, these acts are subject to multiple interpretations. For example, deliberate attacks against civilians during international armed conflict might be best understood as war crimes, rather than terrorism. By failing to analyze alternative interpretations of such events, Carr oversimplifies the issue and leaves the reader questioning not only his definition, but also his entire terrorism analysis.¹⁶ Yet, the problems go deeper.

Carr’s definition of terrorism is also too narrow. Without critical examination, the definition excludes terrorist attacks against military personnel or property.¹⁷ To Carr, an attack on military personnel or property is guerilla warfare, not terrorism.¹⁸ Thus, he generally ignores the attacks on the Khobar Towers and the *U.S.S. Cole*, even though both attacks were against individuals who were either off duty or not engaged in hostilities. Moreover, each attack was ostensibly aimed at the same political motives that Carr attempts to capture in his definition of terrorism—the destruction of public support for “either leaders or policies that the agents of such violence [found] objectionable.”¹⁹ Carr’s failure to address at least this part of the definitional debate again detracts from the credibility of his overall terrorism analysis.

Future U.S. Counterterrorism Policy

Based on his historical and terrorism analyses, Carr argues for major changes in U.S. counterterrorism policy. Specifically, he advocates the adoption of a new strategy based upon his lessons of terror and the progres-

15. *Id.* at 180.

16. *See also id.* at 195. Another example of Carr’s oversimplification is his assertion that Presidents Kennedy, Johnson, and Nixon, and Secretary of State Henry Kissinger were all “terrorists” based upon civilian casualties during operations in Vietnam. *Id.*

17. *See supra* text accompanying note 11. The Department of State’s more comprehensive definition also focuses on “noncombatants” which includes not only civilians, but also “military personnel who at the time of the incident are unarmed or not on duty.” PATTERNS OF GLOBAL TERRORISM—2000, *supra* note 11, at 1. It also includes “attacks on military installations or armed military personnel when a state of military hostilities does not exist at the site, such as bombings against US bases in Europe, the Philippines, or elsewhere.” *Id.*

18. CARR, *supra* note 1, at 122.

19. *Id.* at 6.

sive war theories of eighteenth century philosopher Emmerich de Vattel.²⁰ This new strategy includes such controversial themes as treating terrorists as soldiers; use of government-sponsored assassination; and the use of unilateral, preemptive military strikes.²¹ Although Carr's recommendations are thought provoking, his failure to address key political and social issues related to such changes makes them appear shallow, and his history-alone approach seem deficient.

The first step toward Carr's progressive war strategy is the classification of terrorists as soldiers, rather than criminals. History demonstrates that the "first rule of battling an enemy, even one whose methods we despise, is to know him and, if not respect him, at least respect the nature and scope of the danger he poses."²² Carr argues that this classification will do just that by ensuring that the United States responds to terrorism with a comprehensive military strategy, rather than with limited attempts at criminal investigation and prosecution.²³

While Carr strongly asserts that the soldier label will not "ennoble"²⁴ terrorists or provide them with the international protections afforded uniform combatants, such classification would have important political and social repercussions that Carr's analysis neglects. For example, even if being called soldiers does not ennoble or protect terrorists, using such a loaded term may certainly provide them with an unwarranted "legitimacy" on the world diplomatic stage. Increased international attention to the "struggle" of these "soldiers" could inadvertently strengthen terrorist resolve, and may even increase their support throughout the world. Unfor-

20. *Id.* at 91, 225, 244. Emmerich de Vattel is the author of *The Law of Nations or the Principles of Natural Law* (Charles Fenwick trans., Carnegie Institution 1916) (1758) (an influential treatise discussing the proper conduct of belligerents during international hostilities), available at <http://www.constitution.org/vattel/vattel.html>.

21. See CARR, *supra* note 1, at 222-56. As part of his progressive war strategy, Carr also advocates internal reorganization of the U.S. intelligence and military assets. Specifically, he argues that the Central Intelligence Agency should be eliminated and that all Special Operations Forces should be combined into a separate branch of the Armed Forces. *Id.* at 237-43.

22. *Id.* at 54.

23. See *id.* at 7-13, 52-63, 227-229.

24. *Id.* at 54.

tunately, Carr's history-alone approach is too narrowly tailored to address such issues adequately.

The second step toward Carr's progressive war strategy is a change in U.S. military tactics. Carr argues that

the tactics that we have traditionally turned to in times of war—unlimited—must now be abandoned in favor of more precise, limited methods if we wish to emerge not only safe but once again living within the kind of stable international order that is required for the operation of international democratic capitalism.²⁵

His tactics include government-sponsored assassination, and unilateral, preemptive military strikes. Once again, Carr's recommendations suffer from the dearth of his focus.

In advocating the use of state-sponsored assassination, Carr points to its success in quelling rebel uprisings in the Roman Empire. He argues that "such movements—then as today—tended to be organized by and around charismatic leaders who were difficult to replace and who did not tend to surround themselves with characters of equal talent, who might become rivals."²⁶ While this description may be true, Carr again ignores significant political and social issues. First, the international community may condemn the use of assassination, greatly impairing the ability of the United States to build effective international coalitions. Second, the assassination of a key leader of any organization creates a hero, if not a saint. By creating such a martyr, the tactic may actually strengthen fervor among members and "constituents" of the terrorist organization, thereby increasing attacks. Once again, Carr's very limited approach does not address significant issues adequately, which may directly impact upon his radical policy recommendations.

Finally, at the center of Carr's new strategy is the use of "daring offensive action to resolve dangerous situations before they develop into overwhelmingly violent ones."²⁷ Specifically, he advocates the tactic of unilateral, preemptive military strikes against not only terrorist camps, but also the conventional forces of state sponsors. Citing the success of the

25. *Id.* at 225.

26. *Id.* at 28.

27. *Id.* at 91.

U.S. raid on Libya in 1986, he argues that “[b]y attacking the conventional forces of state sponsors, we drastically change the position of those states in their regional balances of power . . . [, for] as much as they may hate America[,] they value their regional power even more.”²⁸

While history may support this generalization, Carr’s limited focus again prevents him from recognizing the important political and social issues raised by unilateral action, including the potential damage to diplomatic relations with America’s allies, the destabilization of other nations in a particular region, and potential violations of international law. Whether such issues would prevent unilateral, preemptive military strikes is unclear; however, Carr’s failure to acknowledge them reveals again the dubious nature of his history-alone approach and deflates the quality of his recommendations.

Conclusion

Readers seeking a comprehensive, objective, and well-reasoned analysis of modern international terrorism will be greatly disappointed in *The Lessons of Terror* and should look elsewhere. As described above, it has several analytical shortcomings that detract tremendously from the value of the book. Although Carr provides a succinct and instructive review of the tactical and theoretical history of deliberate warfare against civilians, his controversial terrorism analysis and his progressive war strategy are perfunctory and myopic. By failing to analyze the social, political, and definitional aspects of terrorism effectively, Carr leaves readers with far more questions than answers about the appropriate “post-September 11th” U.S. counterterrorism strategy. For although history is certainly a valuable tool, Carr’s history-alone approach is simply too narrow to encompass such a complex, dynamic, and multifaceted topic.

28. *Id.* at 252.

A REVIEW OF KURSK DOWN¹MAJOR LOUIS A. BIRDSONG²

*Total darkness, like that in the deepest cave, had embraced the survivors. The black would have been almost palpable, like a paralyzing blanket that curdled spirits and confused their brains. The deck had acquired a horrible new and much sharper slant. How long since the explosions? Seconds? Minutes? The only sound was the unmistakable whoosh of compressed air forcing water out of the ballast tanks. That one roaring noise, combined with the impossible deck angle, told them the Kursk was sinking.*³

In *Kursk Down*, Clyde Burleson graphically recreates the events leading up to and surrounding the sinking on 12 August 2000 of Russian Attack Submarine K-141, an ultra-modern and deadly weapon of war known by her crew as the *Kursk*. The author immediately captures the reader's attention with a horrific description of the disaster from the perspective of the Russian crew who survived for a short period following the sinking of the *Kursk*. Burleson forces the reader to confront the terror of being confined in a mortally crippled submarine at the bottom of the Barents Sea, cut off from the rest of the world, in total blackness, while near freezing sea water slowly seeps into the small compartment holding the twenty-three survivors. Burleson creates this literary illusion and effectively weaves in the details surrounding the disaster of the *Kursk's* sinking.

While focusing on the events surrounding the loss of the *Kursk*, Burleson's agenda from the outset of the book is to both discredit the Russian military as an obsolete, under-funded, and mismanaged entity and to malign the Russian government's clumsy efforts in handling the media blitz that ensued following the disaster. The author asserts that the Russian military expects too much from its forces, considering the state of its equipment, facilities, lack of training, and budgetary restraints. In Burleson's view, it is foolhardy for a country as financially and politically bankrupt as Russia to try and project its influence and strength beyond its

1. CLYDE BURLESON, *KURSK DOWN* (2002).

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. BURLESON, *supra* note 1, at 27.

borders. Considering the new “reality” as he describes it, any effort to maintain a strong military is “dancing with disaster.”⁴ Ultimately, Burleson concludes that this “attitude” sank the *Kursk*.⁵

In a literary ploy to interest the reader, Burleson brazenly promises in his preface to reveal the “real reason” the *Kursk* sank and to prove that “an enormous explosion”⁶ on the boat caused the sinking to take place, contrary to alleged reports by the Russian Navy suggesting a different cause.⁷ Despite this assertion by the author, what caused the *Kursk*’s demise has never really been in question. Just before noon on 12 August 2000, two explosions ripped through the *Kursk*, which was operating in the Barents Sea while taking part in a large-scale Russian naval exercise. The first blast shook the massive 500-foot long boat and registered 1.5 on the Richter scale in nearby Norway.⁸ The second blast, about two minutes later, registered 3.5 on the Richter scale⁹ and doomed the boat while killing most of the 118-man crew instantly.¹⁰

In truth, the Russian government, once it understood the magnitude of the catastrophe, never denied that an onboard explosion sent the *Kursk* to its watery grave. The fact that numerous vessels (Russian, American, and British) and countries (United States and Norway) recorded the shock waves from the two explosions made such an incident apparent. In addition, many sailors on nearby Russian surface ships actually claimed to be eyewitnesses to an underwater explosion.¹¹ The Russian government questioned not whether there was an explosion, but the cause of the explosion.¹² Therefore, the author’s dramatic promise to reveal the reason the *Kursk* sank and his ultimate conclusion that an onboard explosion was the cause is merely prose intended to interest the reader, since that fact was clearly established in 2000. As this becomes clearer to the reader, this realization undermines the author’s credibility.

Despite this dramatic bit of salesmanship designed to exploit the emotional appeal of the disaster (probably to make the book seem more intrigu-

4. *Id.* at 236.

5. *Id.* at 233.

6. *Id.* (inside cover).

7. *Id.* at 97, 107, 134, 168, 181, 185, 191, 195, 227-28.

8. *Id.* at 72.

9. *Id.* at 73.

10. *Id.* at 221.

11. *Id.* at 65.

12. *Id.* at 138.

ing and interest potential buyers), the author does a good job of recreating the last days of the *Kursk*, weaving in the supposed perspectives of several crewmembers who ultimately perished that fateful August. Relying on media interviews with surviving relatives, statements made by Russian military and government officials, and a note found on the corpse of a crewmember who survived the initial blasts, the author recreates a riveting portrait of heroism, sacrifice, and death as the *Kursk* sailed on its last voyage.

Burleson focuses on the tragic circumstances of Captain-Lieutenant Dmitry Kolesnikov. Kolesnikov authored a note in the waning hours of his life aboard the crippled *Kursk*, 330 feet beneath the surface of the sea.¹³ The idea that a Russian officer left a note for his wife and chain of command while slowly suffocating in his cold and watery cell is compelling. This note offers the world a glimpse of how it must feel to be trapped aboard a hopelessly doomed ship as it meets the same fate untold thousands of ships have met since man first attempted to tame the sea. With his literary prowess, Burleson uses this hastily scrawled note to enhance his description of the *Kursk*'s final hours. The result is a sickeningly realistic portrayal of a submariner's fate when the mission goes awry.

The author also uses this glimpse inside the sunken submarine to illustrate his proposition that the Russian military and government mishandled the disaster from the beginning. By providing the reader with the desperate emotions of a doomed sailor, Burleson attempts to inflame the reader's opinion regarding the failed rescue attempts by the Russian Navy and subsequent handling of the disaster generally. Clearly, the Russian government was unprepared for the catastrophe that befell the *Kursk*. There is also evidence that the Russian government, whether intentionally or not, released confusing, contradictory, and sometimes erroneous information to the media in the initial weeks and months that followed the disaster.¹⁴ The author's indictment of the Russian government is overly harsh, however, considering the dearth of facts that surrounded the initial loss of the boat.

As discussed below, Burleson compares information gathered up to eighteen months following the disaster and after divers explored the sunken boat with what the Russian government released at the beginning of the crisis. He then concludes that the Russian military deliberately allowed the rescue mission to proceed slowly, thereby ensuring the deaths

13. *Id.* at 212.

of all sailors aboard the *Kursk*.¹⁵ Burleson also asserts that the Russian government embarked on an early and intentional campaign of disinformation initially to hide the disaster and later to shift responsibility for the incident to a foreign government.¹⁶ Burleson ultimately concludes that the anachronistic and obsolete “attitude” of the Russian leaders led to the *Kursk* disaster and that Russia must face new realities of its global stature instead of trying to regain power and prestige through military might.¹⁷

To bolster his conclusion, Burleson claims that the Russian military intentionally delayed the rescue operation for nearly twelve hours while the *Kursk* sailors slowly died below the waves.¹⁸ He also claims the Russian government delayed requesting foreign assistance because it feared that the truth that the *Kursk* sank due to an internal explosion instead of a collision with a foreign submarine would be apparent. After the explosion, Russian naval leaders waited to hear from the *Kursk* for about five hours. There was speculation that the boat may have been enroute back to port, having suffered some unknown damage, or was simply maintaining radio

14. *Id.* at 108.

In the early evening hours of Sunday, August 13, as activity at the *Kursk* site was building, Admiral Popov appeared on Russian national T.V. From the deck of *Peter the Great*, he declared that the Northern Fleet’s sea war games had been a resounding success. No mention was made of the *Kursk*.

Id. See also *id.* at 110.

Two days after the disaster, on Monday 14, at 1045 hours, the Navy Press Center issued the first public statement: “[T]here were malfunctions on the submarine, therefore she was compelled to lay on a seabed in a region of Northern Fleet exercises in the Barents Sea.” . . . Further information, this time a bit less truthful, indicated communications with the submarine were said to be working.

Id.

15. *Id.* at 81-92.

16. *Id.* at 84-85, 87, 107-08, 110-11, 113-14, 120-21, 127, 133-34.

17. *Id.* at 233.

18. *Id.* at 88; see also Vladimir Shigin, *We Must Fight for Our Lives, We Must Win Time!* (excerpt from VLADAMIR SHIGIN, *EMPTY MOORAGE* (forthcoming) (analyzing the evidence surrounding the *Kursk* disaster, to include Kolesnikov’s note), at <http://kursk.strana.ru/english/dossier/999494361.html> (last visited Jan. 24, 2003).

silence until the exercise was complete. In any event, the nearby Russian Fleet continued its exercise under the observant eyes of foreign powers.¹⁹

The Russian Northern Fleet implemented a hastily planned full-scale rescue operation at 2330 on 12 August.²⁰ A mere six and a half hours later, the Russian Navy located the *Kursk*.²¹ Despite this impressive response time, repeated attempts by four different Russian submersible rescue vehicles over a five-day period failed to secure access to the *Kursk* for various reasons.²² During this period, the Russians refused all offers of assistance from foreign countries, including the United States. The media pressure increased exponentially as the hope for survivors faded.²³

Burleson's criticism of the Russians in this case is interesting. He has a point that the initial delay of the rescue operation was too lengthy, as the Russians probably could have responded faster, given the facts known today. After initiating the rescue mission, however, the Russians moved with remarkable speed, notwithstanding budget limitations, a media frenzy, and national security concerns. Furthermore, the Russians' refusal of foreign aid is hardly surprising, considering the *Kursk* was their most modern and advanced submarine. Allowing foreign governments the opportunity to look closely at the sunken vessel was out of the question.²⁴ If one also takes into account that Russian submersibles were actively trying to gain entry into the *Kursk*, the Russians' belief they could conduct the rescue operation alone becomes more understandable. Ultimately, the fact that the Russian government was able to approach Norway, secure foreign assistance, and gain access to the submarine in over 300 feet of water within nine days is an impressive timetable in itself.²⁵ Thus, upon closer scrutiny, accusations of a delayed response, with the possible exception of the initial hours following the disaster, ring hollow.

Clear to the reader, however, is the author's frustration with how the Russian government handled the media during the crisis. According to Burleson, leaks and rumors abounded in the Russian government and speculation was rampant during the early weeks following the loss of the *Kursk*. During this period, the Russian government clearly attempted to keep the loss out of the press to the extent practicable. This was impossible, however, and both the national and international media flocked to

19. BURLESON, *supra* note 1, at 85.

20. *Id.* at 88.

21. *Id.* at 105.

22. *Id.* at 102-40.

23. *Id.* at 111, 113, 127.

nearby Russian ports to await word and investigate the matter.²⁶ When the Russian government released information too slowly, the media sometimes created news stories to feed the frenzy surrounding the loss.²⁷ The author then uses these stories to fuel his criticism of how the Russian government released false or confusing information in the aftermath of the disaster.

Burleson condemns the Russian government for initially blaming the disaster on an underwater collision with a foreign submarine as a petty effort to shift blame and responsibility for the tragedy.²⁸ Although many Russian leaders made this speculation, this was not as absurd as the author suggests. Since 1967, eleven collisions between United States and Russian (Soviet) submarines have been documented, with at least one Soviet submarine lost due to such a collision as recently as 1986.²⁹ Considering the advanced nature of the *Kursk*, the experienced captain and crew, the suddenness of the disaster, and the history of collisions in the Barents Sea, the

24. See generally Andrew Toppan, *Haze, Gray & Underway: Naval History and Photography, Frequently Asked Questions, Section G.12: Project Jennifer, Glomar Explorer, HMB-1, and the "Golf"-Class SSB* (describing Project Jennifer, a CIA effort in 1974 to recover an earlier sunken Soviet submarine), at <http://www.hazegray.org/faq/smn7.htm#G12> (last visited Jan. 24, 2002). According to Toppan,

Project Jennifer was the codename applied to the CIA project that salvaged part of a sunken Soviet submarine in 1974. The Soviet Golf-class ballistic missile submarine (SSB) K-129 sank off Hawaii on 11 April 1968, probably due to a missile malfunction. . . . The sunken submarine was located in 16,500 feet of water. . . . The CIA ran an operation to recover the sunken submarine. The recovery effort centered on *Hughes Glomar Explorer*, a 63,000 ton deep-sea salvage vessel built for the project. [A]ccording to the [version of Project Jennifer] released to the public, only the forward thirty-eight feet of the submarine was recovered. The section included two nuclear-tipped torpedoes, various cipher/code equipment and eight dead crewmen.

Id.

25. BURLESON, *supra* note 1, at 157.

26. *Id.* at 152.

27. *Id.* at 153.

28. See *id.* at 228-29.

29. Venik's Aviation, *What Happened to "Kursk"* (Feb. 18, 2001) (noting that eight of these collisions occurred in the Barents Sea), at <http://www.aeronautics.ru/nws002/kursk001.htm> (archive).

initial assessment that a collision with a foreign submarine was the likely cause of the sinking had merit.

Burleson does not limit his criticism to how the Russian government handled the incident. He also hammers at the concept that the Russian military establishment and government generally were foolhardy to pursue an aggressive training scenario like that conducted during the naval exercise. He states that “it is easier . . . to strive to regain old glories than accept new realities. That attitude sank the *Kursk*.”³⁰ The breakup of the former Union of Socialist Soviet Republics, however, did not, and should not, necessitate the breakup of Russia’s military forces, naval or otherwise. The reality of the events surrounding the *Kursk* disaster is that the Russian Northern Fleet was engaging in a rare and large-scale training event.

Burleson details how the sea time of Russian sailors, even elite submariners, had fallen drastically compared to Cold War standards. He describes in great detail how critical it was to Russian military leaders to maximize training opportunities for budgetary, political, and training purposes.³¹ These, of course, are the same reasons U.S. military leaders desire to hold and successfully complete large-scale military exercises. Nevertheless, the author criticizes the Russian effort to push its military to excel while maintaining a lower operational level than that previously enjoyed during the Cold War as anachronistic or foolish.

Additionally, the author contradicts his own criticism. He describes the modern Russian submarine in great detail, summarizing that it was the “best submarine” in the Russian Fleet.³² Furthermore, Burleson lauds the *Kursk*’s commander, Captain 1st Rank Gennadi P. Lyachin, as “one of the finest submarine commanders in the Russian Navy.”³³ The author then spends pages and pages describing the proficiency of the officers and sailors on the *Kursk*.³⁴ While this section adds to the drama of the explosions and resulting disaster, Burleson undermines his own premise that the new

30. BURLESON, *supra* note 1, at 236.

31. *See id.* at 36.

32. *Id.* at 17. *See also* Vladimir Isachenkov, *Cause of Submarine Tragedy Is Confirmed*, ABCNews.com (July 26, 2002), at <http://abcnews.go.com/sections/world/DailyNews/kursk020726.html>. General Prosecutor Vladimir Ustinov stated that the “disaster occurred . . . because of the explosion of a practice torpedo inside the fourth torpedo tube, which in turn triggered explosions in torpedo charge chambers in the submarine’s bow section.” *Id.*

33. BURLESON, *supra* note 1, at 17.

34. *See id.* at 17-25.

realities of the post-Cold War era precluded precision training and high pressure military maneuvers.

Despite the author's intent to paint the Russian government in as unfavorable a light as possible,³⁵ the book is well written and engaging. The lack of footnotes or endnotes weakens the author's many assertions and conclusions since the reader is precluded in most cases from verifying the author's factual basis. Also, the lack of maps and diagrams of both the wreck site and the submarine itself is an inexcusable oversight because such items are readily available in print media or on the Internet.³⁶

Nevertheless, Burleson achieves his stated purpose of discussing the events leading up to and surrounding the loss of the *Kursk*. He recreates a realistic series of events that probably are as close as anyone will come to describing what happened on the *Kursk* as it suffered fatal blows and slowly died, alone on the Barents Sea floor. The author injects perspectives from both the doomed submariners on board the *Kursk* and their Russian counterparts on the surface, and although he relies heavily on conjecture, he portrays a terrifying account of what happened to the *Kursk* in August 2000.

I recommend this book to readers interested in military history generally and naval warfare specifically. *Kursk Down* provides a unique insight into both submarine duty and the inner workings of the Russian military. The book is not, however, the definitive resource for the *Kursk* disaster. Burleson injects an inordinate amount of personal opinion based on conjecture into his analysis and uses these opinions to draw broad conclusions about what happened and why. While entertaining and possibly on point, the lack of factual data to support such conclusions undermines the author and his book's credibility.

35. *Id.* at 233-36.

36. *See, e.g.*, Center for Nonproliferation Studies, *The Kursk Accident* (wreck site), at <http://cns.miis.edu/pubs/reports/kurskmap.htm> (last updated Aug. 22, 2000).

THE EYES OF ORION¹REVIEWED BY MAJOR CARL A. JOHNSON²

*Platoon leaders historically suffer more casualties than other soldiers since they lead the way.*³

I. Introduction

The Eyes of Orion, co-written by five lieutenants who served as armor platoon leaders in Operations Desert Shield and Desert Storm, provides a unique perspective into the 1990-1991 Persian Gulf War. The authors led the way as the 24th Infantry Division (Mechanized) (24 ID(M))⁴ deployed to Saudi Arabia as part of Desert Shield in 1990, then spearheaded the ground offensive for the Allied Coalition Forces during Operation Desert Storm in 1991.⁵ Based on current events, this book is a must read for military personnel, particularly those junior leaders deploying to the Middle East.

The viewpoint of *The Eyes of Orion* contrasts with the majority of books written on the Gulf War, which tend to focus at the macro level, providing the reader with an overview of the geopolitical events leading up to the war and the war itself. For example, Bob Woodward's *The Commanders*⁶ and Friedman and Karsh's *The Gulf Conflict 1990 – 1991*,⁷ two excellent books in this latter genre, focus on the highest levels of command and leadership—the President, the National Security Council, the Secretary of

1. ALEX VERNON, NEAL CREIGHTON, JR., GREG DOWNEY, ROB HOLMES & DAVE TRYBULA, *THE EYES OF ORION* (1999). The Orion star constellation is the Warrior God's eternal monument to soldiers. *Id.* at 145-46.

2. United States Army. Written while assigned as a student, 51st Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. VERNON ET AL., *supra* note 1, at 155.

4. The 24 ID(M) was deactivated on 25 April 1996 and then reactivated on 5 June 1999 at Fort Riley, Kansas. 24th Infantry Division (Mechanized) & Fort Riley, *24th Infantry Division (Mechanized) Unit History*, at <http://www.riley.army.mil/Units/HQ24ID> (last visited Jan. 21, 2003).

5. VERNON ET AL., *supra* note 1, at 260; Letter from Major General Barry R. McCafrey, Division Commander, to the Soldiers of the 24th Infantry Division (Mechanized) (Mar. 12, 1991), *reprinted in* VERNON ET AL., *supra* note 1, at 260. Major General McCafrey commanded 24 ID(M) during Operations Desert Shield and Desert Storm. VERNON ET AL., *supra* note 1, at xxii.

6. BOB WOODWARD, *THE COMMANDERS* (1991).

7. LAWRENCE FRIEDMAN & EPHRAIM KARSH, *THE GULF CONFLICT 1990-1991* (1993).

Defense, the Chairman of the Joint Chiefs of Staff, and the Combatant Commander. *The Eyes of Orion*, however, sees the Gulf War through the lens of the lowest level of command, detailing the day-to-day activities and emotions of those small units serving on the front line.

II. The Authors

A little background on the co-authors provides some insight into *The Eyes of Orion*. Alex Vernon, Neal Creighton, Jr., Dave Trybula, and Rob Holmes all graduated from the United States Military Academy at West Point, New York, in May 1989.⁸ After completing the Armor Officer Basic Course at Fort Knox, Kentucky,⁹ they were assigned to Fort Stewart, Georgia, as tank platoon leaders in 2d Brigade, 24 ID(M).¹⁰ When they arrived at Fort Stewart, they met First Lieutenant Greg Downey—the senior platoon leader for 2d Brigade, Task Force 1-64, Delta Company¹¹—and a graduate of Nebraska State University at Kearney.¹²

These five former junior officers state that they wrote *The Eyes of Orion* to provide a more accurate and personal portrait of what it was like to live through Operations Desert Shield and Desert Storm, as compared to how those operations were portrayed by the media.¹³ This review divides its critique into three sections: (1) the deployment to Saudi Arabia; (2) Operation Desert Shield; and (3) Operation Desert Storm; then concludes with an analysis of *The Eyes of Orion* in the context of the authors' stated purpose for writing the book.

III. Deployment

The Iraqi attack on Kuwait began on 2 August 1990, defeating the Kuwaiti Army almost immediately, and eventually involving some 140,000 Iraqi troops and 1800 tanks.¹⁴ The United States could not respond to the Iraqi invasion at that time because the armed forces necessary to prevent the attack or expel the Iraqi military from Kuwait were not

8. VERNON ET AL., *supra* note 1, at 3.

9. *Id.* at 5.

10. *Id.* at 7.

11. *Id.* at 8.

12. *Id.* at 15.

13. *Id.* at xv.

14. FRIEDMAN & KARSH, *supra* note 7, at 67.

in place in the Persian Gulf.¹⁵ *The Eyes of Orion* begins on 7 August 1990 when 24 ID(M) received the alert to deploy to Saudi Arabia. Within hours of receiving the alert, the authors—along with the rest of 24 ID(M)—moved to the National Guard Training Center at Fort Stewart, Georgia, where they were “locked-down” to prepare for the deployment.¹⁶

The lock-down presented the authors with their first leadership challenge. The unit had less than a week before the ships carrying its equipment would leave for the Gulf,¹⁷ and many of the M1 Abrams Tanks (M1s) and Bradley Fighting Vehicles (Bradleys) in the authors’ platoons had been stripped for parts or otherwise badly needed repairs.¹⁸ During the lock-down, it was crucial for the platoon leaders to get their M1s and Bradleys in proper fighting condition. They did the best they could; however, as is discussed below, the authors continued to face problems with their equipment and weapons systems once they arrived in Saudi Arabia.

IV. Desert Shield

By 24 August 1990, the majority of 24 ID(M)’s soldiers were in Saudi Arabia.¹⁹ Once in theater, the authors had to work quickly to unload their M1s, Bradleys, and other equipment. Their mission was to “draw a line in the sand” quickly and serve as the primary force protecting Saudi Arabia from Iraq.²⁰ The five authors provide a candid assessment of the conditions and their readiness for battle during the early portions of Desert Shield:

Dave [Trybula’s] own tank’s turret was not fully operational. The majority of the fourteen tanks in Neal Creighton’s Alpha Company could not transfer fuel from the rear to the front tanks from where the engine drew, halving the distance the M1s could travel before running out of gas. Three of Greg Downey’s six Bradley [Combat Fighting Vehicles] could not shoot. Since we had not received the parts to repair these vehicles in the States, we hardly expected them to fortuitously appear in Saudi Arabia—the division had in fact exhausted its supply of spare parts

15. *Id.* at 85.

16. VERNON ET AL., *supra* note 1, at 13.

17. *Id.* at 1.

18. *Id.* at 13.

19. *Id.* at 25.

20. *Id.* at 26.

getting its vehicles ready for shipping. When the alert for deployment hit, the 24th did not have a single brigade's basic load of ammunition and had to scrounge from depots across the country to arm itself. From where would the next load come? Rob Holmes did not have either a gunner or loader on his tank, effectively rendering it weaponless as well.²¹

The authors' personal accounts of the early phases of Desert Shield reveal their awareness of their unit's vulnerability at that time, a view shared by the senior leadership about American forces in general.²² Fortunately, Iraq failed to attack.

Once deployed in Saudi Arabia, the authors faced new challenges. The desert heat and sand caused numerous problems for the M1s and Bradleys assigned to their platoons. Supplies, including replacement parts, were still unavailable. When a tank or combat vehicle was damaged, it would be out of action for weeks, if not months.²³ The authors thoroughly describe the maintenance problems caused by the weather conditions and the adjustments they made to overcome these problems:

[I]t meant cleaning out the turbine engine's air filters at a minimum after every six-to-eight hours of operation, and once daily on days the tank engine did not fire up Operation Stand Still called for an unequivocal order not to operate our equipment during the afternoon and to focus all maneuver training at night when the desert cooled considerably. . . . Because of the sand, we could not use oil to lubricate the weapons else the sand would stick to the lubricant. Eventually the army purchased a dry graphite lubricant to keep the weapons functioning properly.²⁴

After being in Saudi Arabia for a little over a month, the authors began to conduct much needed training with their platoons with greater frequency. This training time was essential because of the authors' inexperience: Only two of the five authors had been to the National Training Center,²⁵ the authors had limited time leading their platoons in any sort of field exercise, and at least one of the authors had never maneuvered his platoon at all.²⁶ For example, First Lieutenant Downey, who had become

21. *Id.* at 31.

22. WOODWARD, *supra* note 6, at 282.

23. VERNON ET AL., *supra* note 1, at 52.

24. *Id.* at 52-53.

25. *Id.* at 96.

the Task Force 1-64 (Armor) (TF 1-64) Scout Platoon leader only six weeks before Iraq invaded Kuwait,²⁷ complained that he had not gotten to know his scouts well enough before deployment because in the short time he had been their leader, his scouts were always on a detail or on leave.²⁸ This lack of training, coupled with the maintenance and ammunition problems, further illustrates the vulnerability of the authors' unit during the early phases of Desert Shield.

The training conducted by the authors with their platoons during Desert Shield was critical to their success in Desert Storm. As the training continued, it evolved from defensive tactics to offensive tactics.²⁹ The authors realized they would be leading their platoons into combat, and that their lives and those of their men would depend on how they performed in battle. They had to wrestle with issues concerning their confidence in their ability to lead these soldiers into combat and bring them home alive. On the brink of offensive operations, the authors feared for the safety of the men they led; they feared for their own lives; and they worried about mechanical problems, personnel problems, and—maybe most of all—they feared fratricide.³⁰

V. Desert Storm

Operation Desert Storm began with an air campaign that lasted from 17 January to 23 February 1991.³¹ During the air campaign, the authors received their mission: 24 ID(M) was to attack 300 kilometers deep into Iraq to block the Euphrates River Valley to close the escape route for 500,000 enemy soldiers in Kuwait.³² Second Brigade (which all five authors belonged to) was selected to lead the Division. Task Force 1-64 (Armor) (which three of the five authors belonged to) was designated to

26. *Id.* at 11.

27. *Id.* at 8. The scout platoon is the most autonomous unit in a combat battalion. Working well forward, it provides information on the routes and the enemy to the battalion commander so he can decide how to best employ his four companies. *Id.*

28. *Id.* at 14.

29. *Id.* at 107.

30. *Id.* at 147-73.

31. *Id.* at 145.

32. *Id.* at 177.

lead 2d Brigade. Delta Tank, First Lieutenant Rob Holmes's platoon, was selected to lead TF 1-64.³³

First Lieutenant Holmes's platoon led 24 ID(M)'s ground offensive into Iraq on 24 February 1991.³⁴ The other authors and their platoons followed. They did not encounter Iraqi forces on their first day on the offensive; instead, they had to deal with the familiar problems of maintenance and weather. A large sandstorm hit them, which Second Lieutenant Trybula describes as the worst sandstorm he had seen in the time they had been in Saudi Arabia.³⁵ Despite limited visibility, the authors all navigated their platoons without incident on the first day of the ground campaign.³⁶

Due to the success of operations elsewhere, 24 ID(M) was pressed to speed up its assault into Iraq. As it pushed the ground offensive, the authors encountered the enemy for the first time, and they were shocked at what they found. Instead of finding soldiers, they found old men and young boys whose Achilles tendons were cut by their officers so they could not run away.³⁷ First Lieutenant Downey writes that the hate he had for the Iraqis dissipated at the sight of these hungry, cold, and scared victims of Saddam's tyranny.³⁸

Lieutenant Downey provides another example of unexpected changes to his emotions driven by first-hand experience. During the ground offensive, Downey's platoon was attacked with Iraqi artillery. Downey called in an artillery strike, which quickly destroyed the enemy's position. When Downey's platoon captured an Iraqi officer who survived the attack, he told Downey that the artillery strike wiped out over 600 Iraqi soldiers. This information astonished Downey, who grew up in a small town in Nebraska with a population less than the number of Iraqis he had just helped to kill.³⁹

The 24th Infantry Division continued to press its attack at a pace that far exceeded anyone's expectations. The authors' platoons engaged Iraqi soldiers on the way to their major objective, Jalibah Airfield. Most of the Iraqi forces surrendered with little or no fight, and those who fought were

33. *Id.* at 152.

34. *Id.* at 184-85.

35. *Id.* at 183.

36. *Id.* at 183-88.

37. *Id.* at 190.

38. *Id.*

39. *Id.* at 205.

quickly defeated.⁴⁰ Jalibah Airfield, however, was heavily defended, and the authors' accounts of their successful battle for Jalibah are the highlight of the book.

VI. Analysis and Conclusion

The authors successfully deliver an exciting and thought provoking first-hand account of the Persian Gulf War from the perspective of the small-unit leader. In particular, the authors' assessment of their platoons' combat readiness and the leadership problems they encountered in their deployment, the candid description of their emotions, and the outstanding accounts of the five authors each leading their platoon in a different part of the battlefield during the offensive at Jabilah support their purpose of providing a personal portrait of their experiences during the Gulf War. Current and future leaders can learn from the problems these authors faced, and think about ways to confront or avoid them.

The biggest weakness of the book, however, is that the authors never clearly state how they believed the media portrayed Desert Shield and Desert Storm, and, therefore, never clarify how their book helps to correct history. The book is predominantly biography; one must consult outside sources to determine if, in fact, the authors' premise—that the media reported the true story of the war inaccurately—has merit.

Furthermore, one must recognize the limitations of *The Eyes of Orion*: By design, the book encompasses a micro view of the experience of the American forces in the Persian Gulf. Therefore, *The Eyes of Orion* does not provide a comprehensive overview of the war. This book does not describe in great detail what happened and why during Operations Desert Shield and Desert Storm. Instead, it is simply a very personal account based on the recollection of five platoon leaders.

Despite this criticism, *The Eyes of Orion* is a solid book. Alex Vernon, the author responsible for integrating the five accounts of the events leading up to Desert Shield and Desert Storm, does a good job with a difficult task. *The Eyes of Orion* is an excellent book for judge advocates and junior leaders, giving them unique insight into the practical problems faced by the soldiers on the front line as they faced down Saddam Hussein. The

40. *Id.* at 190-228.

authors' insights are especially relevant today, as the United States continues its recent operations in the Middle East.

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