



MILITARY LAW REVIEW

ARTICLES

LAWLESSNESS WITHIN A FOREIGN STATE AS A LEGAL BASIS FOR UNITED STATES MILITARY INTERVENTION TO RESTORE THE RULE OF LAW

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WHAT REMEDY FOR ABUSED IRAQI DETAINEES?

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THE PAST AS PROLOGUE: MAJOR GENERAL GEORGE S. PRUGH, JR. (RET.) (1942-1975)—WITNESS TO INSURGENT WAR, THE LAW OF WAR, AND THE EXPANDED ROLE OF JUDGE ADVOCATES IN MILITARY OPERATIONS

Lieutenant Colonel George R. Smawley

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MILITARY LAW REVIEW

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LAWLESSNESS WITHIN A FOREIGN STATE AS A LEGAL BASIS FOR UNITED STATES MILITARY INTERVENTION TO RESTORE THE RULE OF LAW

MAJOR RUSSELL K. JACKSON*

I. Introduction

*In the criminal justice system, the people are represented by two separate yet equally important groups: the police who investigate crime and the district attorneys who prosecute the offenders. These are their stories.*¹

This is the opening line to television's longest running crime series.² It presupposes that legitimate governmental authority will maintain law and order. But what happens when fundamental law and order breaks down or ceases to exist? In the international arena, this possibility has become an all too common occurrence as, repeatedly, nations degenerate into lawlessness, creating a situation that threatens international peace

* Judge Advocate, U.S. Army. Presently assigned as Chief, Military and Civil Law Division, 1st Infantry Division, Wiesbaden, Germany. Written in partial completion of the requirements for LL.M., 2005, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. J.D., 1996, University of Toledo College of Law; B.S., 1989, Liberty University. Previous assignments include: Center Judge Advocate, William Beaumont Army Medical Center, Fort Bliss, Texas, 2003-2004; Command Judge Advocate, 501st Military Intelligence Brigade, Seoul, Korea, 2001-2003; Defense Counsel, Fort Knox Kentucky, 1999-2001; Trial Counsel, 4th Infantry Division, Fort Hood, Texas, 1998-1999; Administrative Law and Legal Assistance Attorney, 1st Armored Division (Forward), Eagle Base, Tuzla, Bosnia-Herzegovina, 1998; Legal Assistance Attorney, 4th Infantry Division, Fort Hood, Texas, 1997-1998. Member of the bars of the Commonwealth of Virginia, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States.

¹ See TNT, Law & Order, <http://www.tnt.tv/title/?oid=333808-602> (last visited Feb. 21, 2006).

² See NBC, Law & Order, http://www.nbc.com/Law_&_Order/about/index.html (last visited Feb. 21, 2006).

and creates conditions for terrorism that threaten the United States and its interests. In these nations, there is no functioning government to control borders, apprehend criminals, or prevent territory from being used as staging bases for terrorist training and terrorist missions.³

The rule of law and the maintenance of law and order in foreign states are legitimate policy concerns of the United States government.⁴ This article explores the theory that the collapse of law and order within a foreign nation provides a legal basis for intervention using military force to reestablish the rule of law. The rationale behind this theory relies on the customary law of anticipatory self-defense, the United Nations (UN) Charter, and the 1974 UN General Assembly Resolution on Aggression.⁵ This article draws the conclusion that lawlessness, as a sole factor, is not sufficient to justify armed intervention for purposes of self-defense. That conclusion changes, however, if additional facts indicate that the lawless state is becoming a sanctuary for terrorist elements. This article argues that the traditional doctrine of self-defense is still the correct measure by which to gauge the actions of the United States. What shifts is the degree of evidence required to meet the imminent threat standard of the law.

This article is not a policy statement recommending a specific course of action; rather, it is designed to further discussion about when the United States may intervene. Although this article takes a unilateral view towards intervention, there is no reason that the legal rationale could not be adopted by a regional organization, by an ad hoc coalition, or by the UN, to authorize early intervention.

³ These nations are often referred to as “failed states.” The whole notion of a “failed state” is a controversial topic and is discussed at some length in Part III of this article. Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT’L & COMP. L. REV. 453, 454 (Spring 2004) (citing Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL’Y, Dec. 1992, at 3). *But cf. generally* Ralph Wilde, *The Skewed Responsibility Narrative of the Failed State Concept*, 9 ILSA J. INT’L & COMP. L. 425 (2003).

⁴ See The National Security Strategy of the United States of America, September 2002, <http://www.whitehouse.gov/nsc/nss.html> [hereinafter NSS].

⁵ G.A. Res. 3314, 29th Sess., U.N. Doc. A/RES/3314 (XXIX) (1974).

II. Background on the Customary Law of National Self-Defense and the Anticipatory Use of Force

A. The Customary Law of National Self-Defense

1. *President Jefferson and the Barbary Pirates*

It is generally recognized that a nation has the right to defend itself.⁶ Historically, the United States' position has been that it has the inherent right to defend itself, its interests, and its people and their property, regardless of where they are located around the world.⁷ That notion was enforced early in the life of the Republic when President Thomas Jefferson determined to use force to end the tyranny of the Barbary States, which were exacting huge costs to commerce operating in the Mediterranean Sea.⁸

The Barbary States were a group of small, North African city-states, loosely under the rule of the Ottoman Sultan.⁹ They were significant commercial centers but also engaged in commerce raiding.¹⁰ After seizing ships, the states would ransom the crews.¹¹ If ransoms were paid once, the Barbary Pirates increased the ransoms at the next opportunity.¹² Simultaneously, insurance rates skyrocketed.¹³ Alternatively, some nations negotiated peace treaties with each of the Barbary States; not surprisingly, these treaties came at an exceptionally high price.¹⁴ For example, the treaties the United States struck with Tripoli and Algiers in the late 1700s cost approximately \$1 million per year.¹⁵ The French and

⁶ 2 HUGO GROTIUS ON THE LAW OF WAR AND PEACE 184 (Francis W. Kelsey trans. 1925) (1646), in THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott, ed. 1925) [hereinafter GROTIUS].

⁷ "The great object and duty of government is the protection of the lives, liberty and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving." *Durand v. Holland*, 8 F. Cas. 111, 112 (S.D.N.Y. 1860).

⁸ James R. Sofka, *The Jeffersonian Idea of Security: Commerce, the Atlantic Balance of Power, and the Barbary War 1785-1805*, Address at the Robert H. Smith International Center for Jefferson Studies (July 13, 2004), available at <http://www.monticello.org/streaming/speakers/sofka.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

British willingly paid the high costs because the ransoms freed their navies for duty elsewhere and ultimately decreased the competition for French and British goods by shifting the focus to the fleets of smaller nations.¹⁶

President John Adams subscribed to the French and British approach to the Barbary States; however, his Secretary of State, Thomas Jefferson, disagreed.¹⁷

Thomas Jefferson . . . believed that if a nation wishes to be free and live in peace it must be able to defend itself and be willing to protect its rights. The issue was not whether we preferred war or peace, but whether we would have the option of peace in the absence of a credible ability and willingness to defend our rights.¹⁸

And from his own pen:

If it be admitted, however, that war, on the fairest prospects, is still exposed to uncertainties, I weigh against this, the great uncertainty of the duration of a peace bought with money . . . by a nation who, on hypothesis of buying peace, is to have no power on the sea, to enforce an observance of it.¹⁹

From Jefferson's perspective the United States lost, regardless of whether it paid the ransoms or struck treaties.²⁰ Failure to pay ransoms or make treaties meant the United States could not do business in the Mediterranean.²¹ Paying ransoms or making peace treaties rewarded the misbehavior of the Barbary States, encouraging them to increase their subsequent ransoms and treaty fees.²² Jefferson did the math; the money used to pay ransoms and fund treaties could be better spent building a

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L L. 121, 127-28 (Spring 2003).

¹⁹ 5 THE WRITINGS OF THOMAS JEFFERSON 366 (Albert Ellery Bergh, ed., 1907).

²⁰ Sofka, *supra* note 8.

²¹ *Id.*

²² *Id.* As the final insult, often the money paid was used by the Barbary States to purchase new ships with which they could further terrorize the Mediterranean. *Id.*

navy, which could interdict the pirates and open the shipping lanes for the United States.²³

In 1785, while an Ambassador to France, Jefferson made his first efforts to do something about the problem.²⁴ His idea was to form an “anti-piratical confederacy” with the weaker states on which the Barbars preyed.²⁵ The French, however, vetoed the idea.²⁶ Subsequently, treaties were struck with Tripoli and Algiers, but they devolved as the Barbary States refused to abide by them.²⁷ A 1793 government commerce report further boosted Jefferson’s ideas by concluding that commerce was an essential resource of the nation’s defense and that United States commerce was vulnerable at sea.²⁸ In the waning years of the eighteenth century, Jefferson identified his three primary foreign policy concerns: (1) the United States was militarily weak and therefore vulnerable; (2) the United States economy needed time to develop; and (3) neutrality and independence best secured the United States during the time of European wars.²⁹

Thomas Jefferson was elected President of the United States in 1801.³⁰ With his foreign policy concerns in mind, he pursued a two-tiered philosophy: first, use the economic force of commerce to deal with strong powers (e.g., England and France) by pitting their demand against them by properly valuating the United States’ ability to be the source of supply;³¹ and second, for dealing with the lesser powers (e.g., Spain and Barbary States), use armed force to defeat their interference with the United States’ commerce.³² This policy explicitly took a prospective view. These states were likely to try and harm United States commerce; therefore, the United States should militarily intervene and “meet the first insult.”³³

President Jefferson wasted no time in taking military action against the Barbars. At his very first cabinet meeting he addressed the issue of

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

the Barbary States.³⁴ The cabinet unanimously concurred that the Navy should be dispatched to protect U.S. commercial shipping in the Mediterranean Sea and make war, if war was declared by the Barbary States on the United States.³⁵ Although some within the Jefferson administration sought a formal declaration of war, the President opted instead to dispatch a naval fleet under the command of Commodore Richard Dale, with express instructions “to ‘chastise’ Algiers and Tripoli if they continued to attack American shipping.”³⁶ The fleet set sail on 1 June 1801.³⁷ As it departed Hampton Roads, the Jefferson Administration was unaware that Tripoli had already declared war on the United States almost three weeks earlier.³⁸ The American fleet proved highly effective in engaging the ships of the Barbary States, thereby opening the Mediterranean waters to U.S. shipping.³⁹ Notably, it was almost six months later, in his annual address to Congress, that President Jefferson formally notified Congress of the dispatch of these forces.⁴⁰ The record does not indicate that Congress felt in any way that this use of force without a declaration of war or congressional authorization was improper or that the delay in formal notification was inappropriate.⁴¹

2. *The Bombardment of Greytown, Nicaragua*

A second incident that ingrained the notion that the President could act in defense of the nation’s interests also occurred fairly early in the life of the Republic. It involved the bombardment of Greytown, Nicaragua. On 1 May 1852, at San Juan del Norte (Greytown), the Mosquito government relinquished control of the town to a government

³⁴ Turner, *supra* note 18, at 128-29.

³⁵ *Id.*

³⁶ STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 379 (2d ed. 1997) (quoting Memorandum of the Attorney General on the Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. Off. Legal Counsel 8 (Dec. 4, 1992)). Those seeking a written record of Jefferson’s thoughts regarding the decision to dispatch forces will be disappointed; apparently he purposefully put little in print. Likely this was purposeful as he was elected on a peace platform and would not have wanted to be on record should the venture have failed. See Sofka, *supra* note 8.

³⁷ Turner, *supra* note 18, at 129.

³⁸ *Id.* at 124.

³⁹ *Id.* at 129.

⁴⁰ *Id.* at 130.

⁴¹ *Id.*

formed by local residents.⁴² This new government came into friction with the Accessory Transit Company (Company), a business composed of U.S. citizens.⁴³ The government ordered the Company to remove some buildings, but the Company did not comply with the order.⁴⁴ The government then sent an armed group who destroyed the buildings.⁴⁵ The situation was exacerbated a few days later when one of the Company's superintendents was arrested.⁴⁶

Difficulties between the new government and the Company continued through 1853.⁴⁷ On 16 May 1854, an armed band tried to arrest the captain of the Company's steamer on a charge of the murder of a native boatman.⁴⁸ The United States' minister to Central America attempted to intervene in the matter and was injured by a mob.⁴⁹ The *U.S.S. Cayne*, under the command of Captain (CPT) George H. Hollins, was dispatched to Greytown to demand reparations for the Company's destroyed property and the insult to the United States' diplomat.⁵⁰ The authorities at Greytown did not respond to Captain Hollins's demands; therefore, he issued notice that the city would be bombarded, and on 13 July 1854, he leveled the town.⁵¹

President Franklin Pierce defended the actions of CPT Hollins and issued the following statement regarding the incident and the government of Greytown:

Not standing before the world in an attitude of organized political society, being neither competent to exercise the rights or discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages

⁴² 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 414-15 (1906).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

depredating on emigrant trains or caravans and the frontier settlements of civilized states.⁵²

Later in 1854, the government of Nicaragua, representing some of its nationals who lost property in the bombardment, made a demand for payment on the U.S. government.⁵³ The claim was denied, and in rather harsh diplomatic terms, the government of Nicaragua was told that those who suffered loss were on notice of the pending bombardment and that by staying in Greytown, the United States considered the Nicaraguans associates of the marauding local authorities, and, as such, no less culpable than the Greytown authorities.⁵⁴ Further, the Secretary of State castigated the Nicaraguan government for allowing a band of renegades to operate within its territory.⁵⁵ Reminding the Nicaraguans of their international duties, he stated,

It would be a strange inconsistency for Nicaragua to regard the organization at San Juan as a hostile establishment in her territory and at the same time claim the right to clothe with her nationality its members I infer that the Government of Nicaragua . . . will not hesitate to acknowledge her responsibility to other states for the conduct of the people which she has permitted to occupy that part of her territory.⁵⁶

B. The Anticipatory Use of Force in National Self-Defense

1. *Grotius and the Use of Force in Anticipatory Self-Defense*

When speaking of the use of force in anticipatory self-defense, the *Caroline* case is usually cited as the seminal case on point.⁵⁷ The doctrine, however, has an extensive international law basis that far predates the United States. In terms of modern war theory, Hugo Grotius

⁵² *Id.* at 416.

⁵³ *Id.* at 417-18 (citing Mr. Marcy, Sec'y of State, to Mr. Marcoleta, Nicaraguan min., Aug. 2, 1854, MS. notes to Cent. Am. I. 62).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See discussion *infra* Part II.B.2.

wrote extensively on the matter during the seventeenth century.⁵⁸ By collecting the works of several ancient scholars, philosophers, statesmen, and warriors, he promulgated a legal theory for the justified reasons to initiate a war. Living during an era of significant armed conflict, “Grotius sought to stem the tide of a people’s lack of restraint in going to war and prosecuting it with more cruelty and brutality than barbarous forces and invaders.”⁵⁹ The value that his work has for the modern international law theorist is that “from World War II to the present, these solidarist concepts [just war theory and its different bases for the use of force] have been written into positive treaty law and enshrined in the Pact of Paris of 1928, which outlawed war, the Covenant of the League of Nations, and the Charter of the United Nations.”⁶⁰

Grotius concluded there were three justifiable causes of war: “defence, recovery of property, and punishment.”⁶¹ He focused extensively on the private right to war as his definition of war was defined by the era in which he lived:

He conceived of war as armed conflict, including armed conflict between private persons . . . or more precisely, between independent powers at various levels, as well as armed conflict between states or nations, i.e., public war At the same time he understood war as having essentially the same function and structure as a lawsuit: as a remedy for violation of rights.⁶²

From this perspective, Grotius discussed the rights of individual behavior and then built the justifications for a state to resort to the use of force. However, Grotius perceived these rights as being on the same continuum; thus, although modern civilization no longer recognizes private rights to engage in war, it is necessary to understand that in Grotius’ jurisprudence, the private right to war informed the notion of,

⁵⁸ Grotius was born in 1583, in the town of Delft, Holland. He was admitted to the bar at The Hague at age sixteen and served in various positions within government. He later escaped from prison and fled to France due to political persecution. KENNETH W. THOMPSON, *FATHERS OF INTERNATIONAL THOUGHT: THE LEGACY OF POLITICAL THEORY* 69-70 (1994).

⁵⁹ *Id.* at 71.

⁶⁰ *Id.*

⁶¹ GROTIUS, *supra* note 6, at 171.

⁶² A *NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS* 57 (Onuma Yasuaki, ed., 1993) [hereinafter *PEACE, WAR, AND JUSTICE*].

and acted as a springboard to, the public right of states to engage in war. Notably, once Grotius moved from the private to the public law sector of the continuum, he actually appeared to broaden the bases upon which a state may go to war and how a state may pursue military operations against its enemies.

Writing on the basic premise of the right of self-defense, Grotius remarked,

If an attack by violence is made on one's person, endangering life, and no other means of escape is open, under such circumstances war is permissible . . . [a]s a consequence of the general acceptance of this principle we showed that in some cases a private war may be lawful. This right of self-defence . . . has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor.⁶³

Thus, Grotius' basis for the use of force in self-defense was founded in natural law.⁶⁴ This is significant because the era in which he lived was dominated by religious thought and ecclesiastical law.⁶⁵

Most of the wars Grotius sought to regulate by means of law were religious wars in which both sides were striving to achieve their respective aims in the name of God. Appeals to divine law were particularly useless in dealing with religious wars: thus there was no choice but to embark on the task of giving reason a status independent of divine will, removing natural law from theology.⁶⁶

Turning to the anticipatory use of force in self-defense, Grotius articulated what would one day become the *Caroline* formula:

The danger . . . must be immediate and imminent in point of time Those who accept fear of any sort as

⁶³ GROTIUS, *supra* note 6, at 172.

⁶⁴ *Id.*

⁶⁵ See generally THOMPSON, *supra* note 58, at 72-74.

⁶⁶ PEACE, WAR, AND JUSTICE, *supra* note 62, at 28.

justifying anticipatory slaying are themselves greatly deceived, and deceive others. Cicero said truly . . . that most wrongs have their origin in fear, since he who plans to do wrong to another fears that, if he does not accomplish his purpose, he may himself suffer harm.⁶⁷

Thus, Grotius justified the anticipatory use of force to halt a pending attack, but drew the line at the use of force to prevent a possible attack. He simply was not ready to embrace a “might harm” standard:

If a man is not planning an immediate attack, but it has been ascertained that he has formed a plot . . . 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.⁶⁸

Grotius’ reasoning alters when he applies the general law principle to the behavior of a state:

In private war, self-defence is generally the only consideration; but public powers have not only the right of self-defence but also the right to exact public punishment. Hence it is permissible for them to forestall an act of violence which is not immediate, but which seems to be threatening from a distance; not directly - for that . . . would work an injustice - but indirectly, by inflicting punishment for a wrong action commenced but not yet carried through.⁶⁹

This is an important nuance, especially when judging the current Bush Doctrine, which authorizes the use of force preemptively against those who might harm the United States.⁷⁰ Grotius does not require the

⁶⁷ GROTIUS, *supra* note 6, at 174.

⁶⁸ *Id.* at 174-75.

⁶⁹ *Id.* at 184.

⁷⁰

America will act against such emerging threats before they are fully formed . . . We will disrupt and destroy terrorist organizations by . . . defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it

same degree of certainty for a state to act anticipatorily that he requires of a private individual to act anticipatorily. He does not wholly jettison the imminence standard—he still limits the amount of force and the means by which a state may lawfully act—but he clearly conceives of a lower threshold in attaining imminence, thereby justifying forceful action on the part of the target state. Grotius' rationale is not inconsistent. He was creating a normative jurisprudence for dealing with the bases for going to war.⁷¹ His goal was to narrow those bases without negating the right altogether.⁷²

It is necessary to first understand Grotius' context and motivation, because when applying his lessons to contemporary issues, failing to understand the background in which those principles were elucidated may result in faulty reasoning in a modern setting. Grotius considered the realities of his day when developing his legal theories; even so, current realities should inform the thinkers of the modern era. For example, Grotius couches the whole self-defense discussion in terms of a nation's "neighbor."⁷³ The context indicates that he speaks of bordering countries, where, if one nation builds a fortress along the border and there is no treaty between the nations prohibiting such an act, that act would not, by itself, give the other nation a right to invade.⁷⁴ Rather, the other nation would have to resort to building its own fortress as a means of defense.⁷⁵ What Grotius does not answer is what rights the potential victim has if the fortress is built in violation of a treaty. If it is, is there sufficient cause so that the potential victim may invade as an act of national self-defense? Would action in violation of a treaty provide enough certainty on which the other nation could use force? From a modern perspective, we must question whether this is really a viable standard in the context of transnational threats. For example, Grotius would not allow for wars of liberation of a subject people.⁷⁶ Today, the United States, as well as many other nations, would vociferously oppose

reaches our borders . . . we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists . . . We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.

NSS, *supra* note 4, at cover letter.

⁷¹ THOMPSON, *supra* note 58, at 71.

⁷² *Id.*

⁷³ GROTIUS, *supra* note 6, at 550-51.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

that opinion. If then this principle is not adopted, what necessarily binds the United States to Grotius' reasoning with regard to preventive warfare?

Grotius further complicates the analysis by discussing and illustrating a methodology propagated by Polybius regarding "justifiable and persuasive" causes of war. The former are called "pretexts"; the latter are called "causes."⁷⁷ Wars lacking either pretext or cause are "wars of savages."⁷⁸ They are engagements of war for the mere sport of combat and a lust for danger.⁷⁹ Wars that have cause but lack pretext are "wars of robbers."⁸⁰ This is the Darwinian concept of the strong shall survive, usually by preying on the weak.⁸¹ But Grotius also finds another unjust cause for war—those wars that may appear on the surface to be justified but upon deeper inspection prove to have an "inadequate" basis.⁸² One such basis is "fear of something uncertain"⁸³ or resorting to war because one is afraid someone else might harm them. This underscores Grotius' thinking that use of force by a state against a potential enemy is not unlawful, so long as the force used is short of war-making.

To summarize Grotius' reasoning, self-defense requires necessity, and necessity means the danger is imminent.⁸⁴ Danger is not imminent unless the potential victim is certain of both an attack and the assailant's ability to carry out the attack,⁸⁵ and "[t]he degree of certainty required is that which is accepted in morals."⁸⁶ Grotius never states whose morals apply to this analysis, so one can only assume that he speaks of that which is generally morally acceptable on an international scale at the time of the pending attack. Grotius does consider the opinion of Aristotle, who noted that moral questions cannot be relegated to a mathematical equation. The determination as to the certainty of an attack hinges largely on the judgment of the leader exercising military authority.⁸⁷ Hence, one could argue that Grotius envisioned a sliding

⁷⁷ *Id.* at 546.

⁷⁸ *Id.* at 547-48.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 549.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 557-58.

scale on which the degree of certainty adjusts based on the capabilities of the attacker and the mores of the times. This pliable rationale is not uncommon for Grotius: Professor Yasuaki notes that “Grotius consistently appeals to utility when he encounters difficult issues of critical importance.”⁸⁸ In other words, even the philosopher must ultimately formulate pragmatic solutions to intractable problems.

Arguably, the decision to use preemptive force is largely a matter of discretion. Grotius did offer some concrete advice in this area: “Where one really must do one of two things, and yet is in doubt whether either is right . . . [he] may choose that which appears to him to be less wrong. For always, when a choice cannot be avoided, the lesser evil assumes the aspect of the good.”⁸⁹ This begs the question, “What is the lesser evil?” Grotius draws from a jurisprudential philosophy that calculates the lesser evil to be that course of action which does not lead to irreversible results. For example, once inflicted, capital punishment cannot be reversed.⁹⁰ Applying this analysis to the question of whether to commit to war in anticipatory self-defense, Grotius would, where there is doubt, side with inaction, for once soldiers are committed to the fight, people will die and that cannot be undone, especially a problem if it is later determined that there was no actual threat.⁹¹ Quoting Cicero, “Since there are two methods of settling a difference, the one by argument, the other by force, and since the former is the characteristic of men, the latter of beasts, we should have recourse to the second only when it is not permitted to use the first.”⁹² Finally, Grotius cites a caution from Euripides that war is a risky business, and, once started, success is not guaranteed:

Whenever men proceed to vote on war
No one reflects that death hangs over him,
But each destruction for the other plans;
Had we, when casting votes, with our own eyes
The funerals beheld, the funerals as we voted,
Would not have perished war-frenzied Greece.⁹³

⁸⁸ PEACE, WAR, AND JUSTICE, *supra* note 62, at 7.

⁸⁹ GROTIUS, *supra* note 6, at 557-58.

⁹⁰ *Id.* at 560-64.

⁹¹ *Id.* Grotius does offer three alternative methods to resolve such a conflict: (1) call a conference between the parties; (2) seek arbitration; or (3) draw lots. *Id.*

⁹² *Id.* at 560 (citing *On Duties*, I [xi. 34]).

⁹³ *Id.* at 571 (citing *Suppliants*, 481 ff).

So what does Grotius contribute to the question of whether lawlessness in a foreign state may be a basis for military intervention? First, he advocates a principled approach to war-making. Grotius' analytical model is historically tested to produce, to some degree of certainty, a justifiable basis for the resort to arms. Though Just War Theory may no longer be the paradigm by which nations rationalize the use of force, there is still a call for moral legitimacy whenever armed force is used.⁹⁴ Anyone answering affirmatively the question posed by this article should likewise elucidate a morally-principled basis for that decision. Second, Grotius conceded that the decision to resort to arms ultimately remains a matter of discretion. Critics of those who choose to intervene with force must do more than criticize the decision to employ arms. There will always be the counter-argument against the use of force, as Grotius proves in his own extensive writings. The critics must demonstrate why a decision to employ arms is an abuse of that discretion, otherwise, the one with the power to commit forces is acting within his legal authority. Third, the exercise of that discretion should be informed both by the collective wisdom of the ages regarding the use of force as well as by the facts and circumstances of the era in which one lives. The rules do not operate in a vacuum, and neither should decision-makers.

2. *The Caroline Case*

*It was in the Caroline case that self-defence was changed from a political excuse to a legal doctrine.*⁹⁵

In 1837, a rebellion occurred in Canada.⁹⁶ Several of the rebel forces fled to the United States and later forcibly occupied Navy Island, a territory belonging to the British and sitting in the Niagara River.⁹⁷ The rebel encampment grew until the forces stationed there numbered approximately 1,000 men.⁹⁸ The rebellion had such strong support among the American populace living along the United States–Canadian

⁹⁴ *Id.*

⁹⁵ R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938).

⁹⁶ 2 THE PAPERS OF DANIEL WEBSTER, SPEECHES AND WRITINGS 1834-1852, at 399 (Charles M. Wiltse, ed., 1988) [hereinafter THE PAPERS OF DANIEL WEBSTER].

⁹⁷ *Id.*

⁹⁸ MOORE, *supra* note 42, at 409.

border that the U.S. government was unable to prevent its citizens from aiding in the rebels' cause.⁹⁹

The steamer *Caroline* was used to ferry men, arms, and supplies for the rebels on Navy Island.¹⁰⁰ The British response was to mount an expedition to destroy the *Caroline*.¹⁰¹ On 29 December 1837, they found the boat at anchor on the U.S. side of the Niagara River.¹⁰² The British forces crossed the international boundary, commandeered the vessel, set it on fire, and sent it over Niagara Falls.¹⁰³

The British claimed the raid was an act of national self-defense.¹⁰⁴ Specifically, the British Law Officers opined that Britain was justified in its actions because "it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past. What had been done previously is only important as affording irresistible evidence of what would occur afterwards."¹⁰⁵

On 6 February 1838, the British transmitted a declaration justifying their destruction of the *Caroline*.¹⁰⁶ They claimed to have destroyed it because its "piratical character" had been established and that the United States was not able to enforce its laws along the border in question; hence a staging base for the rebels was created that necessitated the destruction of the *Caroline* in order to defend Canada.¹⁰⁷

Secretary of State Daniel Webster communicated to Lord Ashburton of Britain what has become the hallmark standard for the anticipatory use of force in self-defense. He stated that such a basis only applied in cases where its necessity was "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."¹⁰⁸ Thus, the ancient customary law as stated by Grotius was brought forward and cemented in American law. If, however, that is true, then the whole of his ancient wisdom should be brought forward as well. This should include those parts of the

⁹⁹ Jennings, *supra* note 95, at 82.

¹⁰⁰ THE PAPERS OF DANIEL WEBSTER, *supra* note 96, at 361.

¹⁰¹ *Id.* at 399-401.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Jennings, *supra* note 95, at 87 (quoting opinion signed by J. Dodson, I. Campbell, R. M. Wolfe, F. O. 83. 2207).

¹⁰⁶ MOORE, *supra* note 42, at 410.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 412 (citing 6 WEBSTER'S WORKS 301-02 (1842)).

jurisprudence that admitted these matters were in large part an act within the discretion of the relevant sovereign, as well as needing to be informed by the facts, circumstances, and mores of the times in which the rules are to be applied. In the current era that would include the means and methods of those individuals who would use the territory of a failed state as a cloak for their preparation of terrorist ambitions.

C. The UN Charter and Its Impact on the Customary Law Analysis of National Self-Defense and the Anticipatory Use of Force

On 25 June 1945, the UN Charter was voted into existence.¹⁰⁹ Central to its purpose was the notion that nations would not resort to force to achieve their foreign policy objectives.¹¹⁰ In fact, the Charter's preamble specifically cites the previous two world wars as the impetus for the world's nations to come to some agreement so that such tragedies would no longer occur.¹¹¹ This "No War" stance was actually the product of a "No War" evolution occurring throughout the early twentieth century. The first effort to attain that goal was the League of Nations as formulated and espoused by President Woodrow Wilson.¹¹² For several reasons, the League of Nations failed, but on its heels came a treaty that changed the perspective of how many nations, including the United States, would approach war: "The decisive turning point in the development away from the freedom to wage war and towards a universal and general prohibition of war was constituted by the Briand-Kellogg Pact, signed in Paris on 27 August 1928."¹¹³

The UN Charter was next in the war renunciation lineage. It was an advance on the League of Nations in that member countries "renounced the right not only of resort to war and to measures of force short of war but also of threats of war and acts falling short of it."¹¹⁴ It also created a worldwide collective security arrangement that was, at least in theory, superior so as to make unilateral resort to arms unnecessary. As Mr.

¹⁰⁹ STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 252-54 (2003).

¹¹⁰ 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, DISPUTES, WAR, AND NEUTRALITY 97 (H. Lauterpacht ed., 7th ed. 1952).

¹¹¹ U.N. Charter pmb.

¹¹² SCHLESINGER, *supra* note 109, at 19-32.

¹¹³ 1 BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 116 (2d ed. 2002).

¹¹⁴ OPPENHEIM, *supra* note 110, at 97.

Stephen Schlesinger notes, “Having endured the most calamitous war in human history, this generation extracted from the human propensity for devastation the right lesson for our time— the need for world organization to oversee and guide state craft toward a peaceful future.”¹¹⁵ Notably, the United States was perceived as having a unique role in maintaining this peace. Senator Thomas Connally, one of the United States’ representatives to the UN Conference, said while speaking to the United States Senate, “The United States has a peculiar responsibility. It has a lofty duty to perform in leading the peoples of the earth away from the sword.”¹¹⁶

1. The UN Charter and the Use of Force

The drafters of the Charter did not completely forsake the use of force. Written into its text is distinct language authorizing force and recognizing the need for self-defense. For example, Article 1 states that the purpose of the UN is to both prevent and *remove* threats to peace and to *suppress* aggression.¹¹⁷ A threat to peace includes acts of force, “an attitude of unneighborliness and lack of accommodation inimical to the maintenance of international peace and security,” violations of international law that do not include use of force, or non-compliance with recommendations from either the Security Council or General Assembly.¹¹⁸ Logically, removal and suppression may require the use of force; otherwise they could easily be thwarted. Article 42 is an explicit grant of authority to use force to “maintain or restore international peace and security” should measures short of armed intervention prove ineffective.¹¹⁹ Article 51 recognizes that a nation’s right of self-defense survived enactment of the Charter.¹²⁰ Thus, the Charter both states and implies that there are times when force may be necessary. Ideally, the UN acts as a collective security arrangement against those threats requiring a unified opposing force with its members rapidly surging to the defense of those nations threatened by aggression. Over time, idealism has given way to realism. The unmistakable truth is that the UN (a collection of wholly diverse nations with several irreconcilable differences) is not “united” at all. From its inception, significant geo-

¹¹⁵ SCHLESINGER, *supra* note 109, at xvii.

¹¹⁶ *Id.* at 81.

¹¹⁷ U.N. Charter art. 1(1) (emphasis added).

¹¹⁸ OPPENHEIM, *supra* note 110, at 163.

¹¹⁹ U.N. Charter art. 42.

¹²⁰ *Id.* art. 51.

political forces have virtually paralyzed it from ever offering a true and timely defense of victim states.

a. Article 2

Article 2 goes directly to the heart of the prohibition on the use of force. Article 2(3) states, “All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” This subparagraph places an affirmative obligation on states to settle disputes peacefully; however, there is some tempering of this language in its interpretation. This obligation is “to strive for the resolution of a dispute existing between [states] only to the best of their abilities. There is no obligation to reach a specific result.”¹²¹

Article 2(4) says that all UN members agree to “refrain . . . from the threat or use of force against the territorial integrity or political independence of any state.” The obligation not to use force or the threat of force is not limited by the words “against the territorial integrity or political independence of any State.”¹²²

A State would be acting in breach of its obligations . . . if it were to invade or commit an act of force within the territory of another State . . . without the intention of interfering permanently with the territorial integrity of that State. The prohibition of paragraph 4 is absolute except with regard to the use of force in fulfillment of the obligations to give effect to the Charter or in pursuance of action in self-defense consistently (sic) with the provisions of Article 51.¹²³

b. Article 51

Article 51 states, “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

¹²¹ SIMMA, *supra* note 113, at 106.

¹²² OPPENHEIM, *supra* note 110, at 154.

¹²³ *Id.*

Council has taken measures necessary to maintain international peace and security.”¹²⁴ Article 51 traces its genesis to a compromise made to accommodate both the Latin American states and the Soviet Union.¹²⁵ With the pressure of communism growing in several Latin American countries, many of these nations wanted the latitude to create regional security arrangements to fend off threats.¹²⁶ After significant negotiations, which almost halted the UN Conference, Article 51 was crafted so as to recognize that each nation retained the right of self-defense, that the right of self-defense was inherent, and that the right could be exercised either individually or collectively.¹²⁷ Further, Article 52 was added to promote regional arrangements for the settlement of disputes.¹²⁸ In spite of this seemingly clear purpose, this article of the UN Charter has engendered some of the most heated debate regarding the use of force.

2. *The Impact of the UN Charter on the Customary Law Regarding the Use of Force, the Right of Self-Defense, and the Anticipatory Use of Force in Self-Defense*

In view of the significance of the Charter, the question that naturally follows is how the Charter has affected the customary international law regarding the use of force that was already in place. There seem to be two major schools of thought dividing this issue. The first school sees the Black Letter Law as changing the customary rules by which nations have historically conducted themselves. This school views the Charter as requiring nations to act differently than they had prior to its enactment, sometimes even to their detriment. This school is often technically correct, but wrong in practice, as following its rationale can lead to absurd or disastrous results.

The second school of thought sees the positive enactments as a separate body of law that did not necessarily nullify the concept of state practice under customary law. The rationale of the second school often appears self-serving and, arguably, undermines the Charter’s system of

¹²⁴ U.N. Charter art. 51.

¹²⁵ SCHLESINGER, *supra* note 109, at 175-92.

¹²⁶ *See generally id.* (noting that a few years after the Charter was passed their fears were substantiated when the Soviet Union invaded or assisted in propping up several communist governments in nations around the world.)

¹²⁷ *Id.*

¹²⁸ *Id.* at 192.

collective security. That said, this school of thought has been effective in countering threats when the UN collective security arrangement was paralyzed or ineffective.

Interestingly, both schools of thought lead to a breakdown in the rule of law, so neither truly has the moral high ground. The former produces contempt for the law by asserting procedure over substance. Victims are often left without meaningful relief, and worse, acts of self-defense are condemned while the initial acts of aggression are not. The second school of thought is not much better. It leads to disrespect for the law by essentially rationalizing virtually every use of force. As such, states using force become a standard unto themselves and the ends are used to justify the means.

a. Impact on Article 2

The initial prohibition on the use of, or threat of use of, force demonstrates the uneasy juxtaposition between the ban on the unilateral use of force and the customary right to use force when a nation perceives it is necessary. The legislative history of Article 2(4)'s prohibition on the use or threat of use of force indicates that small states feared armed intervention by larger states.¹²⁹ "Accordingly, an interpretation of Article 2(4) indicates a presumption against unilateral military measures underlying the United Nations Charter as a whole."¹³⁰ Some now even consider this prohibition to be customary international law.¹³¹ That presumption, however, is debatable in light of Article 51's explicit recognition of the right to use force in individual self-defense. Also, it seems implausible that this prohibition has risen to the level of customary international law when state practice, since the inception of the Charter, has been quite the opposite.¹³² Something cannot be considered customary international law if, in fact, states have not customarily practiced in that manner. Also contradicting this notion is

¹²⁹ 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, 344-45 (1998) (referencing IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (1963) [hereinafter BROWNIE]).

¹³⁰ *Id.* at 344-45.

¹³¹ SIMMA, *supra* note 113, at 66.

¹³² Michael J. Glennon, *Military Action Against Terrorists under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540 (Spring 2002).

the observation that Article 2(4)'s prohibition sits within the greater context of the Charter's collective security arrangement as a means to control the use of force in order to coerce a state's behavior.¹³³ "Article 2(4) was never an independent ethical imperative of pacifism. . . . It is in the context of the Organization envisaged by the Charter and not as a moral postulate that Article 2(4) acquired its cogency."¹³⁴ Thus, attributing meaning to it that was never intended in the first place is disingenuous to the Charter itself.

An idealistic notion of the prohibition on the use of force can lead to absurd results. For example, this mechanical application of Article 2(4) has been argued by some as prohibiting armed force for the purpose of humanitarian intervention,¹³⁵ as well as armed intervention for the purpose of noncombatant evacuation.¹³⁶ Even if this view is technically correct,¹³⁷ it demonstrates the irrationality of a strict application of the Charter's prohibition on the use of force. It essentially creates a legal regime that places civilians at the mercy of rogue states while tying the hands of governments that are capable and willing to intervene. What government can be said to adequately represent the interests of its citizens if it refuses to use force to evacuate them from a dangerous area? Has not such a government forsaken part of its very purpose for existence?¹³⁸ If this is indeed the correct interpretation of Article 2(4), did those within the United States who ratified the Charter knowingly cede the United States' sovereignty in this matter? Can the United States, or any other government, accept such an interpretation?

¹³³ W. Michael Reisman, *Comment: Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (July 1984).

¹³⁴ *Id.*

¹³⁵ SIMMA, *supra* note 113, at 130-32.

¹³⁶ *Id.* at 799.

It can be said in summary that State practice is characterized by considerable reluctance to qualify rescue operations involving the use of force as in any case unlawful. This applies at least to the attitude of third States, as well as that of the UN organs, which are thereby possibly giving rise to a corresponding rule of customary international law *in statu nascendi*. As the law stands at present, however, no rule of international law allows rescue operations for the protection of a State's own nationals.

Id.

¹³⁷ The author finds it difficult to believe that Senator Connally, Senator Vandenberg, or Secretary of State Stettinius would have agreed to such an interpretation.

¹³⁸ *See supra* text accompanying note 7.

The technocrats understand this great dilemma and seek to resolve it by moving the focal point away from the Charter and toward customary international law. For example, Mr. Simma states that if the Security Council fails to intervene in a crisis like a humanitarian disaster or noncombatant evacuation, then a customary international rule of law permitting intervention might emerge as the norm.¹³⁹ With regard to the threat of using force, he notes, “State practice reveals a relatively high degree of tolerance towards mere threats of force, one decisive reason for which seems to be that some of the most obvious threats of force are legitimized by the right of self-defense embodied in Article 51 of the UN Charter.”¹⁴⁰ He also states, “Threats of force are often tolerated of State practice [because] they play the role of a ritualized substitute for the use of force and, as such, may help to speed up the peaceful settlement of disputes.”¹⁴¹ Thus, the idealists in the first school of thought end up with the realists in the second school of thought. The end is the same; it is the road there that is different. Interestingly, by permitting customary international law to circumvent the Charter to meet a greater moral aim, the road of the technocrats unwittingly erodes the necessity of the very UN body they seek to preserve.

b. Impact on Article 51

Two propositions seem well settled: first, the right of self-defense survived the enactment of the Charter; and second, a victim state’s right of self-defense will, at some point, allow the use of armed force against a third party assisting an aggressor or the exercise of force on the territory of a third party who is failing to stop an aggressor.¹⁴² A third debatable

¹³⁹ SIMMA, *supra* note 113, at 130-32. Arguably the intervention into a failed state, as a corollary to Mr. Simma’s rationale, would likewise be lawful.

¹⁴⁰ *Id.* at 124.

¹⁴¹ *Id.*

¹⁴² Mr. Simma writes:

It is compatible with Art. 51 and the laws of neutrality when a warring State fights hostile armed forces undertaking an armed attack from neutral territory on the territory of the neutral State, provided that the State concerned is either unwilling or unable to curb the ongoing violation of its neutrality.

Id. at 799-800.

Further, he writes,

proposition is that the language of Article 51 is broad enough to allow for self-defense against non-state actors.¹⁴³

A special situation arises, (sic) if a State is not reluctant but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to that State, the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Arts. 2(4) and 51 of the Charter are aiming at.

Id. at 802.

Mr. Michael Glennon echoes this sentiment,

If a host state is unable or unwilling to curtail harmful private conduct when that conduct originates from within the host territory, it makes no sense to insist that the victim state remain indifferent to such conduct, effectively sacrificing the integrity of its own territorial sovereignty for that of the host state. Similarly, it does not make sense to permit defensive force against the wrongdoer but not against the wrongdoer's host if the wrongdoer's capability to inflict harm depends upon the indifference of a host government that can curtail that harm by simply withdrawing its hospitality. Acts of omission in such circumstances shade into acts of commission, and aggrieved states should not be faulted for treating them the same.

Glennon, *supra* note 132, at 550.

Although Mr. Carsten Stahn agrees, he would impose one intermediate step: where terrorists operate from the territory of a state that is not participating in the terrorist acts, he would require the injured state to ask the other state to intervene. If that state proved incapable or unwilling to act, then the injured state could take military action in self-defense. Carsten Stahn, *International Law Under Fire: Terrorist Acts as Armed Attacks: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 47 (Summer/Fall 2003).

He also sees this power extending to the interdiction of terrorists:

The unspoken premise of the September 11 attacks is that terrorist groups shall not receive an 'unwitting shield' from the territorial integrity of a state which is unable or unwilling to put an end to terrorist activity giving rise to an armed attack. The normative corollary of this hypothesis is the emergence of the principle, which posits that the right to territorial integrity must, in some instances, yield to the exercise of another state's right to protect itself and its citizens under the rubric of self-defense.

Stahn, *supra*, at 44.

From that point on, it seems the doctrine of self-defense is an even more contentious issue than the proscription on the use of force in Article 2(4). The sticking point in the debate regarding the ambit of self-defense is that this right was not just another common, ordinary right created by positive law; rather, it was recognized as the “inherent” right of self-defense.¹⁴⁴ This specifically refers to the right as it existed prior to enactment of the Charter, which inevitably sweeps in significant customary international law that predates the Charter and all the discordant opinions that come with it. Thus, the real debate does not center on whether the right exists, but rather when that right emerges and what role the UN, and more specifically the Security Council, plays under the Charter’s collective security scheme. This debate has only intensified as terrorists either use or collude with failed states in order to train for and plan attacks, and to evade capture.

On one side of the issue there are those who see the application of force under Article 51 as embedded within the “broader context of collective security” envisioned by the UN Charter, and that the right to use force in self-defense was subordinated to the collective security arrangement created by the Charter.¹⁴⁵ On the other side, there are those who see any derogation of what was customarily considered the “inherent” right of self-defense as nullifying the inherence of that defense, thereby making it little more than a creature of statute.¹⁴⁶ This point of view argues that this historical right was never negotiated away and that it remains at the discretion of the individual nation to determine when it becomes necessary.¹⁴⁷

The latter opinion is more persuasive. Consider the words of former Secretary of State Frank Kellogg who stated, after concluding the 1928 Kellogg-Briand Treaty that renounced war as an instrument of national policy, that the right to self-defense “is inherent in every sovereign state and implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.”¹⁴⁸ It seems incomprehensible

¹⁴³ Stahn, *supra* note 142, at 36.

¹⁴⁴ Glennon, *supra* note 132, at 554-55.

¹⁴⁵ Stahn, *supra* note 142, at 38-39.

¹⁴⁶ Glennon, *supra* note 132, at 554-55.

¹⁴⁷ *See generally id.* at 539.

¹⁴⁸ *Id.* at 539 n.51 (citing Frank B. Kellogg, Address Before the American Society of International Law (Apr. 28, 1928), in 22 PROC. AM. SOC’Y INT’L L. 141, 143 (1928)).

that the United States' representatives to the UN Charter Conference, let alone the Congress, would have ever negotiated away or agreed to a treaty that severed this most fundamental sovereign right.

Enveloped within this debate as to when a nation may exercise its right of self-defense is the matter of the anticipatory or preemptive use of force. A plain reading of the Charter's language seems to argue that there is no right to use force in anticipation of attack.

If Article 51 is . . . read in connection with Article 2(4), the stunning conclusion is . . . that any State affected by another State's unlawful use of force not reaching the threshold of "armed attack", is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force, which are thus totally ineffective. This at first sight unacceptable result is undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible. Until an armed attack occurs, States are expected to renounce forcible self-defence. Because of the pre-eminent position of the S[ecurity] C[ouncil] within the Charter system of collective security, the affected State can . . . merely call upon the S[ecurity] C[ouncil] to qualify the violations of Art. 2(4) as constituting a breach of the peace and to decide on measures pursuant to Arts. 41 or 42.¹⁴⁹

Going even further,

An anticipatory right to self-defence would be contrary to the wording of Art. 51 . . . as well as to its object and purpose, which is to cut to a minimum the unilateral use of force in international relations. Since the (alleged) imminence of an attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the State concerned. The manifest risk of abuse of that discretion which thus emerges would *de facto* undermine the restriction to one particular case of the right to self-defence. Therefore, Art 51 has to be interpreted

¹⁴⁹ SIMMA, *supra* note 113, at 790.

narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been launched.¹⁵⁰

There is some historical substantiation for this point of view, or at least a position that is close to it. While crafting Article 51, the British wanted a broader basis for action than merely “armed attack.”¹⁵¹ “[Secretary of State] Stettinius refused to permit this, contending that a broader phraseology would allow states too great a leeway, including the right of preventive actions, which would legally wreck the organization.”¹⁵²

Mr. Simma argues that “this interpretation [of Article 51] corresponds to the predominant State practice, as a general right to anticipatory self-defence has never been invoked under the UN Charter.”¹⁵³

At the time when the UN Charter entered into force the traditional right of self-defence covered not only the case of armed attack, but also many areas of self-help. As a rule of customary law, that right could only have been replaced or amended if, as from a certain moment in time, its voidness or modified existence had been commonly assumed, so that a new rule of law could emerge, based upon the uniform practice of States. Such a development, however, cannot be claimed to have occurred with regard to the right of self-defence. Though the founding members of the UN had at first waived the broad concept of self-defence by adopting Art. 51, subsequent State practice did not confirm that position in such a way as to amount to a uniform pattern of behavior.¹⁵⁴

Mr. Simma then concludes that State practice does not change Article 51’s restrictive use of self-defense; rather, it largely ignores it.¹⁵⁵ To that extent, State practice has not changed the law of Article 51, and the more

¹⁵⁰ *Id.* at 803-04.

¹⁵¹ SCHLESINGER, *supra* note 109, at 185.

¹⁵² *Id.*

¹⁵³ SIMMA, *supra* note 113, at 803-04.

¹⁵⁴ *Id.* at 805-06.

¹⁵⁵ *Id.*

restrictive view of self-defense is actually the legal test for self-defense actions.¹⁵⁶ This appears to contradict Mr. Simma's early opinion that State practice already conformed with a restrictive interpretation of Article 51.

Professor Michael J. Glennon strongly disagrees with this restrictive view of the right of self-defense. He notes that Article 51 specifically refers to the inherent right of self-defense, and that it would not be impaired by the Charter: "The implication is not only that the right of self-defense existed prior to the ratification of the U.N. Charter, but also that an inherent right continues to exist—unimpaired—after ratification."¹⁵⁷ He then notes that Article 51 tries to limit this "inherent right" to instances where armed attack has already occurred and only to the extent the Security Council has not intervened.¹⁵⁸ He argues that this effectively nullifies the "inherent" character of the right of self-defense, turning it into a creature of positive law.¹⁵⁹ This, Glennon contends, does not reflect state practice and is unrealistic.¹⁶⁰

For example, he notes that by maintaining a "launch-on-warning" posture during the Cold War, the United States essentially rejected the notion of no anticipatory use of force in self-defense.¹⁶¹ He also notes that such a position would have required the United States to wait until the Japanese actually dropped bombs on Pearl Harbor before using force against Japan.¹⁶² As a sad corollary to his analogies, American policy-making, at least with respect to al Qaeda, was apparently so timid that it required Al Qaeda flying airplanes into buildings before the United States took significant, forceful action to eliminate them and their Taliban host.

Common sense would likewise seem to argue for retention of the inherent right to act anticipatorily. As with Article 2, a mechanical application of Article 51 could lead to absurd results. If a victim state could not legally use force in defense until after it was attacked, then an aggressor state could essentially do everything necessary to launch an

¹⁵⁶ *Id.*

¹⁵⁷ Glennon, *supra* note 132, at 554-55.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Mr. Glennon notes that the French version actually uses the words "*droit naturel*," which implies a form of natural law that supersedes human law. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 552.

¹⁶² *Id.*

aggressive war, and the victim state could do little more than hope it had adequately prepared for the onslaught. This is an enormous risk that would likely only embolden aggressors, as they would technically not be in violation of the prohibition on the use of force until after they had launched an attack. Once having done so, it would be difficult to dislodge them from the territorial gains they had seized or from the concessions they had wrung from their victim. Moreover, the general ineptitude with which the UN has dealt with these situations does not bode well that those suffering harm will receive timely and effective redress.

c. Reconciling the Two Viewpoints

At the core of the debate over Articles 2 and 51 is the ever-present struggle between idealism and realism. On one side are those who wish nations *would* forsake armed force as a means of doing business, and on the other side are those who wish nations *could* forsake armed force as a means of doing business. Is there any resolution to this quandary?

Underlying this dilemma is the problem that:

[t]he existence of an effective system for the peaceful settlement of disputes is one of the main preconditions for a prohibition on war or the use of force to be sufficiently complied with in practice. . . . a significant reason why the prohibition of force is still not satisfactorily heeded is exactly the fact that current international law still lacks a comprehensive and effective system of pacific dispute settlement.¹⁶³

As a practical matter, that “comprehensive and effective system” is a world government, complete with those attributes of government that make it effective (e.g., law enforcement, military assets, independent courts of law with compulsory process, etc.). As long as nations remain sovereign, and as long as sovereign nations remain the mechanism for enforcing the rule of law in the international arena, there will be no ultimate conclusion to this question. And since there generally is an aversion to true world government, then the rules binding states and the

¹⁶³ SIMMA, *supra* note 113, at 68.

interpretation of those rules must preserve the latitude necessary for states to act, while ensuring some means of accountability.¹⁶⁴

One possible solution is found in the rules regarding treaty interpretation: “Under the systematic method of interpretation, the meaning of the norm is ascertained by comparison with other norms set forth in the treaty and by referencing the entire structure of the treaty.”¹⁶⁵ Likewise, “When two or more possible interpretations conflict[,] the one that best serves the recognizable purposes of the treaty prevails.”¹⁶⁶ This methodology reconciles varying points of view by discovering a rule that serves the intent of the Charter while remaining true to the text as written. Technical adherence to the letter of the law fails to meet the Charter’s intent if the result is inaction, defeat, and victimization. Concurrently, overgeneralization that ignores the limits on the use of force is inconsistent with the text of the Charter and defeats the aim of reducing the use of force as a foreign policy tool.

Professor W. Michael Reisman voices an opinion on the use of force that reflects this kind of thinking. He writes,

A sine qua non for any action . . . is the maintenance of minimum order in a precarious international system. Will a particular use of force enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics: the enhancement of the ongoing right of peoples to determine their own political destinies. That . . . point . . . is the main purpose of contemporary international law: Article 2(4) is the means.¹⁶⁷

¹⁶⁴ Professor Reisman notes that the realities of world politics has prevented the collective security arrangements as envisioned in the Charter from truly coming into force. Hence force has often been used and often used unilaterally. “The challenge for contemporary lawyers is not to engage in automatic indiscriminate denunciations of unilateral resorts to coercion by states as violations of Article 2(4). They must begin to develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion.” Reisman, *supra* note 133, at 643.

¹⁶⁵ Nowrot & Schabacker, *supra* note 129, at 341(citing GEORG RESS, INTERPRETATION IN THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 25 (Bruno Simma et al., eds., 1994)).

¹⁶⁶ *Id.*

¹⁶⁷ Reisman, *supra* note 133, at 643.

He sets out two questions with regard to the use of force, which are designed to meet the letter of the Charter while ensuring fulfillment of its intent: (1) does the use of force maintain the minimum necessary world order; and (2) does the use of force enhance the right of self-determination of the affected people?¹⁶⁸

He reiterates those principles:

Each application of Article 2(4) must enhance opportunities for ongoing self-determination. [Some interventions] may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure. . . . It is important to remember that norms are instruments devised by human beings to precipitate desired social consequences. One should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and without appropriate regard for the factual constellation in the minds of the drafters.¹⁶⁹

The informed rule regarding the use of force under Article 2(4) seeks its norm in context of the reason for creating the UN. That context, as previously stated, was to avoid the human catastrophe of the previous world wars. It was not necessarily an abdication of the right to use force, unilaterally or collectively, when necessitated by world events.

Professor Reisman concludes:

Coercion should not be glorified, but it is naïve and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question . . . is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it has been applied in ways whose

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 643-44.

net consequences include increased congruence with community goals and minimum order.¹⁷⁰

Reisman's charge to international lawyers is "not to engage in automatic indiscriminate denunciations of unilateral resorts to coercion by states as violations of Article 2(4). [But rather] develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion."¹⁷¹

Another possible option for resolving the quandary is that espoused by Mr. Michael Glennon. He takes a "let's get real" approach to the whole matter. He accepts that the Charter's use-of-force provisions have never corresponded with state practice, and that there really is no resolution between the two.¹⁷² By way of example, Mr. Glennon notes that 126 of the UN's 189 members have been involved in some type of interstate conflict since the passage of the Charter.¹⁷³ Regardless of what these nations labeled their specific intervention, state practice has been to use force where it was deemed necessary to accomplish the foreign policy objective.¹⁷⁴ In essence, Mr. Glennon asks why international law continues to try to fit a square peg into a round hole. "The reality is that Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior."¹⁷⁵

Mr. Glennon concludes that a mechanistic application of the Charter's use of force provisions cannot guide responsible policy-making.¹⁷⁶ "No rules will work that do not reflect underlying geopolitical realities. The use-of-force regime set out in the UN Charter failed because the Charter sought to impose rules that are out-of-sync with the way states actually behave."¹⁷⁷

¹⁷⁰ *Id.* at 645.

¹⁷¹ *Id.* at 643.

¹⁷² *See generally* Glennon, *supra* note 132, at 557.

¹⁷³ *Id.* at 540.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 549-50.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

III. “Lawlessness:” The New Frontier of Intervention

Can lawlessness truly pose an imminent threat? This question must be answered affirmatively to justify the use of anticipatory force in self-defense. The answer should be that lawlessness *alone* does not create a basis for armed intervention. However, a state of lawlessness does have the potential to rise to the level of imminent armed aggression, and at that point, the answer would change to yes.

Although aggression has been historically difficult to define, an attempt was made in the 1974 UN General Assembly Resolution on Aggression. Though the resolution is non-binding, it demonstrates some common understandings within the world community. Of particular importance within this article is how the resolution treats blockades. Aggression includes “[t]he blockage of the ports or coasts of a State by the armed forces of another State.”¹⁷⁸ At least if maintained effectively, the blockade is also to be considered “an armed attack.”¹⁷⁹ Thus, a blockade can start out as mere aggression and become an armed attack, when in actuality nothing has changed. The behavior of the aggressor state is the same; the difference is the *effect*. At the moment a blockade has been “maintained effectively,” it becomes an armed attack.¹⁸⁰ Using a similar rationale, it is possible that a state of lawlessness within a nation has become aggression arising to the level of imminent armed attack if that failed state is supporting terrorism or proves incapable of preventing terrorists from using its territory. The action of the target state is the same—lawlessness. What has altered is its effect—territory used by terrorists or other armed groups to plan and execute missions against other nations, and that effect legitimates an armed response in anticipatory self-defense.¹⁸¹ Although the measure of imminence is never precise, it seems only logical that the United States may act early to prevent greater harm both to itself, its allies, and the powerless peoples who are directly affected by lawlessness.¹⁸² The descent into the abyss

¹⁷⁸ G.A. Res. 3314, 29th Sess., U.N. Doc. A/Res/3314 (XXIX) (1974).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ SIMMA, *supra* note 113, at 797.

¹⁸² It is not that far from the reasoning justifying humanitarian intervention. To that end the four-part test crafted by the International Commission of Jurists to determine the legality of unilateral, humanitarian intervention may be of some benefit in determining when a situation mandates intervention for self-defense purposes:

1. “Manifest guilt of the target government;

of lawlessness necessarily will have devastating repercussions on the security of the United States and its interests, both at home and abroad, justifying this anticipatory action.

There is now a necessity to consider lawlessness as aggressive behavior that may require the anticipatory use of force. Lawlessness creates a breeding ground for terrorists and gives them maneuver room to plan and train; therefore, early intervention serves the self-defense needs of the United States.

The concerns . . . about failed states can be summed up in three points. First, their lawlessness allows terrorist organizations to conduct activities without fear of capture or punishment. . . . Second . . . [it] allows terrorist organizations access to resources they need to conduct their activities. . . . Third . . . [it] offer[s] terrorists the cover of state sovereignty.¹⁸³

Thomas Jefferson held a similar perspective with regard to the Barbary States. He observed their behavior on the high seas where there was no effective law enforcement mechanism. “Weakness provokes insult and injury, while a condition to punish it often prevents it. . . . An insult unpunished is the parent of many others.”¹⁸⁴ He demonstrated a good understanding of human nature and that wisdom should inform policy makers today. A contemptuous spirit for the rule of law breeds more aggressive forms of lawlessness. Like President Jefferson in 1801, the United States will choose in this modern era either to face the danger or bend to its will.

President Theodore Roosevelt adopted this same perspective when spelling out his corollary to the Monroe Doctrine:

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2. Lack of practical peaceful means to correct the situation;
 3. Opportunity for the international community to act first;
 4. Use of only necessary force with accounting to the international community and withdrawal as soon as practical.”

Alan Dowty & Gl Loescher, *Refugee Flows as Grounds for International Action*, 21 INT’L SECURITY 43, 63 (Summer 1996).

¹⁸³ Dunlap, *supra* note 3, at 460.

¹⁸⁴ Turner, *supra* note 18, at 128 (Letter from Thomas Jefferson to John Jay, Secretary of State for the Continental Congress, Aug. 23, 1785, reprinted in 8 THE PAPERS OF THOMAS JEFFERSON 426, 427) (Boyd, Bryan, & Hunter, eds., 1953)).

Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society . . . may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly . . . to the exercise of an international police power.¹⁸⁵

This train of thought has found a rebirth in the Bush Doctrine. After the attacks of 11 September 2001, President George W. Bush asserted a new perspective concerning how his administration would defend the United States of America. “The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interest.”¹⁸⁶ This distinction includes an emphasis on powerful deterrence and a pragmatic evaluation of what constitutes an imminent threat, especially when applied to terrorists and states that sponsor them.

Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. . . . We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. . . . Weapons can be easily concealed, delivered covertly, and used without warning.¹⁸⁷

The twist that has brought this strategy such criticism is its commitment to preemption that appears to smack of *preventive* warfare.

We will disrupt and destroy terrorist organizations by . . . defending the United States, the American people, and

¹⁸⁵ James Holmes, *Perspectives on U.S. Foreign Policy: Police Power: Theodore Roosevelt, American Diplomacy, and World Order*, 27 FLETCHER F. WORLD AFF. 125, 126 (Winter/Spring 2003) (quoting Theodore Roosevelt, Message of the President to the Senate and the House of Representatives (Dec. 6, 1904).

¹⁸⁶ NSS, *supra* note 4, at 1.

¹⁸⁷ *Id.* at 15. It is the covert nature of staging the attack that demands a redefinition of imminence. The whole point is to prevent an al-Qaeda remix of Brittny Spears’s, *Oops! I Did It Again!*

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.¹⁸⁸

Even in his cover letter to the National Security Strategy, the President indicated that he will look to intervene well ahead of what traditionally has been considered that point at which a threat is imminent, versus that which is speculative:

Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government . . . America will hold to account nations that are compromised by terror. . . . The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn. . . . America will act against such emerging threats before they are fully formed. . . . States, such as Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.¹⁸⁹

One critic is Mr. Carsten Stahn, who embraces the need for anticipatory self-defense, but retains the traditional “imminence of harm” standard.¹⁹⁰ He rejects the Bush Doctrine, which extends the right to use force in anticipatory self-defense where “‘sufficient threats’ to national security” exist.¹⁹¹ He sees this extension of the self-defense doctrine as

¹⁸⁸ *Id.* at 6.

¹⁸⁹ *Id.* at cover letter.

¹⁹⁰ Stahn, *supra* note 142, at 49.

¹⁹¹ *Id.*

destabilizing to the “world public order,” because it undermines the international rule of law.¹⁹² In this criticism, he may have a point. As previously mentioned, preventive warfare has generally been disavowed, as evidenced by Grotius’ teachings. Likewise, President Jefferson’s intervention against the Barbary Pirates, as well as President Pierce’s intervention at Greytown, were based on actual harms being inflicted at the time of armed intervention – these were not speculative threats. That said, the Bush Doctrine makes a strong case that current and future adversaries pose a real harm that no longer neatly fits the traditional notions of imminence. Therefore, this article recommends a retooling of the Bush Doctrine so that it is clearly not a policy of preventive warfare, but rather an appropriate recalibration of the level of certainty required to determine an imminent threat. In other words, it is time to move the counterweight on Grotius’ sliding scale of imminence to accurately reflect real-world, real-time threats posed by lawless states and those who use them. The President can do that by clearly stating that lawless states *do* pose an *imminent danger* to the United States. At that point the Bush Doctrine becomes a twenty-first century restatement of the traditional doctrine of anticipatory self-defense, not an apology for preventive warfare.

A. Defining and Establishing a Degree of Proof to Determine a State of Lawlessness or a “Failed State”

The whole notion of declaring a state “failed” is quite contentious. No country wishes to have other nations label them as failed. It also is ripe for abuse because an aggressor nation could essentially define its victim as “failed” and then invade. As Mr. Dunlap notes, “State failure has no legal meaning under international law. States have legal personality that outlives any one regime or government, and their status cannot be terminated by other states.”¹⁹³ So the concept is fraught with significant legal challenges.

With the sensibilities of failing nations duly noted, it is of no value not to recognize something for what it is. Once a nation can no longer perform the functions of a state, and if internal political influences are

¹⁹² *Id.*

¹⁹³ Dunlap, *supra* note 3, at 470 (citing Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 435 (1999)).

absent to change the situation, it is extreme to expect other nations to merely sit by while the failed state becomes infested with global “ne’er do wells” bent on the destruction of civilization as it is now known.

International law has generally applied three traditional tests to determine statehood: (1) a defined territory and population; (2) the territory and population are under control of the government; and (3) the “capacity to engage in formal relations with other States.”¹⁹⁴ The U.S. State Department has expanded on that definition and added a fourth element to the test: (1) “effective control over a clearly defined territory and population;” (2) “organized governmental administration of the territory;” (3) “capacity to act effectively to conduct foreign relations and to fulfill international obligations;” and (4) international recognition.¹⁹⁵

Since nations apply criteria in determining whether statehood has been attained in the first place, there is no reason why that status cannot be reassessed at a later date, if circumstances warrant it. This position then supports the following definition of a failed state:

A “failed state” is generally characterized by the collapse or near-collapse of State authority. Such a collapse is marked by the inability of central authorities to maintain government institutions ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy.¹⁹⁶

Other writers corroborate that a failed state is one whose government is so weak it cannot maintain territorial integrity, an economic infrastructure, and physical security,¹⁹⁷ and is characterized as being unable to “project power within [its] borders,”¹⁹⁸ or provide “the most

¹⁹⁴ Memorandum, Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees 16 (Jan. 22, 2002) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201).

¹⁹⁵ *Id.* (citing Eleanor McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT’L L. 337 (1977)).

¹⁹⁶ *Id.* at 15.

¹⁹⁷ Dunlap, *supra* note 3, at 470.

¹⁹⁸ *Id.* at 458.

fundamental services that make up the state's obligations . . . [to] society: first and foremost [being] physical security."¹⁹⁹

No burden of proof currently exists as to the amount of evidence needed to consider a state failed. This seems to be a judgment call by those intervening. A mere preponderance of the evidence standard is probably too low, but a beyond a reasonable doubt standard seems too high. A clear and convincing standard is the recommended one. This should insulate decisions from becoming rash and arbitrary, while not bogging them down in a legal quagmire that would essentially nullify the ability to respond.

In arriving at an evidentiary standard, some triggering mechanisms may serve well in identifying failed or failing states. Based on a historical perspective, the following triggering mechanisms are offered:

1. Assassination of a head of state or other key senior government leaders followed by an immediate authority vacuum. (Rwanda).
2. Military coup or other scheme that neutralizes the civilian government and its ability to maintain order. (Grenada, Panama, Haiti).
3. Checked banditry resulting in the perpetration of mass murder, insurrection, property confiscation, and mass refugee flows.²⁰⁰ (Rwanda, Sudan, Somalia).

¹⁹⁹ *Id.*

²⁰⁰ "Since an elementary justification for the state is its ability to provide reasonable security for its citizens, states that force these same citizens to flee call into question the very basis of their sovereignty." Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT'L SECURITY 43, 60 (Summer 1996). The third triggering mechanism has already received significant consideration as "[t]he emphasis internationally is . . . shifting 'from humanitarian obligations to legal obligations not to harm other states by imposing burdens of unmanaged refugee flow.'" *Id.* at 51 (citing JACK I. GARVEY, *THE NEW ASYLUM SEEKERS: ADDRESSING THEIR ORIGIN*, in DAVID MARTIN, ED., *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 187 (1988)). The customary law doctrine of the abuse of rights, as discussed in the writings of both Oppenheim and R. Yewdall Jennings, conceives a basis for intervention to halt refugee flows. *Id.* at 54-58. Essentially, the doctrine holds that a state may not exercise its rights so as to injure other nations. Once a nation does exercise its rights so as to injure another nation, the other nation may intervene to halt the injury. *Id.* This principle is readily apparent in refugee flows. A state acts, or fails to act, so as to create a refugee flow to its neighbor. The neighbor state now is faced with all the costs and responsibilities

Adopting a set of triggering mechanisms could provide some lead time in bringing the matter before the UN and appropriate regional bodies, so that there is at least a good faith attempt to make it a collective security operation. Adopting these mechanisms might also create an incentive for a failing state to look closely at its governing affairs as the specter of the entry of foreign troops to restore law and order would be very real.

B. Who Has the Authority to Declare that a State of Lawlessness Exists?

In this area of analysis, there are essentially two schools of thought. One school leaves the authority to declare a state of lawlessness in the hands of individual nations and the other school leaves it in the hands of the UN. Not surprisingly these two schools of thought mirror those of the exercise of self-defense and the anticipatory use of force.

The first school reflects the thinking of President Teddy Roosevelt.

When a government failed to discharge its legal obligations towards foreign nations and its own citizens, the local great power might rightfully intervene in its affairs, even those affairs normally thought to be within the government's own jurisdiction. To cope with anarchy, each great power thus would exercise a kind of legal jurisdiction in its geographic neighborhood. Yet, this did not bestow on great powers a license for wanton military adventurism or territorial aggrandizement. The police power had to be deployed judiciously and in self-denying fashion.²⁰¹

For the advocates of this position,

The purpose . . . was not total defeat of an enemy nation, but "to restore normal government or to give the people a better government than they had before, and to establish peace, order, and security on as permanent a

associated with absorbing the refugee flow. Thus, the neighbor state can act so as to stem the flow, and, arguably, can do so in a preemptive manner so as to ensure a refugee crisis does not occur. *Id.*

²⁰¹ Holmes, *supra* note 185, at 129.

basis as practicable.” [] “There must be instilled in the inhabitants’ minds the leading ideas of civilization, the security and sanctity of life and property, and individual liberty.”²⁰²

The strength of this position is that it is more efficient and timely. It does not subject a nation’s defense to the inevitable politicking of the UN and the Security Council. Furthermore, it actualizes the inherence of a nation’s right to act in its own defense without prior recourse or permission from an international body.

On the other side of the issue, advocates state that military force with a long-term and significant impact on the governance of a nation not directly involved in an armed attack, should be taken only upon a UN authorized mission under the Charter’s Article 39 authority to counter-threats to peace and security.²⁰³ They perceive this as a lawful preventive use of force, rather than an Article 51 action in self-defense, which they contend can only be used in response to actual armed attack.²⁰⁴ Mr. Stahn sees this as the appropriate place for interventions such as Operation Iraqi Freedom.²⁰⁵

The benefit of this position is that it places the use of force against terrorists under the supervision of the UN Security Council.²⁰⁶ This is considered desirable because: (1) it creates oversight and accountability if force must be used in self-defense; (2) it gives the Security Council the opportunity to exercise the UN’s authority under a Chapter VII peace enforcement mission; (3) it may obviate the need for the use of force in self-defense; and (4) it legitimizes any use of force that goes beyond the mere needs of self-defense.²⁰⁷

²⁰² *Id.* at 139 (quoting U.S. MARINE CORPS, SMALL WARS MANUAL: UNITED STATES MARINE CORPS 1940, at 11-14 (Ronald Shaffer, 2d ed.)).

²⁰³ Stahn, *supra* note 142, at 41.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* Mr. Dunlap is another who advocates this position. He would support intervention in failed states only after a UN Security Council resolution finding that a country is a failed state and authorizing intervention so as to avoid establishing a customary rule of international law regarding invasion on a “failed state” basis. Dunlap, *supra* note 3, at 470. His concerns appear to be legitimacy and accountability. *Id.* at 472-73. Unfortunately, he does not address the generally abysmal record of UN intervention. If nations could trust that the UN would act in a timely and sufficient manner, then there would be little use for the doctrine of preemption and the need for

The authority should simultaneously rest in the hands of both. Notice to the UN fulfills the United States' treaty obligation and demonstrates a commitment to the rule of law and the desire for the peaceful settlement of disputes. However, the UN cannot become, or continue to be, an obstacle. We must be realistic; those bent on attacking the United States are usually not looking to peacefully settle their disputes. These persons are often extremists with homicidal tendencies and imaginations of world dominance and vindication of what they see as the greater good. Observance of legal formalities does not necessarily impress them nor does it deter them. Likewise, obsessing over the integrity of the failed state that is either colluding with or powerless to stop the terrorists fails to grasp that self-defense is no defense if not exercised in a timely manner.

IV. Conclusion

The lawless state will continue to present the United States and the international community significant challenges. The United States should stand by its policy to support the rule of law. Although lawlessness may not by itself be a basis for armed intervention, it is a strong precursor to a predictable result. Inaction is an inadequate solution. Now is the time to formalize an intervention strategy that adequately protects the United States and its interests. The customary law of self-defense and the anticipatory use of force are sufficient legal bases, even in the modern era of the UN Charter. It is time to heed the call of Professor Reisman, and stop bickering about the resort to force, and instead develop the criteria needed to appraise the appropriate use of coercion.²⁰⁸

individual states to intervene. History has proven the converse to be true. The UN is essentially a fractious body of competing states with divergent interests. This often paralyzes the armed intervention process. In fact, it some times even stymies the emplacement and enforcement of economic sanctions. Rogues in failed states should not find sanctuary in the disputes of international jurists arguing the finer points of international peace and security while never concluding what the lawful course of action actually is.

²⁰⁸ Reisman, *supra* note 133, at 643.

WHAT REMEDY FOR ABUSED IRAQI DETAINEES?

Major Julie Long*

*If we do not maintain Justice, Justice will not maintain
us.*¹

*Justice cannot be for one side alone, but must be for
both.*²

I. Introduction

Both United States and international law prohibit murder, torture, and any degrading or inhumane treatment of any person detained by U.S. personnel.³ It appears that U.S. servicemembers and other persons

* Judge Advocate, U.S. Army. Presently assigned as Officer in Charge, Stuttgart Law Center, 21st Theater Support Command, Stuttgart, Germany. LL.M., 2005, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia; J.D., 1996, University of Minnesota School of Law; M.A., 1996, University of Minnesota Hubert H. Humphrey Institute of Public Affairs; B.A., 1987, Bowling Green State University, Bowling Green, Ohio. Previous assignments include Special Trial Attorney, U.S. Department of Justice, 2002-2003; Litigation Attorney, US Army Litigation Division, 2001-2002; Trial Defense Attorney, 154th Legal Support Organization, 2000-2001; Trial Counsel, Kaiserslautern Law Center, 21st Theater Support Command, 1998-1999; Chief, Legal Assistance and Legal Assistance Attorney, Office of the Staff Judge Advocate, 21st Theater Support Command, 1996-1998; Chief, Communication Electronics Division, G6, U.S. Army Southern European Task Force, Vicenza, Italy, 1987-1988; Operations and Executive Officer, 54th Signal Company, 509th Signal Battalion, Vicenza, Italy, 1989-1990. Member of the bars of the State of Wisconsin and the Supreme Court of the United States. Previous publications: *Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements*, 80 Minn. L. Rev. 231 (1995); *Comparative Views of U.S. Customs Valuation Issues in Light of the Customs Modernization Act*, with Edward J. Hayward, 5 Minn. J. Global Trade 311 (1996); *Sometimes it Pays to Be Ignorant*, Army Lawyer, June 2003, at 26; *The Mission: Waging War and Keeping Peace with America's Military* (reviewing Dana Priest, *The Mission, Waging War and Keeping Peace with America's Military* (2004)), 182 Mil. L. Rev. 160 (2004). This article was submitted in partial completion of the Master of Laws requirements of the 53d Judge Advocate Officer Graduate Course.

¹ Francis Bacon, World of Quotes, <http://www.worldofquotes.com/author/Francis-Bacon/2/index.html> (last visited Mar. 16, 2006).

² Eleanor Roosevelt, World of Quotes, <http://www.worldofquotes.com/author/Eleanor-Roosevelt/1/index.html> (last visited Mar. 16, 2006).

³ See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter GCIV]; *Sosa v. Alvarez-Machain*, 542 U.S. 692

accompanying the force in Iraq may have violated these prohibitions in their treatment of some detainees in Iraq;⁴ indeed, several U.S. service members have been convicted of crimes relating to the abuse of Iraqi detainees.⁵ The appropriate remedy for breaches of these prohibitions by United States persons, whether service members or contractor personnel accompanying the force, is more problematic than simply recognizing that a breach occurred. Criminal prosecution is available under various U.S. federal statutes, including the Uniform Code of Military Justice (UCMJ).⁶ Although prosecution is important, it is unlikely to provide any

(2004); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 701, 711 (1987) [hereinafter RESTATEMENT (THIRD)].

⁴ See, e.g., Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade 17-18 (n.d.), http://www.npr.org/iraq/2004/prisonabuse_report.pdf (last visited Mar. 16, 2006) (reporting abuses alleged by detainees in paragraph eight) <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.htm1#FNopinon1.11> (stating “although the Taguba Report is marked *Secret/No Foreign Dissemination*, it has been widely distributed, and made available to the public worldwide since at least the week of May 2, 2004) [hereinafter Taguba Report]; Douglas Jehl, *Senate May Open Inquiry Into CIA’s Handling of Suspects*, N.Y. TIMES, Feb. 13, 2005, § 1, at 15.

⁵ See, e.g., Susan Candiotti & Jim Polk, *Abuse ‘Ringleader’ Awaits Sentence*, Jan. 18, 2005, CNN.com, <http://www.cnn.com/2005/LAW/01/14/graner.court.martial/>; Steven C. Welsh, *Abu Ghraib Court Martial: Staff Sergeant Ivan Frederick*, CENTER FOR DEF. INFO (Oct. 26, 2004), <http://www.cdi.org/news/law/abu-ghraib-courts-martial-frederick.cfm>.

⁶ See, e.g., UCMJ arts. 93, 118, 119, 120, 124, 125, 128 (2005). Similarly, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) provides that any member of the military forces or any person accompanying the force who engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may be punished for that offense, although it was committed outside the United States. 18 U.S.C.S § 3261(a) (LEXIS 2006). The United States has in fact convicted various service members under the UCMJ for crimes stemming from prisoner abuse in Iraq. See *supra* note 5 and accompanying text. In addition, six contract employees were referred to the Department of Justice for prosecution for their involvement in detainee abuse at Abu Ghraib. Renae Merle & Ellen McCarthy, *6 Employees From CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18, available at <http://www.washingtonpost.com/wp-dyn/articles/A33834-2004Aug25.html>. Various authors have explored a state’s obligations under international law regarding criminal prosecution for violations of international humanitarian and human rights law. See, e.g., M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 25-28 (1996) (discussing the requirement for states to achieve criminal and civil accountability for international human rights violations committed during armed conflicts); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 452 (1990) (arguing for the recognition of an affirmative international law obligation on states to investigate “grave human rights violations”).

compensation to the abused person and, as noted below, may be insufficient to meet international law obligations.

In a purely domestic context, civil suits for damages provide a remedy that fills the holes left by criminal prosecution. Civil suits compensate the injured, re-apportion the burden of the injury, and, perhaps most significantly in this article's context, help the alleged wrongdoer repair reputation and relational damage.⁷ United States law provides various civil remedies to compensate those who have been injured by U.S. service members or contractors.⁸ In fact, several persons alleging abuse at the hands of U.S. service members or contractors while detained in Iraq have filed administrative claims against the United States.⁹ In addition, a number of detainees filed lawsuits in federal court against Secretary of Defense Donald Rumsfeld and members of the U.S. Army alleging torture and mistreatment.¹⁰ Several more have filed a

⁷ See Beth Stephens, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 579-94 (1997) (comparing domestic criminal and tort law with similar international law concepts and considering the applicability of tort concepts to international wrongs).

⁸ See, e.g., Federal Tort Claims Act, 28 U.S.C.S §§ 2671-80 (LEXIS 2006) [hereinafter FTCA]; Foreign Claims Act, 10 U.S.C.S § 2734 (LEXIS 2006) [hereinafter FCA]; Alien Tort Claims Act, 28 U.S.C.S § 1350 (LEXIS 2006) [hereinafter ATCA].

⁹ Telephone Interview with Lieutenant Colonel (LTC) Charlotte Herring, Chief, Foreign Torts Branch, U.S. Army Claims Service (Feb. 28, 2005) [hereinafter Herring Interview] (explaining that twelve abuse claims have already been filed).

¹⁰ See American Civil Liberties Union, ACLU and Human Rights First Sue Defense Secretary Rumsfeld Over U.S. Torture Policy, Mar. 1, 2005, <http://www.aclu.org/safe-free/general/17594prs20050301.html> (noting that Rear Admiral John D. Hutson (Ret. USN), former Judge Advocate General of the Navy; and Brigadier General (BG) James Cullen (Ret. USA), former Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals, are serving pro bono as co-counsel on the lawsuit); Faye Bowers, *Lawsuit Lays Blame for Torture at the Top* (Mar. 2, 2005), <http://www.csmoniotr.com/2005/0302/p04s-01-usju.html>.

lawsuit against U.S. contractors.¹¹ These cases may be just the proverbial tip of the iceberg.¹²

As this article explains, many factors make it unlikely that recourse to current U.S. law will result in efficient, just, or politically palatable outcomes in these cases.¹³ In spite of such difficulties, Secretary Rumsfeld hinted during an interview at the height of the Abu Ghraib scandal that the United States indeed may compensate Iraqi detainees who were abused by U.S. personnel.¹⁴ Moreover, the United States has obligations arising from treaty provisions to ensure an adequate remedy is available to those whose protections under such treaties have been violated.¹⁵ The question then becomes how the United States can accomplish this obligation if current law is legally, practically, or politically inadequate.

The international law concept of espousal, a mechanism through which one government adopts, or “espouses,” and then settles the claims

¹¹ Second Amended Complaint, *Saleh v. Titan*, No. 04-CV-1143 (S.D. Ca. filed July 30, 2004), available at <http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%/20%Titan%20Corp%20Second%20Amended%20Complaint.pdf>. This lawsuit alleges that U.S. servicemembers and contractor personnel murdered, raped, tortured, and unlawfully detained numerous persons in Iraq. *Id.* at 23–37. Plaintiffs seek class certification and damages, *id.* at 60–61, under numerous legal theories, including the ATCA, *id.* at 44–51; the Racketeering Influenced and Corrupt Organizations (RICO) Act, *id.* at 41–44; the Geneva Conventions and other treaties and international agreements, *id.* at 51; and various state common law torts. *Id.* at 55–59.

¹² See *Weekend All Things Considered: Prison-Abuse Scandals Prompt Lawsuits* (National Public Radio broadcast July 31, 2004), <http://www.npr.org/templates/story/php?storyId=3807438>.

¹³ See *infra* Part III (describing potential remedies for international law violations).

¹⁴ *Good Morning America: Diane Sawyer Interview of Secretary of Defense Donald Rumsfeld* (ABC television broadcast May 5, 2004), available at U.S. Department of Defense News Transcript, *Secretary Rumsfeld on ABC's Today Show with Diane Sawyer* (May 5, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040505-ecdef0703.html> (In response to the question, “[S]hould there be financial compensation to these [abused] persons?”, Secretary Rumsfeld replied, “[F]rom time to time various types of compensation and assistance have been provided to people in Iraq whose circumstances were altered unfairly.”); Jim Garamone, *Prison Abuse ‘Unacceptable, Un-American,’ Rumsfeld Says*, AM. FORCES INFORMATION SERV., May 5, 2004, http://www.defenselink.mil/news/May2004/n05052004_200405051.html.

¹⁵ See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Katherine Shirey, *The Duty to Compensate Victims of Torture Under Customary International Law*, 14 INT’L LEGAL PERSP. 30, 38–40 (2004) (arguing that customary international law recognizes a duty to provide compensation to individual victims of torture).

of its nationals against another government,¹⁶ may provide a feasible solution. This treaty-based solution offers the prime advantage of holistically dealing with such claims in the process of restoring peace and creating a new relationship between Iraq and the United States in the aftermath of Saddam Hussein's regime.¹⁷ In addition, such a solution precludes costly and piecemeal litigation of such claims in U.S. courts, while providing compensation to legitimate claimants in accordance with local norms and laws.

This article first examines and analyzes the duties the United States and any of its agents owed to detained Iraqis under the provisions of the law of armed conflict, also called international humanitarian law. Then, looking at the development of customary and treaty-based international law, the article explores the current state of the law regarding the obligation to provide an adequate remedy to victims of violations of international humanitarian law, including whether a right to compensation exists in current international law. Both customary and treaty-based international law include a right to reparations when a state or its agents violate the protections of humanitarian law. Significantly, however, this right of reparation is distinct from an individual's right to compensation.

Because U.S. law provides avenues through which individual Iraqis may bring claims against their alleged abusers, the article then explores those avenues and demonstrates that those alternatives are legally, practically, or politically inadequate to offer a remedy to Iraqi detainees. The article then describes the development, use, advantages, and limitations of espousal, and suggests the parameters of a treaty-based solution for claims of detainee abuse in Iraq.

II. Obligations and Breaches: The Geneva Conventions

Of course, as in any personal injury case, whether the United States or any other party must compensate a detainee alleging wrongful injury turns first on the traditional tenets of tort law: duty, breach, proximate

¹⁶ *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989).

¹⁷ Rudolf Dolzer, *The Settlement of War Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, 20 BERKELEY J. INT'L L. 296, 338-41 (2002).

cause, and damages.¹⁸ Tort law in the United States is almost exclusively the province of state law,¹⁹ and the majority rule provides that the law of the place where the injury occurred provides the substantive law of the case.²⁰ In the case of Iraqi detainees, however, the allegedly wrongful conduct and injuries arose in a foreign country during a time of armed conflict, and the alleged wrongdoers were U.S. federal employees, including service members and contractors.²¹ Domestic state law—even Iraqi law—does not alone provide the substantive law by which to judge such acts.²² The definitions of who owed what duties to whom, what constitutes a breach of those duties, and what remedies may be available may also reside, if at all, in federal and

¹⁸ RESTATEMENT (SECOND) OF TORTS § 281 (1965).

¹⁹ *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In *Erie*, the Supreme Court stated:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or “general,” be they commercial law or a part of the law of torts.

Id.

It follows that a federal district court sitting pursuant to diversity jurisdiction applies the substantive law of the state in which it sits. *Suzik v. Sea-Land Corp.*, 89 F.3d 345, 348 (7th Cir. 1996). Similarly, in tort cases brought against the United States, the FTCA requires the application of the law of the place in which the wrongful act or omission occurred, rather than referring to a federal common law of torts. 28 U.S.C.S. § 2672 (LEXIS 2006).

²⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (describing the general rule that the state law of the place where the injury was suffered is applied in tort actions). This general rule likewise applies to international cases. *Id.* § 10. With respect to tort suits against the United States, courts apply the choice of law principles of the state in which the alleged acts or omissions occurred. *Richards v. United States*, 369 U.S. 1, 11 (1962). Torts “arising in a foreign country” are expressly excluded by the FTCA from the subject matter of the federal courts; accordingly, such a suit brought against the United States under the FTCA would be dismissed for lack of subject matter jurisdiction. 28 U.S.C.S. § 2680(k) (LEXIS 2006).

²¹ See *supra* notes 4–6 and accompanying text.

²² It is beyond the scope of this article to analyze whether U.S. personnel or contractors may be subject to tort actions in Iraqi courts or under Iraqi law; however, Iraqi detainees alleging abuse may bring an action in federal court alleging violations of international law. See *infra* notes 25, 220–35 and accompanying text (describing scope of the Alien Tort Claims Act (ATCA) after *Sosa*). *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

international law.²³ In this case, the applicable law includes obligations arising under international humanitarian law treaties to which the United States is a party, and obligations arising under principles of customary international law that are binding on the United States.

International humanitarian law establishes clear obligations with regard to the treatment of Iraqi detainees held by the United States. The 1949 Geneva Conventions are the most prominent example of treaties that bind the United States to a particular course of conduct with respect to Iraqi detainees.²⁴ Like all international humanitarian law, the Geneva Conventions are designed to limit the effects of war by protecting those not—or no longer—participating in hostilities.²⁵ The Conventions

²³ See, e.g., *Sosa*, 542 U.S. at 692, 712 (finding that under the ATCA, plaintiffs may bring lawsuits alleging damages resulting from a limited number of breaches of international law).

²⁴ It is beyond the scope of this article to determine all the possible international agreements and elements of customary international law that might prohibit the abuse of Iraqi detainees. Instead, the article is confined to the Geneva Conventions, for they are the most prominent source of international humanitarian law and were applicable to the United States during the invasion and occupation of Iraq. See discussion *infra* Parts II.A.1–2. In addition to the Geneva Conventions, other sources of international humanitarian law, such as the Hague Regulations, also applied. See Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, available at <http://www.icrc.org/ih.nsf/0/1d1726425f6955aec125641e0038bfd6?OpenDocument> [hereinafter Hague IV Regulations]. There is also ongoing debate in the international law community regarding the role of human rights law in armed conflicts. Contrary to the traditional view that international human rights law applies only within the territory of a contracting party, many commentators now argue that international human rights law, such as the International Convention on Civil and Political Rights and the Torture Convention, likewise applied to the United States in Iraq. See Steven R. Ratner, *The Schizophrenia of International Criminal Law*, 33 TEX. INT'L L.J. 237, 249 (1998) (arguing that human rights treaties apply during periods of armed conflict as well as in the domestic sphere); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8) (asserting that human rights treaties apply in armed conflict and not just in the domestic context), http://www.icj-cij.org/icjwww/icasess/iunan/iunan_judgment_advisory%20opinion_19960708/iunan_judgment_19960708_Advisory%20Opinion.htm. Allegations of detainee abuse in Iraq, especially those of civilians allegedly abused during the occupation when the United States essentially served as the domestic civil authority in Iraq, will no doubt fuel that debate.

²⁵ See INT'L COMMITTEE OF THE RED CROSS ADVISORY SERVICE ON INT'L HUMANITARIAN LAW, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JNXM/\\$FILE/What_is_IHL.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JNXM/$FILE/What_is_IHL.pdf); see also U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 2 (18 July 1956) [hereinafter FM 27-10] (describing the U.S. Army's view of the application and purpose of international humanitarian law).

consist of four separate instruments that define the manner in which the contracting parties must treat those protected under each specific convention.²⁶ Most significant to an analysis of U.S. obligations toward Iraqi detainees are the Convention Relative to the Treatment of Prisoners of War (GCIII), the Convention Relative to the Protection of Civilian Persons in Time of War (GCIV), and the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). As is explored below, GCIII defines who qualifies as a prisoner of war (POW) and outlines the protections that High Contracting Parties to the Conventions must provide to those who qualify.²⁷ Geneva Convention IV establishes categories of civilians and defines protections the High Contracting Parties must provide to persons in these categories. Protocol I supplements all the Geneva Conventions when contracting parties are engaged in an international armed conflict. While the United States is not a party to Protocol I, as noted below, it accepts many of Protocol I's provisions to be binding customary international law.²⁸

Before describing the specific manner in which the Geneva Conventions obligate the United States with respect to the Iraqi detainees, it is significant to note that by their terms, the Conventions have broad application. Common Article 1²⁹ of the Conventions states “The High Contracting Parties undertake to respect and to ensure respect

²⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 [hereinafter GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363 [hereinafter GCII]; GCIII, *supra* note 3; GCIV, *supra* note 3.

²⁷ See *infra* Part II.A.1.

²⁸ Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420–29 (1987).

²⁹ The four Geneva Conventions contain a certain number of “common” articles, the language of which is identical in each of the conventions. Pictet's Commentaries state:

Each of the four draft texts prepared by the International Committee of the Red Cross began with the principal provisions of a general character, in particular those which enunciated fundamental principles and so should, by rights, be repeated in the various Conventions. Most of the Articles in this Part are accordingly to be found in identical, or slightly modified, form in the other three Conventions.

for the present Convention in *all circumstances*.”³⁰ In addition, Common Article 2 expressly states,

Although one of the Powers in a conflict may not be a party to the present Convention, the Powers who are parties thereto remain bound by it in their mutual relations. They shall furthermore be bound by it in relation to the said Power, if the latter accepts and applies the provisions thereof.³¹

Unlike previous attempts to regulate the conduct of war,³² these provisions mean that a contracting party must follow the requirements of the Conventions regardless of whether its rival is a party to the Convention.³³ Moreover, although the language of Common Article 2 might seem to limit a contracting party’s obligations to those “Powers” who in fact observe the protections of the Conventions, Pictet’s Commentaries indicate that a contracting party must comply with its obligations regardless of whether its foe complies. Pictet states that the contracting parties agreed that the Conventions are:

not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations “vis-à-vis” itself and at the same time “vis-à-vis” the others. This motive

³⁰ GCIII, *supra* note 3, art. 1 (emphasis added).

³¹ *Id.* art. 2.

³² The 1929 version of the Geneva Conventions did not contain a requirement to regulate one’s conduct in accordance with the laws of war when the opposing party was not bound by the same requirements. *See* Convention Relative to the Treatment of Prisoners of War art. 82, July 27, 1929, 47 Stat. 2021, 2059. As a result, during World War II the parties’ treatment of prisoners captured from different enemies varied dramatically. For example, Germany, the United States, and the United Kingdom were contracting parties to the 1929 POW Convention, but the Soviets and the Japanese were not. Tracy Fisher, Note, *At Risk in No-Man’s Land: United States Peacekeepers, Prisoners of “War,” and the Convention on the Safety of United Nations and Associated Personnel*, 85 MINN. L. REV. 663, 670 (2000). Accordingly, Germany extended POW treatment only to the soldiers of other signatories, and Japan generally did not conform its treatment of prisoners to the requirements of the 1929 Conventions at all. *Id.*

³³ *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 4 (1990) (asserting that the Geneva Conventions of 1949 “renounce any dependency on reciprocity”).

of the Convention is so essential for the maintenance of civilization that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties.³⁴

Here, both Iraq and the United States are contracting parties to the Geneva Conventions and are therefore bound to the Conventions' terms.³⁵ Although there are allegations that Iraq did not always observe its obligations,³⁶ the United States nevertheless remains obligated to provide the protections required by the Conventions pursuant to Common Article 2³⁷

Before crafting an appropriate strategy for cases of abuse of Iraqi detainees in U.S. custody, one must first determine about whose obligations and breaches the U.S. must be concerned. Allegations of abuse have been raised against both U.S. government employees and U.S. contractors.³⁸ The United States obviously must address allegations of abuse brought against service members in their official capacity.³⁹

³⁴ PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 1.

³⁵ INT'L COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2003: STATE PARTIES TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/622MGD/\\$FILE/icrc_ar_03_Map_conven_A4.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/622MGD/$FILE/icrc_ar_03_Map_conven_A4.pdf) [hereinafter STATE PARTIES].

³⁶ See, e.g., *Contemporary Practice of the U.S. Relating to International Law: Use of Military Force to Disarm Iraq* (Sean D. Murphy, ed.), 97 A.J.I.L. 419, 429 (2003) [hereinafter *Military Force*] (documenting episodes in which the Iraqi Army failed to comply with its humanitarian law obligations).

³⁷ See also Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331 (entry into force Jan. 27, 1980) (requiring that its provisions for termination or suspension of the operation of a treaty as a consequence of a breach do not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character"). The United States signed but has not ratified the Vienna Convention; however, at least one commentator asserts that the provisions of Article 60 are reflective of customary international law in U.S. foreign relations. See John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 893 (1999); see also RESTATEMENT (THIRD), *supra* note 3, § 335 cmt. c.

³⁸ See Second Amended Complaint at 23–60, Saleh v. Titan, No. 04- CV-1143 (S.D. Ca. July 30, 2004), available at <http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%-20Corp%20Second%20Amended%20Complaint.pdf>; American Civil Liberties Union, *supra* note 10; Bowers, *supra* note 10.

³⁹ See 28 U.S.C.S § 2679(b) (LEXIS 2006). This provision, known as the Westfall Act, makes a suit against the United States the exclusive remedy for any person alleging negligence or wrongful acts by an employee of the United States acting in the scope of his or her federal employment. *Id.* § 2679(b)(1). After certifying that an employee was

The conduct of federal employees and U.S. contractors, however, was deeply intertwined, and contractors face liability for acts they apparently undertook pursuant to their contractual obligations.⁴⁰ As a result, the United States must also be concerned about any duties and potential breaches of its contractors.⁴¹ Accordingly, this section will focus first on the United States and its employees and will then examine when the actions of U.S. contractors may be attributable to the United States.

A. The United States and its Employees

According to Section 207 of the Restatement (Third) of the Foreign Relations Law of the United States:

A state is responsible for any violation of its obligations under international law resulting from action or inaction by (a) the government of the state, (b) the government or authorities of any political subdivision of the state, or (c) any organ, agency, official, *employee*, or other agent of a

acting in the scope of his federal employment, the Attorney General must act to substitute the United States for any individually named defendant, remove the suit to the appropriate federal court, and defend the suit. *Id.* § 2679(d)(1). Of course, if the employee's alleged negligent or wrongful acts were done outside the scope of his employment, the United States is not substituted, and the Attorney General does not defend the case. Moreover, a person alleging negligence or wrongful acts by a federal employee must first submit and have denied a claim for money damages to the appropriate federal agency before he can bring a suit in court. *Id.* § 2675(a). The United States is therefore involved in administrative proceedings regarding such allegations well in advance of any actual lawsuit. *See also* *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999) (finding that "state actors, and not merely the state itself" can be held liable for violations of the law of nations).

⁴⁰ LTG ANTHONY R. JONES & MG GEORGE R. FAY, ARMY REGULATION 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47-52 (2004), <http://news.findlaw.com/nytimes/docs/dod/fay82-504rpt.pdf> [hereinafter FAY-JONES REPORT]; Second Amended Complaint at 14-60, *Saleh v. Titan*, No. 04-CV-1143 (S.D. Cal. July 30, 2004), available at <http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf>.

⁴¹ *See Kadic v. Karadic*, 70 F.3d 232, 245 (2d Cir. 1995) (noting that a private actor can violate international law when acting under color of state authority and using the color of law jurisprudence under 42 U.S.C. § 1983 as a "relevant guide"); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1305 (S. D. Fla. 2003) (applying *Kadic* and determining that a finding of "under color of state authority" requires more than "conclusory allegations").

government or of any political subdivision, acting within the scope of authority or under color of such authority.⁴²

Accordingly, if the United States, through its service members or other federal employees acting within the scope of their authority, violated international law with respect to treatment of Iraqi detainees, the United States is responsible for those acts. The analysis must then turn to the Geneva Conventions and to what duties the United States had with respect to these detainees.

In addition to the broad divisions established among the Conventions themselves,⁴³ the protections contained in each of the Conventions differ depending on whether the armed conflict is “international”⁴⁴ or “internal”⁴⁵ in character. Section 1 below explores the extensive protections that the United States owed to Iraqi detainees during periods of international armed conflict and occupation in Iraq. Section 2 follows

⁴² RESTATEMENT (THIRD), *supra* note 3, § 207 (emphasis added).

⁴³ See *supra* note 26 and accompanying text.

⁴⁴ Common Article 2 describes an international armed conflict as one that “may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” GCIII, *supra* note 3, art. 2.

⁴⁵ Common Article 3 does not specifically define an internal armed conflict, other than to say that its provisions apply to an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” *Id.* art. 3. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) attempts a more comprehensive definition. Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II]. Article 1 of Protocol II states that Protocol II applies in cases of armed conflict not covered by Protocol I, and

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Id.

Article 1 further states that Protocol II does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.” *Id.* The United States is not a party to Protocol II, and although it views much of the Protocol as binding customary international law, the United States objects to this provision in Article 1. Matheson, *supra* note 28, at 420–29.

with a discussion of the more limited duties owed by the United States in any period of internal armed conflict in Iraq.

1. Common Article 2: International Armed Conflict or Occupation

Common Article 2 of the Geneva Conventions states “the present Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . [and] to all cases of partial or total occupation of the territory of a High Contracting party . . .”⁴⁶ Accordingly, the vast majority of the protections, such as status as a POW under GCIII⁴⁷ and status as a “protected person” under GCIV,⁴⁸ apply only during international armed conflict (armed conflict between two or more High Contracting Parties) or occupation.⁴⁹ Here, both Iraq and the United States are High Contracting Parties.⁵⁰ Accordingly, although neither side issued a formal declaration of war, from 19 March 2003, when President

⁴⁶ GCIII, *supra* note 3, art. 2.

⁴⁷ *Id.* art. 4.

⁴⁸ GCIV, *supra* note 3, art. 4.

⁴⁹ Territory is considered occupied “when it is actually placed under the authority of a hostile army.” Hague IV Regulations, *supra* note 24, art. 42. The *Operational Law Handbook* produced by the U.S. Army Judge Advocate General’s Legal Center and School indicates that various dates have been offered regarding the commencement of occupation by coalition forces in Iraq. U.S. DEP’T OF THE ARMY, INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 272 (2005). The Commander, United States Central Command (CENTCOM), issued “Instructions to the Iraqi People” on 16 April 2003 that spelled out controls he was implementing as the Coalition Force Commander. *Id.* The Instructions included notice of sanctions if the instructions were violated. President Bush issued Executive Order 13315 on 28 August 2003. *Id.* “Section 4(d) [of EO 13315] defines the ‘former Iraqi regime’ to mean the Saddam Hussein regime that governed Iraq until on or about 1 May 2003.” *Id.* The Handbook further notes that “at some point in time, arguably 16 April 03, the coalition forces representing the Occupying Powers began to have certain obligations, to wit, authority under the Hague Regulations and the Geneva Conventions (IV) Relative to the Protection of Civilians in Time of War.” *Id.* Moreover, the United Nations Security Council recognized in a resolution on 22 May 2003 that occupation law applied by the coalition forces was in effect in Iraq. S.C. Res. 1483, U.N. Doc. S/Res/1483 (May 22, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf>.

⁵⁰ STATE PARTIES, *supra* note 35.

George Bush announced that armed conflict against Iraq had begun,⁵¹ until at least 28 June 2004, when official occupation ended with the establishment of the Iraqi provisional government,⁵² Common Article 2 and the protections it triggers created duties for the United States with respect to Iraqi detainees.

More specifically, those detainees who qualified as POWs⁵³ were entitled to the full protections of GCIII. Part II of GCIII outlines those protections in detail. For example, Article 13 requires that “[p]risoners of war must at all times be humanely treated.”⁵⁴ Article 13 also prohibits any “unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody” and regards such acts or omissions as “serious breach[es] of the present Convention.”⁵⁵ Article 13 further requires that “prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.”⁵⁶ Article 17 states that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any

⁵¹ The White House, President Bush Addresses the Nation (Mar. 19, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>; see also *Military Force*, *supra* note 36, at 429.

⁵² The White House, President Bush Discusses Early Transfer of Iraqi Sovereignty, Remarks by President Bush and Prime Minister Blair on Transfer of Iraqi Sovereignty, (June 28, 2004), <http://www.whitehouse.gov/news/releases/2004/06/20040628-9.html>. The Department of Defense Office of the General Counsel (DOD OGC), however, asserts that international armed conflict continues in Iraq, even as of the time of writing. Interview with Major Sean Watts, Professor, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army, in Charlottesville, Virginia (Feb. 24, 2005) [hereinafter Watts Interview]. Assuming, *arguendo*, that the DOD OGC’s determination is incorrect, it is essential to fix an end date for the applicability of Common Article 2 and the rest of the Geneva Conventions.

⁵³ It is beyond the scope of this article to analyze whether any particular detainees are prisoners of war under Article 4 of GCIII. The following groups qualify for POW status under GCIII: members of armed forces of a Party to the conflict; members of certain militias and resistance movements belonging to a Party to the conflict; members of the armed forces of an authority not recognized by the detaining powers; certain persons who accompany the armed forces; members of crews of the merchant marine and civil aircraft of Parties to the conflict; and inhabitants of non-occupied territory who spontaneously take up arms to resist invading forces. GCIII, *supra* note 3, art. 4. News reports indicate, however, that at least some of the allegedly abused detainees were members of the regular Iraqi military forces at the time of their capture. See, e.g., Miles Mofeit, *Brutal Interrogation in Iraq, Five Detainees Deaths Probed*, DENVER POST, May 19, 2004, at A1.

⁵⁴ GCIII, *supra* note 3, art. 13.

⁵⁵ *Id.*

⁵⁶ *Id.*

kind whatsoever. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”⁵⁷ Article 118 requires that after the cessation of active hostilities, prisoners of war shall be “released and repatriated without delay.”⁵⁸ The Convention contains no provision whereby a prisoner of war may be detained because he may possess intelligence of value to the detaining party, or because he is deemed likely to engage in future hostilities.⁵⁹ In fact, subsequent articles allow the detaining party to delay repatriation after the cessation of hostilities only where criminal proceedings are pending or where delay is necessary for the completion of adjudged punishment.⁶⁰

Significantly, Article 130 of GCIII specifically defines willful killing, torture, inhumane treatment, and willfully causing great suffering or serious injury to the body or health of a POW as “grave breaches” of the Convention.⁶¹ Finally, GCIII Article 131 states, “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in [Article 130].”⁶²

For detainees who do not qualify as POWs under GCIII, the provisions of GCIV apply.⁶³ Article 50 of Protocol I, accepted by the United States as an accurate reflection of customary law,⁶⁴ defines a civilian as anyone who does not qualify for protection as a prisoner of war under Article 4(A)(1), (2), (3), and (6) of GCIII.⁶⁵ Field Manual 27-10 specifically explains that GCIV protects “all persons who have engaged in hostile belligerent conduct but who are not entitled to

⁵⁷ *Id.* art. 17.

⁵⁸ *Id.* art. 118.

⁵⁹ Indeed, POW status is predicated on the detainee’s prior status as a combatant. It is presumed that if released prior to the cessation of hostilities, the POW would return to combat. From the perspective of the U.S. Armed Forces, this concept is contained in the U.S. Code of Conduct. See Donna Miles, *Code of Conduct Guided U.S. POWs in Iraq*, AM. FORCES INFORMATION SERV., July 16, 2004, http://www.defenselink.mil.news/Jul-2004/n07162004_2004071605.html.

⁶⁰ GCIII, *supra* note 3, art. 119.

⁶¹ *Id.* art. 130.

⁶² *Id.* art. 131.

⁶³ GCIV, *supra* note 3, art. 4; see Protocol I, *supra* note 15, art. 50; FM 27-10, *supra* note 25, para. 247 b.

⁶⁴ See Matheson, *supra* note 28, at 426.

⁶⁵ Protocol I, *supra* note 15, art. 50.

treatment as prisoners of war.”⁶⁶ Article 4 of GCIV provides that “[p]ersons protected by the Convention are those who, in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁶⁷ Pursuant to Article 5 of GCIV, even if a civilian is “detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power,” that person does not lose his status as a civilian protected under GCIV, but merely loses “rights of communications under the present Convention.”⁶⁸

Collectively, these provisions require that during the period of international armed conflict and occupation in Iraq,⁶⁹ any Iraqi detained by the United States who did not qualify as a POW was a GCIV “protected person” entitled to the protections of GCIV,⁷⁰ including respect for one’s person, dignity, and honor; humane treatment; and protection from acts or threats of violence and from insults or public curiosity.⁷¹ Article 31 of GCIV specifically prohibits physical or moral coercion to obtain information from a person protected under GCIV.⁷² Perhaps most significantly for this analysis, Article 32 states,

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder [and] torture . . . but also to *any other measures of brutality* whether applied by civilian or military agents.⁷³

⁶⁶ FM 27-10, *supra* note 25, para. 247b.

⁶⁷ GCIV, *supra* note 3, art. 4.

⁶⁸ *Id.* art. 5. Pictet notes that these rights are quite limited and generally include only the right to communicate with the outside world, such as sending and receiving correspondence. COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art. 5 (Jean S. Pictet ed., 1960) [hereinafter PICTET COMMENTARY TO GCIV].

⁶⁹ See *supra* notes 49–52 and accompanying text.

⁷⁰ See generally David J. Scheffer, *Agora (Continued): Future Implications of the Iraq Conflict: Beyond Occupation Law*, 97 A.J.I.L. 842, 856–59 (2003) (describing the responsibilities and future liabilities of the United States and the United Kingdom as occupying powers in Iraq).

⁷¹ GCIV, *supra* note 3, art. 27.

⁷² *Id.* art. 31.

⁷³ *Id.* art. 32 (emphasis added).

In addition to these extensive obligations, Protocol I also adds a layer of protection.⁷⁴ Article 75 of Protocol I, which the United States views as binding customary international law, is one such provision.⁷⁵ Under Article 75, civilian and military agents of contracting parties are prohibited from committing violence to the life, health, or physical or mental well-being of protected persons, including murder; torture of all kinds, whether physical or mental; corporal punishment; mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment; and threats to commit any of these acts.⁷⁶

2. Common Article 3: Internal Armed Conflict

As noted above, as long as the United States occupied Iraq or was engaged in international armed conflict there, the protections triggered by Common Article 2 applied to Iraqi detainees in U.S. custody.⁷⁷ On June 28, 2004, however, the Iraqi provisional government took power.⁷⁸ From that point on, the United States remained in Iraq at the invitation of the Iraqi provisional government, and the United States was arguably no longer either occupying Iraq or engaged in international armed conflict.⁷⁹

⁷⁴ Protocol I, *supra* note 15, art. 75(2).

⁷⁵ See Matheson, *supra* note 28, at 427.

⁷⁶ Protocol I, *supra* note 15, art. 75(2).

⁷⁷ See *supra* notes 49–52 and accompanying text.

⁷⁸ See *supra* note 52 and accompanying text.

⁷⁹ As noted previously, however, the DOD OGC asserts that international armed conflict continues in Iraq. See *supra* note 53 and accompanying text. In any case, Pictet notes certain criteria in his Commentaries by which the contracting parties may determine if an internal armed conflict exists. PICTET'S COMMENTARIES TO GCIII, *supra* note 29, art. 3. Specifically, he states that an armed conflict exists under the following circumstances:

- (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the de jure Government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a

Still, as is obvious from daily news reports, armed conflict continues in Iraq. Pursuant to Common Article 3 of the Geneva Conventions, when armed conflict not of an international nature occurs in the territory of a High Contracting Party, such as Iraq, only the provisions of Common Article 3 apply.⁸⁰ Accordingly, even if the United States is no longer fighting an international armed conflict in or occupying Iraq, the United States must afford the protections contained in Common Article 3 to any detainees under its control.⁸¹

Common Article 3 is sometimes known as a “convention in miniature” because it contains the most basic protections that must be afforded by the contracting parties in times of an internal armed conflict.⁸² More specifically, Common Article 3 requires that “[p]ersons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely”⁸³ Common Article 3 also forbids, “at any time and in any place whatsoever, ‘violence to life, in particular murder of all kinds, mutilation, cruel treatment, and torture’”

threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory. (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Id.

Pictet further asks “Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? We do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible.” *Id.* By this definition, it is difficult to argue with the proposition that the war in Iraq now constitutes at least internal armed conflict.

⁸⁰ See, e.g., GCIV, *supra* note 3, art. 3.

⁸¹ Of course, under the DOD OGC’s analysis that international armed conflict continues in Iraq, Common Article 2 and the protections it triggers still apply in Iraq. See *supra* notes 49–52 and accompanying text.

⁸² PICTET’S COMMENTARIES TO GCIII, *supra* note 29, art. 3.

⁸³ See, e.g., GCIV, *supra* note 3, art. 3. *Hors de combat* is a French term meaning “out of the fight; disabled; no longer able to fight.” RANDOM HOUSE COLLEGE DICTIONARY 639 (Jess Stein ed., 1975).

as well as “outrages upon personal dignity, in particular humiliating and degrading treatment”⁸⁴

It follows that under the Geneva Conventions, whether in time of international or internal armed conflict, the United States owed an obligation to Iraqis detained by the United States to refrain from torture, murder, and cruel, humiliating, or degrading treatment. More importantly, during the time period in which Common Article 2 was triggered, the United States was bound by the higher standards of treatment of GCs III and IV.

Unfortunately, U.S. forces apparently failed to provide the required protections to Iraqi detainees “at all times” and in “any place whatsoever.”⁸⁵ The Fay-Jones Report demonstrates that, at a minimum, the United States used improper coercion to extract information from detainees.⁸⁶ Even if the methods employed to extract information did not amount to torture and even if the detainees were not entitled to protection as POWs or as civilians, the use of improper coercive techniques violates U.S. obligations under Common Article 3. Likewise, the photos taken at Abu Ghraib and made public in many fora depict humiliating and degrading treatment of Iraqi detainees by U.S. service members.⁸⁷ Again, whether those detainees were entitled to GCIII protections as POWs or GCIV protections as civilian protected persons, the treatment visited on the detainees, as exhibited in the photos, violates U.S. obligations under those Conventions. Indeed, it appears that U.S. Soldiers may have murdered some Iraqi detainees, some of whom likely qualified as POWs.⁸⁸ As Article 130 of GCIII and Article 147 of GCIV provide, these killings are grave breaches of the Conventions from which the United States, a “High Contracting Party,” may not “absolve itself.”⁸⁹

⁸⁴ *Id.*

⁸⁵ *E.g.*, GCIV, *supra* note 3, art. 3.

⁸⁶ FAY-JONES REPORT, *supra* note 40, at 135.

⁸⁷ See *supra* note 5 and accompanying text; U.S. Dep’t. of Defense, DD Form 458, Charge Sheet (May 2000) [hereinafter DD Form 458], [http://news/findlaw.com/hdocs/iraq/graner51404chrg.html](http://news.findlaw.com/hdocs/iraq/graner51404chrg.html) (Mar. 20, 2004) (charge sheet for Corporal (CPL) Charles Graner); *id.* [http://news/findlaw.com/hdocs/docs/iraq/sivits50504chrg.html](http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html) (Mar. 20, 2004) (charge sheet for Specialist (SPC) Jeremy Sivits); *id.* [http://news/findlaw.com/hdocs/docs/iraq/ifred32004chrg.html](http://news.findlaw.com/hdocs/docs/iraq/ifred32004chrg.html) (Mar. 20, 2004) (charge sheet for Staff Sergeant (SSG) Ivan Frederick); *id.* [http://news/findlaw.com/hdocs/docs/iraq/davis42804chrg.html](http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html) (Mar. 20, 2004) (charge sheet for Sergeant (SGT) Javal Davis).

⁸⁸ Moffeit, *supra* note 53, at A1.

⁸⁹ GCIII, *supra* note 3, arts. 131 (defining grave breaches of GCIII), 131 (forbidding state absolution of responsibility for grave breaches); GCIV, *supra* note 3, arts. 147

B. Contractors of the United States and Their Employees

Unfortunately, United States responsibility for abuse inflicted on Iraqi detainees may not stop with the acts of U.S. employees and service members. *Saleh v. Titan*⁹⁰ and the Fay-Jones Report⁹¹ assert that U.S. contract interrogators and translators participated with U.S. employees in conduct that violated the Geneva Conventions. As further explained below, if those contractors were U.S. agents or were acting under color of U.S. authority when they committed any such acts, that conduct may be attributable to the United States under both international and federal law.

1. Responsibility for Private Actors Under International Standards

a. The International Court of Justice

The International Court of Justice (ICJ) faced the question of when a government could be liable for the action of private individuals in the *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*.⁹² This case arose from the seizures in November 1979 of the U.S. Embassy and other consular properties and personnel in Iran.⁹³ In its discussion of the facts, the ICJ noted that armed groups of militant students overran and occupied the U.S. Embassy in Tehran and the consulates in Tabriz and Shiraz, took hostages at the Embassy, and seized and destroyed property in all three locations.⁹⁴ The court noted that to reach a decision on the merits, it must first “determine how far, legally, the acts in question may be regarded as imputable to the Iranian State.”⁹⁵ The court then stated that there was no evidence “that the militants, when they executed their attacks on the Embassy, had any

(defining grave breaches of GCIV), 148 (forbidding state absolution of responsibility for grave breaches).

⁹⁰ Second Amended Complaint, *Saleh v. Titan*, No. 04-CV-1143 (S.D. Cal. July 30, 2004), available at <http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf>.

⁹¹ FAY-JONES REPORT, *supra* note 40, at 47–52.

⁹² *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24), available at http://www.icj-cij.org/icjwww/icses/isuir/iusir_ijudgment/iusir_ijudgment_19800524.pdf.

⁹³ *Id.* at 12.

⁹⁴ *Id.* at 12–15.

⁹⁵ *Id.* at 29.

form of official status as recognized ‘agents’ or organs of the Iranian State,” and that their actions against the United States could not, therefore, be imputed to Iran on that basis.⁹⁶ Accordingly, the court concluded that the conduct of the militant students could be directly imputed to the Iranian State “only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.”⁹⁷

The court then found that just days before the attacks, the religious leader of Iran, the Ayatollah Khomeini, “declared that it was ‘up to the dear pupils, students, and theological students to expand with all their might their attacks against the United States,’” and that in a statement after the attacks, a spokesman for the militants referred to this message to explain their actions.⁹⁸ The court, however, concluded that “it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy.”⁹⁹ Likewise, the court viewed congratulations conveyed after the seizures from various parts of the Iranian government to the militants as insufficient to impute the attacks on the Embassy to the State of Iran.¹⁰⁰

Nevertheless, the ICJ still held that Iran was liable to the United States.¹⁰¹ Although the attacks themselves could not be considered imputable to the Iranian State, Iran failed either to prevent the attacks or to secure the release of the hostages and return of the seized properties following the attacks.¹⁰² The court noted that the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular

⁹⁶ *Id.* The International Court of Justice (ICJ) offers no authority or explanation for its conclusion that a state may be responsible under international law for the actions of private individuals recognized as agents of the state, but this conclusion is in accord with Restatement Third of the Foreign Relations of the United States § 207, which states, in part, that a State may be held responsible for any violations of international law by “any organ, agency, official, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.” RESTATEMENT (THIRD), *supra* note 3, § 207.

⁹⁷ *Iran*, 1980 I.C.J. at 29.

⁹⁸ *Id.*

⁹⁹ *Id.* at 30.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 31–35.

¹⁰² *Id.* at 31–33.

Relations of 1963 placed Iran “under the most categorical obligations . . . to take appropriate steps to ensure the protection of the United States Embassy and Consulates”¹⁰³ The court found that Iran failed to even attempt to take such steps.¹⁰⁴ In contrast to the initial acts of the militants, moreover, the court found that Iran made it clear that the militants enjoyed the full support of the Iranian State for their takeover of the Embassy and detention of the U.S. personnel.¹⁰⁵ As the court held,

The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailors of the hostages, had now become agents of the Iranian State, for whose acts the State itself was internationally responsible.¹⁰⁶

The ICJ, then, seems to establish two rules through which a state may be responsible under international law for the acts of private individuals. First, a state may be liable if the private actor is an “agent” of the state “charged by some competent organ of the [s]tate to carry out a specific operation.”¹⁰⁷ Second, a state may be liable if it ratifies the actions of private individuals either by failing to take steps required under international law to prevent or stop the violative acts or by subsequently endorsing those acts.¹⁰⁸ Unlike Iran, the United States of course did not ratify the violative conduct of the private individuals who abused Iraqi detainees by failing to take preventive steps to stop the abuse or by endorsing such abuse as its express policy. Accordingly, the court’s ratification test does not apply in the circumstances under analysis here. As for the court’s “agency” test, the Tehran Embassy Case unfortunately does not provide any insight into its elements. Indeed, some commentators note that criteria for what constitutes state agency for the

¹⁰³ *Id.* at 30.

¹⁰⁴ *Id.* at 31.

¹⁰⁵ *Id.* at 34.

¹⁰⁶ *Id.* at 35.

¹⁰⁷ *Id.* at 30.

¹⁰⁸ *Id.* at 35.

purposes of international law have never been clearly articulated and that international law has largely failed to address the question.¹⁰⁹

Professor Claire Finckelstein, however, offers a definition for state agency gleaned from ICJ and U.S. federal court opinions.¹¹⁰ Traditionally, “[w]hat law there is on the question of state agency focuses on the *nature of the offense*, rather than on the *status of the offender*.”¹¹¹ More specifically, she posits that under what she terms the “act-by-act” approach, international law has traditionally held that

if the perpetrator decides to perform the act on his own initiative, the act cannot be shown to be an act of the state, even if the actor is generally authorized to act for the state. On an act-by-act test, then, the actor must display little or no independence of judgment in order for the individual to be considered a state actor with respect to the act. In most cases, this will mean that the individual must have been acting under orders to commit the crime.¹¹²

Professor Finckelstein notes that the ICJ explicitly endorsed this “act-by-act” approach in its opinion in *Nicaragua v. United States*.¹¹³ In that case, Nicaragua claimed that the actions of the contras, U.S.-backed rebels fighting against the Nicaraguan government, could be attributed to the United States because the United States was organizing, funding, commanding, and recruiting contra members.¹¹⁴ Professor Finckelstein further notes that the court disagreed, stating:

¹⁰⁹ E.g., Claire Finckelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L L.J. 261, 271 (1995).

¹¹⁰ *Id.* at 270–75 (analyzing the 1992 conviction by a French domestic court of Paul Touvier, a Vichy official, for crimes against humanity). Professor Finckelstein explains that Paul Touvier was the head of a division of the *Milice*, the military police organization of the Vichy government in occupied France in World War II. *Id.* at 264. Touvier played a role in the execution of seven Jewish hostages at a cemetery in Rillieux-la-Pape, on 29 June 1944. *Id.* “The killings occurred the day after members of the resistance had assassinated Philippe Henriot, the Minister of Information of Vichy.” *Id.* at 264–65. The killings at Rillieux were in retaliation for Henriot's assassination. *Id.* at 265. Touvier was also responsible for detaining Jewish and political prisoners. *Id.*

¹¹¹ *Id.* at 271 (emphasis added).

¹¹² *Id.*

¹¹³ *Id.* at 274.

¹¹⁴ Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 64 (June 27), available at http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf.

[F]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations *in the course of which the alleged violations were committed.*” Although the Court did not elaborate its view of the agency relation, Judge Ago articulated the Court’s approach to state agency in a concurrence, saying that state agency can only be imputed “in cases where certain members of [the *Contras*] happened to have been *specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind* on behalf of the United States.”¹¹⁵

Pursuant to this analysis, likewise hinted at in the ICJ’s Tehran Embassy opinion,¹¹⁶ the United States is responsible for the international law violations of its contractors under the agency theory if U.S. authorities instructed the contractors to commit those violations. It would not be sufficient, however, to demonstrate only that the contractors were engaged in the execution of their contract when they allegedly abused detainees.¹¹⁷ But if U.S. government officials directed, supervised, or conspired with civilian contractors in conduct violative of U.S. obligations under the Geneva Conventions, or if U.S. authorities authorized or instructed contractors to engage in conduct that constituted torture, acts by the contractors in compliance with those orders or instructions would likely be imputable to the United States.¹¹⁸

¹¹⁵ Finckelstein, *supra* note 109, at 274 (quoting *id.* at 188–89 (separate opinion of Judge Ago)) (emphasis added).

¹¹⁶ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 30 (May 24), available at http://www.icj-cij.org/icjwww/icas/iusir/iusir_ijudgment/iusir_ijudgment_19800524.pdf.

¹¹⁷ *Id.*

¹¹⁸ According to the *Schlesinger Report*, interrogators at Abu Ghraib used interrogation techniques that had been approved for use on detainees at Guantanamo Bay, who were not entitled to the protections of the Geneva Conventions. JAMES R. SCHLESINGER, ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 14 (2004), <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> [hereinafter SCHLESINGER REPORT]. It was improper, however, to use these techniques on detainees at Abu Ghraib, who were entitled to Geneva Convention protections. *Id.*

b. Common Article 1 of the Geneva Conventions

Common Article 1 of the Geneva Conventions may provide another avenue under international law by which the United States may bear responsibility for the actions of its contractors.¹¹⁹ Common Article 1 requires that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”¹²⁰ As Pictet explained in his Commentaries to GCIII, for a state to meet its Common Article 1 obligations, “it would not be enough for a Government to give orders or directions and leave the military authorities to arrange as they pleased for their detailed execution. It is for the Government to supervise the execution of the orders it gives.”¹²¹ Pictet’s Commentaries to GCIV regarding Common Article 1 are even more explicit:

The Contracting Parties do not undertake merely to respect the Convention, but also to “ensure respect” for it. The wording may seem redundant. When a State contracts an engagement, the engagement extends *eo ipso* to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders. The use in all four Conventions of the words “and to ensure respect for” was, however, deliberate: they were intended to emphasize the responsibility of the Contracting Parties.¹²²

The contractors the United States hired to interrogate Iraqi detainees were certainly persons over whom the United States had authority, especially in the context of the work the contractors were hired to perform. It almost goes without saying that the United States does not meet its obligations to ensure respect for the Conventions if it fails to supervise its contractors who, in the course of executing their contract,

¹¹⁹ Watts Interview, *supra* note 52; see also Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 136–37 (2003) (asserting that nations who do not ensure that other parties respect the protections of GCIV are in breach of Common Article 1).

¹²⁰ GCIII, *supra* note 3, art. 1.

¹²¹ PICTET’S COMMENTARIES TO GCIII, *supra* note 29, art. 1.

¹²² COMMENTARY TO THE GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art 1 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org> [hereinafter PICTET’S COMMENTARIES TO GCIV].

breach the Conventions.¹²³ It would seem to render meaningless the obligation to ensure respect for the Conventions if a High Contracting Party could simply hire contractors to breach the Conventions on its behalf.

United States investigations into incidents of detainee abuse are highly critical of the role played by contract interrogators and translators. In fact, the Schlesinger Report found that contract interrogators were sometimes considered more effective than less experienced service members, but that oversight of contractor personnel was not sufficient to ensure their activities fell within the requirements of the law.¹²⁴ The Taguba Report likewise found that at least two contractor personnel violated the law in the conduct of their duties.¹²⁵ In sum, while international law sets the “agency” standard high,¹²⁶ the risk is significant that either through application of the ICJ test or through a Common Article 1 analysis, the United States could be found responsible under international law for the actions of its contractors.

2. *Responsibility for Private Actors Under U.S. Law*

United States federal courts apply a different standard than that recognized by the ICJ in determining when the actions of private

¹²³ It is interesting to note that “supply contractors” are included in the GCIII, Article 4 definition of prisoners of war, and are therefore entitled to the GCIII protections if captured. GCIII, *supra* note 3, art. 4. Whether “supply contractor” extends to the myriad of contractors on the battlefield today is beyond the scope of this paper. Nevertheless, it seems incongruent that a government who captures a contractor is obligated to provide POW protections to that person but would not be responsible to ensure that contractors hired to interrogate POWs respect the POWs’ protections.

¹²⁴ SCHLESINGER REPORT, *supra* note 118, at 69.

¹²⁵ Taguba Report, *supra* note 4, at 48.

¹²⁶ Professor Finkelstein proposes that the Touvier case demonstrates that a lower, more flexible approach based on the status of the actor, rather than the “act-by-act” approach, is more appropriate to international law agency issues. Finkelstein, *supra* note 109, at 276–82. She argues that the Touvier court applies an analysis similar to that described in § 207 of the Restatement (Third) of the Foreign Relations Law of the United States and applied by U.S. courts in similar cases. *Id.*; *see also* Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts arts. 5, 8, 9 (Nov. 2001), [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf) [hereinafter State Responsibility Draft Articles] (asserting that a state is responsible for the internationally wrongful acts of an individual when, the individual actually exercises governmental authority, acts under the instruction or direction of the State authorities, or exercises authority in the absence or default of the actual authority).

individuals in violation of international law may be attributable to the State. United States foreign relations law recognizes that a state may be liable for the acts that violate international law of any “agent . . . acting within the scope of authority or under color of such authority”¹²⁷ To determine whether an act of a private individual was done under the color of state authority, “one must consider all the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for a public purpose or for private gain, and whether the person acting wore official uniforms or used official equipment.”¹²⁸

Federal courts have also drawn analogies to similar provisions in federal law to determine when the actions of a private individual may be attributable to a state for the purposes of proving a violation of international law. In *Kadic v. Karadzic*,¹²⁹ victims of atrocities committed in Bosnia sued Radovan Karadzic, a private individual who was recognized as the putative president of the Bosnian Serbs and leader of the Bosnian Serb forces.¹³⁰ On appeal, the Court of Appeals for the Second Circuit analogized the “color of law” jurisprudence of 42 U.S.C. § 1983, explaining that § 1983 served as a “relevant guide” to determine whether a private individual had engaged in official acts that violated international law.¹³¹ Accordingly, the court found that “[a] private individual acts under color of law . . . when he acts together with state officials or with significant state aid.”¹³²

The U.S. District Court for the Eastern District of Louisiana followed *Kadic* in *Beanal v. Freeport-McMoran, Inc.*¹³³ Beanal, a resident of Irian-Jaya, Indonesia, sued Freeport-McMoran, the corporate owner of a

¹²⁷ RESTATEMENT (THIRD), *supra* note 3, § 207.

¹²⁸ *Id.* § 207 cmt. d.

¹²⁹ *Kadic v. Karadic*, 70 F.3d 232, 245 (2d Cir. 1995).

¹³⁰ *Id.*

¹³¹ *Id.* Section 1983 of Title 42, United States Code, provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.S. § 1983 (LEXIS 2006).

¹³² *Kadic*, 70 F.3d at 245.

¹³³ *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 365 (E.D. La. 1997).

gold mine in Indonesia, for numerous violations of international human rights laws.¹³⁴ Following the lead of the Second Circuit, the court noted that it had to consider the test for state action contained in *Restatement* section 207 and the “under color of law” jurisprudence of 42 U.S.C. § 1983.¹³⁵ The court then observed that Beanal could meet the requirement to show state action by demonstrating, for example, that Freeport-McMoran’s actions constituted or appeared to constitute official acts of the Indonesian government; that Freeport-McMoran was carrying out a public purpose in its activities; that the presence of Indonesian military or governmental officials lent an air of authority to Freeport-McMoran’s actions; that Freeport-McMoran “acted in concert with a foreign state;” or that Freeport-McMoran was “conspiring in, aiding, or abetting official acts.”¹³⁶

Under these federal court precedents, the United States is likely responsible for the actions of its contractors who participated in abuse of detainees.¹³⁷ The Taguba Report indicates that contractor personnel sometimes wore military uniforms,¹³⁸ and further finds that contract personnel “allowed and/or instructed [military police], who were not trained in interrogation techniques, to facilitate interrogations by ‘setting conditions’ which were neither authorized and in accordance with applicable regulations/policy”¹³⁹ and that contractor personnel “clearly knew [the] instructions [provided to MPs] equated to physical abuse.”¹⁴⁰ Contractors then acted “together with state officials.”¹⁴¹ Arguably, contractors could also have been “acting in concert” with the United States government and “aiding or abetting official acts” with respect to detainee treatment.¹⁴² Under either test, the acts of United States contractors are attributable to the United States as official state action.

¹³⁴ *Id.*

¹³⁵ *Id.* at 374.

¹³⁶ *Id.* at 375.

¹³⁷ See generally Gregory G.A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 388–93 (synthesizing situations when private corporations or individuals may be held liable for violations of international law with situations when state action is necessary).

¹³⁸ Taguba Report, *supra* note 4, at 26.

¹³⁹ *Id.* at 48.

¹⁴⁰ *Id.*

¹⁴¹ *Kadic v. Karadic*, 70 F.3d 232, 245 (2d Cir. 1995).

¹⁴² *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp 362, 375 (E.D. La. 1997).

3. *Why It Matters*

Allowing a contractor to be cloaked with government authority by acting as an “agent” of the government or by acting under the color of state authority has two important consequences when analyzing the remedies available for abused Iraqi detainees. First, under the international law “act-by-act” agency standard articulated by the ICJ in *Nicaragua v. United States* and explained by Professor Finckelstein, a government may be responsible for the actions of private individuals, when a state authority directs the private individual to commit those acts.¹⁴³ Even if the relationship between the state and the private individual does not rise to the level required by the ICJ, the United States’ failure to properly instruct or supervise the contractors may have breached its obligations under Common Article 1 to ensure respect for the Conventions.¹⁴⁴ In the case of abused Iraqi detainees, this alleged breach could lead to claims from the Iraqi government that the United States, through its employees and contractors, owes Iraq state-to-state reparations.¹⁴⁵

Second, as U.S. courts recognized in *Kadic* and *Beanal*, when an individual acts under the color of state authority, that individual becomes open to suit under various United States statutes, including the Alien Tort Claims Act, for violations of international law.¹⁴⁶ While it is unlikely that these suits against private individuals would result in judgments against the United States,¹⁴⁷ the plaintiffs must prove both the connection between the private individual and the State and the private individual’s violations of international law.¹⁴⁸ The result could be extensive third party discovery involving the United States and U.S. personnel, an undesirable development under any circumstances.

¹⁴³ See *supra* notes 92–117 and accompanying text (describing International Court of Justice decisions concerning, respectively, the Iranian hostage episode in 1979 and U.S. military involvement with the Nicaraguan *Contras*).

¹⁴⁴ See *supra* notes 118–21 and accompanying text.

¹⁴⁵ See *infra* notes 156–65 and accompanying text.

¹⁴⁶ See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710–34 (2004) (determining generally the scope of the ATCA and examining other sources of law as they related to tort-like suits for damages in U.S. federal courts).

¹⁴⁷ See *infra* Parts III.B, C.

¹⁴⁸ *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 365 (E.D. La. 1997).

III. Remedies for International Law Violations

As the preceding sections have explained, the U.S. government must be concerned about the risk and cost it faces for acts of abuse in violation of international humanitarian law against Iraqi detainees by both U.S. personnel and contractors. This section will demonstrate, however, that international humanitarian law is generally ill-equipped to address claims of individual victims alleging injuries because of a state's violation of international law.¹⁴⁹ As a result, especially given the political overtones inherent in any such case, it is quite likely that additional Iraqi detainees alleging abuse will seek redress under U.S. domestic law and in the federal courts. As argued below, this avenue will likely result in protracted litigation without bringing relief to those abused and is not in the best interests of the United States.

At the outset, “[u]nder international law, the breach of an international obligation, whether deriving from customary international law or from international agreement, gives rise to *international* remedies against the violating state.”¹⁵⁰ These international remedies include traditional state-to-state diplomatic protection and demands for reparations, as well as any additional remedies provided for in an international agreement relevant to the claims.¹⁵¹ An international agreement may provide remedies for individual victims of international law obligations. Modern international human rights agreements sometimes provide individual victims access to international forums and allow individual victims to present petitions without requiring sponsorship of the petition by a state party.¹⁵²

¹⁴⁹ See Scheffer, *supra* note 70, at 856–59.

¹⁵⁰ RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. a (emphasis added); see Dolzer, *supra* note 17, at 296–97.

¹⁵¹ See RESTATEMENT (THIRD), *supra* note 3, § 703.

¹⁵² See RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. c (stating that international human rights agreements usually require state parties to provide remedies for violations in domestic law), § 906 cmt. a (stating that some human rights agreements allow individuals to present petitions to certain international forums); Chante Lasco, *Repairing the Irreparable: Current and Future Approaches to Reparations*, 10 HUM. RTS. BR. 18, 18–20 (2003) (analyzing current reparations law and suggesting future parameters that could better meet individual victim's needs); Roht-Arriaza, *supra* note 6, at 479–83 (describing remedies available to individuals for violations of international human rights laws); Christian Tomuschat, *Restitution for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 157–59 (2002) (providing historical analysis for settling claims of international human rights violations..

In the case of international humanitarian law, however, the remedial framework is markedly different. As discussed below, international humanitarian law agreements seldom allow individuals to access international forums and rarely contain specific requirements with regard to individual remedies against violating states. More frequently, international humanitarian law agreements require states to enact legislation designed to ensure victims an effective remedy in the event of a treaty violation.¹⁵³ One difficulty with this approach is a lack of guidance within the agreements about what “remedy” is effective. Another problem is the rarity of specific mechanisms to directly compensate victims, especially in older agreements.¹⁵⁴ Indeed, Pictet’s Commentaries to Article 148 of GCIV state:

As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State, and they form part, in general, of what is called “war reparations.” It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability.¹⁵⁵

Nevertheless, as explored below, individual victims may pursue remedies in the domestic courts of their own state or the violating state, pursuant to domestic law.¹⁵⁶ The process is frequently long and expensive. Even worse, the recent United States Supreme Court decision

¹⁵³ See, e.g., GCIV, *supra* note 3, art. 146; RESTATEMENT (THIRD), *supra* note 3, § 703 cmt. c.

¹⁵⁴ Compare GCIII, *supra* note 3, arts. 130–32 (describing grave breaches, stating no party may absolve itself from responsibility for violations that constitute grave breaches, and providing for “enquiry” in the event a party believes another party has breached the convention) with International Convention on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 71 (providing rights to compensation in two specific instances and requiring state parties to enact necessary domestic legislation) and Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (providing that each state party must enact an enforceable right through which victims of torture can obtain redress and compensation). See generally Tomuschat, *supra* note 152, at 161–73 (discussing debate in the international community over the meaning of the word “remedy” in international agreements).

¹⁵⁵ See PICTET’S COMMENTARIES TO GC IV, *supra* note 122 art. 148.

¹⁵⁶ See RESTATEMENT (THIRD), *supra* note 3, § 906 cmt. b.

in *Sosa v. Alvarez-Machain* made successful federal litigation significantly more difficult for victims of international law violations.¹⁵⁷ Unfortunately, current U.S. claims laws and the lack of clear alternatives in the international system usually make U.S. federal courts the best solution. Significantly, this choice is also the least attractive for the U.S. government and for the individual defendants who are accused of abuse.

A. States' Obligation to Make Reparations

While more recent international humanitarian law agreements invariably seem to contain a requirement that states enact laws to prosecute violators of the most important provisions of international humanitarian law,¹⁵⁸ the agreements are generally silent regarding what "civil" remedies the victims may claim in the event of a violation.¹⁵⁹ Customary international law, as evidenced by the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts,¹⁶⁰ specifically notes, however, that a state responsible for an internationally wrongful act¹⁶¹ is under an obligation

¹⁵⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710–34 (2004) (narrowing the scope of the Alien Tort Claims Act relative to prior interpretations in lower courts and examining other sources of law as they related to tort-like suits for damages in U.S. federal courts).

¹⁵⁸ See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide art.5, Dec. 9, 1948, 78 U.N.T.S. 277; GCIII, *supra* note 3, art. 129. See generally Bassiouni, *supra* note 6, at 9 (discussing in detail the need and requirement to prosecute offenders of serious violations in international humanitarian law).

¹⁵⁹ For example, GCIII provides only a means through which states may mediate or consult regarding suspected violations, but it contains no specific consequences or remedies if a violation occurs. See GCIII, *supra* note 3, art. 132.

¹⁶⁰ See Chairman of Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001) delivered to the General Assembly*, 29–365, U.N. Doc. Supp. No. 10, A/56/10 (2001), available at <http://www.un.org/law/ilc/reports/2001/2001report.htm>; see also United States Department of State, Draft Articles on State Responsibility: Comments of the Government of the United States of America (Oct. 22, 1997), available at http://lcil.law.cam.ac.uk/projects/state_document_collection.php#5 [hereinafter U.S. 1997 Comments to Draft Articles] (acknowledging that many of the draft articles constitute customary international law); Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, INT'L REV. OF THE RED CROSS, June 2002, at 401.

¹⁶¹ State Responsibility Draft Articles, *supra* note 126, art. 2 ("There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) Is attributable to a State under international law; and (b) constitutes a breach of an international obligation of the State."). See generally Sassoli, *supra* note 160, at 401 (discussing application of the Draft Articles to international humanitarian law).

to make reparations for the injury caused by that act.¹⁶² Reparations¹⁶³ include restitution, re-establishment of “the situation which existed before the wrongful act was committed;”¹⁶⁴ compensation, including “financially assessable damage” to the extent “such damage is not made good through restitution;”¹⁶⁵ and satisfaction, utilizing other measures necessary to correct the injury, such as an apology or an expression of regret.¹⁶⁶

Significant for the analysis here, the United States noted in its Comments on the Draft Articles that the articles on reparations represent customary international law, except to the extent that some of their provisions tend to “undermine the well-established principle of ‘full reparation.’”¹⁶⁷ In sum, under customary international law, Iraq may demand, and the United States would owe, reparations for violations of international humanitarian law that were committed against Iraqi nationals and are attributable to the United States. Although the United States likely owes reparations to Iraq under customary international law, abused Iraqi detainees do not have corresponding individual rights to compensation for the abuse they suffered at the hands of U.S. employees and contractors.

B. No Direct Remedy Through International Humanitarian Law

Recall that the obligations of the Geneva Conventions and of customary international law are owed from one state to another. They are obligations of the State either because the states are parties to an international agreement or, in the case of customary international law, because the states are part of the international community. Significantly, as the earlier discussion indicates, international law obligations are generally not the obligations of the individuals charged to carry them out,¹⁶⁸ and the obligations do not run to individuals.¹⁶⁹ International

¹⁶² State Responsibility Draft Articles, *supra* note 126, art. 31.

¹⁶³ *Id.* art. 34 (listing types of reparations as restitution, compensation, and satisfaction, “either singly or in combination.”).

¹⁶⁴ *Id.* art. 35.

¹⁶⁵ *Id.* art. 36.

¹⁶⁶ *Id.* art. 37.

¹⁶⁷ U.S. 1997 Comments to Draft Articles, *supra* note 160.

¹⁶⁸ *See supra* notes 92–117 and accompanying text. Of course, individuals can be held both criminally and civilly liable if sufficient domestic or international law exists. Even when this is the case, as the above analysis demonstrated, individual liability for

agreements, “even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts”¹⁷⁰ Indeed, most commentators conclude that no private right to compensation exists outside of a limited number of provisions in certain human rights treaties that specifically create a mechanism through which individual claimants may bring their grievances.¹⁷¹

More specifically, as Professor Christian Tomuschat notes, a set of draft rules pertaining to “the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms” has been pending before the United Nations Commission on Human Rights for several years.¹⁷² This document, which is based on the recently adopted *Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts*, would grant victims “all conceivable rights,”¹⁷³ including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁷⁴ Professor Tomuschat points out, however, that “states are quite reluctant to accept such a regime,”¹⁷⁵ and despite requests by the U.N. Commission on Human Rights, few states have even commented on the draft articles.¹⁷⁶ Accordingly, Professor Tomuschat concludes that rules that seek to endow victims of international

violations of international law rests on tying the individual’s actions to the responsibilities of the state.

¹⁶⁹ See Dolzer, *supra* note 17, at 306.

¹⁷⁰ RESTATEMENT (THIRD), *supra* note 3, § 907 cmt. a. With respect to U.S. law, courts have recognized that treaties such as the International Convention on Civil and Political Rights are not privately enforceable, as they are not self-executing, but instead require implementing legislation to give them direct force in U.S. law. See *Sosa v. Alvarez-Machain*, 542 U.S. 682, 735 (2004); *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40 (D.C. Cir. 2005). One U.S. court, however, has determined that the portions of the Geneva Conventions designed to create individual protections are self-executing, and, therefore, potentially enforceable by individuals. *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992), *cert. denied*, 523 U.S. 1060 (1998). *But see* *Tel-Oran v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (concurring opinion noted that Geneva Conventions are not self-executing).

¹⁷¹ See Tomuschat, *supra* note 152, at 157-59 (providing historical setting for claims of international human rights violations); see also Dolzer, *supra* note 17, at 297 (describing the classical approach to resolving war-related claims); Lasco, *supra* note 152, at 18 (providing analysis of current and historical reparations matters).

¹⁷² Tomuschat, *supra* note 152, at 160.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

wrongdoing with individual rights to restitution or compensation, outside of those limited rights specifically enshrined in certain international human rights agreements,¹⁷⁷ “do not, as of yet, enjoy the support of the international community.”¹⁷⁸

This observation has particular significance with respect to international humanitarian law agreements. Significantly, as Professor Rudolf Dolzer notes:

[T]he classic view of individual war claims as being covered by the process of negotiating and exacting reparations is based on the difference in the status of war and of peace in international law . . . Wars, as understood in international law, exist between states, not within states and not between states and persons.¹⁷⁹

It follows from this line of reasoning that war claims, whether arising from battle damage or from violations of international humanitarian law, are unique from other international personal injury or property claims brought during peacetime. Indeed, as Professor Dolzer argues,

From a perspective of pure legal logic, it is possible to consider the extension of the concept of human rights to the area of [war] claims settlement in the sense of replacing the rules of diplomatic protection to granting direct standing to an individual to raise a claim against a foreign government. In practice, however, the international community has refrained from drawing such a conclusion, as is evident in every textbook of international law. As far as the specific rules of humanitarian law are concerned, no changes have been introduced in the post-war period which would indicate the will of the international community to alter the general lack of standing of individuals to raise a claim, even though this body of law was revisited by the states on several occasions.¹⁸⁰

¹⁷⁷ *Id.* at 161–73.

¹⁷⁸ *Id.* at 161.

¹⁷⁹ Dolzer, *supra* note 17, at 300.

¹⁸⁰ *Id.* at 336.

The text of the major international humanitarian law agreements likewise supports the conclusion that individual victims of war do not have a private right of action to seek compensation or redress. For example, GCIII, which covers the protection of POWs, contains minimal explanation of the consequences for violating its terms and does not provide for individual claims by prisoners who have been victims of such violations. Specifically, only four articles, Articles 129 through 132, deal specifically with violations of the Convention. Article 129 requires state parties “to enact any legislation necessary to provide *effective penal sanctions* for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130].”¹⁸¹ No mention is made of providing compensation or restitution for the victim of that grave breach. Similarly, Article 132 provides:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.¹⁸²

Thus, Article 132 also fails to mention remedies for victims. Instead, remedies for any violations of the terms of the Convention will be the result of state-to-state procedures, helped along, if necessary, by an “umpire.”¹⁸³

Perhaps the closest GCIII comes to providing some recourse for victims is found in Article 131, which provides that “[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in [Article 130].”¹⁸⁴

¹⁸¹ GCIII, *supra* note 3, art. 129 (emphasis added).

¹⁸² *Id.* art. 132.

¹⁸³ It is interesting that in its final sentence, Article 132 could be read to limit the consequences of violations to putting an end to the violative actions. Read in light of the customary law, state-to-state remedies outlined *supra*, however, it is likely best read as not limiting other avenues for the aggrieved party. *See* discussion *supra* Part III.A.

¹⁸⁴ GCIII, *supra* note 3, art. 131.

As state parties themselves are not amenable to penal sanctions, and Article 131 uses the term “liability,” a term closely associated with civil damages, Article 131 would appear to allow—if not require—a state party who suffered a grave breach to demand some form of civil compensation. Nevertheless, Article 131 does not mention individual victims and creates no right to or expectation of compensation for the victims themselves.¹⁸⁵

Similarly, GCIV, relevant to the protection of civilians in time of war, contains no provisions through which an individual victim may claim compensation for a breach of its terms. Indeed, it contains enforcement provisions virtually identical to those in GCIII: penal sanctions against persons who commit grave breaches of the Convention; inter-state dispute resolution; and a prohibition against states absolving themselves of responsibility for grave breaches of the Convention.¹⁸⁶ Accordingly, civilians who suffer breaches of GCIV cannot rely on its terms to provide an avenue to compensation.

In contrast, Protocol I, which supplements the Geneva Conventions in times of international armed conflicts, does contain a provision requiring that a party that violates the terms of the Conventions is liable to pay compensation.¹⁸⁷ Unfortunately, it does not specify to whom compensation is owed, nor does it provide a mechanism for individual victims to present such a claim.¹⁸⁸

The statutes of international criminal tribunals similarly support the conclusion that individual victims of international law violations during international armed conflicts do not have a private right of action to seek compensation or redress. The Statute of the International Criminal Tribunal for the Former Yugoslavia limits punishment for convicted offenders to imprisonment and the return of seized property to its rightful owners.¹⁸⁹ It offers no mechanism, however, whereby individuals may

¹⁸⁵ See *supra* notes 179-181 and accompanying text. Pictet’s Commentaries contain identical language. PICTET’S COMMENTARIES TO GCIII, *supra* note 29, art. 131.

¹⁸⁶ See GCIV, *supra* note 3, arts. 146 (penal sanctions for grave breaches), 148 (forbidding states from absolving themselves of responsibility for grave breaches), 149 (providing for an interstate dispute resolution mechanism).

¹⁸⁷ Protocol I, *supra* note 15, art. 91.

¹⁸⁸ Protocol II, which supplements the Geneva Conventions in times of internal armed conflicts contains no similar provision. Protocol II, *supra* note 45.

¹⁸⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia art. 24, May 25, 1993, available at <http://www.un.org/icty/legaldoc-e/index.htm>.

present a claim for their missing or damaged property.¹⁹⁰ The Statute for the International Criminal Tribunal for Rwanda is virtually identical. It likewise does not provide for reparations to individual victims or allow victims to personally bring claims before the tribunal.¹⁹¹ The Rome Statute, the foundational document for the International Criminal Court, in contrast, contains a provision that allows the court to award reparations to victims of crimes prosecuted before the court, including restitution, compensation, and rehabilitation.¹⁹² In addition, it establishes a trust fund, funded by assets seized from defendants convicted by the court, to compensate certain victims of international crimes.¹⁹³ While this certainly is a step toward compensating individual victims of international crimes, like other international humanitarian law agreements, the Rome Statute does not allow individual victims either to bring claims directly before it or to make claims directly against the trust fund.¹⁹⁴

C. Domestic Law Remedies

This analysis demonstrates that individual abused Iraqi detainees have no direct right to compensation through international humanitarian law. It is equally likely, however, that the United States government may be liable for reparations because of international humanitarian law violations attributed to the United States. United States domestic law, also provides several avenues that in principle seek to bridge this gap. The first part of this section will provide a short overview of the statutes that are applicable to Iraqi nationals that allow individuals to present claims against the United States.¹⁹⁵ As the second part notes, the statutes currently in force are inadequate to address claims brought by Iraqi detainees alleging abuse by U.S. personnel. The third part will briefly explore the Alien Tort Claims Act and its application after *Sosa v.*

¹⁹⁰ *Id.*

¹⁹¹ Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, available at <http://65.18.216.88/ENGLISH/basicdocs/statute/2004.pdf>.

¹⁹² Rome Statute of the International Criminal Court art. 75, July 17, 1998, available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

¹⁹³ *Id.* art. 79.

¹⁹⁴ *Id.*

¹⁹⁵ Other claims statutes exist, but this section will highlight those potentially most applicable to Iraqi detainees claiming abuse.

Alvarez-Machain,¹⁹⁶ arguing that it is not in the United States' best interests to allow Iraqi abuse claims to be litigated in U.S. federal courts.

1. *Claims Statutes in U.S. Domestic Law*

a. *The Foreign Claims Act (FCA)*

The FCA authorizes payments to inhabitants of a foreign country for personal injury, death, or damage to real or personal property attributable to the United States; damage to real property incident to its use or occupation by U.S. forces; and damage or loss of property bailed to the U.S. armed services.¹⁹⁷ The loss must be the result of the negligent or wrongful acts or omissions of U.S. service members or civilian employees, regardless of whether the act or omission occurred in the scope of employment.¹⁹⁸ In addition, losses that result from the criminal acts of U.S. service members or civilians are payable under the FCA.¹⁹⁹ Claims that arise directly or indirectly from the combatant activities of the U.S. armed forces, however, are not payable under the FCA,²⁰⁰ and claims that apparently would otherwise fall within the terms of the statute are not payable if the claim "is presented by a national . . . of a country at war or engaged in armed conflict with the United States . . . unless . . . the claimant is, and at the time of the incident was, friendly to the United States."²⁰¹ Under the current claims procedures in Iraq, all claims of detainee abuse are forwarded through Army service channels to the Department of the Army General Counsel for final adjudication and settlement determinations.²⁰² Finally, because the FCA does not waive the U.S.'s sovereign immunity, recourse to U.S. domestic courts is not available if a claim is denied or a claimant is unwilling to accept the amount tendered in settlement.²⁰³

¹⁹⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹⁹⁷ 10 U.S.C.S. § 2734 (LEXIS 2006); U.S. DEP'T OF THE ARMY, REG. 27-20, CLAIMS ch. 10 (1 July 2003) [hereinafter AR 27-20].

¹⁹⁸ AR 27-20, *supra* note 197, para. 10-3a.

¹⁹⁹ *Id.* para. 10-4a.

²⁰⁰ *Id.* para. 2-39d(10).

²⁰¹ *Id.* para. 10-4i. The determination of whether the claimant is friendly is made by the settlement authority. *Id.*

²⁰² Herring Interview, *supra* note 9.

²⁰³ 10 U.S.C.S. § 2735; AR 27-20, *supra* note 197, para. 10-6f(4).

b. Federal Tort Claims Act (FTCA)

Unlike the FCA, the FTCA provides a limited waiver of United States sovereign immunity, and it provides a basis for jurisdiction in federal courts for tort claims that arise from the negligent or wrongful acts or omissions of U.S. employees, including service members, acting in the scope of their federal employment.²⁰⁴ Prior to filing suit in federal court, however, the FTCA requires that a claimant exhaust his administrative remedies with the federal agency whose employee allegedly engaged in the negligent or wrongful behavior.²⁰⁵ In addition, the FTCA is the exclusive remedy for damages pled in tort against either the United States or its employees acting in the scope of their federal employment (“in-scope employees”).²⁰⁶ If a suit is brought against an in-scope employee in his individual capacity, the Attorney General or his designee is empowered to substitute the United States for the individually named employee, procure the dismissal of the individually named defendant, and, if necessary, remove the case to federal court.²⁰⁷ The FTCA, however, specifically exempts from its waiver of sovereign immunity both torts that occur outside of the United States²⁰⁸ and intentional torts, including assault and battery.²⁰⁹

c. Military Claims Act (MCA)

The MCA allows the worldwide payment of claims that arise from the wrongful acts or omissions of service members or civilian employees of the military services acting in the scope of their federal employment.²¹⁰ It also allows for the payment of claims incident to the non-combatant activities of the U.S. armed services, even in the absence of negligent or wrongful acts or omissions of U.S. personnel.²¹¹ A tort-based claim arising in a foreign country may be settled under the MCA only if the claimant is normally a resident of the United States at the time

²⁰⁴ 28 U.S.C.S §§ 2671–80 (LEXIS 2006); AR 27-20, *supra* note 197, ch. 4.

²⁰⁵ 28 U.S.C. §§ 2672 (delegating settlement authority for FTCA claims to defendant agency), 2675 (administrative exhaustion requirement).

²⁰⁶ *Id.* § 2679(a).

²⁰⁷ *Id.* § 2679(d).

²⁰⁸ *Id.* § 2680(k).

²⁰⁹ *Id.* § 2680(h). This exemption would presumably cover sexual assault as well.

²¹⁰ 10 U.S.C.S. § 2733; AR 27-20, *supra* note 197, ch. 3.

²¹¹ AR 27-20, *supra* note 197, paras. 3-2a(2), 3-3a(2).

of the incident giving rise to the claim.²¹² Like the FCA, the MCA does not waive the U.S. sovereign immunity, so recourse to U.S. federal courts is not available if a claim is denied or a claimant is unwilling to accept the amount tendered in settlement.²¹³

d. Article 139 of the Uniform Code of Military Justice (UCMJ)

Article 139, UCMJ, provides an administrative mechanism through which a commander may ensure restitution is paid to a claimant who has suffered property damage as the result of certain types of wrongful acts by U.S. service members.²¹⁴ Once adjudicated, the United States pays the claimant and then recoups the payment from the wrongdoer's military pay.²¹⁵ Article 139, UCMJ, is not applicable to personal injury claims, nor can it be used to compensate claimants for the deeds of service members acting in the scope of their employment.²¹⁶ Likewise, it does not apply to damages caused by the negligent acts of service members²¹⁷

e. Claims Under Status of Forces and Other International Agreements

When an international agreement, such as a status of forces or basing agreement, contains provisions regarding the payment of claims that are authorized by 10 U.S.C. §§ 2734a or b, the United States will pay claims in accordance with those provisions of law and the terms of the international agreement.²¹⁸ Under 10 U.S.C. § 2734a, the United States agrees to pay a portion of the losses incident to the non-combat, in-scope activities of U.S. armed forces in foreign countries.²¹⁹ Under 10 U.S.C. § 2734b, the United States agrees to pay a share of the losses incident to

²¹² *Id.* para. 3-2c.

²¹³ *Id.* paras. 3-6d, 3-7.

²¹⁴ 10 U.S.C.S § 9393; AR 27-20, *supra* note 197, para. 9-4 (explaining that Article 139 claims may extend to claims for property willfully damaged or wrongfully taken by a service member).

²¹⁵ AR 27-20, *supra* note 197, para. 9-7.

²¹⁶ *Id.* paras. 9-5b (personal injury), 9-5c (in-scope damages).

²¹⁷ *Id.* para. 9-5a.

²¹⁸ *Id.* para. 7-1

²¹⁹ 10 U.S.C.S. § 2734a(a).

any in-scope activity of foreign armed forces causing damages in the United States.²²⁰ The United States currently does not have such an agreement with Iraq.

2. *Current Claims Statutes Do Not Reach the Problem*

The above discussion demonstrates that the United States cannot address violations of its obligations under international humanitarian law involving Iraqi detainees through existing claims statutes. The FCA, seemingly the most obvious choice, is unlikely to result in a positive adjudication because of its limitations regarding unfriendly claimants and its restrictions on claims stemming from the combatant activities of the U.S. armed services. The MCA does not specifically preclude unfriendly claimants, but it precludes payment of claims outside the United States, unless it is to a claimant who ordinarily resides in the United States. Like the FCA, the MCA also excludes claims for combat-related damages. Article 139, UCMJ does not compensate claimants for property damage caused by the misconduct of civilian employees, and it excludes claims for personal injury and claims stemming from negligence or the in-scope activities of service members. The FTCA excludes claims arising outside the United States and from intentional torts. Finally, the United States does not currently have an international agreement with Iraq that calls for the payment of claims.

In addition, the claims statutes described above provide settlement procedures only for claims specifically against the United States—in other words, for acts of U.S. service members and civilian employees. Even if they could be made applicable to claims of Iraqi detainees against the United States, the statutes do not provide a method to settle claims against U.S. contractors for violations of international law. Articles 2 and 31 of the Draft Articles make it clear that the obligations of states, including reparations, attach to all internationally wrongful acts attributable to the State under international law, not just those acts specifically committed by the State or its employees.²²¹

²²⁰ *Id.* § 2734b(a).

²²¹ State Responsibility Draft Articles, *supra* note 126, arts. 2, 31. The United States offered no specific comment on this article, but noted in its comment regarding the Draft's treatment of attribution that

Draft Article 8 provides that the conduct of a person or group of persons may be attributed to the State if 'it is established that such

3. *The Alien Tort Claims Act (ATCA)*

Individual Iraqis can, and indeed already have, filed lawsuits in U.S. federal court under the Alien Tort Claims Act.²²² The ATCA vests U.S. federal district courts with original jurisdiction to hear tort claims by aliens for injuries sustained as the result of violations of the law of nations or a treaty of the United States. The Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, however, clarified and narrowed the scope and applicability of the ATCA.²²³ In *Sosa*, the U.S. Drug Enforcement Agency (DEA) directed Mr. Sosa and others to seize Mr. Alvarez-Machain in Mexico, forcibly remove him to the United States, and subsequently turn him over to the DEA to stand trial for the torture and murder of a DEA agent.²²⁴ Upon his acquittal and release, Alvarez-Machain sued the United States under the FTCA and sued Sosa for violations of the law of nations under the ATCA.²²⁵

The Supreme Court recognized, *inter alia*,²²⁶ that the law of nations is a part of U.S. common law that evolves as circumstances change.²²⁷ It then held that district courts may look to the modern law of nations to

person or group of persons was in fact acting on behalf of that State.' We agree with the basic thrust of this provision that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship.

U.S. 1997 Comments to Draft Articles, *supra* note 160, at Part VI.2. Accordingly, it appears that the United States accepts the proposition that it may be responsible to make reparations for conduct attributed to the United States, as well as for its own actual conduct.

²²² 28 U.S.C.S § 1350 (LEXIS 2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

²²³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710–34 (2004).

²²⁴ *Id.* at 698.

²²⁵ *Id.* at 697–98.

²²⁶ The Court also issued an important clarification of the FTCA in this case. Although beyond the scope of this article, it is relevant to potential lawsuits by abused detainees that the Court overturned the so-called "headquarters tort" exception to the portion of the FTCA that excluded from its waiver of sovereign immunity acts or omissions that arose in a foreign country. *Id.* at 701. This judicially created doctrine reasoned that if the wrongful act or omission occurred in the United States, this was sufficient to vest a court with jurisdiction under the FTCA, even if the injury resulted in a foreign country. *Id.* The *Sosa* Court rejected this view, holding that the Act's exemption of torts arising in a foreign country referred to the location of the injury and not the location of the act or omissions. *Id.* at 710.

²²⁷ *Id.* at 720–21.

find underpinnings for the private causes of action anticipated under the ATCA.²²⁸ Given the unique nature of the law of nations, however, the Court held that district courts should “require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with . . . specificity.”²²⁹ The Court noted that prohibitions against torture rise to the requisite level of specificity, but, other than analyzing the nature of the violations alleged in the suit, reserved judgment on any other specific acts.²³⁰

The Court held that Alvarez-Machain’s actual complaints, alleging violations of international prohibitions against unlawful detention and arbitrary arrest, did not yet rise to the status of binding customary international law.²³¹ Moreover, the Court noted that although the International Convention on Civil and Political Rights (ICCPR), an international agreement binding on the United States, bars arbitrary arrest, it is not self-executing, and without implementing domestic legislation it does not create obligations enforceable in federal courts.²³² Accordingly, the Court held that Alvarez-Machain did not have a cause of action under the ATCA.²³³

Even after *Alvarez-Machain*, though, the ATCA might provide a viable remedial mechanism for abused Iraqi detainees. The Court noted that torture rises to the requisite level of specificity to be actionable under the ATCA.²³⁴ In addition, unlike the ICCPR, at least one court has concluded that the Geneva Conventions are self-executing in U.S. domestic law, at least with respect to those portions specifically designed to protect individuals.²³⁵ Accordingly, violations of GCIII and GCIV could apparently serve as the basis of a claim brought under the ATCA.

²²⁸ *Id.* at 724–25.

²²⁹ *Id.* at 725.

²³⁰ *Id.* at 732.

²³¹ *Id.* at 733–38.

²³² *Id.* at 735.

²³³ *Id.* at 738.

²³⁴ *Id.*

²³⁵ See *U.S. v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992), *cert. denied*, 523 U.S. 1060 (1998). *But see* *Tel-Oran v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (concurring opinion noted that Geneva Conventions are not self-executing); *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–40 (D.C. Cir. 2005) (concluding that the Geneva Conventions are not directly actionable in federal courts). It is also significant to note, however, that in *Hamdi v. Rumsfeld*, the Supreme Court apparently rejected the Fourth Circuit’s determination that the GCIII is not self-executing. *Hamdi v. Rumsfeld*, 542 U.S. 507, 515 (2004). While the Court did not expressly find that GCIII was self-

The ATCA, however, does not waive the United States' sovereign immunity,²³⁶ and individual U.S. employees and service members acting in the scope of their federal employment who are sued pursuant to the ATCA retain their Westfall Act immunity.²³⁷ The United States would, therefore, be substituted for any such individually named defendant. As a result, any suit brought directly against the United States or against a U.S. employee acting in the scope of his employment would likely be dismissed for lack of subject matter jurisdiction.²³⁸ Those employees found not to be acting in the scope of their employment, however, would remain subject to suit as individual defendants, as would any contractor or its employees. While it is unlikely that the United States would be found liable in a domestic court setting for the actions of these individuals, such a suit opens the door to extensive third party discovery involving the United States.

Pursuit of remedies in U.S. domestic courts is undesirable for other reasons as well. Unlike standard private torts, claims based on destruction, injury, and damage caused during a time of armed conflict have meaning outside of the dispute between the victim and the wrongdoer. Recognizing that ending hostilities involves more than simply stopping the fighting, "international practice has almost invariably resorted to a method of global settlement when formally putting an end to armed conflict by treaty arrangement."²³⁹ As Professor Dolzer explains:

executing, it specifically applied the principles of GCIII in concluding that Hamdi could no longer be held indefinitely in detention. *Id.* at 520–22. On remand from the Supreme Court, the Fourth Circuit further remanded the case to the Eastern District of Virginia for further consideration. *Hamdi v. Rumsfeld*, 378 F.3d 426 (4th Cir. 2004).

²³⁶ *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 886 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 354 (D. N.J. 2003).

²³⁷ See *supra* note 39 and accompanying text.

²³⁸ One commentator raises the interesting point that several exceptions the United States normally relies upon to counter mixed ATCA/FTCA claims might not be applicable during the occupation of Iraq. See Scheffer, *supra* note 70, at 857–58. Professor Scheffer suggests that application of occupation law in Iraq undermines application of the discretionary function exception. *Id.* at 858. The independent contractor exception is likewise undermined by the day-to-day supervision and control of many of the contractors by the United States, particularly in the unique circumstances presented in Iraq during the occupation. *Id.* Finally, Professor Scheffer argues that as there was no sovereign authority in Iraq other than the U.S. occupation authority, application of the foreign country exception is weakened. *Id.*

²³⁹ Tomuschat, *supra* note 152, at 180.

[The objective of peace treaties is to] end the hostilities, and establish the basis for durable accommodation and reconciliation, and to contribute to a new order of stability and security. These integrated goals are typically promoted by the inclusion of territorial, political, economic, financial and juridical parts, which in their entirety form the conditions under which both sides anticipate that a new order will be possible and desirable. Obviously, the various elements amount to a “package deal” in which negotiated compromises are embodied not just for their individual components, but as a whole. Indeed, peace treaties are permeated by the necessity of negotiated political compromise in order to allow adjustment and stabilization on both sides.²⁴⁰

....

In contrast, individual suits do not offer the same broad-based restructuring of the relations of the warring parties.²⁴¹

For example, individual jury awards based on individual proof of damages cannot holistically take into consideration the ability of a potentially war-ravaged wrongdoer to pay.²⁴² Perhaps more to the point here, claimants in a war-ravaged country may not realistically have access to U.S. federal courts. Moreover, the interest of the individual claimant in gaining compensation for the wrong suffered is not necessarily the same as his government’s interest in creating a stable, secure post-war environment.²⁴³

Recourse to individual domestic litigation also ignores the fact that the duties created in international law run between states, and the obligation to make good on those violations is the requirement of the wrongdoing state.²⁴⁴ While this usually will include the responsibility to

²⁴⁰ Dolzer, *supra* note 17, at 300.

²⁴¹ *Id.* at 302.

²⁴² Tomuschat, *supra* note 152, at 180.

²⁴³ One commentator notes, for example, that it is conceivable that an Iraqi victim could bring a suit under the ATCA against the U.K. for abuses that occurred during the occupation, a result that would certainly be unwelcome to U.S. authorities, and perhaps to the Iraqi authorities as well. Scheffer, *supra* note 70, at 858.

²⁴⁴ This is not to say that individual responsibility for wrongful acts committed during armed conflict should go unpunished. Rather, care must be taken to recall that it is

punish the actual perpetrators, it also includes the obligation to make reparations to injured States, as discussed above. Given the current state of the law, including the procedural barriers that stand in the way of a lawsuit against the United States brought by an abused Iraqi detainee, it is unlikely that such a suit would be successful. If this remains the only avenue through which such claims may be addressed, it is exceedingly unlikely that individual suits will serve to ensure that the United States meets its international law obligations.

IV. The Doctrine of Espousal

As the preceding sections show, international humanitarian law provides no direct avenue for addressing allegations of abuse of Iraqi detainees. Furthermore, U.S. domestic law solutions are inadequate to compensate abused detainees, regulate the United States' failures to meet its international law obligations, and restructure the relationship between the United States and Iraq. The answer, instead, is a treaty-based solution through which the United States and Iraq may address the contours of their post-Saddam relationship, including any claims of international humanitarian law violations by U.S. actors against Iraqi citizens.

A. Settlement of War-Related Claims

More specifically, the doctrine of espousal is a mechanism through which one government adopts, or espouses, and then settles the claims of its nationals against another government and its agents or nationals.²⁴⁵ Espousal is generally incorporated into an overall treaty that sets the parameters for the parties' future relations.

The United States has used this technique to settle claims in a variety of other settings. For example, in 1951 the United States signed an agreement with France regarding settlement of claims by French POWs held by the United States during World War II.²⁴⁶ According to the

insufficient to ignore the responsibility of the state—often significantly harder to pursue domestically and internationally—and focus solely on the easier to procure punishment of an individual wrongdoer.

²⁴⁵ See *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989).

²⁴⁶ Agreement between the United States of America and France, Settlement of Claims of French Prisoners of War, Feb. 2, 1952, T.I.A.S. 2951, 5 U.S.T. 622 [hereinafter U.S.-

agreement, the United States acknowledged that it had obligations to the French POWs stemming primarily from Military Payment Orders and Certificates of Credit Balances issued under the 1929 Geneva Convention on Prisoners of War.²⁴⁷ The United States further agreed that after the French authorities collected claims from former prisoners, the United States and France would negotiate a settlement of the claims “to relieve the United States of all obligations arising out of claims” by “nationals of France who were formerly prisoners of war in the custody of the United States”²⁴⁸ The United States would then satisfy its obligations to the French government under the terms of other agreements between the U.S. and France, including a \$50 million line of credit the United States made available to France following the war, rather than through direct payment to France.²⁴⁹

France then agreed, in return for this settlement, to “assume the responsibility of satisfying” all such claims of French nationals to discharge and hold harmless the United States from further liability to the ex-POWs.²⁵⁰ In other words, rather than paying the money owed directly to the ex-prisoners, the United States paid France a negotiated amount. France then agreed to espouse the claims of its citizens against the United States and settle them, holding the United States harmless.

France Agreement]. France, of course, was not actually at war with the United States during World War II. It was, however, partially occupied by Germany, and the remaining unoccupied portion was ruled by a French administration located in the town of Vichy. THE MILITARY HISTORY OF WORLD WAR II 18–28 (Barrie Pitt ed. 1986). French nationals from France itself and from its territories—especially, as the notes accompanying the Agreement state, persons from the Alsace and the Moselle regions of France—fought on the side of the Germans. Undated Note from the French Ministry of Foreign Affairs, Office of the Director of Administrative and Social Affairs Unions, to the Embassy of the United States in France, *appended to U.S.-France Agreement, supra*.

²⁴⁷ U.S.-France Agreement, *supra* note 246, pmb1.

²⁴⁸ *Id.* para. 5.

²⁴⁹ *Id.* para. 6 (explaining that the United States would pay its obligations to France from

[F]rancis accruing to the United States by the terms of any agreement between the Government of the United States and the Government of France, such as the Economic Cooperation Agreement of July 10, 1948 and the exchange of letters of December 6, 1947 between the French Minister of Finance and the Central Field Commissioner for Europe, Office of the Foreign Liquidation Commissioner, Department of State in connection with the fifty million dollar credit extended to the French Government on that date.).

²⁵⁰ *Id.* para. 7.

B. Jurisdiction Stripping Provisions

The U.S.-France Agreement²⁵¹ illustrates well the concept of espousal and the manner in which settlement of individual war-related claims is incorporated into the overall arrangements for peace between two states.²⁵² As noted below, in other circumstances, such agreements have also included provisions that strip U.S. courts of jurisdiction to hear suits involving the espoused claims.

Following World War II, the United States assumed a UN trusteeship for the Pacific Island Trust Territories, including the Marshall Islands, the Mariana Islands, and the Caroline Islands.²⁵³ During its trusteeship, the U. S. conducted nuclear testing on some of the islands that resulted in numerous lawsuits for property damage and personal injury against the United States and the contractors who worked on the testing.²⁵⁴ In the 1960s, the Pacific Island Trust Territories became four independent states:²⁵⁵ the Federated States of Micronesia, the Republic of Palau, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands.²⁵⁶ These states entered into Compacts of Free Association with the United States, parts of which consisted of agreements for the settlement of claims related to nuclear testing.²⁵⁷

To the Marshall Islands, the United States agreed to make a grant of \$150 million for payment and distribution under a separate agreement for settlement of the nuclear claims, the so-called “Section 177

²⁵¹ Interestingly, this agreement was effected by an “exchange of notes” rather than by an official treaty. U.S.-France Agreement, *supra* note 246, para. 6. Some commentators object to this technique, arguing that it usurps the constitutional authority of the Senate to ratify treaties. See Ingrid Brunk Wuerth, *The Dangers of Deference: International Claims Settlement by the President*, 44 HARV. INT’L L.J. 1 (2003). The argument has more resonance when the agreement strips the jurisdiction of the federal courts to hear the claims with which the agreement is concerned. See *infra* notes 250–59 and accompanying text. The United States did submit the Agreements with the former Pacific Trust Territories to the Congress, discussed *infra*, which passed a statute ratifying the Compacts of Free Association and the accompanying settlement agreements. See *Juda v. United States* 13 Cl. Ct. 667, 673 (Cl. Ct. 1987). This factor was of great significance to the courts that later determined the validity of the jurisdiction stripping provisions. *Id.*

²⁵² See *supra* notes 242–47 and accompanying text.

²⁵³ *Antolok v. United States*, 873 F.2d 369, 370 (D.C. Cir. 1989).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 371.

Agreement.”²⁵⁸ Article X of the Section 177 Agreement, entitled “Espousal,” states that the agreement “constitutes full settlement of all the nuclear testing claims, including any then pending or later filed in any court or other judicial or administrative forum, including . . . the courts of the United States and its political subdivisions.”²⁵⁹ In addition, Article XI contained an indemnification provision whereby the government of the Marshall Islands agreed to hold harmless “the United States, its agents, employees, contractors, civilians, and nationals from all claims set forth in Article X and any later claims arising out of the same nuclear testing program.”²⁶⁰

More importantly, Article XII of the Section 177 Agreement stated, “[a]ll claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.”²⁶¹ This language stripped U.S. courts of the jurisdiction to hear any claims of persons in the former Pacific Trust Territories for damages resulting from nuclear testing. In *Antolok v. United States*, over the objections of individual claimants who lost their right to sue, the U.S. Court of Appeals for the District of Columbia enforced the provision and dismissed all the suits encompassed by the Section 177 Agreement that were pending before it.²⁶² Significantly, based on the broadly inclusive language of Articles X and XI, federal courts were likewise divested of jurisdiction over claims both against contractors and agents of the United States and also claims against the United States itself.

²⁵⁸ Agreement for the Implementation of Section 177 of the Compact of Free Association, June 25, 1983, United States-Marshall Islands, available at <http://www.nuclearclaims.tribunal.com/177text.htm> [hereinafter Section 177 Agreement] (author was unable to locate an official source or a hard copy of this document, and it is cited in pertinent court cases only as an annex to the parties’ exhibits); *Antolok*, 873 F.2d at 371.

²⁵⁹ Section 177 Agreement, *supra* note 258, art. X, sec. 1; *Antolok*, 873 F.2d at 373.

²⁶⁰ Section 177 Agreement, *supra* note 258, art. XI; *Antolok*, 873 F.2d at 373 n.4.

²⁶¹ Section 177 Agreement, *supra* note 258, art. XII; *Antolok*, 873 F.2d at 373.

²⁶² *Antolok*, 873 F.2d at 385. Other courts followed suit. *Id.* at 372 n.3; see also *People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988) (dismissing similar suits brought by residents of Enewetak); *People of Bikini v. United States*, 859 F.2d 1482 (Fed. Cir. 1988) (dismissing similar suits brought by Bikini Islanders).

C. Espousal and Emerging States

In *Juda v. United States*, a related case with special significance for Iraqi detainee claims, nuclear testing claimants from the Bikini Atolls, a political subdivision of the Republic of the Marshall Islands, argued that the Section 177 Agreement was invalid because the government of the Marshall Islands lacked the capacity to espouse the plaintiffs' claims.²⁶³ More specifically, the Bikini plaintiffs argued that customary international law bars a government from espousing a claim unless the claim was continually owned by nationals of the state that purports to espouse the claim from the date the claim arose until at least the date the claim was asserted.²⁶⁴ The plaintiffs contended that because their claims arose prior to the existence of the government of the Marshall Islands, the government lacked authority to espouse their claims.²⁶⁵

In response, the court agreed with the plaintiffs' statement of international law, but stated that its application under the facts of the case did not "accord with the rationale for the doctrine."²⁶⁶ Unfortunately, the court does not go much farther than that, except to state that questions of international law regarding the nationality of citizens of emerging states were novel and unresolved, and that in any case, the jurisdiction-stripping provisions of Article XII were not contingent on judicial determination of the validity of the espousal provisions.²⁶⁷ The court then upheld the provisions of Article XII and dismissed the case.²⁶⁸

It is beyond the scope of this article to fully address the answers, if any, that have emerged in the eighteen years since *Juda* regarding nationality in the context of emerging states and its impact on espousal agreements involving claims of Iraqi detainees. Nevertheless, given the parallels between the governments of emerging states and the new Iraqi government, drafters of similar provisions in any agreement between the United States and Iraq should give significant consideration to the language of the espousal and jurisdiction-stripping provisions to ensure an outcome that can withstand any reservations a court may have in the light of the language in *Juda*. Of course, it is significant to note that courts upheld the jurisdiction-stripping arrangements, despite questions

²⁶³ *Juda v. United States*, 13 Cl. Ct. 667, 684 (Cl. Ct. 1987).

²⁶⁴ *Id.* at 685.

²⁶⁵ *Id.* at 686.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 690.

surrounding the capacity of the government of the Marshall Islands to espouse the claims. Unlike the Marshall Islanders, who held U.S. citizenship prior to their independence, Iraqi detainees were nationals of Iraq even before the creation of the current Iraqi government. As noted by the court in *Juda*, concerns about the ability of a new Iraqi government to espouse such claims would have to be addressed first to that new government and would have no resonance in U.S. courts.²⁶⁹

Espousal of claims of abused Iraqi detainees as part of an overall treaty between the United States and the new Iraqi government has significant advantages. First, it would settle under the same terms all potential claims involving the United States rather than leaving each claimant to face separate litigation. Indeed, negotiators should explore the possibility of including U.S. contractors directly in the settlement provisions, perhaps even requiring contribution to the settlement amounts by these contractors. In the wake of settlements involving corporations and governments stemming from World War II era claims regarding insurance payments and slave labor, such a prospect is not unprecedented.²⁷⁰

Second, as the U.S-France Agreement demonstrates, such an arrangement couches the settlement of the claims in the overall terms of peace between the parties. Finally, espousal keeps Iraqi claims out of U.S. courts. This exclusion both helps claimants and meets the requirements of the state parties and international law.

V. Conclusion

News stories virtually every day remind the reader or listener that U.S. personnel and contractors abused detainees in U.S. custody in Iraq in violation of the U.S.' international law responsibilities. International humanitarian law, however, especially the 1949 Geneva Conventions, does not provide an avenue through which victims of international law violations may directly assert their claims. Nevertheless, international law places responsibility for these violations, whether committed by the United States itself or by its agents acting under color of state authority, squarely on the U.S. government.

²⁶⁹ *Id.*

²⁷⁰ See Dolzer, *supra* note 17, at 296 (describing and analyzing recent lawsuits for World War II era claims).

The victims' most obvious response, one that several have already made, is to file claims and lawsuits under U.S. federal law against the United States, its employees, and contractors. For numerous reasons, that response is not only unlikely to result in satisfaction for claimants and plaintiffs, but also is not in the best interests of the United States. The United States can act to prevent this result by incorporating into future agreements with Iraq espousal of claims and jurisdiction stripping provisions like those used in the settlement of nuclear testing claims with the former Pacific Trust Territories.

Although Iraq is not emerging from trust status, the parallels between Iraq and the Pacific Trust Territories are significant. As with the former Trust Territories, the United States is seeking not only to settle claims but also to re-invent its relationship with Iraq. Accordingly, settlement of claims of abuse by Iraqi detainees must be treated as one interwoven part of the two governments' efforts to move beyond the past and into a more productive, mutually beneficial future.

THE PAST AS PROLOGUE:¹ MAJOR GENERAL GEORGE S. PRUGH, JR. (RET.) (1942-1975)—WITNESS TO INSURGENT WAR, THE LAW OF WAR, AND THE EXPANDED ROLE OF JUDGE ADVOCATES IN MILITARY OPERATIONS

LIEUTENANT COLONEL GEORGE R. SMAWLEY²

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.

— Sir Walter Scott³

I. Introduction

Forty years ago, the American Army faced an enemy unlike any they had previously fought. The Vietnam War was a conflict in which culture and politics blurred battle lines and where evil blended with innocence as the enemy moved almost seamlessly among and between civilian populations. The World Wars and Korea offered few lessons for fighting this new kind of war, where technology and overwhelming mass were no longer the keys to victory. Vietnam was also a war in which the traditional paradigms of international law seemed to reach the limits of its ability to order and define the disparate treatment of detainees,

¹ “Whereof what’s past is prologue, what to come in yours and my discharge.” WILLIAM SHAKESPEARE, *THE TEMPEST*, act II, sc. i, available at http://www.shakespeare-literature.com/The_Tempest/3.html.

² Judge Advocate General’s Corps, U.S. Army. Presently assigned as the Deputy Staff Judge Advocate, 10th Mountain Division (Light Infantry) and Fort Drum, Fort Drum, New York. The U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, 2004; LL.M., 2001, The Judge Advocate General’s School, U.S. Army; J.D., 1991, The Beasley School of Law, Temple University; B.A., 1988, Dickinson College. Previous assignments include Plans Officer, Personnel, Plans, and Training Office, Office of The Judge Advocate General, Washington, DC, 2001-2003; Legal Advisor, Chief, Administrative and Civil Law, and Chief, International Law, United States Army Special Operations Command, Fort Bragg, North Carolina, 1998-2000; Senior Trial Counsel, Special Assistant U.S. Attorney (Felony Prosecutor), Chief, Claims Division, Fort Benning, Georgia, 1995-1998; Trial Counsel, Special Assistant United States Attorney (Magistrate Court Prosecutor), Operational Law Attorney, Chief, Claims Branch, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1992-1995. Member of the bars of Pennsylvania, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court.

³ SIR WALTER SCOTT, *GUY MANNERING* 259 (New York: E. P. Dutton & Co., 1906) (1815).

insurgents, terrorists, saboteurs, freedom fighters, and domestic criminals. It was a war unlike any other, and the lessons of those who witnessed the conflict in Southeast Asia have resurgent value as a new generation of military leaders adapt to the new paradigm of the Global War on Terror (GWOT).

One such witness was Major General (MG) George S. Prugh, Jr., former The Judge Advocate General of the Army (TJAG) and a giant in the history of the Judge Advocate General's Corps (JAGC), whose tremendous legacy of integrating the law into military operations is still studied three decades after his retirement. Major General Prugh's remarkable career included a tour as General (GEN) William C. Westmoreland's legal advisor, U.S. Military Assistance Command, Vietnam (MACV),⁴ service as a formal delegate to the Diplomatic Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict,⁵ tenure as The Judge Advocate General of the Army, and seven years as a faculty member at University of California (U.C.), Hastings College of Law. His military experience spanned World War II, the Korean War, Vietnam, and the Cold War. This period included an evolution in military justice from the Articles of War to the Uniform Code of Military Justice (UCMJ), and a transformation military jurisprudence exemplified by the establishment of an independent military judiciary and creation of a separate criminal defense service.

⁴ The Military Assistance Command, Vietnam (MACV) was the United States command structure during the Vietnam War from 1962-1975. It was the successor to the Military Assistance and Advisory Group (MAAG), established in 1950, to assist the French and the Republic of Vietnam. The Vietnam War was the longest conflict in U.S. history, claiming over 58,000 casualties and an estimated 304,000 wounded. *See generally* SHELBY L. STANTON, VIETNAM ORDER OF BATTLE (2003); BRUCE PALMER, THE 25-YEAR WAR: AMERICA'S MILITARY ROLE IN VIETNAM (2002); GUENTER LEWY, AMERICA IN VIETNAM (1992); ANDREW A. WEIST, THE VIETNAM WAR 1956-1975 (2002).

⁵ The conference contributed to the overall work of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict. The conference resulted in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 8 June 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/ihl.nsf/INTRO/465?OpenDocument> [hereinafter Additional Protocol I]; *see* George S. Prugh, *American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions*, MILITARY L. & L. OF WAR REV. 31, 232 (1992); *see* George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1981) (providing an overview of the Protocol and discussion of some of its major changes in the law).

During and following his thirty-three years of military service, MG Prugh remained one of those rare leaders who continually sought new ways to integrate judge advocates and the law into military operations, and who provided a legacy of his experience for use by future generations. In his book, *Law at War: Vietnam 1964-1973*,⁶ over two dozen publications, and countless lectures and speeches, he articulated a vision for military law that is more relevant than ever. The contextual framework between Operations Enduring Freedom and Iraqi Freedom, and Prugh's own description of Vietnam, are striking.⁷ In 1974, Prugh wrote of Vietnam:

The battlefield was nowhere and everywhere, with no identifiable front lines, and no safe rear areas . . . It involved combatants and civilians from a dozen different nations. Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.⁸

Given the increasing attention paid to the role of international law in military operations, it is appropriate to remember Prugh at a time when

⁶ MAJOR GENERAL (MG) GEORGE S. PRUGH, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 (U.S. Army Center of Military History 1974), *available at* <http://www.army.mil/cmh-pg/books/vietnam/law-war/law-fm.htm> [hereinafter PRUGH, LAW AT WAR].

⁷ See CONRAD C. CRANE & W. ANDREW TERRILL, RECONSTRUCTING IRAQ: INSIGHTS, CHALLENGES, AND MISSIONS FOR MILITARY FORCES IN A POST-CONFLICT SCENARIO (2003); Edward P. Djerejian, Frank G. Wisner, Rachel Bronson, & Andrew S. Weiss, Guiding Principles for U.S. Post-Conflict Policy in Iraq (2003); James R. Howard, Preparing for War, Stumbling to Peace, Planning for Post-Conflict Operations in Iraq (May 26, 2004) (unpublished monograph) (on file with the School of Advanced Military Studies, Army Command and General Staff College, Fort Leavenworth, Kansas) (examining whether a disparate focus on combat operations during the planning and execution phase of Operation Iraqi Freedom contributed to slow and often ineffective reconstruction efforts); Seth G. Jones, et al., Establishing Law and Order after Conflict (2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG374.pdf ("Establishing security is critical in the short run to avert chaos and prevent criminal and insurgent organizations from securing a foothold in society, as well as to facilitate reconstruction in other areas such as health, basic infrastructure, and the economy."); *id.* at xii.

⁸ PRUGH, LAW AT WAR, *supra* note 6, at 62. "[I]t certainly is arguable that many Viet Cong did not meet the criteria of guerrillas entitled to prisoner of war status under Article 4, Geneva Prisoner of War Conventions." *Id.* at 66.

his experience in Vietnam and elsewhere is increasingly cited for its insights on difficult legal issues surrounding the status of insurgents, detention operations, application of the Geneva Conventions, and related issues. His career and work foreshadowed many of the issues the U.S. armed forces see today, which occupy headlines in an age when tactical decisions have enormous strategic implications.

This article introduces three separate but related stories: MG George Prugh's life and career; the role of judge advocates in Vietnam and its aftermath; and the importance of the law in military operations. Emphasis is given to Prugh's leadership philosophy and the institutional changes in the practice of military law observed throughout his service.⁹ In particular, this article introduces Prugh's direct involvement and work as the MACV Staff Judge Advocate (SJA). It is an introduction to one man's remarkable life and journey from the sandlots of San Francisco to the Pentagon, and of the Army and JAGC during the post World War II period.

II. 1920-1948¹⁰

A. Background

George Shipley Prugh, Jr. was born on 1 June 1920 in Norfolk, Virginia. His father's medical school education was interrupted a year short of graduation when his National Guard unit was federalized under General Pershing to pursue Poncho Villa along the Mexican border.¹¹ After several years as a provisional regular officer in the Infantry, including service in Panama and Europe, George Prugh, Sr. resigned his commission and ultimately took a job in 1928 with the Bausch and Lomb Optical Company in San Francisco, California. Prugh's mother, a

⁹ See THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 159-262 (1975) [hereinafter THE ARMY LAWYER].

¹⁰ See U.S. Army Military History Institute, Senior Officers Debriefing Program: Conversations Between Major General George S. Prugh and Major (MAJ) James A. Badami, Lieutenant Colonel (LTC) Patrick Tocher, and Lieutenant Colonel Thomas T. Andrews (various dates, 1975 & 1977) (unpublished manuscript, on file with The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS) Library, Charlottesville, Virginia) [hereinafter Prugh History, date of interview]. The Senior Officers Debriefing of MG Prugh is one of over two dozen personal histories on file with TJAGLCS Library. They are available for viewing through coordination with the TJAGLCS Librarian. See also THE ARMY LAWYER, *supra* note 9, at 256-257.

¹¹ *Id.* Prugh History, 18 June 1975, *supra* note 10, at 2.

teacher by education, remained at home after her marriage and applied high personal and academic standards to her two sons.¹²

Major General Prugh enjoyed an active childhood, characterized by athletics and membership in the Boy Scouts, where he earned the status of an Eagle Scout at the early age of 16,¹³ awarded by the founder of the scout movement himself, Lord Baden Powell.¹⁴ The young Prugh played baseball with Joe DiMaggio and the DiMaggio brothers in the sandlots of San Francisco's Marina District.¹⁵ He held part-time jobs as a paper boy for the Saturday Evening Post, and later as a bagman for Prohibition-era bootleggers, fondly remembering "accepting small amounts of money to carry packages that gurgled for some of the fellows that were delivering things around the neighborhood."¹⁶

This early period growing up in San Francisco included the increasing awareness of the rise of Hitler's National Socialist Movement, and the threats it posed.

I remember a German submarine coming to San Francisco, a Nazi submarine, and how . . . German people welcomed the Nazi seamen in town; they came all around, and we saw the swastika for the first time. This was about 1935 or '36. [It was] [v]ery ominous and the sort of thing that youngsters paid a lot of attention to. What was going on in Europe was really quite apparent, and everybody was thinking that there was going to be a war someday.¹⁷

¹² *Id.* at 6-8.

¹³ E-mails from Lieutenant Colonel Virginia P. Prugh, U.S. Army, Judge Advocate General's Corps to LTC George R. Smawley (Jan. 2-31, 2006) [hereinafter Correspondence with LTC Prugh] (on file with author). Lieutenant Colonel Prugh is the younger daughter of MG Prugh and currently serves as a military legal advisor to the U.S. State Department.

¹⁴ Prugh History, 18 June 1975, *supra* note 10, at 10.

¹⁵ *Id.* at 30. Major General Prugh remembers:

Joe DiMaggio was just about the same year in high school that I was. Dominick was a couple years behind and there were two other brothers that also played. . . . Anytime you [went] over to play ball, of course, there was at least one of the DiMaggios there playing.

Id.

¹⁶ *Id.* at 20.

¹⁷ *Id.* at 16-17.

His father's military experience helped inspire Prugh to seek and obtain an appointment to the U.S. Military Academy, but poor eyesight disqualified him from attending.¹⁸ In 1938, he enrolled at the San Francisco Junior College as an engineering major, where tuition was free; he later switched to pre-law when he received official word that he was medically ineligible for West Point.¹⁹ The next year he transferred to U.C. Berkeley, because of its fine reputation, proximity to San Francisco, and relative affordability at \$27.50 a semester. He majored in political science and minored in economics and history.²⁰

During his year at junior college, MG Prugh enrolled in a National Guard commissioning program and entered the Coast Guard Artillery Reserve Officer Training Corps (ROTC) program when he transferred to U.C. Berkeley.²¹ He received his bachelor's degree in May 1941, but still had a year to go before completing the ROTC commissioning requirements. The following fall he enrolled in law school at U.C. Berkeley, Boalt Hall, where he began his final year of pre-commissioning training.²² But in 1941, Pearl Harbor²³ changed everything, and realizing his law school education was about to be interrupted, Prugh took a leave of absence to focus on completing his pre-commissioning program. Also during this time, Prugh met his wife, Katherine "Kate" Buchanan, during a fraternity-sorority exchange. Katherine was the daughter of Rear Admiral Patton Buchanan.²⁴ The

¹⁸ Correspondence with LTC Prugh, *supra* note 13.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 20-21.

²¹ *Id.* at 23.

²² *Id.*

²³

On Dec. 7, 1941, while negotiations were going on with Japanese representatives in Washington, D.C., Japanese carrier-based planes swept in without warning over Oahu and attacked the bulk of the U.S. Pacific fleet, moored in Pearl Harbor. Nineteen naval vessels, including eight battleships, were sunk or severely damaged; 188 U.S. aircraft were destroyed. Military casualties were 2,280 killed and 1,109 wounded; 68 civilians also died. On Dec. 8, the United States declared war on Japan.

Encyclopedia.com, Pearl Harbor, <http://www.encyclopedia.com/html/P/PearlHar.asp> (last visited Feb. 24, 2006).

²⁴ Prugh History, 18 June 1975, *supra* note 10, at 24-25. Rear Admiral Patton Buchanan (U.S. Naval Academy, Class of 1911) had a distinguished career with service throughout the Pacific, including Guadalcanal, for which he received the Silver Star for heroism, China, and the Philippines. See George S. Prugh, *Reminiscences* 36 (1995) (unpublished

couple was engaged in the spring of 1941 and married in September 1942.²⁵

B. The Coast Guard Artillery & WWII

In March 1942, Prugh received his commission as a second lieutenant (2LT) and entered active duty four months later with the 19th Coast Guard Artillery Regiment (CGAR), stationed at Fort Rosencrans, San Diego.²⁶ The unit's mission focused on the harbor defense for the city of San Diego, armed with two batteries of twenty-year-old sixteen-inch guns.²⁷ Major General Prugh recalls his two-year service with the 19th as "a great experience . . . dug in on the side of a hill, firing [often] and training Marine artillery on [the] guns."²⁸

Shortly after arriving at the 19th CGAR, and despite only completing one semester of law school, Prugh was identified and detailed by his chain of command to serve as a criminal defense counsel. "[I] was one of the stable of about five defense counsel; the chief defense counsel was the only one in the group who was a lawyer."²⁹ During the first six

manuscript, on file with TJAGLCS Library). ". . . Admiral Pat Buchanan...was easily identified as an old sea dog. There was little tom-foolery when he was around." *Id.*

²⁵ Prugh History, 18 June 1975, *supra* note 10, at 24. Major General Prugh recognized the unique challenges for military wives:

A family has got to be able to adjust to [hardships of military life] and that is difficult for many wives, certainly for Judge Advocate wives. It seems to me that my observations of it is that the girl usually marries this young law school graduate having in mind being married to a lawyer and living in a community with all of the stability that the legal profession would normally have. They don't visualize being married to an Army officer and traveling around the world and moving their homes so frequently. I think this creates a real problem for us, especially in military lawyers. *Id.* at 27.

²⁶ *Id.* at 31-32; *see also* Prugh, *Reminiscences*, *supra* note 24, at 9-35.

²⁷ Prugh History, 18 June 1975, *supra* note 10, at 32. "[A]s artillery pieces, they were magnificent things. When we ultimately fired them, we got the longest range at that particular time that any American artillery had ever fired: 55,000 yards, which was then considered to be a tremendous range." *Id.*; *see also* Prugh *Reminiscences*, *supra* note 24, at 21-32.

²⁸ *Id.* at 33.

²⁹ *Id.* at 34. "My earliest court-martial cases were tried before I became a lawyer, while I was an artillery officer during World War II. Few counsel in those World War II days

months he tried roughly a case a month, including a rape contest resulting in an acquittal.³⁰ Thereafter, he was detailed as a trial judge advocate for his regiment, where he participated in numerous special courts-martial.³¹ Line officers without legal training were commonly detailed to this level of criminal trial work. Soldiers charged with offenses were not entitled to representation by an attorney for special courts-martial prior to the 1968 changes to the Uniform Code of Military Justice.³² Applicable military law at the time was derived from the 1928 Manual for Courts Martial (MCM) and the Articles of War, which, as Prugh notes, was “largely a repetition of the same basic law with which the United States Army had fought in World War I.”³³

In 1944, after completing the battery commander’s course at Fort Monroe, Virginia, Prugh returned to California for overseas movement to New Guinea aboard his father-in-law’s ship, the *Zielin*.³⁴ On the island of Leyte, New Guinea, he worked through a number of assignments, including infantry company commander and commander of a harbor defense battalion. Later, he moved to Oro Bay with the 276th Coast Artillery Battalion, where he held duty as the S-3 (operations officer) and commander of a Coast Artillery battalion.³⁵ In 1945, the 276th started up

had legal training and courts-marital were additional duties for already overburdened junior officers.” Prugh, *Reminiscences*, *supra* note 24, at 118.

³⁰ *Id.* at 34.

³¹ *Id.*

³² See JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* (2001). See generally DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 8-3 (1999); MAJOR GEORGE S. PRUGH, JR., *OBSERVATIONS ON THE UNIFORM CODE OF MILITARY JUSTICE: 1954 and 2000*, 165 MIL L. REV. 21, 37 (2000) [hereinafter PRUGH, *OBSERVATIONS*]; The Judge Advocate General’s Legal Center and School, *available at* <http://www.jagcnet.army.mil/JAGC-NETONINTERNET/HOMEPAGE/AC/TJAGSAWEB.SF/Main?OpenFrameset> (last visited Feb. 24, 2006).

³³ Prugh History, 18 June 1975, *supra* note 10, at 37.

³⁴ *Id.* at 40. See Prugh, *Reminiscences*, *supra* note 24, at 38-44.

³⁵ Prugh History, 18 June 1975, *supra* note 10, at 40-41. Although he held several commands during his service in the South Pacific, MG Prugh observed little if any serious misconduct.

[D]uring World War II when I was in New Guinea, we didn’t have any social problems. There was just too much other activity going on. It was not an agreeable environment so that people were thinking more about how to just survive and make out with their own basic comforts rather than being concerned with social problems. We didn’t have courts-martial. During all the time that my battalion was

the Luzon River, Philippines, landed at Subic Bay near Bataan, and encamped in San Marcellino in preparation for a final movement and invasion of Japan.³⁶ The long journey ended quietly when the war concluded two weeks later.

Following the Japanese surrender, the battalion moved to Manila, where Prugh had his first experience with prisoners of war and the issue of war crimes. He recalls that

the Filipino people were quite eager to tell of all the difficulties that they had had under the Japanese during this period. So there were plenty of things to remind you of atrocities to prisoners, war crimes, violations of conventions and all that sort of business, and I was very much interested in all [of it].³⁷

With the war over, Prugh returned home to California in February, 1946, and continued where he had left off at U.C. Berkeley Law School. When the school discouraged him from working in support of his wife and young daughter, he transferred to Hastings College of the Law, University of California, located in San Francisco.³⁸ Prugh estimates that “almost 100 percent of [his Hastings] class had served during the war,” the vast majority of whom were in school under the G.I. bill.³⁹

In November 1947, Prugh accepted a Regular Army (RA) commission in the Coast Artillery, and pursuant to his request, was assigned to the 6th Army Student Detachment in order to finish law school. In May 1948 he graduated from Hastings; President Harry Truman handed him the diploma.⁴⁰ That fall he received “a little post card telling [him] to report for duty to the 6th Army, Judge Advocate Office,”⁴¹ where he served, pending the results of California bar exam.

in New Guinea and the Philippines, I think we had, in close to two years, we only had one court-martial.

Id. at 31.

³⁶ *Id.* at 41.

³⁷ *Id.* at 43.

³⁸ *Id.* at 51-52.

³⁹ *Id.* at 52.

⁴⁰ *Id.* at 62.

⁴¹ *Id.* at 64.

III. 1948-1964

A. Entry Into the JAGC and Early Introduction to International Law

Major General Prugh was assigned to the Military Affairs Division, 6th Army, Presidio, where he benefited from traditional developmental jobs, including legal assistance and criminal defense work. He was the junior member in an office otherwise staffed by talented and experienced military attorneys with service in World War II.⁴² Issues facing the Presidio in the late 1940s often dealt with the aftermath of the Second World War. Prugh described the Presidio's mission as "sweeping up the debris of WWII . . . We were still concerned with the return of WWII dead, burials . . . and weren't doing very much in the way of military matters."⁴³ Nevertheless, the fundamental work of the legal office retained a traditional focus on military justice, claims, legal assistance, and related legal services.⁴⁴

One of the early and enduring impressions for Prugh was the need for some sort of institutional training program for young judge advocates.⁴⁵ It is important to remember that The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS)⁴⁶ as it currently resides did not exist in 1948; continuing education in military law was informal at best. Years later, as The Judge Advocate General, Prugh became an active advocate of judge advocate continuing legal education and helped facilitate programs like the Criminal Law New Developments course and the publication of *The Army Lawyer*.⁴⁷

During this early period at the Presidio, Prugh was also introduced to international law and war crimes through his immediate supervisor, Colonel (COL) Burton F. Ellis, who had the distinction of serving as the Chief Prosecutor for the Malmedy Massacre war crimes tribunals. These military tribunals concerned seventy-three Nazi Waffen SS Troops who were tried and convicted for the deaths of approximately eighty American prisoners of war during the Ardennes offensive of the Battle of

⁴² Prugh History, 5 July 1975, *supra* note 10, at 13.

⁴³ *Id.* 27-28.

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 19.

⁴⁶ See The U.S. Army Judge Advocate General's Legal Center and School, available at <http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (last visited Feb. 24, 2006).

⁴⁷ Prugh History, 5 July 1975, *supra* note 10, at 19-20.

the Bulge, December 1944.⁴⁸ The trial, *United States v. Valentin Bersin*,⁴⁹ began on 12 May 1946 before the Dachau International Military Tribunal.⁵⁰ The tribunal was established by the Judge Advocate Department of the U.S. Third Army to prosecute minor crimes and those alleged to have committed war crimes against U.S. personnel.⁵¹

By 1949, COL Ellis “was defending *himself* in the attacks that had been brought against the government’s prosecution of the Malmedy massacres.”⁵² The controversy, which included a U.S. Senate inquiry,⁵³

⁴⁸ See JAMES J. WEINGARTEN, *A PECULIAR CRUSADE: WILLIS M. EVERETT AND THE MALMEDY TRIAL* 40-43 (2000); see also UNITED NATIONS WAR CRIMES COMMISSION, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* (1997). An abbreviated history of the Malmedy Massacre Trial is available online. Dachau Scrapbook, Malmedy Massacre, <http://www.scrapbookpages.com/DachauScrapbook/DachauTrials/Malmedy.Massacre02.html> (last visited Feb. 24, 2006).

Less well known than the International Military Tribunal at Nuremberg which tried major German war criminals, the American Military Tribunal at Dachau tried 1,672 German alleged war criminals in 489 separate proceedings. Unlike the International Military Tribunal at Nuremberg which consisted of judges from 4 different nations, the Dachau trials were overseen exclusively by the United States. In this sense, the Dachau trials were not “international” in nature and are therefore more closely analogous to the 12 Subsequent Nuremberg Trials which also were overseen by the United States.

Id.; see also *The Malmedy Massacre Trial*, Jewish Virtual Library, at <http://www.jewishvirtuallibrary.org/jsource/ww2/malmedy2.html>.

⁴⁹ Records of U.S. Army War Crimes Trials in Europe: *United States of America v. Valentin Bersin, et al.*, War Crimes Case 6-24, May 16-18, 1946.

⁵⁰ WEINGARTEN, *supra* note 48, at 45.

⁵¹ *Id.* at 42-47.

⁵² Prugh History, 5 July 1975, *supra* note 10, at 1. (emphasis added)

I watched him – pretty much alone, defending the actions that he had taken and the decisions that had been clearly approved by his superiors at the time of the Malmedy action but which, when open to inquiry later, and most especially to political inquiries, no one else was coming forward to say, ‘Well, I approved that and I cleared it, therefore I should take some of the responsibility for it.’ It was a good lesson, I think, to learn that you have to stand on your own hind legs yourself.

Id. at 2.

⁵³ *Id.* at 2, 3. Major General Prugh recalled that,

concerned certain constitutional and procedural aspects of the prosecution of the cases that questioned the legitimacy of the trial.⁵⁴

[The accused] were identified through the use of confessions, and of course there were no American witnesses who could identify the units. Almost all this information had to be developed from confessions that were obtained from the men who actually participated, or from records which indicated that they were present at that time. At trial, the admission of these confessions became crucial. Were they obtained under constitutional safeguards as we would know in our own criminal courts? Or even in our own court martial courts?... there were concerns over our own military law system... and was a period when there were several so-called soul searching reviews of the whole military law system resulting in the Elston Act and then, a year or two later, the UCMJ.⁵⁵

Prugh's early introduction to the process and issues associated with war crimes, legal as well as political, was a defining moment that benefited him later in Korea with the Returned Exchanged Captured Allied Prisoners Korea (RECAP-K) (1953-1955), and in Vietnam. As he recalls, "the basic problems that I got a chance to learn a little about, back in 1948 and 1949, allowed me to apply those lessons on other occasions."⁵⁶

Senator Baldwin, Senator Kefauver, one or two others whose names escape me at the moment, were primarily the Senate sub-committee investigating the Malmedy massacre, and there was Senator Joe McCarthy, who was an invited member, to participant on the committee. Of course, he was one of the antagonists, and listening to him cross-examine not only Colonel Ellis, but Colonel Straight, who later became a Judge Advocate general officer, and General Mickelwaite, and a few of the other leaders of the Military Law community at that time, was a very interesting experience form my point of view.

Id.

⁵⁴ *Id.* at 2-5.

⁵⁵ *Id.* at 4, 5.

⁵⁶ *Id.* at 5.

In late 1948, Prugh finally received word of his passage of the California bar exam, and received orders to move to Washington, D.C. for an “observation tour” at the Pentagon. He hoped for a Regular Army (RA) commission in the Judge Advocate General’s Department after this assignment.⁵⁷ His SJA at the Presidio managed to defer his orders until March 1949, so Prugh could be present for the birth of his second child, a favor he never forgot. “It is the sort of thing that you remember, with an SJA that considerate, to work it out with the thoughts of the family involved. . . . [it helps] keep a person in the service.”⁵⁸ He received his RA commission later that summer.

B. Pentagon, Litigation-Claims Division

By the spring of 1949, the Prugh family arrived in Washington, and the general began work in the Military Litigation-Claims Division supporting Army litigation worldwide. The division was headed by COL Claude Mickelwaite, who later served as The Assistant Judge Advocate General of the Army (TAJAG).⁵⁹ The work focused on the preparation of materials for the Department of Justice in litigation involving military personnel or property. Significant cases included the Texas City Disaster,⁶⁰ which involved the explosion of ships off the Texas coast; and

⁵⁷ *Id.* at 28. Prugh recalls:

In those days, all new judge advocates had observation tours here at the Pentagon, usually a one-year observation tour and at the end of that time, the regular of JAG might be offered to you. Of course, I hadn’t yet gotten the results of the bar, in those days you didn’t have to be a lawyer to be a judge advocate.

Id. It is worth noting that Prugh completed his World War II (WWII) service in the rank of major, but had to accept the lesser rank of captain when he returned to active duty in 1949. Not too long afterward, during the Korean War, judge advocates who served during WWII were brought back on active duty in highest rank they had previously served. Correspondence with LTC Prugh, *supra* note 13.

⁵⁸ *Id.* at 28-29.

⁵⁹ *Id.* at 29. It is worth noting that Micklewaite was stationed at the Presidio when MG Prugh was a boy; his son, Malcolm, served in the Boy Scouts with MG Prugh, and they later attended the Army Command and General Staff College (CGSC) together. *Id.* at 30.

⁶⁰ *Id.* at 32. Major General Prugh recalls:

[It was] probably the biggest tort claim disaster the United States had ever had up to that point...The ships were carrying nitrate that had been brought down the Mississippi from various war production plants. [The] vessels were French with the intention that they be

the Empire State plane crash, in which “a bomber tried to fly through the middle of the Empire State Building and scattered its parts throughout downtown Manhattan, killing several people.”⁶¹

The Empire State case, in particular, offered some special lessons for Army litigation. Prugh notes that “when problems get to be so large that they influence the minds or pocketbook of the interest of a large number of people, then you can expect the decisions may well be political, rather than legal, and [that] political aspects have to be taken into account.”⁶² He also observed that the Department of Justice (DOJ) was ill-equipped to independently handle all the litigation involving the United States and that it relied heavily upon outside agencies for litigation support.⁶³ “So it became important to actually prepare the case from the standpoint that if you were going to be trying it yourself, what would you need? . . . [I]f you ask yourself that question as a JAG officer in litigation you are going to come up with a much better product.”⁶⁴

During his final two months at the Pentagon, Prugh shared a special assignment with Major (MAJ) Bruce Babbitt⁶⁵ to review clemency matters arising from World War II courts-martial. The team, known as KD-2 after a form used for criminal clemency reviews,⁶⁶ was charged with clemency review of serious criminal cases and had the special authority to make dramatic reductions in adjudged sentences.⁶⁷ Major General Prugh observed that “uniformity is an arguable thing and each

shipped to France in return for nitrate the U.S. used in WWII. So it was a payment in kind. No one knows, of course, what caused the explosion, but there was a feeling that there was a sort of *res ipsa loquitur* application here and that the explosion must have indicated negligence on the part of the (U.S.) government.

Id.

⁶¹ *Id.* at 35.

⁶² *Id.* at 34.

⁶³ *Id.* at 35.

⁶⁴ *Id.*

⁶⁵ *Id.* at 42-43. Babbitt was later promoted to Brigadier General (BG), and served as The Assistant Judge Advocate General for Civil Law. He is credited with authoring the 1968 Manual for Courts-Martial (MCM). Brigadier General Babbitt was a decorated Infantry officer during World War II, the top graduate from the first Judge Advocate Career Course in Charlottesville, Virginia, and had the distinction of assuming command of an Infantry battalion and fighting a rear-guard action while serving as a judge advocate in Korea. *Id.*

⁶⁶ *Id.* at 41.

⁶⁷ *Id.* at 42.

case is different and it is awfully hard to find [a method for giving] a precise punishment.”⁶⁸ The experience had a profound influence on Prugh, and convinced him of the importance of a robust appellate system.

C. United States Army Europe

In March 1950, Prugh was assigned to the Wetzlar Military Post near Frankfurt, Germany. The post-war period was difficult for the local population. Prugh distinctly recalls that “this was the time when Germany was pretty much flat on its back. It was having terrible black market problems, terrible financial problems, unemployment, and a tough winter due to a shortage of coal.”⁶⁹ He was assigned as the trial counsel and legal assistance officer for a large region that included much of Germany north of Frankfurt.⁷⁰ It was a busy time for the young judge advocate:

I was given a driver, an interpreter, and a jeep, and I roamed all over Germany. I was left very much on my own devices to prepare my cases. The case load was about one or two general court cases per week, and I could spend about three or four days in preparation and one day in trial. That [was normal]. The types of cases were largely black market, assault, murder, rape and armed robbery, and relatively few drug cases.⁷¹

A year later, in July 1951, Prugh was reassigned to the Rhine Military Post, Western Area Command, located in Kaiserslautern, Germany.⁷² This was a period of dramatic change in the practice of military justice. The 1948 Elston Act,⁷³ and the *1949 Manual for Courts Martial* implementing it, had come into effect and served as the first effort in a generation to update the Articles of War in effect since the

⁶⁸ *Id.* at 42-43.

⁶⁹ Prugh History, 7 July 1975, *supra* note 10, at 2.

⁷⁰ *Id.* at 2-3.

⁷¹ *Id.* at 3.

⁷² *Id.* at 12.

⁷³ Elston Act, Pub. L. No. 80-759, 62 Stat. 604, 627-28 (1948).

First World War. The Act was transitional legislation bridging the Articles of War to the 31 May 1951 introduction of the UCMJ.⁷⁴

The 1951 changes were significant and included the establishment of an “embryonic” judicial system, civilian oversight of military cases,⁷⁵ expansion of nonjudicial punishment (UCMJ Article 15) authority, and created the right of accused to have enlisted representation on courts-martial panels.⁷⁶ At the command level, revisions to Article 15, which replaced the Article of War 104, were particularly important because they afforded commanders new power to impose forfeitures of pay. This transformation in jurisprudence, however, was not without some resistance. Prugh recalls the atmosphere of a 1951 judge advocate conference, designed to explain the changes detailed in the new UCMJ,

was skeptical if not hostile. . . . The conferees sought answers to many questions regarding the new Code. Why is it necessary to make sweeping changes in that older law after it successfully served the United States through [the World Wars]? What is to be gained by an overwatching civilian Court of Military Appeals? Isn't it risky to undertake such a change in the midst of the then current disasters in Korea? Why should the very useful law member be removed from the trial court's deliberations? Is it not foolish to charge the law officer with the requirement to instruct the court-martial on the elements of the offense, thus adopting a civilian procedure that so frequently generates error on appeal? This new Code obviously demanded many more military lawyers—where would the services find sufficient legal talent to meet the needs?⁷⁷

Also during this period, Prugh observed the dramatic transformation of the American presence in Germany from a post-conflict occupation

⁷⁴ The Uniform Code of Military Justice (UCMJ) was enacted on 5 May 1950. Act of 5 May 5, 1950, 64 Stat. 108 (1950) (codified at 10 U.S.C. § 801-940 (1959)); see PRUGH, OBSERVATIONS, *supra* note 32; see also DANIEL WALKER, MILITARY LAW (1954); JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953); JAMES SNEDEKER, THE UNIFORM CODE OF MILITARY JUSTICE, 62 HARV. L. REV. 1377 (1949).

⁷⁵ Article 67 of the UCMJ established the Court of Military Appeals as a three-judge civilian court. 10 U.S.C. § 867 (1951).

⁷⁶ Prugh History, 7 July 1975, *supra* note 10, at 12.

⁷⁷ PRUGH OBSERVATIONS, *supra* note 32, at 39.

Army to the long-term, institutionalized presence developing on the eve of the Cold War. The Kaiserslautern area, in particular, saw a dramatic influx of military personnel, family members, and construction as “the American strength went from something like a division and a half to close to five divisions in a period of about a year.”⁷⁸ The rapid growth in the American presence created opportunities for unscrupulous businesses and contractors, mostly American, who took advantage of an environment with little oversight and massive amounts of money. Major General Prugh remembers:

[W]e sacrificed the integrity of the system for the expedient, and I think that whenever you do this you have to anticipate that you are vulnerable to the crook who wants to take advantage of it. These people were known as ‘five percenters’; they got the five percent out of it and became very wealthy people with Swiss bank accounts.⁷⁹

By 1952, Prugh assumed the position of Staff Judge Advocate for the four-attorney Rhine Military Post legal office following the unfortunate and untimely death of the previous SJA, Lieutenant Colonel (LTC) Carl Patterson. Prugh, a relatively young major with less than two years time in grade, was perhaps the youngest staff judge advocate in Europe at the time.⁸⁰ The responsibilities were enormous and included legal work covering “the largest land mass and the largest concentration of people [administered by] the Americans in Germany.”⁸¹ During his period in Europe, Prugh witnessed the remarkable evolution of U.S. involvement

⁷⁸ Prugh History, 7 July 1975, *supra* note 10, at 16.

⁷⁹ *Id.* at 18.

⁸⁰ *Id.* at 19.

⁸¹ *Id.* at 23. Prugh recalls that the staffing of the Rhine Military Post was clearly insufficient for the mission.

I found that a four man JAG office—a four lawyer JAG Office—simply cannot work in a busy jurisdiction. Clearly we were unrealistic in our earlier figures. A division general court-martial jurisdiction today has fifteen lawyers in it. You can see what we were up against with four. . . . We got the job done, I think, but we paid a heavy price in not doing or not trying some of the cases that we should have tried and maybe not trying them as well as we should have.

Id. at 24.

in post-war Germany and the conclusion of the radical downsizing and restructuring of the U.S. Army from 8,000,000 men and eighty-nine divisions in 1945 to 591,000 men and ten divisions in 1950.⁸² When he arrived in Europe in 1950, most military work was conducted by the U.S. Constabulary Army (1946-1952).⁸³ When he left over two years later, the Constabulary created for the allied occupation of Germany had given way to the unified U.S. European Command (USEUCOM) and North Atlantic Treaty Organization (NATO), and the new challenge of the Cold War.⁸⁴

D. Office of The Judge Advocate General (OTJAG): The Army Board of Review and Military Justice Division

Major General Prugh returned to Washington in 1953, where he served as a member of the Army Board of Review, Office of The Judge Advocate General, headed by his former mentor, COL Burt Ellis.⁸⁵ The Board of Review was the appellate body established by The Judge Advocate General for the review and processing of criminal cases.⁸⁶ In 1968, the board was renamed the United States Army Court of Military Review (ACMR);⁸⁷ in 1994, the name was again changed to the United

⁸² See AMERICAN MILITARY HISTORY 529, 540 (1989). The mission of the Constabulary was to:

maintain general military and civil security; assist in the accomplishment of the objectives of the United States Government in the occupied U.S. Zone of Germany (exclusive of the Berlin District and Bremen Enclave), by means of an active patrol system prepared to take prompt and effective action to forestall and suppress riots, rebellions, and acts prejudicial to the security of the U.S. occupational policies, and forces; and maintain effective military control of the borders encompassing the U.S. Zone.

Lieutenant Colonel A.F. Irzyk, *Mobility, Vigilance, Justice*, MIL. REV., Mar. 1947, available at <http://www.usarmygermany.com/Sont.htm> (follow U.S. Constabulary link, then HQ Constabulary, then "Mobility, Vigilance, Justice" link).

⁸³ See generally U.S. Army in Germany, <http://www.usarmygermany.com/Sont.htm> (follow U.S. Constabulary link, then HQ Constabulary) (last visited Feb. 27, 2006).

⁸⁴ Prugh History, 7 July 1975, *supra* note 10, at 23.

⁸⁵ *Id.* at 25.

⁸⁶ THE ARMY LAWYER, *supra* note 9, at 237.

⁸⁷ See Military Justice Act of 1968, Pub. L. No. 90-632 § 2(27), 82 Stat. 1335 (1968). See generally Establishment, Court of Appeals for the Armed Forces, <http://www.armfor.uscourts.gov/Establis.htm> (last visited Feb. 27, 2006) (detailing a history of the CAAF).

States Army Court of Criminal Appeals (ACCA).⁸⁸ Prugh served on the board for one year, which he considered a “fascinating experience.”⁸⁹ The review board was “deluged with cases from Korea . . . desertion cases,” including a case of an American battalion that “left behind most of its officers and senior non-coms [non-commissioned officers] who were overwhelmed by the Chinese in Korea and were killed or captured.”⁹⁰ The resulting trial resulted in convictions for “over a hundred members of the unit,” and Prugh recalls that it was a “[f]ascinating bit of work.”⁹¹

Prugh was the junior member of the board, and consequently it became his responsibility to do much of the research and writing. This was a watershed moment because it facilitated and furthered an interest in thinking about issues and taking the time to memorialize them through publication.⁹² This was also the first time Prugh had the opportunity to work directly with prisoner of war cases: “We were having the first cases involving the returning prisoners of war from Korea who had gotten into some form of trouble over there—collaborating with the North Koreans or the Chinese.”⁹³ These cases were considered with COL Ellis, the man who first exposed him to some of the problems and issues of prisoners of war and international law.

In 1954, after a year on the Board of Review, Prugh moved to the Opinions Branch of the Military Justice Division. During this time the Army was engaged in the return of American prisoners of war from Korea, known as Operation Big Switch and Operation Little Switch.⁹⁴ One of the first issues concerned the identification and prosecution of American prisoners of war who had collaborated with communist

⁸⁸ See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

⁸⁹ Prugh History, 7 July 1975, *supra* note 10, at 25.

⁹⁰ *Id.*

⁹¹ *Id.* at 25-26.

⁹² *Id.* at 26. Prugh notes:

I really think that this had a profound influence on the rest of my career, because during this period of time I [wrote] a lot of articles and got quite a few published. I think that helped a great deal to get to be known and to know more about military law.

Id.

⁹³ *Id.*

⁹⁴ *Id.* at 31.

authorities while in captivity. A key challenge became the process of gathering information from interrogations conducted by intelligence personnel following repatriation.⁹⁵ “[T]he files were collected by [intelligence] with a great mass of hearsay, and then all of the files—just a big mess of them—were put together in rooms with judge advocates who would try and index them.”⁹⁶ It became apparent to Prugh and others that a critical flaw in the process was the absence of military attorneys working hand-in-hand with interrogators.

The difficulty was in trying to transpose what we had obtained in the intelligence [process] for use in the criminal prosecution . . . The two just don’t fit or they don’t work the same way. There were no lawyers, for example, involved in the basic interrogation. . . .The result of it was that most of the basic information that we had was just simply not useable for our purpose, and when we started to gather together the material for the prosecution it was necessary to go out and almost to start from scratch.⁹⁷

Following the litigation originating from the Big Switch and Little Switch Operations, Prugh dealt with the related issue of American prisoners of war held by North Korea who, remarkably, opted not to repatriate to the United States immediately following the cessation of hostilities and were suspected of collaborating with enemy.⁹⁸ The RECAP-K program repatriated Americans held prisoner by North Korean forces. The question, in a few key cases, was status. As an action officer in the Military Justice Division, Prugh participated in writing the OTJAG opinion recommending that those Soldiers who voluntarily remained in Communist Korea be declared deserters.⁹⁹

[T]hey were entitled to be dropped from the roles, were not to be given a discharge certificate at all, that the only form of discharge that would be appropriate for them

⁹⁵ *Id.*

⁹⁶ *Id.* at 25-26.

⁹⁷ *Id.* at 33. Prugh recalls that there were as many as 400 possible collaboration suspects, but that in the end only forty to fifty were likely candidates for prosecution. *Id.*

⁹⁸ Prugh History, 5 July 1975, *supra* note 10, at 10-12.

⁹⁹ *Id.*

would be a dishonorable discharge, and that can only be imposed by reason of punishment of a court-martial.¹⁰⁰

The position was adopted by the Department of the Army.¹⁰¹ The Department of Defense (DOD) General Counsel, however, overruled the opinion and directed the Army to issue dishonorable discharges in the absence of courts-martial, which it did.¹⁰² The decision was politically-driven in an environment where civilian leaders wanted to avoid the appearance of prosecuting American Soldiers, despite the circumstances.

Later, however, the Chief of Staff and the Secretary of the Army decided to pursue the prosecution option despite an OTJAG opinion that the discharges the Soldiers received upon their release in Korea denied proper jurisdiction. Prugh, who participated in the meetings with the Chief of Staff and Army Secretary, articulated the OTJAG view that “if the Army was going to exercise the jurisdiction over these men at all, it should be done right at the beginning . . . when they crossed the bridge at Hong Kong and came into the hands of American authorities.”¹⁰³ The advice was disregarded; the men were permitted to fly home via Hawaii, received financial assistance, and were finally arrested by a senior Military Police official in San Francisco Harbor in full view of the media. It was “the worst possible way the thing could have been done.”¹⁰⁴

The Soldiers were confined at Fort Baker, California, and shortly thereafter were released by the Federal District Court under a writ of habeas corpus.¹⁰⁵ As Prugh observed,

[It was] a very predictable result, but one I think that showed a certain lack of sophistication from the standpoint of understanding on the part of our authorities . . . this was fundamentally a political and civilian

¹⁰⁰ *Id.* at 11.

¹⁰¹ *Id.*

¹⁰² *Id.* at 12; *see also* Prugh History, 7 July 1975, *supra* note 10, at 40-43.

¹⁰³ Prugh History, 7 July 1975, *supra* note 10, at 41.

¹⁰⁴ *Id.* at 42.

¹⁰⁵ *Id.* These matters were decided at approximately the same time as a U.S. Supreme Court ruling in which the court held that a lawful discharge normally severs the constitutional and statutory power of a court martial convening authority to try and individual. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981) (three opinions).

decision . . . [and] the uniform force was put into the position where it really looked like they were being very stupid . . . ”¹⁰⁶

The men were ultimately released, and the discharges set aside by the U.S. Court of Claims. Much to his frustration, the “turncoats,” as Prugh described them,¹⁰⁷ were granted the full benefits of Soldiers who had served honorably.¹⁰⁸

Major General Prugh saw the RECAP-K issue and the actions by the DOD as indicative of a fundamental lack of understanding by civilian leaders of the important nuances of military law and procedure. Had the Soldiers who refused repatriation at the end of the Korean War been tried as deserters, as recommended by OTJAG and the Department of the Army (DA), there would have been no issue regarding benefits. But when the DOD indiscriminately ordered the process, the agency violated its own procedures regarding the nature and authority for military discharges, allowing redress by the Court of Claims. The lesson, from MG Prugh’s perspective, was that the military services should be attentive to the fact that civilian leaders within the Pentagon may not always understand, or respect, military law and its implications.¹⁰⁹

[T]hey don’t understand the intricacies of military law, and they don’t regard it with the same degree of care and attention that they would civilian law. . . . This is a difficult thing to overcome, because the civilians who head up the Department of Defense/Department of the Army frequently have no exposure to [military] law, and since it is strange to them and seems to be primarily regulatory, from their point of view, they think it is easy to override and get possible political results.¹¹⁰

¹⁰⁶ Prugh History, 7 July 1975, *supra* note 10, at 42.

¹⁰⁷ Prugh History, 5 July 1975, *supra* note 10, at 10.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Prugh was similarly concerned about cases tried before the federal courts impacting military operations. “They are tried usually by civilian representatives of the Department of Justice or the U.S. Attorney without the basic knowledge—of the particular military aspects, at any rate—that become so important.” Prugh History, 7 July 1975, *supra* note 10, at 47.

By 1956, Prugh completed his tour at Pentagon, which included interesting additional duties, such as speech-writer for The Judge Advocate General and active participation in the Washington Foreign Law Society and American Society of International Law.¹¹¹ The tour ended when he was selected, along with three other judge advocates, to attend the year-long course of instruction at the U.S. Army Command and General Staff College (CGSC), at Fort Leavenworth, Kansas.¹¹²

Prugh enjoyed the academic environment afforded by the college and recalls the association and friendship with other military professionals: “Right up until the time of my retirement there were officers that I had served with in Leavenworth . . . one of the great advantages of that school that everyone acknowledges.”¹¹³ Prugh graduated with honors from CGSC in the Spring of 1957, finished the year by being promoted to the rank of lieutenant colonel, and was assigned overseas as the Deputy Staff Judge Advocate, 8th Army, Seoul, Korea.¹¹⁴

E. Eighth Army, Korea

The Staff Judge Advocate at 8th Army¹¹⁵ was COL Fernandez, who gave Prugh broad authority to manage and administer the Seoul legal office. “He gave me enough latitude that I could make my own mistakes and learn from them and not cause too much disaster as a result.”¹¹⁶ Significant accomplishments included the establishment of a claims service authorized to administer military claims in Korea,¹¹⁷ and planning for negotiations leading to the creation of a U.S.-Korean Status of Forces Agreement (SOFA). It is worth noting that many military leaders, including Prugh, were initially opposed to the implementation of SOFA agreements, because they limited U.S. authority and autonomy in places like Germany and Korea. Prugh recalls,

¹¹¹ Prugh History, 7 July 1975, *supra* note 10, at 50.

¹¹² *Id.* at 51. The other three officers were MAJ Tom Reese, MAJ Bruce Babbitt, and MAJ Kenneth Crawford. *Id.*

¹¹³ *Id.* at 52.

¹¹⁴ Correspondence with LTC Prugh, *supra* note 13.

¹¹⁵ The 8th United States Army has been in existence from 1944 to the present. A short history of the unit is available at Wikipedia, U.S. Eighth Army, http://en.wikipedia.org/wiki/US_Eighth_Army (last visited Feb . 27, 2006).

¹¹⁶ Prugh History, 7 July 1975, *supra* note 10, at 55.

¹¹⁷ *Id.* Until this time, all military claims were forwarded to claims authorities in Japan for adjudication and settlement.

Most all of us at that point felt that the Status of Forces Agreement was not a very good device. It was restrictive to the services, restrictive to American activities and subjected us to taxation and certain limitations among other things. It certainly took away the authority that we had in legal matters over so many people, and would actually subject us to the local law to a certain extent. . . . So there was considerable distrust and dislike on the part of uniformed people for most Status of Forces Agreements. Looking back on it over twenty years of operation. . . . they have been a magnificent effort and we who objected were clearly wrong.¹¹⁸

His role in helping plan for the SOFA conferences involved developing proposals for what U.S. forces should seek in any future agreement, with alternatives in the event initial recommendations were rejected. The considerations ran the full spectrum of legal concerns, including “criminal jurisdiction, over flight provisions, transportation rights, taxation, communications and radios and just about every aspect of where one nation’s touches upon another when forces from that nation are located in the territory of another.”¹¹⁹ The final staff paper, which included three different courses of action for future consideration, was filed and later referenced when the U.S.-Korean SOFA was finally negotiated in the early-to-mid-1960s.¹²⁰

This early experience with SOFA agreements was complemented by Prugh’s work on behalf of negotiations with the Korean government regarding the return of certain real estate under U.S. control.¹²¹ The language Prugh provided during the negotiations was ultimately adopted and incorporated into the international agreement, and demonstrated the

¹¹⁸ *Id.* at 56.

¹¹⁹ *Id.* at 57.

¹²⁰ Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, United States- South Korea, 17 U.S.T. 1677, 674 U.N.T.S. 16; Agreement Between the United States of America and the Republic of Korea Amending the Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea of July 9, 1966, as Amended, *available at* http://www.korea.armymil/sofa/2001sofa_english%20text.pdf (last visited Feb. 27, 2006) (showing the full text of the Agreement)

¹²¹ Prugh History, 7 July 1975, *supra* note 10, at 59.

remarkable contribution military attorneys can make in an international legal setting.¹²²

F. Sixth Army, California

Major General Prugh completed his tour in Korea in late 1958 and was reassigned to the 6th U.S. Army, Presidio of San Francisco.¹²³ Prugh and his family were finally home again in Northern California. His assignments there included tours as Chief of Military Affairs, Administrative Law; Chief of Military Justice; Deputy Staff Judge Advocate; and for a short period, the Acting Staff Judge Advocate.¹²⁴

This was the first assignment where Prugh dealt in any meaningful way with the more complex aspects of procurement, contracting, and related elements of administrative and civil law.¹²⁵ He took special interest in legal issues affecting the relationship between the military and civilian authorities, specifically military support and aid to state and local disaster relief contingency planning.¹²⁶ Prugh also took an increasingly active interest in developing meaningful continuing legal education opportunities for judge advocates.

As a California-licensed attorney living in the state, the disparity between the legal education programs available through the state and city bar associations and the near absence of any comparable program through the 6th Army legal office became readily apparent.¹²⁷ In response, Prugh organized a series of conferences and weekly education and speaker programs that grew to become widely attended by military attorneys from 6th Army, Fort Mason, the local Air Defense Command, and elsewhere.¹²⁸ It was a model for developing junior officers that he would expand further later in his career.

¹²² *Id.* As Prugh remembers, “. . . this was pretty heady stuff, and I found that I thoroughly enjoyed that kind of work. It influenced me greatly in later years in wanting to be involved in international negotiation. . . . Having been once bitten by that bug I never recovered.” *Id.* at 59-60.

¹²³ *Id.* at 61. Sixth United States Army, <http://www.nps.gov/prsf/history/hrs/thompson/tt21.pdf> (last visited Feb. 27, 2006) (containing a short history of the Sixth United States Army, 1946-1980).

¹²⁴ *Id.* at 61-62.

¹²⁵ *Id.* at 62, 65-66.

¹²⁶ *Id.* at 65.

¹²⁷ *Id.*

¹²⁸ *Id.* at 66.

The Presidio was also one of the first opportunities for Prugh to work closely with his commanding officer, Lieutenant General (LTG) C. D. Palmer. General Palmer was a memorable figure for Prugh, not because of his brilliance or professionalism, which were beyond reproach,¹²⁹ but because of the way he cared about Soldiers. Prugh recalled that Palmer would conduct inspections “and look at the very fundamental things that you wouldn’t expect a three-star commander to be doing.”¹³⁰ It was another lesson in caring for Soldiers that he carried with him throughout his career: “[I]t is so easy for a military lawyer to get detached from the real flesh and blood Soldier that working with troops and being with a commander who gets out to look at troops and being with him and watching [him] is a great lesson for every judge advocate.”¹³¹

In early 1961, Prugh was selected as one of two judge advocates to attend the one-year course of instruction at the U.S. Army War College, in Carlisle, Pennsylvania. During this period, he took advantage of the opportunity to pursue personal and professional interests developed throughout his career. His thesis related to the Soviet Status of Forces Agreement and how the Soviets dealt with the same issues facing the U.S. in Europe, Korea, and elsewhere.¹³² Overall, the academic focus in 1961-1962 was clearly on the Cold War and events in Europe, the recent rise of the Berlin wall, and Cuba following the Bay of Pigs crises.¹³³ In less than two years, however, all eyes would be focused on Southeast Asia and the gathering storm in Vietnam.¹³⁴

G. Office of The Judge Advocate General, Chief of Career Management

After graduating from the War College in June 1962 and having recently been selected below-the-zone for promotion to colonel,¹³⁵ Prugh returned to the Pentagon as the Chief of the Career Management Division for the Judge Advocate General’s Corps.¹³⁶ It was not a

¹²⁹ *Id.* at 67.

¹³⁰ *Id.* at 67-68.

¹³¹ *Id.* at 68.

¹³² *Id.* at 69-70.

¹³³ *Id.* at 70-71.

¹³⁴ *Id.* at 71.

¹³⁵ Prugh History, 10 July 1975, *supra* note 10, at 2.

¹³⁶ *Id.* at 1. The Career Management Division for the Judge Advocate General’s Corps is currently the Personnel, Plans and Training Office (PP&TO), Office of The Judge Advocate General. U.S. Army Judge Advocate General’s Corps, Personnel, Plans &

position he had sought, recalling “[he] had really hoped to get back to the criminal law division,”¹³⁷ but it allowed Prugh to address some long overdue institutional changes regarding personnel assignments, career development education, and policy initiatives. He would, quite literally, transform the way military attorneys were developed and managed.

One of the first changes involved the manner in which judge advocates were assigned. As Prugh recalls,

I found that assignments were being made by the chief clerk, a civilian named Eileen Burns, who was well known throughout the corps. I decided in my own mind that it was wrong for a civilian to be assigning the lawyers . . . I was horrified on two or three occasions early in that game, going to visit with Miss Burns to see The Judge Advocate General,¹³⁸ when she would make an assignment on a senior officer, a colonel, for example, and in discussing [the officer] would say, “Oh! He has a mediocre record,” or some other slighting remark that would clearly be devastating to that man’s position with respect to the The Judge Advocate General who apparently didn’t know very many of the officers below the rank of colonel.¹³⁹

Thereafter, selected judge advocates made or at least controlled the recruiting and assignment of officers. Assignment policies, which Prugh admits contributed to a lack of credibility for the career management process among many officers, were also consolidated, published, and distributed to the field so individuals would be able to understand the career management process.¹⁴⁰

More fundamentally, perhaps, was the discovery that the Career Management Office had little in the way of informed rosters of active duty judge advocates; he recalls, “we had to find out who we had in the

Training Office, [https://www.jagcnet.army.mil/85256D660060221E/\(JAGCNETDocID\)/HOME?OPENDOCUMENT](https://www.jagcnet.army.mil/85256D660060221E/(JAGCNETDocID)/HOME?OPENDOCUMENT) (last visited Feb. 27, 2006).

¹³⁷ Prugh History, 10 July 1975, *supra* note 10, at 2.

¹³⁸ Major General Charles L. Decker. *See* THE ARMY LAWYER, *supra* note 9, at 233-34.

¹³⁹ Prugh History, 10 July 1975, *supra* note 10, at 3.

¹⁴⁰ *Id.* at 4.

Corps.”¹⁴¹ In 1963, Prugh began the process that continues to the current day, albeit in an updated form, of developing consolidated rosters or directories of all active duty judge advocates cataloging name, grade, current duty station, date of rank, and projected moves.¹⁴² Other initiatives including publication of a pamphlet entitled *Your JAGC Career* and distribution of personnel information in a newsletter that became the precursor to *The Army Lawyer*.¹⁴³

In all, these and related initiatives were an effort to provide greater transparency and understanding of the career management process. Prugh strived to bring predictability to officer policies and assignments, and to enfranchise individuals in the process, and to encourage their commitment to military service despite occasional disappointments or hardship tours. He summarized the career management process in four key principles: equity toward the government; equity toward the individual; requirements for latitude and acceptance of unpredictability; and fair policies.¹⁴⁴

Another aspect of the career management position was recruiting and retaining qualified judge advocates, and seeking lawyers with the qualities required for success in a military practice. Prugh’s focus was on identifying candidates with varied backgrounds who had demonstrated character and integrity through their discharge of responsibilities in academics and in life.¹⁴⁵ Prugh asked of candidates, “What did he do? Is his record . . . only as a student? Is he a leader? Is he a campus politician? Is he a writer? Is he supporting a family while he is going to school and doing a decent job of it? Does he pay his own way?”¹⁴⁶ Prugh looked beyond pure academics and sought a mix of talent, with a focus on character and work ethic, recognizing that “the old style ‘C’ student who has these characteristics could be the winner for us.”¹⁴⁷

¹⁴¹ *Id.* “If we wanted, say, a captain with five years of experience, that could speak Spanish and was an international law expert, we would have one heck of a time trying to find out who this was. . . . It was clearly an impossible situation.” *Id.* at 4-5.

¹⁴² *Id.* at 5, 8; see U.S. PERSONNEL & ACTIVITY DIRECTORY & PERSONNEL POLICIES, JA PUB 1-1 (2005-2006).

¹⁴³ Prugh History, 10 July 1975, *supra* note 10, at 6.

¹⁴⁴ *Id.* at 8.

¹⁴⁵ Prugh History, 4 April 1977, *supra* note 10, at 30-31.

¹⁴⁶ *Id.* at 30.

¹⁴⁷ *Id.* at 30-31.

Prugh's time as the Chief of JAGC Personnel was cut short in his second year by the early retirement of The Judge Advocate General, MG Charles Decker.¹⁴⁸ In late 1963, Prugh was reassigned as the Executive Officer (XO) for the Office of The Judge Advocate General, where he coordinated Decker's retirement and assisted the incoming Judge Advocate General, MG Robert H. McCaw.¹⁴⁹ Some of the issues Prugh observed during his short tenure as the Executive Officer included the reorganization of the Army Staff and the subsequent elimination of The Judge Advocate General as a primary member of the Army Staff Counsel,¹⁵⁰ the creation of the civilian General Counsel's Office, Army Materiel Command, and related erosion of the Judge Advocate General's Corps of the Army's principle procurement and contracting mission.¹⁵¹

¹⁴⁸ Major General Decker was the Judge Advocate General of the Army from 1 January 1961 to 31 December 1963. See THE ARMY LAWYER, *supra* note 9, at 233-34.

¹⁴⁹ Major General McCaw was the Judge Advocate General of the Army from 27 February 1964 to 30 June 1967. Prugh History, 10 July 1975, *supra* note 10, at 10-14. Prugh remembers MG McCaw as an "extraordinarily cautious" leader who, although possessing great scholarship and integrity, was far less active and involved in professional associations and The Judge Advocate General's School than his predecessor, MG Decker.

General McCaw had a totally different attitude about things. He would pretty much stay in his office. He didn't like to travel. He rarely visited other offices . . . and rarely went to the school. . . . I hope I am not being unfair to him, because I can see that there are a lot of advantages in a lawyer taking a very low profile like that and trying to give only the most precise answer that is absolutely necessary. But it just seems to me that the Army needs more help with that from its lawyers.

Id. at 11, 14; see also THE ARMY LAWYER, *supra* note 9, at 238-39.

¹⁵⁰ Prugh History, 10 July 1975, *supra* note 10, at 14-15. Major General Prugh recalls that at the time this "seemed to indicate a down playing of the prestige of the office" to many in judge advocate community. *Id.* at 15.

¹⁵¹ *Id.* at 15-17.

This was regarded at the time of the negotiations as a real disaster. A bad situation from the standpoint of the Judge Advocate General's Corps and, of course, I think events have proven that that was a correct assessment—a very poor move from our standpoint. It had some very bad effects in drying up the procurement attorney's positions for senior uniformed lawyers. The result of it is, while we still have the need to supply senior uniformed people overseas that have a procurement capability, there are so few positions in the middle management area . . . that we can't develop a proper base to train enough colonels. . . ."

In the end, Prugh looked back on his year and a half in career management and later as the Executive Officer as a unique opportunity affording him an invaluable look at some of the fundamental problems and issues facing senior leaders and the JAGC institution itself.¹⁵² They were lessons that would serve him well later in his career, which took a spectacular turn in the fall of 1965 when he was reassigned to Headquarters, Military Assistance Command—Vietnam (MACV).

IV. 1964-1967: MACV SJA, Vietnam—Adapting to the Changing Nature of War¹⁵³

[T]he American public likes nice, neat boundaries of time and place. This is possibly a consequence of our devotion to sports and the sanctity of prime time. This is also consistent with our proclaimed dedication to the “rule of law,” but our staying power seems to be well circumscribed by program time. . . . We are impatient people who like frequent headline changes, choice in our program selection, and arm-chair second-guessing.¹⁵⁴

Id. at 17.

¹⁵² *Id.* at 6-7. Prugh recalls:

What I was getting at [in] the personnel job was a fascinating think to get a chance to see where our [personnel problems] were, where our people served, the kinds of conditions that they had to work under, the getting at the sort of the beginning of the Corps. The recruiting of it, the handling of the dirty linen, the officer cases where there had to be removal or [reduction in force] actions, helping in promotion cases and things of that sort. So you got exposed to a lot of information that the normal career would never have provided. I look back on it now as a very favorable thing.

Id.

¹⁵³ See FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001) (providing a detailed account of the role of judge advocates during military operations in Vietnam and elsewhere).

¹⁵⁴ Major General George S. Prugh, Address at the Fifth Judge Advocate General Military Law Center, Presidio of San Francisco: Post Gulf War (Mar. 15, 1991) [hereinafter Presidio Address]; Prugh Reminiscences, *supra* note 24, at 114.

A. Introduction

Major General Prugh arrived in Saigon with his wife and younger daughter on Thanksgiving Day, 1964.¹⁵⁵ They occupied a small flat in a local Vietnamese community near other American families, including senior officers from the MACV command.¹⁵⁶ What began as a somewhat “sleepy operation” with approximately seven attorneys and 18,500 personnel changed radically on Christmas Eve when terrorists bombed the Brink Hotel during a party attended mostly by Americans.¹⁵⁷ In an essay included in his collective work, *Reminiscences*, Prugh recalled:

The blast kills and injures many. It marks the commencement of major attacks on US personnel. Life in Saigon for the relatively small group of advisors, support personnel, Embassy people, and dependents suddenly takes on a new and hostile aspect. The next morning, at the Christmas services in the small make-shift chapel, armed and helmeted sentries stand outside as the families, dressed in “Sunday best,” assemble. With unaccustomed gusto and fervor, the congregation sings old hymns and several patriotic songs. Everyone present senses the changed circumstances—the commencement of war, the distance from home, and the tenuous position for this handful of Americans at the small end of a very long line. Surely soon the dependents will be sent home, to be replaced by US combat troops. The long agony of the Vietnam War has begun.¹⁵⁸

Within months, MACV planners were preparing for the massive influx of men and material that followed in 1965, rapidly raising the American presence in South Vietnam from less than 20,000 to nearly 500,000.¹⁵⁹ This necessarily included an exponential growth in the

¹⁵⁵ Prugh History, 11 July 1975, *supra* note 10, at 21; Correspondence with LTC Prugh, *supra* note 13.

¹⁵⁶ Prugh History, 11 July 1975, *supra* note 10, at 21.

¹⁵⁷ *Id.* at 21-22, 27-29. The Brink Hotel was the main transient billet for officers in Vietnam.

¹⁵⁸ George S. Prugh, *Reflections* (10 Aug. 1993) in Prugh *Reminiscences*, *supra* note 24, at 47. Mrs. Prugh and the Prugh’s daughter, Virginia, were evacuated to California on 12 Feb. 1965. Correspondence with LTC Prugh, *supra* note 13.

¹⁵⁹ Prugh History, 11 July 1975, *supra* note 10, at 9-10, 20-21.

number of judge advocates from all military services that were required to meet the anticipated need for full-spectrum legal services. By his own account, Prugh recalls planning for 100 additional judge advocates by the summer of 1965 and 200 by Christmas.¹⁶⁰

The requirements he was generating were stressing the Judge Advocate General's Corps' ability to manage its available manpower.¹⁶¹ Prugh estimates that by the end of 1965 as much as twenty percent of all uniformed Army lawyers were in Vietnam.¹⁶² The scope of judge advocate responsibilities was extremely broad and ranged from traditional disciplines in legal assistance, claims, and military justice to new cross-agency relationships, including Prugh's regular role as legal advisor to American Ambassadors Maxwell Taylor and Henry Cabot Lodge.¹⁶³

As Prugh considered the rapidly changing operational environment, he distilled his priorities down to two essential factors: "One was to assure that whatever MACV did was done within the law, and secondly, to look for ways in which the law can assist MACV in accomplishing its mission. In other words, fighting the war . . . how can MACV benefit by the lawyers?"¹⁶⁴ The first question was relatively straightforward; uniformed lawyers had always worked to keep commanders and staffs within the bounds of policy, regulation, and statute. The second, however, was more problematic and begged answers that had never fully been considered during previous American conflicts. The questions he was asking concerned the very nature and substance of jurisprudence as it existed in South Vietnam. He was looking to find out how local law was playing a role in the conflict, good or bad, and how it could be leveraged to assist in the war effort.¹⁶⁵

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Id.* at 10. It took approximately one year to bring a judge advocate onto active duty, between recruiting, passage of the bar examine and admission to practice law, and initial entry and training. *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 59. Prugh recalls that "[the Ambassadors] had no regularly assigned lawyer." *Id.*

¹⁶⁴ *Id.* at 11.

¹⁶⁵ *Id.* at 11-12.

First of all, we had to find out what the role was that the law was to play in Vietnam, and we're thinking not just the law with respect to the Americans over there but what was the law with respect to the Vietnamese? Was it helping the Vietnamese in fighting the war?

Lost in most histories is fact that the Vietnam War began as a communist insurgency.¹⁶⁶ Prugh took a unique interest in the special character and dynamics of a conflict that differed fundamentally from the force-on-force experience of the World Wars and Korea. The different nature of what was happening in Vietnam seemed, in Prugh's mind, to implicate the law in ways few had considered. In particular, he was interested in identifying the role that local law played—or could play—in defeating an insurgency that seemed to grow like a cancer from rural communities inward. How, he asked, would the communists from North Vietnam and Laos use the law to their advantage? What could be done within the government of South Vietnam to bolster the law's role in defeating them, involving everything from the legitimacy of the judicial system itself to the laws and procedures for dealing with an unconventional enemy?

The law can be used by the insurgent [as a] device for him when he wants protection against search and seizure, for example, or [when] he wants to assure that processes will be delayed and will be deliberate. He can take advantage of that for his gain as an insurgent or as a terrorist to be close to the line of the criminal and get the protection . . . that the law affords a criminal as distinguished from a combatant. . . .¹⁶⁷

Among Prugh's key concerns were the institutional mechanisms available to deal with this new kind of enemy, and how to classify them as either combatants, civilians, or neither. He recalls, "one of the basic problems that we face throughout all of our [counterinsurgency] operations in Vietnam is that we . . . did not grasp clearly the line of demarcation between that which was military and that which was civilian. . . . and frequently there was a gap between the two."¹⁶⁸ These mechanisms included a legal code able to account for the peculiarities of insurgent warfare, law enforcement capable of pursuing it, and a judicial infrastructure sufficient to process, try, and incarcerate those who violate

Id.

¹⁶⁶ See generally THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISION-MAKING ON VIETNAM CH. 5 ORIGINS OF THE INSURGENCY IN SOUTH VIETNAM 1954-1960, sec. 1, at 242-69 (1971), available at <http://www.mtholyoke.edu/acad/intrel/pentagon/pent11.htm>.

¹⁶⁷ Prugh History, 11 July 1975, *supra* note 10, at 12.

¹⁶⁸ *Id.* at 13.

the law.¹⁶⁹ Prugh was asking a remarkable new question: what can the law and military attorneys do, not only in terms of military law, but in regard to the operation of civilian law, as a combat multiplier in the overall conduct of operations?

B. The Judge Advocate Advisory Detachment

One of the first projects Prugh undertook was the creation of a Judge Advocate Advisory Detachment within the MACV Staff Judge Advocate Office.¹⁷⁰ The idea was relatively simple, “to find out how the law was functioning in Vietnam.”¹⁷¹ His intent was to use five judge advocates—one per corps combat zone, plus a chief—to monitor the effectiveness of the South Vietnamese civil law system, gather relevant facts, report observations and offer assistance when appropriate.¹⁷² The response to the proposal from Washington astounded him:¹⁷³

It was from General McCaw¹⁷⁴ indicating—it was signed by him personally—that he did not see the need for the advisory detachment but he was even more impressed by the fact that I was risking these officers . . . that they might be in a position where their safety was imperiled and that he really thought that that was not a good utilization for lawyers.¹⁷⁵

Undeterred, Prugh approached the MACV Commander, General Westmoreland, and explained the plan for the advisory detachment, how it would operate and what its advantages could be. General Westmoreland fully supported the idea and gave Prugh “carte blanche” to increase space allocations in the SJA office and requisition the five judge advocates using MACV officer authorizations.¹⁷⁶ In the end,

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 13-14. For an in-depth review of the operation of the judge advocate advisory role, see PRUGH, LAW AT WAR, *supra* note 6, at 40-60.

¹⁷¹ Prugh History, 11 July 1975, *supra* note 10, at 13.

¹⁷² *Id.* at 13-16.

¹⁷³ *Id.* at 14.

¹⁷⁴ Major General Robert H. McCaw, The Judge Advocate General of the Army, 27 February 1964–30 June 1971.

¹⁷⁵ Prugh History, 11 July 1975, *supra* note 10, at 14. Major General McCaw also expressed doubts about the role an advisory detachment might play in inducing the South Vietnamese to conform to American standards of law. *Id.*

¹⁷⁶ *Id.* at 14.

despite the objections of The Judge Advocate General, Prugh successfully “established an advisory division which functioned from early 1965 until the end of the war.”¹⁷⁷

A good example of how effectively the Advisory Detachment operated involved the South Vietnamese court and prison systems as they applied to Vietcong (VC) and other insurgents captured by American forces and later remanded to the South for adjudication. Prugh recalls that in early 1965, General Westmoreland asked a simple but obvious question: “What happens to the Vietnamese that we capture [and] the Viet Cong that are captured by the Army of the Republic of Vietnam [ARVN]?” No one knew the answer.¹⁷⁸

What was known was that U.S. intelligence personnel held prisoners for purposes of interrogation and then remanded them to ARVN officials.¹⁷⁹ Particularly valuable detainees would go to the National Interrogation Center and some to the ARVN Military Interrogation Center,¹⁸⁰ “but the vast bulk of the people that would be picked up . . . would not go to either of those. They would go off to some other place and nobody knew where they were.”¹⁸¹ The Advisory Detachment was charged with answering these questions and more.

C. Translation and Compilation of Vietnamese Civil and Criminal Code

Another example of the role played by judge advocates in Vietnam concerned the translation of certain provisions of Vietnamese code into English. This was as much due to military operations as it was a service to the U.S. State Department and others in need of information on the operation of Vietnamese law.¹⁸² Prugh recalls that, “Resource control law, search and seizure law, and all that sort of business became very important.”¹⁸³ Military Assistance Command—Vietnam judge advocates became in-house authorities on Vietnamese law, providing to both U.S.

¹⁷⁷ *Id.* Major General Prugh recalled that “[MG McCaw] had a feeling that maybe we had too many Judge Advocates in Vietnam at that particular time. But he did not raise the issue of the advisory detachment, and I didn’t try to back of [it].” *Id.* at 17.

¹⁷⁸ *Id.* at 30.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 59-60.

¹⁸³ *Id.* at 60.

personnel and, through the Advisory Detachments, to ARVN commanders who would use it to enforce domestic law.¹⁸⁴

The operational benefits of a catalogue of English translations of local Vietnamese criminal and civil code were many, perhaps best exemplified by the Market Time operations conducted by the U.S. Navy and Coast Guard.¹⁸⁵ In March 1965, U.S. naval forces were deployed to conduct interdiction operations against North Vietnamese and Vietcong efforts to use indigenous vessels to carry the contraband material to insurgent forces in the south.¹⁸⁶ American vessels patrolled within the limits of the national waters claimed by the Republic of Vietnam,¹⁸⁷ but because they were enforcing local law, the skippers required accurate translations of what exactly the Vietnamese law was. Prugh recalls, “The MAVC JA office identified those laws and got them translated . . . some 100 copies . . . a very vital role played by . . . the military lawyers from the very beginning. . . . General Westmoreland was enthusiastic with that kind of support. . . .”¹⁸⁸

V. 1964-1967: A War of Laws—Treatment of Insurgents, Detained Personnel, and War Crimes

It was evident that international law was inadequate to protect victims in wars of insurgency and counterinsurgency, civil war, and undeclared war. The efforts of the international community to codify the humanitarian law of war of 1949 drew upon examples from World War II which simply did not fit in Vietnam. The law left much room for expediency, political manipulation, and propaganda. The hazy line between civilian and combatant became even vaguer in Vietnam.¹⁸⁹

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 41-42; see JONATHAN S. WIARDA, *THE U.S. COAST GUARD IN VIETNAM: ACHIEVING SUCCESS IN A DIFFICULT WAR* (1997), available at <http://www.nwc.navy.mil/press/Review/1998/spring/art3-sp8.htm>.

¹⁸⁶ WIARDA, *supra* note 184.

¹⁸⁷ Prugh History, 11 July 1975, *supra* note 10, at 41-42.

¹⁸⁸ *Id.*

¹⁸⁹ PRUGH, *LAW AT WAR*, *supra* note 6, at 78.

A. The Civil Response to Insurgency

Events in Iraq, Afghanistan, and elsewhere in the War on Terror have demonstrated the legally complex relationship between insurgents and the law. The questions implicate a broad spectrum of law as it applies to military law, civil law in counterinsurgencies,¹⁹⁰ and international law under the Geneva Conventions. But the lessons of the last three years are not new and were as much a part of the Vietnam experience forty years ago as it is today. As Prugh recalled in 1975,

When you have an insurgency, a counterinsurgency program, clearly the law has an important role. The law can be used by the insurgent to be a protective device for him when he is . . . when he wants protection against search and seizure for example, or he wants to assure that processes will be delayed and will be deliberate. He can take advantage of that for his gain as an insurgent or as a terrorist to be close to the line of the criminal and get the protection, whatever protection that may be, that the law affords a criminal as distinguished from the combatant who might otherwise be shot out of hand or a terrorist who might be dealt with quite differently. Clearly, the insurgent who knows how to use the legal protections that are normally available in a peacetime operation has a special factor that he can take into account.¹⁹¹

An example of the treatment and protections granted insurgents in Vietnam involved the local prison system. Members of the Advisory Detachment went into the prisons as part of their program to see how the government of the Republic of Vietnam was dealing with confinement and evaluate any possible impact on the anti-insurgency campaign. What they discovered surprised them. The U.S. Overseas Mission (USOM), an extension of the U.S. State Department headquartered in the American Embassy,¹⁹² had provided civilian advisors to the local government to assist with prison administration and had primary focus upon rehabilitation. They were not, however, effectively integrated into

¹⁹⁰ *Id.* at 123-27.

¹⁹¹ Prugh History, 11 July 1975, *supra* note 10, at 12.

¹⁹² *Id.* at 31.

the war effort or the counterinsurgency mission.¹⁹³ Prugh recalls that in many cases USOM personnel were,

two or three pot-bellied old retired deputy sheriffs from down south, working as rehabilitation experts, and they were teaching . . . Viet Cong prisoners automotive maintenance, automotive repair, electrical repair, trades which back in prison in the United States would have been useful. . . But in Vietnam were ideal training for enemy soldiers. The USOM people had addressed the prisoner problem as you would address the prison problem here in the United States and yet we were dealing with a different breed of cat.¹⁹⁴

The Advisory Detachment actively traveled, interviewed, and gathered facts on the function of the local military and civilian penal systems, “[pulling] each item of information out like extracting teeth from the various ARVN officials, who were reluctant to talk about prisoner problems.”¹⁹⁵ One issue with particular sensitivity for both American and ARVN leaders was the discovery that the Vietnamese penal system was utterly incapable of providing reliable, sustained confinement for Vietcong insurgents. Prugh recalls that the system lacked the facilities needed to accommodate and process the increasingly large numbers of Vietcong detainees and that by late 1964, detainees were averaging only around six months in prison due to overcrowding:¹⁹⁶

That meant that a Viet Cong picked up by ARVN . . . by the Vietnamese Army . . . or by the 173rd Infantry or the Marines or any of the American units in those early days, turned over to the National Police System, would go into one of the prisons and six months later, rested, rehabilitated and given the best medical care available in Vietnam, they would then pop out at the other end, trained in something like automotive maintenance or electrical repair, radio repair . . . Free to leave and fight us and be captured again.¹⁹⁷

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 31-32.

¹⁹⁵ *Id.* at 32.

¹⁹⁶ *Id.* at 33-34, 36-38; *see also* PRUGH, LAW AT WAR, *supra* note 6, at 62-67.

¹⁹⁷ Prugh History, 11 July 1975, *supra* note 10, at 33-34.

When Prugh shared his findings with General Westmoreland, the MACV Commander was “horrified” to learn he was “fighting the same man twice.”¹⁹⁸ Money was not the issue; Prugh recalls that there were a variety of American and international aid programs for a host of domestic priorities ranging from agriculture to education.¹⁹⁹ Prisons, however, were considered an internal domestic matter and the sole responsibility of the South Vietnamese government.²⁰⁰ What Prugh and his team understood, as few others did, was the inherent disconnect between providing military and economic assistance while ignoring the domestic judicial system responsible for processing the enemy during an insurgent war.²⁰¹

Gradually, and with Prugh’s considerable assistance, MACV authorities began to integrate themselves in a system they had earlier ignored,²⁰² with the Provost Marshal and judge advocates taking a lead role in influencing the outcome of insurgents detained during combat operations.²⁰³ The particular circumstance concerned the status of insurgent detainees, and what, if any, law should define their status as domestic criminals, international combatant, or something in between. He looked to the four Geneva Conventions of 1949 for guidance.²⁰⁴

¹⁹⁸ *Id.* at 34. Prugh recalls: [W]e figured out that it was over 50,000 [prisoners] that went through the [Vietnamese] system in one year. So clearly what we were doing [resulted] in a lot of the resting, recuperating, training, and rehabilitating of our enemy.” *Id.* at 36.

¹⁹⁹ *Id.* at 34.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 36. Prugh recalls, “this was a whole operation in which there was no military agency that was responsible . . . no MACV staff office which was charged with working [prison operations]. Provost Marshal did not; Judge Advocate did not.” *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 38. See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention (III) for Treatment of Prisoners of War, Geneva, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter GPW]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC]. The full texts of the Geneva Conventions are available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

B. An Insurgency by Any Other Name

Prugh carefully considered the conventions addressing refugees, the sick and wounded, and ship-wrecked, and concluded they generally did not apply to the situation in Vietnam in 1965 involving an insurgent enemy within a sovereign state.²⁰⁵ What did apply, Prugh argued, were provisions of Common Article 3 of the Third Geneva Convention for Prisoners of War (GPW).²⁰⁶ But it was not a perfect fit.²⁰⁷ As tens of thousands of Americans flowed into South Vietnam in 1965, the character of the conflict was changing, and begged the question of what sort of conflict was it—internal or international?

[T]he Geneva Conventions don't say anything about . . . the point at which they became applicable in a international armed conflict . . . North Vietnam and South Vietnam had been divided by a military armistice line in which at the time of the Geneva Accords of 1954 it had been clearly said [that] this is only an armistice line; it is not intended to divide the country into two pieces. . . . [O]ur argument was that the South Vietnamese government was the legitimate heir of the preceding government, and of course there was a legal dispute on that with the North Vietnamese. . . . [W]e ended up with an inability to say just when the Geneva Conventions would become applicable.²⁰⁸

But as time went by, the increasing number of multinational forces and regional players in the conflict convinced Prugh and others that the war in Vietnam was an international conflict.²⁰⁹ By July 1965, he recommended to General Westmoreland that the Vietcong be treated as prisoners of war in accordance with the Geneva Conventions. The MACV Commander agreed, and as Prugh recalls, Westmoreland seemed

²⁰⁵ Prugh History, 11 July 1975, *supra* note 10, at 38.

²⁰⁶ GPW, *supra* note 204. Prugh notes: “As indigenous offenders, the Viet Cong did not technically merit prisoner of war status, although they were entitled to humane treatment under Article 3, Geneva Prisoner of War Conventions.” PRUGH, LAW AT WAR, *supra* note 6, at 62; see George S. Prugh, *Prisoners at War: The POW Battleground*, 123 DICK. L. REV. 60, 123-38 (1956).

²⁰⁷ Prugh History, 11 July 1975, *supra* note 10, at 39.

²⁰⁸ *Id.* at 39-40.

²⁰⁹ PRUGH, LAW AT WAR, *supra* note 6, at 63; see Prugh History, 11 July 1975, *supra* note 10, at 40.

genuinely appreciative of the fact that his attorney was so fully engaged in support of the counterinsurgency effort: “[Westmoreland] was looking for all the help that he could get and he really hadn’t expected the law or lawyers, the military lawyers, to give him much help. . . . [H]e was just grateful for anything that we could give to assist him in the operation.”²¹⁰ In August, the position was adopted as official U.S. policy, over the determined objections of the North Vietnamese who maintained that the conflict was an internal dispute.²¹¹

C. Opposition by the South Vietnamese

The Republic of Vietnam considered the insurgents domestic criminals, and therefore outside the scope and protections of the Geneva Conventions. One of Prugh’s most significant accomplishments as the MACV SJA was his successful campaign to persuade the South Vietnamese government to recognize the Vietcong in the context of international law.²¹² He recalled that,²¹³ “Their position [in 1965] was that this is not a war, this is not an Article 2, Geneva Convention type of operation so the Conventions don’t yet come into play . . . we had to induce them to do it.”²¹⁴

Prugh set out to convince the South Vietnamese that accession and adoption of the Geneva Conventions for prisoners of war would benefit the war effort. In meetings with high level officials, he emphasized two key points tied to the success of military operations.²¹⁵ First, affording

²¹⁰ Prugh History, 11 July 1975, *supra* note 10, at 41.

²¹¹ PRUGH, LAW AT WAR, *supra* note 6, at 63; *see* Prugh History, 11 July 1975, *supra* note 10, at 40.

²¹² Prugh History, 11 July 1975, *supra* note 10, at 47-49. “. . . we had to convince the South Vietnamese of this. We needed to have their cooperation.” *Id.* at 47.

²¹³ The South Vietnamese argued, not unlike their Northern counterparts, that this was not an international armed conflict within the scope of the Geneva Conventions. Article 2, GPW, states in relevant part:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all *cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.

GPW, *supra* note 204 (emphasis added).

²¹⁴ Prugh History, 11 July 1975, *supra* note 10, at 48-49.

²¹⁵ *Id.* at 48.

Vietcong prisoners basic Geneva Convention (III) for Treatment of Prisoners of War protections would enhance the South's ability to gather intelligence by making prisoners available and perhaps compromising their resistance: "Killing prisoners out of hand without an interrogation certainly deprives you of any intelligence."²¹⁶ Secondly, a clear policy for the humane treatment of prisoners of war would "help show the world the maturity of South Vietnam—that they were in fact complying with international law on this and that they were taking a very responsible position. [P]olitically, it certainly was attractive."²¹⁷

One of the best resources for this issue can be found in a book by COL Frederic L. Borch, III (Retired), *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia 1959-1975*.²¹⁸ In it, he summarizes Prugh's role in the prisoner of war status for the Vietcong:

Persuading the South Vietnamese armed forces to change their position concerning the . . . status and treatment of Viet Cong and North Vietnamese prisoners of war was not a judge advocate responsibility, and Colonel Prugh had not been tasked with resolving the matter. Recognizing, however, that the increasing number of Americans captured by the Viet Cong and North Vietnamese would have significantly enhanced chances to survive if South Vietnam applied the Geneva Prisoners of War Convention to enemy soldiers in its custody, Prugh and his staff spearheaded the efforts to bring about this change.²¹⁹

Prugh observed a situation in Southeast Asia where the South Vietnamese government was reluctant to acknowledge the international nature of the forces fighting to remove it. The Vietcong were, in the minds of many, little more than communist rebels deserving less than the limited protections afforded common criminals. "In short, the Saigon government refused to treat Viet Cong captives as prisoners of war, maintaining that the Geneva Conventions addressed only armed conflicts

²¹⁶ *Id.* at 49.

²¹⁷ *Id.*

²¹⁸ FREDERIC L. BORCH, III, *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975* (2003).

²¹⁹ *Id.* at ix.

between states and not civil insurrections such as the one taking place in South Vietnam.”²²⁰

The issue of the international character of the conflict aside, the concerns and objections voiced by the South Vietnamese were many. Most immediately, they were uncertain as to what they would call these prisoners in 1965 prior to any declaration of war. “Prisoners of war” would suggest a state of formal hostilities that did not yet exist.²²¹ Secondly, they adamantly resisted the GPW provisions requiring payment for prison labor,²²² and were concerned about committing sparse medical resources to Vietcong prisoners at a time when ARVN soldiers received primitive care, at best.²²³ A final concern related to the potential for international criticism of South Vietnamese prisons without a relative comparison to the treatment of prisoners held by the Vietcong and North Vietnamese.²²⁴

D. Application of the Geneva Conventions to the Vietcong

By August, 1965, the Republic of Vietnam finally acceded to the application of the Geneva Conventions toward the communist insurgency.²²⁵ This was a historic development in international law because in this issue of first impression—the relationship of law to an insurgency—the United States and its allies had taken the broad view to extend GPW protections to unconventional combatants. The implementation of the policy required rapid development of training programs and related assistance for ARVN forces, establishment of prisoner of war camps, and coordination with the International Committee of the Red Cross (ICRC).²²⁶

These efforts were led, in large measure, by Prugh and the team of uniformed attorneys at MACV. It is significant that the much of the language and manner of thinking about insurgent detention operations, processing, and treatment was developed forty years ago by Army judge

²²⁰ *Id.* at 11.

²²¹ Prugh History, 11 July 1975, *supra* note 10, at 51.

²²² *Id.* at 49.

²²³ *Id.* at 51.

²²⁴ *Id.* at 51-52.

²²⁵ PRUGH, LAW AT WAR, *supra* note 6, at 65.

²²⁶ Prugh History, 11 July 1975, *supra* note 10, at 52-53; *see* PRUGH, LAW AT WAR, *supra* note 6, at 65-70.

advocates in policies such as *MACV Directive 381-11*.²²⁷ That Directive states in relevant part: “All interrogations will be conducted according to the GPW with particular regard to the prohibitions against maltreatment contained in Article 17 and the fact that these prohibitions apply equally to detainees/PW [prisoners of war] (Article 5, GPW).”²²⁸ Associated policies required all detainees be treated in accordance with the GPW at point of capture, through their interrogation for “legitimate tactical intelligence,” until released to Vietnamese authorities.²²⁹

A related problem for MACV concerned the identification and segregation of detainees and the issue of status. The general policy required application of GPW protections to all detainees regardless of circumstances, even though many failed to qualify as prisoners of war under governing tenets of international law. The three principle categories for detainees were: prisoners of war, civilian defendants under the domestic criminal code of South Vietnam, and “terrorists, spies, and saboteurs.”²³⁰

The problem of identification and status for the MACV should be familiar to anyone even remotely associated with some of the essential dilemmas of detention operations in Guantanamo Bay, Iraq, and Afghanistan. This includes the problems of processing, transporting, interrogating, and housing detainees who might otherwise be held in civilian confinement facilities but who potentially posed some kind of continued risk to military operations. Prugh recalls,

You see a youngster down the trail in black pants and you think he had a weapon a moment ago. Somebody down there fired. He doesn't have one now. Is he a prisoner of war? Twelve years old, [fourteen] years old? How do you treat him? What provisions exist? He is not wearing a uniform, he is not carrying arms openly, and he had no insignia. As far as you know . . . he's not a combatant. [T]he pressures of the Geneva Convention are that when you are in doubt, you treat him as a

²²⁷ MACV DIR. NO. 381-11, EXPLOITATION OF HUMAN SOURCES AND CAPTURED DOCUMENTS (5 Mar. 1968), in PRUGH, *LAW AT WAR*, *supra* note 6, at 127.

²²⁸ *Id.* at 129.

²²⁹ PRUGH, *LAW AT WAR*, *supra* note 6, at 65.

²³⁰ *Id.* at 66. Terrorists were treated in accordance with the provisions of GPW, but were not granted prisoner of war status, as were the Vietcong captured in the course of combat operations.

prisoner of war, and you only deprive a person of prisoner war status by reason of the action if a military tribunal . . . [But in Vietnam] if we applied those rules we would [be required] to treat the prisoner as a . . . civilian defendant, not as a prisoner of war. If he went to a [South Vietnamese] civilian jail the chances were that he would only be there six months because of the pressures and volume in the prison. If he was held as a prisoner of war, he would go to the prisoner of war camp and would stay there for the duration . . . [T]he Viet Cong well understood that.²³¹

This led to the creation of an expansive, largely American-sponsored prisoner of war program designed to accept, process, and administer select prisoners to keep them out of the crowded and unreliable South Vietnamese civilian penal system.²³² The prisoner of war camps adhered to the protections granted under the Geneva Conventions,²³³ and by the close of 1967, housed upward of 13,000 prisoners, mostly Vietcong.²³⁴ Prugh used judge advocates in the field, including the Advisory Detachment, to monitor the progress and success of the prisoner of war program with particular focus on accountability, treatment, and confinement conditions.²³⁵

It is also important to note that during this period, MACV judge advocates, led by Navy Commander (CDR) George Powell, drafted the first set of procedures for conducting a prisoner of war status tribunal.²³⁶ Prugh notes:

[T]his was a novel area because there is no procedure set out in the Geneva Convention for [tribunals]. It doesn't say anything about counsel; it doesn't say anything about who does the deciding or what the due process and procedures are. So, we "ginned" this up out of whole cloth and made it . . . what amounted to a small trial.²³⁷

²³¹ Prugh History, 11 July 1975, *supra* note 10, at 54-55.

²³² PRUGH, LAW AT WAR, *supra* note 6, at 67-68.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Prugh History, 11 July 1975, *supra* note 10, at 58.

²³⁶ *Id.* at 56-57.

²³⁷ *Id.*

The MACV procedures included provisions for the role of the general court-martial convening authority (GCMCA), establishment of military counsel, and evidentiary standards in an effort to bring integrity and fairness to a forum empowered to deny an individual the special protections afforded by the Geneva Conventions.²³⁸

A final and particularly significant contribution Prugh and his team made during 1965-66 concerned the development of a MACV policy for handling war crimes investigations.²³⁹ Prugh recalls that the first cases of violations of the law of war involved violent and “barbarous” crimes against U.S. personnel.²⁴⁰ In 1965, after researching war crime reporting procedures from the Korean War,²⁴¹ Prugh authored *MACV Directive 20-4, Inspections and Investigations of War Crimes*.²⁴² “What we were looking for was aiming [the directive] at what would our people do when they came across a war crime scene? . . . [P]reserve the evidence and [begin] an investigation.”²⁴³ The directive was the first effort to institutionalize key definitions, appointing and reporting procedures, and related responsibilities for investigations of war crimes committed against American service members.²⁴⁴ The directive was subsequently updated and expanded in 1966 and 1968 to include procedures for investigations involving crimes by U.S. personnel²⁴⁵ and remains a key contribution in the history of jurisprudence in this area.

E. Preserving the Lessons of Vietnam

From 2001 to the present, the period encompassing the war on terror and the downfall of the Taliban and the Hussein dictatorship, the United States has revisited the idea and application of military tribunals and

²³⁸ *Id.* at 57.

²³⁹ See PRUGH, *LAW AT WAR*, *supra* note 6, at 72-73; see also BORCH, *LAWYERS IN VIETNAM*, *supra* note 218, at 20-21.

²⁴⁰ Prugh History, 11 July 1975, *supra* note 10, at 68.

²⁴¹ BORCH, *supra* note 218, at 20.

²⁴² MACV DIR. 20-4, *INSPECTIONS AND INVESTIGATIONS OF WAR CRIMES* (20 Apr. 1965), *cited in* PRUGH, *LAW AT WAR*, *supra* note 6, at 72; see also BORCH, *supra* note 218, at 21.

²⁴³ Prugh History, 11 July 1975, *supra* note 10, at 68.

²⁴⁴ *Id.* at 68; see PRUGH, *LAW AT WAR*, *supra* note 6, at 72.

²⁴⁵ PRUGH, *LAW AT WAR*, *supra* note 6, at 72-73, 136-39. Prugh observes that, “had the war crimes directive been enforced, the My Lai thing would have been uncovered much earlier, Firebase Maryanne much earlier, [and] the whole war crimes problem that we had would have been far smaller that it later turned out to be.” Prugh History, 11 July 1975, *supra* note 10, at 69.

related forums for the adjudication of terrorists and violations of the law of war.²⁴⁶ Major General Prugh witnessed the establishment and operation of this kind of expansive prosecutorial effort. Nearly thirty years before the creation of the Guantanamo Bay Tribunal, MG Prugh anticipated the need to institutionalize the memory, means, and methods by which tribunals might operate.

Prugh's legacy on prisoners of war and war crimes, including *Law at War: Vietnam 1964-1973*,²⁴⁷ remains an invaluable resource for anyone interested in the subject. His observations for retaining records of how the Army deals with such issues are instructive.

I'd say the first big lesson is that we should be getting to work now, "we" being the government, and primarily the Judge Advocate General's Corps, to go to work to study [tribunals and large scale criminal litigation,] and put it in as orderly a fashion as we can to incorporate the lessons that have been learned. . . . [n]ot to permit our people to forget how to handle it. Then I think from this we should be devising some measure. I don't like to use the term expediting measures, but clearly and sometimes in cases there should be some special deviations from the rules permitted. Maintaining fairness, maintaining the basic protection, but permitting some deviation from the rules, that are so rigidly applied, and properly so, in the small criminal cases.²⁴⁸

As previously noted, Prugh was deeply concerned about developing a record of lessons learned for future generations. In large measure, this concern resulted from MG Prugh's personal experience in dealing with issues of relative first impression and, in absence of any records of institutional knowledge, having to seek guideposts wherever he could find them. The issue of the availability of records and resources for the development of war crimes policies is a good example. Prugh recalls:

²⁴⁶ See generally Jeffrey L. Spears, *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*, 176 MIL. L. REV. 96 (2003).

²⁴⁷ PRUGH, *LAW AT WAR*, *supra* note 6, at 61-78.

²⁴⁸ Prugh History, 5 July 1975, *supra* note 10, at 7.

When I was serving as General Westmoreland's lawyer, at COMUS [Commander U.S.] MACV, I was quite concerned and conscious of the necessity to have something worthwhile on the books on war crimes and on the handling of prisoners of war [I]n 1965, when we were looking to try to find materials to apply for the development of a War Crimes Directive applicable in Vietnam for the incoming American troops, we could not find any basic references . . . including searches at the Pentagon. Unable to find anything, we ultimately got one copy of a War Crimes Directive developed by then Colonel George Hickman, who later became The Judge Advocate General, when he was the Far East Judge Advocate during the early years of the Korean War. We used that document as a springboard in Vietnam in 1965 to develop a war crimes directive. . . . Clearly, there should have been a better record available to us considering the range of time and experience we had.²⁴⁹

Years later, Prugh looked back upon his twenty months²⁵⁰ of service in Vietnam with justifiable pride and sense of accomplishment for all he had accomplished and witnessed as the MACV Staff Judge Advocate. It was, for him, an exciting time in the history of the Army, the nation, and the law.²⁵¹ He recalls the experience of dealing with the many issues and challenges of first impression that arose in Vietnam as "an adventure, . . . where you [could] go as far as your imagination and your energy will take you."²⁵² That adventure included several milestones in the history and evolution of the role of judge advocates in military operations and the American experience with the Geneva Conventions, prisoners of war, the relationship of the law to counterinsurgency operations.

²⁴⁹ *Id.* at 8-9. The General goes on to recognize the role of TJAGLCS as a resource for future international law practitioners. "I think the JAG School alone, today, can provide to anyone who has this sort of problem again a good deal more of the variations and the provisions and the concepts that ought to be taken into account when dealing with war crimes and prisoners of war." *Id.*

²⁵⁰ The MACV assignment was originally a two-year tour, but was curtailed to a one-year tour in early 1965 when family members were returned to the United States. Prugh agreed to an eight-month extension of the adjusted twelve-month assignment. Prugh History, 11 July 1975 (2), *supra* note 10, at 1.

²⁵¹ *Id.* at 70.

²⁵² *Id.* at 70-71.

VI. 1967-1971

A. European Command and United States Army Europe

In August 1966, Prugh reported to the United States European Command (EUCOM),²⁵³ located at Camp-de-Loges, France, outside Paris.²⁵⁴ The Commanding Officer was General David A. Burchinal. From the moment Prugh arrived, he was hard at work supporting the recently announced American withdrawal from France and the French withdrawal from the NATO military structure.²⁵⁵ The action was ordered by President Charles de Gaulle in February 1966 and was known internally as the fast relocation out of France (FRELOC). For Prugh, it was a mass movement of American manpower and equipment, transfer of property, and related issues for Army lawyers. He observed:

[F]or a lawyer it was a great opportunity because here again the command had not foreseen . . . the sort of problems you get when you suddenly dissolve a tremendous military presence, with all the financial arrangements, all the contracting arrangements, the employment and tax issues . . . the whole raft of things that made our ties with France over a [twenty]-some year period very strong, and that suddenly have to be terminated.²⁵⁶

Army judge advocates were actively involved in significant actions concerning the suspension of U.S. payments to the French for government-to-government contracts undertaken during the period of French participation in NATO.²⁵⁷ These included contracts for facilities, construction, and related claims for the “negative residual value” of French property converted to military use, “e.g., . . . farmland converted to an airfield.”²⁵⁸ Following the move from north of Paris, the EUCOM headquarters shifted to Stuttgart, Germany; Allied Forces Central Europe (AFCENT) moved from Fontainebleau, France, to Brunssum, Holland; and the Supreme Headquarters Allied Powers Europe (SHAPE) moved

²⁵³ See The Establishment, Evolution, and Accomplishments of the United States European Command History, <http://www.eucom.mil/english/Command/history.asp>.

²⁵⁴ Prugh History, 11 July 1975 (2), *supra* note 10, at 3.

²⁵⁵ *Id.* at 4.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.* at 7.

from near Paris to outside Mons Casteau, Belgium.²⁵⁹ At the same time EUCOM was working the legal issues associated with leaving French territory, a host of new matters arose in anticipation of the pending U.S. presence in Germany, the Netherlands, and Belgium.²⁶⁰

The agreements were negotiated to address issues such as broadcasting rights, police authority, criminal justice jurisdictions, taxes and import duties, and establishment of post exchanges and commissaries.²⁶¹ In some cases, as with Germany, many issues were resolved within the context of the NATO treaty and related SOFAs.²⁶² In others, individual agreements were required to clarify the status, obligations, and privileges of American forces. Prugh recalled that the intensity and detail of judge advocate involvement surprised him. “I never would have anticipated that the lawyers would have been involved in the negotiation and undertaking with a foreign government. But here again, the American Embassies in both [Holland and Belgium] were without lawyers and they hadn’t really been faced with problems like these before.”²⁶³ Similar agreements for the stationing of U.S. personnel were later also reached with Spain and Turkey, each uniquely tailored to the specific concerns host nation governments.

As in Vietnam, Prugh and his military attorneys also became the principle authorities for the multitude of host nation laws impacting the U.S. presence, including over 250 individual international agreements affecting American operations.²⁶⁴ Across the board, military lawyers in EUCOM were actively involved in new disciplines, leading Prugh to note that, “here again, somewhat like Vietnam, you could go as far as your imagination would take you.”²⁶⁵ As the scope of judge advocate work expanded, so did Prugh’s attention to the manner and substance with which legal products were presented in operational planning documents. Contingency planning, in particular, merited special attention.

²⁵⁹ *Id.* at 7. See generally NATO Allied Command Operations, <http://www.nato.int/shape/news/2003/history/index.htm> (detailing a history of Supreme Headquarters Allied Powers Europe (SHAPE)).

²⁶⁰ Prugh History, *supra* note 10, at 7-9.

²⁶¹ *Id.*

²⁶² *Id.* at 8.

²⁶³ *Id.* at 12.

²⁶⁴ *Id.* at 14.

²⁶⁵ *Id.* at 16; see Colonel George S. Prugh, Jr., *United States European Command—A Giant Client*, 44 MIL L. REV. 97 (1969).

[T]he legal annexes to [contingency planning documents] were generally hog wash. . . . [T]he same language would appear in all of them. There had been no realistic appraisal of what the legal requirements would be. . . . I thought it would be useful to take a look at all those plans from a real point of view and see what we could collect with respect to basic identifying information—how far out was the territorial sea, what kind of law did they have, what is the role of the Minister of Interior with respect to handling police matters . . . What is the role of Moslem law which in many cases along the Mediterranean is very important. Who knows what that law is? . . . I saw the contingency planning problem as a very real problem for a headquarters like EUCOM, for the military lawyer.²⁶⁶

By this time Prugh had developed a well-deserved reputation for hard work and innovation at all levels, and for his demonstrated ability to move and expand the role of judge advocates in support of commanders in new and important ways. On 1 May 1969, following the unexpected departure of Brigadier General (BG) Louis Shull, Prugh was reassigned as The Judge Advocate, U.S. Army Europe (USAREUR) and 7th Army,²⁶⁷ Heidelberg, Germany—the senior uniformed Army lawyer in Europe. Shortly thereafter, in September 1969, Prugh learned that a recent Army selection board had identified him for promotion to brigadier general.²⁶⁸ He was promoted approximately two months later.

During his tenure as the USAREUR Judge Advocate, Prugh addressed a host of issues related to the evolving nature of military jurisprudence and the special conditions present during this period in Cold War Europe. Several noteworthy issues included the creation of regional law centers, the development of the military magistrate program, racial animosities among minority service members, and implementation of the Military Justice Act of 1968.

²⁶⁶ *Id.* at 21-22.

²⁶⁷ *Id.* at 24-29. At both United States European Command (EUCOM) and United States Army Europe (USAREUR), the senior legal officer was The Judge Advocate as opposed to a staff judge advocate because his role was that of a supervisory judge advocate and principle legal advisor to the command, and not just a member of the staff. Correspondence with LTC Prugh, *supra* note 13.

²⁶⁸ Prugh History, 5 July 1975, *supra* note 10, at 36-37.

From an institutional perspective, an important development during this period was the evolving role of the Army judge advocate in areas not traditionally embraced by military attorneys. The European law centers were a key fault line in the changing nature of military practice. Recalling the role and responsibilities of the law centers, Prugh notes:

[I]t was apparent that we were being asked to do an awful lot of work, not just the traditional kinds of [military justice], but. . . for example, housing legal advice to the young soldiers with his wife who were in Europe for the first time; the drug problem;²⁶⁹ a great many administrative law problems, the insurance problem. . .²⁷⁰

Acting on his long-held view that judge advocates are “problem-solvers for the Army,”²⁷¹ Prugh went forward with a program to establish regional law centers to consolidate and maximize the availability of legal services to Soldiers and others regardless of command affiliation. Prugh recalls, “What we tried to do there was to bring together the legal talent that had been assigned into areas and try to have them address the problems for everybody in the particular area . . .”²⁷² This regional approach to legal services was designed to make better use of legal assets, but it was not without opposition.

We had difficulties with commanders, not the senior commanders, but the commanders of small intermediate staffs who felt they were being deprived of “their” legal officer . . . and to some extent they were correct. . . . I think that to some extent our own people . . . sometimes dragged their feet. They didn’t understand what a law center was and it was different from what they had expected and so it ran counter to a ‘belonging unit’ which they wanted. So we got opposition from Judge Advocates themselves . . .²⁷³

²⁶⁹ Prugh History, 4 April 1977, *supra* note 10, at 2. Prugh recalls that, “during the period 1969-1970, the role that the Judge Advocate played in USAREUR was primarily to be a catalytic agent and as a staff support to the command’s programs in trying too feel for a solution for the drug problem.” *Id.*

²⁷⁰ *Id.* at 2-3.

²⁷¹ *Id.* at 4.

²⁷² *Id.*

²⁷³ *Id.* at 4-5.

Despite these objections, the regional law center concept later took hold, particularly in Germany, and grew into a successful tool for the efficient delivery of full spectrum legal services for U.S. personnel stationed in Europe.²⁷⁴

A second key development in Europe was the first military magistrate's program. The idea arose in the mid-1970s, during a meeting in Berlin of USAREUR staff judge advocates, where Prugh recalls one participant asked, "Why don't we try a program of having a JAG judge at the stockade to handle habeas corpus—a magistrate?"²⁷⁵ The issue arose from the fact that at the time there were over 500 Soldiers in pretrial confinement facilities in Nuremberg and Mannheim, all at the direction of commanders but without any kind of formal legal review.²⁷⁶

You can have a young man in there for a ten day [absence without leave] AWOL and in the same cell with a man on a murder charge, and also in the same day a fellow facing a German rape charge for which he might not come to trial for a year. . . . Clearly there had to be a better remedy than what we had approached up to that time. We had to have somebody who could take a good hard look at this pretrial confinement and, in a diplomatic way, deal with the commander who was responsible.²⁷⁷

Despite UCMJ and MCM provisions that largely vested pretrial confinement responsibility with commanders,²⁷⁸ Prugh persuaded the USAREUR Commanding General (CG), General James Polk, of the relative merits of such a program.²⁷⁹ In 1971, after a brief trial run, General Polk signed a directive essentially delegating his oversight command authority to full-time military magistrates, who conducted pre-confinement reviews of Soldiers at the major European confinement facilities.²⁸⁰ The initial program, and its progeny, was extremely

²⁷⁴ Interview with Major General George S. Prugh, Jr., in Orinda, Cal. (Apr. 29, 2005) [hereinafter Prugh Interview].

²⁷⁵ Prugh History, 4 April 1977, *supra* note 10, at 9.

²⁷⁶ *Id.* at 10.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 9-10. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304(b), 305(c) (2005).

²⁷⁹ Prugh History, 4 April 1977, at 10-11.

²⁸⁰ *Id.* at 11-15.

successful. Within three months of implementation, the pre-trial confinement population in Europe dropped from over 500 to around 250.²⁸¹ “Commanders weren’t going to send questionable cases in because they didn’t want a magistrate JAG captain releasing them. . . .”²⁸² The USAREUR program was a great lesson for the Army, and a harbinger for subsequent expansions of the program, including the part-time magistrate program and active integration of judge advocates in areas such as search and seizure.²⁸³

Another issue addressed racial animosities among African-American service members. A key concern involved the perception of an inequality within the military justice system as evidenced by the disproportionate number of minority Soldiers in confinement, particularly because of non-judicial punishment.²⁸⁴ In response, a deliberate effort was made to get the facts and to “come up with some valid explanations for whatever the facts were and to try to take actions to reassure [African-American] soldiers that there was square dealing in this.”²⁸⁵

Prugh, along with other subject matter experts, including the USAREUR Inspector General (IG), established a “flying squad” to travel and inspect the administration of military justice down to the company level, to see whether minorities were, in fact, unfairly subject to non-judicial punishment.²⁸⁶ The squads “would descend, unannounced, in a command and look at the non-judicial punishment records and get the specifics . . . and try to see if they couldn’t verify whether there were discriminatory actions as a result.”²⁸⁷ Prugh recalls that the “flying squads” . . . “helped keep the system honest, and . . . their existence was a healthy thing that helped placate the fears of [African-American] soldiers in non-judicial proceedings.”²⁸⁸

In acknowledging the related situation of minority mistrust of the military system in 1969-1971, Prugh observed, “what was not working in

²⁸¹ *Id.* at 14.

²⁸² *Id.*

²⁸³ *Id.* at 14-15.

²⁸⁴ Prugh History, 11 July 1975 (2), *supra* note 10, at 42.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 42-43.

²⁸⁸ *Id.* at 43.

USAREUR at that time was the chain of command.”²⁸⁹ African-American Soldiers and other minorities experienced frustration at their apparent inability to seek recourse from their military leaders, the IG, or others.²⁹⁰ A key lesson learned during this period was the importance of a multi-agency approach to Soldier concerns, with integrated solutions across the full spectrum of available resources. Prugh notes:

I am convinced that it is necessary to tell the command all of the various channels [available to Soldiers]. It is wrong to use just the chain of command. It is wrong to erode the chain of command. I think you certainly have to support the chain of command but all the staff sections can work in support [of it]; the Judge Advocate, the housing officer, the personnel officer, the IG, the Chaplain, even the Provost Marshal. [I]f these are all working in tune, they can do a great deal toward reducing the tensions and suspicion; the tension comes from the suspicion that the soldier . . . is not getting a square deal.²⁹¹

A final matter of special relevance was the implementation of the Military Justice Act of 1968.²⁹² The law, implemented in 1969, placed enormous new burdens on the administration of military jurisprudence. In particular, the Act and subsequent amendments created a military judiciary through designation of law officers as military judges under the authority of TJAG; integrated judge advocates and military judges in special courts-martial; created certain rights of appeal for service members sentenced to dismissal, punitive discharge, or confinement greater than a year; changed the appellate Army Boards of Review to the

²⁸⁹ *Id.* at 44.

²⁹⁰ *Id.* at 44-45.

²⁹¹ *Id.* at 45. In many cases, the frustration of African American Soldiers, and others, arose from the lack of housing available on the German economy. Prugh notes that in many cases, lower enlisted, most of them draftees, would bring spouses to Germany even though they were not authorized command-sponsorship for family members. The already tight housing market, high rents, and occasional discriminatory practices of German landlords contributed to considerable difficulty and anger on the part of many. *Id.* at 45-49.

²⁹² See THE ARMY LAWYER, *supra* note 9, at 243-49. The changes to the UCMJ were long championed by several key members of the U.S. Senate, particularly Senator Sam J. Ervin of North Carolina. “The theme of [his] proposals was the elimination of legal thinking by layman: Qualified attorneys would henceforth administer the military legal system.” *Id.* at 249.

Army Court of Military Review; and demanded a substantial increase in the number of judge advocate defense counsel.²⁹³

Across the Army, there were an estimated 400 special appointments to the Judge Advocate General's Corps to fill the new requirements,²⁹⁴ bringing the size of the JAGC to a Vietnam era high of 1,782 officers.²⁹⁵ In a single twelve-month period, from 1969-1970, the JAGC accessed as many as 600 attorneys onto active duty, far more than the typical 200-250.²⁹⁶ The largely unregulated influx included many who simply did not belong in the Army, and offered lessons for the type of lawyer the uniformed services should seek, and those they should not.

They had great academic records but they didn't have the feel for the Army. They didn't have a feel for the soldier's problems; they didn't have a feel for the commander's problems; they didn't have an appreciation of the dynamism that goes into all that; and they might have been splendid defense appellate counsel but miserable as an advisor to a battle group commander. . . .²⁹⁷

VII. 1971-1975

A. The 28th Judge Advocate General of the Army

On an early morning in the Spring of 1971, MG Prugh received a personal message from General Westmoreland congratulating him on his selection as The Judge Advocate General of the Army. Prugh was still in Europe at the time, serving out the final year at USAREUR, and was "thunder-struck" with the news.²⁹⁸

Perhaps more striking than the announcement of his selection for TJAG was the notice, contained in the second paragraph of the same message, that unless Prugh had some objection, the incumbent Judge

²⁹³ Prugh History, 4 April 1977, *supra* note 10, at 56; THE ARMY LAWYER, *supra* note 9, at 245-246.

²⁹⁴ Prugh History, 4 April 1977, *supra* note 10, at 55.

²⁹⁵ THE ARMY LAWYER, *supra* note 9, at 249.

²⁹⁶ Prugh History, 4 April 1977, *supra* note 10, at 55.

²⁹⁷ *Id.* at 58.

²⁹⁸ Prugh History, 6 April 1977, *supra* note 10, at 1.

Advocate General, General Kenneth J. Hodson,²⁹⁹ would become the Chief Judge of the Army Court of Military Review and Chief Judge of the newly created U.S. Army Legal Services Agency (USALSA).³⁰⁰ This was another seminal moment in the jurisprudence of the Army, because the service was solidly on the path to institutionalizing a senior judge advocate as the head of the appellate court.

[T]hink of what this does to the judiciary and the establishment of an independent, very strong, dynamic, well directed, military judge system—it clearly adds to the prestige. No other service has yet gotten to the point where they can have a general officer or flag officer spot for their Chief Judge. Here was a golden opportunity for the Army.³⁰¹

But the announcement also raised interesting questions: Would all future Judge Advocates General retire to the Chief Judge position?³⁰² How would a former TJAG react to taking direction on policy or related matters from his successor - both senior MGs.³⁰³ In the end, the relationship between Prugh and Hodson was extraordinarily successful; however, the Army would not carry the Chief Judge position as a two-star billet beyond Hodson's tenure. Institutionally, the result was an additional brigadier general authorization for the Judge Advocate General's Corps.

[T]his is the way [MG Hodson] had actually planned it. He had thought that . . . maybe [the Army] could not guarantee a position of a major general, after all that is a pretty heavy investment in a position that had up to that point always had a colonel. It didn't have any statutory requirements, and its position in the Army's table of organization . . . was unclear. To have a Chief Judge and to figure out what his role was and what his power

²⁹⁹ The Judge Advocate General of the Army, 1 January 1967– 30 June 1971; see THE ARMY LAWYER, *supra* note 9, at 255.

³⁰⁰ Prugh History, 6 April 1977, *supra* note 10, at 2-3; see THE ARMY LAWYER, *supra* note 9, at 255. "The Agency brought together the Army's trial and appellate judiciary under one administration and included both the appellate counsel and case examiners necessary to conduct the statutory review of courts-martial." *Id.*

³⁰¹ Prugh History, 6 April 1977, *supra* note 10, at 4.

³⁰² *Id.*

³⁰³ *Id.* at 5.

was, when we were doing it we were really modeling it after a civilian system rather than anything in the military's manning table...the long and short of it is that it worked out beautifully.³⁰⁴

As Prugh prepared to return to Washington, he thought long and hard on what his priorities might be as The Judge Advocate General. “[Y]ou begin to think suddenly you are in a position where you can have a voice in the way things are going to go, the directions that things will take involving the Army’s law and the delivery of the Army’s law services, the whole pattern of Judge Advocate activities.”³⁰⁵ His emphasis would be a restatement of the lessons he learned in Vietnam. He asked, “[W]hat can I as a staff officer do to further the mission of my command; what can I as a lawyer do? What can the law do in support of the command?”³⁰⁶

One of the first things Prugh did was reach out within the professional spectrum of the JAG Corps for ideas and input from young officers and those with many years of military experience.³⁰⁷ “[W]e need to constantly find ways to bring in the new ideas, the young thinking, and the current material coming out of the schools and add that to the judgment and experience level of the older officers.”³⁰⁸ He worked to achieve this by emphasizing continuing legal education, regional “captains’ conferences” for junior officers, and quarterly meetings with senior leaders.³⁰⁹

³⁰⁴ *Id.* at 6.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 7. Prugh recalls,

I had to try and figure out what the Army was going to look like during the period that I was going to be The Judge Advocate General. Obviously, in a matter of turmoil, with the Vietnam War drawing down. Our overseas commitments were under some constraints, with a good possibility that they would be reduced. This has personnel ramifications; it has ramifications of the educational system that the Army has, and specifically JAG.

Id. at 10-11.

³⁰⁷ *Id.* at 14-16.

³⁰⁸ *Id.* at 16.

³⁰⁹ *Id.* at 1.

Like any Judge Advocate General, Prugh's four years were characterized by events driving the Judge Advocate General's Corps, the Army, and the nation. His tenure included the institutional effects of the downsizing following America's withdrawal from Vietnam,³¹⁰ the delicate litigation and clemency arising from the *Calley* war crimes case,³¹¹ tenuous relations with the Army General Counsel,³¹² personal participation in the 1974 Geneva Conventions,³¹³ the DOD Task Force on Racial Discrimination in the Army,³¹⁴ and the bicentennial of the Judge Advocate General's Corps.³¹⁵ It is beyond the scope of this article to discuss each significant event that occurred during Prugh's service as The Judge Advocate General. Several, however, merit special attention.

B. Downsizing the JAG Corps Following Vietnam

As the Vietnam War began to wane in the early 1970s, the Army was planning for the largest demobilization of forces since the 1950s and the aftermath of Korean War. The effect on the Judge Advocate General's Corps was no different, and Prugh recalls it as a key issue early in his tenure as The Judge Advocate General.³¹⁶ The challenge Prugh faced was planning for an equitable reduction in force commensurate with the diminished U.S. presence in Southeast Asia.³¹⁷

If you had to reduce say, 300-400 officers from a Corps at that point of about 1,800, dropping down to around 1,500 and do it in an equitable way, sending these young fellows out of the service and into either the reserves or

³¹⁰ *Id.* at 17-19.

³¹¹ *Id.* at 30-40.

³¹² *Id.* at 23-29.

³¹³ *Id.* at 42-52.

³¹⁴ *Id.* at 55-59.

³¹⁵ *Id.* at 65-69.

³¹⁶ Prugh History, 4 April 1977, *supra* note 10, at 57.

[I] have often thought that one of the toughest problems I wrestled with at the beginning of my time as The Judge Advocate General...is the transition from the five-year term of service down to the three-year term of service, and the orderly elimination of these extra 400, getting the normal JAG strength of roughly 1500-1550, without causing great trauma throughout the Corps.

Id.

³¹⁷ Prugh History, 6 April 1977, *supra* note 10, at 17.

into the civilian community with at least a palatable recollection of their military service and a friendly orientation toward the Army.³¹⁸

From this downsizing process, Prugh learned some of the things junior officers wanted: better continuing legal education opportunities, better materials from The Judge Advocate General's School, and a greater understanding of the personnel system.³¹⁹ "They wanted some order brought out of the chaotic Army lawyer business as they saw it."³²⁰ A key response to these concerns involved an expansion of the educational opportunities and institutional focus of The Judge Advocate General's School, in which Prugh invested heavily.³²¹

C. Role of Military Attorneys and the Relationship with the Army General Counsel

Prugh recognized the fundamental issues associated with the appropriate roles for military and civilian attorneys within the Department of the Army three decades before the Army's current, and dramatic, effort in institutional transformation and associated policy detailing military to civilian conversions.³²² He acknowledged opportunities for civilianization of certain uniformed positions, but stressed the importance of retaining vital capabilities within the uniformed service for the benefit of commanders and future military operations. A generation before Army transformation to the modular force, Prugh argued:

[T]he Army has got to be able to send some of its lawyers overseas or into dirty, undesirable, disagreeable positions at a time when they may not want to go, and the only assurance the Army can have so an attorney will

³¹⁸ *Id.* at 17.

³¹⁹ *Id.* at 18.

³²⁰ *Id.*

³²¹ It was therefore fitting that in 1975 one of his last official acts before retirement was the dedication of the current school facilities next to the law school of the University of Virginia, Charlottesville, Virginia. Prugh History, 7 May 1977, *supra* note 10, at 6.

³²² See Memorandum, General Peter J. Schoomaker, U.S. Army Chief of Staff and R. L. Brownlee, Acting Secretary of the Army, to MACOM Commanders, subject: Military-Civilian Conversion Target to Support Transformation (Mar. 11, 2004) (on file with author).

do this is when he is a uniformed attorney. . . . [But to do this] you have got to have some good job jobs for them to go to. Some jobs where they learn. Some jobs where they can aspire to positions of responsibility. If all the good jobs are given to, let's say, civilian attorneys, and all the dirty, dangerous and disagreeable jobs are given to the uniformed lawyers, before long you won't have a uniformed lawyer in the service.³²³

Among the long-standing challenges for The Judge Advocates General has been the nature and scope of their relationship with the civilian leadership of the Army from the General Counsel to the Secretary of the Army. Prugh recalls this relationship as “the most difficult problem he faced” during his four-year tenure as The Judge Advocate General.³²⁴ The essential question concerned the precise role played by the senior military and civilian attorneys within the structure and leadership of the Army. Prugh recalls, “During the period that I was there, I never thought that Uncle Sam really got the best service out of his lawyers because we ended up with sort of a two-headed monster in the Army . . . [one civilian, one uniformed]”.³²⁵

Upon assuming the position as the Army's senior uniformed attorney, Prugh learned that the Army General Counsel had sponsored a policy within the Army Secretariat that all members of the Secretariat would receive legal counsel exclusively from the General Counsel's Office.³²⁶ Prugh recalls that, “The Judge Advocate General had the back door closed to him and had to deal through the General Counsel to get to the Secretary . . .”.³²⁷ As a result, Prugh worked through the Army Chief of Staff, and through him to the Secretariat on matters of relevance to the

³²³ Prugh History, 10 July 1975, *supra* note 10, at 23.

³²⁴ Prugh History, 6 April 1977, *supra* note 10, at 23.

³²⁵ *Id.* at 23-27.

³²⁶ Prugh History, 10 July 1975, *supra* note 10, at 21-22.

It wasn't until I became The Judge Advocate General that I saw how much the position had been eroded from what I thought it had been, from what [Title 10, USC § 3037] gave it and that in fact The Judge Advocate General was no longer the legal advisor to the Secretary directly, except on a very limited basis.

Id. at 24.

³²⁷ *Id.* at 28.

uniformed service. The system worked, but it was clearly not what Prugh had originally envisioned.³²⁸

One instance of friction in the relationship arose from the proper place of the procurement law function. This had traditionally been a function for judge advocates; examples included a lieutenant colonel assisting as legal advisor to the Senate Armed Services Procurement Regulations Committee.³²⁹ This position exposed mid-grade judge advocates to the inner workings of Army contracting, including the Assistant Secretary for Installations and Logistics.

Given the position's developmental value for judge advocates, Prugh was understandably disturbed when the Army General Counsel, Robert W. Berry, decided the position should be transferred to his office and threatened to civilianize it if Prugh did not comply.³³⁰ After great consideration, Prugh finally agreed to transfer an officer to the Office of General Counsel, but only as a means of keeping the expertise resident within the Corps. He still considered the matter highly regrettable and "another aspect of an erosion of the JAG's procurement role."³³¹

He was fortunate, however, in the special relationships he had with GEN Westmoreland during Westmoreland's tenure as the Army Chief of Staff,³³² and to a lesser degree afterwards with GEN Creighton Abrams³³³ and GEN Frederick Weyand.³³⁴ Those relationships enabled Prugh to participate in many of the critical discussions regarding legal issues within the Department of the Army including creation of the volunteer force and related draw-down following the Vietnam war.³³⁵

Nevertheless, Prugh could not escape the underlying fact that he was forced to do business through the General Counsel.³³⁶ While

³²⁸ *Id.* at 28-29. "The other system . . . the system that I imagined worked from [Title 10, U.S.C. § 3037] had The Judge Advocate General being responsible to both the Secretary and the Chief of Staff." *Id.*

³²⁹ Prugh History, 6 April 1977, *supra* note 10, at 29.

³³⁰ *Id.*

³³¹ *Id.* at 30.

³³² Chief of Staff, 3 July 1968– 30 June 1972. Historical Resources Branch, U.S. Army Center of Military History, *available at* <http://www.army.mil/cmh-pg/faq/FAQ-CSA.htm> (last visited Mar. 7, 2006).

³³³ Chief of Staff, 12 October 1972–4 September 1974.

³³⁴ Chief of Staff, 3 October 1974–31 September 1976.

³³⁵ Prugh History, 10 July 1975, *supra* note 10, at 36.

³³⁶ *Id.* at 39.

acknowledging the need for the Secretary to have “his own private counsel . . . to advise him on problems that have answers that are ambivalent, and . . . mixed in very deeply with politics,”³³⁷ Prugh felt strongly that legal services in the Army should be headed by a single authority.

The big picture of it . . . should be dealt with by a career lawyer and I think under our present system this is best handled by a Judge Advocate General. I think that is what the system once was, and I believe that is the way it operated at its best.³³⁸

D. Participation at the 1974 Geneva Conference

In the late 1960s, there was a growing sense that the tenets of international law governing armed conflict since the aftermath of World War II required revisiting.³³⁹ In response to a 1968 United Nations Assembly initiative, the ICRC undertook a series of high-level meetings to draft protocols on international humanitarian law applicable in armed conflict.³⁴⁰ This effort, known as the “conferences of government

³³⁷ *Id.* at 42.

³³⁸ *Id.* at 43.

It is just from the stand point of getting into cross purposes at the top level for advice, many times on crucial issues where the Secretary and the Chief of Staff ought to be reading from the same sheet of music and should be getting legal advice from a source which is together. . . . so that they are not giving their best professional answers to their client. That we need, and I think that we do not have.

Id. at 44, 45-46. Prugh was particularly concerned about General Counsel and Secretary of the Army involvement in matters of military justice.

They could argue about how this might sit politically or might sit with Congress or how it might sit with the White House, but to analyze the responsibility of the major on the ground at the time . . . these took a professional “know-how” that only the uniformed man could inject.

Id. at 52.

³³⁹ Prugh History, 6 April 1977, *supra* note 10, at 44.

³⁴⁰ Major General George S. Prugh, Address to the Commonwealth Club of San Francisco, California: Diplomatic Conference on Updating the Law of War (Mar. 23,

experts,” was a preparatory measure designed to draft protocols to the Geneva Convention for debate and consideration later by a diplomatic conference.³⁴¹ While the Conventions themselves are multilateral treaties among and between sovereign states, the ICRC was an influential force because of its compliance and monitoring relationship.³⁴²

In 1971, the first of two conferences of experts representing seventy-seven countries met in Geneva, Switzerland to begin drafting the protocols.³⁴³ The following year, Prugh, recently sworn in as The Judge Advocate General, received permission from the Secretary of the Army and the Army Chief of Staff to take a six-week leave of absence to attend the second conference. He was excited for the opportunity and could not escape the historical importance of his participation.³⁴⁴ He recalled, “General George Davis, The Judge Advocate General right after the turn of the century, had participated in the Hague Peace Conference that resulted in The Hague Regulations, and I felt that we ought to continue [the tradition of Army JAG involvement].”³⁴⁵

Mr. George Aldrich, Deputy Legal Advisor to the State Department, headed the American delegation to the 1972 conference of experts.³⁴⁶ Prugh served as his principal assistant and was the American delegate to the committee considering matters involving prisoners of war, which he recalls was “[a] very difficult area and a very tricky one in which there

1974) [hereinafter Prugh Diplomatic Conference Address] (transcript on file with author). See also Prugh History, 6 April 1977, *supra* note 10, at 44-45.

³⁴¹ Prugh Diplomatic Conference Address, *supra* note 339.

³⁴² Prugh History, 6 April 1977, *supra* note 10, at 44-45.

³⁴³ Prugh Diplomatic Conference Address, *supra* note 339.

³⁴⁴ Prugh History, 6 April 1977, *supra* note 10, at 45. Prugh was eager to participate in the conference.

The main reason I wanted to participate in Geneva, during this development in the Geneva Convention—apart from the fact that I had a personal interest in the subject matter—was the fact that I couldn’t help but think that back in 1907 The Judge Advocate General of the Army had been participating in the conferences of the Hague Peace Conference and that was General George Davis; and here I am almost 70 years later . . . having the same chance to work on the now current version of the Geneva Conventions that have taken over and developed.

Prugh History, 4 April 1977, *supra* note 10, at 77.

³⁴⁵ Prugh History, 6 April 1977, *supra* note 10, at 46.

³⁴⁶ *Id.*

was very little agreement.”³⁴⁷ The disagreements, however, were not without their memorable anecdotes. Prugh recalls one exchange in which the Soviet Ambassador publicly referred to him as “a genocidist and exterminator,” and then later insisted they share a drink of vodka together.³⁴⁸

In July 1973, the ICRC petitioned the Swiss Government to call a diplomatic convention, the Diplomatic Conference on the Law of War, to consider two draft protocols (Protocols I & II to the Geneva Convention) resulting from the earlier conferences of experts.³⁴⁹ Protocol I dealt with international conflicts; Protocol II concerned civil wars and other non-international armed conflicts.³⁵⁰ The conventions included representatives from 126 countries; Prugh was a member of the American delegation and focused on legal issues concerning the Geneva Conventions.³⁵¹ These protocols, which Prugh described as “complicated, ambitious, controversial, frequently vague, indefinite, and ambiguous,”³⁵² were designed to “strengthen the spirit” of The Hague and Geneva Conventions drawn in the first half of the century.³⁵³

As Prugh observed, “After every war an effort is usually made to try to clean up the legal debris that occurred or was visible during that particular fight . . . Vietnam was no exception.”³⁵⁴ The character of the war in Vietnam was clearly different from the European wars of the first half century and demanded a fresh look at issues including the status and treatment of combatants.

[T]he problems that we had involved not only dealing with enemy prisoners, but the Viet Cong, a little kid in black pants who had a weapon in his had a little while ago, and you now take him and you don’t know if he is to be a prisoner of war, or to be treated as a civilian terrorist, or whatever. Clearly this was a new problem

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Prugh Diplomatic Conference Address, *supra* note 340; *see also* Prugh History, 6 April 1977, *supra* note 10, at 47, 49.

³⁵⁰ *Id.*

³⁵¹ Prugh History, 6 April 1977, *supra* note 10, at 47.

³⁵² Prugh Diplomatic Conference Address, *supra* note 340.

³⁵³ *Id.*

³⁵⁴ Prugh History, 6 April 1977, *supra* note 10, at 44.

that had to be addressed . . . at The Geneva Convention.³⁵⁵

The attendees at the 1974 Diplomatic Conference considered the texts of the two draft protocols dealing with international armed conflict, internal conflicts, and wars of “national liberation” similar to that observed in Vietnam. They were, in part, an effort to provide a legal framework for a new kind of war, where “the enemy moved covertly in and out of the civilian infrastructure seeking shelter among the innocent population prior to striking out in legal combat. The Geneva and Hague Conventions . . . were not readily applicable or adaptable to this guerrilla warfare.”³⁵⁶

A key provision of Protocol II contained language reflecting Prugh’s experience in Vietnam, whereby minimum humanitarian standards and protections would attach to detainees involved in internal armed conflicts.³⁵⁷ This expanded Article 4 of the GPW beyond the traditional definitions for lawful combatant—e.g., insignias and uniforms, chains of command, and certain weapons prerequisites—but did not apply to terrorists, saboteurs, or spies.³⁵⁸ Even these modest gains were highly controversial, because, as Prugh recalled, “nations don’t want international law to repeal their treason laws.”³⁵⁹

While there was modest agreement at the Diplomatic Conference on certain matters expanding international prisoner of war status, including wars of national liberation, freedom from colonialism, and wars against racial conflict, the politics of the conference made meaningful progress difficult. Prugh recalls, “We thought we were going to get into the substance of the matter but . . . were thrown into politics right off the bat: international politics, third world politics, anti-Vietnam politics, and anti-U.S. politics.”³⁶⁰

³⁵⁵ *Id.*

³⁵⁶ Major General George S. Prugh, Keynote Address at the 1973 United States Army Reserve Judge Advocate General’s Conference (Nov. 15, 1973) (transcript on file with author).

³⁵⁷ Major General George S. Prugh, Remarks to Cadets Enrolled in the Law Course at the United States Military Academy (Sept. 27, 1973) [hereinafter Prugh Remarks to Cadets] (transcript on file with author).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Prugh History, 6 April 1977, *supra* note 10, at 47. Prugh noted in a 1974 speech:

An example of the discord present during the convention was a proposal for the creation of a “protecting power” with broad authority to inspect and monitor compliance of the draft international protections.³⁶¹ The issue concerned the effective implementation of the Geneva Conventions through an international authority, whatever it might be. This was an attempt to redress a fundamental weakness of the Geneva Conventions—the lack of institutional enforcement. Prugh summarized the problem:

[The Geneva Conventions] assume that each belligerent will accept protecting powers; they do not provide a mechanism which insures their appointment. Moreover, the ICRC, whose humanitarian functions are recognized by the conventions, is given no treaty right to operate on the territory of a party unless that party decides to authorize it.³⁶²

Although a priority for many western nations, the idea of a multi-national authority with extraterritorial enforcement abilities was an anathema to many countries, including the Soviets and some Third World nations, who were sensitive to the notion of third parties entering their territory.³⁶³

While Prugh missed the final meetings of the Diplomatic Conferences held in 1976 and 1977, he nonetheless looked back on the historic nature of Army judge advocates’ participation in the Geneva Conventions, the progress made, and his contributions to it.³⁶⁴ The discussions on expanded definitions for “enemy combatants” and the legal rights that derive from it remain a lasting discourse, still relevant three decades later as we debate the tangled laws applicable to insurgencies and international terrorism.

The United States view, very simply, is that, within the system regulating armed conflict, the people affected by struggles for self determination, whose movement does not qualify for statehood, are entitled to protection under the Law Governing Civil Wars and under the minimum standards of Customary International Law and we stand prepared to provide meaningful consideration for that type of conflict in Draft Protocol II.

Prugh Diplomatic Conference Address, *supra* note 340.

³⁶¹ Prugh Remarks to Cadets, *supra* note 357.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Prugh History, 6 April 1977, *supra* note 10, at 49.

Prugh, like GEN Davis two generations earlier, was a witness and participant to the gradual evolution of international law, and the war of laws that collide in diplomatic forums where politics mean as much or more than jurisprudence, precedent, or the rights of men. His message, memorably given in his statement before a conference of experts, was for the need to learn from the past, as he and others worked toward the future.

In a very real sense, we are all prisoners of our time and our common history. We can neither ignore our past nor repeal it. We can learn from it, and we have all seen from the aphorism that if we do *not* learn from it, we shall be condemned to repeat it.³⁶⁵

E. Changes in Military Justice

No introduction to the tenure of a Judge Advocate General would be complete without at least a short review of the developments in military justice. During his time in the Pentagon, Prugh took the opportunity to study and institutionalize many of the components he started at USAREUR. The legal center concept, for example, which centralized processing of legal actions through an area jurisdiction and consolidated special courts-martial at the brigade or equivalent level, was broadly implemented.³⁶⁶

Also implemented was the Military Magistrate Program, which a test program found “was highly successful in reducing pretrial confinement without a significant adverse impact on unit discipline, while engendering a degree of confidence in the system for undergoing pretrial confinement.”³⁶⁷ The magistrate program was so successful that the DOD Task Force on the Administration of Military Justice in the Armed

³⁶⁵ Major General George S. Prugh, U.S. Army, Statement as The United States Representative in Commission III, International Committee of the Red Cross, Concerning the Protection of Civilians (May 16, 1972) (transcript on file with the author).

³⁶⁶ Prugh Interview, *supra* note 274; *see also* Major General George S. Prugh, *TJAG's Annual Report*, ARMY LAW., Aug. 1974, at 1.

³⁶⁷ Prugh, *TJAG's Annual Report*, *supra* note 366 at 1; *see also* Prugh History, 4 April 1977, *supra* note 10, at 8-16.

Forces recommended adoption of the program by the other military Services.³⁶⁸

Other changes included expanding rights of accused to present evidence and call witnesses during nonjudicial punishment proceedings,³⁶⁹ a test program for the random selection of court-martial panel members,³⁷⁰ and the continued growth of a trained, independent military judiciary and publication of Rules of Court for courts-martial.³⁷¹ These efforts were part of an informal program to enhance the faith Soldiers and others had in the fairness and professionalism of the military justice system. But perhaps the greatest institutional change began in 1972, when the DOD Task Force on the Administration of Military Justice in the Armed Forces recommended the establishment of an independent criminal defense bar—the Trial Defense Service (TDS).

The Army had previously studied the idea of a separate criminal defense service, but obstacles, including the insufficient number of officers and support personnel, frustrated the effort. The idea garnered new life through the DOD Task Force, which was appointed following allegations of racial bias in military justice, and was among the recommendations forwarded to the Service Secretaries on 30 November 1972.³⁷² This was a part of an effort to install greater confidence in the military legal process.

It required a “visible, physical separation between defense counsel and staff judge advocate offices,”³⁷³ monitoring by staff judge advocates to ensure qualified defense counsel, and the creation of an independent technical chain.³⁷⁴ Senior leaders with area responsibility were assigned to TDS, as were experienced, senior defense counsel, to manage and supervise junior attorneys.³⁷⁵ The goal of the bifurcation of prosecution and defense responsibilities was an effort to ensure that each Soldier had complete confidence in his lawyer, so no defense attorney “would be

³⁶⁸ Prugh Interview, *supra* note 274; *see also* Prugh, *TJAG’s Annual Report*, *supra* note 366, at 1.

³⁶⁹ Prugh, *TJAG’s Annual Report*, *supra* note 366, at 2.

³⁷⁰ *Id.* at 4.

³⁷¹ Prugh Interview, *supra* note 274; *see also* Major General George S. Prugh, Address to the U.S. Army Armor School Advanced Class (Dec. 12, 1972) [hereinafter Prugh Address to U.S. Armor School] (transcript on file with author).

³⁷² *Id.*

³⁷³ Prugh, *TJAG’s Annual Report*, *supra* note 366, at 3.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

influenced, directly or indirectly, consciously or unconsciously, to do less than his best for his client.”³⁷⁶

F. Relationship with General Westmoreland

Events and timing often drive the direction of an officer’s military career and have lasting effects. Things may be been very different, for example, had Prugh not been the MACV Staff Judge Advocate on the eve of the Brink Hotel bombing and the acceleration of American involvement in Southeast Asia in 1965. Events are also tempered by personalities, and no recollection of Prugh’s career would be complete without at least a brief mention of his special lawyer-commander relationship with General Westmoreland, a truly historic figure in the history of the Army and the Vietnam War.

As the Commander of U.S. forces in Vietnam, and later as the Chief of Staff of the Army, General Westmoreland benefited from having Prugh as his legal advisor. Whether in combat or on the Army staff, in matters of applying prisoner of war status to the Vietcong or dealing with Army-level policy, Prugh found Westmoreland to be the ideal client for his reasonable approach to the law and willingness to listen to lawyers, not only for their technical competence but for the analytical assets they brought to the table. Prugh recalls that Westmoreland was “wonderful with lawyers . . . receptive to advice . . . and was always very attentive.”³⁷⁷

Westmoreland also enfranchised Prugh in a personal way that testified to their many years together. Prugh recalls Westmoreland treated his staff well, and was “very warm, very pleasant, very direct, and very official.”³⁷⁸ But he was also social and would invite Prugh to his home at Quarters #1, Fort Myer, Virginia, for dinners. On one occasion, a dinner included “Potter Stuart, Associate Justice of the Supreme Court, the French Ambassador, and the parents of Mrs. John Kennedy.”³⁷⁹ It was a formal, yet special, relationship of two leaders with the shared experience of war and its aftermath.

³⁷⁶ Prugh Address to U.S. Armor School, *supra* note 371.

³⁷⁷ Prugh History, 6 April 1977, *supra* note 10, at 76.

³⁷⁸ *Id.* at 78.

³⁷⁹ *Id.*

VIII. "Standing on His Own Hind Legs": A Leadership Philosophy

I just think you have to understand that you are going to be responsible, have to be held responsible because you made the decision. You might as well reconcile yourself to this. You have to stand on your own hind legs.³⁸⁰

Throughout over three decades of military leadership, Prugh developed, exercised, and lived a number of key leadership tenets. First and foremost, it is worth remembering that Prugh was an officer who continually sought to move judge advocates and the law into new venues to maximize their effectiveness both for commanders and the mission. Part of this effort required seeking information and feedback. Prugh proudly sought the insights of others and looked beyond the sometimes-narrow confines of headquarters buildings for innovation and truth.

A good example of this was the officers mess luncheons MG Prugh sponsored as The Judge Advocate General. Each month, he would gather seven judge advocates—a judge advocate general officer, two OTJAG division chiefs, and four captains—for lunch at the Pentagon Secretary's Mess. Prugh recalled, "It takes forever to get through the Corps but in about two years we covered a pretty substantial chunk of junior officers; and we'd bring them in there and ask them questions about what was going on, what did they see from their point of view. . . ."³⁸¹ Prugh used the opportunity to informally coach and mentor young officers in the lessons and principles he valued most. The following twelve leadership tenets offer valuable insight into the general's own driving sense of self, his expectations of others, and his goals for individuals and organizations.

³⁸⁰ Prugh History, 5 July 1975, *supra* note 10, at 10-11. Major General Prugh formulated this lesson early in his career, dating back to his observations of the treatment of LTC Ellis and the Malmedy Massacres.

I would say one lesson I learned from this is that when the chips are down, and issues are very high and very important, that you cannot count on support from anyone else in the Army or governmental structures. You have got to pretty well be able to stand on your own hind legs.

Id. at 2.

³⁸¹ Prugh History, 4 April 1977, *supra* note 10, at 71.

1. *Take responsibility for your actions.*³⁸²
2. *Get as much information as you can; be deliberate in your analysis.*³⁸³
3. *Be prudent, but not so cautious or deliberate that you lose opportunities.*³⁸⁴
4. *Take the time to meet and know junior officers; take care of your people.*³⁸⁵

³⁸² Prugh History, 5 July 1975, *supra* note 10, at 10-1; *see also* Prugh History, 10 July 1975, *supra* note 10, at 27.

[I] think the Army normally trains the staff officers sufficiently that an officer stands on his hind legs and calls it as he sees it. He is not going to be influenced by grade, rank, people outside of that chain, and a lawyer shouldn't be (either). I think a lawyer has got to call it—if he is the counsel for this particular client he has got to call the shot for that client, give him the best advice. Now if the client wants to go somewhere else for legal advice, let him do it, but don't let the attorney subject himself to the pressures of another attorney who is the legal advisor to another layer and echelon so that our attorney is giving a diluted advice, trying to please a legal superior as well as the client. I think it is bad for the client and I think it is bad for our business, [and] for the Army.

Id.
³⁸³ *Id.* at 10.

I think in any decision making, whether it is legal or otherwise, you want to get as much information as you can, you want to be as deliberate as you can; you've got to be as critical of all sides as you make you analysis. Sometimes you have to go very fast, and in some cases, you are going to make what amounts to an educated guess. . . . lawyers are probably able to make more of an analytical decision when they can take more time, when they get more information.

Id.
³⁸⁴ *Id.*

³⁸⁵ Prugh History, 7 July 1975, *supra* note 10, at 1. In 1950, upon his arrival at Bremerhaven Port, Germany, the Prughs were greeted by the local Staff Judge Advocate, Colonel Noah Lord. It left a great impression on Prugh.

[T]hat the senior military lawyer in that post would have taken the trouble to come out and meet an incoming judge advocate captain. I learned that he met almost every judge advocate as he arrived in Europe. I think that this sort of thing impressed me early in my time

5. *Learn the lessons now, and preserve them for the future.*³⁸⁶

6. *Keep your own notes and records, your memos for record, on matters likely or even just barely possible to become important.*³⁸⁷

7. *Don't look over your shoulder – there is, as Satchel Page remarked, something back there and it might catch up. Be confident! Most worries never come about.*³⁸⁸

8. *Write – if only for your own amusement and records.*³⁸⁹

9. *There is no sense in trying to cover up mistakes.*³⁹⁰

in the JAG Corps—of the interest that the senior officers have and how much this can influence the junior officers to have [a] family aspect to the JAG Corps.

Id.

³⁸⁶ No where was this more the case than with the administration of military tribunals.

[I] think an important thing right now, is that we should be studying how to handle these matters. They are not handled in the same fashion as you try a 1, or 2, or even 4 or 5 accused case. . . . The number of times witnesses must be interrogated, the numbers of counsel which you must provide, the distribution throughout the world, the geographical distribution of the witnesses when there is a long delay before you can bring the case to trial. All of these make it very difficult to try, using the normal system that you would use for [smaller cases]. Our system just breaks down.

Id. Prugh History, 5 July 1975, *supra* note 10, at 6.

³⁸⁷ Major General George S. Prugh, Address at Fort Lewis, Washington, JACG: Past, Present and Future (March 1995) [hereinafter Fort Lewis Address], *in* Prugh Reminiscences, *supra* note 24, at 120.

³⁸⁸ *Id.* at 125.

³⁸⁹ *Id.* “This will have many benefits, including entertaining yourself as you re-read your own papers in retirement.” *Id.*

³⁹⁰ Prugh History, 7 July 1975, *supra* note 10, at 54.

You just as well come right out and admit it when you make mistakes, and take your lumps if you have to. From the standpoint of the commander or leader or manager, it isn't always necessary to give one. Sometimes you can achieve all the corrective action just by

10. *The troops come first, and if its cold enough for them to be without an overcoat, its cold enough for [you] to be without an overcoat.*³⁹¹

11. *Understand that judge advocates are more than just lawyers; they are problem solvers.*³⁹²

12. *Understand the unique nature of the military client.*³⁹³

In a speech following the 1991 Gulf War, MG Prugh recalled a conversation he had with the Army Chief of Staff, GEN Frederick Weyand, about what had gone wrong in the war they had fought together in Vietnam. In it, he recalled the vital contributions uniformed attorneys made, and detailed his vision for the integrated role of judge advocates:

having the right atmosphere and then by not applying the pressure and the power at that time, you can achieve greater results.

Id.

³⁹¹ Prugh History, 5 July 1975, *supra* note 10, at 25. Taking care of Soldiers and their families was extraordinarily important for MG Prugh, and he felt that by doing so, leaders paid both a small debt to those who served past as well enfranchising current military member in the future.

And if they all get this feeling, that we do take care of our own, really, not just lip service to it, then I think this will have a tendency to have more of a family attitude about the [Judge Advocate General's Corps] itself and that makes it a stronger tie with the service. . . . By and large the return on the investment is pretty great.

Id. at 26.

³⁹² Prugh History, 4 April 1977, *supra* note 10, at 47.

This is something that [a judge advocate] must sell to his commander, and it isn't easy for every person. The personality and psychology for each is very different. You have go to persuade [your commander] somehow, whether by action or by word, that you really want to help him; that you are there to try to further the accomplishment of his mission.

Id.

³⁹³ Prugh, Presidio Address *in* Prugh Reminiscences, *supra* note 24, at 110-11.

What my client wanted was military-legal-political judgment, the kind that takes into account all the years of rubbing elbows with line soldiers, with service in the field at varying levels of responsibility, with knowledge of what makes soldiers tick and respond in dirty and dangerous situations, with sharing the same worries, failures, errors, jargon, values, and traditions.

This, it seems to me, is what sets the military lawyer apart from his civilian counterpart. It isn't enough to be able to draft a will, review a contract, serve as counsel or judge, or accomplish all the many chores lawyers traditionally perform. Those tasks have to be undertaken within the special environment of the military service, with full knowledge of the military risks and principles, supported by the confidence of that military client that the advice he or she is getting is well-suited to the real military world. . . . [I]t has to be delivered in terms understandable to a very specialized class that has its own time-tested structure, language, and atmosphere.³⁹⁴

IX. Conclusion: The Past as Prologue

As soon as I identify a particular fact and put it in a time box the damn fact shifts to an older status. The future becomes the present and almost instantly becomes the past. Rather like learning that the fine old Army Court of Military Review, also once known as the Army Board of Review, has again changed its name to the Army Court of Criminal Appeals.³⁹⁵

Major General Prugh was at the center of dramatic institutional changes in military law and practice and had a significant hand in moving judge advocates out of the narrow space of administrative legal practice and into their proper role as command counselor integrated into military operations. He saw uniformed attorneys as problem solvers, who should look to the law with a broad view on making it work for commanders as another combat multiplier. Examples include his use of

³⁹⁴ *Id.* at 112; *see also* Prugh History, 6 April 1977, *supra* note 10, at 71.

³⁹⁵ Presidio Address *in* Prugh Reminiscences, *supra* note 24, at 123.

Advisory Detachments in Vietnam, application of the Geneva Conventions to detainees and insurgents, and his role in creating a separate criminal defense service to make it a fairer, more professional and trusted institution.

Some of the great legacies of Prugh's career were the lessons he created through decades of thoughtful writing, speeches, mentorship, and action. His contributions to the Army legal community are the recorded history of a life spent witnessing events with timeless relevance, and the expanded scope of responsibilities of uniformed attorneys, which he championed. His service during the war in Vietnam, and the American desire for definitive timelines and clarity amid the uncertainty of military operations, are as valid today as they were three decades ago. In particular, leaders seeking to build a future based on an understanding of the past should study his efforts on behalf of international law and the integration of military lawyers in the operational setting. On 16 March 1991, Prugh gave a presentation on the 1991 Gulf War at the Presidio of San Francisco,³⁹⁶ in which he summarized his observations on the perpetual lessons of war and the role of the judge advocate:

(1) [T]he calling of the military lawyer is not measured simply by the metes and bounds of the law – on the contrary it has a full military scope; (2) the lessons of war are never-ending and ever-changing. Each generation of commanders and their legal advisors is continually engaged in this learning process, whether assaulting the beaches of Normandy, slogging through Korean mud, or scouting a jungle tree line. The sands of the Gulf War were only the most recent classroom.³⁹⁷

While Prugh participated and contributed much to the development and application of international law, his career also spanned a period of breathtaking transformation in military justice. From the mid-1940s through the early 1970s, a vastly improved professional judiciary, an increasingly autonomous criminal defense organization, the refinement of the Military Rules of Evidence to become consistent with federal standards, and the greater sophistication of military legal training and education dramatically characterized the civilianization of military

³⁹⁶ *Id.* at 110-119.

³⁹⁷ *Id.* at 116.

criminal practice.³⁹⁸ As Prugh noted in 2000, “Fifty years of activity under the UCMJ have quieted the strident voices of so-called reform that Congress heard in those early days following World War II.”³⁹⁹

Prugh retired from the Army on 30 June 1975 before a memorable review of the Old Guard in Fort Myer, Virginia.⁴⁰⁰ On that day, as he and his family were leaving the parade grounds, he recalls a young judge advocate captain saying, “Well, it sure beats retiring from General Motors.”⁴⁰¹ For Prugh, he “couldn’t help think that [the young captain] had expressed a good deal in that one simple sentence of the great life that Army service has and can make possible, and how it stands apart from almost any other kind of activity that [he knew] of and certainly so for the military lawyer.”⁴⁰² That great life took him from the sandlots of San Francisco, to New Guinea, Germany, Vietnam, and the Pentagon, where he witnessed historic changes in the law of war and the practice of military law.

Following his retirement, Prugh returned to his beloved Northern California where he accepted a faculty position with his alma mater at Hastings College of Law. He taught criminal law and procedure and continued to actively write and speak on matters of importance, with particular emphasis on the Geneva Conventions and the law of war. He retired from Hastings in 1982 but continued to contribute to his considerable legacy of writings and speeches. General Prugh and his wife, Kate, presently lead a quiet life in their home overlooking the mountains outside the San Francisco bay area.

Over the span of three decades, George Prugh answered many of the questions some still ask about the role of legal professionals in military operations. The significance of his military career, his life, and the immeasurable contribution he made to the Army cannot be overstated. His experience with the treatment of insurgents and questions of status and law are more relevant than ever. His concerns with judge advocate professional development are timeless, and his profound dedication to expanded roles for uniformed attorneys finds voice in the new modular force where judge advocates are imbedded at the brigade level. He was a

³⁹⁸ PRUGH OBSERVATIONS, *supra* note 32, at 40.

³⁹⁹ *Id.* at 41.

⁴⁰⁰ Prugh History, 7 May 1977, *supra* note 10, at 9.

⁴⁰¹ *Id.* at 10.

⁴⁰² *Id.*

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remarkable lawyer with a true sense of history, and should be credited as one of the great architects of the modern JAGC.

**BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S
SUPREME COURT JOURNEY¹**REVIEWED BY MAJOR EMILY C. SCHIFFER²

[I]n September, just before the new term began, Justices Black and Harlan suddenly retired—each for reasons of rapidly failing health. . . . The vacancies presented Chief Justice Burger with an administrative problem. Given the contentious political climate, with memories of the Haynsworth and Carswell nomination debacles still fresh, there was every reason to fear that the positions would not be filled quickly.³

The bench had two empty seats, Congress quizzed potential justices, and reporters speculated on the future make-up of the Supreme Court. The challenges facing the Supreme Court in September 2005 were eerily similar to those in September 1971. Justice Harry A. Blackmun was an associate justice both when the Supreme Court lacked a full bench in 1971 and 1986 and during the adjustment periods following the new Court appointments. In 2006, as newly seated Chief Justice John G. Roberts, Jr., and Justice Samuel Alito move into their offices, there could not be a more relevant time in Supreme Court history for lawyers to learn from the past. In *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*, Linda Greenhouse uses the personal and official memoranda of Harry Blackmun (the Blackmun Papers) to examine his development as a Supreme Court Justice.⁴ *Becoming Justice Blackmun* is a highly readable, entertaining, and interesting legal narrative, but it has limited usefulness as a comprehensive biography of Justice Blackmun.

Justice Blackmun gifted his personal and official documents to the Library of Congress, directing that they be made public on 4 March

¹ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005).

² U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ GREENHOUSE, *supra* note 1, at 80.

⁴ *Id.* at xi.

2004, five years after his death.⁵ The detail of these documents gave a unique glimpse into the inner-workings of the Supreme Court.⁶ Filling over 1,500 boxes and requiring more than 600 feet of space on the Library of Congress's shelves, Justice Blackmun's papers document almost every event in his personal and professional life from 1919 until his death in 1999.⁷ The Blackmun Papers encompass diverse items ranging from Justice Blackmun's honeymoon hotel receipts to the vote tallies for many significant Supreme Court cases during his twenty-four term tenure on the Court from 1970 to 1994.⁸

The Blackmun family granted three media outlets access to the files two months before their public release.⁹ One of the advance reviewers was Linda Greenhouse, the lead Supreme Court reporter for the *New York Times* since 1978.¹⁰ Greenhouse won a Pulitzer Prize in 1998 for her Supreme Court coverage.¹¹ Although Greenhouse is an experienced reporter, her critics often attack her favorable reporting of the Court's more liberal justices.¹² "'The Greenhouse Effect,' referring to the warm

⁵ Library of Congress Manuscript Reading Room, *U.S. Supreme Court Justice Harry A. Blackmun (1908–1999): A Selected Bibliography*, <http://www.loc.gov/rr/mss/blackmun/blackmun-ex-bib.html> (last visited Apr. 3, 2006) (listing available resources on Justice Blackmun within the Library of Congress). The Library of Congress digitized many articles of the collection and made them available on its website. The website includes a 518-page oral history of Justice Blackmun and assorted legal memoranda with Blackmun's handwritten notes.

⁶ GREENHOUSE, *supra* note 1, at xi.

⁷ *Id.* at xi, 1.

⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Callins v. Collins*, 510 U.S. 1141 (1994); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *supra* note 5.

⁹ Press Release, Library of Congress, Papers of Supreme Court Justice Harry A. Blackmun Opened for Research at Library of Congress (Sept. 7, 2005), available at <http://www.loc.gov/today/pr/2004/04-041.html> [hereinafter Press Release, Library of Congress].

¹⁰ John Greenya, *Blackmun's Path to Roe v. Wade*, WASH. TIMES, June 26, 2005, at B7 (reviewing GREENHOUSE, *supra* note 1).

¹¹ *Id.*

¹² John Leo, *Time to Fix the Court*, U.S. NEWS & WORLD REPORT, June 6, 2005, at 62 (discussing how Washington D.C. Appeals Court Judge Laurence Silberman coined the term "Greenhouse effect" addressing the issue of media having too much control over the holdings in federal cases and federal judges wanting the reporters approval). See Dahlia Lithwick, *The Souter Factor*, SLATE, Aug. 3, 2005. Justice Blackmun addressed his relationship with the press in an oral history conducted with Professor Harold Hongju Koh, a former law clerk for Justice Blackmun. Justice Blackmun stated "[r]elationships with the press, of course, are up and down and depending on which member of the press

reciprocity between court reporters and justices who meet with their approval, is named for her.”¹³

In *Becoming Justice Blackmun*'s prologue, Greenhouse appropriately warns readers that the book will be neither a “conventional biography nor a comprehensive survey of a judicial career.”¹⁴ She instead purports to provide a “coherent narrative” of Justice Blackmun's personal and professional life.¹⁵ *Becoming Justice Blackmun* achieves Greenhouse's goal and provides readers with a human interest story uncommon among conventional biographies.

Justice Blackmun evolved from a conservative Nixon appointee to one of the Court's leading liberal jurists. The turning point, Greenhouse concludes, was his historic abortion opinion in *Roe v. Wade* and its trying aftermath.¹⁶ As Greenhouse repeatedly emphasizes, Justice Blackmun became a historic Supreme Court Justice once he wrote and defended *Roe v. Wade*.¹⁷

[Justice Blackmun] locked *Roe* in a tight embrace and never let it go. Its defense carried him in new directions: to commercial speech in *Bigelow v. Virginia*, the abortion advertising case; to the other world “out there” of poverty and need in the abortion-funding cases; and, most significant, to his eventual commitment to the struggle for women's equality in the sex discrimination cases.¹⁸

As she parses the Blackmun Papers, Greenhouse supports her thesis about *Roe*'s impact with an analysis of Justice Blackmun's post-*Roe* opinions, demonstrating that Justice Blackmun found his true judicial

we're talking about.” See Transcript of the Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, Conducted by Professor Harold Hongju Koh, Yale Law School (July 6, 1994–Dec. 13, 1995), available at <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?SERIESID=D09&FOLDERID=D0901&SIZE=6408> [hereafter Blackmun Oral History].

¹³ Leo, *supra* note 12.

¹⁴ GREENHOUSE, *supra* note 1, at xi.

¹⁵ *Id.*

¹⁶ See *id.* at 101.

¹⁷ *Id.* at 251

¹⁸ *Id.* at 250–51.

heart only after he had to battle *Roe*'s critics.¹⁹ Greenhouse concludes that, out of necessity, Justice Blackmun evolved.²⁰

Becoming Justice Blackmun's organization and fluidity make the book a page-turner for readers who want to learn more about Justice Blackmun and the Supreme Court. Greenhouse analogizes her thematic organization to a miner "standing in front of a huge open-face mine on which seams of precious metals were visible, running in various directions. . . . I could choose the most promising and see where they led."²¹ Greenhouse thoroughly mined the stories of the friendship of Chief Justice Warren E. Burger and Justice Blackmun, the creation and evolution of *Roe v. Wade*, the development of Justice Blackmun's death penalty philosophy, and Justice Blackmun's treatment of sex discrimination.²² Illustrations from the Blackmun Papers enhance her observations. When discussing significant cases in Blackmun's career, Greenhouse intersperses images of Justice Blackmun's handwritten notes and comments.²³ These images allow readers to catch a rare, personal glimpse of his mental deliberations and judicial temperament.

Greenhouse also exposes the reader to the other justices who sat during Justice Blackmun's tenure, especially Chief Justice Warren Burger. The deteriorating friendship between Chief Justice Burger and Justice Blackmun becomes a significant focal point of the book. Greenhouse carefully tracks the exchanges of encouragement, congratulations, and, eventually, disappointment between the two men.²⁴ Additionally, Greenhouse examines Justice Blackmun's interaction with the rest of his contemporary justices, such as his manner of welcoming new justices to the Court.²⁵ Greenhouse includes personal notes between Justice Blackmun and other members of the Court that the public would not normally see. For example, in an exceptionally touching exchange between Justice Anthony Kennedy and Justice Blackmun, Justice

¹⁹ See *id.* at 251.

²⁰ *Id.* ("In defending his legacy, he created his legacy. He became Justice Harry Blackmun.").

²¹ *Id.* at xii.

²² *Id.* at xiii.

²³ *E.g., id.* at 130 (*Bakke* notes), 192 (conference notes from *Webster*).

²⁴ See, e.g., *id.* at 21 (Blackmun encouraging Burger to pursue a judicial appointment in 1957), 41 (Blackmun congratulating Burger on his nomination to be Chief Justice in 1969), 185 (noting that by 1986, "the friendship between Burger and Blackmun had vanished").

²⁵ *Id.* at 238. Justice Blackmun and Dottie Blackmun would host a function for the new justices. *Id.*

Kennedy pleads for Justice Blackmun to delay his retirement.²⁶ Justice Kennedy writes, “My own devotion to the Court and its constitutional place have been shaped in most profound ways by your splendid juristic dedication, and you still inspire me to try to do better in my own work.”²⁷ During that Supreme Court Term, Greenhouse portrays Justice Blackmun as the diplomatic glue that held many liberal opinions together.²⁸

Although it is an enjoyable book, *Becoming Justice Blackmun* is not flawless. First, the book has minimal usefulness as a scholarly source because it lacks documentation and balance. Throughout the book, citations and footnotes are conspicuously absent. Greenhouse writes as if the book is simply an extended newspaper article. She states, “Because Harry Blackmun saved so much written material, telling his story required only minimal investigation of other sources. To provide context for the narrative, I drew on my years of observing and reporting on the Supreme Court. . . .”²⁹ Although her journalistic prose makes the book an entertaining read, the lack of documentation might make readers question whether her conclusions come from the Blackmun Papers, her background knowledge of the Court, or her liberal views.³⁰ Providing some indication of the sources she bases her comments on would lend more credibility to her interpretation of the Blackmun Papers.

Second, *Becoming Justice Blackmun* views the effect of *Roe v. Wade* and Justice Blackmun’s defense of it through rose-colored glasses. Greenhouse underestimates the effect of Harry Blackmun’s upbringing when she concludes that the hardship of authoring *Roe v. Wade*, with its

²⁶ *Id.* at 234.

²⁷ *Id.* at 233.

²⁸ *Id.* at 235. Greenhouse writes:

According to data compiled by Joseph F. Kobylka, from the 1981 term through the 1985 term, Blackmun voted with William Brennan 77.6 percent of the time and with Thurgood Marshall 76.1 percent. From 1986 to 1990, his rate of agreement with the two most liberal justices was 97.1 percent and 95.8 percent.”

Id.

²⁹ *Id.* at 253. Greenhouse also lists a variety of other sources that she relied on for various sections of the book. *Id.* at 253–54.

³⁰ See Lithwick, *supra* note 12 (implying that Greenhouse is part of the “liberal intelligentsia” who justices so often try to please).

fallout, produced his judicial philosophy.³¹ Greenhouse initially discusses Justice Blackmun's family and childhood, but she fails to adequately relate his philosophy to these formative years.³² Justice Blackmun grew up "with progressive ideas about racial equality and a deep suspicion of the Southern states'-rights political agenda."³³ "Blackmun left a strong mark in [civil rights and states'-rights issues]—and probably would have done so even if he had never put pen to paper in *Roe*."³⁴ His admiration of the underprivileged classes came from "growing up . . . on the east side of St. Paul" with "people of not great influence politically or by wealth or otherwise."³⁵ Contrary to Greenhouse's suggestions, both this admiration for marginalized groups and the rest of his judicial ideology probably did not come entirely from authoring and defending *Roe*.

Third, Greenhouse fails to closely examine other significant Supreme Court cases decided during Justice Blackmun's tenure.³⁶ For example, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*³⁷ is not mentioned even though the case is crucial to interpreting Federal Rule of Evidence 702. Greenhouse also gives scant attention to Blackmun's death penalty and affirmative action opinions. For example, she discusses Justice Blackmun's final declaration on the death penalty in five pages, affirmative action in seven pages, and *Roe v. Wade* in over seventy pages.³⁸ It is hard to ignore the fervor surrounding *Roe v. Wade*, but Greenhouse should have given more attention to all the topics she earlier pledged to "mine." Finally, Greenhouse fails to comment on Justice Blackmun's favorite opinion: *Flood v. Kuhn*.³⁹ A "sentimental journey" through baseball's greats,⁴⁰ Justice Blackmun referred to over one

³¹ Edward Lazarus, *The Natural Evolution of a High Court Liberal*, LOS ANGELES TIMES, July 17, 2005, sec. R, at 8 (reviewing GREENHOUSE, *supra* note 1).

³² *Id.*

³³ *Id.* His grandparents were Union Soldiers in the Civil War, and Justice Blackmun idolized Abraham Lincoln. *Id.*

³⁴ *Id.*

³⁵ Blackmun Oral History, *supra* note 12, at 52; *see also id.* at 58 (noting that Justice Blackmun "saw [discrimination] against the African-Americans and to some degree against Native Americans").

³⁶ *Id.* at 20 ("[*Roe v. Wade*] isn't the only thing I wrote. And, of course, my death penalty dissent seems to have taken some of the steam out of *Roe against Wade*, fortunately for me.").

³⁷ *Daubert v. Merrill Dow Pharms. Inc.*, 509 U.S. 579 (1993).

³⁸ GREENHOUSE, *supra* note 1, at 265–66.

³⁹ Blackmun Oral History, *supra* note 12, at 18.

⁴⁰ *Id.*

hundred famous baseball players in the first part of the opinion.⁴¹ In light of *Flood*'s personal importance to Justice Blackmun, at least a passing reference by Greenhouse would have been appropriate.

In a biography, serious examination of the subject's faults helps the reader dissect and comprehend the famous person and lends credibility to the author. Although *Becoming Justice Blackmun* is admittedly not a "conventional biography," Greenhouse glosses over Justice Blackmun's faults to a disturbing degree. Besides giving short shrift to Justice Blackmun's tendency to be thin-skinned, Greenhouse blames the Burger-Blackmun relationship debacle on Chief Justice Burger.⁴² Without an honest account of Justice Blackmun's flaws, the reader feels a sense of imbalance.

Fourth, Greenhouse does not adequately explore a potentially controversial aspect of Justice Blackmun's career on the Court: his alleged over-reliance on law clerks for substantive, original legal opinions. Historian David Garrow, like Greenhouse, has examined the Blackmun Papers, but Garrow has concluded that Justice Blackmun lacked "personal responsibility" for the work being produced in his name.⁴³ Not only did Blackmun's clerks check legal citations (a traditional, mundane duty), but they also drafted original legal thought on cases where guiding precedent was absent.⁴⁴ His clerks forcefully suggested comments in opinions, pleaded that Blackmun adopt certain strategies, made disparaging comments at times about other Supreme Court Justices, and gathered intelligence from other clerks to forecast

⁴¹ *Flood v. Kuhn*, 407 U.S. 258, 262–63 (1972).

⁴² See GREENHOUSE, *supra* note 1, at 187 (Justice Blackmun annotates "[Chief Justice Burger] picks on me at conference" and "[Chief Justice Burger] for the first time very cool").

⁴³ David Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS, May–June 2005, http://www.legalaffairs.org/issues/May0June-2005/feature_garrow_mayjun05.msp.

⁴⁴ *Id.*; see Blackmun Oral History, *supra* note 12, at 15 (Justice Blackmun states:

It varies from clerk generation to clerk generation because of the difference in their talents. The last two or three years, I've indulged in the luxury of letting them put together a first draft, which they like to do usually . . . I take it and go over it, read all the cited cases, add to it, delete some things. I spend about a week before that opinion circulates. . . I think they like to have the privilege of putting together a first draft.).

votes.⁴⁵ Garrow worries that sometimes Supreme Court Justices in general, and Justice Blackmun in particular, have delegated opinion writing duties to their law clerks.⁴⁶ Greenhouse responded to this concern by noting that, although it was not her “job to defend Harry Blackmun,” her book offers a “well-rounded” portrayal of the relationship between Justice Blackmun and his clerks, even noting some instances in which Blackmun rejected his clerks’ advice.⁴⁷ Although Garrow’s criticisms are far from undisputed, nothing in Greenhouse’s book sufficiently provides vindicating context for the writings passed between Justice Blackmun and his clerks.⁴⁸

Finally, Greenhouse’s examination of the decline of Chief Justice Burger and Justice Blackmun’s friendship is one-sided and somewhat unfair. Forgetting that it usually takes two people to destroy a friendship, Greenhouse seemingly blames Chief Justice Burger for the gradual deterioration of the relationship for his handling of *Roe* and its aftermath.⁴⁹ Greenhouse calls *Roe* a trip “into dangerous waters without a life preserver”⁵⁰ and a “baptism by fire”⁵¹ that Burger forced Blackmun to endure alone. Justice Blackmun’s response seems surprisingly petty—he refused to go to the ground-breaking ceremony for the Warren E.

⁴⁵ GREENHOUSE, *supra* note 1, at 125 (noting that in 1977, law clerk Richard K. Willard criticized Chief Justice Burger as follows: “Needless to say, I think the Chief’s comments on this case are ridiculous.”); *id.* (In 1986, law clerk Pamela Karlan (who is now a professor at Stanford Law school) wrote, “The Chief’s opinion has come around. Like the Bourbons, he forgets nothing and learns nothing.”); *see* Garrow, *supra* note 43 (noting the activity of Supreme Court clerks generally).

⁴⁶ Garrow, *supra* note 43.

⁴⁷ Tony Mauro, *Emory Prof: Blackmun Abdicated Power*, FULTON COUNTY DAILY REP., Apr. 20, 2005, at 20. *See also* GREENHOUSE, *supra* note 1, at 221 (describing Blackmun’s refusal to follow the recommendation of one of his clerks in *Mississippi University for Women v. Hogan*).

⁴⁸ At least two of Blackmun’s former clerks whose writings Garrow cited, Andrew Schapiro and Randall P. Bezanson, insist that their written work product for Justice Blackmun was based on his discussions with them. *Id.* at 20. In addition, both Joseph Kobyłka, who is writing a Blackmun biography, and Harold Koh, the Yale Law School Dean who conducted the Blackmun Oral History Project interviews, have criticized Garrow’s failure to consider the daily meetings and countless discussions that Justice Blackmun had with his clerks concerning the opinions they were drafting. *Id.* (Harold Koh noting that Blackmun had “myriad conversations each day” with his clerks); Joseph F. Kobyłka, *No Empty Robe: Points of View: Justice Harry Blackmun Was Not a Pawn of His Clerks*, LEGAL TIMES, Apr. 25, 2005, at 60.

⁴⁹ *See* GREENHOUSE, *supra* note 1, at 251.

⁵⁰ *Id.*

⁵¹ *Id.* at 127.

Burger Law Library;⁵² he threatened to write a disparaging footnote in retaliation in a dissent;⁵³ and he publicly stated, “I think I knew Warren Burger intimately, maybe in some ways better than he knew himself.”⁵⁴ At the conclusion of the book, regardless of who seems to be more responsible for the breakup of the friendship, the Justices’ nastiness toward each other should linger with readers. Despite their awesome responsibility in our judicial system, Supreme Court Justices are still mere mortals.

Overall, these criticisms do not diminish the book’s importance. Readers can enjoy the book as long as they are forewarned that it is not a scholarly source, but is instead a largely uncritical look at a few aspects of Justice Blackmun’s legal career. To an attorney, the book provides insight to the current Supreme Court, for Justice Blackmun was a “contemporary, for varying amounts of time, of seven of the current associate justices who sit on the Supreme Court.”⁵⁵ Tracking these Justices’ voting trends, internal conference conversations, and personality traits might help readers decipher the current Court’s composition and potential rulings. With Greenhouse’s book, the Court’s normally hidden traditions and procedures are exposed.⁵⁶

In light of the recent Supreme Court vacancies, Greenhouse’s book is even more intriguing. Tim Russert, commentator on *NBC’s Meet the Press*, questioned Senate Judiciary Committee Chairman Arlen Specter before the confirmation hearings for Chief Judge Roberts in September 2005. Russert’s first question reveals the continued importance of *Roe v. Wade*: “Do you believe that John Roberts would seek to overturn *Roe v.*

⁵² *Id.* at 185.

⁵³ *Id.* at 125.

⁵⁴ *Id.* at 124. Justice Blackmun’s comments on Chief Justice Burger’s briefs were more derogatory: “A regular law review article!” and “WEB did not write this.” *Id.* at 125.

⁵⁵ Press Release, Library of Congress, *supra* note 9 (listing John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg).

⁵⁶ GREENHOUSE, *supra* note 1, at 87. For example, discussing a note from Justice Burger to Justice Blackmun, Greenhouse notes:

As a communication from one justice to another on a pending case, Burger’s note was unusual, a clear violation of the Court’s social norms. In the Court’s ordinary practice, drafts of opinions circulate among the justices and are left to stand or fall on their own persuasive powers. When justices do lobby one another, the discourse is highly formal, with personal appeals disfavored.

Id.

*Wade?*⁵⁷ Supreme Court watchers should read *Becoming Justice Blackmun* for fascinating human interest stories behind the impersonal black and white lines of *Roe* and other landmark Supreme Court opinions. It is an engaging story, but for a more impartial view of Justice Blackmun, visit the the Library of Congress and read the Blackmun Papers yourself.

⁵⁷ MSNBC, Transcript for September 11, Sept. 11, 2005, <http://msnbc.msn.com/id/9240461>.

AMERICA'S SPLENDID LITTLE WARS¹REVIEWED BY MAJOR KEITH A. PARRELLA²

*It was the sort of war—neither small nor splendid but short—in which the United States performed at its best to achieve its objective and, most important, minimize casualties.*³

Last year marked the sixtieth anniversary for many of the great battles of World War II. Our nation rightfully celebrates veterans of battles such as Iwo Jima and Okinawa for the incredible sacrifices they made while facing a determined and disciplined enemy. The U.S. flag being raised atop Mount Suribachi⁴ remains an icon of the American fighting spirit. *America's Splendid Little Wars* reminds readers about the sacrifices made by U.S. service members since 1975, a period of military operations that are less familiar than the larger and costlier wars of the twentieth century, but are no less significant for those who fought in them.⁵ Although the book is brief and might leave readers desiring more information, Huchthausen nonetheless provides a fascinating account of America's recent conflicts. More importantly for the author, the book accomplishes its goal of reminding readers that these recent conflicts were "neither splendid nor small."⁶

¹ PETER HUCHTHAUSEN, *AMERICA'S SPLENDID LITTLE WARS: A SHORT HISTORY OF U.S. ENGAGEMENTS FROM THE FALL OF SAIGON TO BAGHDAD* (2003).

² U.S. Marine Corps. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ HUCHTHAUSEN, *supra* note 1, at 158 (describing the Gulf War and the successful humanitarian action in Kurdistan).

⁴ The raising of the flag on Mount Suribachi refers to the famous photograph taken by Joe Rosenthal depicting five Marines and one Navy corpsman raising an American flag on top of the mountain during the battle of Iwo Jima. See MARINE CORPS ASSOCIATION, *USMC: A COMPLETE HISTORY* 376 (Jon T. Hoffman ed., 2002).

⁵ See HUCHTHAUSEN, *supra* note 1, at xv ("[T]he personal adventures of the blood-caked veterans described in these pages more accurately reflect the words of the duke of Wellington in 1815: '[A] great country can have no such thing as a little war.'").

⁶ *Id.*

America's Splendid Little Wars provides a chronological, historical account of America's military intervention in over a dozen conflicts since the fall of Saigon in 1975.⁷ The book provides a brief historical snapshot of the actual military operations during this era, succinctly describes the events leading up to and the underlying motivation for each intervention, and analyzes lessons learned for future operations.⁸ Huchthausen traces the evolution of the American military from what was arguably its lowest point of the twentieth century—the years immediately after the prolonged Vietnam War—to its current state as the world's preeminent military superpower. According to the author, each conflict presented an important, and often costly, illustration of the changing threats facing our nation and the corresponding strategic changes required to respond appropriately and effectively.⁹

The book begins in the aftermath of the Vietnam War when the spread of Communism was still perceived as a viable threat to the United States, and the U.S. military sought to prove that it was still able to deliver a potent blow to an adversary anywhere in the world.¹⁰ America's first opportunity to prove its military prowess came in 1975. In May 1975, Khmer Rouge guerrillas hijacked the SS *Mayaguez* while it sailed through international waters off the coast of Cambodia.¹¹ Although the mission to rescue the crew succeeded, the number of U.S. casualties exceeded the number of crew members finally rescued.¹² The mission also suffered from vague intelligence and confused dissemination of information from civilian to military leaders.¹³ Despite

⁷ *Id.* at xiii.

⁸ *Id.* at xiv.

⁹ *See id.* at 219–20 (describing some of the lessons learned from military ventures of the past twenty-five years). The days of large and heavy conventional forces squaring off on the field of battle were replaced by a wide array of complex regional conflicts where the enemy was often elusive and did not adhere to traditional rules of warfare. *See id.* at 220.

¹⁰ *Id.* at 16.

¹¹ *Id.* at 4–5. The SS *Mayaguez* was a U.S.-flagged cargo container ship. *Id.* at 3–4.

¹² *Id.* at 17. The *Mayaguez* incident resulted in eighteen killed in action (KIA) and fifty wounded in action (WIA), whereas the *Mayaguez* crew consisted of only forty people. *Id.* at 7, 15.

¹³ *Id.* at 9, 14. Some of the problems resulted from the Ford Administration repeating the mistakes of earlier administrations by attempting to influence and direct actions at the tactical level. *See id.* at 14. Unfortunately, subsequent administrations repeated this mistake. In Lebanon, for example, the issue of how to handle the security of U.S. Marines after the withdrawal of Israeli forces was decided directly by then-Secretary of Defense Caspar Weinberger, who ignored the theater commander's advice to withdraw the Marines and instead left them in an "indefensible position." *Id.* at 56. As

the heavy price in casualties, Huchthausen considers this mission to have been a success because it began the process of America reasserting its military might.¹⁴

In addition to the *Mayaguez* incident, the book also classifies U.S. military operations in Grenada, Libya, Panama, the first Gulf War, and the rescue of the Kurds in Northern Iraq as successful operations.¹⁵ On the other hand, it labels the attempted Iran hostage rescue, U.S. military operations in Lebanon, Somalia, and the interventions in Bosnia and Kosovo as failures.¹⁶ Huchthausen surmises that what distinguished success from failure in these operations was the presence of sound policy objectives, not military execution.¹⁷ Simply stated, military intervention with concrete policy objectives generally produced better results for the United States.¹⁸

Huchthausen validates his thesis by providing a detailed description of the respective policy objectives, or lack thereof, for each mission. He effectively contrasts missions with ambiguous objectives, such as Lebanon,¹⁹ with those missions where the United States had a clear, concise objective supported by a vital national interest, such as the first Gulf War.²⁰ In addition, he briefly, yet accurately, reveals the impact of

Huchthausen states, “Diplomatic and political restrictions . . . overrode the designs of combat, echoing the American experience in Vietnam.” *Id.* at 57.

¹⁴ *Id.* at 17. Huchthausen’s inclusion of the *Mayaguez* incident in *America’s Splendid Little Wars* was particularly informative because of the incident’s relative obscurity in comparison to more recent conflicts. Although this incident occurred shortly after the Vietnam War ended, it was a separate and distinct incident that warrants reflection for the part it played in shaping future operations.

¹⁵ *Id.* at 220. *But see* CHARLES TRIPP, A HISTORY OF IRAQ 258 (2d ed. 2002) (suggesting that the U.S. failed to provide military assistance to the Kurds after the Gulf War).

¹⁶ HUCHTHAUSEN, *supra* note 1, at 209 (noting that the U.S. “finally agreed to concrete intervention” in Bosnia after learning of Srebrenica massacre), 215 (calling the intervention in Kosovo “late and overly cautious”), 220 (listing the Iranian hostage rescue mission, Lebanon, and Somalia as failures).

¹⁷ *Id.* at 220.

¹⁸ *See id.* (explaining that the successful operations resulted from “an overall national policy that either was already in force at the time of the action or had been formed just prior to it”).

¹⁹ *Id.* at 55 (describing how the “American way of war”—to destroy the enemy with all available means—was inconsistent with the peacekeeping mission and led to “self-perpetuating combat”).

²⁰ *See id.* at 130–31 (listing the clear American interests and national objectives asserted by President George H.W. Bush).

the media on the formation of U.S. foreign policy.²¹ For example, Huchthausen discusses how media reports of starving children in Somalia and genocide in Bosnia swayed public opinion and led the United States to enter those conflicts without a clear national interest or a viable chance of success.²² As Huchthausen explains, during the past twenty-five years, “moral outrage and popular sentiment at times interfered with the creation of sound U.S. foreign policy and military strategy.”²³

Fortunately, *America's Splendid Little Wars* does more than just recite history. Whether readers wear combat boots or loafers to work, the book sets forth important lessons. First, it explores how U.S. military experiences in the last quarter of the twentieth century influence our current military-friendly culture. The armed forces have escaped the dark days of the Vietnam War and its aftermath, and military service has regained a favorable place within American society.²⁴ The military has demonstrated that it can deliver decisive and overwhelming force to destroy an adversary anywhere in the world quickly and with minimal U.S. losses.²⁵ In addition, *America's Splendid Little Wars* facilitates an improved understanding of current American foreign policy with respect to military and humanitarian intervention. It explains policies such as the Goldwater-Nichols Act²⁶ and the Powell Doctrine,²⁷ which improved the way the Department of Defense prepared for and executed missions

²¹ *Id.* at 83–84 (discussing Grenada), 137 (discussing the first Gulf War), 167 (discussing Somalia).

²² *Id.* at 167 (recounting how images in the media of the “death and destruction” in Somalia drove the public to demand action despite a lack of U.S. interests in that country), 186–87 (“[T]he United States . . . found it difficult to contemplate intervention until . . . the sight of horrible suffering daily on the news reached unbearable levels.”).

²³ *Id.* at 219 (cautioning that “[m]oral indignation, while a laudable attribute for a powerful democracy, is no substitute for a well-thought-out foreign policy”).

²⁴ Despite the on-going wars in Iraq and Afghanistan, the Marines, the Navy, and the Air Force are all meeting their year-to-date recruiting goals. *Army Expects to Miss Goals for Recruiting*, N.Y. TIMES.COM, Sept. 13, 2005, at A18, available at <http://www.nytimes.com/2005/09/13/politics/13recruit.html>. The Army, although behind in its annual recruiting goal, had its best recruiting month in four years in August 2005. *Id.*

²⁵ HUCHTHAUSEN, *supra* note 1, at 220.

²⁶ *Id.* at 104 (explaining that the Goldwater-Nichols Defense Reorganization Act of 1986 gave senior military leaders the authority to shape command and control to suit the mission).

²⁷ *Id.* at 170 (defining the “Powell Doctrine” as the term used by the media to describe the military’s post-Gulf War hesitancy to enter a conflict without decisive force and clear goals). The term is derived from then-chairman of the Joint Chiefs of Staff, General Colin Powell. *Id.* at 171.

against a changing, complex threat. Finally, *America's Splendid Little Wars* offers numerous lessons for today's professional military officer. For example, Huchthausen uses the conflicts to demonstrate the benefits of improved coordination of joint operations, comparing the poor coordination of the Iran hostage rescue mission in 1980 to the smooth execution of joint forces during the bombing of Libya in 1986 and the invasion of Panama in 1989.²⁸ Huchthausen also provides an interesting history of special operations forces before examining their employment during the failed Iran hostage rescue attempt.²⁹ Missions like Iran and Somalia reveal the risks of not properly integrating special operations forces with conventional forces.³⁰

America's Splendid Little Wars also provides specific learning points for judge advocates. The experience of the Marines in Lebanon confirmed the need for rules of engagement that would not limit the commander's ability to respond to an identified threat.³¹ Further, humanitarian and nation building operations like Somalia and the Balkans, as well as current operations in Iraq and Afghanistan, are replete with legal issues and demonstrate the need for thorough planning and training by judge advocates in preparation for deployment.

Why write a book like *America's Splendid Little Wars*? If the average American were asked to name the major wars of the twentieth century, they would likely name World Wars I and II, Korea, Vietnam, and the first Gulf War. They would not likely name Lebanon, Grenada, Panama, Somalia, or the *Mayaguez* incident. Despite an increase in global media access and real-time reporting, these later conflicts, with the exception of the Gulf War, failed to arouse more than a fleeting

²⁸ *Id.* at 37 (discussing the Iranian hostage rescue mission), 96 (discussing the bombing of Libya), 113 (discussing the invasion of Panama).

²⁹ *See id.* at 21–25. The book, however, contains no bibliography for this chapter of the book.

³⁰ Huchthausen attributes some of this to reluctance on the part of conventional military leaders to integrate special operations units, who they sometimes viewed with “serious mistrust.” *Id.* at 24. In Somalia, Huchthausen does not criticize the performance of the special operation's units but blames senior military and civilian leaders who failed to send in either armor or enough conventional forces. *Id.* at 175, 177.

³¹ *Id.* at 92. The sentries guarding the airport in Beirut prior to the bombing of the Marines' barracks were prohibited from keeping ammunition in their weapons. *Id.* According to Huchthausen, many commanders continued to suffer from this “enforced hesitancy,” even after the rules of engagement were changed to give these commanders greater freedom. *Id.*

interest by the general American public.³² Without Hollywood's depiction of these events in popular movies like *Black Hawk Down*,³³ they would be all but forgotten by most Americans. In light of America's recent historical amnesia, *America's Splendid Little Wars* ensures that readers do not forget either the lessons learned from this important period of history or the personal sacrifice of those who participated in these conflicts. As Huchthausen states, it is "necessary to record the details of these events so that neither the participants nor their descendants forget what they achieved."³⁴

A common criticism of *America's Splendid Little Wars* is its brevity.³⁵ In its introduction, Huchthausen boldly asserts that "[u]ntil now, there has been no book that encompassed the full American military experience since 1975 in one volume or explored this period in relation to past conflicts and its larger impact on modern world history."³⁶ After reading *America's Splendid Little Wars*, readers might respond that such a book still does not exist. Although *America's Splendid Little Wars* delivers an interesting overview of many frequently overlooked conflicts of the late-twentieth century, it does not provide a thorough analysis of how this period relates to past conflicts or how it impacts modern world history.³⁷ More precisely, this book represents the *Cliff's Notes*³⁸ for American military history since 1975.

³² Perhaps this is attributable to the replacement of conscription with an all-volunteer professional military, which, in turn, has curtailed mainstream America's contact with the military. See Pat Towell, *Is Military's 'Warrior' Culture in America's Best Interest?*, CONG. Q. WKLY., Jan. 2, 1999, at 25, 25 (noting that because the draft ended in 1973, "relatively few Americans have any military experience, or know any relatives or role models such as teachers who have been in uniform").

³³ *BLACK HAWK DOWN* (Columbia Pictures 2001) (depicting the experience of Task Force Ranger in Somalia).

³⁴ HUCHTHAUSEN, *supra* note 1, at xv.

³⁵ See Daniel Benjamin, *Books of the Times; Military Revival After the Vietnam Trauma*, N.Y. TIMES, Aug. 15, 2003, at E33 (reviewing HUCHTHAUSEN, *supra* note 1) (claiming that *America's Splendid Little Wars* "touch[es] on big themes without developing them"); see also H.W. Brands, *Fire Power*, WASH. POST, July 20, 2003, at T3; HUCHTHAUSEN, *supra* note 1) ("Here one wants additional information on the political context in which U.S. military operations took place.").

³⁶ HUCHTHAUSEN, *supra* note 1, at xiii.

³⁷ Huchthausen undoubtedly faced a daunting task in attempting to cover a dozen major military operations in just over two hundred pages. Unfortunately, the process of squeezing it all in forced him to gloss over significant details at the tactical level. See, e.g., *id.* at 179–82 (providing little detail regarding the battle in Mogadishu between U.S. forces and local clan warlords).

³⁸ *Cliff's Notes*, <http://www.cliffsnotes.com/WileyCDA/> (last visited Apr. 27, 2006).

Another criticism of *America's Splendid Little Wars* is that it fails to pay adequate tribute to the service members who fought in recent conflicts.³⁹ Critics fairly conclude that the book neglects the human side of these operations by omitting the personal stories of those who participated.⁴⁰ Huchthausen does, however, forewarn the reader that this book is a “purely historical” account.⁴¹ Moreover, although personal stories may have added convincing detail to the book, the book’s notes and bibliography contain ample evidence that Huchthausen thoroughly researched his subject matter and extensively interviewed several key actors.⁴² Further, Huchthausen’s wholly historical description pays tribute to those who fought by reminding readers of what those service members achieved, even when their achievement was only to provide a lesson for future operations.⁴³

In Huchthausen’s defense, writing this book was a challenging task. He attempted to provide a historically accurate, yet interesting, snapshot of twenty-five years of U.S. military history. Each conflict described in *America's Splendid Little Wars* merits its own separate text.⁴⁴ Nonetheless, Huchthausen’s consolidation of complex events provides average readers with enough information to grasp the big picture. In fact, the lack of comprehensive detail also makes the book universally appealing and easy to read. Readers do not need comprehensive knowledge of military terminology or hardware to enjoy this book.⁴⁵

³⁹ See, e.g., Daniel Benjamin, *supra* note 35, at E33 (“While [Huchthausen] says his greatest obligation is to those who fought, he tells us little about who they are . . .”).

⁴⁰ See *id.* (“The human side of the military transformation of the last three decades is surely the most fascinating part of the story.”).

⁴¹ HUCHTHAUSEN, *supra* note 1, at xiv.

⁴² See *id.* at 225–43. Despite his detailed research, Huchthausen makes some “mistakes of fact.” Benjamin, *supra* note 35, at E33. Perhaps most notably, he states that after the retaliatory bombing of Libya, Libya’s “overt support of terror attacks ceased.” See HUCHTHAUSEN, *supra* note 1, at 96. In fact, less than two years later Libyan agents destroyed Pan Am Flight 103, killing 270 people. Benjamin, *supra* note 35, at E33.

⁴³ See HUCHTHAUSEN, *supra* note 1, at xv.

⁴⁴ An examination of the bibliography reveals that each of these incidents have been extensively written upon. See *id.* at 235–43.

⁴⁵ See Jerry Harkavy, *Author Examines U.S. Military Engagements Over 25 Years*, Nov. 10, 2003, <http://www.marinetimes.com/print.php?f=1-213098-269271.php> (reviewing HUCHTHAUSEN, *supra* note 1) (“The goal was to pitch this book for the average general reader, and they prohibited [Huchthausen] from using any military jargon.”). The book also contains numerous helpful maps and a limited number of photographs. E.g., HUCHTHAUSEN, *supra* note 1, at 31 (map of Iranian hostage rescue mission), 71 (map of Grenada invasion).

Huchthausen intended it for any audience desiring a better understanding of recent U.S. history and military policy.⁴⁶

Further, Huchthausen demonstrates that these so-called splendid little wars were neither small nor insignificant. Throughout the book, Huchthausen awakens readers to the enormity of the operations involved. In describing the monumental preparation for the Gulf War, he writes, "Desert Shield was more demanding logistically and larger than any other operation in military history, including the Normandy landings in 1944. The distances were greater, the cargoes were bigger, and there had been little time to prepare."⁴⁷ The book also lists many other military milestones achieved during these conflicts, proving that the operations had military significance despite their relative historical obscurity.⁴⁸

A career Navy Officer with thirty-two years of active service, Huchthausen was amply qualified to write a book on recent military history. Although his expertise primarily revolves around submarines,⁴⁹ he successfully draws upon his extensive military experience.⁵⁰ Huchthausen clearly demonstrates unfailing loyalty to service members, often defending their actions in missions that turned out badly.⁵¹ Although this loyalty draws criticism from at least one commentator,⁵² Huchthausen seems to understand the frustration of service members

⁴⁶ According to Huchthausen, he hoped that the book would be used as a text for high school or college history classes. Harkavy, *supra* note 45.

⁴⁷ HUCHTHAUSEN, *supra* note 1, at 137.

⁴⁸ Some milestones included: in Operation Just Cause (Panama), "one of the most high-density air operations" ever conducted, *id.* at 121, the combat debut of the F-117 Stealth bomber, *id.*; and the first complete integration of conventional and special operations forces, *id.* at 123; in Operation Desert Shield/Desert Storm, the first use of long range bombers based in the United States to attack targets across the world, *id.* at 144; and the largest mobilization of U.S. Reserve and National Guard components since Korea, *id.* at 151; and in the Bosnian intervention, the longest American resupply in history, *id.* at 201; and the largest NATO combat operation ever mounted, *id.* at 210.

⁴⁹ Huchthausen also authored other works: PETER HUCHTHAUSEN, K-19: THE WIDOWMAKER—THE SECRET STORY OF THE SOVIET NUCLEAR SUBMARINE (2002); PETER HUCHTHAUSEN ET AL., HOSTILE WATERS (1998); and PETER HUCHTHAUSEN, OCTOBER FURY (2002); see HUCHTHAUSEN, *supra* note 1, at i.

⁵⁰ Huchthausen's service as an intelligence analyst in Hawaii at the time of the *Mayaguez* incident, and as a naval attaché in Yugoslavia lend additional credibility to his accounts of the *Mayaguez* incident and the events in the Balkans. See Harkavy, *supra* note 45.

⁵¹ For example, when analyzing the failed Iran hostage rescue Huchthausen is quick to defend the pilots who flew the mission against criticism from senior Carter administration officials. See HUCHTHAUSEN, *supra* note 1, at 37.

⁵² See Brands, *supra* note 35, at T3 (noting that when the operations succeed, Huchthausen credits the military, but when the operations fail, he blames the politicians).

when their missions are hampered by poor policy decisions that are far beyond their control.

In taking the reader through the good, the bad, and the ugly of contemporary American military history, Huchthausen concisely and effectively surveys the full spectrum of America's military successes and failures in recent operations. Understanding these operations allows readers to better analyze the nation's most recent military experiences in Afghanistan and Iraq. As Huchthausen notes in his afterword, the military campaigns in both Afghanistan and Iraq demonstrate that the military's civilian and uniformed leadership have indeed learned some of the lessons from the conflicts of the past twenty-five years. Huchthausen writes, "The deployment of forces to destroy the Taliban in Afghanistan in 2001 and the invasion of Iraq in 2003 were deliberate, carefully planned, and expertly carried out campaigns."⁵³

On the other hand, as in Somalia and the Balkans, the military's limited nation building capacity still hinders stability and support operations in both Afghanistan and Iraq.⁵⁴ This deficiency causes Huchthausen to ask if the "nation building mission" is a "legitimate" task for combat units.⁵⁵ Although this question may fall to policy makers and not the military professional, military forces will need additional planning, training, and preparation to successfully engage in nation building.⁵⁶

Ultimately, the conflicts in Afghanistan and Iraq will likely join those examined in *America's Splendid Little Wars* to offer both positive and negative lessons for future military intervention. Moreover, like the conflicts in this book, the relatively short conflicts in Afghanistan and Iraq will also not be regarded as either "small" or "splendid" by those who participated or shed blood.

⁵³ *Id.*

⁵⁴ *Id.* at 222 ("American combat forces in both Afghanistan and Iraq . . . have been less successful at establishing a secure environment and maintaining the peace."). Since 1 May 2003, the date that President Bush declared an end to major hostilities in Iraq, 2370 service members have been killed while supporting the on-going mission in Iraq. Michael White & Pat Kneisler, Iraq Coalition Casualty Count, <http://icasualties.org/oif/> (last visited Mar. 6, 2006).


⁵⁵ HUCHTHAUSEN, *supra* note 1, at 222.

⁵⁶ *Id.* at 223 (suggesting that military occupation activities require additional emphasis in the areas of military government, civil affairs, military police, and psychological warfare operations).

By Order of the Secretary of the Army:

PETER J. SCHOOMAKER
General, United States Army
Chief of Staff

Official:

A handwritten signature in black ink that reads "Joyce E. Morrow". The signature is written in a cursive style with a large, stylized initial "J".

JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
0608802