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MILITARY LAW REVIEW

TABLE OF CONTENTS

MILITARY LAW REVIEW

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Associate Judge William H. Cook,
United States Court of Military Appeals

A TRIBUTE:

Judge William H. Cook

Judge William H. Cook, Associate Judge of the United States Court of Military Appeals, has announced that he will retire from the court in March 1984. Judge Cook will thus conclude a decade of service on the court and over thirty years in the service of the United States government.

Born in Carbondale, Illinois, and educated in the Carbondale school system, Judge Cook served in the United States Army from 1942 to 1946. He completed his undergraduate work at Southern Illinois University and attained his law degree from Washington University in 1947. Admitted to the bar of the State of Illinois and the United States Supreme Court, Judge Cook embarked on the private practice of law in Charleston, Illinois from 1949 to 1952.

Judge Cook began his career in the federal legal corps in 1954, when he became an attorney with the Federal Trade Commission. Rising to the post of Assistant to the Chairman, he served with the Commission until 1959, at which time Judge Cook began a four-year assignment as Associate Counsel for Property and Special Matters in the Bureau of Aeronauticsof the Department of the Navy. In 1963, he became counsel for the Armed Services Committee of the House of Representatives.

Nominated to be an Associate Judge of the Court of Military Appeals by President Nixon in 1974 to fill the vacancy caused by the resignation of Chief Judge William H. Darden, Judge Cook was unanimously confirmed by the Senate. In 1976, he was renominated by President Ford for a full fifteen-year term; the reconfirmation was also unanimous.

Judge Cook's tenure on the court was marked by opinions of thoughtful legal analysis and a careful attention to balancing the rights of the individual service member with the needs of the military. The vacancy that he creates will not be easily filled. Upon his retirement, the Editorial Board dedicates this issue of the *Military Law Review* to Judge William H. Cook.

SANCTIONS AND ENFORCEMENT OF THE HUMANITARIAN LAW OF THE FOUR GENEVA CONVENTIONS OF 1949 AND GENEVA PROTOCOL I OF 1977

by Major Thomas J. Murphy*

I. INTRODUCTION

The four Geneva Conventions of 1949[1] embrace the substance of that body of public international law known as the humanitarian law of armed conflict. Their purpose, in essence, is to provide minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts. The Geneva Conventions are designed to protect individuals who are affected by but are not directly engaged in armed hostilities as well as former combatants in armed conflicts who by reason of injury, illness or capture are placed *hors de combat,* that is, outside of and unable to participate further in the conflict. In four hundred and twenty-nine articles, these international covenants set forth a wide range of general principles and specific rules governing the treatment to be accorded to individuals, and in some circumstances to the whole of a region's population, in times of armed conflict. To effect these protections of victims of armed hostilities, the Conventions

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This article was adapted from a thesis submitted in partial satisfaction of degree requirements in the LL.M. program in International Law at The George Washington University.

'Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, (1956) 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, (1956) 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 31 [hereinafter cited as Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, (1956) 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, (1956) 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Fourth Geneva Convention].

establish norms of behavior for individuals and nations, substantive penal rules, and procedural implementation and enforcement responsibilities for states.

The "Protocol Additional to the Geneva Conventions of **12** August 1949, and Relating to the Protection of Victims of International Armed Conflicts" (Protocol I)[2] embodies the most recent advances made through the continuing endeavors of the international community to formulate meaningful and effective measures for enforcement of the international humanitarian law of armed conflict. Protocol I is supplementary to, rather than a recodification of, the Geneva Conventions of 1949.[3] As stated in its preamble, the intended function of Protocol I may be considered to have two aspects: first, to reaffirm and to develop the normative provisions of the humanitarian law which protect victims of armed conflicts and, second, to supplement those measures contained in the humanitarian law which are intended to reinforce the application of its protective provisions by states.[4] A substantial number of Protocol I's one hundred-two articles promote the first aspect of its goal by enacting enhanced standards of conduct and of responsibility both for states and for individuals. Other articles promote the latter aspect of its function by instituting additional procedural mechanisms which are designed to increase effectiveness in the implementation and enforcement of the humanitarian law of armed conflict. In the final analysis, however, the essential purpose of Protocol I is the same as that of the Geneva Conventions: to minimize unnecessary destruction of human and material values in situations involving armed hostilities. The incorporation of more explicit standards of conduct and more effective implementation and enforcement measures in the humanitarian law can only result in the realization of more meaningful protections by a greater number of individuals who fall victim to situations of armed conflict.

The four Geneva Conventions of 1949 were opened for signature on August 12, 1949 and entered into force on October 21, 1950.[5] As of

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*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, U.N. Doc. A/32/144/Annex I (1977), *reprinted in* 16 I.L.M. 1391-1441 (1977), *in* 72 Am. J. Int'l L. 457-502 (1978), *and in* 42 Law & Contemp. Probs. 203-251 (1978) *(entered into* force Dec. 12, 1977).

[3]Protocol I, art. 1 (3).

[4]*Id.* at Preamble, para. **3.**

[5]The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents 299-529 (D. Schindler & J. Toman eds., 2d. rev. & completed ed. 1981) [hereinafter cited as Schindler & Toman]. All Conventions and Regulations relating to the laws of armed conflict discussed herein are reprinted in this compilation of documents.

June 30, 1982, one hundred fifty-one states had become parties to the Geneva Conventions by depositing their instruments of ratification, accession or declaration of succession with the Federal Council of Switzerland, the depository state.[6] Thus, under conventional or international treaty law, nearly every nation on earth is legally bound to comply with both the substantive norms and the procedural rules which are set forth in the Conventions. Furthermore, when the Geneva Conventions were drafted, they were, to a great extent, merely declaratory of customary international legal principles which are applicable to all states. Since they came into effect, many newly recognized humanitarian legal principles which they codified have been acknowledged to constitute an integral part of the customary law of nations. Therefore, the essential principles of humanity which the Geneva Conventions comprise simply reflect international customary law and constitute absolute commitments for all nations. While the Conventions prescribe procedural methods of enforcing humanitarian protections and of obtaining redress for their invasion which may be binding only upon their signatory states, the Conventions are not mere reciprocal treaties that are limited in their application to relations between states that are parties to them. Rather, their substantive international legal principles create, define, and regulate humanitarian protections which have universal application.[7]

In contrast, Geneva Protocol I of 1977 has rather limited application at this time. Protocol I was adopted at Geneva on June 8, 1977, and entered into force on December 7, 1978.[8] Through August 13, 1982, twenty-five states had become parties to Protocol I by depositing instruments of ratification or accession with the Swiss Government.[9] None of the major economic or military powers of the East or of the West have as yet become a party to Geneva Protocol I. Consequently, the substantive legal principles that are newly enunciated in Protocol I, as well as the additional procedural methods set forth therein for implementation and enforcement of the humanitarian law by states, constitute binding commitments for only a minority of all nations. In certain respects, however, Protocol I is itself merely declaratory of legal precepts which have been recognized to reflect the customary law of nations. Such principles already established in customary international law have the same universal application as do the customary standards set forth in the Geneva Conventions. The

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[6] Int'l Rev. of the Red Cross, July-Aug. 1982, at 245.
[7] J. Pictet, Humanitarian Law and The Protection of War Victims 20 (1975).
[8] Schindler & Toman, supra note 5, at 551.
[9] Int'l Rev. of the Red Cross, Sept.-Oct. 1982, at 281.

codification of such internationally recognized norms in Protocol I may therefore be considered to be binding upon all states regardless of their status as signatories or non-signatories of Protocol I.

The purpose of this article is to examine those provisions of the humanitarian law of armed conflict which pertain to enforcement and sanctions so that an evaluation may be made of the potential benefits of the additional humanitarian enforcement principles and procedures which have been enunciated in Geneva Protocol I of 1977. First, this examination considers the role of the humanitarian law of armed conflict in international law and gives a perspective of its historical development. Second, the sanctions and enforcement provisions of the Geneva Conventions of 1949 are reviewed in order to identify those provisions of the humanitarian law that currently are applicable to nearly every state under conventional law or that have universally binding effect upon all states under the customary law of nations. Third, the supplemental provisions of Geneva Protocol I of 1977 that concern enforcement and sanctions are studied to distinguish those that merely reflect customary international law from those that are intended to establish new precepts and procedures in the humanitarian law. Fourth, enforcement and sanctioning provisions of Protocol I are analyzed to determine the extent to which they enhance the existing humanitarian law embodied in the Geneva Conventions and to appraise the prospects for meaningful application and effective enforcement of the humanitarian law in international armed conflicts under the cumulative humanitarian law of the Geneva Conventions and Protocol I, should the latter gain widespread acceptance by states. Finally, some recommendations regarding the adoption of Protocol I by states and concerning future developments in the humanitarian law are offered for consideration by those persons who have an interest in the continuing development of the humanitarian law of armed conflict.

The scope of this inquiry can be clarified by defining some terms that reflect the essence of this subject. First, for the provisions of the law of armed conflict to be given meaningful application, they must include some element of sanction and enforcement. The term "sanction" is used here in a broad sense in reference to all matters which promote adherence to that law. Such sanctions create the possibility for actual enforcement of the law of armed conflict and thereby give it the true substance of law.[10] Second, the sanctions of that law include both implementation and enforcement measures; therefore,

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[10] Mallison, *The Laws of War and the Judicial Control of Weapons of Mass Destruction in General and Limited Wars*, **36 *Geo.*** Wash. L. **Rev. 14 (1967).**

a distinction between the meaning of implementation and of enforcement should be noted. The term, implementation, as it is usually used in the field of international humanitarian law, has a generic meaning. Implementation of an international humanitarian principle, policy or convenant may or may not include specific measures for enforcement because it encompasses the entire range of procedural and organizational methods utilized to effect supervision and control over such humanitarian standards and obligations with a view to making them work in practice. The concept of enforcement of an international humanitarian principle or convention, however, connotes an imperative quality which implies an element of compulsion. Therefore, enforcement of such norms or treaties generally concerns the fulfillment of mandatory obligations and the potential for the imposition of penalties or punishment for failure to discharge a humanitarian obligation or for violation of a humanitarian principle.[11]

Since this study concerns those terms of the Geneva Conventions and of Protocol I which embody sanctions to promote adherence to the law and which establish enforcement measures to insure its effective application, it primarily considers segments of those covenants that establish general obligations of states, substantive principles, or standards of conduct for both individuals and states that are prohibitive in nature, specific obligations of enforcement that have been or may be undertaken by states, and the enforcement process through which penalties or punishment are to be imposed upon those persons or states that breach the mandatory standards of the humanitarian law. In addition, however, consideration is also given to certain clauses of those covenants which should properly be characterized as implementation rather than as enforcement provisions since their function is either to prevent any need for enforcement by requiring education and dissemination of information concerning the humanitarian law or to create international mechanisms which are devoid of enforcement authority to effect supervision of humanitarian protections in times of armed hostilities. These implementation measures constitute important sanctions in the law of armed conflict.

The primary sanction of the laws of armed conflict is the common conviction of the participants in armed hostilities that their self-interest is advanced by adhering to the law rather than by violating

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[11] Humphrey, *The Implementation of International Human Rights Law*, **24** N.Y.L. Sch. L. Rev. **35** (1978).

it.[12] This incentive for compliance with the humanitarian law is substantial both because belligerent states usually recognize that application of the humanitarian law in the hostilities between them is in their mutual interest and because they also generally recognize that their relationships with non-belligerent states are enhanced by their own adherence to the internationally accepted standards of conduct embodied in humanitarian law. Whatever degree of interdependence of interests may actually exist or be perceived to exist in relationships between belligerent states, however, the applicability under international law of much of the conventional humanitarian law is not dependent upon correlative legal obligations. Rather, the basic sanctions and enforcement provisions of the Geneva Conventions and of Protocol I are based not only upon mutual and reciprocal obligations of states but also upon unilateral responsibilities of each nation to comply with the humanitarian law of armed conflict in its relationships with other nations regardless of their conduct.[13] The humanitarian legal principles and the procedural enforcement and implementation measures of the Geneva Conventions and of Geneva Protocol I that are analyzed in this paper impose both such multilateral and unilateral obligations and standards of responsibility upon states to ensure effective application of the humanitarian law of armed conflict.

II. THE HUMANITARIAN LAW OF ARMED CONFLICT IN PERSPECTIVE

A. ROLE ININTERNATIONAL HUMANITARIAN LAW

The role of the humanitarian law of armed conflict in international law and a summary of the historical development of that part of it which is now embodied in the Geneva Conventions of 1949 must be considered before proceeding with an analysis of the humanitarian law's sanctions and enforcement provisions. The term "humanitarian law" is commonly used in reference to two distinct concepts, one of which is broad in meaning and the other narrow. In its comprehensive meaning, humanitarian law refers to that segment of public

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[12] M. McDougal & F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion **53** (1961); Mallison, Studies in the Law of Naval Warfare: Submarines in General and Limited Wars 19 (1966).

[13] Solf & Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12*, 1949, 9 Case W. Res. J. Int'l. L. **205,** 205 n.1 (1977).

international law known as international humanitarian law and which encompasses both human rights law and the laws of armed conflict or laws of war. However, that term is also commonly used in a limited sense to refer to that portion of the laws of armed conflict which concern the protection of potential or actual victims of armed conflicts. The term humanitarian law is primarily used in this study in its narrow meaning; that is, in reference to the humanitarian law of armed conflict. The distinction between international humanitarian law and the humanitarian law of armed conflict, and the function of the latter in the law of nations, can best be understood by identifying the fundamental concepts and principles of the international humanitarian law from which the humanitarian law of armed conflict derives.[14]

International humanitarian law is composed of all international legal principles and specific rules, whether embodied in conventions and statutes or developed in customary or common law, which have the purposes of insuring respect for the individual and of promoting his or her development. The fundamental principle of international humanitarian law, which developed in customary international law and upon which specific rules of the various international humanitarian conventions are founded, evolved from a balancing of the two contradictory concepts of humanity and necessity. The first concept, humanity, requires that every state action shall be for the good of mankind. The opposing concept of necessity, arising from a recognition of the oftentimes harsh realities of this world, provides that the maintenance of public order may legitimate the use of a certain amount of force by a state and that the existence of armed conflict may justify a nation's resorting to the use of violence. The result of the compromise struck in international law between these concepts of humanity and necessity is the basic principle of international humanitarian law: that respect for the individual and for his or her well-being shall be assured by the state to the extent that it is compatible with public order and, in time of armed conflict, with military exigencies.

This underlying principle of international humanitarian law is implemented through the two interrelated but fundamentally distinct branches of the international humanitarian law which have been designated human rights law and the law of armed conflict. Human rights law is comprised of general principles and specific rules concerning a broad spectrum of human rights issues which are embodied in numerous international declarations and covenants.[15]

[14] *See generally* Pictet, *supra* note 7, at 11-48. *See also* Mallison, *supra* note 10, at 6-8.
[15] *See generally* I. Brownlie (ed.), Basic Documents of Human Rights (2d ed. 1981).

They primarily govern the relationship between the state and its own nationals and are essentially applicable in peacetime: many human rights conventions contain derogation clauses which restrict or eliminate their applicability in times of armed conflict. Furthermore, many international human rights instruments are not universally applicable to the community of nations, nor are their principles always of a mandatory nature. In contrast, the law of armed conflict is more exceptional in character since it essentially governs the relationship between the state and foreign nationals and is primarily applicable during the existence or in the aftermath of armed conflicts, at the very time when realization of the protections afforded by human rights law are prevented or restricted. Thus, unlike human rights law, the law of armed conflict has a fairly limited scope of application inasmuch as it is specifically focused upon the occurrence of armed conflicts and the consequences arising therefrom. Although many principles of the law of armed conflict originated in or have been incorporated into the general principles recognized to be binding upon states under customary international law, its conventional provisions are chiefly set forth in a limited number of international covenants known as the Hague and Geneva Conventions which are nearly universal in application and mandatory in nature.

The function of both of these branches of the international humanitarian law is to insure minimum safeguards and humane treatment for all persons, both in periods of peace and in times of armed conflict. This common aspiration of each branch is expressed in their respective guiding principles. The central principle of human rights law provides that the individual shall at all times be guaranteed the prerogative to exercise fundamental rights and liberties and be guaranteed conditions of existence that are favorable to the harmonious development of his or her personality. The concentration of the law of armed conflict is more narrow as its fundamental principle specifies that, in times of armed conflict, belligerents shall not inflict harm on their adversaries which is out of proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy. Clearly, human rights law and the law of armed conflict are interrelated since their ultimate purpose is the same: to insure respect for the individual and to promote human development. Nevertheless, their historical development, specific goals, and the means utilized in international law to attain those goals have been and remain distinct.

The precept of the law of armed conflict stated above is plainly intended both to regulate armed hostilities and to diminish the hard-

ships they cause to the extent that military necessity permits. This dual function of the law of armed conflict is reflected in the historical development of two subordinate branches of the law of war: the law of The Hague, which had the purpose of regulating methods and means of conducting armed hostilities, and the law of Geneva, which had the goal of protecting victims of armed conflicts. Historically, these two branches of the law of war developed somewhat separately in international conventional law and as a result they came to be known by the name of the city where the major international covenants concerning each aspect of the law of war were adopted. Nevertheless, these two lines of development of the law of armed conflict have always been closely interrelated and they have in fact overlapped substantially in their coverage of international legal principles relating to warfare.

In its traditional conception, the law of The Hague, also known as the laws of war in the strict sense of that term, concerned the rights and duties of belligerents regarding methods of conducting military operations and placed limitations on the means by which a belligerent could inflict damage on the enemy. Thus, "Hague law" determined rules of warfare or rules of engagement which are applicable in armed hostilities. These rules were primarily developed in the Hague Conventions and their annexed Regulations of 1899 and 1907,[16] although such rules of warfare were also adopted in covenants not named after that city, such as the St. Petersburg Declaration of 1868[17] and the Geneva Protocol of 1925.[18] The guiding principle of this branch of the law of armed conflict, reflected in the law of The Hague, is that belligerents do not have an unlimited choice in the means which they can utilize to inflict damage on the enemy.

In contrast, the law of Geneva developed historically with a focus on the protection of victims of armed conflicts. Its central principle, which is reflected in the Geneva Conventions of 1949, was that persons placed *hors de combat* and persons not directly participating in

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Wonvention (II) with Respect to the Laws and Customs of War on Land (and Annexed Regulations), ***signed*** at The Hague, July 29, 1899, 32 Stat. 1803, T.S. No. 403, II Malloy 2042 [hereinafter cited as Hague Regulations of 18991; Convention (IV) Respecting the Laws and Customs of War on Land (and Annexed Regulations), ***signed*** at The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, II Malloy 2269 [hereinafter cited as Hague Regulations of 1907].

[17] Declaration Renouncing the **Use,** in Time of War, of Explosive Projectiles under 400 Grammes Weight, ***signed*** at St. Petersburg, Nov. 29 & Dec. **11,** 1868.

[18] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonousor other Gases, and of Bacteriological Methods of Warfare, ***signed*** at Geneva, June 17, 1925, 94 L.N.T.S. 65.

armed hostilities shall be protected, respected, and treated humanely at all times. This aspect of the law of armed conflict, traditionally conceived of as the "Geneva law", has come to be known as the essence of the humanitarian law of armed conflict because of this focus on the protection and treatment of victims of warfare. However, the concept of the humanitarian law of armed conflict is not limited to "Geneva law" in its traditional sense. First, the traditional distinction made in the treaty law of armed conflict between "Hague law" and "Geneva law" was an imprecise generalization since portions of the "Hague law" concern the protection of victims of armed hostilities and segments of the "Geneva law" concern the regulation of means and methods of warfare. Second, Geneva Protocol I deals both with the regulation of warfare and with the protection of victims of hostilities. Consequently, whatever validity there may once have been in distinguishing the "Hague law" from the "Geneva law", such a distinction was lost in Protocol I in which the two traditions of the conventional law of armed conflict merge into one.[19] Therefore, in its narrow meaning the term "humanitarian law" refers to both aspects or branches of the law of armed conflict, that which regulates the methods and means of conducting armed hostilities as well as that which provides protections for the victims of such conflicts. The humanitarian nature of both branches of the law of armed conflict is the same inasmuch as both attempt to maintain and to protect human and material values to the extent that military necessity permits during times of armed conflict.

B. CONVENTIONAL DEVELOPMENT, 1864-1940

Development of the humanitarian law of armed conflict regarding the protection of victims of warfare began in international treaty law with the adoption and entry into force of the Geneva Convention of 1864[20] for the protection of members of the armed forces on land who are wounded or sick. This first treaty on humanitarian law had only ten articles, yet it enunciated three main principles which formed the foundation of later developments in the humanitarian law: first, that members of the armed forces who are wounded or sick, and thus harmless and defenseless, must be respected and cared for without distinction as to nationality; second, that in the interests of the

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[19] Mallison, *The Protection of Civilian Persons Under the Humanitarian Law of the Geneva Protocols of 1977*, at 2 (March 1981) (unpublished manuscript prepared for the Meeting of the Military Law Committee of the Inter-American Bar Association, Quito, Equador, March 16-20, 1981).

[20] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *signed* at Geneva, Aug. 22, 1864, II Malloy 1903, I Bevans 7.

wounded and sick, medical personnel and medical establishments or units are to be inviolable, that is, they are to be protected against hostile acts; and third, that the distinctive emblem of the red cross on a white ground would be utilized as the visible signs of this immunity.[21] Revision of this convention was attempted in 1868 when a diplomatic conference produced additional articles having the primary purpose of adapting the principles of the Geneva Convention of 1864 to maritime warfare,[22] but this draft convention failed to secure any ratifications and never entered into force. In 1899, however, the First Hague Peace Conference adopted Hague Convention (111) of 1899[23] which did adapt the principles of the first Geneva Convention to warfare at sea and subsequently did enter into force.

The Final Act of the Hague Peace Conference of 1899[24] expressed a desire that steps be taken to revise the Geneva Convention of 1864. That wish was fulfilled in the Geneva Convention of 1906[25] which, in thirty-three articles, specified more detailed and precise provisions for the protection of wounded and sick members of armed forces in the field than did the superseded Convention of 1864. The corresponding adaptation of these improved provisions to naval warfare was accomplished in Hague Convention (X) of 1907,[26] which revised and enlarged Hague Convention (111) of 1899.

The experiences of World War I led to the Geneva Diplomatic Conference of 1929, which was convened for the purpose of revising the Geneva Convention of 1906 and of adopting a new convention concerning the treatment of prisoners of war. The third version of the Geneva Conventions for the protection of the wounded and sick in armies in the field was adopted in the Geneva Convention of 1929 regarding wounded and sick members of armed forces on land.[27] At the same time, the first Geneva Convention relative to the treatment

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[21] Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 11-15 (J. Pictet ed. 1952) [hereinafter cited as I ICRC Commentary].

[22] Additional Articles Relating to the Condition of the Wounded in War, *signed* at Geneva, Oct. 20, 1868, 22 Stat. 946, II Malloy 1907 (did not enter into force).

Wonvention (111) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, *signed* at The Hague, July 29, 1899, 32 Stat. 1827, II Malloy 2035.

[24] Final Act of the International Peace Conference, *signed* at The Hague, July 29, 1899, *reprinted in* Schindler & Toman, *supra* note 5, at 49.

Wonvention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, *signed* at Geneva, July 6, 1906, 35 Stat. 1885, II Malloy 2183.

Wonvention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, *signed* at The Hague, Oct. 18, 1907, 36 Stat. 2371, II Malloy 2326.

Wonvention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, *signed* at Geneva, July 27, 1929. 47 Stat. 2074, 118 L.N.T.S. 303 [hereinafter cited as 1929 Wounded & Sick Convention].

of prisoners of war was adopted.[28] That Convention supplemented provisions concerning the treatment of prisoners of war which had previously been enunciated in the Hague Regulations of 1899 and of 1907.[29]

The Geneva and Hague Conventions identified above were concerned only with the protection of combatants, not of civilians. Before 1949, only the Hague Regulations of 1899 and 1907 contained provisions concerning the protection of populations against the consequences of war and their protection in occupied territory, but these provisions were limited and proved to be inadequate during World War I. The Final Act of the Diplomatic Conference of 1929 recommended that an exhaustive study should be made with a view to concluding an international convention regarding the conditions and protection of civilians in enemy territory and in enemy occupied territory.[30] The International Committee of the Red Cross[31] prepared a draft of such a convention which, along with proposed revisions of the Geneva Convention of 1929 concerning the wounded and sick on land and proposed revisions of Hague Convention (X) of 1907 concerning the wounded and sick at sea, were to be considered at a diplomatic conference to be held in Geneva early in 1940. The outbreak of World War 11, however, precluded the convening of that conference. Consequently, the existing humanitarian law remained unrevised and additional protections were not extended to civilian persons for the duration of World War 11.

The implementation and enforcement provisions of these pre-1949 humanitarian conventions were substantially inadequate. Nevertheless, the progressive development of such provisions in the humanitarian law should be noted. The Geneva Convention of 1864 only provided that "[t]he implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention."[32] That Convention provided no specific enforcement measures or implementation mechanisms; rather, it relied upon states and

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[28]Convention Relative to the Treatment of Prisoners of War, ***signed*** at Geneva, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter cited as 1929 Prisoner of War Convention].

[29]Hague Regulations of 1899 and 1907.

[30]Final Act of the Diplomatic Conference 1929, ***signed*** at Geneva, July 27, 1929, ***reprinted in*** Schindler & Toman, ***supra*** note 5, at 253-55.

[31]For information on the role of the ICRC in the development and application of humanitarian law, ***see generally*** J. Pictet, The Principles of International Humanitarian Law (1966). ***See also*** D. Forsythe, Humanitarian Politics (1977).

[32]Geneva Convention of 1864, art. 8.

their military commanders to unilaterally implement its provisions. The Hague Convention (111)of 1899 which adapted the 1864 Convention to maritime warfare was also lacking in specific implementation measures. One notable clause that it did incorporate, to the detriment of its effective application, was the *clausula* si *omnes,* a provision to the effect that the Convention is binding during a conflict only if all of the belligerents are bound by it.[33] As a result, if any single belligerent involved in a conflict was not a party to that Convention, then it was not applicable to any state, including its signatories, during that conflict. The only sanction attributable to the Geneva Convention of 1864 and the Hague Convention (111)of 1899, therefore, was the unstated but inherent basic sanction that the signatory states' interests would be furthered by adhering to the terms of those Conventions in compliance with the treaty commitments undertaken by them in international law.

The Geneva Convention of 1906 and the related Hague Convention (X) of 1907 reiterated the provision placing implementation responsibilities on governments and their Commanders-in-Chief and the *clausula si omnes.* They also inserted three new provisions into the humanitarian law. First, they required the signatory governments to take whatever measures that might be necessary to inform both their armed forces and the public of the terms of the Conventions.[34] Second, those states were charged with a duty to establish sufficient measures in their domestic law to give effect to the 1906 Convention's prohibition on the use of the emblem or name of the Red Cross by private persons, commercial entities, or societies other than those on which that Convention conferred a right of use.[35] Third, the signatory states also undertook an obligation to adopt in their penal domestic law measures necessary to prevent, in time of war, individual acts of robbery, pillage, and ill treatment of the sick and wounded persons protected by those Conventions, and to punish the wrongful use of emblems or insignia of the Red Cross.[36] Thus, these two Conventions adopted the sanction of education which was intended to promote adherence to the humanitarian law by guaranteeing widespread knowledge of it. They created a means of promoting the implementation of the humanitarian law by prohibiting the use of the emblem or name of the Red Cross for other than humanitarian purposes. Finally, they laid the foundation of the enforcement scheme of the Geneva Conventions which were to follow by establish-

[33]Hague Convention (III) of 1899, art. 11.
[34]Geneva Convention of 1906, art. 26; Hague Convention (X) of 1907, art. 20.
[35]Geneva Convention of 1906, art. 27.
[36]Geneva Convention of 1906, art. 28; Hague Convention (X) of 1907, art. 21.

ing the dual obligations of signatory states to incorporate effective penal sanctions for violations of those covenants in the states' municipal law and to punish persons who commit such violations.

The Geneva Conventions of 1929 made further advances toward effective implementation of the humanitarian law. Both of those Conventions abolished the *clausula si omnes* and replaced it with an article[37] which provided that the provisions of those Conventions were to be respected by their signatory states in all circumstances, thus specifically stating as a general obligation the inherent responsibility undertaken by each party by treaty under the customary law of nations. This clause was apparently intended to formalize that obligation and to preclude the possibility of a state relying upon some pretext to evade its obligation to comply with those Conventions. The second clause of that article specifically stated that those Conventions were binding between all belligerents in a conflict that were parties to them even if one or more of the belligerents was not a party. This change enhanced the utility of the humanitarian Conventions by providing for their continuous application in time of war between their respective signatory states regardless of the status of other belligerents in respect to the Conventions.

The other implementation provisions noted above were carried over from the earlier covenants and incorporated into the 1929 Conventions. In addition, the 1929 Conventions incorporated new provisions into the humanitarian law. First, the 1929 Convention on the wounded and sick expanded the obligation of its parties to adopt municipal penal laws by requiring that those laws be adequate to furnish measures necessary for the repression in time of war of any act contrary to its provisions, rather than just the few specific acts which were previously named.[38] Second, that Convention established the framework of an enquiry procedure to be instituted by states concerning any alleged violation of the Convention and it enunciated a mandatory responsibility for states to end and to repress such violations when their occurrence was established.[39] Third, the 1929 Convention on prisoners of war formally recognized the usefulness within the field of the humanitarian law of the time-honored practice of the utilization by one state of another state, known as the Protecting Power, to safeguard the first state's interests and those of its nationals in relation to some third state. That Convention provided a legal basis for the activities of such protecting powers in implemen-

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[37] 1929 Wounded and Sick Convention, art. 25; 1929 Prisoner of War Convention, art. 82.

[38] 1929 Wounded & Sick Convention, art. 29.

[39] *Id.* at art. 30.

tation of the humanitarian law.[40] In this manner, the 1929 Conventions expanded the sanctions of the humanitarian law in four ways: they extended its applicability between signatory states to encompass all circumstances, they increased the enforcement obligations of states to cover any act contrary to the Conventions, and they fashioned two additional mechanisms, the enquiry procedure and the Protecting Power system, which were intended to augment the efforts of states to effectively implement the humanitarian law.

The sanctions afforded by these pre-World War II humanitarian covenants were minimal and their enforcement provisions lacked specificity. That is not to say, however, that they were totally ineffective; they advanced the protection of victims of war in the period of their applicability. These inadequacies will become apparent upon consideration of the substantial revisions of the humanitarian law that were effected in the first five post-war years. This survey of the historic formulations of the humanitarian conventions has not considered the specific standards, rules, and procedures which they enunciated to provide protection and humane treatment to the victims of warfare, yet such provisions were the substance of those conventions. Their substantive provisions either constituted a codification of principles already embodied in the customary law of nations or an establishment of novel standards in the conventional law. As often as not in the latter case, such untried norms were themselves subsequently recognized to be merged into customary international law. Consequently, despite the sparsity of their sanctions and the meagerness of their enforcement provisions, these early conventions laid the foundation for a viable system of humanitarian law and they commenced the long and arduous process of progressively developing that law in light of the experience gained by mankind from the continuing occurrence of armed conflict.

III. THE GENEVA CONVENTIONS OF 1949

A. BACKGROUND

Following the unprecedented destruction which occurred in World War 11, the task of revising and extending the conventional humanitarian law in light of the experience gained during that war was undertaken again by the International Committee of the Red Cross (ICRC). With the assistance of experts from governments, National Red Cross Societies and other relief societies, the ICRC

[40] 1929 Prisoner of War Convention, art. 87.

prepared four draft conventions. Three of these drafts were designed to revise the two Geneva Conventions of 1929 and the Hague Convention (X) of 1907, and the fourth was a new draft convention for the protection of civilians. These drafts were reviewed and revised by several conferences of experts, including the Preliminary Conference of National Red Cross Societies in 1946 and the Conference of Government Experts in 1947, before they were presented to the XVII International Red Cross Conference at Stockholm in 1948 where they were adopted with some amendments. The draft conventions were subsequently utilized as the exclusive working documents for the Diplomatic Conference of 1949 at which representatives of sixty-three governments assembled. The Diplomatic Conference was held in Geneva from April 21 to August 12, 1949.[41]

Four main committees were established by the Diplomatic Conference to simultaneously consider these four topics. First, the draft Geneva Convention regarding wounded and sick combatants in the field and the draft Geneva Convention which adapts it to maritime warfare, which were intended to revise the Geneva Convention of 1929 concerning the wounded and sick and Hague Convention (X) of 1907 concerning the wounded and sick at sea became the First and Second Geneva Conventions of 1949. Second, the draft Prisoners of War Conventions which was to revise the Geneva Convention of 1929 relative to prisoners of war became the Third Geneva Convention. Third, the draft of a new convention for the protection of civilians became the Fourth Geneva Convention. Fourth, provisions were constructed which were to be common to all four of the Conventions. This innovative step taken by the Conference in grouping together the common provisions of all four of the Conventions in order to provide consistency and uniformity in their terms to the extent practicable was an important development of their implementation and enforcement provisions. As will be seen, the majority of the four Geneva Conventions' provisions regarding sanctions and enforcement are contained in such common articles.

The Diplomatic Conference adopted the texts of the four Conventions on August 12, 1949. The designation "Geneva Convention" was for the first time officially given to such humanitarian covenants when it was extended to all four of these Conventions as a tribute to the city of Geneva where the Red Cross had been founded and where, at the instigation of the founding Conference of the Red Cross, the original convention for the protection of victims of war had been

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[41] Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War **3-9** (J. Pictet ed. 1958)[hereinafter cited as IV ICRC Commentary].

concluded in 1864.[42] The four Geneva Conventions of 1949 subsequently entered into force on October 21, 1950.

The measures adopted into positive international law by the Conventions to insure their effectiveness by promoting adherence to the humanitarian law, and which therefore constitute their sanctions, are specified in the following provisions of the Geneva Conventions of 1949.[43]

B. SCOPE OF APPLICATION

The sanctions of the Geneva Conventions of 1949 must be viewed in the context of their application. To determine the applicability of the Conventions, consideration must be given to two factors: the conditions or situations in which they are applicable and the denomination of the classes of persons to whom their protections apply.

1. Conditions of Applicability

The titles of the earlier humanitarian conventions made clear that they were intended to apply in wartime but they did not include any definition of the conditions in which they applied. It was generally understood, however, thay they were formally applicable only in international wars that were regularly declared and as to which both adversaries recognized that a state of war existed. In the preceding century, the meaning of war was evident and needed no defining, but experiences since the turn of the century began to show that armed conflicts which displayed all of the characteristics of a war could arise without being preceded by the previously customary formal declarations of war. Additionally, a number of instances arose in which states at war contested the legitimacy of the enemy's government and therefore refused to recognize the existence of a state of war with that government. Consequently, in the times of the early Conventions, either where war had not been declared or where the state of war had not been recognized by a party to the conflict, the applicability of those humanitarian conventions could be contested. This problem of applicability was remedied by providing for the application of the humanitarian conventions to undeclared and declared wars in the 1949 revisions of the humanitarian law.

The resolution of this problem was aided by post-World War II changes in the general conception of the humanitarian conventions.

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[42] I ICRC Commentary, *supra* note 21, at 18.

[43] An essential source of information on each article of the Geneva Conventions of 1949 and their historical development is the four volume J. Pictet (ed.), ICRC Commentary on the Geneva Conventions of 1949 (1952-60). This is the primary reference for the discussion of those Conventions herein.

They had come to be regarded more as a solemn affirmation of principles to be respected for their own sake and as a series of unconditional commitments on the part of each signatory state which were contracted before the community of nations as represented by the other parties, than as contracts based merely on reciprocity which were concluded only in pursuit of the national interests of each of the parties. This modern conception of the role of the humanitarian law recognized that a state does not proclaim principles regarding the protections due to wounded, sick and shipwrecked combatants, prisoners of war, and civilians in time of armed conflict solely in the hope of protecting its own nationals and of promoting its own interests. Rather, it does so in recognition of the basic respect that is due to the human person as such.

As a result of these considerations, Article 2 of each of the four Geneva Conventions of 1949 specifies the criteria of its application in the following identical terms:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

The first paragraph of this article surmounts the historical restriction of application of the humanitarian laws of war only to situations in which a conflict was declared and recognized by the belligerents as being a state of war in international law. The expansion of these Conventions over such prior conventional formulations to encompass "any other armed conflict" between parties "even if a state of war is not recognized by one of them" made the Conventions applicable to the realities of international armed conflicts by overcoming the prerequisite of existence of a technical state of war. The addition of the general expression "armed conflict" made it possible to avoid

potentially endless arguments about the legal definition of "war". It is apparent, therefore, that an armed conflict within the meaning of Article 2 of the Conventions encompasses any difference arising between two states which leads to the intervention of armed forces or their equivalent. The Conventions are applicable in any such conflict, whatever its duration and regardless of the degree of violence that takes place; the applicability of their protections is not dependent upon the length of an armed conflict nor upon the number of protected persons that are affected by it. Thus, the Geneva Conventions are applicable during every stage of all factual situations involving international armed conflict.

The second paragraph of common Article 2 specifies the situations of belligerent occupation of territory to which the Conventions apply. On one hand, it is repetitious of paragraph one to the extent that it makes the Conventions applicable in cases of occupation of territory which occur during hostilities; in such cases, the Conventions would be in force from the beginning of the armed conflict or from the time war was declared in accordance with the first paragraph. On the other hand, however, paragraph two extends the applicability of the Conventions to cases in which an occupation has taken place without the commencement of hostilities and without a declaration of war. The function of this clause is to fill the gap left by the preceding paragraph so that the interests of protected persons could receive the same protection when a territory is occupied without hostilities or armed resistance by the inhabitants as they would receive if the occupation were carried out by force. Thus, this provision specifies that the Conventions apply in all cases of either partial or total occupation of territory by a party to the Conventions whether or not such an occupation was carried out by armed force or was met with armed resistance. One effect of this paragraph was to replace the traditional requirement that an occupation of territory be militarily effective before the protective principles of the humanitarian conventions would become applicable for the occupying power. Consequently, the application of these Conventions is not dependent upon distinctions drawn between the phases of invasion and occupation or the degree of control over the occupied territory which is exercised by an occupying state.[44]

The final paragraph of Article 2 addresses the applicability of the Conventions between parties thereto and between parties and non-

[44] Mallison and Jabri, *The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity,* **42** *Geo.* Wash. L. Rev. 187 **(1974).**

parties. It constitutes a further development of the humanitarian law provisions which originated in the *clausula si omnes* of the 1906 Geneva Convention and the 1907 Hague Convention (X) as modified by the 1929 Conventions. The first sentence of this paragraph in essence repeats the formulation adopted in the 1929 Conventions by providing that parties to the Conventions of 1949 are bound by them in their mutual relations even though one power involved in a conflict is not a party. The second sentence was an addition to the humanitarian law which was designed to expand the applicability of the Conventions to relations between their contracting parties and non-contracting states. Two conditions must be fulfilled for the Conventions to become applicable between party and non-party states involved in hostilities: acceptance and *de facto* application of the Conventions by the non-contracting nation. It should be noted that acceptance of the provisions of the Conventions does not necessarily require an explicit declaration of acceptance because such an acceptance may well be implicit in the *defacto* application of the Conventions by the non-party state. As a result of this innovation adopted in the Conventions of 1949, a state that is a party to the Conventions is obligated to abide by them not only in its relations with other parties to the Conventions but also in its relations with non-party states that are participating in the conflict if such non-party powers accept and apply the terms of the Conventions. Therefore, a party to the Conventions is bound to abide by them in any armed conflict in which it is involved with another party or with a non-party which accepts and applies the provisions of the Conventions, but it is not bound to them in its relations with a non-party nation which does not accept and apply their terms. Nevertheless, experience has demonstrated that parties to the Conventions have recognized compelling reasons to abide by them in situations of armed conflict even in their relations with opponents that neither are parties to the Conventions nor have accepted or applied their terms.[45]

Although not a subject of this study except as regards the applicability of the Conventions, common Article **3** should be noted. Inasmuch as Article 2 concerns armed conflicts between parties to the Conventions or other "powers", they are generally applicable only in relations between sovereign states. Consequently, their applicability is restricted to international armed conflicts, with one very important exception. Common Article **3** of each of the Geneva Conventions of 1949 specifies minimum protections to be applied by the signatory states in armed conflicts not of an international character and it

[45] Reed, *Laws of War: **The Developing** Law of **Armed** Conflict—**Some Current Problems, 20*** Case W. Res. J. Int'l L. 17, **27-28** (1977).

encourages them to bring other provisions of the Conventions into force in regard to such a conflict by means of special agreements. Therefore, in such a non-international conflict involving a party to the Conventions, Article 3 is the only provision binding on that state until such time as a special agreement brings other provisions into force. This article constituted a momentous and innovative step forward in the development of the humanitarian law by extending at least some fundamental rules of humanity that are recognized as being essential by civilized nations to apply in situations of internal conflicts. This inceptive provision in the humanitarian law regardng the protecting of victims of non-international armed conflicts has recently been developed in substantial detail in Geneva Protocol II of 1977.[46]

2. Persons Protected

Each of the four Geneva Conventions was designed to provide certain protections, standards of humane treatment, and guarantees of respect to specified categories of persons during the existence of the previously identified circumstances or conditions in which the Conventions are applicable. The First Convention protects wounded or sick combatants, that is, members of the armed forces of any party to the conflict and other designated persons associated with or equivalent to such armed forces.[47] Its protections apply in all circumstances to which the Convention is applicable and, in the case of protected persons in the hands of the enemy, it remains applicable until the time of their final release and repatriation.[48]

The Second Convention protects wounded and sick combatants aboard ships and combatants who are shipwrecked from any cause, including forced landings at sea by or from aircraft. Its protections apply in all circumstances within the scope of that Convention.[49] The First and Second Conventions also provide that combatants who come under the control of an enemy belligerent shall be deemed to be prisoners of war and be protected in accordance with the more extensive provisions of the Third Convention if it is binding upon the detaining power, or otherwise in accordance with the provisions of

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[46] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11) *adopted* June 8, 1977, U.N. Doc. A/32/144 Annex II (1977), *reprinted in* 16 I.L.M. 1442-49 (1977), *in* 72 Am. J. Int'l L. 502-11 (1978), *and in* 42 Law & Contemp. Probs. 252-261 (1978) *(entered into force* Dec. 12, 1977).

[47] First Geneva Convention, arts. 12, 13.

[48] *Id.*, at art. 5.

[49] Second Geneva Convention, arts. 12, 13.

international law concerning prisoners of war.[50]

The Third Convention protects prisoners of war, as defined in Article 4 thereof, from the time they fall into the power of the enemy until their final release and repatriation.[51]

The Fourth Convention protects civilian persons who are not members of the armed forces and who do not participate in any military operations.[52] These persons are noncombatants. It provides protection for persons who, either in an armed conflict or in an occupation, find themselves under the control of a party to the Convention of which they are not nationals. However, persons who are nationals of a state which is not bound by the Convention and individuals who are nationals of a neutral or of a eo-belligerent state which has normal diplomatic relations with the state detaining them are not protected. Persons who are protected by one of the other Geneva Conventions are not considred to be persons protected by the Fourth Convention.[53] It should be noted, however, that Part II of the Fourth Convention which provides general protections for populations against certain consequences of war is broader in application and covers the whole of the populations of the countries in conflict.54

The protections of the Fourth Convention apply from the outset of any conflict or occupation specified in Article 2 until the general close of military operations or, in the case of occupied territory, one year thereafter except that an occupying power governing such territory continues to be bound by specified articles of that Convention for the duration of the occupation. Additionally, persons protected by the Fourth Convention remain protected by it until the time of their release or repatriation if it occurs after the dates specified above.[55]

Additionally, the four Geneva Conventions extend protection to medical personnel, which includes persons exclusively engaged in administering medical treatment and their support personnel, to chaplains and religious personnel attached to the armed forces, to both medical and religious personnel who are retained to assist prisoners of war, and to staff members of National Red Cross Societies and other relief societies and organizations, including those of neutral states, that are duly recognized and authorized to exclusively

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[50]First/Second Geneva Conventions, arts. 14/16.
[51]Third Geneva Convention, art. 5.
[52]Fourth Geneva Convention, art. 4.
[53]*Id.*
[54]*Id.* at art. 13.
[55]*Id.* at art. 6.

perform medical, religious, or other humanitarian aid functions during hostilities and during the period of internment of prisoners of war or of protected noncombatants.

C. GENERAL OBLIGATION: RESPECT FOR THE CONVENTIONS

Article 1 of each of the four Geneva Conventions of 1949 states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The obligation of a state to respect a convention to which it is a party is inherent in the sovereign act of entering into a treaty. This obligation of states "to respect" the Geneva Conventions "in all circumstances" connotes a greater obligation than that which is imposed by customary treaty law. It reflects that the Conventions are not based solely on reciprocity and, hence, they are not binding for each party only to the extent that other parties observe their obligations. Rather, this sentence imposes a unilateral legal obligation upon signatory states to comply with the terms of the Conventions in all circumstances and that obligation is not dependent upon any corresponding observance of the Conventions by other parties to them.[56]

Parties to the Geneva Conventions do not merely undertake to respect the Conventions themselves, they also undertake "to ensure respect" for the Conventions "in all circumstances". This phrase emphasizes and strengthens the general obligation of the contracting states to effectively enforce the Conventions both at home and abroad. First, while the obligation of states to respect the Conventions obviously extends to all levels of both civilian and military authority within the state's government, the state is further obliged to ensure respect for the Convention by other persons or entities within its range of authority or influence. Second, contracting states are further obligated to insure that other states remain in compliance with the Conventions or, if another state should fail to fulfill its obligations under the Conventions, to insure that such a state returns to an attitude of respect for the Conventions. Thus, if anyone party is in violation of the Conventions, the other parties must take such action as is necessary to insure that the violating party henceforth respects their terms. The third consequence of the obligation to insure respect for the Conventions is that in a situation where a party is in violation of them, if the other parties do not act so as to insure the violating state's respect for the Conventions, then those other parties will themselves be in violation of them.

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[56] 1 M. Bassiouni & V. Nanda. A Treatise on International Criminal Law 371 (1973).

Finally, the words "in all circumstances" clearly refer to the circumstances in which the Conventions are applicable, that is, common Article 2 discussed above. Except for certain implementation provisions which are applicable in peacetime and disregarding Article 3 which concerns only non-international conflicts, the obligation to respect and to insure respect for the Conventions "in all circumstances" means that, when the conditions of application specified in Article 2 are present, no state bound by the Conventions can assert any valid reason for not respecting their terms. In short, application of the Conventions is not dependent upon any specific characterization of a conflict. Whether an armed conflict is considered to be just or unjust, or a war of aggression or of resistance to aggression, respect for the Conventions is to be guaranteed by states so that the protection and care afforded by the Conventions may be provided to all protected persons in all of the conditions and situations to which the Conventions apply.

Since compliance with the humanitarian provisions of the Geneva Conventions is directly promoted by the general obligations of states specified in common Article 1, those obligations constitute important sanctions in the humanitarian law of armed conflict.

D. REPRESSION OF BREACHES

The Geneva Conventions are a part of that body of laws which has generally been known as the laws or customs of war. Breaches of those laws are commonly called "war crimes". Prior to conclusion of the Geneva Conventions of 1949, repression of breaches of the laws or customs of war depended solely on the existence of domestic laws repressing such acts because the conventional law contained no substantive definition of the acts which constituted war crimes nor did it create any mandatory obligation of states for enforcement of those laws. States were at liberty either to punish or not punish violative acts committed by members of their own forces or by members of enemy forces that were under that state's control. Consequently, the early humanitarian conventions proved to be rather ineffective in the matter of the repression of breaches.

As was mentioned previously, Article 28 of the Geneva Convention of 1906 and Article 21 of the Hague Convention (X) of 1907 provided for the repression of violations in only two cases: individual acts of pillage and ill-treatment of the wounded and sick of the armed forces on land or at sea and abuse of the Red Cross flag or emblems which was to be punished as an unlawful use of military insignia. Article 29 of the 1929 Convention on the wounded and sick amended the earlier provision to state simply that the parties would enact penal laws

necessary for the repression of any act contrary to that Convention. Despite the latter Convention's clear and imperative terms, the parties to that Convention did not give full effect to their obligation to promulgate penal provisions for the repression of all breaches of the Convention. The inadequacy of these provisions to cause states to effectively repress breaches of the humanitarian law became abundantly clear during and after the Second World War. As a result, the drafters of the Geneva Conventions of 1949 devised a system for more effective repression of breaches of the humanitarian law.

The enforcement scheme of the Geneva Conventions of 1949 is primarily set forth in three articles to implement penal sanctions in their municipal law for violations of the Conventions, the identification of grave breaches of the Conventions, and the immutability of a state's liability for such violations. This system for suppression of breaches of the Conventions is based upon a classification of breaches as either grave breaches or simple breaches. Those violations which constitute grave breaches are specifically enumerated in each Convention. All other violations constitute simple breaches. As used in the Conventions, the terms "repression" and "suppression" of breaches, whether simple or grave in nature, encompass both the obligation to impose penalties or punishment for the commission of such acts and the duty to prohibit and to prevent the occurrence of breaches. Furthermore, repression of either simple or grave breaches appears to demand the imposition of penal punishment whereas suppression of other than grave breaches connotes utilization of administrative and disciplinary measures as well as penal sanctions for the prevention and punishment of simple breaches.[57] The duty of states to repress and to suppress breaches are enunciated in an article which is common to all four of the Conventions and the identification of grave breaches of each Convention is set forth in similar articles of each Convention which immediately follow that common article.

1. Obligation to Implement Municipal Laws

The common article which establishes the system for repressing and suppressing breaches of the Conventions is based on three essential obligations of the signatory states: an obligation to enact municipal legislation and take other necessary measures to suppress violations of the Conventions, an obligation to search for any person accused of having committed a grave breach, and an obligation to

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[57] Bassiouni, *Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 Rut.-Cam. L. J. 196 (1977).

prosecute persons responsible for the commission of grave breaches or to turn them over to another concerned state for trial. The common article which lays this foundation for a system of enforcement of the Convention states:

> The High Contracting Parties undertake 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 the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.[58]

The obligation to enact necessary domestic legislation for the repression of grave breaches which the first paragraph of this article specifies creates a duty for states to implement that provision in peacetime, not just during the periods specified in Article 2 regarding the general applicability of the Conventions. Furthermore, that first clause mandates that penal sanctions are to be provided both for persons who commit grave breaches and for persons who order that such breaches be committed. Thus, it establishes the joint responsibility of the perpetrator of a grave breach and of the person who may order the commission of such an act. Finally, this obligation of states implies that such penal legislation is to be applicable to any person, whether a national of the enacting state or of an enemy state, who commits a grave breach.

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[58]Geneva Conventions of 1949, common arts. 49/50/129/146.

The second paragraph imposes on states an affirmative obligation to actively search for persons accused of grave breaches and to arrest and prosecute such persons without delay. The prosecution of such violators is to be conducted through their national criminal court system, whatever the nationality of the accused, so that the uniform proceedings of the prosecuting state are utilized to try all such accused persons. It follows, therefore, that special tribunals to prosecute persons of enemy nationality who are accused of committing grave breaches are not to be created. The additional obligation to extradite is dependent upon two conditions. Such extradition is subject to the will and municipal law of the state that has detained the accused and the state which is seeking extradition must establish by sufficient evidence that the charges against the accused are well founded. It should be observed that this paragraph does not exclude the possibility that a state may deliver an accused to another state for prosecution before an international penal tribunal if the competence of that tribunal is recognized by the signatory states concerned.

The third paragraph of this common article is a restatement of Article 29 of the 1929 Convention on wounded and sick which called for the punishment of all acts contrary to the Convention. The present formulation requires a state to do everything in its power to prevent the commission or any repetition of acts which violate the Conventions. In light of the two preceding clauses of this article, this provision primarily concerns the suppression of violations other than grave breaches, but it makes it clear that all breaches of the Conventions are to be suppressed by national legislation. It leaves the means of suppressing simple breaches to the discretion of the parties, They are not required to enact or to enforce penal sanctions under their municipal law for simple breaches of the Conventions, but they are certainly at liberty to designate such internationally proscribed conduct as crimes under municipal law. The parties do, however, have an affirmative obligation to suppress simple breaches, whether through administrative or penal sanctions. Since those acts which constitute simple breaches of the Conventions are not designated as, nor have generally been recognized to be, crimes under international law, only the parties' national authorities and courts are competent to enforce them and to impose penalties or punishments for such violations of the Conventions.[59]

One category of simple breaches concerning misuse of the emblems or name of the Red Cross and its equivalents are specifically enumerated in the First and Second Geneva Conventions. The res-

[59] Bassiouni, *supra* note 57, at 196.

trictions on such use originated in the 1906 Geneva Convention and Hague Convention (X) of 1907 and were enhanced by the 1929 Geneva Convention (X) of 1907 and were enhanced by the 1929 Geneva Convention relative to the wounded and sick. The restrictions on use of the Red Cross name and emblems which were specified in Article 28 of the 1929 Convention depended on measures which states were to adopt or to purpose to their legislatures. The qualification of these restrictions was removed in Article 53 of the First Geneva Convention of 1949 which absolutely prohibits any unauthorized use of such distinctive emblems. Additionally, several articles of the First and Second Conventions enumerate their proper uses.[60] Misuse of Red Cross emblems may include either their improper use such as for commercial purposes or abuse of them as protective signs in wartime. An additional article in the First and Second Conventions specify that protection of the distinctive emblem from either form of abuse must be enforced by all states in their national legislation. That article states that the parties to the Conventions shall, if their legislation is not already adequate, take measures necessary for the prevention and repression at all times of abuses of the distinctive emblems.[61] Consequently, states have an affirmative obligation to enact legislation to prohibit and to punish such abuses. These articles are somewhat duplicative of the third paragraph of the common article to all four Conventions inasmuch as the latter calls for states to take all measures necessary to suppress acts other than grave breaches that are contrary to the Conventions, which would include such misuse of these emblems. Nevertheless, because of the historical development of these provisions and the importance attributed to protection of the proper use of the distinctive emblems of the Red Cross, those two Conventions specifically reaffirm the state's obligation to suppress such simple breaches and they separately mandate enactment of appropriate municipal legislation to fulfill that obligation.

The final paragraph of this common article provides safeguards for a fair and regular trial and defense of persons accused of grave breaches of the Conventions who are prosecuted in accordance with the first and second clauses of that article. This provision resulted from a recognition that certain safeguards for a proper trial and defense are essential in all cases where persons are accused of war crimes, especially when the accused person is tried in the court of an enemy state. The Diplomatic Conference which formulated the Geneva Conventions elected to adopt rules that were already established

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[60] First Geneva Convention, ch. VII; Second Geneva Convention, ch. VI,
[61] First/Second Geneva Conventions, arts. 54/45.

for the protection of prisoners of war rather than to establish new standards. Consequently, each of the Conventions refer to those safeguards provided in the Third Geneva Convention of 1949 regarding prisoners of war and adopt them as the minimum safeguards of trial and defense. In the event of their judicial prosecution, persons accused of having committed grave breaches or of having ordered such acts to be committed by another must be given specifically enumerated rights and a means of defense,[62] must be given the same rights of appeal or petition from any sentence as are bestowed upon members of the prosecuting state's armed forces and they must be fully informed of those rights.[63] Sentences of accused persons must be served under the same conditions as are afforded to members of the prosecuting state's armed forces, which conditions must conform to the requirements of health and humanity, and they must be given the benefit of specified penal regulations.[64] Most importantly, accused persons in the hands of an enemy state are entitled to the assistance of a Protecting Power to which the prosecutingstate must send notification of any judgment and sentence.[65]

These safeguards for the fair and proper trial of persons accused of grave breaches of the Conventions are applicable in all circumstances. Hence, they constitute restrictions both on the national legislation enacted by parties to repress grave breaches and on any conferral of jurisdiction over such breaches to an international tribunal. Any municipal legislation enacted to prosecute grave breaches and any international tribunal granted jurisdiction over such breaches must, at a minimum, provide the specified safeguards.

In summary, this common article of the Geneva Conventions 1949 establishes an indirect enforcement scheme whereby the individual signatory states, rather than an international penal tribunal, are responsible for identifying the commission of grave breaches and for applying criminal sanctions to persons responsible for such violations. Although the Conventions embody a preference for the repression of grave breaches by national courts, the parties are not restricted from conferring jurisdiction upon an international tribunal over such grave breaches as constitute crimes in international law. However, since no such international penal court has yet been vested with such jurisdiction, the sanctioning of grave breaches of the Conventions by national tribunals is, at present, the means of

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[62]Third Geneva Convention, art. 105.
[63]*Id.* at art. 106.
[64]*Id.* at art. 108.
[65]*Id.* at art. 107.

enforcement accepted by the international community of states.[66]

2. Identification of Grave Breaches

Those acts which constitute grave breaches of the Geneva Conventions, if committed against persons or property protected by them, were specifically listed in each Convention. Due to the different scope of application of each Convention, the proscribed grave breaches are not identical in each of them. A collective list of acts which are grave breaches is as follows:[67]

> (1) willful killing, torture or inhuman treatment, including biological experiments;
>
> (2) willfully causing great suffering or serious injury to body or health;
>
> (3) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> (4) compelling a prisoner of war (Third Convention) or a protected person (Fourth Convention) to serve in the forces of the hostile power;
>
> (5) willfully depriving a prisoner of war (Third Convention) or a protected person (Fourth Convention) of the rights of fair and regular trial prescribed in the Convention;
>
> (6) unlawful deportation or transfer or unlawful confinement of a protected person: and
>
> (7) taking of hostages.

The definition of acts which constitute grave breaches was incorporated into the Conventions in order to insure universality of treatment in their repression by states. The term "grave breaches" was used in lieu of "grave crimes" or "war crimes" because of the different legal meanings and their ramifications which the word "crimes" has in the municipal law of various nations. Nevertheless, the acts defined in these articles were previously described as crimes in the penal laws of most states and, in accordance with the common article just discussed, every party to the Geneva Conventions becomes obliged to criminalize these grave breaches in their domestic legislation. Grave breaches, therefore, constitute serious crimes in the most literal sense regardless of their unique designation.

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[66]Bassiouni, *supra* note 57, at 196 n.78.
[67]Geneva Conventions of 1949, common arts. 50/51/130/147.

Grave breaches are those acts listed above that are committed against persons or property protected by the Conventions. The persons protected generally are wounded, sick, or shipwrecked members of armed forces or their equivalent, prisoners of war, protected civilians, medical personnel, and chaplains as specified in each of the Conventions. The property protected is defined in various articles of each Convention. This listing of grave breaches is not an exhaustive list of war crimes; states are free to adopt legislation which designates additional breaches of the Conventions as serious or grave offenses. This enumeration of the most offensive violations of the humanitarian principles set forth in the Conventions is a codification in conventional law of substantive penal rules reflecting the fundamental standards of conduct which have been recognized to have universal application. Consequently, the normative proscriptions enumerated in these articles of the Conventions constitute an integral part of the customary law of nations. Those proscriptions comprise the violations of the Conventions which the signatory states are obligated to enforce through enactment of municipal penal legislation and by prosecution in their national courts of persons responsible for the commission of such acts.

3. Liability of States

The third consecutive common article in the series of articles of each Convention which establish their enforcement scheme specifies the unchangeable nature of the responsibility of the contracting parties in these terms: "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 the preceding Article."[68] Upon adoption of the Geneva Conventions, this article established a new provision in the humanitarian conventional law. In international law, generally only a state can assert claims against another state and, therefore, states must put forward on behalf of its nationals any claim which they may have against another state. States are also generally free to absolve another state of any liability in relation to claims asserted by the first state's nationals or to conclude an agreement by which another state absolves it from any liability for claims which may be asserted by nationals of the second state. This article is designed to prevent any such waivers of the liability of a state for grave breaches of the Conventions by its nationals for which the state is ultimately liable. Additionally, it was specifically designed to prevent a victorious state from compelling a defeated state, in a peace treaty or

[68] *Id.* at common arts. 51/52/131/148.

armistice, to relinquish all claims which the defeated state or its nationals may have a right to assert against the victorious state for grave breaches committed by the latter state's forces.

This common article clearly declares that the liabilityof any party to the Conventions regarding grave breaches is not subject to unilateral or even bilateral exoneration. It reinforces both the affirmative obligation of each signatory state to repress grave breaches in accordance with the common articles on repression of breaches and the dual obligation of each party under common Article 1 to itself respect and to insure that other parties respect their obligations and liabilities relating to such breaches. This article is indicative of and consistent with recognition that the acts specified to be grave breaches of the Conventions are also crimes in international law.

E. AIDS TO ENFORCEMENT

The Geneva Conventions of 1949 provide two means for states to obtain assistance through cooperation between belligerent states or from external sources in their endeavors tofaithfuly apply the terms of the Conventions, the enquiry procedure and the Protecting Power System. Unfortunately, neither of these aids to enforcement and implementation of the Conventions has been successfully utilized to any meaningful extent.[69]

1. Enquiry Procedure

Each of the 1949 Conventions incorporated an article which substantially expanded upon the initial enquiry provision that was introduced into the humanitarian law in the 1929 Convention on the wounded and sick as was noted previously. The basis for the establishment of an enquiry procedure to be conducted concerning any alleged violation of the Conventions is set forth in a common article which 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 Conventions.
>
> 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.

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[69] Forsythe, Who *Guards the Guardians: Third Parties and the Law of Armed Conflict,* 70 Am. J. Int'l L. 41, 45-6 (1976).

> 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.[70]

The first clause of this article indicates that the institution of an enquiry proceeding is compulsory once one of the belligerents has requested it. The second clause, however, affirms that the parties must reach an agreement on the procedure to be used for the enquiry. That clause attempts to resolve those cases where the parties to the conflict do not reach agreement on the procedure for the enquiry by providing that an umpire be selected to choose the procedure to be followed. In the latter case, however, it is still necessary for the parties to agree on the choice of an umpire, but the Article does not provide guidance on the course to be taken if the parties cannot reach agreement on the appointment of an umpire. The Protecting Power could well play a meaningful role in the institution of such enquiry proceeding, both because belligerent states would doubtless make a request for such an enquiry through a Protecting Power and because the power protecting the interests of the state which complains of a violation of the Conventions may be the best entity to carry out the enquiry. The final paragraph of this clause reaffirms the obligation of the parties to enforce the terms of the Conventions and to expeditiously repress both grave and simple breaches of them.

2. Protectang Power System

The scheme for enforcement of the Geneva Conventions by states is further supplemented by the Protecting Power system which is set forth in several articles in each Convention.[71] These provisions were derived from Article 86 of the 1929 Geneva Convention relative to prisoners of war, but the provisions of the 1949 Conventions regarding the role of Protecting Powers in relation to armed conflicts are much more detailed than was the provision introduced in the 1929 Convention. It is not possible to give a complete analysis of this system of supervision here. However, its general characteristics should be reviewed.

The role of Protecting Powers in the humanitarian law of armed conflicts extends to many aspects of its implementation and it can certainly play an important role in the actual enforcement of the Conventions' substantive norms by states. The articles previously discussed established that the primary legal obligation to apply and

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[70]Geneva Conventions of 1949, common arts. 52/52/132/149.

[71]*Id;* First, Second & Third Conventions, arts. 8, 10, 11; Fourth Convention, arts. 9, 11, 12.

to insure compliance with the terms of the Conventions rests with the states that are parties to them, especially those that are involved in an armed conflict situation. A mechanism for overall supervision of the implementation of the laws of international armed conflict embodied in the Conventions is provided in these common articles of the four Conventions which adopt the customary international law role of Protecting Powers. Protecting Powers, neutral states or their substitutes, are given rights and duties by the parties to the Conventions to act as observers to verify compliance or noncompliance by states with the requirement of the Conventions. The Conventions require each state to cooperate with the Protecting Powers in exercising the state's responsibility to implement the Conventions; such cooperation is not optional. Likewise, the Conventions also mandate that Protecting Powers, if parties to the Conventions, shall be obligated to participate in their implementation.

The Conventions establish a complex process of supervision by Protecting Powers and other agencies under which both official supervision and unofficial supervision is possible. Official supervision by Protecting Powers may be effected in three ways: by Protecting Powers appointed by belligerents, by official substitutes for Protecting Powers designated by belligerents, and by the automatic introduction of an official substitute. Unofficial supervision is possible by the automatic introduction of the International Committee of the Red Cross (ICRC) to perform specific humanitarian tasks, such as visits to detainees and tracing, and by the possible introduction of Red Cross agencies to perform traditional humanitarian tasks not specifically identified in the Conventions. Numerous specific tasks which may be undertaken by Protecting Powers are defined in various articles of the Conventions. Not all of these specific duties are mandatory for the Protecting Power, nor are states always required to utilize them to perform specific functions. However, the fundamental duties of the Protecting Power are mandatory. Essentially, the function of the Protecting Power is to cooperate with a state whose interests the Power safeguards in the state's application of the Conventions, to scrutinize such application to ensure that the state conforms to the requirements of the Conventions, and to act as an intermediary on behalf of protected persons in order to resolve disputes between belligerent states. Two of the most important specific tasks of Protecting Powers in supervising the Conventions' implementation by states are contained in Article 126 of the Third Convention and Article **143** of the Fourth Convention. These articles require states to permit unrestricted visits to and interviews with protected persons who are detained by a state both by representatives or delegates of the Protecting Powers and by approved delegates of the

International Committee of the Red Cross.

Although this complex system for official and unofficial supervision of the application of the Geneva Conventions is in part made mandatory upon the state parties to the Conventions, states have not generally acquiesced to official supervision by Protecting Powers nor have they otherwise given meaningful application to these provisions in armed conflicts since the Geneva Conventions came into effect.[72]

F. PROVISIONS RELATING TO EXECUTION

In order that the fundamental principles embodied in the Geneva Conventions may be meaningfully implemented, each of the Conventions contains several articles which are designed to promote effective execution of their terms. These provisions concern the detailed execution of the Conventions and their applicability in unforeseen cases, dissemination of the texts and knowledge of the Conventions, and the communication between states of their respective laws and regulations which concern the application of the Conventions. The ultimate purpose of each of these provisions is to provide some minimum guidelines for states to assist them in fulfilling the general obligation which they have incurred under Article 1.

The Geneva Conventions primarily express fundamental principles which must be applied in very complex factual situations by representatives of the states. The Conventions could not possibly regulate in detail every application of their terms, nor can states be expected to foresee all situations to which the Conventions might apply when states adopt measures for their implementation. The First and Second Conventions, which require detailed application by the armed forces of a state in the midst of hostilities, provide guidance in this regard in an identical article which provides: "Each Party to the conflict, acting through its Commander-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforseen cases, in conformity with the general principles of the present Convention.[73] This article reflects one change from the similar provision which was enunciated in both the 1906 and 1929 Conventions relative to wounded and sick. It clarifies that states remain fully responsible for the duty of detailed execution of these Conventions and for the acts of their commanders-in-chief in effect-

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[72] Forsythe, *supra* note 69, at *42-46. See also* Pierce, *Humanitarian Protection for the Victims of War: The System of Protecting Power and the Role of the ICRC,* 90 *Mil. L.* Rev. 89 (1980).

[73] First and Second Geneva Conventions, arts. **45/46.**

ing such detailed execution. Additionally, this article enunciates the standard that is to be applied in cases or situations that are not specifically addressed by the Conventions: the general principles of the Conventions are always to be applied.

The obligation which the parties undertook by virtue of Article 1to respect and to insure respect of the Conventions in all circumstances is also to be implemented by states through affirmative efforts to spread knowledge of the humanitarian law in order to foster its effective application. A similar article in each of the Conventions provides:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in heir programmes of military and, if possible, civil .nstruction, so that the principles thereof may become known to the entire population.. . .

The First and Second Conventions conclude this article with "in particular to the armed fighting forces, the medical personnel and the chaplains."[74] The Third Convention completes this article by stating: "Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions."[75] The Fourth Convention for the protection of civilians adds: "Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions."[76]

By this related article in each of the Conventions, the parties undertake to disseminate the texts thereof in their respective countries and to include their study in military and, if possible, civilian programs of instruction so that the principles embodied in the Conventions will be familiar to members of their armed forces and, to the maximum extent possible, to their entire populations. This provision, which originated in the 1906 Geneva Convention and was reiterated in the 1929 Conventions, has been amplifed and made more specific in the present articles. The current obligation of states is

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[74] *Id.* arts. **47, 48.**
[75] Third Geneva Convention, art. 127.
[76] Fourth Geneva Convention. art. **144.**

absolute and requires implementation both in times of peace and of armed conflict. These provisions concerning dissemination of the Conventions, education regarding the conventional laws of armed conflict, and possession and knowledge of the texts by those responsible for protected persons are the logical first step toward effective implementation of the rules prescribed by those international agreements. These articles constitute preventive legal measures designed to facilitate compliance with those laws and to deter violations of them by attaining wide dissemination of the texts of these instruments, by fostering objective understanding of their terms by all, and by promoting awareness of the consistency of the humanitarian laws of armed conflict with military principles and tradition.

Many nations have in fact taken measures to comply with their absolute duty to disseminate knowledge of the Geneva Conventions among their armed forces and civilian populations. Pursuant to several resolutions adopted at International Red Cross Conferences since 1965 which expressed the wish that governments and National Red Cross Societies submit periodic reports to the ICRC on the steps taken by them in this matter, the ICRC published a report on the dissemination of knowledge of the Geneva Conventions in August 1981.[77] That report, which reflects the answers of thirty-one governments and fifty-nine National Societies of the Red Cross to a questionnaire issued by the ICRC, indicates that many states have taken measures in a variety of ways to fulfill their obligation to disseminate knowledge of the international humanitarian law. Undoubtedly, however, greater attention should be given by most states to meaningful fulfillment of this obligation so as to eradicate the greatest obstacle to effective implementation of the Conventions, which is ignorance of the humanitarian law.

The last common article of the Conventions to be noted which promotes their implementation by states provides: "The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the law and regulations which they may adopt to ensure the application thereof."[78] This article requires the parties to communicate to one another the official translations of the Conventions which are made by their executive authorities in accordance with their municipal

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[77] ICRC, Dissemination of Knowledge and Teaching of International Humanitarian Law and of the Principles and Ideals of the Red Cross (CPA/4.1/1, Aug. 1981) (document submitted by the ICRC to the Twenty-Fourth International Red Cross Conference held at Manila, Nov. 1981).

[78] Geneva Conventions of 1949, common arts. 48/49/128/145.

law. This requirement does not include the French and English texts which are the authentic texts of the Conventions, nor does it include the Spanish and Russian versions which are official translations made by the Swiss Federal Council pursuant to the Conventions.[79] States that have more than one national language may therefore be required to communicate more than one translation of the Conventions. The "laws and regulations" which must also be communicated encompass all legal documents promulgated by the executive and legislative authorities of a state which concern the application of the Conventions. These would include both those laws which are enacted in fulfillment of a requirement of the Conventions and any other laws and regulations which may be adopted even though the Conventions do not require it. Finally, these communications will be made in time of peace through the Swiss Federal Council and in time of armed conflict through the Protecting Powers. This provision is meant to nurture a mutual understanding between states regarding each other's means of execution of the Conventions by requiring a continuous and complete exchange of information about the implementation measures undertaken by each of them.

G. SANCTIONS OF THE GENEVA CONVENTIONS

Most of the numerous principles and regulatory provisions established in the conventional law by the Geneva Conventions of 1949 have not been considered here. However, the articles discussed above enunciate the basic obligations of states that are parties to the Conventions, the fundamental standards of conduct which are the basis of the Geneva Conventions' proscriptions, the means by which they are to be enforced, and certain implementation measures that are designed to serve as aids to states in their enforcement of this aspect of the humanitarian law. The Geneva Conventions as a whole are structured to serve as guides for the conduct both of states and of individuals in their involvement in situations of armed conflict in order to minimize unnecessary destruction of human and material values in times of warfare. In pursuit of this objective, the Conventions establish essential protections that are to be accorded to all protected persons and to certain types of property, and they enunciate standards of humane treatment and fundamental guarantees of respect for individuals affected by armed conflicts. Realization of these protections by their intended recipients depends, of course, on the degree of effectiveness that is achieved by states in their imple-

[79] *Id.* at common arts. 55/54/133/150.

mentation and enforcement of the Conventions. The specific formulations of normative principles and procedural mechanisms identified herein constitute the minimal measure both of duties for signatory states and of rules of penal responsibility for individuals that are necessary to ensure the effectiveness of the humanitarian law of armed conflict.

Since no international or supranational polity having supremacy over nations exists and because sovereign states have not themselves vested jurisdiction over violations of the humanitarian law in any international body, the Geneva Conventions rely upon an indirect enforcement system. Upon ratifying or acceding to the Conventions, individual states clearly assume affirmative obligations to structure their municipal law in accordance with the requirements specified in the Conventions, to actively pursue enforcement of the Conventions' proscriptions, and to effectively implement the nonpenal regulatory provisions of those covenants. Any inadequacies in the sanctions created for states by the Geneva Conventions and any deficiencies in the means established for their enforcement can be attributed to the necessarily indirect nature of this enforcement scheme.

The principal obligations which the Geneva Conventions prescribe for states regarding implementation of the humanitarian law are unambiguous and authoritative: to respect and to insure respect for the Conventions, to insure their detailed execution in the armed forces through their commanders-in-chief, to adopt necessary measures in municipal law to repress grave breaches and to suppress all other breaches, and to actively seek out and prosecute or extradite persons accused of having committed grave breaches of the Conventions. Additionally, states have an absolute responsibility to undertake preventive measures to facilitate realization of the goals of the humanitarian law by disseminating the texts of the Conventions and by including study of them in military and, to the extent possible, civilian programs of instruction. These cardinal duties of states are comprehensive since they extend to every signatory state, belligerents and non-belligerents alike, both in times of peace and during the existence of armed hostilities.

Three general categoriesof law.; which define and which prescribe the legal consequence for the commission of crimes exist within the present order of international humanitarian law and municipal law: common crimes as defined in municipal law systems, was crimes as defined in the customary law of nations, and grave breaches as defined in the conventional law by the Geneva Conventions of 1949. Common crimes proscribed by national authorities may well include

those acts which constitute war crimes in the customary law. In fact, the legislation of most states does proscribe conduct which constitutes the more grievous of the customary war crimes. However, states are not required under customary law to adopt legislation which criminalizes all war cirmes, although every nation is bound to recognize the criminality of such acts in international law. The general obligation of states to abide by the customary law established by the community of states would indicate that states have some duty to enforce the penal standards of international law that are reflected in the customary law's designation of certain acts as war crimes. Nevertheless, this duty of enforcement of the customary law by states is, as a legal and practical matter, subject to the exercise of discretion by states.

It has long been recognized that the acts identified as grave breaches in the Conventions are war crimes in violation of the laws and customs of war. Many proscribed acts that may constitute war crimes are defined in various declarations that were issued following World War II, including the Charter of the International Military Tribunal and Control Council Law Number 10.[80] The International Tribunals at Nuremberg and Tokyo conducted trials following the Second World War for three categories of war crimes specified in the Charter of the International Military Tribunal: crimes against the peace which included the planning or initiation of war, violations of the laws or customs of war, which included murder, ill-treatment or deportation of civilians or prisoners of war, plunder of public or private property, and wanton destruction of cities, and crimes against humanity, which included murder, extermination, enslavement, deportation and other inhumane acts against a civilian population. Subsequently, the United Nations General Assembly adopted a resolution recognizing that a formulation of the Nuremberg Principles reflected the proscription of such acts in the customary law of nations.[81] Therefore, the enumeration of grave breaches in the Geneva Conventions is merely a codification of substantive penal proscriptions already embodied in customary law.

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[80] Agreement for the Establishment of an International Military Tribunal (London Declaration) with annexed Charter of the International Military Tribunal, *concluded* at London, Aug. 8, 1945, U.S. Dept. of State, Trial of War Criminals 13, Dept. of State Pub. No. 2420 (1945), 39 Am. J. Int'l L. Supp. 257 (1945). See also Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, *reprinted in* T. Taylor, Final Report *to* the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, at 250 (1949).

[81] The United Nations General Assembly adopted the International Law Commission's draft of a "Formulation of the Nuremberg Principles" in 1947, G.A. Res. 95, 5 U.N. GAOR, Supp. (No. 12) 11, U.N. Doc. A/1316 (1950).

The acts which are identified as grave breaches of the substantive principles set forth in the Geneva Conventions do not encompass all acts which constitute war crimes in the customary law of nations. Many war crimes that are not designated as grave breaches may nevertheless be breaches of the Conventions and serious crimes under customary law. All war crimes, including grave breaches, are under customary law potentially subject to the universal jurisdiction of states, but the characterization of such offenses in municipal law and the nature of the sanctions which may be imposed for their commission are determined by each state in the exercise of its jurisdiction. Under the conventional law of the Geneva Conventions, however, grave breaches are distinguishable from other customary war crimes. A consensus was reached at the Diplomatic Conference in 1949 that the acts declared to be grave breaches of the Conventions are so heinous that they should be subject to uniform and universal penal jurisdiction among signatory states and that a statutory basis for extradition of persons accused of such offenses should be established in the humanitarian conventional law contingent upon the requirements of each state's extradition statutes and agreements. Consequently, the enforcement scheme of the Conventions was created to impose on states obligations to enact municipal legislation that provides effective penal sanctions for the commission of grave breaches, to actively search for persons responsible for the commission of such acts, and to prosecute such persons or, at the will of the detaining state and, in accordance with its legislation, to turn such persons over to another signatory state for prosecution.

Parties are also obligated to adopt legislation to suppress breaches of the Conventions that do not constitute grave breaches, which includes other war crimes under customary law that violate the Conventions and other simple breaches of the Conventions, although the nature of such legislation is left to the discretion of states since penal sanctions for these breaches are not required. Thus, states may adopt judicial or nonjudicial measures to suppress such simple breaches. Therefore, war crimes that are not designated to be grave breaches but which do constitute violations of the Conventions remain subject to the same discretionary authority of enforcement by states that they retain under customary law, with the important exception that, under the Geneva Conventions, each signatory state has contracted with the others in international law to take all measures necessary to in fact suppress such acts.

The Geneva Conventions represent a formal declaration of agreement and consensus by states on humanitarian public policy arrived at through the international political process. In view of the political

and other constraints experienced by the participants in the Diplomatic Conference of 1949, it could not be expected that the Geneva Conventions would be faultless. Several of the deficiencies that relate to the implementation of their humanitarian principles and which result either from the inherent character of that process or from the indirect nature of their enforcement system can be identified.

The list of grave breaches specified in the Conventions may have been too narrowly drawn inasmuch: other acts which constitute both war-crimes under customary law and serious transgressions of the humanitarian principles set forth in the Conventions could also have been specified to be grave breaches. The assignment of penal responsibility for the commission of the grave breaches that are enumerated in the Conventions is extended to persons who commit such acts and to persons who order that such breaches be committed, but the Conventions do not extent such criminal responsibility to persons who fail to prevent or to repress grave breaches when they are under a duty to do so. In addition, the Geneva Conventions do not resolve issues which concern several types of special defenses, including military necessity, state immunity, and superior orders, which have been asserted in war crimes prosecutions. Finally, the Conventions do not enunciate rules or guidelines concerning the specific dutiesof military commanders to prevent and suppress all breaches of the Conventions.

The procedural mechanisms that are established by the Conventions to aid states in their enforcement of the humanitarian law also exhibit some inadequacies which inhibit effective utilization of them by states. The provision for extradition between states of persons accused of responsibility for the commission of grave breaches is fully contingent upon the apprehending state's will and municipal law rather than upon a mandatory extradition statute governed by legal and procedural rules established in the conventional law. Successful utilization of the Conventions' framework for institution of an enquiry procedure is inhibited by the necessity of the belligerent states' agreement upon the means of conducting such an enquiry or on the selection of an umpire to choose that means. Additionally, utilization of the Protecting Power system is in actuality dependent upon the acquiescence of belligerent states, despite the clearly mandatory obligations imposed upon states to cooperate with Protecting Powers and regardless of the immense potential which that system of supervision offers for the realization of humanitarian protections by victims of armed conflicts.

Finally, the most serious deficiency in the enforcement scheme of the Geneva Conventions is that their provisions are to be enforced to a

great extent by the belligerent states that are involved in an armed conflict. Such states may unilaterally determine that their actions do not violate the Conventions or that the Conventions are not applicable in given situations. This deficiency is offset to some degree by the absolute obligation of all signatory states, whether involved in armed hostilities or not, to insure that all parties to the Conventions respect their terms. Hence, in regard to a particular armed conflict situation, non-belligerent states should utilize all lawful means at their disposal to influence or compel belligerent states to comply with the substantive principles of the Conventions and to effectively fulfill the belligerent states' affirmative obligations to implement and enforce their provisions. Informational deficiencies also inhibit effective enforcement of the Conventions. Although they necessarily rely upon this indirect system of enforcement, creation of an impartial investigating body would aid in the implementation of the humanitarian law if that body were unassociated with the belligerent parties involved in armed hostilities and did not require the belligerents' consent to function in relation to that conflict. Such an investigatory institution could gather and provide complete and unbiased information on which all concerned states and humanitarian organizations could rely, thereby enhancing the likelihood of effective enforcement of the Conventions by all states.

The Geneva Conventions of 1949 substantially enhanced the conventional humanitarian law of armed conflict. These treaties meaningfully supplemented the fundamental humanitarian principles of the customary law of nations as they existed when the Conventions were adopted both by codifying portions of that customary law, thereby giving uniformity to the definition and scope of its principles, and by establishing new humanitarian norms of behavior and detailed methods for implementation of the humanitarian law. The fact that the Conventions have been almost universally endorsed by states since the date of their adoption is evidence of the extensive degree of authority under international law which these covenants comprise for the community of nations. Despite their imperfections, the Geneva Conventions of 1949 established a functional means of implementing the humanitarian laws of armed conflict which is dependent only upon the willingness of states to comply with their obligations under both conventional and customary law.

IV. GENEVA PROTOCOL I OF 1977

A. BACKGROUND

Since the adoption of the four Geneva Conventions in 1949, a proliferation of new nations have entered the world community, a multitude of armed conflicts have taken place under a variety of conditions, and marked changes have occurred in the nature of both international and non-international hostilities. These factors led to widespread views that the body of traditional law for the protection of victims of armed conflicts, as embodied primarily in the Geneva Conventions of 1949, the Hague Conventions of 1907, and the customary law of nations, was not adequate to fulfill its purpose in the modern age. Consequently, two decades after the close of World War II efforts were undertaken to further develop the international humanitarian law.[82]

These efforts were given impetus by resolutions adopted at the Twentieth and Twenty-First International Conferences of the Red Cross which were held respectively in Vienna in 1965 and in Istanbul in 1969.[83] The resolution of the latter conference requested the ICRC to take specific action, including the drafting of proposals to supplement the humanitarian law and the holding of consultations with government experts on any proposed supplementary rules. Meanwhile, the International Conference on Human Rights which met in Tehran in 1968 adopted a resolution entitled "Human Rights in Armed Conflict" which asked the United Nations General Assembly to invite the Secretary-General to undertake a study of measures that could be taken to secure better application of the existing humanitarian law.[84] The General Assembly responded by adopting resolutions in 1968 and 1969 which asked the Secretary-General, in consultation with the ICRC, to study steps that might be taken for improved application of and compliance with the existing humanitarian law and to examine the need for additional international agreements to better protect victims of armed conflicts and to prohibit or restrict

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[82] *See generally* Mallison & Mallison, *The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 Law & Contemp. Probs. 4, 6-9 (1978).

[83] Resolution XXVIII, Protection of Civilian Populations against the Danger of Indiscriminate Warfare, Twentieth International Conference of the Red Cross, Vienna, Oct. 1965, Resolutions 21, 22 (1965); Resolution XIII, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Twenty-First International Conference of the Red Cross, Istanbul, Sept. 1969, Resolutions 10 (1969).

[84] Resolution XXIII, International Conference on Human Rights (Tehran 1968) *reprinted in* 90 Int'l. Rev. of the Red Cross 473-74 (1968).

the use of certain methods and means of warfare.[85] The Secretary-General subsequently issued three reports in 1967, 1970, and 1971 which in part identified particular inadequacies in the existing humanitarian law of armed conflict.[86]

Continuing in the role it had played for over a century as the principal proponent and administrator of international conventions for the protection of victims of warfare, the ICRC convened two conferences of Red Cross Experts in 1971 and 1972 to develop proposals for supplementation of the humanitarian law.[87] Also in 1971 and 1972, the ICRC sponsored two Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Representatives of thirty-nine nations attended the first conference and experts representing seventy-seven governments participated in the second conference. The latter conference considered two draft additional protocols to the Geneva Conventions of 1949, one concerning international conflicts and the other concerning internal conflicts, which had been prepared by the ICRC.[88] The results of these conferences were utilized by the ICRC to prepare two revised draft protocols[89] and a commentary on each of them[90] for consideration by a Diplomatic Conference which was to convene in 1974.

The Swiss Federal Council convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in February of 1974 to consider the two revised draft protocols. The Diplomatic Conference met in Geneva for several months at four sessions held once a year from 1974 through 1977. Between one hundred-nine and one hundred-twenty states participated in each session and, by consensus of the Conference, ten national liberation movements that were recognized by their respective regional international organizations participated without vote in the work of the Diplomatic Confer-

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[85] G.A. Res. 2444 (XXIII), Dec. 16, 1968, 23 U.N. GAOR Supp. (No. 18) 50, U.N. Doc. A/7218 (1968); G.A. Res. 2597, 24 U.N. GAOR, Supp. (No. 30) 62, U.N. Doc. A/7630 (1969).

[86] The three reports are entitled "Respect for Human Rights in Armed Conflict": U.N. Doc. A/7720 (1969); U.N. Doc. A/8052 (1970); U.N. Doc. A/8370 (1971).

[87] M. Bothe, K. Partsch & W. Solf, New Rules for Victims of Armed Conflicts 3 (6982) [hereinafter cited as Bothe.]

[88] Mallison & Mallison, *supra* note 82, at 7-8 & n.15.

[89] ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973), at 3-32.

[90] ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (1973).

ence.[91] The two revised draft protocols and their commentaries as submitted by the ICRC constituted the basic working documents for the Diplomatic Conference. The primary issues considered by the Conference, as reflected in the draft protocols, were methods and means of warfare, new forms of warfare, such as guerilla warfare, enhanced protection of civilian populations against the dangers of hostilities, increased protection for the wounded and sick and for medical personnel, units, and transports, detailed protection of the victims of non-international armed conflicts, and better means of attaining actual observance of the humanitarian law of armed conflict.

On June 8, 1977, the final versions of the two Protocols were adopted by consensus of the state participants of the Diplomatic Conference.[92] Both Protocol I[93] concerning international armed conflicts and Protocol II[94] concerning non-international armed conflicts entered into force on December 7, 1978.[95]

This study concerns the last of the issues stated above that was considered by the Diplomatic Conference. Geneva Protocol I supplements the preexisting conventional humanitarian law provisions regarding their implementation and enforcement by extending protection of the humanitarian law to more persons, by enunciating new substantive norms in defining additional categories of grave breaches and in clarifying standards of responsibility, and by enumerating additional or supplemental enforcement and implementation measures. These provisions of Protocol I supplement the Geneva Conventions of 1949. Consequently, they must be considered in conjunction with the sanctions and the enforcement provisions which were previously analyzed. The supplementary conventional provisions which create additional sanctions in the humanitarian law of international armed conflicts and which promote both meaningful implementation of that law generally and effective enforcement of its substantive principles specifically are set forth in the following articles of Geneva Protocol I.[96]

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[91] Mallison & Mallison, *supra* note 82, at 8 & n.20.

[92] Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *signed* at Geneva 10 June 1977, U.N. Doc. G.A. A/32/144 (1977), *reprinted in* Schindler & Toman, *supra* note 5, at 535-49.

[93] Protocol I.

[94] Protocol II.

[95] Int'l. Rev. of the Red. Cross, *supra* note 9.

[96] A useful commentary on each article of the Geneva Protocols of 1977 which reflects their drafting history is Bothe, *supra* note 87. This is a primary reference for the discussion of Protocol I herein.

B. SCOPE OF APPLICATION

As in the preceding analysis of the Geneva Conventions, two aspects of the field of application of Protocol I should be considered: the conditions in which it applies and the categories of persons who are to be recipients of its protections. Protocol I appears to expand the application of the humanitarian law in both respects.

1. Conditions of Applicability

Since Protocol I supplements the four Geneva Conventions of 1949, it was open for signature and has subsequently been open for ratification or accession only to states that are parties to those Conventions.[97] To determine the conditions in which Protocol I is applicable, three articles must be considered. Its basic scope of application is defined in the third and fourth clauses of Article 1; the legal consequences of Protocol I's applicability in relations between states and other specified authorities is described in Article 96; and finally, the period of its applicability, excepting those provisions that are applicable at all times, is set forth in Article 3. The general scope of protocol I's application is stated in Article 1 as follows:

> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The meaning of Article 1(3) is clear: Protocol I is to apply in cases of declared war or of other international armed conflicts between contracting states and in cases of total or partial occupation of a signatory state's territory, whether or not that occupation was effected by armed force or met with armed resistance, in accordance with the criteria established in common Article 2 of the Geneva Conventions. The ramifications of Article 1(4), however, are less certain. That

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[97] Protocol I, arts. 92, 93, 94.

clause purports to extend the applicability not only of Protocol I, but of the four Geneva Conventions as well, to conflict situations which involve struggles against colonial domination, alien occupation, and racist regimes. Such situations have come to be called "CAR conflicts."

The inclusion of CAR conflicts within the scope of application of the Conventions and Protocol I appears to modify the traditional distinction made between international and internal or national armed conflicts. Traditionally, conflicts taking place in the territories of different states, or in the territory of one state but involving the armed forces of different states, were considered to be international conflicts. On the other hand, conflicts taking place within the territory of a single state and not involving the armed forces of other states were deemed to be non-international conflicts. The determination of the character of such conflicts was made on an objective and factual basis. In the humanitarian conventions, internal or non-international conflicts fell within the scope of Article 3 of the Geneva Conventions and, more recently, they came within the purview of Geneva Protocol II which greatly enhanced the humanitarian law applicable to such national conflicts. The formulation adopted in Article 1(4) is based on the fundamentally different concept, however, that armed struggles in which peoples are attempting to exercise their right to self-determination or in which they are fighting against racist regimes constitute conflicts of an international character under modern day positive international law, as reflected in part in the two international instruments cited in Article 1(4).

The legitimacy of this juridical characterization of CAR conflicts as constituting international armed conflicts under the current norms of international customary and conventional law and the legal and practical effect of Article 1(4) on the field of application of the Conventions and of Protocol I have been the focus of much study and controversy since the first session of the Diplomatic Conference in 1974.[98] A complete analysis of this provision is outside the scope of this study, but it should be noted that both legal and practical difficulties will undoubtedly be enountered in the implementation of this provision. However, the negotiating history of Protocol I indicates that such CAR conflicts have been given a narrow meaning. Therefore, Article 1(4)'s apparent expansion of the field of application of the Conventions and Protocol I to include armed conflicts in which peoples are fighting against colonial domination, alien occupation, or

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[98] *See* Mallison & Mallison, *supra* note 82, at 10-18. ***See*** *also* Bothe, *supra* note 87, at 36-52.

racist regimes in the exercise of their right of self-determination may not constitute a very substantial expansion in the scope of the humanitarian laws of armed conflict.

Article 96 of Protocol I establishes rules to govern three situations: treaty relations between states that are parties to the Conventions and Protocol I, treaty relations between states involved in a conflict when one such state is not a party to Protocol I but one or more other states involved therein are parties to it, and the relationship between states that are parties to Protocol I and the authority that represents a people engaged in an armed conflict referred to in Article 1(4). In the last case, the relations between states and the authority representing a national liberation movement are not ture treaty relations under international law. Article 96 specifies these governing rules in the following manner.

> 1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
>
> 2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
>
> 3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
>
> (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
>
> (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

It will be recalled that common Article 3 of the Conventions established the relationship amongst their signatory states and between them and a non-party state that is involved in an armed conflict. Those rules continue to govern relations between states none of which are parties to Protocol I. The first two paragraphs of Article 96 adopt those same rules to apply between states in regard to their relationships under Protocol 1. Consequently, Protocol I is applicable in relations between states in any case of armed conflict or of declared war between parties to it, in any case of partial or total occupation of territory of a party to Protocol I, and in any armed conflict or declared war between a party to Protocol I and a state which is not a party to it if the latter accepts and applies the provisions of Protocol I in regard to its involvement in that conflict. As under Article 2 of the Conventions, under Article 96(2) of Protocol I a state's acceptance of Protocol I may be explicit or it may be implicit in its *de facto* application of Protocol I.

The relationship between states and authorities representing a national liberation movement under Protocol I is more complex. Article **2,** paragraph 3, of the Geneva Conventions refer to "powers" in a conflict that are not parties to the Conventions. There can be no doubt that that designation concerns sovereign states and does not, therefore, encompass any authorities which represent a liberation movement. Article 96(2) of Protocol I, on the other hand, refers to one of the "Parties" to the conflict which is not bound by Protocol I, an obvious reference to signatory states of the Geneva Conventions of 1949. Consequently, a nonsovereign "authority", such as one representing a national liberation movement in a CAR conflict, has no standing to effect application of Protocol I under Article 96(2) by accepting and applying its provisions since that authority could not be a signatory state to the Geneva Conventions. Article 96(3), therefore, establishes the rule by which the representative of a "peoples" specified in Article 1(4) may undertake to apply the Conventions and Protocol I in relation to their struggle. Such an authority does so by making a unilateral declaration, presumably of that authority's intention to apply the Conventions and Protocol I, addressed to the depositary of Protocol I. The effect of such a declaration in relation to that conflict upon its receipt by the depository is defined in the second sentence of Article 96(3). That sentence established that those effects, the bringing into force of these humanitarian covenants, the assumption of rights and obligations by the nonsovereign "authority", and the universal binding effect of the covenantson all parties to the conflict, only ensue when such a declaration is made. Consequently, it must be concluded that a national liberation movement authority's declaration of the applicability of the Conventions and

Protocol I must be explicit. Such an authority's declaration may not, unlike the case of a sovereign state that is not a party to the Conventions or to Protocol I but which accepts and applies their terms, be implied from any *defacto* application of those covenants. As a result, the extension of the humanitarian law to situations of armed conflict defined in Article 1(4) of Protocol I may well be greatly limited by practical factors which arise both in the establishment of and in the identification of "[t]he authority representing a people" within the meaning of Article 96(3) which has the ability and willingness to explicitly declare the applicability of these humanitarian covenants in relation to the armed conflict in which it is involved.

Article 3 of Protocol I establishes the beginning and end of application both of Protocol I and of the four Geneva Conventions. It provides that those covenants are applicable from the beginning of any situation referred to in Article I of Protocol I and that its application ceases in the territory of parties to a conflict on the general close of miltary operations and, in occupied territories, upon termination of the occupation, except that persons whose release or repatriation takes place after the occurrence of such events remain protected by the Conventions and Protocol I until the time of their final release, repatriation or re-establishment. Thus, this article annuls, between states that are parties to Protocol I, those provisions of the Conventions which concerned the beginning and end of their application in order to provide uniform applicability of this combined body of humanitarian law.

This article's reference to Article 1 of Protocol I, rather than Article 2 of the Geneva Conventions, extends the rule regarding the beginning of application of these covenants to situations of declared war and of other armed conflicts as specified in Article 2 of the Conventions and to conflicts for national liberation as defined in Article 1(4) of Protocol I. However, the covenants would be applicable in the last case, to wars of national liberation, only from the time that the authority representing the concerned liberation movement made the unilateral declaration of their applicability that is required by Article 96(3). The specific rule of Article 96(3) clearly constitutes a prerequisite to application of the general rule enunciated in Article 3.

The rules established in Article 3 regarding termination of the application of the Conventions and Protocol I present three difficulties. First, application of these covenants in the territory of parties is to cease "on the general close of military operations". A factual determination as to when military operations have generally ended may be difficult to make and subject to much controversy, especially

when an armed conflict involves several or a multitude of states and when military operations close at different times within different regions involved in the conflict. Second, application of the above rule to armed conflicts for national liberation may be complex in practice. If a war of national liberation which at one point in time constitutes an armed conflict within the meaning of Article 1(4) of Protocol I subsequently fluctuates greatly in its intensity, with periods of armed hostilities interspersed with perhaps lengthy periods in which no hostilities occur and during which possibly one or both sides to the conflict claim victory and a final end of hostilities, the "general close of military operations" may be quite difficult to ascertain. Similarly, if a national liberation movement is partially successful but remains unrecognized by other states and forcefully opposed by neighboring states, the time at which military operations close may be uncertain. Other cases may also arise in which the formula calling for an end of application of the Conventions and Protocol I on the "general close of military operations" may be troublesome to apply. Third, these rules call for termination of the application of the covenants in occupied territory "on the termination of the occupation". At what point in time an occupation of territory actually terminates may also be a difficult question to answer in particular circumstances.

Each of these dilemmas concerning the period of time during which the Conventions and Protocol I are applicable require resolution in light of specified factual situations. Obviously, Protocol I could not provide detailed rules of application for every potential set of circumstances. It is to be hoped, therefore, that the spirit of these humanitarian covenants will guide the application of their terms by states so that they will be invoked or kept in force in any armed conflict situation in which their application would be advantageous to persons affected by the conflict.

2. Persons Protected

The humanitarian protections of Protocol I are to be extended essentially to the same categories of persons that are protected by the Geneva Conventions of **1949.** However, Protocol I does provide clarification of the scope of the categories of protected persons and it expands those categories to some extent.

Article 8 gives detailed definition to the terms "wounded", "sick" and "shipwrecked" persons, "medical personnel", "religious personnel", and other terms used in the covenants to refer to protected units, establishments, and means of transportation used for medical purposes. These detailed definitions in part guarantee that equal protec-

tion is extended to civilian and military persons or objects, a matter which was unclear under the terms of the Conventions. These definitions also specify the prerequisites for protection of such persons by specifying that certain persons who are wounded, sick, and shipwrecked are protected only if each is a person "who refrains from any act of hostility", and by providing that medical personnel, religious personnel, medical transports and premanent medical personnel, units, and transports are protected only if they are "exclusively" assigned or engaged in the activity for which protection is afforded. Although Article 8 indicates that these definitions apply "for the purpose of this Protocol", they would appear to be equally applicable to matters within the scope of the Geneva Conventions since these definitions represent the apparent consensus of states on the meaning of those terms within the humanitarian law generally.[99]

Article 9 does not alter the categories of protected persons but it does establish a notable nondiscrimination standard according to which the protections of Protocol I are to be applied. It provides that the provisions of Protocol I which are intended to ameliorate the conditions of protected persons shall apply to all such persons affected by armed conflicts to which Protocol I applies "without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria". This provision constitutes a general prohibition of adverse distinction based on reprehensibly discriminatory criteria in the implementation of Protocol I's protective provisions.[100]

Finally, the combined effect of Articles 44, 45, and 85(2) is to add two classes to the Categories of persons who are protected by these humanitarian covenants, refugees and stateless persons. Additionally, those articles expand the scope of the existing categories of protected persons who are combatants, other persons who have taken part in hostilities, wounded, sick or shipwrecked persons, and medical or religious personnel.

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[99]Bothe, *supra* note 87, at 95-96.
[100]*Id.* at 105.

C. GENERAL OBLIGATION: RESPECT FOR PROTOCOL I

In addition to the provisions concerning the scope of application of Protocol I which were previously discussed, Article 1 also enunciates the general obligation of signatory states and it announces the applicability of principles of international law to the protection of combatants and civilians in situations which are not governed by Protocol I or by other international agreements. The first two paragraphs of Article 1 provide:

> 1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
>
> 2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The first paragraph repeats the general obligation set forth in common Article 1 of the four Geneva Conventions of 1949. Parties to Protocol I, therefore, undertake the same dual obligation to respect and to insure respect for Protocol I as they undertook upon becoming parties to the Conventions. This provision establishes the mandatory character of Protocol I and emphasizes that a state's obligation under Protocol I is unilateral and thus not conditioned upon reciprocity. The obligation created for parties to insure respect for Protocol I is not limited to the parties or territories involved in an armed conflict. Consequently, such an obligation extends also to parties to Protocol I that are not involved in a particular conflict. Just as they are obligated under the Conventions, such non-belligerent parties must use any available lawful means in their international relations to insure that other signatory states involved in an armed conflict respect Protocol I. Furthermore, since this dual obligation to respect and to insure respect for Protocol I is applicable "in all circumstances", the special conditions of applicability established by Articles 1(4) and 96(3) give rise to this obligation for the authority representing a national liberation movement in a CAR conflict. Article 96(3)(b) requires such an authority to have the ability to assume and to fulfill this dual general obligation upon making its declaration of the applicability of the Conventions and Protocol I to its struggle for self-determination.[101]

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[101] *Id.* at 43-44.

The second paragraph of Article 1 sets forth a revised form of the "Martens clause" which had originally been incorporated into the preambles of the Hague Conventions on land warfare of 1899 and 1907[102] and which was set forth in the common article of the Geneva Conventions of 1949 regarding denunciation.[103] The function of this provision is to identify that body of law which is applicable to provide for the protection of civilians and combatants in factual situations to which Protocol I and other treaties do not apply. That body of law is comprised of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience. These principles constitute general principles of law recognized as a source of the customary law of nations.[104] Inclusion of the revised "Martens clause" in Protocol I does not create any obligations for states in the positive law since by its own terms the principles referred to in that provision apply in situations to which Protocol I and other treaties are not applicable. However, it does constitute an affirmative declaration by the signatory states that they recognize the applicability of such general principles of international law in circumstances not governed by specific provisions of the conventional law.[105] Although Article 1(2) of Protocol I establishes no duty for states under conventional law, the principles of international law referenced therein are fully binding upon them for the customary law of nations in its own right has universal and mandatory effect for all states.

D. REPRESSION OF BREACHES

The enforcement scheme of the Geneva Conventions is primarily supplemented in Protocol I at Part V, Section II. The articles enunciated in that section substantially expand both the substantive rules and the procedural mechanisms of the Conventions that are applicable to the repression of breaches set forth in these humanitarian covenants.

1. Article 85—Repression of Breaches of Protocol I

The first paragraph of Article 85 refers to the provisions of the Conventions which relate to enforcement and makes them applicable to the repression of breaches and of grave breaches of Protocol I, as supplemented by this Section II. Paragraphs 2 through 4 of Article 85 primarily concern the identification of additional categories of

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[102]Hague Regulations of 1899, Preamble, para. 9; Hague Regulations of 1907, Preamble, para. 8. *See also* Bothe, *supra* note 87, at 37, 38, 44.
[103]Geneva Conventions of 1949, common arts. 63/62/142/158.
[104]I.C.J. Statute, art. 38.
[105]Bothe, *supra* note 87, at 44 & n.11.

protected persons and of grave breaches that are established in Protocol I. Paragraph 5 declares the relationship between grave breaches and war crimes. This article of Protocol I enhances the application of the Geneva Conventions' provisions concerning grave breaches by expanding the categories of persons who are protected against the commission of such acts and by enumerating new categories of grave breaches.

The second paragraph of Article 85 increases the number of persons who are protected by providing that the acts described as grave breaches in the Conventions are also grave breaches of Protocol I if committed against certain classes of persons protected by Protocol I. Those categories if individuals are:

> (a) combatants and other persons who have taken part in hostilities, who are entitled to prisoner of war status under Protocol I, and who are in the power of an adverse party;
>
> (b) refugees in the power of an adverse party;
>
> (c) stateless persons in the power of an adverse party;
>
> (d) wounded, sick and shipwrecked of an adverse party; and
>
> (e) medical or religious personnel and medical units or medical transports under the control of the adverse party.

This paragraph identifies these categories of persons who are to be the recipients of the protections afforded by the Conventions and Protocol I regarding the commission of grave breaches so that such protections may be provided to such persons who had either not been protected or had not been fully protected by the Conventions.

The third paragraph of Article 85 enumerates new categories of grave breaches which may be classified as combat offenses. These acts are grave breaches if they are committed willfully, in violation of Protocol I, and causing death or serious injury to body or health. These prerequisites are consistent with traditional standards of criminal responsibility which require proof of a culpable state of mind or *mens rea*, a common law or statutory violation, here a humanitarian treaty violation, and, for these offenses, causation of such death or injury.[106] The following acts constitute grave breaches if those three elements are present:

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[106] Solf & Cummings, *supra* note 13, at 224-25.

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminative attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is *hors de combat;* and

(f) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or Protocol I.

This paragraph also refers to the acts defined as grave breaches in Article 11 of Protocol I. That article states that any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a party other than the one on which he depends shall be a grave breach, if such act or omission:

(a) subjects persons who are interned, detained or otherwise deprived of liberty to any medical procedure which is not indicated by the state of health of that person and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to the detaining parties' own nationals;

(b) carries out on such persons, even with their consent: physical mutilations, medical or scientific experiments, or removal of tissue or organs for transplantation, except where these acts are justified and are in conformity with the medical standards referred to above; or

(c) causes an involuntary, coerced or induced donation of blood for transfusion or of skin for grafting, or effects even a voluntary donation of blood or of skin for other than therapeutic purposes or under conditions not consistent with the prescribed medical standards.

The fourth paragraph of Article 85 sets forth an additional list of acts which constitute grave breaches. The preambular provision establishes two prerequesites to penal liability for these acts; they must be committed willfully and in violation either of the Conventions or of Protocol I. These additional prohibited acts are:

> (a) the transfer by the occupying Power of partsof its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
>
> (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
>
> (c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
>
> (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization,the object of attack, causing as a result extensive destruction thereof, where there is no evidence that the adverse party has used such objects in support of its military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives:
>
> (e) depriving a person protected by the Conventions or those referred to in Article 85, paragraph 2, above of the rights of fair and regular trial.

The acts here defined as grave breaches, except for those listed under subparagraph (d), do not directly concern the conducting of hostilities but are practices or acts of states ancilliary to their involvement in armed conflict or occupation of territory. Thus, they are not truly combat offenses. They may be better characterized as state or governmental offenses since they concern matters which are generally within the personal scope of responsibilty of high level government officials, rather than of field military commanders charged with conducting the hostilities or occupation.[107]

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[107] *Id.* at 232.

The fifth paragraph of Article 85 clarifies that the substantive norms enunciated in the Conventions and Protocol I regarding the repression of grave breaches are in the nature of a penal code, even through their enforcement depends upon the actions taken by states under their municipal law. Article 85(5) provides that, without prejudice to the application of the Conventions and Protocol I, grave breaches as defined in those instruments shall be regarded as war crimes. This declaration that grave breaches are war crimes was modified by the introductory phrase "Without prejudice to the application of the Conventions and of the Protocol" to clarify that the declaration does not mean that all war crimes under the customary law are grave breaches of these covenants, and to insure that persons convicted of having committed grave breaches do not lose the protections of the humanitarian law that are otherwise applicable to them. In this manner, the strict definition of certain acts as constituting grave breaches was maintained.[108] This provision also has the immediate effect of making it possible for some states to avoid enacting new penal legislation regarding grave breaches because such nations' treaty obligations, including those relating to penal conduct and punishment, are binding in municipal law without the need of further enabling legislation.[109]

2. *Provisions Relating to Repression of Breaches*

The provisions of the Geneva Conventions regarding the repression of grave breaches,[110] as supplemented by Protocol I in the manner stated above, are further supplemented by four additional articles of Protocol I. Article 86 states:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible

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[108] Bothe, *supra* note 87, at 521-22.
[109] Solf & Cummings, *supra* note 13, at 239.
[110] Geneva Conventions of 1949, common arts. 49/50/129/146.

> measures within their power to prevent or repress the breach.

This provision does not establish new law, but clarifies the cutomary law rule that breaches may result from a failure to act when under a duty to do so. Paragraph 1 reaffirms that the parties are obligated to repress grave breaches and to suppress other breaches which result from this cause. The second paragraph defines the responsibilities of a superior in relation to acts of a subordinate; the superiors are obligated to intervene by taking all feasible measures within their power to prevent or to repress a breach if they know or have are obligated to intervene by taking all feasible measures within their power to prevent or to repress a breach if they know or have information which should enable them to know that a breach is being committed or is going to be committed. This article specifically provides that a superior is not absolved from penal or disciplinary responsibility for the acts of a subordinate if the superior fails to act in such circumstances. Such responsibility for failing to act to repress grave breaches and to suppress all other breaches is implicit in the obligation of states and of persons acting in their behalf to comply with and to enforce the provisions of the Conventions and Protocol I. This article affirms that obligation by codification of it in specific terms.

Article 87 of Protocol I provides the following standard regarding the duty of military commanders:

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
>
> **2.** In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> **3.** The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol,

and, where appropriate, to initiate disciplinary or penal action against violators thereof.

This provision is complementary to Article 86 of failure to act. The first paragraph imposes a duty on the parties to require their military commanders to prevent and, where necessary, to suppress breaches and to report them to compenent authorities. The second paragraph lists one specific duty, armed at preventing and suppressing breaches, which the parties shall impose upon their commanders commensurate with their level of responsibility: to insure that those under their command are aware of their responsibilities under the Conventions and Protocol I. The third paragraph requires that any commander who is aware that subordinates or other persons under his or her control are going to commit or have committed a breach must intervene to prevent such violations and, when appropriate, initiate disciplinary or penal action against such violators. Thus, Article 87 places an obligation on parties to insure that those individuals who can most effectively implement the Conventions and Protocol I, military commanders, properly execute their terms.

Article 88 is entitled "Mutual Assistance in Criminal Matters". It provides that the parties shall afford one another the greatest measure of assistance in connection with criminal proceedings regarding grave breaches, that the parties will cooperate in matters of extradition, and that the municipal law of the parties from whom extradition is requested shall apply in all cases. These provisions are specified by Article 88 in the following terms:

> **1.** High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
>
> **2.** Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
>
> **3.** The laws of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Since the extradition provisions of the Geneva Conventions are incorporated into Protocol I by its Article 85(1), this article does not add significantly to the duties of states but merely accentuates their agreement to cooperate in matters of enforcement of violations of the proscriptions contained in these instruments.

Article 89 of Protocol I reflects that the United Nations potentially has a role to play in the repression of breaches of the Conventions. That article specifies: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." This provision imposes an additional obligation on the parties to Protocol I. Unfortunately, the scope of application of this provision is unclear since the phrase "situations of serious violations" is undefined and may be interpreted differently by states. Nevertheless, this provision recognizes the complimentary roles of parties to Protocol I and of the United Nations in the enforcement of the humanitarian laws of armed conflict.

The final article of this section of Protocol I concerning the repression of breaches provides simply that parties are responsible for all acts committed by persons forming part of its armed forces which violate the provisions of the Conventions or of Protocol I and that such parties shall, if the case demands, be liable to pay compensation for such violations. This provision was not previously embodied in the Geneva Conventions but is adopted from the Hague law regarding the laws and customs of war.[111] These provisions are stated in Article 91: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." The means of determining such liability and of assessing compensation are not specified in Protocol I. Presumably, the parties must rely for the adjudication of such matters on procedural methods and judicial forums established by their bilateral and multilateral treaties and upon competent international bodies, such as the International Court of Justice. The obligation of parties to act in cooperation with the United Nations and in conformity with its Charter, as specified at Article 89, may promote effective application of this provision.

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[111] Hague Regulations of 1907, art. 3.

E. AIDS TO ENFORCEMENT

It will be recalled that the Geneva Conventions provided two primary means by which states can acquire external assistance in their efforts to implement the terms of the Conventions. They are the enquiry procedure and the Protecting Power system. Protocol I was designed in part to enhance the usefulness of those measures in future applications of these humanitarian covenants in situations of international armed conflict. The enquiry procedure of the Conventions is supplemented by Article 90 of Protocol I which creates a mechanism for establishing an international factfinding commission. The protecting power system of the Conventions is amended by Protocol I, Article 5, which alerts the methods by which protecting powers or official substitutes are selected.

1. *International Factfinding Commission*

Article 90 of Protocol I provides that the signatory states may elect to establish an international factfinding commission in peacetime, but that they are not obligated to do so. The commission is to come into existence when at least twently parties accept its competence. At that time, a panel of commission members are to be elected by the parties, from which Chambers of seven members would be appointed to act on behalf of the commission in any specific situation in which the commission is requested to act. The commission is to establish its own rules of procedure in accordance with the guidelines set forth in Article 90. Included in those guidelines are the right of parties involved in the conflict under inquiry to participate in the commissions' hearings, the right of the commission to conduct its investigation of facts *in loco* if necessary, and a prohibition on any public release of the commission's findings unless all parties to the conflict request such public disclosure.

The competence of the international factfinding commission may be recognized by a party to Protocol I at any time. In doing so, a party declares that in its relations with any other party accepting the same obligation, the commission is competent in fact and without the need of further special agreement to inquire into certain allegations which may be made by such other party. The article specifically provides that the commissions' competence extends, in relations between parties that have accepted this obligation, to inquire into any facts alleged to be a grave breach or other serious violation of the Conventions and of Protocol I and to facilitate through its good offices the restoration of an attitude of respect for those instruments. In these situations the commission's authority to undertake a factfinding inquiry is binding between the obligated parties, without

further need of their consent.

Article 90 proceeds to state that, in all other situations arising between its signatory states regarding allegations of other than a grave breach or serious violation and in matters involving two parties to Protocol I, one of which has not accepted the commissions, competence, the commission is competent to institute an inquiry at the request of a party to the conflict, but only with the consent of the other parties concerned.

The commissions' authority is specifically limited to inquiring into the factual situations underlying an allegation made by a party to an armed conflict. It does not extend to adjudication of liability or guilt nor to the imposition of sanctions, whether penal, disciplinary, or administrative. The factual determinations made by the commission, through the efforts of the designated Chamber, are to be provided to the concerned parties with such recommendations as the commission deems to be appropriate. The parties may then utilize the information and recommendations provided by the commission in fulfilling their obligations to enforce the humanitarian laws of armed conflict.

This factfinding body, therefore, is not intended to resolve allegations of violations of the laws of armed conflict, but to serve as an investigative aid to the parties by responding rapidly upon request, with minimal procedural requirements, to determine the facts underlying a specific allegation of violation of the Conventions or of Protocol I. The benefits of this arrangement are that the parties will be obligated to accept the competence of the commission prior to the existence of a situation of armed conflict, that the commission will exist and be able to respond promptly to an allegation of a violation of the laws of armed conflict, and that the members of the commission will be duly elected by the parties in advance of identification of the subject of their inquiry, thus avoiding the difficulty states experience in choosing neutral investigators after an event to be investigated has occurred, and thereby providing a satisfactory degree of impartiality in the membership of the inquiring Chamber.

The international factfinding commission is meant to be supplemental to the enquiry procedure which is adopted by Protocol I to the Geneva Conventions[112] by which the parties themselves establish a mechanism for inquiring into alleged violations of those instruments. With both of these mechanisms for inquiry available to par-

[112]Protocol I, art. 90(2)(e).

ties to Protocol I, their adherence to and enforcement of the laws of armed conflict should be effective, since the means of fulfilling those responsibilities are available to them.

2. Protecting Power System

Protocol I expands the protecting power provisions of the Conventions but it falls short of establishing an automatic, fully mandatory, protecting power system. Article **5** of Protocol I, paragraphs **1** and **2** reaffirm the duty of the parties involved in an armed conflict situation to designate and accept a protecting power for each of them and to allow it to function in that conflict situation. Paragraph **3** provides that, if a protecting power is not appointed, the ICRC is obliged to offer its good offices to facilitate the appointment of a protecting power by mandatory submission by each party of a list of acceptable nominees for the protecting power role from which a mutually agreeable protecting power is to be chosen. Paragraph **4** provides that, if the above procedures do not result in the selection of a protecting power, the parties to the conflict are obligated to accept an offer by the ICRC or by any other qualified organization to act as a substitute. Such organizations, however, are not required to proffer their services. If such an offer is made, the parties to the conflict are required to accept it, but paragraph **4** further provides that the functioning of a substitute is subject to the consent of the parties to the conflict.

Thus, the designation of a protecting power remains subject to the discretion of each party to the conflict. Although states are formally obliged to designate and to permit the functioning of protecting powers, in reality they may simply fail to do so. Likewise, the additional provision requiring that parties accept an offer made by an international humanitarian organizational to act as a substitute protecting power is rendered subject to the parties' discretion by the requirement that the parties consent to the functioning of such a substitute. Protocol I, therefore, is only partially successful in making the protecting power system of the Conventions more effective by adding a new method of designating a protecting power and by requiring the acceptance of a substitute by the parties if such services are offered by a qualifying international organization. The usefulness of the protecting power system remains subject to the reality that a protecting power or substitute could not function in an armed conflict situation without the consent of the party to the conflict which controls the territory in which it would have to operate.[113]

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[113] Aldrich, *New Life for the Laws of War*, 75 **Am.** J. Int'l. L. **764, 767-68 (1977).**

Nevertheless, effective utilization of protecting powers by states involved in an armed conflict situation can benefit their interests. The primary purpose of the protecting power system is to protect the interests of a state in territory under the control of a belligerent state and to insure that humanitarian treatment is afforded to all protected persons. One aspect of a protecting power's role is to verify compliance with the mandates of humanitarian laws and to aid states in fulfilling their obligation to enforce those laws. In this respect, effective use of the protecting power system can accentuate the elements of reciprocity and mutuality which underlie relations between states.

F. PROVISIONS RELATING TO EXECUTION

Four articles of Protocol I contain general provisions which enunciate obligations for states to be fulfilled in peacetime as well as during armed conflicts. The first of these provisions, Article 80, establishes the general duties of states regarding measures to be taken in the execution of Protocol I by stating:

> 1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
>
> 2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

This provision is complementary to common Article 1 of the Geneva Conventions and Article 1(1) of Protocol I which mandate that signatory states shall respect the terms of those covenants. The first paragraph sets forth a duty of states to take all action, which apparently includes both executive and legislative measures, that are necessary to execute these instruments but it does not indicate any specific measures that are so required. The second paragraph is directed specifically toward executive authorites since they are responsible for issuing orders and instructions. These authorities, whether military or civilian, are charged with an affirmative obligation to ensure the observation of the Conventions and of Protocol I by all persons who fall under their range of authority. They are to give orders and instructions that are necessary for that purpose and they are to affirmatively supervise the execution of those orders and instructions to insure compliance with these humanitarian covenants.

A related provision of Protocol I, at Article 82, specifically requires that the parties at all times insure that legal advisers are available, when necessary, to advise military commanders both on the application of the Conventions and Protocol I and on appropriate instruction to be given to the armed forces on this subject. Article 82 provides:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

This distinction is made in this article between High Contracting Parties that must make legal advisors available to commanders at all times and Parties to the conflict that need only to provide legal advisors to commanders in time of armed conflict in recognition that a national liberation movement under Article 1(4) can only be bound to Protocol I from the time that armed hostilities commence and the authority representing that movement has made the declaration required by Article 96(3). It should also be noted that this article is indefinite in two respects: the minimum or expected qualifications of legal advisors are not specified and the broad term "commander" is undefined for the purpose of this requirement. Additionally, only military commanders "at an appropriate level" must be provided with legal advisors. Consequently, not all persons who hold a military command must be so advised and it is left to the discretion of the parties to determine the level of command to which this obligation applies. These uncertainties in the scope of this provision may diminish the potential effectiveness of its underlying purpose. Nevertheless, the role specified in this article for legal advisors to advise military commanders regarding both the application of these humanitarian covenants and the instruction to be given to the armed forces thereon is appropriate. Despite this provision's inadequacies, it does impose a mandatory obligation upon the parties which serves **a** useful purpose for it is recognized that military commanders most often make the decision in conflict situations that implement and enforce the laws of armed conflict. Hence, competent legal advice is to be available to them to assist in their understanding of those laws and to ensure that military commanders adequately insure their proper application.

Article 83 of Protocol I enunciates an obligation for states similar to that imposed by the Conventions with respect to dissemination of the text of Protocol I and inclusion of its study in military and, if possible, in civilian educational programs. Article 83 states:

> 1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
>
> 2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

This article imposes no new requirements upon states and in fact relaxes the related requirements of the Conventions in two respects. Under the common article of the Conventions, parties were to provide instruction to the civilian population if possible. The first paragraph of this article of Protocol I, however, merely requires states to encourage the study of these covenants by the civilian population. Second, the Third and Fourth Geneva Conventions require that anyone with authority over protected persons must possess the texts of the Conventions, whereas Protocol I only requires that such authorities must be fully acquainted with these texts. Thus, a tangible obligation of possession of the texts has been deleted in Protocol I and the obligation of states regarding civilian education about the humanitarian law is more restricted. Consequently, Article **83** does nothing to enhance the obligations of states to actively spread knowledge of the humanitarian principles embodied in these covenants.

Article 84 of Protocol I merely repeats the common article of the Geneva Conventions concerning translations and rules of application, although it does add that such communications shall be made "as soon as possible". This article specifies: "The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application." The purpose of this provision of the Conventions and of Protocol I is to require the communication of sufficient information between signatory states so that each of them will gain an understanding of how

these covenants are actually applied by the other states. This requirement of Protocol I should be implemented by states in the same manner as was required by the Conventions.

G. ENHANCED SANCTIONS UNDER PROTOCOL I

The substantive and procedural provisions of Protocol I discussed above substantially enhance the sanctions and the enforcement system established in the four Geneva Conventions of **1949.** Since Protocol I supplements the foundation of this aspect of the humanitarian law that was instituted in the four Geneva Conventions, these terms of Protocol I must always be considered in conjunction with the implementation provisions and the enforcement scheme of the Conventions. The articles of those humanitarian covenants that are analyzed in this study reflect the primary sanctions of the humanitarian law and they comprise the essence of their enforcement scheme.

The fundamental obligation of states to respect and to ensure respect of the principles embodied in these humanitarian covenants in all circumstances remains the same under Protocol I as it was under the Conventions alone. The least that is required of a state in fulfillment of this general obligation is that the state faithfully perform each of its duties to implement the covenants, that the state insure that persons acting under its authority, especially its armed forces, abide by the normative standards of conduct set forth in the covenants, that the state actively enforce the penal proscriptions of these instruments through its municipal judicial system, and that the state take every lawful action available to it to insure that other state parties to the Conventions and Protocol I comply with their respective obligations to respect the humanitarian law. The manifold benefits which could accrue to individuals and to the governments of states through application of humanitarian standards in times of hostilities will only be fully realized when states universally discharge all facets of this fundamental obligation.

Although Article 1(4) of protocol I purports to expand the scope of application of the Conventions and of the Protocol to include armed conflicts for national liberation conducted against colonial, alien, or racist regimes and even though this provision has sparked much controversy, that expansion of the coverage of these covenants is not likely to be substantial in their prospective application. However, the detailed definition given to categories of protected persons and property in Article 8 of Protocol I and the application of these humanitarian protections to additional and broader categories of individuals through Article 85(2) do constitute a meaningful clarification and a

beneficial growth of the humanitarian law.

The designation of additional categories of offenses as grave breaches of the Conventions and of Protocol I in Article 85(3) and (4) of the latter merely reflect a codification of substantive norms already recognized in the customary law of nations. The combat offenses listed at Article 85(3) are penal violations only if three traditionally recognized prerequisites to criminal responsibility for such acts are present. Likewise, penal responsibility for the offense specified at Article 85(4)(d), which may also be classified as a combat offense, is dependent upon two standard criteria of criminal culpability for such acts. Consequently, these penal proscriptions do not incorporate new war crimes in international law. Rather they merely codify existing offenses in conventional law and thereby make them the subject of the enforcement mechanism established by the Conventions and Protocol I. The grave breaches enumerated at Article 85(4)(a) through (c), which can be characterized as state or governmental offenses, are also penal violations only if they were committed willfully and in violation of the Conventions or of Protocol I. Thus, other relevant provisions of those covenants establish the standards by which those acts are judged. These governmental offenses include transfers of its civilian population into occupied territory by an occupying state or deportation of the population of that occupied territory within or without that territory by the occupier, unjustifiable delays in repatriating prisoners of war or civilians, and inhuman and degrading practices based on racial discrimination. Each of these acts contravene related provisions of the Conventions or of Protocol I and have been recognized to violate acceptable standards of conduct by states embodied in the customary law.[114] As a result, none of the acts which are designated as additional grave breaches in Protocol I are novel penal offenses in international law. Rather, in so designating them Protocol I is merely declaratory of the proscriptions embodied in the customary law of nations.

The standards of penal responsibility set forth in the Conventions are also supplemented by Protocol I in that it extends culpability for grave breaches to persons who fail to act when under a duty to do so. Article 86, which establishes both that an omission may constitute a grave breach and that a superior may be penally responsible for acts committed by a subordinate, may be considered to constitute a new obligation for states which have not codified such rules of responsibility in their municipal law. Although there is precedent in interna-

[114] Bothe, NEW RULES, *supra* note 87, at 517-19.

tional law for imposing criminal responsibility on a person who fails to act or on a superior for acts of a subordinate,[115] it cannot be said that these norms are embodied in the customary law. Consequently, Protocol I substantively expands the penal norms of the Geneva Conventions in this respect.

Protocol I also enhances the mechanisms set forth in the Conventions to aid states in their implementation and enforcement of the humanitarian law. If used effectively, the enquiry procedure of the Conventions, the international factfinding commission of Protocol I, and the Protecting Power system could each be of assistance to states, not only in their own efforts to fulfill their humanitarian legal obligations, but also to induce states belligerent to them to comply in situations of international armed conflict, with the duties and restrictions embodied in these humanitarian treaties.

The cumulative provisions of the Conventions and of Protocol I regarding sanctions and enforcement provide a means by which states can effectively fulfill the goals of the humanitarian law of armed conflict. The substantive standards enunciated in Protocol I mostly codify existing rules of the customary law. The procedural mechanism provided in Protocol I for enforcement of those standards, as well as the specific responsibilities for implementation which it imposes, further enhance the terms of the Conventions. Therefore, although inadequacies may still be found in those instruments and unforseen difficulties may arise in implementing the supplemental provisions of Protocol I, this humanitarian covenant establishes a new framework for effective implementation of the humanitarian law.

V. RECOMMENDATIONS

The overall purpose of the humanitarian laws of armed conflict is to minimize unnecessary destruction of human and material values in situations of war and in other cases of armed hostilities. Until the time arrives when the society of nations and their peoples find it possible to avoid or prevent such conflicts altogether, standards of conduct and proscriptions of unlawful behavior of both states and individuals are necessary to regulate their relationships. The Geneva Conventions of 1949 comprise those conventional humanitarian laws to which a vast majority of states have agreed and Protocol I of 1977

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[115] **Trial of General Yamashita, 4 Law Reports of Trials of War Criminals 1 (U.S. Mil. Comm'n, Manila, Philippines, 1946),** *aff'd, In re* **Yamashita, 327 U.S.1 (1946).** *See* **Parks,** *Command Responsibility for War Crimes,* **62 Mil. L. Rev. 1 (1973).** *See* **also Bothe,** *supra* **note 87, at 523-26.**

constitutes the most recent growth in the humanitarian law applicable to international armed conflict. To effect the goal of minimizing unnecessary destruction of human and material values, an effective system of enforcement of the rules and principles embodied in the humanitarian law is required. The enforcement system described above is intended by states to fulfill this need.

The objectives of these humanitarian laws in general terms are to serve as guides for the conduct of states involved in situations of armed conflict, to provide standards of behavior for individuals engaged in such hostilities, and to provide a penal codification of the proscriptions set forth in the laws of armed conflict. Their purposes, therefore, encompass prevention and deterrence of the commission of acts in violation of these humanitarian laws and punishment by imposition of penal sanctions upon violators of those laws. Reliance for enforcement is placed squarely on the signatory states, which become responsible not only for their own compliance but also for insuring that all other parties abide by their humanitarian obligations as well.

The Diplomatic Conference of **1974-1977** considered and subsequently incorporated into Protocol I many provisions regarding major issues that have not been reviewed in this article. These include provisions concerning methods and means of warfare, new forms of warfare, increased protection of civilian populations, and enhanced protection for combatants as well as for medical and religious personnel. **A** full analysis of those issues and of the related terms of Protocol I would have to be accomplished before judgments could be made regarding their potential utility in the humanitarian law and whether states should or should not adhere to those supplemental treaty provisions. This study does permit such judgments to be made, however, regarding the primary issue considered herein, that of providing through Protocol I a better means of attaining actual observance of the humanitarian law of armed conflict.

The Geneva Conventions of **1949** established a detailed and complex framework for the protection of victims of armed conflicts which relies upon the efforts of states for realization of its goals. Implementation of the Conventions depends upon the commitment of nations to fulfill their conventional obligations in good faith in accordance with the procedural means set forth in the Conventions. The normative standards enunciated in the Conventions merely codified a portion of the customary law principles relating to standards of conduct applicable in armed conflicts. **As** such, the Conventions failed to reflect the whole range of such principles. The additional substantive principles set forth in Protocol I simply expand upon the

conventional law coverage of such customary norms with the purpose of applying the conventional implementation and enforcement structure embodied in these covenants to a broader range of generally accepted principles. At the same time, Protocol I supplements the Conventions' implementation measures specifically enhances their indirect enforcement system in order to enable states to implement these covenants and to enforce the proscriptions of the humanitarian law with greater effectiveness. Consequently, while Protocol I increases the scope of the sanctions, substantive penal norms, and enforcement provisions of the humanitarian law, the existing fundamental obligations of states under conventional and customary law are not drastically changed by these portions of Protocol I. The ideals of the humanitarian law to which the vast majority of states have subscribed in becoming signatories to the Geneva Conventions are meaningfully supplemented by Protocol I. The sanctions embodied in these provisions of Protocol I and its supplementation of the Conventions' enforcement scheme reflects a consensus of opinion among representatives of the community of nations regarding the best means of attaining actual abservance of the humanitarian law of armed conflict. Therefore, all states should extend their commitment to effect realization of the humanitarian objectives of these covenants by promptly ratifying or acceding to these portions of Protocol I.

Additionally, states and persons concerned with the continuing development of the humanitarian law of armed conflict should consider the interrelationship between the laws of armed conflict and human rights law. These constitute the two branches of the international humanitarian law in the broad sense of that term. Since the creation of the United Nations in 1946 and the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948, the international community has repeatedly focused its concern on increasing protections of all basic human rights. These nearly universal concerns of the world community resulted in demands for the codification of human rights law and for the establishment of effective measures for their implementation. Consequently, a substantial number of human rights which reflect mankind's basic values are recognized today in international law and have been proclaimed in various conventions, treaties, and agreements. These achievements of states and international organizations have substantially formulated the world community's common aspirations for mankind. Nevertheless, the formulation of international human rights standards has not automatically resulted in authoritative implementation and enforcement of them by nations. Therefore, the realization of many basic human rights

has not yet been accomplished. In some fields of the international law of human rights, however, the central question is no longer whether there are such essential human rights, rather it is whether the existing standards for the protection of such human rights are sufficiently specific to be deemed to be legally binding on states and to require their enforcement by states.

The legal responsibility of states for the protection of human rights depends upon the existence of such fundamental rights in international law and upon the existence of a binding duty of states to implement and to protect those human rights. Once such human rights principles are incorporated in international law norms, whether in customary or conventional law or both, and states become legally bound by them, implementation of those rights and enforcement of proscriptions for transgressions against such rights require that effective sanctions and enforcement measures be enunciated in the human rights law. As human rights covenants are developed which contain express duties for their enforcement by states and specific mechanisms for their international implementation, the relationship between the humanitarian law of armed conflict and human rights law may increase. At least, such developments in the field of human rights should be considered to determine their applicability to the laws of armed conflict or their potential utility if incorporated into the humanitarian law embodied in the Geneva Conventions and Protocol I.

The legal principles and procedural standards contained in the Conventions and Protocol I have been developed from long traditions of customary and conventional laws relating to armed conflicts. The enforcement mechanism of the Conventions as supplemented by Protocol I involves both the protection of victims of war and regulation of the means by which states conduct hostilities. Consequently, their effectiveness or ineffectiveness, for which the state parties are responsible, will have profound influence not only on the relations of states but also on the actual conduct of hostilities and on the welfare of countless potential victims of armed conflicts.

The sanctions and the enforcement provisions of the humanitarian law as supplemented by Protocol I fall short of establishing a perfect system of enforcement. Yet, they constitute a major advance over the humanitarian law established in the Geneva Conventions. Protocol I provides additional substantive legal norms that are necessary to give the penal provisions of the laws of armed conflict appropriate scope, and it provides useful procedural mechanisms for utilization by states in their enforcement efforts. If many states ratify or accede to Protocol I, it will prove to be an important inducement for states to

respect and to effectively enforce the humanitarian laws of armed conflict.

SIGNIFICANT DECISIONS OF THE COURT OF MILITARY APPEALS: 1982-1983

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This article is a review of significant decisions of the Court of Military Appeals rendered between 1 October 1982 and SO September 1983. The review is not an exhaustive analysis of all opinions of the court; it is intended to discuss last term's decisions that are likely to significantly affect the administration of military justice. The article is organized generally in trial chronology, from decisions affecting pretrial practice through trial and post-trial procedures. Decisions of the court that impact in more than one area are discussed in detail once and referred to in other sections.

I. PRETRIAL PROCEDURE

A. JURISDICTION

The court made several significant decisions concerning the scope of court-martial jurisdiction over persons and offenses during the term. In *United States v. McDonagh*,[1] the court held that the **1979** amendment to Article **2** of the Uniform Code of Military Justice (UCMJ) was intended to be retroactive. The court restricted the retroactive application of the amendment to offenses for which military status is not an element. For peculiarly military offenses, the *ex post facto* prohibition of the Constitution prevents the elimination of an issue which must be resolved by the finders of fact on a beyond reasonable doubt standard. Because the issue of military status, *i.e.* whether McDonagh was a person subject to the Uniform Code of Military Justice, was not an element of his drug offenses, the "defense" of recruiter misconduct was inapplicable. In *United States v. Marsh*,[2] the court reversed the unauthorized absence conviction of a sailor where the trial judge relied on the amendment to Article **2** to preclude litigation of the recruiter misconduct issue. Because violation of Article 86 is a peculiarly military crime, military status is an element of the offense and a "defense" to that element cannot be eliminated *ex post facto*.

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[1] 14 M.J. **415 (C.M.A. 1983).**
[2] 15 M.J. **252 (C.M.A. 1983).**

In *United States v. Fitzpatrick*[3] and *United States v. Handy*,[4] the court expressed a nearly unanimous view of continued court-martial jurisdiction after the expiration of a soldier's term of service (ETS). Jurisdiction continues if, prior to the ETS date, some official action by the sovereign authoritatively signals an intent to impose legal processes against the service member, or if the member fails to object to retention beyond ETS, or if the service member properly objects and demands release but the government takes official action with a view toward trial within a reasonable time. Chief Judge Everett's minority view is that jurisdiction continues until the separation of the service member without regard to any objection or delay.

The court's decision in *United States v. Lockwood*[5] is a milestone in the area of subject-matter jurisdiction. On appeal, the accused challenged the service-connection of larceny and forgery offenses committed off-base in the nearby civilian community. After tracing the development of the service-connection doctrine, the court concluded that a service member's misconduct "outside a military enclave is service-connected...if it has a significant effect within that enclave."[6] In *Murray v. Haldeman*,[7] the court addressed the service-connection of drug abuse by service members in private, on extended leave, and far away from any base. Use of drugs under those circumstances will be service-connected if the member returns to post under the influence of the drug.

B. PRETRIAL CONFINEMENT

The court addressed pretrial confinement practices and rules in *United States v. Davidson*,[8] *United States v. Bruce*,[9] and *United States v. Suzuki*.[10] In *Davidson*, the court concluded that, because pretrial confinement is not punishment and is not the legal equivalent of confinement at hard labor, the cumulative period of pretrial and adjudged confinement may exceed the maximum authorized period of confinement. The court decided in *Bruce* that a pretrial confinee cannot waive the right under Article **13,** UCMJ not to be punished before trial by accepting the conditions of a sentenced prisoner. At

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[3] **14 M.J. 394 (C.M.A. 1983).**
[4] **14 M.J. 202 (C.M.A. 1982).**
[5] **15 M.J. 1(C.M.A. 1983).**
[6] *Id.* **at 6.**
[7] **16 M.J. 74 (C.M.A. 1983).**
[8] **14 M.J. 81 (C.M.A. 1982).**
[9] **14 M.J. 254 (C.M.A. 1982).**
[10] **14 M.J. 491 (C.M.A. 1983).**

least absent statutory or regulatory authority, the waiver is improper and the pretrial confinement is illegal. Finally, in *Suzuki*, the court addressed the military judge's authority to grant a remedy for illegal pretrial confinement, holding that the judge could grant more than day-for-day credit for egregious cases of illegal pretrial confinement and the convening authority could not unilaterally ignore the judge's order.

C. MULTIPLICITY

An area considered relatively dormant, multiplicity received extensive attention from the court this year. The multiplicity melee began with United States *v. Baker.*[11] The court, in a lengthy split opinion, found aggravated assault and communication of a threat, occurring at the same time and place, separate offenses for findings, but not separately punishable. In United States *v. Lott*,[12] the accused was charged with indecent assault of a trainee and violation of a regulation dealing with the treatment and handling of trainees at Fort Dix, New Jersey. The same assaultive conduct was cited as the basis of the regulatory violation. The trial court found Private Lott guilty of both charges and was properly instructed that the offenses merged for sentencing. On appeal, the court determined that the offenses were also multiplicious for findings and dismissed the Article **92** conviction. Similarly, in several cases where there was no prejudice as to sentence the court nevertheless set aside one of the guilty findings on multiplicity grounds: possession of LSD and distribution of LSD, possession charge dismissed;[13] unauthorized absence and breach of restriction, unauthorized absence dismissed;[14] resisting apprehension and assault, assault charge dismissed;[15] possession and introduction of LSD onto a ship, possession charge dismissed;[16] rape, murder and felony-murder, felony-murder dismissed.[17] In United *States v. Holliman*,[18] the court dealt with a threat communicated as part of a rape. Although the court cited Baker for comparison, the holding went far beyond Baker, dismissing the threat offense and ordered a rehearing on sentence.

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[11] 14 M.J. 361 (C.M.A. 1983).
[12] 14 M.J. 489 (C.M.A. 1983).
[13] United States **v.** Miles, 15 M.J. 431 (C.M.A. 1983).
[14] United States **v.** Doss, 15 M.J. 409 (C.M.A. 1983).
[15] United States **v.** Jean, 15 M.J. 433 (C.M.A. 1983).
[16] United States **v.** Hendrickson, 16 M.J. 62 (C.M.A. 1983).
[17] United States **v.** Teeter, 16 M.J. 68 (C.M.A. 1983).
[18] 16 M.J. 164 (C.M.A. 1983).

Many other multiplicity cases were handled by summary disposition. Although the issue was occasionally raised by appellate counsel, in most cases, the court specified the multiplicity issue on its own motion.

D. COMMAND CONTROL

In *United States* v. *Blaylock*[19] and *United States v. Charette*,[20] the court dealt with similar fact situations arising from the same jurisdiction. In each case, the special court-martial convening authority had referred charges to a special court-martial not empowered to adjudge a bad conduct discharge. Both Private Blaylock and Private Charette then requested administrative discharges in lieu of court-martial, which brought their cases to the attention of the general court-martial convening authority. This superior convening authority not only denied the requested discharges, but referred both cases to courts-martial empowered to adjudge a bad conduct discharge. Overturning *United States v. Hardy*[21] in part, the court held that the superior convening authority could effectively withdraw a referred case from a subordinate convening authority and refer the case to a higher level if deemed appropriate for reasons of discipline and command control. The court found that the rereferral was not jurisdictionally deficient and also rejected the conclusion in *Hardy* that command influence divests the court of jurisdiction.

E. COURT-MARTIAL PERSONNEL

Although an accused has no absolute right to a trial by military judge alone and the trial judge has broad discretion in acting on the accused's request for judge alone trial, the appellate court must have some basis for assessing the judge's action. In *United States* v. *Butler*,[22] an Air Force trial judge summarily denied the request for trial by judge alone with no reason apparent in the record. The court held that, without any stated reason for this judge's exercise of discretion, appellate review was impossible. The court stated that the military judge *must* make the basis of the denial of a judge alone request a matter record. The conviction was reversed and a rehearing authorized.

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[19] 15 M.J. 190 (C.M.A. 1983).
[20] 15 M.J. 197 (C.M.A. 1983).
[21] 4 M.J. 20 (C.M.A. 1977).
[22] 14 M.J. 72 (C.M.A. 1983).

11. TRIAL PROCEDURE

A. SPEEDY TRIAL

The court decided three cases dealing with *Burton*[23] speedy trial rules. In *United States v. Rowsey*,[24] the court discussed the remedy for violation of the *Burton* demand rule when the accused in pretrial confinement demands trial but is confined for less than 90 days. Partly in response to a demand for immediate trial, the accused was released from pretrial confinement after being confined for 85 days. The govermnent did not otherwise respond to the demand for trial and almost 130 days had elapsed from preferral of charges to trial. Although some court of review cases had held that violation of the *Burton* demand rule could be dealt with through sentence reassessment,[25] the court held that the only proper remedy for denial of the right to speedy trial is dismissal of the charges, regardless of whether the denial is a violation of the 90 day rule, the demand rule, or the sixth amendment. In *United States v. Groshong*[26] and *United States v. Colon-Anguiera*,[27] the court decided *Burton* 90 day rule issues. In *Groshong*, the court ruled that the accused's repeated misconduct had required further investigation and resulted in additional charges that were required to be consolidated at one trial. In earlier cases, additional charges were deemed insufficient reasons for delay beyond 90 days,[28] but the court ruled that the delay was for "reasons beyond the control of the prosecution" and the accused's speedy trial rights were not violated, despite 104 days of pretrial confinement. In *Colon-Anguiera*, the court concluded that reasonable delays for psychiatric evaluations would be excluded from government accountability for bringing an accused in pretrial confinement to trial within 90 days.

B. ARGUMENT

In *United States v. Grady*,[29] the court held that military judges have a *sua sponte* duty to restrict argument of counsel concerning command policy. The court's unanimous opinion stated that it does not matter who first brings up the matter of command policy and

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[23] United States v. Burton. 21 C.M.A. 112. 44 C.M.R. 166 (1971).
[24] 14 M.J. 151 (C.M.A. 1982).
[25] *See, e.g.*, United Statesv. Herrington, 2 M.J. 807 (A.C.M.R. 1976); United Statesv. Terry. 2 M.J. 915 (A.C.M.R. 1976).
[26] 14 M.J. 186 (C.M.A. 1982).
[27] 16 M.J. 20 (C.M.A. 1983).
[28] *See, e.g.*, United States v. Johnson, 1 M.J. 101 (C.M.A. 1975); United States v. Ward, 23 C.M.A. 391, 50 C.M.R. 273 (1975).
[29] 15 M.J. 275 (C.M.A. 1983).

said: "It is the spectre of command influence which permeates such a practice and creates the appearance of improperly influencing the court-martial proceedings which must be condemned."[30]

The court summarized their prior decisions where defense counsel had argued for a punitive discharge in *United States* v. *Volmar*.[31] The court said that a sentence must be set aside if the defense counsel has directly or imporperly conceded the appropriateness of a discharge and "there is some evidence in the record which fairly indicates that the accused desires to be retained in the service despite his conviction."[32] In *Volmar*, the court stated that both trial and defense counsel are most effective sentencing advocates when they propose an alternative which has a reasonable possibility of acceptance. Faced with a situation where the serious nature of the offenses practically precluded the possibility of retention in the service, the defense counsel could properly concede the appropriateness of a discharge at a general court-martial in order to convince the members to adjudge a bad-conduct discharge rather than the more severe dishonorable discharge. The court noted that *Volmar* does not question the correctness of earlier decision but observed that those decisions concerned situations where the court members might consider retaining the accused in the service.

C. FINDINGS AND SENTENCING

United States v. *Lawson*[33] involved the practice of taking "straw polls"—an informal, non-binding vote—during deliberations on findings. Although the practice was discouraged by the court, straw polls were not prohibited unless used in an otherwise illegal manner such as to exert superiority of rank over junior members.

The court issued a number of decisions defining the scope of proper sentencing considerations. The court emphasized that presentencing aggravation evidence may include any directly related matter that explains the circumstances surrounding the offense or pertains to repercussions from the offense. In *United States v. Marshall*,[34] the trial counsel properly called the victim to testify about the long term effects that the rape by the accused had had on her lifestyle.

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[30] *Id.* at 276.
[31] 15 M.J. 339 (C.M.A. 1983).
[32] *Id.* at 341.
[33] 16 M.J. 38 (C.M.A. 1983).
[34] 14 M.J. 157 (C.M.A. 1982).

In United States *v. Beaty*,[35] the court expanded on the extent to which the accused's mendacity may properly be considered in deciding an appropriate sentence. While cases from last term dealt with trial by court members,[36] *Beaty* involved a situation where the military judge, before announcing sentence, gratuitously stated: "I found that you testified untruthfully, and I will sentence you accordingly."[37] The accused's false testimony at trial can be considered on sentencing as an indication of rehabilitative potential but is not an appropriate basis for separate punishment. Where the record of trial reflects that the false testimony was considered, it must also reflect the purpose for which it was considered.

Perhaps the most interesting decision the court reached in the sentencing area was United States *v. Morgan*.[38] In Morgan, the trial counsel, pursuant to paragraph 75, MCM, introduced personnel records of the accused as matters in aggravation. The defense counsel objected on the ground that the trial counsel did not present favorable defense evidence which was also contained in the accused's personnel file. The court held that if the defense makes a timely objection the trial counsel must present the accused's complete personnel picture. Because the defense did not present any evidence in extenuation and mitigation, the trial counsel could not rebut the favorable evidence which he was forced to present.

In United States *v. Davidson*,[39] the court reaffirmed that, upon defense request, the military judge must specifically instruct that pretrial confinement should be considered in arriving at an appropriate sentence.

Finally in United States v. *Teeter*,[40] the court examined whether the accused may relitigate the court's findings during the sentencing phase. In Teeter, the defense presented alibi witnesses on the merits but the accused did not testify. During sentencing, the accused wanted to testify about his alibi for the first time. The court held that the trial judge properly excluded the testimony which only sought to relitigate the findings of guilt.

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[35] 14 M.J. 155 (C.M.A. 1982).
[36] *See* United States v. Warren, 13 M.J. 278 (C.M.A. 1982); United States v. Cabebe, 13 M.J. 303 (C.M.A. 1982).
[37] 14 M.J. at 155.
[38] 15 M.J. 128 (C.M.A. 1983).
[39] 14 M.J. 81 (C.M.A. 1982).
[40] 16 M.J. 68 (C.M.A. 1983).

III. CRIMES AND DEFENSES

A. INCHOATE CRIMES

Conspiracy. Past cases required the dismissal of an otherwise valid conviction for conspiracy because all remaining co-conspirators had been acquitted.[41] The court unanimously reversed this requirement in *United States v. Garcia*,[42] stating that acquittal of eo-conspirators will not serve to void a conviction in the absense of some compelling reason of record in the other cases. The convictions of individual conspirators must be reviewed to insure that the evidence supports the accused's complicity in the conspiracy beyond a reasonable doubt. The court did not determine whether inconsistent verdicts as to co-conspirators in a joint trial may be treated separately.

In *United States V. Collier*,[43] the court reconsidered the principle that some overt act which was alleged when pleading a conspiracy must be proved. The court decided that substitution of proof of an unalleged overt act does not constitute a fatal variance between pleading and proof in a conspiracy case. Only substantial similarity between the overt act alleged and that proved is required.

Solicitation. In *United States v. Mitchell*,[44] the court concluded that one who solicits an offense under the UCMJ must specifically intend that the substantive crime solicited be committed. The court found no logical distinction between Articles 82 and **134** in terms of the intent required to support the crime of solicitation.

B. DRUG OFFENSES

The court in *United States* v. *Newman*[45] adopted the proposition that deliberate ignorance may be treated as the equivalent of actual knowledge. This principle, which had been developed primarily in drug courier cases, prevents an accused from avoiding criminal liability by purposefully remaining ignorant of incriminating facts such as the contents of containers he is transporting.

C. MILITARY OFFENSES

Three significant cases where decided in the military crimes area. In *United States* v. *Tolkach*,[46] the court explained what constitutes

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[41] *See, e.g.*, United States v. Nathan, 12 C.M.A. 398, 30 C.M.R. 398 (1961).
[42] 16 M.J. 52 (C.M.A. 1983).
[43] 14 M.J. 377 (C.M.A. 1983).
[44] 15 M.J. 214 (C.M.A. 1983).
[45] 14 M.J. 474 (C.M.A. 1983).
[46] 14 M.J. 239 (C.M.A. 1982).

publication of a general regulation to support the presumption of knowledge under paragraph *171a* of the Manual for Court-Martial. In *Tolkach*, the Eighth Air Force regulation in question had been received on base but distribution to units had been erratic. The court held that publication occurs when a general regulation is received at the official repository where it is available to all base personnel.

In *United States v. Foster*,[47] the court defined the intent necessary to attempt to violate a general regulation. The court resolved a split of authority in the courts of review by holding that the accused must intend to commit the acts the regulation proscribes, *i.e.*, possess drugs, rather than intend to violate the regulation.

In *United States v. Schelin*,[48] the court held that retail merchandise of the Army and Air Force Exchange Service was not military property of the United States within the meaning of Article *108*, UCMJ. The court noted that Exchange retail merchandise was not uniquely military by nature or function and did not require the special protection of Article *108* which proscribes, *inter alia*, simple negligence.

D. AWOL

In *United States v. Francis*,[49] the court substantially changed the **law** of unauthorized absence. The accused, charged with a prolonged AWOL, pled guilty to an earlier termination date, indicating during the providence inquiry that he had turned himself in approximately three months prior to the charged termination date. Although accepting the plea and entering findings of guilty to the shorter period of AWOL, the military judge did not make findings with respect to the additional three months. At a second trial, the accused was charged with AWOL encompassing that period for which no findings had been entered at the original trial. The court agreed with the Navy-Marine Corps Court of Military Review that the accused could not properly be tried at the second court-martial for a period of AWOL included in the specification upon which he was previously tried.[50]

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[47] 14 M.J. **246** (C.M.A. **1982**).
[48] 15 M.J. **218** (C.M.A. **1983**).
[49] 15 M.J. **424** (C.M.A. 1983).
[50] Although the military judge made no findings with respect to the additional period of absence, the judge's silence **was** equivalent in legal effect to a finding of not guilty." *Id.* at **428.** Thus, the accused was entitled to claim former jeopardy and ***res judicata*** at the subsequent trial.

Although this holding resolved the case, the court went on to address the situation where the accused's plea reveals two periods of unauthorized absence rather than one. The court acknowledged that in such situations "the rule seems to be that, since he has been charged with a single offense—a single unauthorized absence—he cannot be found guilty of two absences which occurred within the period of the absence initially alleged."[51] Finding, however, other instances in which a single charge could result in more than one finding of guilt,[52] noting that the accused could not have been misled as to the period of time involved, and recognizing that the accused would be entitled to claim double jeopardy at a subsequent trial for any unauthorized absence encompassed by the initial charge, the court simply changed the law.[53] Thus, where an accused is charged with a single specification of unauthorized absence but information revealed at trial demonstrates two separate absences within the period charged, the accused may be found guilty of both shorter periods of AWOL at the same trial. In order to preclude any unfairness to the accused, however, the maximum punishment for the two separate absences may be no greater than that authorized for the initial, single absence.

E. COMMON LAW OFFENSES

In the common law offenses area, the court reaffirmed or clarified several doctrines. In ***United States*** *v. Teeter*,[54] the court declined to set aside the felony-murder rule, Article 118(4), UCMJ. While the doctrine has been under increasing attack in state courts, the court noted that its constitutionality is unquestioned and declined to substitute its judgment for that of Congress. Similarly, in ***United States*** *v. Smith*,[55] the court declined to overrule the claim-of-right defense to larceny and the larceny component of robbery. The claim-of-right defense states that one who takes property with an honest belief that the property is his or assists an owner in recovering his property cannot be guilty of larceny because the requisite intent to steal is absent. The court went on to note that society is still protected if the offense is robbery because, even if the larceny component is negated, the assault component remains.

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[51] *Id.* at **429.**

[52] The court specifically noted that one charged with robbery could be found guilty of both wrongful appropriation and assault. United States v. Calhoun, **5** C.M.A. 428, 18 C.M.R. **52 (1955).**

[53] *See, e.g.*, United States v. Reeder, **22** C.M.A. **11, 46** C.M.R. **11 (1972).**

[54] 16 M.J. 68 (C.M.A. **1983).**

[55] 14 M.J. **68** (C.M.A. **1982).**

In *United States v. Vandenack*,[56] the court clarified the degree of malice required for vehicular homicide under Article 118(3), UCMJ, which proscribes killing another while engaged in inherently dangerous acts, evincing a wanton disregard for human life. Vandernack, who had never possessed a valid driver's license, drove at high speed on city streets and ran several red lights before running a final red light and striking another car, killing the occupant. Vandernack pled guilty to murder while engaged in an act inherently dangerous to others under Article 118(3) but on appeal contended his conduct at most was culpably negligent manslaughter under Article 119(b)(1). The court stated that some form of exceptionally reckless driving of so dangerous a nature that the possibility of a fatal collision would suggest itself to any reasonable observer is the standard for malice in vehicular murder under Article 118(3).

In *United States v. Wickersham*,[57] the court addressed what can be the subject of an unlawful entry under Article 134, UCMJ. In holding that an Air Force storage area was a protected area, the court reasoned that the term "structure" in Article 130, UCMJ's housebreaking offense was intended to include yards where government property is kept. Areas protected under the housebreaking offense are also protected by unlawful entry. Chief Judge Everett dissented and observed that going beyond "building **or** structure'' raises due process notice questions as to what conduct is prohibited.

F. AFFIRMATIVE DEFENSES

In *United States v. Vanzandt*,[58] the court clarified several controversies regarding entrapment. The court laid out two elements for the subjective entrapment defense; to raise the defense, the suggestion or inducement for the offense must originate with the government. Once the defense is raised, the government must prove that the accused was predisposed. The court eliminated largely unused law that had lingered in the standard instructions provided by the military judge that entrapment could be defeated if the government had a reasonable belief that the accused was involved or about to be involved in criminal activity.[59] The court warned that in contraband cases, *e.g.*, drugs, the government will be allowed greater latitude in

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[56] 15 **M.J.** 230 **(C.M.A.** 1983).
[57] 14 **M.J.** 404 **(C.M.A.** 1983).
[58] 14 **M.J.** 332 **(C.M.A.** 1982).
[59] *See* **also United States v. Gonzalez-Dominici,** 14 **M.J.** 426 **(C.M.A.** 1983).

inducing criminal activity, thus making the defense harder to successfully raise.[60]

The court also recognized the due process defense in *Vanzandt*. The defense lies if, regardless of the accused's disposition, the government's conduct was so outrageous as to violate due process. The due process defense is a question of law for the military judge. Again, the court warned that the defense would be especially difficult to raise in contraband cases.

IV. MILITARY RULES OF EVIDENCE

A. M.R.E. 103

The court suggested in dicta that it will follow the broad waiver rule of Military Rule of Evidence 103(a)(1). In *United States v. Shelwood*,[61] trial counsel offered in aggravation a page containing notations concerning two counseling statements from Shelwood's Service Record Book. Trial defense counsel objected on hearsay and due process grounds. On appeal, defense argued that the exhibit was inadmissible because it failed to comply with Navy regulations. Although the court agreed that the entries on the exhibit did not satisfy applicable regulations, Judge Cook, in a footnote, stated that if the case had been tried after the Military Rules of Evidence had taken effect "trial defense counsel's failure to identify the specific ground of the objection might have precluded review of this issue."[62]

In another pre-rules case, *United States v. Kline*,[63] Chief Judge Everett implied that the rule enunciated in *United States v. Mack*[64] may be different in a case tried after the effective date of the Military rules of Evidence.[65] In *Mack*, the court said that the military judge has a duty to exclude documents taken from the personnel records of an accused that were not completed in accordance with applicable regulations regardless of counsel's failure to object.

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[60] *See also* United States v. Sermons, 14 M.J. 350 (C.M.A. 1982). Decided the same day as *Vanzandt*, *Sermons* held that entrapment was not raised when the accused refused multiple requests to sell drugs, but did so only because he had wanted to sell on his own terms.

[61] 15 M.J. 222 (C.M.A. 1983).

[62] *Id.* at 224 n.1.

[63] 14 M.J. 64 (C.M.A. 1982).

[64] 9 M.J. 300 (C.M.A. 1980).

[65] 14 M.J. at 66 n.4.

B.M.R.E. 201

The court held in *United States v. Mead*[66] that a military judge could properly take judicial notice of a general regulation during a proceeding in revision, rather than only at the original trial by judge alone. The court concluded that judicial notice of a general regulation is subject to judicial notice of domestic law under M.R.E. 201A and is governed by the procedural requirements of M.R.E. 201 and noted that the rule pemits judicial notice to be taken even at the appellate level. Because Mead was given all the benefits to which he was entitled under M.R.E. 201 in the revision proceeding, the court found no prejudice. The court warned, however, that a different finding might result for trials conducted before members. Failure to take judicial notice at such trials would make it impossible to comply with the instructional obligations of M.R.E. 201(g) and could result in the members not being instructed on an element of the offense.

C.M.R.E. 404

The court rendered a significant ruling concerning the admission of character evidence under M.R.E. 404(a)(1). In *United States v. Clemons*,[67] the court held that evidence of the accused's good military character and character for law-abidingness was admissible at a court-martial for unlawful entry, wrongful appropriation, and larceny. Reading the word "pertinent" in M.R.E. 404(a)(1) to be synonymous with "relevant," the court concluded that the accused's good military character was relevant in light of his defense that, while acting as charge of quarters, he took several items to teach his subordinates a lesson in securing their personal property. Applying federal precedent, the court also found that evidence of law-abidingness was a specific, pertinent character trait within the meaning of M.R.E. 404(a)(1). Chief Judge Everett concurred and stated his belief that general good character evidence is always admissible.[68]

D.M.R.E. 412

In a series of important cases concerning M.R.E. 412, the court addressed the admissibility of evidence of a rape victim's sexual behavior. In *United States v. Dorsey*,[69] the court focused on the accused's sixth amendment right to present a defense to determine

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[66] 16 M.J. 270 (C.M.A. 1983).
[67] 16 M.J. 44 (C.M.A. 1983).
[68] *Id.* at 50 (Everett, C.J., concurring).
[69] 16 M.J. 1 (C.M.A. 1983).

whether the prosecutrix' past sexual conduct was constitutionally required to be admitted under M.R.E. 412(b)(1). The court indicated that before such evidence can be admitted, the defense must demonstrate that the proffered evidence is relevant, material, and favorable to its case. Applying this methodology to the facts in *Dorsey,* the court held that evidence of sexual conduct between the prosecutix and accused's roommate hours before the alleged rape was admissible where the defense's theory was that the victim fabricated the rape charge to get even with the accused for rejecting her advances and demeaning her character for chastity because of the prior sexual incident.

In *United States v. Colon-Anguiera,*[70] the court applied the methodology announced in *Dorsey* to determine the admissibility of post-offense sexual conduct. Evidence that the prosecutrix had sex with two fellow cab drivers after the alleged rape was found to be relevant, material, and favorable in light of the defense theory that such evidence showed a motive for consenting to the intercourse. The court held, however, that there was no reasonable likelihood that the excluded evidence would have had any impact on the verdict and affirmed.

In *United States v. Elvine,*[71] the court rejected the defense theories of relevance as inadequate. Prior sexual acts of the prosecutrix were held to be inadmissible despite the defense theory that they tended to show that she had a habit of indiscriminately engaging in sex. Post-offense sexual conduct was also found to be irrelevant for the purpose of showing that such conduct was inconsistent with the normal emotional trauma an unmarried woman would have exhibited after she had been raped.

The court addressed M.R.E. 412(a)'s absolute bar to reputation evidence in *United States v. Holloman*[72] and held that whatever type evidence is offered concerning the victim's past sexual behavior, the analysis is the same. The defense must demonstrate that the proffered evidence is relevant, material, and favorable. If the sixth amendment requires admission under this analysis, the evidence comes in despite M.R.E. 412(a)'s purported absolute bar. Under the facts of *Holloman,* however, evidence that the prosecutrix had a reputation for being a flirt, sexually loose, and "sort of a whore'' was found not to be constitutionally required.

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[70] 16 M.J. 20 (C.M.A. 1983).
[71] 16 M.J. 14 (C.M.A. 1983).
[72] 16 M.J. 164 (C.M.A. 1983).

E. M.R.E. 607, *608, 613*

Recognizing the failure of the parties at the trial level to properly ascertain and distinguish the various ways to impeach, Judge Fletcher, in ***United States*** *v. Banker*,[73] explained the various methods of impeachment and how each should be applied. The court held that evidence of an attempted purchase of drugs by a government informant should have been admitted to show bias and prejudice,

V. CONSTITUTIONAL EVIDENCE

A. SEARCH AND SEISURE (4th AMENDMENT)

The path that the court will follow to resolve fourth amendment issues is clear; government conduct will be assessed under a reasonableness standard, and reasonableness will be defined in light of the unique nature of the military environment. Moreover, reasonableness will be determined by an objective assessment of the facts and circumstances. Using this framework, the court has modified or overturned prior, more restrictive precedent as necessary;[74] limited application of the exclusionary rule in military practice;[75] and supported the power of the commander to maintain good order and discipline.[76] Finally, the court has not viewed the Military Rules of Evidence pertaining to search and seizure as restricting conduct which was otherwise reasonable under the Constitution as applied to the armed forces.[77]

Although only a few fourth amendment cases were decided during the past year, the court was true to form. In ***United States*** *v. McCullugh*,[78] the court initially found that the accused did not have standing to contest a customs search of items placed under a train seat. Nevertheless, the court went on to note that the search was reasonable. The right of German authorities to search at its borders to enforce its customs laws was clear. Moreover, the court held that assistance rendered by American Military Police Customs Investi-

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[73] 15 M.J. 207 (C.M.A. 1983).

[74] *See, e.g.*, United States **v.** Morrison, 12 M.J. 272 (C.M.A. 1982); United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); United States **v.** Middleton, 10 M.J. 123 (C.M.A. 1981).

[75] *See, e.g.*, United States **v.** Kozak, 12 M.J. 389 (C.M.A. 1982); United States **v.** Whiting. 12 M.J. 253 (C.M.A. 1982).

[76] *See, e.g.*, United States **v.** Alleyne, 13 M.J. 331 (C.M.A. 1982); United States **v.** Brown, 12 M.J. 420 (C.M.A. 1982); United States **v.** Acosta, 11 M.J. 307 (C.M.A. 1981).

[77] *See* Murray **v.** Haldeman, 16 M.J. 74 (C.M.A. 1983); United States **v.** Acosta, 11 M.J. 307 (C.M.A. 1981).

[78] 14 M.J. 409 (C.M.A. 1983).

gators, who searched service personnel at the instigation of German officials, was reasonable. The court found support for its conclusion in the fact that such assistance was called for in the NATO Status of Forces Agreement and that it expedited the flow of American military personnel across German borders.

Seizure of the person and the application of *Dunaway v. New York*[79] to the military where addressed in *United States v. Schneider*.[80] When Schneider was taken by guards from the hospital to the Naval Investigative Service Resident Agency, he was clearly under apprehension and probable cause was required. The court recognized, however, that the obligations of a service person and the unique relationships inherent in military command structures prevent literal application of *Dunaway*. For example, a soldier may be required to report to criminal investigators without triggering fourth amendment standards of probable cause. It seems, however, that once the suspect has reported in accordance with a military obligation, further detention must comport with fourth amendment standards because vital distinctions between the military and civlian communities no longer exist.

The court's most recent discussion of the fourth amendment was in *Murray* v. *Haldeman*.[81] Upon reporting to a Navy school, Murray was subjected to a command directed urinalysis. The admissibility of the laboratory report was contingent upon the lawfulness of the seizure of the urine. Affirming the need for such programs in the military and noting the reasonable manner in which the urine was seized, the court gave a broad sanction to command directed urinalysis programs which were "justified by the same considereations that permit health and welfare inspections."[82] *Murray* is another in an increasing line of fourth amendment cases condemning drug abuse in a military environment and enhancing the lawful powers of command to combat the problem.[83] In addition, the court once again made clear that the Military Rules of Evidence pertaining to search and seizure will not serve as a limitation on the court's power to decide fourth amendment issues of reasonableness:

> However, it is not necessary — or even profitable — to try to fit compulsory urinalysis within the specific terms of [Mil-

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[79] 442 U.S. 200 (1979).
[80] 14 M.J. 189 (C.M.A. 1982).
[81] 16 M.J. 74 (C.M.A. 1983).
[82] *Id.* at 82.
[83] *E.g.*, United States v. Acosta, 11 M.J. 307 (C.M.A. 1981); United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

itary Rule of Evidence 313(b) pertaining to inspections]. We have made clear that a search may be reasonable even though it does not fit neatly into a category specifically authorized by a Military Rule of Evidence.[84]

B. SELF-INCRIMINATION (5th AMENDMENT)

Scope of the Right. The court continued to limit the scope of the right against self-incrimination in the military, bringing the protection given by Article 31, UCMJ, in line with traditional fifth amendment rulings. In *Murray v. Haldeman*,[85] the court held that the rights warnings were not required before a compelled command-directed urinalysis, reasoning that the Supreme Court had long held the seizure of body fluids not within the protection of the fifth amendment and that Article 31 should be interpreted similarly.

The Right at Sentencing. The court also used the reasoning that Article 31 is "co-extensive" with the fifth amendment to overrule prior decisions concerning the right against self-incrimination at the sentencing phase. Previously, the military judge was permitted to ask an accused questions in order to establish the admissibility of records of nonjudicial punishment. Relying on the Supreme Court's analysis of the applicability of the fifth amendment to the penalty phase of a trial in *Estelle* v. *Smith*,[86] the court held in *United States* v. *Sauer*[87] that the right against self-incrimination under Article 31 continued through the sentencing portion of trial and the accused could not be compelled to respond to the military judge's questions.

Comment on Accused's Silence. In a series of cases, *United States v. Fitzpatrick*,[88] *United States v. Fields*,[89] and *United States* v. *Reiner*,[90] the court discussed the relationship between fair cross-examination concerning the accused's opportunity to plan testimony and improper comment on the accused's pretrial invocation of the right to silence. A unanimous court looked at the cross-examination in full context and determined that questions relating to whether the trial counsel had ever interviewed that accused or had an earlier opportunity to hear his story were proper and not intended to be comments on the accused's pretrial silence.

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[84] 16 M.J. at 82.
[85] 16 M.J. 74 (C.M.A. 1983)
[86] 451 U.S. 454 (1981).
[87] 15 M.J. 113 (C.M.A. 1983).
[88] 14 M.J. 394 (C.M.A. 1983).
[89] 15 M.J. 34 (C.M.A. 1983).
[90] 15 M.J. 38 (C.M.A. 1983).

Immunity. In addition to changing the rules for the post-trial effects of either granting or recommending immunity in *United States* v. *Newman*[91] and *United States v. Decker*,[92] the court also discussed procedures for granting immunity to civilian witnesses in *United States v. Andreas.*[93] While taking to task the Air Force prosecutors who promised a civilian witness everything from immunity from court-martial to immunity from prosecution by the Philippine government, the court recognized that the Department of Justice retains authority to immunize civilian court-martial testimony.

Attenuation. In *United States v. Butner*,[94] the court addressed the question of follow-up questioning after an initial inadmissible statement and listed several factors that could attenuate the "taint" of the first statement. The factors include the time lapse between the statements, whether the same questioner was involved, whether the second questioner relied on the first statement, whether the accused indicated that the first statement did not induce the later one, and whether new rights warnings were given. Of particular importance is whether the new rights warnings were corrective or "cleansing" warnings, that is, whether the questioner advised the accused that the earlier statement could not be used against him.

Custodial Interrogation. The court struggled with the issue of when interrogation at the police station amounts to custodial interrogation, thus requiring *Miranda*[95] warnings, in *United States v. Schneider.*[96] Recognizing that, particularly in the military context, soldiers may be required to report to military police without probable cause, the court listed several conditions to be considered when trial courts determine whether the interrogation was custodial. The factors include whether the accused reported voluntarily or was ordered to report, whether the accused was a suspect or under guard, whether the accused was free to leave, the relation of the conditions to the interrogation, and whether the conditions directly related to the accused's decision to confess.

Striking Direct Testimony. In *United States v. Richardson*,[97] the court interpreted M.R.E. 301f(2), which permits the military judge

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[91] 14 M.J. 474 (C.M.A. 1983).
[92] 15 M.J. 416 (C.M.A. 1983).
[93] 14 M.J. 483 (C.M.A. 1983).
[94] 15 M.J. 139 (C.M.A. 1983).
[95] Miranda v. Arizona, 384 U.S. 436 (1966).
[96] 14 M.J. 189 (C.M.A. 1982).
[97] 15 M.J. 41 (C.M.A. 1983).

to strike the direct testimony of a witness who invokes the right to remain silent when cross-examined. The court concluded that the military judge may elect not to strike the testimony if the refusal to testify concerns only collateral matters. In addition, the court decided that the right to strike is equal; that is, if a defense witness refuses to answer the government's cross-examination and the issue is not collateral, the military judge may strike direct testimony just as with a government witness.

C. SIXTH AMENDMENT

Compulsory Process, In the area of witness production the court emphasized the defense counsel's burden to make a full and timely materiality showing and has apparently adopted a stricter materiality standard.

In *United States v. Menoken,*[98] the defense requested a sergeant whom it alleged gave the accused permission to be absent from his duty station at Fort Dix. It was disputed whether the sergeant was stationed at Fort Dix or in Korea at the time. The defense requested a continuance to establish the possibility that the sergeant was at Fort Dix. The court held the averment of materiality insufficient. Even if the sergeant was at Fort Dix, that fact was only collateral to the defense's principal contention that he had given the accused permission to be absent. Without an assertion about the alleged permission, the court said there was "not even a legitimate averment of materiality.''

In *United States* v. *Cottle,*[99] the court in dicta warned defense counsel of their burden to make timely requests. The civilian defense counsel had interviewed defense witnesses on **23** October 1979 but did not actually request them until **23** January 1980—five days after referral. The court stated that a delay for tactical reasons until referral is proper, but the defense assumes the risk that the witness may become unavailable.

In both *Menoken* and *Cottle* the court applied the strict materiality test of "essentiality" which it first developed in *United States v. Bennett.*[100] In *Bennett,* the court stated that "material" had been misused. The true test of materiality is "essentiality." The court went on to state: "[i]f a witness is essential for the prosecution's case, he will

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[98] 14 **M.J. 10 (C.M.A. 1982).**
[99] 14 M.J. **260 (C.M.A. 1982).**
[100] 12 **M.J. 463 (C.M.A. 1982).**

be present or the case will fail. The defense has a similar right."[101] This language was a significant departure from existing law. In *United States v. Lucas*[102] and *United States v. Hampton*,[103] a witness was required to be produced if the witness hurt the government or helped the defense. A standard for the military judge as to *how much* the witness must hurt the government or held the defense was never clearly articulated. On appeal, the standard was a reasonably likelihood that the evidence would have affected the judgment of the trier of fact. *Bennet's* essentiality standard not only appears tougher than the "reasonable likelihood" standard but apparently is also to be applied at trial.

In the area of witness production on sentencing, the court discussed alternatives to live witnesses. In *United States v. Gonzalez*,[104] the court addressed a situation where the defense counsel offered affidavits under M.R.E. 405(c) and the trial counsel had additional information from the affiants that contradicted the defense affidavits. The military judge excluded the affidavits after the trial counsel argued that they were "misleading." The court held that it was error to exclude the defense affidavits, stating that the trial counsel's remedy was to obtain additional affidavits. The court also addressed para. 75e(2), MCM, which states that a live witness must be produced at government expense only if, *inter alia*, "the other party is unwilling to stipulate to the facts to which the witness is expected to testify." The court stated that this provision meant stipulation of fact, not stipulation of expected testimony.

VI. POST-TRIAL PROCEDURE

A. POST-TRIAL ACTION

In *United States v. Newman*,[105] the court reversed a long-standing rule of military practice and held that a convening authority who grants immunity or clemency to a witness in a court-martial is *not* disqualified from later reviewing or taking action on the case. In this case, testimonial immunity was given to a defense witness but the court did not limit its unanimous opinion to those facts. The court cited three circumstances in support of the new rule: the developing use of testimonial as opposed to transactional immunity for obtaining otherwise unavailable evidence, the view that a convening

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[101] *Id.* at 465 n.4.
[102] 5 M.J. 167 (C.M.A. 1978).
[103] 7 M.J. 284 (C.M.A. 1979).
[104] 16 M.J. 58 (C.M.A. 1983).
[105] 14 M.J. 474 (C.M.A. 1983).

authority's decision to immunize a witness does not involve a credibility determination, and the abolition of the voucher rule by the adoption of MRE **607.** Under *Newman,* the test for disqualification focuses on whether the actions of the convening authority before and during trial create or suggest a risk that the evidence will not be evaluated objectively and impartially after the trial. To preserve the facts for appellate review, the circumstances surrounding a grant of immunity or clemency should be included in the post-trial review. In *United States v. Decker,*[106] the court logically extended its rationale and the new standard for testing qualification in *Newman* to the staff judge advocate's role of writing the post-trial review for the convening authority.

In *United States v. Sutton,*[107] the court acted to cure prejudice caused by inordinate post-trial delay in reviewing and acting on a record of trial. The accused asserted prejudice in obtaining civilian employment based on the long-pending appellate review. The government could not satisfactorily explain the delay and the court dismissed the charges, relying on *United States v. Clevidence.*[108]

B. APPELLATE PRACTICE

The court addressed the right to adequate representation by appellate counsel in *United States v. Knight*[109] and *United States v. Hullum.*[110] In *Knight,* the court held that the appellate defense counsel had erred by failing to call the appellate court's attention to issues that the accused had specified in his request for appellate representation. In that request, the accused listed three errors as grounds for relief, but appellate defense counsel submitted the case to the court of review without specific assignment of error. Based upon its "rule of practice" mandated in *United States v. Grostefon,*[111] the court said that, at a minimum, "when an accused specifies any error in his request for appellate representation, the appellate defense counsel will invite the attention of the Court of Military Review to those issues."[112]

Failure to raise issues that should have been apparent to appellate counsel may amount to error even if the request for appellate representation does not specify any issues. In *Hullum,* the court held that

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[106] 15 M.J. 416 (C.M.A. 1983).
[107] 15 M.J. 235 (C.M.A. 1983).
[108] 14 M.J. 235 (C.M.A. 1982).
[109] 15 M.J. 202 (C.M.A. 1983).
[110] 15 M.J. 261 (C.M.A. 1983).
[111] 12 M.J. 431 (C.M.A. 1982).
[112] 15 M.J. at 204.

appellate defense counsel failed to handle the appeal with reasonable competence by submitting the case to the Navy-Marine Court of Military Review without specifying any errors. The court concluded that counsel should have argued that the appellant's AWOL convictions were excusable as the result of threats and racial harassment and that the sentence was inappropriately severe. The court concluded that appellate counsel should have been aware of these facts because they had been vigorously asserted at trial and raised after trial in a clemency petition. Judge Cook dissented, warning that the decision would result in clogging the appellate courts with frivolous appeals because appellate counsel with have to raise "every possible issue or suffer the peril of being declared incompetent."[113]

Two cases before the court involved the narrow issue of when a court of military review may lawfully hear a case. In *United States v. Vines*,[114] the court said that the authority of the Chief Judge of the Army Court of Military Review to assign cases to particular panels is virtually unrestricted, but that once a penal assignment is made, a proper "change-of-assignment order" is required before a different panel can hear the case. The record in *Vines* was originally assigned to Panel **4** for review. Through administrative or clerical error the case was inadvertently sent to Panel 5, which affirmed the conviction. The Court of Military Appeals held that it was error for Panel 5 to hear the case, but ruled that assignment of cases was procedural and thus not jurisdictional. Finding no prejudice, the court affirmed.

In *United States v. Elliott*,[115] the court held that the Navy-Marine Corps Court of Military Review could not lawfully operate when it had fewer than three members. One member was on leave from the time of appointment and had not taken the oath of office until after the accused's case was heard. The court ruled that he was not properly serving as a member of the court and, therefore, the Article 66, UCMJ requirement of a three judge panel was not satisfied.

C. EXTRAORDINARY WRITS

The court exercised its extraordinary relief authority in an expansive fashion during this term. In *Shepardson v. Roberts*,[116] the court invoked considerations of judicial economy in using a petition for extraordinary relief to review a dispute about whether a convening authority could withdraw from a pretrial agreement. The court

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[113] 15 M.J. at 270 (Cook, J., dissenting).
[114] 15 M.J. 247 (C.M.A. 1983).
[115] 15 M.J. 347 (C.M.A. 1983).
[116] 14 M.J. 354 (C.M.A. 1983).

cautioned practitioners that the special circumstances of that case impelled prompt review and did not imply an invitation to avoid the ordinary course of appellate review. In *Murray v. Haldeman*,[117] the court noted that a petition's claim that a court-martial lacked jurisdiction was an extraordinary circumstance which justified review of an issue without awaiting trial and the ordinary appeals process. Considerations of judicial economy similar to those in *Shepardson* also prompted the court to address the issue raised: the service-connection of drug usage detected by urinalysis after an extended period of leave.

In *United States v. Labella*,[118] the court's *per curiam* opinion succinctly described the proper analytical approach to government-initiated extraordinary writs. The military judge had dismissed charges for lack of subject-matter jurisdiction, normally a remedy within the judge's discretion for such a defect. Holding that the judge's dismissal of charges was permissible, the court stated that an abuse of discretion would have to amount to a judicial usurpation of power or be characteristic of an erroneous practice likely to recur in order to merit extraordinary relief.

In *Dobxynski* v. *Green*,[119] the court approved, without enthusiasm, the imposition of nonjudicial punishment after a special court-martial judge had suppressed evidence seized from the accused sailor's briefcase. Following the suppression ruling, the convening authority withdrew the charges from special court-martial and initiated an Article 15, which the accused could not refuse because he was assigned to a vessel. Dobzynski attacked the withdrawal but, despite the perception of injustice created by the procedure, the court found no due process violation.

VII. ETHICS

In *United States v. Radford*,[120] the court examined the responsibilities of the defense counsel and the military judge when the defense counsel believes that the client is going to commit perjury. After the accused testified in narrative form about an alibi, the military judge initiated a discussion before the court members about whether the defense had given notice of the alibi defense. The defense counsel expressed disagreement with his client's testimony and then, in an Article 39(a) session, requested permission to withdraw. The military judge did not expressly rule on the withdrawal request.

[117] 16 M.J. 74 (C.M.A. 1983).
[118] 15 M.J. 228 (C.M.A. 1983) (per curiam).
[119] 16 M.J. 84 (C.M.A. 1983).
[120] 14 M.J. 322 (C.M.A. 1982).

Specifically endorsing the "passive representation" scheme contained in the ABA Standards for Criminal Justice, Defense Function 4-7.7, a majority of the court decided that the standards of professional conduct had been breached and the accused had been denied a fair trial. Judge Fletcher concluded that the accused was denied effective assistance of counsel when the defense counsel commented on the evidence adversely to his client and further held that the military judge had an obligation to inquire *sua sponte* whether the accused wanted new counsel. Chief Judge Everett based his concurrence on the judge's failure to inquire into the apparent irreconcilable conflict between the defense counsel and the accused. He said that "perhaps" the defense counsel's expression of disbelief in Radford's testimony constituted a denial of due process but did not make this part of his basis for reversing the conviction.

Judge Cook dissented and focused on the trial record as a whole, concluding that the accused was not deprived of effective assistance of counsel and was not deprived of a fair trial.

VIII. CONCLUSION

The intent of this brief review has been to report the significant decisions of the past year from the Court of Military Appeals. At the same time, however, reviewing past decisions not only reveals areas in which the court has focused its attention, but also indicates trends which should persist. Obviously, the Military Rules of Evidence will remain a major topic of interest for the court. There appears to be a desire, particularly on the part of the Chief Judge, to give substantive meaning to the various rules and to teach counsel how to deal with evidentiary matters at trial. Thus, it seems likely that the court will grant review and provide guidance on scientific evidence and expert testimony, hearsay, character evidence, and the proper scope of rebuttal testimony. Additionally, Section III of the Military Rules of Evidence should continue to be a fertile area for litigation, particularly where the Manual's fourth amendment rules impose a more rigorous standard upon the government than a mere reasonable determination requires.

Crimes, defenses, and intent will also demand much of the court's attention. Decisions in those areas should become the basis for interpretation of similar issues when the new Manual for Courts-Martial becomes effective. The court can also be expected to refine various aspects of pretrial, trial, and post-trial procedure, essentially seeking to teach military practitioners "how to" throughout the trial process. Of particular interest to military counsel will be the ultimate resolution of the military death penalty. The court should also

address multiplicity and attempt not only to clarify the concepts of over-charging, duplicitous pleadings, and multiplicity, but also to provide guidelines to military judges for handling such matters at trial.

The quality of representation in courts-martial also looms as a significant issue. The court has made clear its concern about the quality of appellate representation. Expanded waiver provisions in the Military Rules of Evidence and increased reports of concern over trial representation may generate a similar interest in the effectiveness of representation at trial.

Finally, it is difficult to speculate on the effect of a new judge on the court after the announced retirement of Judge Cook in March. In view of the strong leadership provided by the Chief Judge and the apparent judicial harmony which exists between Judge Fletcher and Chief Judge Everett, however, it seems unlikely that a new personality will generate dramatic changes in directions of the Court of Military Appeals.

BOOK REVIEWS

THE MODERN INTERNATIONAL LAW OF OUTER SPACE*

Carl Q. Christol, *The Modern International Law of Outer Space*. New York: Pergamon Press Inc., 1982. Pages: xiii, 932. Price: $85.00. Publisher's address: Pergamon Press Inc., Maxwell House, Fairview Park, Umsford, New York 10523.

*Reviewed by Major H. Wayne Elliott***

The recent conversion of the space shuttle from an experimental project to the workhorse of the United States space program accentuates the rapid development of space. Keeping almost apace with this technological revolution is a legal revolution. Questions of law which in the not so distant past were viewed as being of only academic interest increasingly are being viewed as questions of day-to-day relevance for American lawyers. The issues range from the uses of space for military purposes to the liability of a state for damages done by a falling satellite. Military lawyers should be familiar with the basic concepts of the international law of outer space.

The book begins with a discussion of the relationship of science and technology to the law of the outer space environment. The author emphasizes that the law will change not only to reflect changes in technology but also to reflect the various legal and political influences. As a result of these different influences, not all countries will

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*The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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approach the law of space with the same interests or concerns. The legal regime applicable in space will, therefore, be the product of formal international agreements and customary international law.

The primary international organization dealing with the space environment has been the United Nations. The Committee on Peaceful Uses of Outer Space (COPUOS) is charged with consideration of the legal problems which might arise in outer space. Chapter Two of the book is devoted to the creation of COPUOS and its role in developing the most important of the space treaties, the 1967 "Principles" Treaty. The author argues that this treaty was the "fundamental starting point" for international cooperation in outer space. As a result the subsequent treaties have evolved from the principle embodied in the 1967 treaty that outer space shall be the "province of all mankind."

The book examines, in subsequent chapters, each of the international agreements concerning outer space which are in force or under discussion. These chapters discuss the historical background of the treaties and provide a readable account of the interpretation to be given to various ambiguous articles in the treaties. The author interprets these ambiguous portions based on research of the negotiating records of the treaties in an attempt to arrive at the intent of the drafters. Thus, the lawyer has in a single volume an informative source to resolve questions of interpretation.

Turning from the formal treaties, the author then considers several issues which may be viewed as forming the genesis for developing customary international law. These chapters consider the debate over such questions as the geostationary orbit, direct television broadcasting, and remote sensing by space object. Chapters are also devoted to the uses of nuclear power in outer space and the future of space transportation.

In the final chapter the author draws some conclusions and makes predictions for the future development of outer space law. He concludes that the law of outer space will continue to reflect the basis principles embodied in the 1967 treaty. In describing the future of space law, he writes:

> The modern international law of outer space is serving the interests, values, wants, and needs of the world community at this moment in history. It is alive to the important issues of the time. Its capacity for growth has been well demonstrated. Its receptiveness to the dynamic and practical influences which have contributed to its present substance will undoubtedly continue unabated. The existing

law is by no means the final law for the space environment.

The appendix section includes the text of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (January 27, 1967), the Convention on International Liability for Damage Caused by Space Objects (March 29, 1972), and other treaties. Also included are documents on space policy such as 1976 Bogota Declaration and a White House fact sheet on U.S. civil space policy. The book contains a detailed index which will be an asset to the lawyer seeking information on the law of outer space.

Carl Q. Christol is Professor of International Law at the University of Southern California. Dr. Christol's formal education includes a Ph.D. from the University of Chicago and LL.B. from Yale Law School. He was awarded an honorary LL.D. degree in 1977 from the University of South Dakota. Dr. Christol has held several honorary and professional appointments to include the Stockton Chair of International Law at the U.S. Naval War College, 1962-1963, and visiting professor at the Institute of Air and Space Law, McGill University, 1979-1980. He is the author of six books and numerous professional articles.

This book is a timely informative addition to the law of outer space. Unlike many of its predecessors, this volume is not a compilation of treaties tied together by a few thought provoking, if esoteric, questions. Christon has provided a readable account of the development of the law of outer space.

FATAL VISION*

Joe McGinniss, *Fatal Vision.* New York, New York: G.P. Putnam's Sons, 1983. Pages: 663. Price: $17.95. Publisher's address: G.P. Putnam's Sons, 200 Madison Avenue, New York, New York 10016.

*Reviewed by Captain Stephen J. Kaczynski***

"I can only tell you from the physical evidence in this case that *things* do not lie. But I suggest that *people* can and do." (Summation of the U.S. Attorney, *United States* v. *McDonald).*

In a poll conducted for the purpose of jury selection shortly before the 1979 trial, it was revealed that 81% of those surveyed had heard of the case of former Green Beret Captain Jeffrey MacDonald. Surveys frequently show that a smaller percentage than that can, at any given time, name the President of the United States. It is precisely this notoriety, or infamy, surrounding the triple murder that occurred on Febrary 17, 1970 at 544 Castle Drive, Fort Bragg, North Carolina that continues the public's interest in seeking to learn why a pregnant woman and two small children were killed in their home on that night.

Fatal Vision is a lengthy, detailed, and inexorible accounting of the events following the murders. In researching the book, author McGinniss was afforded virtually total access to the records, diaries, and intensly private thoughts of the man eventually convicted of the murders, Jeffrey MacDonald. The conclusions reached by the author, however, are scarcely those which had been desired by the subject of the book, nor those anticipated by the author upon his undertaking the task. In sum, author McGinnis concludes, as did a jury in federal district court in North Carolina, that Jeffrey MacDonald was the murderer and that a tale of drug-crazed hippies invading the MacDonald home was a fabrication. He adds however, that the killer may have committed the murders while under the influence of a form of amphetimine taken as a "diet pill" and undetectable

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*The opinions and conclusions expressed in this book review, and in the book itself, are those of the authors and do not necessarily represent the view of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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in the suspect's system under then-existing medical tests. As one proceeds through the book, from the early story told military investigators to the gratuitous lies told to a grand jury to the repeated denials when confronted by damning physical evidence at his trial, the author's conclusion becomes all but indisputable.

The facts of the case are in some measure familiar to all. On the evening of February 17,1970,the military police responded to a call from Captain MacDonald that an attack had taken place on his family in their quarters at Fort Bragg. Upon arriving, the lifeless bodies of Collette MacDonald, **26,** Kimberly MacDonald, **5,** and Kristen MacDonald, **2,** were discovered, all having been clubbed and stabbed to death. Jeffrey MacDonald was also found, alive, suffering from superficial bruises and minor stab wounds. The word "PIG" had been written in blood on the headboard of the master bed. Blood was everywhere, yet the living room, where MacDonald alleged that he had fought for his and his family's lives against three male and one female "hippies," showed no signs of struggle and contained none of Captain MacDonald's blood.

It is undisputed that the initial military investigation on the murders was badly bungled. The quarters were not adequately secured, the MacDonald trash was disposed of without a search for evidence, the toilet was flushed, thereby possibly sending into the sewer system a surgical glove with which the word "PIG" had been written, MacDonald's pajama bottoms were thrown away and burned at the hospital, bodies were moved and the crime scene initially disturbed, and a "known hair sample" of MacDonald turned out to have come from a pony he had bought his children for Christmas. Incredibly, security at **544** Castle Drive was so lax that MacDonald's wallet was stolen from the crime scene by one of the responding military police.

Faced with this abominable investigation, the evidence that the suspect, an "All-American boy," who "was admired by all," and psychiatric testimony that his character type could not have committed so brutal a massacre, an Article **32** investigating officer, after a lengthy pretrial hearing, found the charges that MacDonald had committed the murders "not true." The charges were dismissed and MacDonald shortly thereafter received an honorable discharge from the Army.

The Greek notion of *hubris* deals with an excessive arrogance arising from a perceived pride in one's self. Following his "exonoration" by the Army, Jeffrey MacDonald became infected with *hubris.* He appeared on the *Dick Cavett Show,* was interviewed by *Newsday,*

and actively sought notoriety on the *CBS Evening News* and in *Look* magazine, all to the chagrin of his deceased wife's stepfather, Alfred Kassab.

During the aborted Army prosecution, Mr. Kassab had been among MacDonald's staunchist supporters. Disturbed by his son-in-law's post-discharge activity and enlightened by a painstaking review of the verbatim Article 32 investigation testimony and a visit to the crime scene, however, Mr. Kassab changed his mind. The physical evidence simply did not come close to supporting MacDonald's version of the story. Indeed, he concluded, as had Army investigators, that there had been no "hippies," no intruders, only a murderous Jeffrey MacDonald in the quarters on February 17, 1970.

No one, however, would listen. With evangelical fervor, Mr. Kassab pursued the Justice Department and members of Congress alike to look into the killings anew. Finally, in 1974, a federal grand jury was convened and Jeffrey MacDonald was indicted on three counts of first degree murder.

Trial, however, would not come for five more years. A dismissal of the indictment on speedy trial grounds by the Fourth Circuit led to a review by the United States Supreme Court, which indicated that the panel had exceeded its authority in permitting a pretrial appeal of the denial of the speedy trial motion; the indictment was reinstated.

It has been remarked that the three most overrated things in the world are big game hunting, the state of Texas, and the FBI. It was, however, the testimony of a forensic specialist from the Federal Bureau of Investigation, before both the grand and petit juries, that sealed MacDonald's fate. Evidence undiscovered, ignored, or unintelligible at the time of the original investigation was given substance by the examiner.

His task was made simpler by the fact that each member of the MacDonald family had had a different blood type. Consequently, the examiner was able to determine whom had been attacked where, resulting in a theory completely at odds with the explanation given by MacDonald. Indeed, the single most illuminating part of the book may be an approximately three page excerpt of the examiner's testimony before the grand jury where, unimpeded by strict adherence to the rules of evidence, he delivered an account, amply supported by the physical evidence, of what he thought had happened in the MacDonald household. To a lesser extent, this theory was argued before the petit jury by the U.S. attorney. In both cases, the result was devastating; only three days after the conclusion of the taking of

testimony, the grand jury indicted MacDonald; after only six and one-half hours of deliberation, the petit jury convicted him.

Mr. McGinniss adds a new wrinkle to the already voluminous public record on the MacDonald case. The government has told us who, but no one has satisfactorily explained why. From the notes that MacDonald had given his original military attorney, notes provided to McGinniss as part of the unrestricted access agreement with MacDonald, McGinniss discovered that MacDonald had been taking a form of amphetimine, now withdrawn from the market, as a diet aid. The literature and physicians with whom McGinniss spoke indicate that this pill, taken as it must have been by MacDonald in sufficient quantity to have caused a substantial weight loss in an already physically fit Green Beret, could cause a temporary psychosis and induce a rage sufficient to move a person to kill. McGinniss also notes that some of the symptoms exhibited by MacDonald both at the crime scene and in the hospital were consistent with a reaction to the drug.

The full story will probably never be known; MacDonald to this day protests his innocence. *Fatal Vision* tells, to the extent that it can be told without the truthful input of the only surviving participant, the story of the events of the last minutes of the lives of Collette, Kimberly, and Kristen MacDonald.

The story may not yet be over. Jeffrey MacDonald, convicted triple murderer, will be eligible for parole in 1991.

MAN SLAUGHTER*

Steven Englund, Man Slaughter. New York, New York: Doubleday & Company, Inc., 1983. Pages: 419. Publisher's address: Doubleday & Company, Inc., **245** Park Avenue, New York, New York 10167. Price: $17.95.

Reviewed by *Captain Stephen J. Kaczynski***

Suppose for a moment that you are the staff judge advocate, district attorney, or even a legal clerk and that a homicide has been committed within your bailiwick. You are handed a report of investigation which revealed the following:

Approximately six months prior to the homicide, the victim left the suspect for another woman. The victim filed for divorce and indicated that he would seek custody of his two daughters. Two weeks prior to the homicide, the suspect had purchased a shotgun and test fired it on several occasions. On the day of the homicide, a day on which the suspect knew that the victim would be coming to the house to pick up his daughters for their weekly visit, the suspect sent the daughters to her brother, a neighbor. The victim arrived at the home and briefly argued with the suspect. The suspect thereupon produced the shotgun and fired two shotgun blasts at the victim. The first volley hit the victim in his back, the second was fired at his head at point blank range. Thereafter, the suspect drove the victim's car to another town and took a taxi back, but did not have the taxi drop her at her door. The suspect later made a number of phone calls and visits, including one to the victim's paramour, to query about whether the victim would come to pick up the daughters and expressing a new fear that he was out to get her. Later, the suspect wrapped the body in plastic and buried it in a building on her farm. She disposed of the bloody clothing and, finally, set fire to the crime scene. Upon the arrival of fire investigators, who had immediately determined that the cause of the fire had been arson, she claimed to have heard the familiar sound of her husband's car outside the house just prior to the fire. He must have been trying to kill her.

Assume further that the above had been learned largely through two properly warned confessions of the suspect, one which had been

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**The reviewer's biographical data are provided in the preceding review.

rendered in her own handwriting. In addition, certain mitigatory aspects of the confession can circumstantially, logically, and forensically be disproven, to include that the shotgun must have been loaded and awaiting the victim's arrival. Finally, the body is discovered and the gunsmith and taxi driver are located to corroborate those aspects of the confession.

Given this report, all of which could be admissibly presented to a jury, what charge do you, as SJA, DA, or legal clerk, recommend and expect to stick? Call it first degree murder, murder one, or premeditated murder, the evidence would surely support the most serious available homicide charge.

Such was the seeming state of the evidence in *State v. Patri,* a Wisconsin first degree murder prosecution of Jennifer Patri for the slaying of her husband, Robert Patri. In *Man Slaughter,* Steven Englund, the writer-scholar to whom Mrs. Patri contracted the literary rights to her story, details how, with the aid of a self-promoting defense counsel, and intimidated assistant district attorney, and the cerification by the media of the *Patri* case as a bona fide "cause," the facts were stood on their head and a conviction only for manslaughter was had. In a second prosecution for arson, the social "issue" had so overwhelmed the facts that a change of venue was necessitated and an acquittal by reason of insanity resulted.

The issue was the battered women syndrome (BWS). In a **1977** book entitled *Battered Women,* Del Martin posited that approximately twenty million American women suffer from routine physical and psychological abuse at the hands of their husbands. Members of this group fear their husbands and the consequences of reporting them. Typically, those who do report spousal abuse encounter a male-denominated law enforcement establishment which, subtly or overtly, informs the victim that she somehow had brought the violence on herself. Consequently, the battered woman is relegated to a life of "silent screaming" and future abuse by a husband to whom she may be tied by financial, psychological, or societal pressures. In **1977,** at the time of the Patri homicide, the issue had received little attention in governmental and law enforcement circles.

The *Patri* case was to change all that. **A** curious alliance of the brothers of the victim and the accused imposed upon Jennifer Patri to retain the services of a Milwaukee attorney who, well-briefed on BWS, embarked upon a course designed to make *State v. Patri* the *Brown v. Board of Education* for the battered woman. He saw in the case enough of a skeleton of a BWS issue that he set about directing an investigator to develop evidence of every vice of the victim, while simultaneously enlisting the media and feminist groups in his cause.

News conferences and interviews with attorney and client alike abounded, all bemoaning the lifelong deprivations and abuse of Jennifer Patri and proclaiming Robert Patri to have been the devil incarnate.

The ploy worked. Activists and respected news media alike uncritically adopted the *Patri* case as a *cause celebrere.* That Jennifer Patri had been a battered woman was a given; only the legal consequences of that status in a murder prosecution were in issue.

Among those who unquestioningly joined the crusade and declined to be confused by the facts was Steven Englund. Following the murder trial, he signed on enthusiastically as scribe for the cause. The original proposed title of this book was *Monkey: The Ordeal of Jennifer Patri,* drawn from her attorney's description of the accused's role in the victim's "sexual circus." His initial interviews upon receiving the assignment were singularly favorable to the accused. Mr. Englund was a true believer.

Then, in the hiatus between the trials, he donned that cap of the skeptical academic and set to work. Slowly and inexoribly, the author discovered that the testimony, particularly that of the accused, at the murder trial and the stories fed the media and committed fellow travelers differed in vast degrees from other available evidence. In the end, Mr. Englund cast serious doubt upon whether the heroine of the BWS case had indeed been battered at all.

For example: *Trial Testimony:* The victim once beat his wife so violently that she miscarried. *Counterpoint:* Mrs. Patri had told a relative that she had performed an abortion on herself with a coathanger. She hemmoraged so badly that her husband, who walked in on the act, had to take her to the hospital. Mrs. Patri refused Mr. Englund access to her medical records to confirm or deny either version.

Trial Testimony: Mrs. Patri first shot her husband as he converged on her with a knife. *Counterpoint:* In her confessions and earliest self-serving interviews, she claimed to have shot her husband because he had "upset me so much I just decided I wans't going to take it anymore."

Trial Testimony: The victim had sexually molested his niece. *Counterpoint:* In a bedside desposition (she was about to undergo a Caesarian section), the niece claimed that no such thing took place.

Trial Testimony: Mrs. Patri shot her husband while she stood at the foot of a staircase and he was on the staircase above her. *Counterpoint:* Forensic testimony and the location of blood and dental shards

at the crime scene indicated that the entry wound came from above, such that he would have been on the stairs and she at the top of the staircase.

Finally, no one, save the accused, could establish a single incident of battery. Whatever bruises had been observed, mainly on her arms, were wholly consistent with the hard farm labor with which the accused was concededly associated. In any event, the victim lived apart from his wife for six months prior to the homicide. That these contradictions were not fully developed at trial can be laid to a combination of the prosecutor's reticience, the defense counsel's aggressiveness, and the unflappable demeanor of the accused as witness.

Man Slaughter chronicles in some detail both the murder and arson trials. Those seeking pointers from the performance of counsel will find some. More often, however, will be found instances of poor presentation of the government's case and ineffectual cross-examination of defense witnesses. From the defense counsel, the attorney is provided various ways to antagonize the court, cast personal barbs at opposing counsel, violate **ABA** standards concerning pretrial publicity, and indict a town for persecuting an accused who, prior to being a cast in the mold of the classic battered woman, had appeared to no one to be either classic or battered. It is unfortunate from an academic perspective, however, that, in the end, the defense tactics worked.

The author recounts the arson trial as a spectator. In evaluating the strengths and weaknesses of the abundant psychiatric and psychological testimony presented, Mr. Englund becomes a psychologist himself and observes that, whatever the validity of their diagnoses, all contestants in the battle of the experts testified from a skewed perspective. The government's experts were as obsessed with attaining a conviction as the defense experts were with "the cause." Mr. Englund also debriefed many jurors from both trials and revealed how compromise and emotion played a larger role in the respective verdicts than did the judge's instructions.

A main lesson to be drawn from *Man Slaughter* is that the same type of mass hysteria which may damn the innocent may also lionize the guilty. Noble causes, of which the plight of battered women certainly is one, occasionally choose the wrong instance in which to unfurl their banner and begin the march. Mr. Englund convincingly argues that the Parti cause proceeded from such a faulty premise. The journalists and activists among us should take note.

CONVERSATIONS WITH THE ENEMY: THE STORY OF PFC ROBERT GARWOOD*

Winston Groom and Duncan Spencer, *Conservations With the Enemy: The Story of PFC Robert Garwood.* New York, New York: G.P. Putnam's Sons, 1983. Pages: 411. Publisher's address: G.P. Putnam's Sons, 200 Madison Avenue, New York, New York 10016.

*Reviewed by Captain Stephen J. Kaczynski***

He remained silent.

It was his right. On trial upon charges that he had collaborated with the enemy, that he had informed on his fellow American prisoners of war, and that he had maltreated, assaulted, another American while in captivity, he stood mute. At his court-martial, government witnesses, former POWs, testified that he had been armed guard of American prisoners, that he had boasted of holding rank equivalent with a first lieutenant in the North Vietnamese forces, and that he had become "one of them,'' a "white Cong." In the face of all this, however, he remained silent; it was his right.

Now, however, we have a book. As the title suggests, it is the story of PFC Robert Garwood, the last American to return from Vietnam. The United States departed Vietnam in 1973; Garwood returned in 1979. Where had he been? What had he done both during and after the war? The answers, provided by this book are less than satisfactory.

Always remember, this is Garwood's story. He was a short-timer who had never seen combat when captured by the Viet Cong. A driver, who had accepted a particular mission because it looked like there might be some "sham time" involved with it. Instead, he found himself surrounded by the enemy, shot and killed one of them, and was himself wounded in the affray. Marched from village to village and placed on public display in each, he became for the VC a symbol of American vulnerability. Rewarded with torture for two unsuccessful escape attempts, both, of course, under heroically adverse conditions, he learned from a veteran American captain how to survive in Vietnamese prison camps. He learned the language,

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**The reviewer's biographical data are listed beneath the book review of *Fatal Vision.*

learned to eat most anything, and signed most anything that the enemy wanted him to sign; it would at least let his countrymen know that he was alive.

Always, there was propaganda. He and his comrades were harangued about American imperialism, the Saigon puppet regime, and the humanitarianism of the VC treatment of them. After all, they were war criminals. To the Vietnamese, it was as if an intruder had come into their home and killed their families. The Americans were no better.

Yet, the enemy found "Bobby" Garwood to be "progressive" and afforded him the opportunity to be released. We will never know whether they were serious or not. Garwood declined the offer, deciding instead to stay with the other Americans in the jungle camp.

Eventually, Garwood's American mentor in the ways of survival died. Gone also at the hands of the American imperialists during the Tet Offensive was the Vietnamese translator for the camp. The enemy then looked to Garwood as an interpretor. From this point forward, Garwood was irretrievably set apart from the other Americans. He lived apart, ate apart, and, except for their evening communal listening to "Hanoi Hannah" on the camp radio, stayed apart from the others, whom he increasingly began to distrust and then hold in contempt. Needless to say, the feelings were entirely mutual. The holders of those emotions would later become the witnesses against him at his court-martial.

For some reason, when the war had ended and almost seven hundred prisoners of war had been returned to the United States, the North Vietnamese retained Garwood. He was told: "Vietnam is not so stupid as to release all prisoners.. . What would prevent the U.S. from coming back and bombing Hanoi again?". Indeed, he saw and was told that French prisoners, twenty years after the fall of Dien Bien Phu, were still held hostage. **As** he had learned in the prison camps, the Vietnamese never threw anything away.

By cunning, bribery, and what might be termed American ingenuity, Garwood managed to gain permission to travel to Hanoi to expedite the acquisition of replacement parts for the motor pool that he was operating in his post-war prison camp. Once there, he twice managed to slip notes to English-speaking foreigners concerning his situation. One note failed to bring results, the other made its way to the United States government and earned his repatriation to America.

The homecoming was not a joyous one. For years, since the debrief-

ing of returning POWs in **1973,** the Marine Corps had known of Garwood's suspected collaboration with the enemy. Other services had had information on others as well. All of those cases were dropped; in 1979, Garwood's was not.

After a lengthy pretrial investigation, a revolving door of defense counsel, and a barrage of pretrial motions, the court-martial commenced. The former prisoners testified; Garwood did not. The defense presented was two-fold, perhaps three-fold: I didn't do what they said (if I carried a rifle, you can't prove that it was operable or loaded); if I collaborated, so did everybody else to some extent after torture; and if I did do it, I didn't appreciate the criminality of my activity due to the "coercive persuasion" of my captivity. Nonetheless, he was convicted of five specifications, alleging interpreting during political indoctrination classes, informing the enemy of the complaints of the American prisoners, interrogating American prisoners, inviting Americans to "crossover" to the enemy, serving as a guard, and assaulting an American POW. The sentence: reduction, total forfeitures, and a dishonorable discharge; Garwood had been in prison long enough.

That, in sum, is Garwood's story. It is unsatisfying. Throughout the book, the North Vietnamese and Viet Cong evidence a singular interest in Garwood. Why, if not because he had become "one of them'' and could be put to effective use? Why was Garwood alone retained after the war was over on orders "from a higher headquarters"? What of the sworn testimony of the government witnesses? It was unrebutted. Were the mutually corroborating stories born of contempt for Garwood's special treatment in the prison camps, of a desire for revenge following his return, or through a misunderstanding of what they had seen a decade before? Garwood would explain that it was a combination of the three. Yet the explanation comes belatedly and is subject only to the cross-examination of history.

Read with this perspective, the book provides an insight into what happened to American troops after they fell into enemy hands. To those who survived, and particularly to those who survived unbowed, the reader will accord an even greater respect than that previously held. While the book focuses in general on particular events, particular days, in the lives of the POWs, it should be remembered that these men endured *years* of this treatment. The court-martial termed Garwood's activitiy "dishonorable;" Garwood obviously does not see it *so.* But the testimony of those who spoke against him, and **of** those who could not testify for or against him, emanated from American heroes. In this vein, *Conversations With the Enemy* serves a purpose perhaps unintended by the authors or the subject: it heightens an

awareness of what went on beyond the television camera in the jungles of Vietnam.

WITHOUT HONOR: DEFEAT IN VIETNAM AND CAMBODIA*

Arnold R. Isaacs, *Without Honor: Defeat in Vietnam and Cambodia.* Baltimore, Maryland: The Johns Hopkins University Press, 1983. Pages: xv, 559. Illustrations, Notes, Bibliography, Index. Price: $19.95. Publisher's address: The Johns Hopkins University Press, Baltimore, Maryland 21218.

*Reviewed by Captain Stephen J. Kaczynski***

The American experience in Vietnam has now been over in excess of a decade. At 0800 Saigon time, 28 January 1973, the ceasefire mandated by the Paris peace accords was to have taken effect. Thereafter, following a congressionally-aborted bombing campaign in Cambodia and "Operation Homecoming," the return of six hundred American prisoners of war, the United States washed its hands of Southeast Asia, only to later watch South Vietnam fall to the armies of the North and Cambodia overrun by the murderous Khmer Rouge. By 1976, those who had ridiculed the "domino theory" had been, unfortunately and tragically, proven wrong; a communist hegemony currently exists over Asian nations for the freedom of which tens of thousands of Americans had given their lives. In *Without Honor: Defeat in Vietnam and Cambodia,* Arnold Isaacs, a correspondent with the *Baltimore Sun,* recounts the unfolding of events, from the Paris accords to the fall of Saigon, that led to this sad state of Asian affairs.

By 1972, the American aim in Vietnam, first articulated as a campaign slogan and later as a description of the Paris accords, devolved to one of "peace with honor." **As** the title of this book implies, the author views the situation differently. In Cambodia and Vietnam, honor is one element that he finds lacking on the part of each party to the conflict.

In 1972, Richard Nixon was to have his way—at least with the enemy. Faced with an offensive of major proportions against the South, he ordered a renewed bombing of the North and a mining of Hanoi and Haiphong harbors. The action was effective and protests from Hanoi's patrons, the Soviet Union and People's Republic of

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**The reviewer's biographical data are listed beneath the book review of *Fatal Vision.*

China, were noticably low key. In order to pursue normalized — and profitable — relations with the United States, both nations, enamored with detente, urged the North Vietnamese to seriously negotiate an end to the war. Consequently, by October **1972,** the substance of an agreement had been reached. On the American side, only the acquiescence of their South Vietnamese ally, through the person of President Nguyen Van Thieu, had to be obtained.

Thieu, however, recognizing the potentially fatal danger of leaving North Vietnamese troops in place in the South, could not be moved. It is at this point that the author depicts the Americans in general and Henry Kissinger in particular in the most unflattering terms. To the North Vietnamese, Kissinger double-dealt, refusing to sign the completed agreement on a variety of agreed-upon dates in October **1972.** To the South Vietnamese, Kissinger and Nixon threatened a cutoff of American economic and military aid if Thieu remained an obstacle to peace. Were the North Vietnamese to breach the agreement, Thieu was told, American reintervention would enforce the treaty. To the American public, Kissinger dissembled, repeatedly asserting that it was the North, not South, Vietnamese who were impeding final agreement. To the author, "Henry Kissinger was a man who wore so many masks it was impossible to tell when, if ever, his real face was showing."

As the agreement neared, then took effect, bad faith became evident on the part of both Vietnams. Prior to the effective date of the accords, so technically legal, the North Vietnamese and Viet Cong sought to control as many areas as possible, including many that had never been under communist control. After the effective date, so technically illegal, the South Vietnamese retook many of those areas. More significantly, the author relates the intractable opposition of Thieu to the agreement. Although acquiescing to it in the face of American threats and a massive infusion of American armaments, Thieu never doubted that the treaty would fail; the documented South Vietnamese violations of the ceasefire, apparently far outnumbering those of the communists, reflected this distrust.

The author describes the "post-war" government of South Vietnam with thinly veiled contempt. Bribery and corruption were rampant, repression was arbitrary, and, most significantly, the military was at least undisciplined and occasionally criminal. The latter theme continued through the description of the mass flight in the face of North Vietnamese arms in **1975.** Firing on refugees, pushing to the head of the line for evacuation, and stealing food from children during the evacuations, the South Vietnamese soldier is depicted as both cowardly in the face of the enemy and savage toward their own people.

Nor do the Americans escape unscathed. In Laos and Cambodia, the American government is accused of viewing those two nations' troubles solely in terms of the Vietnam war effort. After the Paris accords, which had mandated a ceasefire in Laos, American officials are accused of so coveting peace in Laos that they forced the pro-Western Laotian government to accept an arrangement that virtually guaranteed a takeover by the communist Pathet Lao. In Cambodia, the 1970 incursion and 1973 bombing, the objectives of which were cast in terms of the South Vietnamese conflict, are claimed to have so upset the balance of Cambodian life that a theretofore weak Khmer Rouge was able within a few years to overrun the country. In the former case, the Americans acknowledged acommitment, but did nothing; in the latter case, the Americans acknowledged neither a commitment nor a responsibility.

In South Vietnam, however, the betrayal was most vivid. Led on by the unworldly expectations of President Thieu and U.S. Ambassador Graham Martin, by assurances of continued American support, and, during the evacuation itself, by promises of American officials that they would not be abandoned, the Vietnamese people were the ones upon which the realization of the end fell most heavily. As the last helicopter departed the roof of the American embassy, many realized, perhaps for the first time, that the war in which uncountable numbers of relatives had died was finally over. Those deaths, it seemed, were in vain.

The author candidly admits that much of the foregoing is undoubtedly tainted by his personal experiences with the people of Vietnam and Cambodia. Indeed, he was among the evacuees from both Phnom Phen and Saigon. Where based upon his personal accounts, the story is lucid and credible. Less convincing are his discourses upon the options of American foreign policy-makers during the Vietnam era. For example, he repeatedly cites a lack of American pressure on Thieu to try to make the ceasefire work as a cause of its collapse. This reasoning seriously underestimates the determination of the North Vietnamese. In this regard, whatever his shortcomings, Thieu correctly estimated the value of the Paris agreement; whatever it was, it was not peace.

Foreign policy and intrigues aside, however, *Without Honor* chronicles in detail a period of history which most Americans would rather forget. Yet, at a time in which every American military commitment of any magnitude is measured against a scale of whether it will become "another Vietnam," it might be useful to reflect upon what happened to Vietnam after we left.

ISLAM AND POWER*

Alexander S. Cusdi and Ali E. Hillal Dessouki, editors, *Islam and Power.* Baltimore, Maryland: The Johns Hop'kins University Press, Baltimore, Maryland 21218, 1981. Pages: 204. Price $20.00. Index.

Reviewed by *Captain Murk D. Welton***

Religion has always provided the impetus for social and political change in the Islamic world. At present, the relationship between religion, politics, and social development is readily apparent;' at other times, the nexus has been less obvious. The importance of understanding the role of religion, however, has never been more important than now as changes in the Islamic world have increasingly widespread political, economic, and military consequences for the rest of the world.

The essays in this book offer different perspectives on the function of religion in Islamic society. They vary widely in scope, covering esoteric topics like the growth and decline of Murji'ism in the century following the Prophet's death, as well as contemporary issues such as the Ayatollah Khomeini's concept of Islamic government. Common threads do run through these essays, though, which ultimately give the reader a better understanding of the religious dynamics of the Islamic world.

The editors' introduction is really a distinct essay on the use of Islam as a political instrument, but it presents the major themes elaborated upon in the subsequent articles. Relying on the premise

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'Recent manifestations **of** conflict in the Islamic world, not mentioned in the book but which illustrate some of the themes of the authors, include the resistance of Afghan fighters to the Soviet occupation of their country, the assasintation of President Anwar el-Sadat of Egypt by Moslem extremists, and the occupation of the Holy Square in Mecca, Saudi Arabia by a religious fundamentalist group.

that Islam is both a religion and a social order whose laws control the public as well as the private lives of most Moslems, the essay examines the effect of rapid urbanization, economic growth, and western ideologies on the traditional patterns of Islamic society. The authors maintain the widespread discomfort with the changes brought about by these forces has led to a search for more stable and indigenous doctrines and institutions. Inevitably, this search leads back to the set of laws and moral precepts (the *shari'a)* established by the Prophet for the first Islamic community (the first *umma).* The *shari'a* may be interpreted and applied in later times by the recognized religious leaders of the community (the *'ulama).* But the only legitimate goal of this effort is to emulate the percieved historican ideal of the first *umma.*

The influence of the *'ulama* thus extends beyond religious affairs into the political, economic, and social activities of the community. Separation of church and state is a concept inconsistent with Islam; the purpose of the state is to maintain and protect the religious community. The *'ulama* may not directly conduct the daily activities of government, but, in times of stress or change, the *'ulama* seeks to reorient the community toward the model of the first *umma* and to assume, if necessary, the political authority necessary for this task.

Three essays in this collection expand upon the critical role of historical analysis in shaping current perceptions of the first *umma.* Michael Cook's "Activism and Quietism in Islam: The Case of the Early Murji'a" argues that, contrary to the prevailing view among Islamic scholars, early Murji'ism was an activist rather than a passive movement.[2] While much of the essay considers recent academic research into the history of the movement, the author's conclusions on the broader topic of activism in early Islam demonstrate that periods of Islamic "resurgance" are not a recent phenomenon. Islam has in fact always been a highly political religion. Murji'ism, like many later intellectual movements in the Islamic world, suffered from the repression of military conquest and occupation of areas where the movement had its strongest roots. It subsequently lost its vigor and influence. Secular political and military control have never displaced religious authority and influence, however, and Murji'ism was soon replaced by other, equally vigorous religious movements.

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[2]The central doctrine in Murji'ism holds that faith consists of belief to the execution of works. This varies from the expansionary tendency of traditional Islam, and it was seen as an obstacle to the rapid growth of Islam through military conquest in the century following the Prophet's death. Muji'ism was defeated as a political movement at the Battle of Jamajim in the year **82** (A.D. **704).**

Ann Lambton reaches a similar conclusion on the politically active nature of Islam in "Changing Concepts of Authority in the Late Ninth/Fifteenth and Early Tenth/Sixteenth Centuries." Her examination of a juristic work, the *Suluk al-muluk* of Abu 'l Khayer Fadl Allah b. Ruzbihan al-Khunji al-Isfahan,[3] focuses on the concern for the religious content of politics among the leading political scientists during a time of decline and turmoil in the Islamic world. Persians are considered to be among the most pragmatic of Moslems, and they occupied most of the top administrative positions in government during the classical Islamic era. The author's revelation of the paramount concern for fundamental religious values in the work of a leading Persian politician and jurist indicates the extent to which Islam was relied upon for guidance in all aspects of social and political life during difficult times.

The historical perspective is summarized in Thomas Naff's essay, "Toward a Muslim Theory of History." In the Islamic view, religion and history are kindred disciplines; each seeks to understand the *shari'a* as first conceived and implemented by the Prophet and to apply it to current situations. Conflict may arise between those who seek innovative interpretations, often secular leaders striving for personal power or, more recently, modernization, and religious fundamentalists who rely on traditional doctrine. Resolution of this conflict is never complete, but the traditional views of the *'ulama* have usually prevailed. Such a result seems logical once the historical roots of Islam are understood.

The remaining essays analyze the role of Islam in contemporary settings, particularly in the Islamic states. The political nature of Islam and the traditional orientation of the religion, with its reliance on historical analysis for practical guidance to present problems, is evident in these studies. In "Religious Resistance and State Power in Algeria." Jean-Claude Vatin reviews the various resistance movements against foreign domination of that country since the early nineteenth century. He finds that each movement was led by the *'ulama* who established unauthorized but flourishing cultural circles, youth organizations, newspapers, private schools, and other associations. The common concern of these groups was religious ideology, the Arabic language, which is an important component of the faith, and national identity. Since independence, the state authorities have successfully incorporated these three tenets of the resistance into a "state Islam." Nevertheless, the state faces some

[3] The title can be translated as *A Mirror for Princes*. The author was born in Shiraz, Persia and, like most Persian intellectuals of the time, wrote in both Arabic and Farsi.

opposition from religious conservatives and the power of the *'ulama* remains a potential check against a hasty change and modernization of the country.

An Islamic resurgance is still unlikely in that portion of Africa south of the Sahara, according to Donal Cruise O'Brien. In "Islam and Power in Black Africa," he discusses the reasons for the relatively apolitical development of Islam in that region. The late spread of the religion to the area, the diverse colonial regimes, and the nonacceptance of Arabic as a universal language have retarded the political development of the faith. In Egypt, however, Islam has become the dominant political force in the country. "The Resurgance of Islamic Organisations in Egypt: An Interpretation," by Ali E. Hillal Dessouki, cites the moral confusion and the political instability of the past thirty years as the main reasons for the revival of fundamentalist Islamic groups, particularly in the universities. Some of these groups are government sanctioned, but many are extremist organizations opposed to virtually any form of secular state authority. Developments since this article, notably the assassination of President Sadat by one of these extremist groups, attest to the accuracy of Dessouki's description of the highly politicized form of Islamic resurgance in Egypt.

Two of the most interesting essays concern the political power of Islam in Iran and the Soviet Union. Abbas Kelidar discusses "Ayatollah Khomeini's Concept of Islamic Government," which is based on Khomeini's own work, *Islamic* ***Government.*** The Shi'a sect of Islam, to which the great majority of Iranians belong, has always been more activist than the Sunn'i sect, to which the majority of Arabs adhere. This tradition, based in part upon Shi's doctrine and in part upon the historical and frequently violent conflict between the Persians and the Arabs, maintains that Islamic jurists must lead a government based solely upon the *Shari'a.* There is no place in the Islamic state for secular leadership. For most Sunn'i Moslems, secular leadership is compatible with Islam as long as the guidance of the *'ulama* is sought to insure that the principles of the *shari'a* are followed. Indeed, many Iranians perceived an opportunity to westernize their country by adopting this view and a strong state structure was developed during the nineteenth and early twentieth centuries, culminating in the founding of the Pahlavi dynasty.

Resistance to this trend was widespread, however, and, when the economic and social dislocations became acute in Iran in the 1970s,

the Shi'a religious leaders[4] seized power. Assumption of political authority by the *'ulama,* according to Khomeini, is necessary to insure that the original concepts of Islamic law, religion and government, as practiced by the Prophet's first *umma,* are fully integrated into the present-day *umma* of all Moslems. Expansion of the Iranian "revolution" is therefore necessary and the concerns of neighboring Arab states, with secular governments deemed by Khomeini to be incompatible with a true Islamic government, seem well-founded.

Khomeini's vision of Islamic government is not anti-western *per se;* it simply considers western values to be irrelevant to Moslems; they should be elimintated wherever they intrude into the activities of the Islamic community. In the Soviet Union, however, the Islamic revival is inherently anti-communist. Marxist ideology sees social and political development as an inevitable progression from an imperfect, class-structured past towards a perfect future communist society. The Moslem, on the other hand, views society in a decline from the perfect model of the first *umma.* Political effort in Marxism is directed at creating a new social order; political effort in Islam seeks to restore the old ideal.

Support for this analysis can be derived from Alexandre Bennigsen's essay, "Official Islam and Sufi Brotherhoods in the Soviet Union Today." The author believes that the fifty million Moslems living in the Soviet Union have successfully resisted assimilation into the prescribed state ideology and that a "parallel Islam" exists alongside the repressed official Islamic organization. The most popular expression of "parallel Islam," the Sufi brotherhoods, are virulently anti-communist, anti-Soviet, and conservative. Government efforts to contain the growth of the Sufi brotherhoods have failed. Soon one out of every three Soviet citizens will be a Moslem; this demographic trend will significantly impact on future Soviet domestic and foreign policy.

The two remaining essays summarize many of the points dealt with in the other works. "The Ideologisation of Islam in the Contemporary Muslim World," by Ali Merad, notes that many secular governments seek to legitimize their power by exalting "authentic Islamic values'' over those of the West. Slogans are a conspicuous

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[4] Religious organization in Islam is highly informal compared to that **of** Christian churches. There is somewhat more formal structure in the Shi'a sect than in the Sunn'i sect, however, with the *mullahs* representing the lowest level of religious authority and the *imams* the highest. Appointment to a position **of** religious leadership is by popular concensus of the *umma* rather than by formal decree. The Ayatollah Khomeini is called "Imam" by some Iranians today, but there is no widespread agreement that he has attained this rank.

feature in many Islamic states, and they invariably preach fundamental and traditional Islamic principles, regardless whether they claim to have "traditional" government (Saudi Arabia) or a radical socialist one (Libya).

P.J. Vatikiotis states in "Islamic Resurgence: A Critical View" that religious resurgances are a periodic feature of Islamic society. In the past, they have been generated by internal struggles over political power, intellectual movements, and outside threats. In the future, the rapid pace of modernization will create pressure on traditional values to a much greater extent than in the past. Episodes of Islamic resurgence and therefore likely to be more violent and disruptive than before. The need for understanding the sources and characteristics of islamic resurgence is clearly essential for Moslems and foreigners alike. The essays in this book make a significant contribution towards such understanding.

STRATEGIC WEAPONS: AN INTRODUCTION*

Norman Polmar, *Strategic Weapons:An Introduction.* New York, New York: National Society Information Center, Inc., 1982. Pages: viii, 126. Preface, Illustrations, Appendices. Publisher's address: National Strategy Information Center, Inc., 111 East 58th Street, New York, New York 10022.

Reviewed by *Major Craig P. Niederpreum***

> The develoment of strategic weapons—weapons of mass destruction that can strike an enemy's homeland—has continued in the nuclear era at a rapid pace, and continues today. The reasons for the development and for the evolution of specific weapons are complex issues.'

With these rather ominous words, Norman Polmar presents an overview of his new work on strategic weapons. Since the termination of World War II and the simultaneous commencement of the Cold War, strategic weapons have come to the forefront of military planning as well as international political concerns. In addition, the civilian population has become increasingly aware of the presence of these weapons while not fully understanding what they are and what they are capable of doing. Accordingly, individuals from all sectors of the population constantly seek answers to questions involving strategic arms. Mr. Polmar's book, a revised and updated version of a similar work he first published in 1975, fills this need to a certain extent.

The book is comprised of ten chapters, five appendices, and over sixty photographs. The appendices provide a comparative descriptive inventory of contemporary strategic bomber aircraft, intercontinental ballistic missiles, submarine launched ballistic missiles, strategic cruise missiles and strategic missile submarines. The pho-

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*The opinions and conclusions expressed in this book review, and in the **book** itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

**Judge Advocate General's Corps, United States Army. Currently assigned to the Litigation Division, Office of The Judge Advocate General, US. Army, 1983 to present. Formerly Chief, Legal Support Activity, Korea, 1980-82; Trial Defense Counsel, U.S. Army Trial Defense Service, Fort Dix Field Office, 1978-80; Administrative Law Officer, Office of the Staff Judge Advocate, Fort Dix, New Jersey. 1977-78. J.D., Western New England College School of Law, 1975; B.S., Canisius College, 1968. Completed 31st Judge Advocate Officer Graduate Course, 1982-83; Judge Advocate Officer Basic Course, 1977. Member of the bar of the Commonwealth of Massachusetts.

[1]N. Polmar, Strategic Weapons: An Introduction 111 (1982).

tos depict various weapons and delivery aircraft from both the United States and the Soviet Union. The book begins with the detonation of the first nuclear weapon in 1945 by the United States at White Sands Missile Range, New Mexico and traces the historical development of strategic weapons until 1982.

The author is an analyst and editor who specializes in Soviet and United States naval and strategic matters. Over the past fifteen years, he has participated in or directed major studies for various agencies of the Department of Defense as well as private defense related firms. This book was funded by the National Strategy Information Center, a "non-partisan institution to encourage civil military partnership" and is part of a series of publications on defense related matters.[2]

The first chapter presents a capsulized history of nuclear weapons, focusing only on the United States and the Soviet Union. The next two chapters deal with the monopoly which the United States held in this area from the first test-firing in 1945 until 1949. In 1949, the Soviet Union infringed on this monopoly and exploded their first "fission device." This event, the author indicates, while a "milestone on the Soviet path to becoming a superpower," still did not cause the United States to relinquish its superiority in the nuclear arena. In chapter four, the author discusses the rapid development of the Soviet nuclear capabilities following 1949. Unlike the United States, which utilized long-range aircraft such as the B-29 to carry its strategic weapons, the Soviet leadership under Nikita Khrushchev followed another course. Mr. Polmar indicates that the Soviet nuclear capability emphasized the development and ultimate deployment of intercontinental ballistic missiles (ICBM). This difference from United States policy was caused, Polmar submits, by the great physical distance between the Soviet Union and its "principal, most dangerous enemy" which was out of range of Soviet aircraft, a lack of a strategic bomber "tradition", and a Russian ability and propensity to examine alternatives, rather than accept obvious, solutions. Once this policy was set in motion, it appeared clear that the Soviet Union was embarked on a nuclear missile effort far exceeding that envisioned by the United States.

In the next chapter, the author discusses the Cuban missile crisis and its impact upon strategic weapons. He states that notwithstanding previous "bellicose pronouncements" by the Soviet Union concerning its own nuclear weaponry, Soviet administration and

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[2] *Id.* at 123. This agency lists sixty-four titles, all of which are related to national defense or national security.

production were unable to keep pace with the rapidly developing strategic weapons systems of this country. The attempted introduction of medium range ballistic missiles ninety miles from the United States was Khrushchev's effort to enhance the Soviet position in the arms race. The subsequent Soviet failure was a major setback. This setback, Polmar notes, was only temporary.

During the 1960s, the United States continued its strategic superiority. The Soviet Union, in response to the Cuban matter and the Kennedy administration's rapid buildup of this weaponry, began to revise its defense programs to include land and sea-based ballistic missiles. Mr. Polmar notes that, during this decade, the United States developed "the strategic TRIAD." This concept was composed of land-based ICBMs, manned bombers, and Polaris strategic loaded submarines.

The author notes that the entire philosophy of strategic weapons began to change. Both superpowers, realizing the amount of destruction that each side could inflict, began to rethink their policies. Two new aspects of strategic weaponry emerged: the ballistic missile defense and multiple warheads. These systems, Polmar states, would become "dominant factors in strategic weapons development." As a result of this activity, the superiority once held by the United States, became greatly diminished during the 1970s.

While the primary coverage in this book concerns the history of the United States and Soviet efforts in strategic arms, one chapter is devoted to the nuclear capabilities of other nations. Mr. Polmar presents a concise and extremely informative historical analysis of the strategic weapons attainment of Great Britain (first nuclear device produced in 1952), France (1960), People's Republic of China (1964), and India (1974). The author surmises that nuclear capabilities are also possessed by Israel.

Chapters eight and nine are an extremely detailed analysis of the present and Polmars' predictions of the future strategic weaponry of the world's two superpowers. Relying on his expertise in United States and Soviet naval and strategic matters, the author indicates in these sections that the Soviet leadership is again giving renewed emphasis to weapons deployment, research, and development. This situation, he warns, coupled with the delays in American strategic weapons development and deployment could quite possibly lead to Soviet strategic superiority in the 1980s.

This book provides a good nontechnical outline of the history of strategic weapons development, and excellent inventory of presently-existing strategic weapons hardware, and a well reasoned

projection of possible future trends. The work, however, contains some shortcomings. Mr. Polmar has compiled an enormous amount of factual and statistical data. While this is indicative of extensive research on his part, the quantity of this type of information frequently overwhelms the reader. The book also employs the jargon of the strategic weapons community. Although there is a well-prepared glossary of terms, *i.e.*, CEP (Circular Error Probable), MPS (Multiple Protective Structures) and ULMS (Underwater Long-range Missile System), much of the text is filled with acronyms which disrupt the flow of the material. Further, while the book is not incomprehensively scientific in its discussion of the weapons systems, the sheer numbers of systems discussed together with their difficult terminology adds to the reader's confusion.

In sum, this book is a good primer for anyone who desires to be exposed to this unique vocabulary as well as for one to become aware of the development, inventory, and destructive capability of strategic weapons worldwide.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review.* With volume *80,* the *Review* began adding short discriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review.*

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and in Section 111, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section 11.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review.* They do not necessarily reflect the view of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

11. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Addlestone, David F., John Koslowske, Lewis M. Milford, Keith D. Snyder, Barton F. Stichman, and the National Veterans Law Center of the Washington College of Law, *Military Discharge Upgrading and Introduction to VeteransAdministration Law: A Practice Manual* (No. 1).

Alexiev, Alexander, A. Ross Johnson, and Robert W. Dean, *East European Military Establishments: The Warsaw Pact Northern Tier* (No. 10).

Bergerson, Frederic A., *The Army Gets an Air Force: Tactics of Insurgent Bureaucratic Politics* **(No. 2).**

Dean, Robert W., A. Ross Johnson, and Alexander Alexiev, *East European Military Establishments: The Warsaw Pact Northern Tier* (No. **10).**

Douglas, William O., *Go East, Young Man: The Early Years* (No. **3)**

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Hartigan, Richard Shelly, *Lieber's Code & the Law of War* (No. 6).

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Lehman, John F., and Seymour Weiss, *Beyond the SALT II Failure* (No. **13).**

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Levie, Howard *S., The Status of Gibraltar* (No. **14).**

Liska, George, *Russia and World Order; Strategic Choices & the Laws of Power in History* (No. 15).

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111. TITLES NOTED

Apartheid: The United Nations Peaceful Change in South Africa, *by Ozdemir A. Ozgur* (No. *21).*

Arms Race: The Political Economy of Military Growth, The, *by Miroslav Ninic* (No. *18).*

Army Gets an Air Force: Tactics of Insurgent Bureaucratic Politics, The, *by Frederick* **A.** *Bergerson* (No. *2).*

Beyond the SALT II Failure, *by John F. Lehman and Seymour Weiss (No. 13).*

Clearing the Air: Reforming the Clean Air Act, *by Lester B. Lave and Gilbert S. Omenn* (No. *12).*

Criminal Justice System and Women, The, *by Barbara Raffel Price and Natalie J.* ***Sokoloff*** *(eds.) (No. 22).*

Earl Warren: A Public Life, *by* G. *Edward White* (No. *27).*

East European Military Establishments: The Warsaw Pact Northern Tier, *by Robert W. Dean,* **A.** *Ross Johnson, and Alexander Alexiev* (No. *10).*

Forgotten Victim: a History of the Civilian, The, *by Richard Shelly Hartigan* (No. *5).*

Future of Conflict in the 1980s, The, *by William J. Taylor, Jr. and Steven* **A.** *Maarranen (No. 26).*

George Washington and the Law, *by George Washington Nordham (No. 19).*

Go East, Young Man: The Early Years, *by William* **O.** *Douglas* (No. **3).**

"How Can You Defend Those People?" The Making of a Criminal Lawyer, *by James S. Kunen (No. 11).*

How to Register a Trademark; Protect Yourself Before You Lose Your Priceless Trademark, *by Walter E. Hurst and Fred Wossner* (No **7).**

Inside the Warren Court, *1953-1969, by Bernard Schwartz and Stephan Lesher* (No. *23).*

Justice At War: The Story of the Japanese American Internment Cases, *by Peter Irons. (No. 8).*

Lieber's Code and the Law of War, *by Richard Shelly Hartigan (No. 6).*

Military Discharge Upgrading and Introduction to Veterans Administration Law: A Practice Manual, *by David F. Addlestone, John Koslowske, Lewis M. Milford, Keith D. Snyder, Barton F. Stichman, and the National Veterans Law Center of the Washington College of Law* (No 1).

New International Status of Civil Defense, *by Dr. Bosco Jaklovljevic* (No 9).

Nuclear Disengagement in Europe, *by Sverre Lodgarrd and Marek Thee (eds.)* (No. 16).

Of Murder and Madness: A True Story of Insanity and the Law, *by Gerry Spence* (No. 24).

Revolutionary Women, by Marie Marmo Mullaney (No. 17).

Russia and World Order: Strategic Choices & the Laws of Power in History, *by George Liska* (No. 15).

Status of Gibraltar, The, *by Howard S. Levie* (No. 14).

United States Government Manual 1983/84, *by the General Services Administration, Office of the Federal Register, and the National Archives and Records Service* (No. 20).

U.S. Strategic Interests in Southwest Asia, *by Shirin Tahir-Kheli (ed.)* (No. 25).

Women in Law, *by Cynthia Fuchs Epstein* (No. 4).

IV. PUBLICATION NOTES

1. Addlestone, David F., John Kosloske, Lewis M. Milford, Keith K. Snyder, Barton F. Stichman, & the National Veterans Law Center of the Washington College of Law, *Military Discharge Upgrading and Introduction to Veterans Administration Law: A Practice Manual.* Washington, D.C.: Veterans Education Project, 1982. Pages: 700, Bibliography. Price: $45.00 (looseleaf). Publisher's address: The Veterans Education Project, Department M, P.O. Box 42130, Washington, D.C. 20015.

In the Foreword, the authors describe this book as "designed to be a desk reference and issue-oriented guide for attorneys, paralegals, veteran advocates, and veterans with discharge upgrading cases. It is an attempt to pull together, for the first time, all of the resources and recent developments in this area of the law." *Military Discharge Upgrading* meets this objective and more.

Divided into twenty-eight chapters, many of which are supplemented by helpful appendices, and rounded out by an extensive bibliography, this looseleaf handbook surveys the structure of the military itself and outlines the criminal and administrative discharge systems within the armed forces. Following such preliminary discussion, the book details the various grouds for discharge

from the military, to include alcohol abuse, homosexuality, unsuitability, misconduct, fraudulent enlistment, and discharge in lieu of court-martial with an eye toward providing the practitioner with grounds to attack discharges which have been based upon each. Armed with these grounds, the authors explain the routes of review and the potential stumbling blocks with each. The chapter on federal court litigation supplies sample petitions to the Court of Claims, a sample complaint for federal district court, and a list of cases dealing with military administrative discharges. Practice before and eligibility for benefits administered by the Veterans Administration are separately discussed. Here, too, the uninitiated attorney is led through the system in a manner which would enable him or her to competently prepare a case and formally litigate it in the proper forum.

The *Manual* is kept up-to-date by the *VeteransRights Newsletter,* a bimonthly publication which highlights current changes and developments in the law, such as the progress of the Agent Orange litigation and the status of defaults on home mortgages guaranteed by the Veterans Administration. This update service is available to individual veterans for $15.00 annually, to organizations for $30.00, to offices funded by the Legal Services Corporation for $20.00, and to incarcerated veterans for $7.50. Especially valuable are case notes and legislative and regulatory revisions which might be otherwise unknown to the attorney not regularly practicing in the area.

The organization under whose auspicies the *Handbook* and *Newsletter* are published, the Veterans Education Project, describes itself as "a nonprofit organization that serves as a national information clearinghouse for veterans. VEP specializes in the areas of discharge upgrading, Agent Orange, Stress Disorder, radiation and veterans benefits problems.'' In addition to the material noted above, the Project has a wealth of other literature, including "self-help" guides for veterans in need of assistance in seeking to alter the status under which they left the service. A listing is available through the address listed above.

2. Bergerson, Frederic **A.,** *The Army Gets an Air Force: Tactics* of *Insurgent Bureaucratic Politics.* Baltimore, Maryland: The Johns Hopkins University Press, 1982. Pages: xiii, 216. Appendices, Notes, Bibliography, Index, Tables. Price: $14.00. Publisher's address: The Johns Hopkins University Press, Baltimore, Maryland 21218.

By the early 1970s, it had flown thousands of major combat missions and had become the third largest aviation flotilla in the world, behind only the United States Air Force and that of the Soviet Union.

Was it the RAF? Israel? The People's Republic of China? No. the third largest air force in the world belonged to the United States Army.

How that branch of U.S. forces which is supposed to control the ground battlefield acquired an air capability after the establishment of the U.S. Air Force in 1947 is the subject of this book. As the title implies, the fight to obtain and retain this capability, which is largely comprised of rotary wing aircraft (the helicopter), was a bureaucratic guerilla war, waged against military and civilian superiors alike.

As early as the days of World War I, there were those, such as then-Major William "Billy" Mitchell, who envisioned two roles for the nascent United States air power. The role then being practiced was direct air support of forces on the ground. In this posture, the air force would "soften" the enemy opposition while it was in direct combat with U.S. forces. Billy Mitchell and others, however, foresaw a larger role for air power, that of strategic bombing of key enemy targets far removed from the front lines. Indeed, some of this latter group espoused the view that air power alone would win future wars. Needless to say, such talk did not please a military hierarchy bred in the infantry or cavalry. The strategic bombers remained a minority.

Following World War 11,with the lessons learned of Pearl Harbor, the Saint Lo carpet bombing after the Normandy invasion, and Hiroshima and Nagasaki, the order of prominence was sharply reversed. The leadership of the new U.S. Air Force saw the strategic mission as the main function of air power. The Army retained an air capability and used it during the Korean conflict, but remained subject to weight and mission limitations. It was in Korea, however, that the concept of an armed helicopter, at first with only a soldier with a rifle, began to develop.

By the Vietnam War, two trends appeared clear. First, the Air Force was not much interested in the helicopter. The USAF sought speed, state of the art technology, and safety for its pilots. Simultaneously, at the Army's Aviation and Infantry Schools, the idea of armed helicopters in close support of ground troops, the "Sky Cav," was tested, found successful, and further developed. By 1966, it was apparent that the nature of the Vietnam conflict and the perceived failure of the Air Force to provide adequate support for ground forces would require a large corps of armed helicopters in the Army's arsenal.

That the helicopter proved to be a valuable tool of combat, however, did not alone guarantee its continued existence. The political,

bureaucratic, and interservice infighting that surrounded the issue are detailed in the book. In any event, as a result of the efforts of both military and nonmilitary guerillas, the Army has an air force.

The author, who formerly served with the 1st Air Cavalry Division in Vietnam, is currently an associate professor of political science at Whittier College.

3. Douglas, William O., Go *East, Young Man: The Early Years.* New York: New York: Vintage Books, **1983.** Pages: xv, **463.** Index. Price **$7.95** (paperback). Publisher's address: Vintage Books, **201** East 50th Street, New York, New York 10022.

This volume is the paperback version of the first installment in the autobiography of the late Justice William O. Douglas. Covering his early years, education, and involvement with the New Deal of President Franklin D. Roosevelt, this book concludes with Justice Douglas' appointment to the United States Supreme Court in **1939.**

Born in Washington state, the young Douglas came to love the land. Prevailing over polio in his youth, he travelled the country and eventually completed his studies at Columbia University and became a faculty member at both Columbia and Yale. While at Yale, he became interested in politics, an involvement that led him to Washington, D.C. and the administration of President Roosevelt. The book chronicles the politicsof the New Deal and Justice Douglas' appointment as Chairman of the Securities and Exchange Commission.

The companion volume to this book, entitled *The Court Years,* will cover the years **1939** to **1975.**

4. Epstein, Cynthia Fuchs, *Women in Law.* New York: Doubleday & Company, Inc., **1983.** Pages: xiii, **438.** Price: **$10.95** (paperback). Publisher's address: Doubleday & Company, Inc., **245** Park Avenue, New York, N.Y. **10167.**

The author analyzes the changing role of women in the legal profession based on research conducted by the author from **1965** to **1980.** She describes and analyzes the ways in which women attorneys are treated by their colleagues and their families, the kinds of pressures they face, and the new and old ways they have dealt with the problems they face. She looks at the subtle and overt forms of discrimination faced by women attorneys as well as the ways in which women have benefited by being unique in a traditionally male profession.

The book is organized in seven main sections which are further divided into nineteen chapters. It additionally includes an appendix

explaining the methodology used in researching the topic, a conclusion, and an index. The author's analysis is well supported with statistics (largely collected by the author), focused interviews, and group studies.

The author discusses the background and occupational heritage of the women who have chosen law as a career, the law school experience, the types of legal practice that women are involved with, the ways in which women manage and cope in their practices, and the effect of their occupation on their private lives.

The author is a professor of sociology at Queens College and the Graduate Center, CUNY, and Co-director of the Program in Sex Roles and Social Change at Columbia University. Professor Epstein was awarded the **1982** American Bar Association's Certificate of Merit and the Annual Scribes Book Award for *Women in Law.*

5. Hartigan, Richard Shelly, *The Forgotten Victim: A History of the Civilian.* Chicago, Illinois: Precedent Publishing, Inc., **1982.** Pages: xi, **173.** Price: **$15.95.** Preface, Notes, Bibliography, Index. Publisher's address: Precedent Publishing, Inc., **520** North Michigan Avenue, Chicago, Illinois **60611.**

The author's central thesis of the book may be simply stated. The progression of the rules of warfare since the just war theories of the Middle Ages to **5** August **1945,** the day that the first atomic weapon was unleashed on Hiroshima, had been toward a discrimination amongst targets and combatants. Civilians had gradually attained an immunity from the deliberate perils of warfare. As St. Thomas Aquinas put it in *Summa theologica,* "it is in no way lawful to slay the innocent." To the advent of nuclear warfare and perhaps out of a drive for the very survival of the species, the laws and practice of war had been evolutionary in the direction of sparing the civilian the unnecessary destruction of warfare.

With modern times, however, the author senses a regression. Modern weapons, such as nuclear warheads, are incapable of discriminating between combatants and noncombatants. Moreover, even non-nuclear means of warfare, such as terrorism, seem intent upon inflicting unjury upon civilian targets, even when such injury can be avoided.

In *The Forgotten Victim: A History of the Civilian,* the author takes the reader along the course of the posited evolutionary development, from primitive warfare, through the just war and chivalry, to the practice in modern conflicts. In his conclusion, the author pleads that modern peoples and governments not let themselves be mastered by weapons systems, but rather that humanity seize control of its own

destiny. Too many wars have begun through ignorance or accident to be content to say that "it will never happen."

Richard Shelly Hartigan is an Associate of the Center for Biopolitical Research at Northern Illinois University and is a founding member of the Association for Politics and the Life Sciences.

6. Hartigan, Richard Shelly, *Lieber's Code & the Law of War*. Chicago, Illinois: Precedent Publishing, Inc., 1983. Pages: vii, 157. Price: $17.95. Introduction, Select Correspondence and Documents, Select Bibliography, Index. Publisher's address: Precedent Publishing, Inc., **520** North Michigan Avenue, Chicago, Illinois 60611.

The modern codification of the rules of warfare can be traced to a document innocuously entitled "General Orders, no. 100." Prepared by Dr. Francis Lieber in 1863as rules for the conduct of Union forces in the Civil War, the "Lieber Code" was copied by the governments of Prussia, France, and Great Britain and ultimately memorialized in principle in the Hague and Geneva Conventions.

In *Lieber's Code and the Law of War*, the author notes that, Dr. Lieber, concerned over the untrained citizen-soldiers who were populating the forces of both sides during the Civil War, undertook to publish a major codification of the means by which civilized nations should conduct hostilities. As his guides, Dr. Lieber utilized "[u]sage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization. . . ." The resulting pamphlet, issued by authority of the Secretary of War and over the signature of the Assistant Adjutant-General, indeed struck a blow for humanitarian warfare and the discrimination in targeting and treatment of noncombatants that has become everyday knowledge for the soldier of today.

The book virtually lets Dr. Lieber tell his story. After a brief introduction, the book reprints the text of Lieber's *Guerilla Parties Considered with Reference to the Laws and usages of War*, in which the proper treatment to be afforded those not an integral part of an organized military unit. Thereafter, the author reprints General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field." As an added perspective on the thoughts and motivations of Dr. Lieber, a final, lengthy section of the book recounts various correspondence and documentation which issued to and from Dr. Lieber in the Civil War era.

The author, Richard Shelly Hartigan, is an Associate of the Center for Biopolitical Research at Northern Illinois University and a founding member of the Association for Politics and the Life Sciences.

7. Hurst, Walter E. and Fred Woessner, *How to Register a Trademark; Protect Yourself Before You Lose Your Priceless Trademark,* Hollywood, California: Seven Arts Press, Inc., **1983.** Pages: viii, **132.** Illustrations, Bibliography, Index, Appendices, Samples. Price: **$20.00** (hardcover), **$10.00** (softcover). Publisher's address: Seven Arts Press, Inc., **6253** Hollywood Boulevard #1100, Hollywood, California **90028-0649.**

Among the most enigmatic and misunderstood areas of the law is the law of trademarks. The procedure for registering a trademark and the protections thereby gained, however, are important to the creative thinker or artist who has come upon a novel design to represent his or her trade.

How to Register Your Trademark; Protect Yourself Before You Lose Your Priceless Trademark is a step-by-step procedural guide through the mazes of the U.S. Patent and Trademark Office. Beginning with a glossary of terms which will be encountered along the way and continuing through the various forms and requirements which must be completed prior to successful trademark registration, the book leads the uninitiated through the process, to include cancellation of a registered trademark. The book is replete with illustrations, sample trademarks, and completed forms to make the burden of compliance with the law easier on the prospective registrant. Not claiming to be *the* substantive work in the field, the book provides an extensive bibliography for those interested in further research.

8. Irons, Peter, *Justice At War: The Story of the Japanese American Internment Cases.* New York, New York: Oxford University Press, **1983.** Pages: xiii, **407.** Sources, Notes, Index. Price: **$18.95.** Publisher's address: Oxford University Press, **200** Madison Avenue, New York, New York **10016.**

The U.S.S. Arizona Memorial rests atop the submerged hull of the *Arizona* just off of Ford Island in Pearl Harbor. The contours of the oblong structure sag in the middle to indicate the initial defeats of December **1941** and rise at each end to symbolize the ultimate victory of the forces of freedom in May and September **1945.** It was at that nadir, however, in the months following the attack upon Pearl Harbor, that America was uncertain about the extent of the Japanese threat and most desirous to immediately strike back. During that period, decisions were made that led to the internment of approximately **100,000** individuals of Japanese descent, over **70,000** of them American citizens. In **1943,** the Supreme Court unanimously sanctioned a militarily-imposed curfew upon those individuals and, in **1944,** their evacuation from the West Coast. Although the Court did

also hold that the government had impermissibly interned admittedly loyal American citizens, that portion of the Court's work had already been overcome by events; President Roosevelt had previously announced that such citizens would be permitted to return to their homes.

In *Justice At War: The Story of the Japanese American Internment Cases,* Peter Irons recounts the chain of events that led to the evacuation and internment of American citizens. The initiation of the internment and its maintainence long after the threat of a Japanese invasion of the West Coast had dissipated are laid to a combination of confusion, deceit, politics, and racism. In order to defend a curfew applicable only to those of Japanese ancestry before the Supreme Court, the Justice Department suppressed evidence that the Office of Naval Intelligence had discounted fears of sabotage and espionage and claimed to already have on file the name of every potentially disloyal Japanese citizen. In defending the evacuation and internment before the Court, the Justice Department suppressed evidence that the reports of espionage activities cited as fact in justification of the evacuation and internment were knowing falsehoods. During this period, even J. Edgar Hoover, no civil libertarian himself, thought that fears of a fifth column comprised of West Coast Japanese Americans were groundless and that "the army was getting a bit hysterical." The most regrettable episode imparted in the book, however, was that of Franklin Roosevelt, the author of the "Four Freedoms" and commander-in-chief of the American forces fighting for freedom throughout the world, postponing any release of concededly loyal Japanese Americans until after the **1944** Presidential election so as not to alientate voters in crucial West Coast states. Tarnished also is the image of the American Civil Liberties Union as the defender of the downtrodden and oppressed. Desirous of remaining in the good graces of the Roosevelt Administration, the ACLU's executive board refused to permit ACLU branch offices to attack the Executive Order upon which the initial evacuation was based.

The author's bent is obvious throughout the book. He frequently takes time to depart from the narrative to highlight legal or factual inaccuracies or to recall for the reader how a position may be inconsistent with one previously advocated by the same party. This adversarial posture may be knowingly excused; Peter Irons is currently, serving, *pro bono publico,* as counsel for the subjects of the three unsuccessful test cases in seeking to overturn their convictions based upon the heretofore suppressed evidence. As an historical account and legal brief for those men, however, *Justice At War* provides a throughly researched and highly detailed indictment of what

Supreme Court Justice Frank Murphy called a "legalization of racism."

9. Jaklovljevic, Dr. Bosco, *New International Status of Civil Defense.* Higham, Massachusetts: Martinus Nijhoff Publishers, **1982.** Pages: **142.** Notes, References, Appendix. Publisher's address: Martinus Nijhoff Publishers, Kluwer Boston, Inc., **190** Old Derby Street, Hingham, Massachusetts **02043.**

The **1977** Protocols to the Geneva Conventions on the Protection of War Victims of August **12, 1949** added significant new provisions and clarifications to the basic humanitarian laws of war. Among the new provisions were new rules concerning the international status of civil defense bodies. This book examines the Protocols as they relate to this new development.

.After briefly surveying the history behind the initial Geneva Conventions and the events leading up to the conclusion of the Protocols, the author specifically evaluates the civil defense aspects of the Protocols. In particular, the author advances the theory that the new provisions advance the cause of human rights in that they would come into play at times of armed conflicts or great disasters, the times during which human rights would be most threatened.

In the second half of the book, a detailed section-by-section analysis of those articles concerning civil defense is provided. As an appendix, the author has added the text of the relevant provisions of various documents concerning civil defense.

The author is the Secretary-General of the Yugoslav International Law Association and a member of the Executive Council of the International Law Association.

10. Johnson, A. Ross, Robert W. Dean, and Alexander Alexiev, *East European Military Establishments: The Warsaw Pact Northern Tier.* New York, New York: Crane Russak & Company, Inc., **1982.** Pages: xiii, **182.** Glossary, Appendices, Index. Publisher's address: Crane, Russak & Company, Inc., **3** East 44th Street, New York, New York **10017.**

"Know thy enemy" has been a fundamental principle of preparation for warfare for centuries. It is through knowledge of the opposition's organization, deployment, morale, and weaponry that the commander will be better able to train, equip, and motivate his troops for combat with that opponent. In *East European Military Establishments: The Warsaw Pace Northern Tier,* the authors provide just such a glimpse at the armies of certain of the Warsaw Pact nations.

In Section I, the authors set out the basic focus of the study and the standard assumptions concerning the Warsaw Pact threat. In Section II, the role of the Warsaw Pact forces in Soviet military strategy is discussed.

Beginning with Section 111, the forces of individual nations are analyzed. The Polish, East German, and Czechoslovak military establishments come under scrutiny. In each case, not only are the force structure, doctrinal settings, and influence of the Communist Party in the military discussed, but the authors render informed judgments concerning the reliability of the respective armies to their Soviet sponsors.

The appendices provide numerican sketches of the forces of the three nations studied and supply data on military expenditures and background of the northern tier officer corps.

A. Ross Johnson and Alexander Alexiev are staff members of The Rand Corporation. Robert W. Dean was formerly a staff member of The Rand Corporation.

11. Kunen, James S., *"How Can You Defend Those People?" The Making of a Criminal Lawyer*. New York, New York: Random House, Inc., 1983. Pages: xii, 270. Notes. Price: $15.95. Publisher's Address: Random House, Inc., New York, New York 10022.

"[W]e are to look upon it as more beneficial that many guilty persons should escape unpunished than one innocent person should suffer." The author of those words was not William Kunstler, nor F. Lee Bailey, nor Edward Bennet Williams. It was John Adams, who spoke those words in defending the British soldiers accused of murder in the Boston Massacre. At that time, the future first Vice President and second President of the United States epitomized the role of the defense counsel in Anglo-American jurisprudence; the advocate for the probably guilty client who had the audacity to challenge the charges against him.

In *"How Can You Defend Those People?" The Making of a Criminal Lawyer*, James S. Kunen has written a book that could be spiritually co-authored by literally thousands of public defenders throughout the country. His dealings with clients, sometimes apparently innocent ones, sometimes unquestionably guilty ones, and the criminal courts, instruments that the author roughly equates to an automobile assembly line, are excerpted in this book.

Moreso than in the military justice system, the civilian public defender encounters frustration. Having won a stirring dismissal of charges or an outright acquittal, the public defender lives to see his

former client back in court on new charges, often strikingly similar to those which had been dismissed or upon which he or she had been acquitted. Was the judge wrong? Was the jury wrong? Or did the prosecution just fail to properly present its case? The author suggests that the former two questions are irrelevant. To the public defender and, by extension, to the accused, the key question is not guilt or innocence, but rather what the government can prove.

Judge advocates may find interesting the author's single and successful encounter with the military justice system. An accused fating a premediated murder charge was acquitted. The author, obviously critical of the military judge's pretrial rulings but the beneficiary of most evidentiary rulings, seemed to attribute his, and his apparently competent and helpful military co-counsel's, success as much to their prowess as to the seeming incompetence of the prosecution team.

In some cases, the ethics wear thin: "Couldn't it have happened this way...?" Such, apparently, is the lot of the public defender. Yet, the myriad war stories of the guilty who would not plead, of the specious but successful insanity defense, and of the no-facts-on-your-side-so-argue-reasonable doubt defense, will ring true to the military defense counsel. *"How Can You Defend Those People?"* is a question often asked. This book offers several answers: because it is their right; to put the prosecution to its proof; to play the gadfly in a sometimes well-ordered society, and the like. The author's well-experienced views serve to show that justice is at least difficult of definition and certainly more difficult of attainment. Within the realities of the system, we simply do the best that we can.

12. Lave, Lester B. and Gilbert S. Omenn, *Clearing the Air: Reforming the Clean Air Act*. Washington, D.C.: The Brookings Institution, 1982. Pages: ix, 51. Price: $5.00 (paperback). Glossary. Publisher's address: The Brookings Institution, 1775 Massachusets Avenue, N.W., Washington, D.C. 20036.

The Clean Air Act was one of the most significant and symbolic pieces of legislation of the 1970s designed to improve the quality of the air breathed by all Americans. At the time, it represented a major triumph for the new environmental movement and signalled a governmental willingness to impose regulatory strictures on a theretofore virtually unregulated aspect of industry.

The success of the Clean Air Act in achieving its goalsover the first decade of its existence is the subject of this book, which had been prepared as a staff study for the Brookings Institution.

After surveying the legislative history of the Act in general, the book proceeds to examine separately the regulation of automobile emission standards and emissions from stationary sources, *i.e.*, factories, and measures their success. The study concludes that the Act has not been successful and recommends five major changes to the Act to enable the Act to fulfill the lofty purposes stated in its legislative history. For those uninitiated in environmental law jargon, a small glossary is also provided.

The authors are affiliated with the Brookings Institution, which describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally."

13. Lehman, John F. and Seymour Weiss, *Beyond the SALT II Failure.* New York, New York: Praeger Publishers, 1981. Pages: xxi, 195, Price: $21.95. Publisher's address: Praeger Publishers, 521 Fifth Avenue, New York, New York 10175.

Comparing American attitudes of the 1970s and 1980s with the posture of the British nation during the heyday of appeasement, the Secretary of the Navy and former U.S. Ambassador to the Bahamas critically analyze the failed SALT II agreement and evaluate the future path of arms control talks.

The book begins with perspectives on the course and purposes of the Strategic Arms Limitations Talks. After surveying the purported "radical change" in negotiating stance from the Ford to Carter administrations, the March 1977 comprehensive SALT II proposal, which is set forth in an appendix to the book, is carefully examined. The dual concerns of the SALT II critics, the possibility of verification and the question of Soviet-American strategic equity were SALT II to be ratified, are discussed at length.

Beyond American concerns with the SALT II Treaty, the authors examine the SALT process through the eyes of the Soviets and of American allies. Interestingly, while the authors posit deep allied distrust of the SALT II agreement, they note that, reined by leftist influences in their respective countries, the national leaders have been reluctant to voice those concerns publicly.

In a chapter entitled "The Myths of SALT," eight purported benefits of the SALT agreement are provided the reader; each is then debunked. In succeeding chapters, the reasons for the ultimate failure of the SALT II agreement are highlighted. Additionally, the course of negotiations in the Mutual and Balanced Force Reduction (MBFR) Talks is followed, with emphasis on the relationship

between the SALT talks and MBFR.

Finally, Secretary Lehman proposes a future bargaining position for the United States in strategic arms talks with the Soviets, a position which he advocates will eliminate the Soviet strategic nuclear advantage. Chiefly through the acquisition and development of new and better weapons systems and the enunciation of a new and determined American bargaining stance, he would restore "logic to our foreign policy, end the destabilization of the strategic balance, and open the way for true arms control.. .."

14. Levie, Howard **S.,** ***The*** *Status of Gibraltar.* Boulder, Colorado: Westview Press, **1983.** Pages: xii, **258.** Notes, Bibliography, International Agreements, Index. Price: **$22.00** (Paperback). Publisher's Address: Westview Press, **5500** Central Avenue, Boulder, Colorado **80301.**

Great Britain has held Gibraltar for almost **275** years. During that period, it has proven to be "a running sore.. .a canker" in the relations between the British and Gibraltar's other claimant, Spain. In ***The*** *Status of Gibraltar,* Howard S. Levie, a professor emeritus of international law at St. Louis University Law School and instructor at the Naval War College, studies the history of the Rock and various proposals to alter its current status.

The present position of the parties does not bode well for a solution. Spain has demanded complete sovereignty over Gibraltar. The British, supported by the result of a referendum which overwhelmingly supported continued ties to Britain, have argued, as with the Falkland Islands, that any decision receive the consent of the inhabitants of the Rock. A special committee of the United Nations, unaffected by the democratic mandate, has backed Spain's claim to the territory.

In concluding, the author offers a solution of his own. Sovereignty of Gibraltar should be transferred to Spain, with a concomitant assurance that Britain could retain a military presence on the Rock for a period of **99** years. Free access to and from Gibraltar would be insured and Great Britain would be premitted to operate the international airport in the Rock. The British would retain exclusive jurisdiction over its personnel for acts committed by them in the territory and duty-free zones for the British military contingent would be created. In recognition that Gibraltar is part of Spain, yet to protect the inhabitants from discrimination in taxation, it would be provided that the taxation of the residents of Gibraltar should not exceed the rate of taxation of the residents of the City of Madrid. Disputes arising from the general agreement would be submitted for peaceful

resolution by the International Court of Justice or other agreed-upon arbitral body.

The lesson of the Falklands War teaches us that conflicts between a distant motherland and an adjacent sovereign may erupt over both strategic (Gibraltar) and nonstrategic (Falklands) territory. As a potential impetus to obtain a solution of a centuries-old dispute and avoid possible military conflict, Mr. Levie's book may prove to be a useful tool.

15. Liska, George, *Russia and World Order; Strategic Choices & the Laws of Power in History*. Baltimore, Maryland: The Johns Hopkins University Press, 1980. Pages: xii, 194. Price $14.50. Preface, Index. Publisher's address: The Johns Hopkins University Press, Baltimore, Maryland 21218.

This book is the third in a set of companion volumes dedicated to understanding and developing the relative and stable strategic roles of the great powers. The first of the three, *Career of Empire: America and Imperial Expansion over Land and Sea* (1978), sudied the worldwide growth of American power and influcence. The second, earlier in publication, but later in subject matter, *Questfor Equilibrium: America and the Balance of Power on Land and Sea* (1977), discussed the proper role for the United States in the global realities of the day. This volume, *Russia and World Order: Strategic Choices & the Laws of Power in History*, crosses the great power divide and considers the proper role for the Soviet Union in the balance of power today.

Europe after de Gaulle and America after Vietnam are surveyed by the author as roughly equivalent; both have suffered a decline in *elan vitale*. In particular, the United States is scored for "a dullness ... of prematurely grizzled middle age,'' a process which has cost America its economic (witness the OPEC boycott) and moral (witness the lack of levarage with South Africa's apartheid or Israel's West Bank occupation) edge. In various areas of the globe, the United States is described as unable or unwilling to respond to changing conditions.

Turning to the other side of the Iron Curtain, the author studies Eastern Europe's relations with its Soviet master and its estranged West. Moral, philosophical, and cultural affinities and aversions are surveyed in discussing whether the true east-west boundary ought to be the Oder, the Elbe, or, perhaps, the Rhine.

Since the 1960s, the Western, and particularly the American, method of dealing with the East has varied between cooperative measures with receptive individual governments and attempting to

secure a better lifestyle for the peoples, while implicitly recognizing Soviet hegemony in the region. As both have been haltingly pursued, neither has proven markedly successful. The more recent challenges are, ordered variously, the politico-military and economic threats to world stability. Indeed, for some time it has appeared that American strategy may have been to barter access to American economic power in return for hoped Soviet politico-military "abstenence in the peripheries." In this scenario, Europe becomes the "man in the middle." Where barter fails, the capacity of the American economy to challenge the Soviets at an intensive arms race and win it remains the ultimate check on "Soviet geo-political adventurism."

In the final chapters of the book, the author posits a new strategy for American-Soviet relations which shifts from containment to a precise definition of vital interests of the great powers around the globe. While recognizing that these redifinitions and the process of negotiating for them will be complex, the author deems them necessary for a stable world order.

The author is a professor of political science at The Johns Hopkins University and a member of the Washington Center of Foreign Policy Research at the School of Advanced International Studies.

16. Lodgaard, Sverre and Marek Thee (eds.), ***Nuclear Disengagement in Europe.*** London: Taylor & Francis Ltd., 1983. Pages: xiii, 271. Abstract, Index. Publisher's address: Taylor & Francis, Inc., 114 East 32d Street, New York, New York 10016.

The prospect of a nuclear-free Europe as a prelude to relaxed tensions between East and West and reunified Germany has occasionally been posed, but never seriously considered. A heightened awareness of the threats to the peace in Europe caused by the controversy surrounding the NATO decision to deploy intermediate range ballistic and cruise missiles, however, has resurrected the proposal as a topic for study by international scholars. ***Nuclear Disengagement in Europe*** is a collection of seventeen papers authored by various students of European affiars. The book has been published under the auspices of the Stockholm International Peace Research Institute, which describes itself as "an independent institute for research into problems of peace and conflict, especially those of arms control and disarmament. It was established in 1966 to commemorate Sweden's 150 years of unbroken peace." SIPRI is financed by the Swedish Parliament.

The collection is divided into five parts. Part I, by Sverre Lodgaard, discusses in general the concept of nuclear disengagement and the characteristics of a nuclear-free zone. Part II contains five

papers which propose nuclear-free zones in northern Europe and the Balkans and highlight how a withdrawal of battlefield nuclear weapons will raise the nuclear threshhold. Part III considers a nuclear-free zone in northern Europe from a military perspective, and the political consequences for the region in light of the strategic interests there of both superpowers. Part IV proposes a treaty text for a Nordic nuclear-free zone and posits a model for the operation of the zone and a method to detect violations. Finally, Part V discusses the steps that should be taken toward the implementation of a nuclear-free zone. Even the authors concede, however, that a nuclear-free Europe could only come about after a tremendous public education campaign, coupled with a change of attitudes on national scales.

17. Mullaney, Marie Marmo, *Revolutionary Women.* New York, New York: Praeger Publishers, 1983. Pages: vii, **401.** Notes, Index, Bibliography. Publisher's address: Praeger Publishers, 521 Fifth Avenue, New York, New York 10175.

Among the condemnations that Karl Marx levelled against capitalist regimes was that those societies tended to oppress their women. Prostitution, sweat shops, and a tradition of male-dominated marriage relationships were all through to be evils which flowed inexorably from bourgeois morality. Their true liberation could only be gained by "fighting alongside the men of their class for the achievement of socialism." Presumably, the triumph of the socialist movement would bring the millenium for women.

In *Revolutionary Women,* Marie Marmo Mullaney demonstrates that neither the struggle for nor the attainment of socialism has brought about the millenium, or even equality. In the case studies of five leading female socialist crusaders, the author reveals that prejudice and discrimination pervaded not only the revolutionary movement, but also the socialist state, once established. The five revolutionary women are Eleanor Marx, described as a "tragic heroine," Alexandra Kollontai, described as a "visionary," Rosa Luxemburg, described as a "martyr," Angelica Balabanoff, described as a "pariah," and Dolores Ibarruri, described as a "symbol."

In the concluding chapter, the author posits a general theory of the female revolutionary. Drawing from these five women, Professor Mullaney attempts to draw a picture of the revolutionary woman and the factors which moved that woman to rebellion.

The author is an Assistant Professor at Caldwell College in Caldwell, New Jersey and is Chairperson of the Department of History and Political Science.

18. Nincic, Miroslav, *The Arms Race: The Political Economy of Military Growth*. New York, New York: Praeger Publishers, 1982. Pages: xii, 207. Name Index, Subject Index, Figures & Tables. Publisher's address: Praeger Publishers, 521 Fifth Avenue, New York, New York 10175.

Few things affect the behavior of governments more than the prospect that their actions may lead to a nuclear confrontation. The various strategies for avoiding nuclear destruction since the attainment by both superpowers of nuclear weapons have at times emphasized "massive retaliation", "mutual assured destruction," or parity. Whatever the label, American and Soviet policies have always revolved around having or attaining at least as large and destructive a nuclear arsenal as the other. Hence, the arms race.

In *The Arms Race: The Political Economy of Military Growth*, the author, an assistant professor of Political Science at the University of Michigan at Ann Arbor, examines all aspects of the arms race, in both nuclear and conventional arms. The relationship between military growth and the American economy is studied with special emphasis on the effect of a spiriling arms race on the private sector, the sciences, and Soviet behavior.

In the international sphere, the author views the American arms trade with the third world and the economic impulses behind it.

In a conclusion, the author stresses that, before we decide to rein in the arms race, those who profit from it should be identified. Thence, progress, however incremental, ought to be sought in areas such as a comprehensive test ban treaty and more innovation will be needed in other areas.

19. Nordham, George Washington, *George Washington and the Law*. Chicago, Illinois: Adams Press, 1982. Price: $12.75 (paperback). Pages: ix, 144. Appendix (Complete text of Last Will and Testament of George Washington), Notes, Bibliography, Index. Publisher's address: Adams Press, Chicago, Illinois.

In twelve chapters, this book documents the various stages of the life of the first President, from early life, to Virginia legislator, to Commander in Chief of the patriot forces, and, finally, as President of the United States. More significantly, the views of George Washington on areas of the law ranging from criminal law to military law to securities and civil rights are discussed throughout the book. Legal assistance officers might do well to frame the quotation of George Washington provided at the outset of the chapter on wills, trusts, and estates: "You will act very prudently in having your Will revised by some person skilled in the law."

The author is a member of the bars of the state of New York and the District of Culumbia. He is the author of several books about George Washington.

20. Office of the Federal Register, National Archives and Records Service, and General Services Administration, *The United States Government Manual 1983/84*. Washington, D.C.: U.S. Government Printing Office, **1983.** Pages: vii, **908.** Appendices, Name Index, Subject/Agency Index, Recent Changes. Price: **$9.00.** Publisher's address: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. **20402.**

Smaller and more inexpensive than its immediate predecessor, the 1983/84 *United States Government Manual* is a valuable tool with which to find one's way through the seemingly impenetrable maze of the federal government. Organized by branch of government, this book provides a directory, by name, address, and function of each governmental agency.

The branch of government with which the average citizen would most likely come in contact, the executive, is dissected for ease of research. Each component agency is described and its mission analyzed to inform the reader of the identity of the persons responsible for what sector of their daily lives. For those unfamiliar with governmental jargon, an appendix of commonly used abbreviations and acronyms is provided. In order to locate the exact address of a particular ranking governmental officer, a name index is located in the rear of the manual. For quick access to the manual, a margin index may be found on the back cover.

A useful tool with which to achieve access to the federal government, the 1983/84 *United States Government Manual* is a valuable addition to the library of any government attorney.

21. Ozgur, Ozdemir A., *Apartheid: The United Nations and Peaceful Change in South Africa*. Dobbs Ferry, New York: Transnational Publishers, Inc., **1982.** Pages xx, **220.** Price: **$25.00.** Introduction, Appendices, Bibliography, Notes, Index. Publisher's address: Transnational Publishers, Inc., P.O. Box **361,** Dobbs Ferry, New York, **10522.**

From the very first session of the General Assembly of the United Nations, the apartheid policy of South Africa has been condemned. Ironically, it was only after the foundation of the United Nations that, in **1948,** South Africa raised the *defacto* discrimination policy to one of law.

The author notes in the Introduction that apartheid is different and more invidious than any other form of human rights violation to be seen today. Unlike political repression, apartheid victimizes people from birth and will never relent, even though the victim may be the most accepting of government policies. Moreover, it forces the victim to become active against, not within, the political system. For those reasons, the author sees the apartheid system as a grave threat to world stability and as one in grave violation of the Charter of the United Nations.

The book is divided into three parts. The first part examines the population, political system, and racial legislation of South Africa and observes the divergence between the human rights declarations of the United Nations and the policies of South Arfica.

Part II analyzes the steps taken by the United Nations since its inception to deal with human rights violations in South Africa. The responses of the South African government are also noted.

Part III is concerned with the impact that actions by the United Nations and others have had upon South African policy. In this regard, the author has noted a three-fold impact. South Africa has been diplomatically isolated within the United Nations. Second, the United Nations has pressured South Africa's friends to, in turn, pressure South Africa to change it racial policies. Finally, the United Nations has caused world opinion to focus on South Africa and impelled nongovernmental bodies to join the march against apartheid.

The book is well-footnoted and has extensive appendices and a bibliography to enable the researcher to find valuable primary source materials in this area.

22. Price, Barbara Raffel, and Natalie J. Sokoloff (eds.), *The Criminal Justice System and Women.* New York City, N.Y.: Clark Boardman Company, Ltd., 1982. Pages: xx, 490. Price: $50.00. Publisher's address: Clark Boardman Company, Ltd., 435 Hudson Street, New York, N.Y. 10014.

The book covers a spectrum of issues relating to women offenders, victims, and criminal justice workers. It is a compilation of **26** articles by different authors with an introduction to each article by the editors.

The book is divided into four sections: Part **1,** Theories and Facts about Women Offenders; Part 2, Women Victims of Crime; Part **3,** Women Workers in the Criminal Justice System; and Part **4,** The Future. Part 1 introduces the topic of women offenders by examin-

ing existing theories about female criminality. This section explores how criminal law has affected and been affected by women. It addresses the issues of crime causation (especially in reference to women and girls), discusses the relationship, if any, between the women's liberation movement and the criminality of women, and describes the woman offender once she is convicted. This section also presents three articles which give the reader a factual picture of the convicted woman, her treatment, and her situation as a prisoner. Part **2** examines women as crime victims. It focuseson crimes which have long victimized women such as rape, incest, wife battering, and sexual harassment. It also looks at societal practices, such as pornography and prostitution, which may victimize women psychologically. Part **3** considers women as working members of the criminal justice system. It provides an overview of how women are influencing the criminal justice system, by choosing to work in traditionally male jobs and by challenging discrimination they encounter as workers within the system. It looks at the social and institutional barriers which limit women's entrance into and hampers their success in the criminal justice field. This section looks at the selection process which keeps women out of judgeships, the female lawyer and how the legal professions participates in sexual discrimination, women police officers, and women correctional officers in all-male facilities. Part **4** provides a summary for the book and looks at possible future steps to changing the criminal justice system.

The editors are both professors at John Jay College of Criminal Justice. Dr. Price is Professor of Criminal Justice in the Department of Law, Police Science and Criminal Justice Administration. Professor Sokoloff is an Associate Professor of Sociology.

23. Schwartz, Bernard and Stephan Lesher, *Inside the Warren Court, 1953-1969.* New York, New York: Doubleday & Company, Inc., **1983.** Pages: **229.** Index, Bibliography. Price: **$17.95.** Publisher's address: Doubleday & Company, Inc., **245** Park Avenue, New York, New York **10167.**

"Earl Warren is honest, likeable, clean, [characterized by] decency, stability, sincerity, and a lack of genuine intellectual distinction. He will never set the world on fire or even make it smoke." Such were the observations of one prominent American journalist of the qualities of one Governor Earl Warren of California. Written in **1947,** before Governor Warren became Chief Justice Warre, before *Brown v. Board of Education, Baker v. Carr, Mapp v. Ohio,* and *Miranda v. Arizona,* the comment rings hollow, even ludicrous, today. Yet, in **1947,** great things were not expected of the man who had executed the deportation of Japanese-Americans to relocation

camps during the West Coast hysteria following the attack upon Pearl Harbor.

Inside the Warren Court, 1953-1969 chronicles the judicial revolution engineered by the Chief Justice who had never been judge. Elevated to the Supreme Court by a reluctant President Eisenhower who had promised Earl Warren "the first vacancy on the Supreme Court" as consolation for not selecting Warren as Attorney General, Chief Justice Warren presided over, and guided, a redefinition of the constitutional rights of minorities, defendants, voters, and, much to critical villification, communists. His predominance over the direction of the Court would be so powerful as would lead Justice William J. Brennan, Jr. to label Earl Warren "Super Chief."

The book, jointly authored by a journalist and a law professor, delves into the inner workings of the sanctum sanctorum of the Supreme Court, the conferences and internal correspondence of the justices, to detail how majorities were formed and cases decided. As a career politician — district attorney, attorney general, governor, unsuccessful vice-presidential and, in 1952, potential compromise presidential candidate, Earl Warren brought to the Court an ability to build consensus where hitherto there had been fractitiousness. Dealing with eight other unique and frequently contentious personalities, the Chief Justice built a Court of virtual unexceptional unanimity on such issues as desegregation and of otherwise consistent majority status on issues such as free speech, due process, and a commitment to the protection of the rights of the defendant against the perceived amassed power of prosecutorial authorities.

The authors reveal that this consensus-building was not by any means an easy process. The personal animosities on the bench and how these conflicts were sometimes reflected in judicial pronouncements are noted in depth. Additionally, the changing personnel of the Court, due to such happenstances as death, disability, or retirement, is revealed to have affected more significant decisions of the Court than jurisprudential concerns. For example, that *Brown v. Board of Education* became a Warren Court case, as opposed to a Vinson Court case, had been entirely dependent upon the delaying tactics of Justice Frankfurter, the unexpected death of Chief Justice Vinson, and the political reward of Earl Warren with the Chief Justiceship.

Pressures were also exerted from outside the Court. In advance of the *Brown* decision, President Eisenhower confided to Chief Justice Warren that southerners "are not bad people. ...all they are concerned about is to see that their little sweet girls are not required to

sit in school alongside some big, black bucks." After the decision, Eisenhower allowed that his appointment of Warren had been "the biggest damned-fool mistake I ever made." In a case involving the authority of the United States to deliver, pursuant to an executive agreement with Japan, an American service member to foreign authorities for prosecution, the Solicitor General visited the Chief Justice to explain the potential foreign policy implications of an adverse decision; in this case, the Court acquiesced. Finally, in 1969, the Department of Justice dispatched its public relations officer to the Court to contend that a decision requiring disclosure of taped conversations in the case of one Cassius Clay would jeopardize the foreign relations of the United States. The Chief Justice heard the functionary out and told him that the Court would consider the issue upon a government petition for rehearing. When made, the petition for rehearing was denied.

Toward the end of the Warren era, the former district attorney and attorney general began to retrench. In *Terry v. Ohio,* he formed a majority to permit the police the authority to stop and frisk. In *Shapiro v. Thompson,* the Chief Justice railed against the majority's decision that a residency requirement for government benefits was unconstitutional. The authors would attribute this reevaluation of position to the reaction of the Chief Justice to the assassination of John Kennedy, the investigation into and the report concerning which bears his name, and of Robert Kennedy. Nonetheless, following the murder of the younger Kennedy in his home state, Earl Warren concluded that his decade-old nemesis, the man who had pledged support to Warren while garnering California delegates for Eisenhower in 1952, Richard Nixon, would become President, tendered his resignation to President Lyndon Johnson; Nixon, whose presidential campaign rhetoric was in large part directed against the decisions of the Warren Court should not select Warren's successor. History recounts, however, the revealed indiscretions of Johnson's nominee for Chief Justice, Justice Fortas, a consequence of which was that Richard Nixon did indeed appoint the new head of the Supreme Court. Ironically, it was this man who, just hours before Warren's death in 1974, briefed "Super Chief" concerning the imminent decision in *United States v. Nixon,* a case which would lead to the resignation in disgrace of the former Chief's nemesis and the current Chief's sponsor.

The book is a premier work concerning not only the personal and professional interactions among the "nine old men" that comprise the Supreme Court, but also of how those interactions could successfully be molded to unanimity or, less successfully, to pluralities or

multiple-opinion cases. Regardless of one's personal view of the correctness or propriety of the decisions of the Warren Court, this book will greatly add to one's understanding of why and how those decisions were reached, thereby increasing a general awareness of the inner workings of the United States Supreme Court. To this end, whatever one's jurisprudential bent, this book is undoubtedly a worthwhile source of knowledge.

24. Spence, Gerry, *Of Murder and Madness: A Story of Insanity and the Law*. New York, New York: Doubleday & Company, Inc., **1983.** Pages: **436.** Price: **$17.95.** Publisher's address: Doubleday & Company, Inc., **245** Park Avenue, New York, New York **10167.**

The issue of insanity and the law has been in vogue since the acquittal of John Hinckley for the attempted assassination of President Ronald Reagan. Evidence of renewed interest in the insanity defense may be found in legal literature and in the several dozen bills which purport to restrict or eliminate the insanity defense proposed by senators, representatives, and the executive branch. An argument of the defenders of the existence of the defense is that it is rarely invoked and even more rarely successful. Only an infinitesmal number of criminal accused escape responsibility for their actions by reliance upon the defense of insanity.

In *Of Murder and Madness: A True Story of Insanity and the Law*, Gerry Spence, noted trial attorney and novice author, relates the circumstances surrounding a successful assertion of the insanity defense.

The case was first degree murder, a capital case prior to the days of *Furman v. Georgia*. The accused walked into a welfare office and, in the presence of eight witnesses, to include a deputy sheriff, put a pistol against the temple of his ex-wife and pulled the trigger. Prior to trial, the accused was examined by both government and defense psychiatrists; all found him sane and his claims of amnesia about the shooting to be feigned.

The resulting trial teaches the attorney about pretrial preparation and dealing with the burdens of proof. In the trial situs, Wyoming, the jury could find the accused either insane at the time of the offense, with **a** resulting acquittal, or that he was unable to assist in his own defense at the time of the trial. The burden rested upon the prosecution to establish sanity at both points in time.

In the trial, without the supporting testimony of a single defense psychiatrist, Gerry Spence won a postponement of the accused's judgment day; the jury found that the government had not met its

burden of establishing that the accused could assist in his own defense. In leading the jury to this result, Mr. Spence exhibited that extensive pretrial preparation into the causes and evidence of insanity and into the background of the accused could make the difference. The defense counsel simply knew more about the accused's background, through records which the welfare department had neglected to supply to the government psychiatrists. As a result, the expert witnesses were unable to say that the facts provided them for the first time on the witness stand would not change their former opinions.

Seven years later, the accused was deemed cured and brought to trial again. By now, even the government psychiatrists opined that the accused had been insane at the time of the offense, A weary prosecutor, forced to take the case to trial by political considerations, ritualistically contested the trial. The accused was finally acquitted by reason of insanity. He left the courthouse a free man.

Sprinkled throughout the book is a good deal of lay sociology and lamenation about what society did to this poor accused. Moreover, those familiar with Mr. Spence's first book, *Gunning for Justice*, will recognize his obsession with prostitutes, houses of ill-repute, and his experiences with both. These do not add to the book. Nor does Mr. Spence's comparison between his own childhood and adolescence and that of the accused ring true. As a discussion of the fallibilities of both psychiatry and the law when confronted by the insanity defense, however, the book tells an interesting story to the trial attorney.

25. Tahir-Kheli, Shirin, (ed.). *U.S. Strategic Interests in Southwest Asia*. New York: Praeger Publishers, **1982.** Pages: x, **230.** Price: **$26.95.** Publisher's Address: Praeger, **521** Fifth Avenue, New York, New York **10175.**

Southwest Asia, which the book designates as the region from the eastern borders of Pakistan and Afghanistan to the western border of Saudi Arabia, is currently an area in turmoil. The region is plagued by intraregional political, cultural, and religious strife. This book addresses United States policy options in this region and the constraints on those options. Soviet policy alternatives and the limits on the Soviet freedom of action are also evaluated.

This book is based on papers presented at the **1981** Military Policy Symposium entitled, "U.S. Strategic Interests in Southwest Asia: A Long Term Committment?", sponsored by the Strategic Studies Institute at the U.S. Army War College, Carlisle Barracks, Pennsylvania, from October **18-20, 1981.**

The book contains nine papers by different authors in addition to a summary papers by the editor, which attempts to offer regional policy suggestions for the United States. The selection of papers is introduced by a section written by Colonel Keith A. Barlow, Director, Strategic Studies Institute, U.S. Army War College, Carlisle Barracks, Pennsylvania.

26. Taylor, William J., Jr., and Steven A. Maarranen (eds.), *The Future of Conflict in the 1980s.* Lexington, Massachusetts: Lexington Books, **1982.** Pages: xiii, **505.** Index. Publisher's address: Lexington Books, D.C. Heath and Company, **125** Spring Street, Lexington, Massachusetts **02173.**

Calling together some of the most prominent thinkers on the subject of American foreign policy, this book focuses on five aspects **of** the future of conflict in the **1980s:** perspectives on the future of conflict and implications for United States policies, some of the causes of low-intensity conflict, psychological operations, terrorism, proxy warfare, and rescue operations, the future of conflict in six regional settings, outer space, and the oceans, and the strategic implications of the spectrum of conflict projected for the **1980s.**

Among the contributors and their contributions are James **R.** Schlesinger on "U.S. National Security Challenges for the 1980s," John Norton Moore on "Ocean-Resource Competition as a Source of Conflict," and Christopher Lamb on "The Nature of Proxy Warfare."

William J. Taylor, Jr., is director of Political-Military Studies and Deputy Chief Operating Officer at the Georgetown University Center for Strategic and International Studies. Steven A. Maaranen is a member of the staff of the Office of Planning and Analysis, Los Alamos National Laboratory.

27. White, G. Edward, *Earl Warren: A Public Life.* New York, New York: Oxford University Press, Inc., **1982.** Pages: x, **429.** Appendix, Notes, Index. Price: **$25.00.** Publisher's address: Oxford University Press, Inc., New York, New York.

In any contemporary listing of the greatest Justices of the United States Supreme Court, former Chief Justice Earl Warren always figures prominently. Having presided over the Court during a most turbulent period of American history, the Chief Justice often spoke for the panel in the most far-reaching decisions in such areas as civil rights, criminal procedure, and reappointment. Yet, Earl Warren has always seemed an enigma. A justice who had never been a judge, a liberal who had been, at best, a moderate, the Chief Justice continually perplexed those around him, including the President who had

nominated him to that high office.

In *Earl Warren: A Public Life*, G. Edward White, a professor of law at the University of Virginia School of Law, details the fruits of his research into the Warren papers in California and concludes that Earl Warren was the product of "educated reformist thought in early twentieth century America." Consequently, as a "Progressive", Earl Warren brought the qualities of justice later manifested in his opinions to the Court.

The book is divided into four parts. The first part discusses Earl Warren's public career in California, as District Attorney, Attorney General, and Governor. Part two deals with the early Court years, incliding *Brown* v. *Board* of *Education* and his service on the commission which investigated the assassination of John F. Kennedy and bears his name. Parts three and four highlight the Chief Justice's judicial philosophy and the legacy which the Warren Court left in American jurisprudence.

If one is in doubt concerning the personal contribution of Earl Warren to the Court's work, the author has provided an appendix, by subject matter, of the opinions authored by the Chief Justice. Upon reviewing this compendium, whether in congressional powers *(Powell v. McCormack)*, or criminal procedure *(Miranda v. Arizona)*, or the First Amendment *(Flast* v. *Cohen)*, one can scarcely question Earl Warren's impact upon the American judicial scene,