Published by the Naval Justice School, the NAVAL LAW REVIEW encourages frank discussion of relevant legislative, administrative, and judicial developments in military and related fields of law. Views expressed in published articles must be considered solely those of individual authors and do not purport to voice the views of the Naval Justice School, the Judge Advocate General, the Department of the Navy, or any other Agency or Department of the United States. The NAVAL LAW REVIEW is published from appropriated funds by authority of the Judge Advocate General in accordance with Navy Publications and Printing Regulations P-35. *This issue of the* NAVAL LAW REVIEW *may be cited as* 53 NAVAL L. REV. [page number] (2006).

SUBSCRIPTIONS

Subscription information may be obtained by writing to the Managing Editor, NAVAL LAW REVIEW, Naval Justice School, 360 Elliot Street, Newport, RI 02841-1523. Publication exchange subscriptions are available to organizations that publish legal periodicals.

INDIVIDUAL PURCHASES

Individual copies of the NAVAL LAW REVIEW, formerly titled the *JAG Journal*, may be purchased by contacting the Defense Technical Information Center (DTIC) and the National Technical Information Service (NTIS) for republication and sale. Copies are not available from the Naval Justice School.

Commands not already registered with the DTIC may obtain registration forms and information on ordering publications by writing to:

Defense Technical Information Center
Attention: Code DTIC-FDRA
Cameron Station, Building 5
Alexandria, VA 22304-6145
COMM (703) 767-8273
DSN 427-8273
1-800-CAL-DTIC (225-3842)

Individual purchasers may obtain information on ordering publications by writing to:

U.S. Department of Commerce
National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161

CONTENTS

Articles, Essays & Notes

KILL AN UNBORN CHILD -- GO TO JAIL: THE UNBORN VICTIMS OF VIOLENCE ACT OF 2004 AND MILITARY USTICE 1
Joseph L. Falvey, Jr.

THE WAR WITHIN THE WAR: NOTICE ISSUES FOR VETERAN REEMPLOYMENT 31
Heather DePremio

MURKY WATERS: THE LEGAL STATUS OF UNMANNED UNDERSEA VEHICLES 55
Commander Andrew H. Henderson, JAGC, USN

MOSCOW'S CORRUPTION OF THE LAW OF ARMED CONFLICT: IMPORTANT LESSONS FOR THE 21ST CENTURY 73
Colonel James P. Terry, USMC (Ret.)

SELF-DEFENSE IN THE MARITIME ENVIRONMENT UNDER THE NEW STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE (SROE/SRUF) 211
Commander Sean P. Henseler, JAGC, USN

U.S.–JAPAN SOFA: A NECESSARY DOCUMENT WORTH PRESERVING 229
Lieutenant Commander Timothy D. Stone, JAGC, USN

THE EVOLUTION OF UNIVERSAL JURISDICTION OVER WAR CRIMES 259
Lieutenant Commander James Paul Benoit, JAGC, USN

PUBLIC PRAYER IN THE NAVY: DOES IT RUN AFOUL OF THE ESTABLISHMENT CLAUSE? 321
Lieutenant Steven R. Obert, USN

Book Reviews

GULAG: A HISTORY 349
Commander Andrew H. Henderson, JAGC, USN

KILL AN UNBORN CHILD -- GO TO JAIL: THE UNBORN VICTIMS OF VIOLENCE ACT OF 2004 AND MILITARY JUSTICE

Joseph L. Falvey, Jr.*

I. Introduction

Historically, the military justice system has had no specific criminal sanctions for persons who harm or kill an unborn child and military prosecutors could seek no additional criminal penalties other than those associated with the person of the mother. This apparent anomaly results from the military court's historic adherence to the common law "born alive rule." The born alive rule provides that no one can be prosecuted for injuring or killing an unborn child unless it is born alive. This common law rule was based in part upon the medical opinion that the cause of death or injury to an unborn child could not be known with certainty, and also upon the complementary legal principle that doubt must be resolved in favor of the defendant in a criminal case.

Today's medical technology permits physicians to determine, with a very high degree of medical certainty, an unborn child's cause of death. Accordingly, a majority of states have now enacted legislation curbing or abolishing the born alive rule, and thus they have allowed prosecution of crimes of violence harming or killing an unborn child. Federal courts, including military courts, however, appeared unlikely to eliminate this gap in criminal law.

In March 2004, Congress adopted the Unborn Victims of Violence Act.[1] President George W. Bush signed it into law on April 1, 2004.[2]

---

* Professor of Law at Ave Maria School of Law, Ann Arbor, Michigan. B.A., University of Notre Dame; J.D., Notre Dame Law School; LL.M., The Judge Advocate General's School of the Army. Professor Falvey is also a Colonel in the U.S. Marine Corps Reserve and serves as an Appellate Judge on the U.S. Navy-Marine Corps Court of Criminal Appeals. The author is indebted to Geoff O'Brien and Michael Thiefels for their research assistance on this paper.

[1] The bill passed the House by a vote of 254-163 on February 26. "House Passes Unborn Victims Bill," February 26, 2004, http://www.foxnews.com/story/0,2933,112579,00.html. It passed the Senate by a vote of 61-38 on March 25. "Bill criminalizes violent harm to fetus," March 25, 2004, http://www.msnbc.msn.com/id/4600845/. The Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified as amended at 18 U.S.C. § 1841 and 10 U.S.C. § 919a (2004)). Previous versions of this legislation had passed the House, but were not acted on in the Senate.

Substantially the same as previously introduced bills,[3] the 2004 bill recognizes as potential criminal victims all unborn children injured or killed during the commission of specified federal crimes.[4] This legislation survived numerous attempts in the Senate to prevent its passage, including a substitute amendment proposed by Senator Diane Feinstein that was defeated by only one vote.[5] During the signing ceremony, President Bush remarked that, "[until] today, the federal criminal code had been silent on the injury or death of a child in cases of violence against a pregnant woman. . . . The swift bipartisan passage of this bill through Congress this year indicates a strong consensus that the suffering of two victims can never equal only one offense."[6]

This article will: 1) examine the history of prenatal criminal law, including its history in military law; 2) review the effect of the Unborn Victims of Violence Act of 2004 on military law; 3) examine the constitutionality of the Act; and 4) discuss the policy considerations underlying its enactment.

II. THE HISTORY OF PRENATAL CRIMINAL STANDARDS

The origin of the common law born alive rule, its development in state courts, and the current trend of state legislation in regards to fetal crime are all important aspects behind the adoption of the Unborn Victims of Violence Act.

"Unborn Victims' bill passed by House," February 26, 2004, http://www.msnbc.msn.com/id/4387085.

[2] Press Release, White House, President Bush Signs Unborn Victims of Violence Act of 2004, (April 1, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040401-3.html.

[3] Before the final vote in the House, a number of amendments were incorporated into it: the captions were revised (*see infra* note 74); the definition of unborn child was reworded; under the Uniform Code of Military Justice (UCMJ), Article 111 was removed from the list of underlying offenses that justified punishment for the death or injury of an unborn child (*see infra* note 78); there were technical changes to the Military law's punishment provision (*see infra* note 79); the section that excluded prosecution for particular conduct, such as for abortions, dropped language limiting the scope of consent to abortion (*see infra* note 87); and there were other minor changes to the statute's language. However, the intention and the effect of the statute did not change as a result of the amendments. *Compare* S. 1019, 108th Congr. (2003) as introduced in the Senate on May 7, 2003 to H.R. 1997 108th Congr. (2004), as placed on the calendar in the Senate on February 26, 2004, *available at* http://thomas.loc.gov, S 1019 and HR 1997, respectively.

[4] White House Press Release, *supra* note 2.

[5] The "Motherhood Protection Act" was proposed on the Senate floor on the day of the final bill's passage. It proposed to create an additional or increased penalty for acts "caus[ing] the termination of a pregnancy or the interruption of the normal course of pregnancy." The underlying federal offenses which would make such additional or increased penalties applicable would have been the same as those enumerated in the Unborn Victims of Violence Act. 150 CONG. REC. S3124, 3125-29 (daily ed. Mar. 25, 2004) (statement of Sen. Feinstein).

[6] White House Press Release, *supra* note 2.

To better understand the new legislation, an examination of the history of prenatal criminal law is necessary.

A. The Born Alive Rule

The "born alive rule" is a common law rule that asserts that only those children who are "born alive" are afforded the protections of the criminal law.[7] The rule can be traced back to 17th century English law, and perhaps further. In his *Commentaries on the Laws of England*, Sir William Blackstone paraphrased Sir Edward Coke's *Third Institutes*,[8] stating:

> To kill a child in its mothers womb, is now no murder, but a great misprison: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the greater opinion, to be murder in such as administered or gave them.[9]

The rule as stated at the time of Coke appears to have been a reversal of earlier practice.[10] Contrary to Blackstone and Coke,[11] Henry Bracton wrote 400 years earlier that "if there be some one, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."[12] Fleta, another writer contemporaneous with Bracton[13] agreed that a child injured *in utero* need not be born alive for the killing to constitute a homicide.

The born alive rule resulted from the evidentiary and medical challenges of the 17th and 18th centuries in determining the actual time and cause of death of an unborn child.[14] The primitive medical knowledge and technology

---

[7] Clarke D. Forsythe, *Homicide of the Unborn Child*: *The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 563 (1987).
[8] LORD CHIEF JUSTICE EDWARD COKE, 3 INSTITUTES 50 (1644).
[9] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book IV, 192 (Oxford: The Clarendon Press, 1765-1769) (reprinted by William S. Hein & Co., Inc., Buffalo, 1992). The "born alive" rule was initially adopted by American courts citing *Sim's Case*, (75 Eng. Rep. 1075 (K.B. 1601). Forsythe, *supra* note 7, at 584, citing *Sim's Case*, 75 Eng. Rep. at 1075; *see also* Vo v. Superior Court, 836 P.2d 408, 414.
[10] *See* James Clark, *State v. Ard: Statutory Aggravating Circumstances and the Emergence of Fetal Personhood in South Carolina,* 50 S.C. L. REV. 887, 889 (1999) (citing State v. Cooper, 22 N.J.L. 52, 54 (1849)).
[11] *Id.*
[12] HENRICUS DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, THE SECOND TREATISE OF THE THIRD BOOK, "CONCERNING THE CROWN," 279 (Buffalo: William S. Hein & Co., Ink., 1990).
[13] Forsythe, *supra* note 7, at 581.
[14] *Id.* at 585.

of the period made any knowledge of the health or condition of an unborn child uncertain.[15] Accordingly, the battery of an expectant mother could not then be proven to be the proximate cause of the death of her unborn child.[16] Furthermore, the born alive rule protected against false accusations when stillborn deliveries, from various causes, were much more common.[17] Thus, most commentators conclude that the born alive rule resulted from problems of proof, and not from any moral or philosophical determination of personhood.[18] Although a majority of states have now abrogated the common law rule, approximately fifteen states still follow it, or some minor variation of it. [19]

In federal actions for crimes against an expectant mother in which the death of her unborn child resulted, the "born alive" rule was the standard for imposing additional punishment on the perpetrator.[20] In the only published case in which the rule was applied to a federal crime, *United States v. Spencer,*[21] the United States Court of Appeals for the Ninth Circuit affirmed a murder conviction under 18 U.S.C. § 1111 for fetal infanticide.[22] In *Spencer*, injuries inflicted upon a pregnant woman resulted in the death of her baby ten minutes after the baby's emergency Cesarean birth.[23] Under 18 U.S.C. § 1111, however, murder is "the unlawful killing of a human being with malice aforethought."[24] As such, the issue was whether this child was a "human being" within the meaning of the statute. In concluding that the child was a human being under the statute, the court stated that in such situations, since at least 1908, the common law "born alive" rule applied.[25]

---

[15] *Id.* at 575.
[16] *Id.* at 582 (citing 16th century writer William Staunford).
[17] *Id.* at 576 (quoting A. TAYLOR, MEDICAL JURISPRUDENCE 530 (7th ed. 1861) ("The onus of proof is thereby thrown on the prosecution; and no evidence imputing murder can be received, unless it be made certain by medical or other facts, that the child survived its birth and was actually living when the violence was offered it.")). *See also* REESE'S TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 195 (D.J. McCarthy, 8th ed. 1911).
[18] Forsythe, *supra* note 7, at 590.
[19] *See* Colleen Jolicoeur-Wonnacott, *The Unborn Victims of Violence Act: Friend or Foe to the Unborn?,* 17 T.M. COOLEY L. REV. 563, 575 (citing generally National Right to Life Committee Federal Legislative Office, http://www.nrlc.org/Unborn_Victims/index.html (last updated June 23, 2003) [hereinafter *NRLC*]). Some changes in state laws have been made since Ms. Jolicoeur-Wonnacott's article was written in 2000, and those changes are incorporated herein. Not included in the number of states following the "born alive" rule is Texas, whose legislature passed in both houses a Pre-Natal Protection Act on June 2, 2003. The bill took effect on September 1, 2003, and protects the unborn from conception to birth. *See* Texas Legislature Online, 78th Regular Session (2003), Bill SB 319, http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm.
[20] Michael J Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, 1998 ARMY LAW. 23, 27 (citing United States v. Spencer, 839 F.2d 1341 (9th Cir. 1988)).
[21] United States v. Spencer, 839 F.2d 1341 (9th Cir. 1988).
[22] Davidson, *supra* note 20, at 27.
[23] *Spencer*, 839 F.2d at 1342.
[24] 18 U.S.C. § 1111(a) (1994).
[25] *Spencer*, 839 F.2d at 1343.

B. Quickening

As an alternative to the born alive rule, some jurisdictions advanced the notion that an unborn child is afforded the protection of the criminal law at "quickening." Quickening has been generally defined as "the first recognizable movements of the fetus, appearing usually from the sixteenth to eighteenth week of pregnancy."[26] Until the early 20th century, it was the most certain method of determining whether or not a woman was pregnant.[27] Because it was the only sure proof that a woman was pregnant, some jurisdictions adopted quickening as the point when an unborn child was a human being under the law.[28] Early courts then used quickening as an evidentiary standard for determining if violations of abortion statutes had occurred, while granting that some form of embryonic or "unanimated" life may have existed before quickening.[29] Lesser punishments were often assigned to abortions of pre-quickened unborn children.[30]

The term "quickening" lost significance in the medical profession as science advanced during the late 19th century.[31] According to one authority who denounced the continued use of quickening by the law: "[t]he foetus is certainly, if we speak physiologically, as much a living being immediately after conception, as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received."[32] Modern sonography established that fetal movements take place nearly two months before quickening.[33] In some jurisdictions, however, the law held to the distinction. Currently, there are seven states with statutes criminalizing the killing of an unborn child after it has quickened.[34]

---

[26] Forsythe, *supra* note 7, at 567 (citing DORLAND'S ILLUST. MED. DICT. 1105 (26th ed. 1985)); Roe v. Wade, 410 U.S. 113, 132 (1973).
[27] *Id.* at 571 (citing SAMUEL FARR, ELEMENTS OF MEDICAL JURISPRUDENCE 4 (1787), *reprinted in* T. COOPER, TRACTS ON MEDICAL JURISPRUDENCE (1819)).
[28] *Id.* at 573 (citing Evans v. People, 49 N.Y. 86 (1872) (appellant's manslaughter charge for causing a miscarriage in violation of abortion statute reversed since woman had not yet experienced quickening, stating "there must be a living child before its death can be produced")).
[29] Evans v. People, 49 N.Y. 86, 89-90 (1872); *See also Roe,*, 410 U.S. at 133-34; Forsythe, *supra* note 7, at 591.
[30] *Roe*, 410 U.S. at 139.
[31] Forsythe, *supra* note 7, at 574 (citing J. BECK, 1 ELEMENTS OF MEDICAL JURISPRUDENCE 276 (11th ed. 1860); and 3 WHARTON & STILLE'S, MEDICAL JURISPRUDENCE 7 (5th ed. 1905)).
[32] Forsythe, *supra* note 7, at 574.
[33] *Id.* at 578 (citing J. PRITCHARD, P. MACDONALD, & N. GANT, WILLIAMS OBSTETRICS 279 (17th ed. 1985)).
[34] *NRLC*, *supra* note 19.

C. Viability

In addition to the born-alive rule and quickening, some jurisdictions have determined that the unborn child is afforded the protections of the law at "viability." The term "viable" is generally understood to mean, "the physical maturation or physiological capability of the fetus to live outside the womb."[35] Although viability can vary in different circumstances, it is usually obtained between the 24th and 28th week of pregnancy.[36]

The first court to include viable unborn children in the statutory meaning of "person" for the purpose of criminal law was the Supreme Court of Massachusetts in *Commonwealth v. Cass*.[37] In that case, the court discarded the "ancient" common law born alive rule and held that the "infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide."[38] The court based its decision on medical advances which render the cause of death of the unborn more easily determinable.[39]

Similarly, in *State v. Horne*,[40] the Supreme Court of South Carolina used viability as a factor in determining criminal culpability. The court held that from that day forward, "the killing of a viable human being *in utero* could constitute a criminal homicide."[41] Regarding the issue of *mens rea*, although the accused only intended to kill his wife, the intent was "transferred" to the actual victim, their viable unborn child.[42]

Two states have passed statutes criminalizing violence on unborn children after viability.[43] In Tennessee, the killing of an unborn child after viability is treated much like any other homicide.[44] The Michigan Supreme

---

[35] *Forsythe*, *supra* note 7, at 569 (citing DORLAND'S ILLUST. MED. DICT. 1455 (26th ed. 1985)).
[36] *Id.*
[37] Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984). *See also* Forsythe, *supra* note 7, at 579 (noting viability "played no part in the development of the common law concerning the unborn child")).
[38] *Cass*, 467 N.E.2d at 1329. The defendant in *Cass* was found guilty of violating the motor vehicle homicide statute, but his punishment was abated due to the unforseeability of the decision. *Id.* at 1330. Five years later, the court applied their ruling in *Cass* to common law murder. *See* Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989).
[39] *Cass*, 467 N.E.2d at 1328. The court noted that they had already deemed out-dated the common law "year and a day" rule due to medical advances (citing Commonwealth v. Lewis, 409 N.E.2d 771 (Mass. 1980)). *Id.*
[40] State v. Horne, 319 S.E.2d 703 (S. Car. 1984).
[41] *Id.* at 704.
[42] *Id.*
[43] *NRLC*, *supra* note 19.
[44] *Id.* (citing Tenn. Code Ann. §§ 39-13-201, 39-13-202, 39-13-210, 39-13-211, 39-13-213, 39-13-214, 39-13-215 (1997 & Supp. 1998)).

Court interpreted a Michigan statute criminalizing the killing of an "unborn quick child" as manslaughter[45] to include only viable unborn children.[46]

D. State Law Trends

The current trend in state legislatures and state courts reflects growing dissatisfaction with the common law born alive rule. Although repeatedly challenged, nearly all courts have upheld the common law rule, indicating that, although the rule was anachronistic, the respective legislatures had the duty to enact changes to existing criminal law.[47] Courts recognized that modern medical technology had removed the obstacle of proving the causation element when the victim of an alleged crime was *in utero*. However, many of these same courts disfavored changing the common law rule, as such a change would seem to create new crimes, traditionally the province of state legislatures.[48] Consequently, a majority (thirty-five) of the state legislatures

[45] Mich. Stat. Ann. § 28.555.

[46] Larkin v. Wayne, 208 N.W.2d 176, 180 (Mich. 1973) (citing Roe v. Wade, 410 U.S. 113, 163-64 (1973)). Subsequently, the Michigan legislature adopted a prenatal protection act that criminalizes injury or death of an unborn child. Mich. Stat. Ann. § 750.323 (2004).

[47] Jolicoeur-Wonnacott, *supra* note 19, at 573 (citing State v. Holcomb, 956 S.W.2d 286, 291 (Mo. Ct. App. 1997) (citing State v. Beale, 376 S.E.2d 1 (N.C. 1989)). *But see* Meadows v. State, 722 S.W.2d 584 (Ark. 1987); State v. Green, 781 P.2d 678 (Kan. 1989).

[48] *See, e.g.,*Meadows v. State, 772 S.W.2d 584 (Ark. 1987); State v. Trudell, 755 P.2d 511 (Kan. 1988); People v. Guthrie, 293 N.W.2d 775 (Mich. Ct. App. 1980); State v. Soto, 378 N.W.2d 625 (Minn. 1985); People v. Vercelletto, 514 N.Y.S.2d 177 (County Ct. 1987); and Commonwealth v. Booth, 766 A.2d 843 (Pa. 2001). Some of these decisions (and others like them) provoked legislation effectively circumventing the common law rule. For a collection of case summaries, *see* Alan S. Wasserstrom, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671.

have now enacted the necessary changes to their criminal codes to circumvent the old rule and criminalize crimes against unborn children.[49]

III. MILITARY LAW BACKGROUND

Traditionally, as in civilian courts, military courts have followed the common law born alive rule.[50] The earliest military-specific reference to the rule dates to Colonel Winthrop, who wrote that murder under the common law required that "the person assailed must be a living being (not an unborn child)."[51] In 1951, Congress enacted the Uniform Code of Military Justice (UCMJ), codifying for the military many criminal offenses, including homicide.[52] However, Articles 118 [homicide] and 119 [manslaughter] of the UCMJ failed to define "human being" in their prohibitions against murder and manslaughter. Consequently, military courts looked to the common law for clarification.[53] In this regard, military courts have consistently upheld the traditional common law approach that has required a child to be born alive in order to be considered a human being and a cognizable victim of a crime. However, even though the common law has prevailed, the military courts have indicated a willingness to reconsider, like civilian courts, the formulation of the born alive rule.

A. The Born Alive Rule in Military Law

The common law born alive rule used by military courts was first developed in the 1954 case of *United States v. Gibson*.[54] In *Gibson*, an Air Force nurse was convicted of unpremeditated murder when she strangled her baby immediately after the child's birth.[55] On review of her conviction, the

---

[49] *NRLC*, *supra* note 19.

[50] *See* Davidson, *supra* note 20, at 28-30; United States v. Nelson, 53 M.J. 319, 321 (2000).

[51] Davidson, *supra* note 20, at 23, 29 (quoting COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (1898)). The Court of Appeals for the Armed Forces relied upon this quote from Winthrop in deciding its two cases that directly addressed the born alive rule. *See* United States v. Robbins, 52 M.J. 159, 163 (C.A.A.F. 1999); United States v. Nelson, 53 M.J. 319, 321 (C.A.A.F. 2000).

[52] Davidson, *supra* note 20, at 29.

[53] *Id.* at 29-30. Davidson's article traces the common law origins of the military homicide laws -- Articles 118, 119, and 134 of the UCMJ. By comparison to state common law trends recognizing fetal crimes, he concludes: "[I]n light of the extensive medical advances seen since the formation of the common law's born alive rule, a compelling argument exists for military courts to reject this antiquated legal maxim and bring viable fetuses within the ambit of the UCMJ's homicide articles." *Id.* at 38.

[54] United States v. Gibson, 17 C.M.R. 911 (U.S.A.F.B.R. 1954).

[55] *Id.* at 919. Gibson was a First Lieutenant at an Air Force Hospital in Alaska. She had kept her pregnancy a secret before the birth of her child at her Bachelor Officer's Quarters. Shortly thereafter

appellant challenged the legal sufficiency of the verdict. The court upheld the conviction, relying on the modern common law "separate existence" test of *People v. Hayne*r. [56] *Hayner,* a New York case decided five years earlier, held that a child would be considered born alive, and thus a human being within the meaning of the statute, if "wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of her own."[57] Additionally, the court applied the modern common law view that did not require severance of the umbilical cord before a child was considered born alive rather than an earlier common-law view that required severance of the umbilical cord.[58]

Applying the modern common law approach, the court noted that the test did not "requir[e] the severance of the umbilical cord but only that the child [was] carrying on its being without help of the mother's circulation."[59] It was a "physiological fact that the circulation between mother and child through the umbilical arteries ceas[ed] almost immediately after the child [was] extruded and breath[ed]."[60] Furthermore, the court stated that the notion that severance of the umbilical cord was required "appear[ed] to have been repudiated by modern advancement in medical knowledge of human physiology."[61] Thus, a child's independent circulation, rather than whether the umbilical cord was severed, determined whether the child was born alive. Because the child had "breathed and cried," the court held "the evidence established that the child was 'born alive' and was a human being within the meaning of the Uniform Code of Military Justice, Article 118."[62]

---

she strangled her child, wrapped her in sheets and put her in a footlocker. The mother did not testify at trial as to the condition of the child at birth but the nurse from a neighboring apartment testified that she heard a child cry for a few seconds. After the mother did not show for a number of meals at the mess hall, a fellow nurse notified a physician who, after an examination of the appellant, had her moved to the hospital where she was treated for loss of blood. The obstetrician who examined her determined that she must have given birth in the three previous hours. A search was then conducted, which resulted in the discovery of the dead baby girl in the footlocker. The pathologist who performed the autopsy on the child testified that the child had been born alive and that her lungs contained air. The mother was tried for the offense of premeditated murder "of an unnamed baby girl, by means of strangulation, in violation of Uniform Code of Military Justice, Article 118." The law officer issued instructions on the offense of unpremeditated murder from the Manual for Courts Martial, but, significantly, gave no instructions regarding the born alive rule. The court martial convicted the mother of murder without premeditation. The sentence approved by the convening authority was: a dismissal from the service; forfeiture of all pay and allowances; and confinement at hard labor for five years.

[56] *Id.* at 926.

[57] *Id.* at 926 (citing People v. Hayner, 90 N.E.2d 23 (1949)).

[58] *Id.*, at 926.

[59] *Id*.

[60] *Id*.

[61] *Id*. at 924.

[62] *Id.* at 919, 927. Evidence of breath was found by an autopsy on the child by a pathologist, Captain James G. Bridgens. In Captain Bridgens' opinion, the child had lived for a "matter of minutes,

Currently, almost a half century later, the *Gibson* court's formulation of the born alive rule remains good law in the military justice system.[63] However, the military, while keeping with the traditional rule, has done so without expressly repudiating modern conceptions of the born alive rule.

B. The Viability Standard

Military courts have discussed two different viability standards, both of which are very different from each other. One has been rejected outright, while the other has been accepted, albeit only in theory. Ironically, it is the former, which was most closely related to the *Gibson* born alive test, that the military has expressly rejected. First, the Court of Appeals for the Armed Forces (CAAF) in *United States v. Nelson*[64] overturned a "viability outside the womb" standard that slightly revised the *Gibson* formulation of the born alive rule.[65] While the lower court still required the *Gibson* formulation that the child be expelled from the mother and have an independent circulation, the lower court, motivated by a desire to "afford the maximum protection [to the child] possible under the law," did not require evidence that the child had taken a breath.[66] Rather, it was only necessary in the opinion of the lower court that the government prove "other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles."[67] CAAF, however, rejected a change to the *Gibson* standard, relying primarily on the need for the legislature rather than the judiciary to handle the issue.[68] Upholding *Gibson,* CAAF also referred to the solid support for the born alive rule in prior military case law, as well as the flexibility the standard offered "to accommodate advancements in medicine that inevitably affect[ed] the reality of what it means to be 'born alive.'"[69]

---

probably less than 10 or 15." His examination revealed that the lungs "contained air, plus areas of emphysema, and [because the lungs] floated when placed in water." *Id.*

[63] *See* United States v. Nelson, 53 M.J. 319 (C.A.A.F. 2000).

[64] A Hull Maintenance Technician Third Class had secretly given birth on ship, had placed her child and the clothing used to clean up the afterbirth in a semi-aerated trash bag, and had disembarked with the bag in tow. There were, however, three doctors and two medical corpsmen "experienced in delivering babies" on Nelson's ship. She arrived at an Italian hospital 12 hours later. Attempts to revive the child were unsuccessful. Expert medical testimony provided at the court-martial supported the conclusion that the child had been born alive, but needed simple medical assistance to begin breathing. The court-martial members were given instructions on the born alive rule as interpreted by *Gibson*. Nelson was convicted of involuntary manslaughter. *Id.* at 321-23.

[65] *Id.* at 323.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 323-24.

Alternatively, a more progressive viability standard akin to the viability standard in civilian courts, remains curiously alive yet unused in military case law. *Gibson*, the same court that developed the born alive test, elaborated the standard. In *Gibson,* the court approved in theory the "more liberal and 'enlightened' version" of the separate existence test from the California Court of Appeals decision of *People v. Chavez*,[70] before adopting the *Hayner* separate existence test. Under the *Chavez* viability standard:

> it would be a mere fiction to hold that a child is not a human being because the process of birth has not been fully completed, when it has reached that state of viability when the destruction of the life of its mother would not end its existence and when, if separated from the mother naturally or by artificial means, it [would] live and grow in a normal manner.[71]

While *Gibson* chose not to apply the *Chavez* viability standard, the court "[did] not reject [the standard] as unsound, or as inapplicable in military law," but instead simply passed on deciding whether *Chavez* and cases like it should be applied in military law.[72] To date, military courts have refrained from discussing viability as a replacement for the born alive rule in any more detail. Rather, they have upheld the born alive rule initially developed in *Gibson.*[73] Thus, the current silence on *Gibson's* proposed viability standard had left, quite possibly, a dormant but nonetheless valid theory in military law, potentially applicable to future cases where the court must decide when an unborn child becomes a human being.

---

[70] *Gibson*, 17 C.M.R. at 926 (citing People v. Chavez, 176 P.2d 92, 95 (Cal. Ct. App. 1947*)*. *Chavez* had carefully considered adopting a viability standard similar to the one adopted by Massachusetts in Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984)).

[71] *Gibson* cited *Chavez's* critique of the born alive rule at length. The *Chavez* court held that the born alive rule was a "legal fiction" because the birth process did not in and of itself "create a human being." The court noted "it [was] well known that a baby may live and grow when removed from the body of its dead mother by a Caesarian operation." Furthermore, the born alive rule presumed the baby would be born dead. Thus the court, in order for a claim to be cognizable, required evidence of life, rather then evidence of death. *Chavez* called this presumption "contrary to common experience and the ordinary course of nature." *Gibson*, 17 C.M.R. at 925.

[72] *Id.* at 926.

[73] *See Nelson*, 53 M.J. at 323-24.

IV. AMENDED ARTICLE 119(a), UCMJ

The Unborn Victims of Violence Act of 2004 ("the Act") amends both Title 18 of the United States Code and Article 119 of the Uniform Code of Military Justice found in Title 10 of the United States Code. Using the same terminology, both were amended to prohibit "caus[ing] death of or bodily injury to an unborn child," to define "unborn child," and to explain what actions cannot be prosecuted.[74]

The Act provides that any person who commits specified federal crimes will be guilty of a separate offense for causing the death of, or bodily injury to, a child in utero.[75] The defendant need not be aware of the presence of the unborn child to be charged or convicted of the separate offense.[76] While this aspect of the Act has drawn much criticism, especially since it protects the unborn from conception regardless of viability, it is clearly founded on the "eggshell skull" or "defendant takes the plaintiff as he finds him" rule.[77] The federal offenses implicated by the Act include terrorist acts, assaults on federal officers and foreign dignitaries, murder, and manslaughter.[78] The punishment for the

---

[74] The Unborn Victims of Violence Act of 2004, or "Laci and Conner's Law," 10 U.S.C. § 919a and 18 U.S.C. § 1841 (2004). The Act amends Title 18 of the U.S.C. by inserting after Chapter 90: "Chapter 90A—Protection of Unborn Children, Sec. 1841. Protection of unborn children." The Act also amends Subchapter X of chapter 47 of title 10, UCMJ, by inserting after section 919 (article 119): "Sec. 919a. Art. 119a. Death or injury of an unborn child." The captions of the 2003 Senate version of the bill were amended before a vote on the bill. Both the Title 18 and the UCMJ captions were changed from "Causing death of or bodily injury to unborn child." However, title 18 was modified to read "Protection of unborn children," whereas the UCMJ title was modified only slightly to "Death or injury of an unborn child." Neither the committee reports nor the Congressional record indicates the exact reasons for the changes to the captions, but they seem not to affect the intent or effect of the Act.

[75] 118 Stat. 568, 569 (codified at 10 U.S.C. § 919a(a)(1)).

[76] 118 Stat. 568, 569 (codified at 10 U.S.C. § 919a(a)(2)).

[77] *See, e.g.*, Bartolone v. Jeckovich, 481 N.Y.S.2d 545 (N.Y. App. Div. 1984). Generally, a defendant will be liable for all injuries, even unforeseeable ones, which result from a physical injury to the person of the plaintiff. This doctrine, along with that of transferred intent, establishes the causation element in the crime. *Id.*

[78] 118 Stat. 568, 569 (codified at 18 U.S.C. § 1841(b)(1)). The complete list of federal crimes is as follows:

> (1) Sections 36 [drive-by shooting], 37 [violence at international airports], 43 [animal enterprise terrorism], 111 [assaulting, resisting, or impeding certain officers or employees], 112 [protection of foreign officials, official guests, and internationally protected persons], 113 [assaults within maritime and territorial jurisdiction], 114 [maiming within maritime and territorial jurisdiction], 115 [influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member], 229 [chemical weapons], 242 [deprivation of rights under color of law], 245 [interfering with federally protected activities, like voting], 247 [damage to religious property;

obstruction of persons in the free exercise of religious beliefs], 248 [freedom of access to clinic entrances], 351 [Congressional, Cabinet and Supreme Court assassination, kidnapping, and assault], 831 [prohibited transactions involving nuclear materials], 844(d) [knowingly transporting an explosive to be used to kill, injure, or intimidate any individual or unlawfully destroy any building, vehicle or other real or personal property], 844(f) [maliciously damaging or destroying, or attempting to do so, by means of fire or an explosive, of federal property], 844(h)(1) [using fire or an explosive to commit any federal felony], 844(i) [maliciously damaging or destroying, or attempting to do so, of property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce], 924(j) [causing death through unlawful use of a firearm], 930 [possession of firearms and dangerous weapons in Federal facilities], 1111 [murder], 1112 [manslaughter], 1113 [attempted murder or manslaughter], 1114 [protection of officers and employees of the US], 1116 [murder or manslaughter of foreign officials official guests, or internationally protected persons], 1118 [murder by a federal prisoner], 1119 [foreign murder of US nationals], 1120 [murder by escaped prisoners], 1121 [killing persons aiding Federal investigations or State correctional officers], 1153(a) [offenses committed within Indian country], 1201(a) [kidnapping], 1203 [hostage taking], 1365(a) [tampering with consumer products], 1501 [assault on process server], 1503 [influencing or injuring officer or juror generally], 1505 [obstruction of proceedings before departments, agencies, and committees], 1512 [tampering with a witness, victim, or an informant], 1513 [retaliating against a witness, victim, or an informant], 1751 [Presidential and Presidential staff assassination, kidnapping, and assault], 1864 [hazardous or injurious devices on Federal lands], 1951 [interference with commerce by threats or violence], 1952(a)(1)(B) [aiding racketeering], 1952(a)(2)(B) [aiding racketeering], 1952(a)(3)(B) [aiding racketeering], 1958 [use of interstate commerce facilities in the commission of murder-for-hire], 1959 [violent crimes in aid of racketeering activity], 1992 [wrecking trains], 2113 [bank robbery and incidental crimes], 2114 [robbery of mail, money, or other property of the US], 2116 [robbery of railway or steamboat post office], 2118 [robberies and burglaries involving controlled substances], 2119 [robberies of motor vehicles], 2191 [cruelty to seamen], 2231 [assault or resistance of person authorized to serve or execute search warrants or to make searches and seizures], 2241(a) [aggravated sexual abuse], 2245 [sexual abuse resulting in death], 2261 [interstate domestic violence], 2261A [interstate stalking], 2280 [violence against maritime navigation], 2281 [violence against maritime fixed platforms], 2332 [killing a national of the US while the national is outside the US, or conspiracy to do so, or intending or causing serious bodily injury to a nation of the US], 2332a [use of certain weapons of mass destruction], 2332b [acts of terrorism transcending national boundaries], 2340A [torture], and 2441 [war crimes] of this title.

(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e) [homicide related to “continuing criminal enterprise”]).

(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283 [killing, assaulting, resisting, or interfering with any person who performs any inspections of facilities as described in the Atomic Energy Act]).

separate offense, where it caused the death or injury to the unborn child, is the same as if that injury or death occurred to the unborn child's mother, except that the death penalty may not be imposed.[79] If the defendant intentionally killed or

---

Id. The prerequisite crimes referred to in the proposed amendment to the UCMJ are as follows:

> The provisions referred to in subsection (a) are sections 918 [murder], 919(a) [voluntary manslaughter], 919(b)(2) [homicide without intent to kill or inflict great bodily harm while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of Article 118, directly affecting the person – excluding homicide by culpable negligence], 920(a) [rape], 922 [robbery], 924 [maiming], 926 [arson], and 928 [assault] of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

118 Stat. 568, 569 (codified at 10 U.S.C. § 919a(b)). Article 111 [Drunken or reckless operation of a vehicle, aircraft, or vessel] was deleted from the list of underlying UCMJ offenses before the bill's final passage in the House. The reason for the amendment is not provided in the Congressional Record, but two reasons present themselves as justifying the deletion. First, drunk or reckless driving is not an offense that any individual -- let alone mother -- suffers at the hands of the perpetrator; rather, it is the resulting car crash that hurts either the passengers, pedestrians or other drivers. Secondly, either article 128 [assault] or article 124 [maiming] would supply the underlying offense to the mother of the unborn child in order to prosecute an impaired or reckless operator of some vehicle, aircraft, or vessel. For example, Article 128 for the Manual for Courts-Martial United States indicates that assault can also be committed with a vehicle. Article 128, section c(2)(c), Manual for Courts-Martial United States (2000)("Examples of battery"), *available at* http://www.uscg.mil/legal/mj/Courts-MartialManual.pdf.

[79] 118 Stat. 568, 569 (codified at 10 U.S.C. §§ 919a(a)(1), 919a(a)(3)). Before the bill was introduced to the full House, members of the House Armed Services Committee asked for and were granted amendments to the Act's penalty provision. H.R. Rep. No. 108-427 (2004). Subsection (a)(2)(A) of Sec (3) was stricken; it had provided that the penalty applicable for an offense to the child was to be the same as if the injury or death had occurred to the mother. In its place, Sec (3)(a)(1) was amended by striking the period at the end of (a)(1) and adding: "and shall, upon conviction, be punished by such punishment as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother." *Id.* The Chairman of the House Judiciary Committee, Representative Sensenbrenner, described the amendments as "technical changes . . . to the . . . UCMJ portion of the bill to conform those provisions to the format of the UCMJ." H.R. Rep. No. 108-427 (2004). Nevertheless, the Chairman's description of the amendment understates the considerable problems the drafters encountered while crafting it. The amendment conforms significantly to the UCMJ's formula for establishing the applicable penalties, but it also modifies the formula in a way unique to the Act. The standard format of articles under the UCMJ provides that an offense under the article "shall be punished as a court-martial may direct." However, a court-martial is not given plenary authority to establish the penalty for each and every offense that comes before it. Rather, the President promulgates a maximum penalty that a court-martial may impose for each enumerated article. Maximum Punishment Chart, Manual for Courts-Martial (MCM), Appendix 12. Moreover, minimum penalties are not provided for in either the Punitive Articles or Table of Maximum Penalties for the MCM. The President's plenary authority over maximum penalties under the UCMJ is due to another act of Congress: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856, Rules for Court-Martial (RCM) 1003. In other words, under a standard UCMJ article, the President can establish the penalty for its violation as low as he or she chooses. Had the UCMJ provision of the Unborn Victims of Violence Act been written in the same way, any President who disapproved of the Act could have removed all force of the Act in the military by establishing a negligible penalty.

attempted to kill the unborn child, however, that person would be punished as provided under the United States Code for intentionally killing or attempting to kill a human being,[80] except that the death penalty will not apply.[81]

However, because the separate offense for death or injury to the unborn child must be attached to another federal crime, the Act has been described as "an enhanced punishment statute."[82] In this way, the Act is similar to a felony-murder statute, or the Racketeer Influenced and Corrupt Organizations (RICO) Act.[83] In this sense, the Unborn Victims of Violence Act arguably does not create new "crimes," it merely increases the punishment for already-defined crimes where certain attendant circumstances are present.[84] "No conduct which was lawful is to be unlawful; no conduct which was legal is to be illegal."[85]

There are three specific exclusions from the prohibitions of the Act in order to preserve the abortion right first recognized in *Roe v. Wade*.[86] Barred from prosecution under the Act are: (1) those conducting consensual abortions;[87] (2) those conducting any medical treatment of the pregnant woman or her unborn child; and (3) any woman with respect to her unborn child.[88]

This circumstance shows why the drafters of the amendment added to the standard UCMJ formula, the following phrase: "which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother." The penalty applicable for the violation of the Act cannot change from administration to administration, unless each should change the maximum penalties for all of the Act's predicate UCMJ offenses. This would be the only reasonable constitutional means of effectuating a reduction (or increase) in the penalty applicable to the Act since any attempt to alter the penalties exclusively for pregnant women would certainly be invalidated as Equal Protection violations.

[80] 118 Stat. 568, 569 (codified at 10 U.S.C. § 919a(a)(3). The section of the federal code referred to for the killing or attempted killing of a human being is 18 U.S.C. 1111(a).

[81] 10 U.S.C. § 919a(a)(4).

[82] *Unborn Victims of Violence Act of 2003: Hearing on H.R. 1997 Before the House Comm. on the Judiciary Subcomm. on the Constitution*, 108th Cong. 1-2 (2003) (statement of Gerard V. Bradley, Professor of Law, University of Notre Dame).

[83] *Id*.

[84] *Id.*

[85] *Id.*

[86] Roe v. Wade, 410 U.S. 113 (1973).

[87] Before its passage, Article 119a(c) was amended. It now says that "nothing in this section shall be construed to permit prosecution of mothers, persons involved in performing consented to abortions, or persons giving medical care to the mother or the unborn child." Furthermore, third party consent to abortions was broadened beyond what was "implied in a medical emergency" to such consent that is "implied by law." The reason for the latter change, which is not documented in the Congressional record, likely is to insulate the exceptions clause of the amendment from a charge that it is a backdoor attempt to curtail certain classes of abortions, since "implied in a medical emergency" might limit the scope of consent for minors obtaining abortions, for example. Such a limitation, while it would not have resulted in the prosecution of the minor child or mother, might very well have subjected a medical practitioner to liability under the Act if he were to have performed an abortion on a minor that was not due to a medical emergency.

[88] Unborn Victims of Violence Act of 2004, 10 U.S.C. § 919a(c).

V. THE CONSTITUTIONALITY OF PRENATAL CRIMINAL LEGISLATION

The first question in determining the constitutionality of the Act is whether or not Congress is empowered to legislate over such matters as violence against the unborn.[89] Regardless of what happens to Section 2 of the Act, the amendment to the UCMJ in Section 3 of the Act should not be overturned on such grounds. Congress is specifically empowered to regulate the Armed Forces, and this is what the Act proposes to do.

Illinois and Minnesota are two states that have enacted prenatal criminal laws similar in scope and punishment to the Unborn Victims of Violence Act.[90] Both have adopted "conception model" laws protecting unborn children from conception until birth.[91] In so doing, both Illinois and Minnesota subject the person causing the death or injury of an unborn child to the same punishment as the person causing the death or injury of a person living outside the womb.[92]

Defendants accused of violating the prenatal criminal statutes in Illinois and Minnesota have challenged the constitutionality of the statutes on due process and equal protection grounds. To date, these challenges have been unsuccessful and the laws in both states have been upheld. The following paragraphs examine the constitutional challenges to the Illinois and Minnesota prenatal criminal laws, and analyze whether the Unborn Victims of Violence Act would pass constitutional muster if challenged on the same grounds. Moreover, although neither the Illinois nor the Minnesota prenatal criminal statutes have been challenged on Eighth Amendment cruel and unusual punishment grounds, such a challenge was made of a similar statute in Ohio, and was unsuccessful as well. Accordingly, this constitutional challenge is also discussed and whether the Unborn Victims of Violence Act would withstand such a challenge is analyzed.

Given the strong similarity between the prenatal criminal laws of Illinois and Minnesota and the Unborn Victims of Violence Act, such challenges to the Unborn Victims of Violence Act on due process and equal protection grounds

---

[89] *Unborn Victims of Violence Act of 2003: Hearing on H.R. 1997 Before the House Comm. on the Judiciary Subcomm. on the Constitution*, 108th Cong. 1-2 (2003) (statement of Gerard V. Bradley, Professor of Law, University of Notre Dame).

[90] *See* ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993); MINN. STAT. sect. 609. 21 *et. seq.*

[91] *See* ILL. ANN. STAT. ch. 720, para. 5/9-1.2 (Smith-Hurd 1993); MINN. STAT. sect. 609. 21 *et. seq.*

[92] *See*, *e.g.*, ILL. ANN. STAT. ch. 720, para. 5/9-1.2(d) (Smith-Hurd 1993) (specifically stating that first degree murder of an unborn child is to be punished exactly like first degree murder, except that no death penalty may be imposed); MINN. STAT. sect. 609.185 (1994) (sentence for first degree murder is life in prison). First-degree murder of an unborn child in Minnesota also carries a sentence of imprisonment for life. MINN. STAT. 609.2661 (1994).

should be unsuccessful and the law should be upheld. Additionally, prosecutions under the act appear not to constitute cruel and unusual punishment in violation of the Eighth Amendment.

A. The Limited Scope of Congressional Powers Challenge

Regardless of what happens to Section 2 of the Act, the amendment to the UCMJ in Section 3 of the Act should not be overturned on such grounds. Congress is specifically empowered to regulate the Armed Forces, and this is what the Act proposes to do.

B. The Due Process Challenge

In a due process challenge to a state criminal statute, a defendant can claim that a statute is void for vagueness in violation of the 14th Amendment.[93] In *Kolendar v. Lawson*,[94] the U.S. Supreme Court held that a criminal law must be drafted so as to give notice as to the prohibited conduct, and so as to preclude arbitrary enforcement in order to satisfy due process.[95]

In *State v. Merrill*,[96] the defendant was charged with homicide under the Minnesota prenatal homicide law.[97] On November 13, 1988, Merrill shot Gail Anderson to death. An autopsy later revealed Merrill also killed the healthy 28 day-old unborn child Anderson was carrying.[98] At trial and on appeal, Merrill claimed the Minnesota prenatal homicide statute violated his due process rights because the statute did not give fair warning as to the prohibited conduct and encouraged arbitrary and discriminatory enforcement of the law.[99]

The Minnesota Supreme Court denied this due process challenge finding that statute gives fair notice to citizens.[100] The Court stated that when an assailant kills a female of childbearing age, he cannot exclude the possibility that she may be pregnant.[101] Applying the doctrine of transferred intent, the court held that the defendant is not excused from criminal liability merely because the resulting victim

---

[93] U.S. CONST. amend. XIV, sect. 1.
[94] Kolendar v. Lawson, 461 U.S. 352 (1983).
[95] *Id*. at 357.
[96] State v. Merrill, 450 N.W.2d 318 (Minn. 1990).
[97] *Id*. at 320. Defendant was charged under both MINN. STAT. sect. 609.2661 (1988) for first-degree murder of an unborn child, and under MINN. STAT. sect. 609.2662 (1988) for second-degree murder of an unborn child. *Id*. at 320 nn.1-2.
[98] *Merrill*, 450 N.W.2d at 320.
[99] *Id*. at 322.
[100] *Id.* at 323.
[101] *Id*. at 324.

of the defendant's actions is different than the intended victim.[102] With this, the Court concluded the defendant had the requisite fair warning to satisfy due process.[103]

Merrill had also claimed that the prenatal homicide statute was constitutionally flawed because the phrase "causes the death of an unborn child" in the statute is too vague, opening the door for arbitrary and discriminatory enforcement.[104] Merrill argued that such language opens the door to the difficult determination of when "life" begins and when "death" occurs.[105] The court denied this challenge noting that by defining an unborn child as "the unborn offspring of a human being conceived, but not yet born,"[106] the legislature required the state to prove only that the "organism" conceived was alive, and was no longer alive due to the defendant's acts.[107] Because the statute had addressed this question, philosophical debates over when life begins and ends were irrelevant for determining criminal liability under this statute.[108]

An Illinois appellate court in *People v. Ford*[109] addressed a due process challenge to the Illinois prenatal homicide statutes.[110] The defendant had been charged and convicted of homicide under the Illinois prenatal homicide statute for stomping or kicking the stomach of his seventeen-year-old stepdaughter, who was five and one-half months pregnant at the time.[111] This battery caused the death of the unborn child.[112] The Illinois statute, like the Minnesota statute,[113] defines "unborn child" as any individual of the human species from fertilization until birth.[114]

---

[102] *Id*. at 323. The court noted that if the intent being transferred results in a different type of harm, then the doctrine of transferred intent cannot apply. Here, however, the court held the intent being transferred was for the same type of harm. *Id.*

[103] *Merrill*, 450 N.W.2d at 323.

[104] *Id*. (referring to MINN. STAT. sects. 609.2661-2662 (1988); these provisions are the prenatal homicide provisions whose counter-parts are first degree murder and second degree murder, respectively).

[105] *Id*. at 324.

[106] *Id*. (quoting MINN. STAT. sect. 609.266(a) (1988)).

[107] *Id.*

[108] *Id*.

[109] People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991).

[110] *Id*. Defendant claimed the statute, ILL. REV. STAT. ch. 38, para.9-1.2, violated both the equal protection and due process clauses of section one of the Fourteenth Amendment of the United States Constitution. *Id.* at 1200.

[111] *Id.* at 1190.

[112] *Id*.

[113] MINN. STAT. sect. 609.266(a) (1994).

[114] ILL. REV. STAT. ch. 38, para. 9-1.2(b). The sentence for intentional homicide of an unborn child is the same as first-degree murder, except the death penalty cannot be given. *Id*. at 9-1.2(d). Also, Illinois law does require that the perpetrator know the woman was pregnant. *Id*. at 9-1.2(a)(3).

The defendant in *Ford* contended that the prenatal homicide law was unconstitutionally vague focusing his challenge on the statutory phrase "caused the death of" an unborn child.[115] Defendant claimed this ambiguous phrase invites each court to give a subjective definition of when life begins and death occurs leading to arbitrary and discriminatory enforcement of the statute.[116] This is the same language and due process challenge made by the defendant in *Merrill*.[117]

The Illinois appellate court, favorably citing *Merrill*, concluded that the Illinois prenatal homicide statute was constitutional.[118] The court held that since the statute clearly defined "unborn child," the trier of fact only had to determine if the "entity" in the woman's womb was alive, and if it ceased to be alive due to the defendant's actions.[119] This clear and simple language in the statute defeated the defendant's void for vagueness challenge[120] and the defendant failed to meet his considerable burden of showing the law was impermissibly vague in all of its applications.[121]

In my view, the Unborn Victims of Violence Act will withstand constitutional attacks on similar due process grounds. A defendant challenging the prenatal criminal law would likely attack the language "causing death of or bodily injury to unborn child," as did defendants in Illinois and Minnesota.[122] The defendant would claim that this language leads to arbitrary and discriminatory enforcement of the law, because the point the unborn child becomes alive and the point the unborn child dies would need to be subjectively determined in each case. This is the same reasoning the defendants in *Ford* and *Merrill* used in their attacks.[123]

---

[115] *Ford*, 581 N.E.2d at 1200.
[116] *Id*.
[117] *Merrill*, 450 N.W.2d at 323.
[118] *Ford*, 581 N.E.2d at 1200-02.
[119] *Id*. at 1201.
[120] *See Id.*
[121] *Id*. (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)).
[122] *Ford*, 581 N.E.2d at 1200; *Merrill*, 450 N.W.2d at 323.
[123] *Ford*, 581 N.E.2d at 1200. Most recently, however, Utah's Supreme Court rejected a similar void for vagueness challenges to Utah's homicide and aggravated homicide statutes. In *Utah v. MacGuire* the defendant challenged the state's laws allowing for the prosecution for killing an unborn child, and for using the death of the unborn child as an aggravating circumstance justifying an aggravated murder charge. 84 P.3d 1171, 1172 (2004). In that case, the defendant was charged with having shot and killed his former wife and her unborn child at her workplace after he had learned from her father that she was engaged and pregnant. *Id*. at 1173. At the time of the unborn child's death, the medical examiner estimated that the unborn child had reached some point between its thirteenth and fifteenth week of development. *Id.*

The Utah homicide statute included "unborn child" in the definition of human being. UTAH CODE ANN. § 76-5-201(1) (criminalizing someone "caus[ing] the death of another human being, including an unborn child"). Also, under the Utah aggravated murder statute, it provides that

The adopted legislation defeats this due process challenge to the Unborn Victims of Violence Act by defining an unborn child as "a child in utero," which is further defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."[124] This is essentially the same language that is used in the Illinois and Minnesota statutes.[125] The clear, simple definition of "unborn child" used in the Unborn Victims of Violence Act means that a fact finder will not have to make a subjective determination as to when life begins and when it ends. The only determinations to be made by the fact finder are whether there has been conception but not birth, and whether the defendant caused the conceived human being to die.

The Illinois and Minnesota prenatal protection laws similarly gave simple, clear definitions of the term "unborn child" defeating the defendants' claims in both

---

one circumstance justifying such a charge is where the "homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more *persons* were killed." UTAH CODE ANN. § 76-5-202(1)(b) (emphasis added). The defendant filed a motion to dismiss the homicide charge for the death of his unborn child and also for the aggravated homicide charge resulting from that second death. The defendant argued that the term "unborn child" does not provide sufficient notice to a defendant because such term leaves open "when unborn childhood begins." *MacGuire*, 84 P.3d at 1175. Moreover, the defendant argued that these statutes encourage arbitrary and discriminatory enforcement because "the prosecutor is left to speculate at what point an unborn child becomes a person for enforcement purposes." *Id*. at 1177. The district court rejected the motion, and the defendant filed an appeal to the Utah Supreme Court. *Id.* at 1177.

The court held that each of the two void for vagueness challenges was unmeritorious. *Id.* at 1178. The court looked at both the plain meaning of "unborn child" and the other statutory contexts in which the Utah legislature used the term. *Id*. at 1175-76. The court held that the plain meaning of the term "unborn child" means "a human being at any stage of development in utero." *Id*. at 1175. Moreover, the court found that this definition was consistent with the Utah legislature's other applications of "unborn child." Therefore, the defendant had sufficient notice of the prohibited conduct. *Id.* at 1175-76. Next, the court held that because the term provides notice of what conduct is prohibited, the prosecutor would have no discretion in choosing whether or not to prosecute the killing of the unborn. *Id.* at 1177. Thus, the court affirmed the district court's rejection of defendant's motion to dismiss. (Note that included in the motion to dismiss had been an equal protection challenge to the legislation which the supreme court refused to hear due to its being procedurally defaulted.) *Id.* at 1178.

Lastly, there was a potentially important concurrence signed by all members of the majority opinion, in response to Chief Justice Durham's lone dissent. *Id.* The dissent argued that the Utah legislature could not constitutionally include an 'unborn child' in its definition of person because consistent with Roe v. Wade, 410 U.S. 113 (1973), the unborn child has never been held to be a full legal person, and therefore the aggravated murder charge had to be dismissed. *Id*. at 1182. The dissent stated: "[I]f a fetus were deemed a legal 'person,' its life could not be taken intentionally in the process of honoring a pregnant woman's 'liberty interest.'" *Id*. (citing *Roe,* 410 U.S. at 157, n. 54.). The concurring opinion by Justice Parrish rejected the dissent's position. He argued that the legislature could use the term "person" to refer to a fetus in certain contexts, where it did not restrict a constitutionally protected right (such as the mother's strong constitutional right to privacy in the decision of whether to bear or beget a child). *MacGuire*, 84 P.3d at 1179.

[124] S. 1019, 108th Cong., § 2 (2003).

[125] 720 ILL. COMP. STAT. sec. 5/9-1.2(b)(1); and MINN. STAT. sect. 609.266(a).

states that the laws violated the due process clause by causing arbitrary and discriminatory enforcement. There is no reason to conclude that the result in federal court would be any different.

C. The Equal Protection Challenge

The second type of constitutional argument raised by defendants when challenging the prenatal criminal statutes in Illinois and Minnesota is based on the denial of equal protection.[126] The equal protection clause of the U.S. Constitution requires that all persons similarly situated be treated alike under the law.[127] If the law in question touches upon a fundamental right, or if it classifies people in a suspect manner (for example, by race), then the court will apply strict scrutiny and the state has the considerable burden of showing it has a compelling interest in legislating as it did.[128] If the law in question does not touch upon a fundamental right, nor classify people in a suspect manner, then the court will apply a rational basis scrutiny and the state only has to show that the law bears a rational relationship to achieving the goal desired.[129]

In *State v. Merrill*,[130] the defendant claimed the Minnesota prenatal criminal statute violated the equal protection clause by not distinguishing between a viable and nonviable fetus.[131] Merrill argued that under *Roe v. Wade*,[132] a nonviable fetus is not a person.[133] The defendant observed that under the prenatal homicide statute, he faced serious criminal penalties for destroying a nonviable fetus while others, like a pregnant woman and her abortionist who do the same thing, are not subject to criminal penalties.[134] Thus, Merrill concluded that similarly situated people are treated differently violating the equal protection clause.[135]

---

[126] People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991); and State v. Merrill, 450 N.W.2d 318 (Minn. 1990).
[127] Plyler v. Doe, 457 U.S. 202, 216 (1982).
[128] Kathleen M. Sullivan, *The Supreme Court 1991 Term Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 n.245 (1992).
[129] Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429, 430 (1994) (citing Danridge v. Williams, 397 U.S. 471, 485 (1970)).
[130] State v. Merrill, 450 N.W.2d 318 (Minn. 1990).
[131] *Id.* at 321.
[132] Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, the court held that although the state does have a legitimate interest in protecting the lives of its citizens, even unborn ones, a woman's right to privacy is a fundamental right, and she is essentially free to terminate her pregnancy with a doctor until the end of the first trimester of pregnancy. *Id*. at 164-65.
[133] *Merrill*, 450 N.W.2d at 321.
[134] *Id*.
[135] *Id*.

Although the court noted that the equal protection clause requires that all persons similarly situated be treated the same,[136] the court was not persuaded by the defendant's argument.[137] Rather, the court held that a defendant who assaults a pregnant woman and a woman who elects to terminate her pregnancy are not similarly situated.[138] *Roe* protects a woman's choice to terminate the pregnancy, but it does not give a third party the right to destroy the fetus.[139] The court upheld the prenatal homicide law holding that the state had an interest in protecting potential human life, including an unborn child, at any stage of development.[140] Therefore, the Minnesota legislature's failure to distinguish between a viable and nonviable fetus did not violate the equal protection clause.[141]

In *People v. Ford*,[142] the defendant made a similar equal protection attack on the Illinois prenatal homicide statute.[143] The defendant claimed that, under *Roe*, a woman can destroy a nonviable fetus without fear of criminal penalty, but the defendant is subject to a severe penalty for destroying a nonviable fetus.[144] Thus, he claimed he was similarly situated with the mother, yet treated differently under the law.[145] The Illinois court favorably cited *Merrill* and held that a defendant charged under the prenatal homicide statute and a pregnant woman choosing to terminate her pregnancy were not similarly situated.[146] The woman had a privacy right to terminate her pregnancy, but the defendant had no similar constitutional right.[147] Therefore, the defendant was not similarly situated with a woman seeking an abortion[148] and treating the defendant differently than such a woman did not violate the equal protection clause of the Constitution.[149]

The court concluded by examining the prenatal homicide statute under a rational basis test because the defendant was not part of a suspect class, and a

---

[136] *Id.* (citing Matter of Harhut, 385 N.W.2d 305, 310 (Minn. 1986)).
[137] *Merrill*, 450 N.W.2d at 321-22.
[138] *Id*. at 321.
[139] *Id*. at 322. The court noted *Roe* is limited to protecting the woman's right to decide whether to terminate her pregnancy without interference from the state. *Id*. (citing Roe v. Wade, 410 U.S. 113, 163 (1973)).
[140] The court noted that a state's interest in protecting the potentiality of human life is an important and legitimate interest. *Merrill*, 450 N.W.2d at 322 (citing *Roe,* 410 U.S. at 162).
[141] *Merrill*, 450 N.W.2d at 322 .
[142] People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991).
[143] *Id*. at 1198.
[144] *Id*. at 1199.
[145] *Id*.
[146] *Id.*
[147] *Id*.
[148] *Id*.
[149] *Id*.

fundamental right was not being affected.[150] The court found that the statute had a rational relationship to a valid state interest -- protecting potential human life.[151]

The Unborn Victims of Violence Act should similarly withstand an equal protection challenge. A defendant in a federal court making an equal protection challenge to the Act would have a difficult time showing that a reviewing court should use heightened scrutiny because the statute does not infringe upon a fundamental right or classify defendants in a suspect manner, such as by race,[152] sex,[153] or illegitimacy.[154]

If a federal defendant claims he is similarly situated with the mother of the unborn child yet treated differently, it is unlikely a court would agree per the reasoning seen in *Ford* and *Merrill*. Although the courts in both *Ford* and *Merrill* acknowledged that *Roe v. Wade*[155] gave a mother a limited right to terminate the life of her unborn child, the courts noted that this in no way translates to a third party right to do the same.[156] Given the convincing reasoning of these courts' decisions on this issue, a reviewing federal court would likely find in the same manner. There is a rational basis between the Act's goal of protecting unborn children and punishing people who cause injury or death to these unborn children. The Unborn Victims of Violence Act should, therefore, withstand an equal protection challenge.

D. The Cruel and Unusual Punishment Challenge

Largely due to the lack of success on equal protection and due process challenges, an Eighth Amendment cruel and unusual punishment challenge was made against prenatal criminal legislation in Ohio.[157] The Eighth Amendment has been read to prohibit not only cruel, barbaric punishments, but also sentences that are disproportionate to the committed crime.[158] Proportionality of sentence to crime is a deeply rooted common-law principle of jurisprudence.[159] In this regard,

---

[150] *Id*. at 1200.
[151] *Id*. at 1199-1200.
[152] *See* Loving v. Virginia, 388 U.S. 1 (1967) (restricting freedom to marry based on race violates equal protection clause).
[153] *See* Craig v. Boren, 429 U.S. 190 (1976) (law that classifies according to gender is subject to heightened scrutiny).
[154] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (law that denies recovery in wrongful death suit to illegitimate children violates equal protection clause).
[155] Roe v. Wade, 410 U.S. 113 (1973).
[156] *See* People v. Ford, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991); State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990).
[157] Coleman v. DeWitt, 282 F.3d 908 (6th Cir. 2002).
[158] *Id*. at 915.
[159] *Id*. (noting the Magna Charta included a clause prohibiting excessive sentences).

Eighth Amendment jurisprudence developed into a three-part test, as set out in *Solem v. Helm*.[160]

In *Solem*, the Supreme Court noted it had recently considered the prohibition against cruel and unusual punishment, striking disproportionate death sentences in Georgia and Florida.[161] The Supreme Court held in *Solem* that the first prong of the three-part cruel and unusual punishments clause test is to examine the gravity of the offense, and the harshness of the penalty given.[162] This analysis includes examining the seriousness and details of the crime, and comparing these factors to other crimes.[163] In so doing, a reviewing court must also consider the severity of the punishment given to make an accurate determination if there has been a violation.[164]

In *Coleman v. DeWitt*, an Ohio prenatal protection act was challenged as cruel and unusual punishment due to its alleged disproportionality.[165] The challenge in this case was particularly weak, and the Ohio court used little analysis from *Solem.* The defendant had received a nine-year sentence for involuntary manslaughter due to his violent assault that resulted in the death of an unborn child.[166] In affirming the decision of the district court, the judge described the sentence as "far from the 'gross disproportionality'" requirement, especially in light of the fact that he deprived the woman of her wanted child and did so in a violent way.[167] However, a more difficult challenge against the Unborn Victims of Violence Act may eventually be presented to federal courts.

The Unborn Victims of Violence Act does not fail the first prong of the *Solem* test. Under the first prong of the cruel and unusual punishment analysis, there is no doubt that the penalty given to a defendant in a federal action convicted of premeditated murder of an unborn child under the Act is severe.[168] The

---

[160] Solem v. Helm, 463 U.S. 277, 290-93 (1983). In more recent rulings, Justices Scalia and Thomas have voiced their discontent with the *Solem* test. *See* Harmelin v. Michigan, 501 U.S. 957, 985 (1991) ("The Eighth Amendment's prohibition of 'cruel and unusual punishments;' was aimed at only certain *modes* of punishment, and was not a 'guarantee against disproportionate sentences.'") (J. Scalia, joined by C.J. Rehnquist in opinion not adopted by majority of the court); Ewing v. California, 538 U.S. 11, 32 (2003) ("Even were *Solem*'s test perfectly clear, however, I would not feel compelled by *stare decisis* to apply it. In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.") (J. Thomas, concurring).

[161] *Solem*, 463 U.S. at 288 (citing Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977)).

[162] *Solem*, 463 U.S. at 290-91.

[163] *Id*. at 291.

[164] *Id*.

[165] Coleman v. DeWitt, 282 F.3d 908, 910 (6th Cir. 2002).

[166] *Id.* at 910-11.

[167] *Id.* at 915.

[168] Under the Act, the maximum penalty for the separate offense could be life in prison. 10 U.S.C. § 1841.

punishment, however, is not out of proportion to the gravity of the offense. The defendant, with or without premeditated intent, has ended the unborn child's life before its natural expiration. The defendant may argue, as one commentator did,[169] that when a prenatal criminal law punishes a defendant for acts against an unborn child the same as if committed against a person living outside of the womb, this violates the first prong of the *Solem* test.[170] This conclusion is based on the following reasoning: Since abortion is permitted in limited circumstances, the right to privacy of the mother is worth *more* than the potential life of the unborn child.[171] The mother's interest in privacy and control over her body outweighs the state's interest in protecting the potential life of the unborn child.[172] Thus, the value of the unborn child's life is at some point inferior to the mother's right to privacy. At no time, however, is the value of the born and living person's life inferior to anything.[173] Therefore, a person who takes the life of an unborn child cannot be punished as severely as one who takes the life of a born person, since the life of the unborn child is not worth as much.[174] To give the same punishment to both defendants would violate the first prong of the *Solem* test.[175] This analysis, however, breaks down under scrutiny. In the case of a federal defendant convicted of premeditated prenatal murder, the mother of the child has chosen to keep the unborn child, not to terminate it. Even if the unborn child's life is not valued as much as the life of a born and living person, the mother's tremendously powerful right to privacy and self-determination is now pulling toward the preservation of the life of her unborn child. There is also an important state interest in preserving the potentiality of human life,[176] which is pulling in the same direction. Any perceived lesser value of the unborn child's life is compensated for by the mother's exercise of her right to privacy in bringing that child to term, and by the state's interest in preserving the potentiality of unborn life. The injury to these two interests, coupled with the loss of the unborn child's life, justifies sentences as stiff as those given for the death of a born and alive person. The injury to the mother's interest and the state's interest by the defendant enhances the *gravity* of the crime, which is the other consideration in the first prong of the *Solem* test.[177] Therefore, the federal defendant's punishment of life in prison, although severe, is not out of proportion to the gravity of the offense committed. Further, even if the mother of an unborn child did not know she was pregnant, the defendant has still violated her powerful

---

[169] Bicka A. Barlow, *Comment, Severe Penalties for the Destruction of "Potential Life" -- Cruel and Unusual Punishment?*, 29 U.S.F.L. REV. 463 (1995).
[170] *Id.* at 501-05.
[171] *Id*. at 502. Barlow cites *Roe v. Wade*, 410 U.S. 113, 158 (1973), for the proposition that a fetus does not have same rights as a person born and alive. *Id.*
[172] Barlow, supra note 169, at 502.
[173] *Id*. at 501-05.
[174] *Id*. at 505.
[175] *Id*.
[176] *Roe*, 410 U.S. at 162.
[177] *Solem*, 463 U.S. at 284-85.

right to privacy by denying her the choice and the chance to bring the child to full term.

The second prong of the *Solem* test is to compare the defendant's sentence to the sentences of other criminals in the same jurisdiction convicted of that same offense.[178] More serious crimes in the same jurisdiction that carry the same or lesser sentences are some indicators that the punishment in question may be excessive.[179] The Unborn Victims of Violence Act does not fail the second prong of the *Solem* test. A federal defendant convicted of prenatal premeditated murder under the Act will not be able to claim that others convicted of the same crime in the same jurisdiction were treated differently. No one has yet been convicted of this new federal "crime," so the defendant has no points of reference from which to make a case. Further, the defendant's penalty under the Act can never be greater than that which can be given to those convicted of killing a human that has been born and is alive. Under the Act, capital punishment may *not* be imposed on a defendant who acts intentionally to kill the unborn child. However, under the federal crime of premeditated (first degree) murder, the death penalty *may* be imposed.[180] Therefore, the defendant cannot say that the Act fails this portion of the *Solem* test.

The final prong of the analysis requires the reviewing court to examine how the same crime is treated in other jurisdictions.[181] If few or no other jurisdictions would sentence a defendant similarly, this too would indicate the sentence is excessive.[182] The Unborn Victims of Violence Act will not fail this third prong of the *Solem* test. A defendant in a federal court convicted of premeditated (first degree) murder of an unborn child under the Act, and sentenced to life in prison without parole, could not claim that defendants in other jurisdictions are treated differently. If he were to compare his punishment to that for similar state crimes, he would find no support for his argument there either, since none of those punishments has been declared unconstitutional. In *People v. Ford*,[183] the defendant was convicted of intentional homicide of an unborn child, and was sentenced to 20 years in prison.[184] In *State v. Merrill*,[185] the defendant was convicted of the second-degree murder of an unborn child, and sentenced to 354

[178] *Id*. at 291.
[179] *Id*.
[180] 18 U.S.C. § 1111(b).
[181] *Solem*, 463 U.S. at 292.
[182] *Id*.
[183] People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991).
[184] *Id*. at 1190.
[185] State v. Merrill, 1991 Minn. App. LEXIS 790 (Minn. Ct. App. 1991). *See also* State v. Merrill, 450 N.W.2d 318 (Minn. 1990).

months in prison (29 and one-half years).[186] Given the consistent and stern nature of these sentences, the federal defendant convicted of premeditated murder would have a difficult time claiming he would receive a different sentence in a different jurisdiction. The Supreme Court held that reviewing courts should use these objective factors recognized in *Solem*.[187] The Supreme Court also recognized that rarely are there sentences so disproportionate that they violate the cruel and unusual punishment clause.[188]

VI. POLICY CONSIDERATIONS

Given the apparent constitutionality of this Act, the only remaining question is whether the legislation reflects sound public policy. Ultimately, the courts will determine the proposed legislation's constitutionality. It is the legislature's role, however, to decide whether the proposed legislation reflects sound public policy. In my view, public policy considerations support the adoption of the Unborn Victims of Violence Act because it promotes several desirable and important goals.

For years, a debate has raged regarding whether and, if so, under what conditions, the state may regulate a woman's use of her own body.[189] Those who profess to be "pro-choice" advocate the right of women to control their own bodies. Those who advocate this position have their interests furthered by the Unborn Victims of Violence Act. Likewise, those who are "pro-life" and advocate for the protection of the unborn life starting at conception will find that this Act advances their cause. Finally, the government will benefit from the Act because its interests in protecting the potentiality of human life and adequately punishing criminals are advanced.

A. The Pro-Life Interest and the Unborn Victims of Violence Act

The Act benefits the "pro-life" cause. By defining the term "unborn child" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb,"[190] the Act extends the maximum protection to unborn children. While the Act does not clarify the legal status of the unborn as "person" or "non-person," the approach used does coincide with the belief that life begins at

---

[186] State v. Merrill, 1991 Minn. App. LEXIS 790, *2 (Minn. Ct. App. 1991). The court affirmed the sentence, which was a 50% upward departure, due to aggravating circumstances. *Id.*
[187] *Solem*, 463 U.S. at 290.
[188] *Id*. at 291, n.17.
[189] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).
[190] S. 1019, 108th Cong., § 2 (2003).

conception, and that life is deserving of respect and protection from that moment.[191] The Act thus punishes those who violate the sanctity of unborn life as it has not been done in federal and military courts before.

B. The Pro-choice Interest and the Unborn Victims of Violence Act

The Act is respectful of a woman's right to choose to use her body as she sees fit. When a woman chooses to bring her unborn child to term, the Act punishes those who interfere with that choice. Even where a defendant causes the death of an unborn child before a woman knows she is pregnant, the Act punishes the defendant for denying the woman the right to make choices about her body and her pregnancy.[192]

Nor can it be said that the Act inhibits or sets back "pro-choice" gains made since *Roe*.[193] A woman who receives an abortion from a doctor cannot be tried under this Act, nor could the doctor if licensed. Even a woman attempting to induce abortion on her own could not be prosecuted under the Act. This is true since the Act excludes from coverage an act committed by the mother of an unborn child, and medical procedures performed by a licensed medical professional.[194]

C. The Federal Interest and the Unborn Victims of Violence Act

There exists a legitimate and important federal interest in protecting the "potentiality of human life,"[195] also known as unborn children. The Act furthers this interest. The law offers the government an additional weapon in its battle against crime, allowing a prosecutor to charge a perpetrator for the loss of an unborn child's life, when under the common-law born-alive rule, the family's loss might go unpunished.

Perhaps the most significant impact from the legislation will be felt in military law. Without the Act, military courts likely would have continued assimilating state fetal criminal statutes, as was done in *United States v. Robbins*,[196]

---

[191] *See* Papal Encyclical: *Evangelium Vitae* (The Gospel of Life), *reprinted in* 24 ORIGINS 689, April 6, 1995.
[192] The Act does not require that the defendant or the mother know about the pregnancy. 10 U.S.C. §919a(a)(2)(i).
[193] Roe v. Wade, 410 U.S. 113 (1973).
[194] 10 U.S.C. §919a(c).
[195] *Roe*, 410 U.S. at 163.
[196] United States v. Robbins, 52 M.J. 159 (1999). In *Robbins*, the U.S. Court of Appeals for the Armed Forces upheld the court martial conviction of a serviceman for terminating the pregnancy of his wife. The court held that the Ohio law under which he had been convicted criminalized a different kind of criminal behavior than the killing of a person, and thus could be assimilated under the UCMJ. The court held as permissible the assimilation of the crime of terminating a pregnancy, while at the same time holding that no such crime existed under the UCMJ. *Id.*

and in that manner prosecute separate offenses against their personnel for causing injury to or death of an unborn child. However, there are among the 50 states many different ways of treating the death of an unborn. Military courts would have been forced to consider among the 35 states with fetal crime statutes many different types of such legislation, which cover different periods of gestation.[197] The military judiciary has a significant interest in having a uniform rule on prosecuting offenses against the unborn, and the Act provides an efficient solution.

The need for a statute protecting prenatal life is clear and well documented. In *People v. Guthrie,*[198] the defendant caused a traffic accident that took the life of an unborn child due for Cesarean delivery the very next day.[199] The prosecutor charged the defendant under Michigan's negligent homicide statute, but the court held that an unborn fetus, even though viable, was not a person under the statutory definition.[200] The State was unable to act due to the statutory inadequacy, and the death of an unborn child went unpunished. The Unborn Victims of Violence Act gives the federal government adequate reach to act when a *Guthrie*-type situation arises again.

Moreover, civil claims based on the death or injury of unborn children are allowed in many jurisdictions where the born-alive rule is still enforced.[201] If those courts have recognized liability for death or injury to an unborn child in the civil arena, the government's interests in protecting life is promoted by allowing for appropriate criminal liability for these same defendants.[202]

VII. CONCLUSION

The Unborn Victims of Violence Act of 2004 passed with bi-partisan support in both the House and the Senate.[203] Nonetheless, the Act was nearly defeated in the Senate by the Feinstein amendment.[204] Those who had opposed the

---

[197] *See NRLC*, *supra* note 19.
[198] People v. Guthrie, 293 N.W.2d 775 (Mich. Ct. App. 1980).
[199] *Id*. at 776.
[200] The appellate court held that they were forced to follow the "archaic" "born alive rule," a situation only correctable by the legislature. *Id*. at 780-81.
[201] Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971) (holding that a common-law action in negligence does exist for prenatal injuries).
[202] *See, e.g.,* State v. Horne, 319 S.E.2d 703, 704 (S. Car. 1984).
[203] In the House, 207 Republicans and 47 Democrats voted in favor of the bill; and 13 Republicans, 149 Democrats and one independent voted against it. NRLC, 108th Congress House of Representatives Scorecard for the NRLC, *available at* http://www.capwiz.com/nrlc/home/. In the Senate vote, 48 Republicans and 13 Democrats voted for the bill, and it was opposed by two Republicans, 35 Democrats, and one independent. NRLC, 108th Congress Senate Scorecard, *available at* http://www.capwiz.com/nrlc/home/.
[204] *See supra* note 5.

Act saw the Act not as one that advances the rights of women, but rather as a direct assault on the right to abortion.[205] This opposition was surprisingly vocal and intense, considering the Act makes specific provisions protecting the private abortion rights of women with regard to their own fetuses.

Perhaps the most clear difference between those who supported and those who opposed the Act can be seen by looking at the doctrine of transferred intent. Under this doctrine, the requisite intent to establish an assault offense against one person is based upon (or transferred from) the intent to injure another person. Supporters of the Act contend that the intent to harm the mother can be transferred to her unborn child (unless it was shown that the defendant actually intended the harm to the unborn, which is rarely the case). The intent is thus shifted from the originally intended wrongful act to the wrongful act actually committed. However, those opposed to the Act might argue that the doctrine does not permit the transferring of intent in these cases, because the harm to an unborn child is different from that to her mother. The different type of social harm would not then be transferred, and the injury to the unborn child should not be separately punished unless that was the original intention of the actor. To hold otherwise, accords the unborn child equal status to the child's mother contrary to *Roe* and its progeny.

This fundamental difference seems to be at the root of resistance to the Act, as it would establish by the federal legislature the similarity of harm to a mother and harm to her unborn child. While this Act does not contradict the letter of the law according to *Roe* and its progeny, it is considered by some against the "spirit" or viewpoint of *Roe*.[206] Nonetheless, the Unborn Victims of Violence Act appears constitutional and will prove to be an appropriate addition to the Uniform Code of Military Justice.

---

[205] For example, Senator Feinstein lamented that "for the first time, [the Act] puts into Federal law the concept that life begins at conception." Further, she predicted that: "[t]his will, in effect, grant a fetus or even a fertilized egg separate rights as a person and can now be used legally to further chip away at a woman's constitutional right to choose." *See* 150 Congr. Rec. 4371 (daily ed. April 26, 2004) (remarks of Sen. Feinstein on "A March for Women's Lives").

[206] *See Criminal Charges for Harm to a Fetus: Hearing on H.R. 503,* "*Unborn Victims of Violence Act of 2001*," *Before the House Comm. on the Judiciary Subcomm. on the Constitution*, 107th Cong. 3 (2001) (statement of Richard S. Myers, Professor of Law, Ave Maria School of Law).

THE WAR WITHIN THE WAR: NOTICE ISSUES FOR VETERAN REEMPLOYMENT

Heather DePremio*

I. INTRODUCTION

During a time in which technology makes fighting war a whole new ballgame, the soldiers, the sailors, and the aircrew are the one thing that our country cannot afford to be without. However, when those men and women come home from fighting, their battle is often not over. According to the Department of Defense, over 100,000 men and women serving in the Reserves and National Guard are currently called up[1] and, with over 2.6 million people in the U.S. Military,[2] many of our servicemen and women are forced to deal with the difficult task of leaving and returning home after completing their service. Over the years, Congress has enacted various statutes that assist in this task, trying to give employers and military members a description of what they can and cannot do regarding employment rights.

This article will discuss employee notice requirements to the employer, an issue that hits at the heart of any veteran. Trying to understand and define "notice" is a battle. Employees must give notice to their employers when they leave for military duties in order to keep their jobs and if they want their jobs back, then they must give notice to their employers when they return. The legal challenge in defining notice is to provide consistency for employees, employers, and the courts. The U.S. Supreme Court has yet to define notice under the recent Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] District and circuit courts have varied widely on their interpretations of the term, and have failed to consistently apply the rulings from prior cases.

---

* The positions and opinions stated in this article are those of the author and do not represent the view of the United States Government, the Department of Defense, or the U.S. Navy. Ms. DePremio is a recent graduate of the Salmon P. Chase College of Law at Northern Kentucky University, concentrating in Labor and Employment Law. She is also a 6-year veteran of the U.S. Navy, serving as a Machinist's Mate on board the USS John C. Stennis and the USS Wasp. Ms. DePremio would like to thank Professor Richard Bales for his support and assistance with this article.

[1] U.S. Dep't of Defense, National Guard and Reserve Units Called to Active Duty (2006), http://www.defenselink.mil/news/Feb2006/d20060215ngr.pdf.

[2] U.S. Dep't of Defense, DoD 101: An introductory overview of the Department of Defense (2002), http://www.defenselink.mil/news/Aug2006/d20060802ngr.pdf.

[3] 38 U.S.C. § 4312 (1994).

Most of the laws regarding veteran employment rights were passed when huge numbers of veterans were returning from major wars (WWII, Vietnam, and the Gulf War). The influx of soldiers in the workforce created unanticipated problems that required Congress to react by enacting legislation. This time, instead of waiting, Congress should act proactively to fix the problem. This article argues that Congress should take anticipatory steps to revise USERRA, to include explanations of what constitutes adequate notice, and that courts should adopt a reasonableness test, as well as a finite set of factors, to implement those definitions. Part II of this article provides the history of reemployment statutes, discussing the Universal Military Training and Services Act (UMTSA), the Veterans Reemployment Rights Act (VRRA) and USERRA. Part III presents the different approaches courts have taken in explaining what is and what is not proper notice, both pre- and post-service, and why these approaches have not provided adequate guidance. Part IV analyzes those approaches, argues that Congress should clarify the USERRA parameters to assist courts in defining notice, and provides a proposed statutory amendment. Part V concludes.

II. THE HISTORY OF REEMPLOYMENT RIGHTS

A. Universal Military Training and Service Act

The first Act that dealt with notice to the employer was the Universal Military Training and Service Act (UMTSA), otherwise known as the Military Selective Service Act of 1948.[4] UMTSA was created to allow Congress to call forth persons to serve in military service when national security so required.[5] UMTSA required a person to pass a physical examination in order to serve.[6] Congress later amended the UMTSA, repealing the requirement that persons who wanted to join the service must request leave from an employer to obtain the physical exam.[7] Congress' long-held purpose for requiring notice was to give employers advance notice of a military member's planned absences from work.[8] The legislative history showed that the Senate saw a distinction between volunteer examinees who failed the physical and reservists who were called up to active duty. Congress wanted to ensure that reservists, unlike their volunteer active-duty counterparts, were able to effectively communicate to their employers their need for time off and to ensure those jobs would still be there for them when they returned. Given that reservists are required to come and go more often than active-duty military members, the "repetitive nature of their

[4] 50 U.S.C.A. app. §§ 451-73 (1948).
[5] *Id*.
[6] *Id*. § 459.
[7] *Id.*
[8] S. Rep. No. 87-1070 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 3319.

absences makes it desirable" that those reservists inform their employers regarding their absences.[9]

B. Veterans Reemployment Rights Act

Many in Congress felt that the UMTSA did not give enough protection for veterans.[10] Congress was especially concerned with issues such as expansion of vocational rehabilitation subsistence allowances, educational programs, and employment services for the veterans and their spouses. [11] In 1974, Congress passed the Vietnam Era Veteran's Readjustment Assistance Act, or what is commonly referred to as the Veterans Reemployment Rights Act (VRRA).[12] The VRRA detailed the rights of enlistees and reservists called to active duty.[13] In enacting this law, Congress intended to ensure that veterans were aided and assisted in obtaining employment upon returning home from the service. Describing what standards should be applied, 38 U.S.C. § 2021(b)(3) provided that personnel should not be denied retention in employment because of any obligation as a member of the Reserves.[14] Furthermore, § 2024(d) provided that, upon request, a person should be granted leave to complete military duties.[15]

In a 1982 case, the U.S. District Court for the Western District of North Carolina stated that "upon request" meant "after proper notice."[16] The employee in that case, Johnny Blackmon, sued under the VRRA, alleging that Observer Transportation Company ("Observer") fired him from his job because of his attendance at reserve training.[17] Although Blackmon testified that he asked for and received leave to attend training at a general meeting, his supervisor, Ralph Belk, and other witnesses denied receiving this request. Furthermore, Belk testified that the company had several reservists working for it and that those reservists were granted leaves of absence upon their requests.[18] Observer had a written policy requiring an employee to request leave from his or her immediate supervisor in advance of military training. This policy allowed Observer to plan work schedules around such absences. Blackmon was aware of this policy and had been granted leave to attend training when he asked for it in the past. The

[9] *Id*.
[10] Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 (1974).
[11] *Id*.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1596.
[15] *Id.* at 1598-99.
[16] Blackmon v. Observer Trans. Co., No. C-C-81-0480-P, 1982 WL 805, *2 (W.D.N.C. Oct. 28, 1982).
[17] *Id.* at *1.
[18] *Id.* at *2.

district court concluded that, based on the testimony of Belk and other witnesses, Blackmon's attempt to give notice to his employer was improper. Thus, the court held that Observer had fired Blackmon due to his lack of proper notice, not due to his military training.[19]

C. *King v. St. Vincent's*

Under the VRRA, a lack of proper notice was determined by some courts based on the reasonableness of the absence for military duty. Circuit courts were split as to whether reasonableness of the request should even be considered in determining a service member's right to reemployment.[20] In *St. Vincent's Hospital v. King*, the district court held that reasonableness was a factor.[21] William King was a National Guard member while working for St. Vincent's. He informed the hospital that he would serve a three-year appointment with the Guard and that he wanted to retain his job upon his return home. The hospital denied his request for leave and sued King, seeking a judgment that said reemployment rights were not available after tours in duration as long as King's tour. The district court held that King's request, under section 2024(d) of the VRRA, must be reasonable, and the request for the length of his time away was unreasonable.[22] King appealed to the Eleventh Circuit, which affirmed, relying on *Lee v. City of Pensacola*.[23]

The Supreme Court then granted certiorari to resolve the issue of reasonableness and reversed the Eleventh Circuit.[24] The Court stated section 2024(d) did not contain any specific time limitation. Furthermore, other provisions of the VRRA expressly gave limitations to their protections and, thus, if Congress had intended to give a limitation to section 2024(d), then it would have done so.[25] The Court disregarded St. Vincent's argument that an employer/employee relationship could not continue over such a long time period. The Court held that the plain language of the VRRA gave no such time constraints for the length of a request of leave and, thus, there was no room for a reasonableness standard.[26]

---

[19] *Id.* at *2.
[20] For conflicting views on whether reasonableness should apply, see *Kolkhorst v. Tilghman,* 897 F.2d 1282 (4th Cir. 1990); *Eidukonis v. Southeastern Penn. Transp. Auth.*, 873 F.2d. 688 (3rd Cir. 1989); and *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981).
[21] St. Vincent's Hospital v. King, No. CV87-H-1844-S, 1989 U.S. Dist LEXIS 14865 (N.D. Ala. Apr. 28, 1989).
[22] *Id*.
[23] St. Vincent's Hospital v. King, 901 F.2d 1068 (11th Cir. 1990).
[24] King v. St. Vincent's Hospital, 502 U.S. 215 (1991).
[25] *Id*. at 220.
[26] *Id*.

D. Uniformed Services Employment and Reemployment Rights Act

Without a reasonableness standard, case law regarding proper notice under the VRRA became sparse and judges were left to determine the meaning of the phrase on an ad-hoc basis.[27] Hoping to alleviate this problem, Congress created the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994.[28] Congress' aim in creating this Act was "to clarify, simplify, and where necessary, strengthen the existing veterans' employment and reemployment rights provisions."[29] The Act expanded provisions that dealt with reemployment rights of anyone, not just reservists, who serves in the uniformed services. Section 4312 sets out the requirements for re-instatement:

> Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter, if:
>
> (1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given **advance written or verbal notice** of such service **to such person's employer**;
>
> (2) the **cumulative length of the absence and of all previous absences** from a position of employment with that employer by reason of service in the uniformed services **does not exceed five years**; and
>
> (3) except as provided in subsection (f), the **person** reports to, or **submits an application for reemployment** to, such employer **in accordance with the provisions of subsection (e)**.[30]

[27] Sawyer v. Swift & Co., 836 F.2d 1257, 1260 (10th Cir. 1988).
[28] Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103-353 (1994) (codified at 38 U.S.C. §§ 4301-34).
[29] Lapine v. Town of Wellesley, 970 F. Supp. 55, 59 (D. Mass. 1997).
[30] 38 U.S.C. § 4312 (1994).

These provisions set out two distinct notice requirements: one for leaving for service and another for returning from service.[31] In addition, Congress limited how much time a service member could remain away from his or her job and still return to that job after the service member returns home. Except in rare situations where a service member's specific job requires him or her to be gone in excess of five years,[32] if a service member's time away from his or her job is over the five-year limitation, the provisions of USERRA do not apply, regardless of how much notice was given.[33]

A few recent additions have refined USERRA. The Seventh Circuit Court of Appeals, realizing that there could be confusion as to whether the VRRA or USERRA applied to any particular military member, ruled that those cases interpreting the guidelines set forth under VRRA were to be used in aiding the interpretation of USERRA claims as well.[34] Cases under VRRA were to "remain in full force and effect in interpreting [USERRA] provisions."[35] The decision also included such cases as the aforementioned *King v. St. Vincent's*, which expressly excluded using a reasonableness test to define adequacy of notice.

In December of 2004, Congress enacted new legislation regarding information employers were required to give persons entitled to USERRA rights and benefits. The Veterans Benefits Improvement Act of 2004 (VBIA)[36] requires employers to provide a notice of the rights, benefits, and obligations of such persons and employers. The statute states what information should be in the notice, where the notice should be posted, and gives alternative notice language for employees of federal executive agencies. VBIA includes a listing of the requirements an employee must meet in order to be eligible to receive USERRA benefits, a description of employee rights regarding discrimination and retaliation, an explanation of employee health insurance benefits, and information about enforcement of USERRA.[37] This notice was implemented to advance the objectives of informing the general public about the rights under USERRA, as well as informing what assistance military members can expect to receive from the government.[38] In addition, the Department of Labor implemented the VBIA in December of 2005. This implementation gives

---

[31] *Id*.
[32] For example, Navy personnel serving in the Nuclear Power field are required to complete a six-year enlistment and, thus, are exempted from the five-year requirement.
[33] 38 U.S.C. § 4312(a)(2) (1994).
[34] McGuire v. United Parcel Service, 152 F.3d 673, 676 (7th Cir. 1998).
[35] H.R. Rep. No. 103-65, pt. 1, *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (1994).
[36] 38 U.S.C. § 4334 (2004).
[37] Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act, 70 Fed. Reg. 75313 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).
[38] *Id*.

explanations of the Department's point of view on how to regulate the provisions of the USERRA.

E. Employer Defenses

These regulations, along with the rulings from cases under the VRRA, include not only the interpretations of what notice is and is not, but the defenses used by employers in VRRA cases as well. Unlike defining adequate notice, however, employer defenses are more concrete. Two of the most prominent are: (1) where it is impossible to reemploy the veteran; and (2) where reemployment would create an undue hardship on the employer. Although an employer is normally required to return a veteran to his or her former job, or a job of "like seniority, status, or pay," if the employer no longer has that position in place, the employer is not required to create a new job for the returning veteran.[39]

1. Impossibility

Impossibility applies to situations such as reductions-in-force, but not to situations where an employer would have to shift around current employees to re-hire the veteran.[40] For example, the court in *Hannah v. Hicks* denied plaintiff reemployment in her former job with the Commonwealth Attorney for the City of Richmond.[41] Susan Hannah worked for the Commonwealth Attorney when she was called up to serve with the Navy Reserve. All Commonwealth attorneys and their staffs were at-will employees.[42] While she was gone, a new Commonwealth Attorney, David Hicks, was elected. At his request, all previous Commonwealth employees were to resign, including Hannah, so a new administration could be put in place. Hannah refused. When she returned from service, Hannah applied for reemployment with Hicks' administration. After being denied reemployment, she sued.

The district court in Virginia highlighted the employer defense of impossibility. The VRRA specifically stated that a veteran should be restored to his or her former position "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."[43] The purpose of this section was to prevent an employer from being forced to hire someone for a job that no longer existed. Usually, the court noted, this occurs when there is a reduction-in-force. However, the court stated that there was little reason not to

[39] Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 824 (2004).
[40] 38 U.S.C. § 4312(d) (1994).
[41] Hannah v. Hicks, No. 3:96cv733, 1997 U.S. Dist. LEXIS 16284 (E.D. Va. June 19, 1997).
[42] *Id.* at *2.
[43] *Id.* at *5.

apply such a theory to the instant situation.[44] As an officer of the State of Virginia, Hicks had the power to replace an administration that he had just defeated in an election. To force him to keep someone from that administration would prevent a "harmonious and cooperative relationship" that such an administration would seek.[45] The court noted it would be unreasonable for Hicks to be forced to hire someone from his opponent's administration and, thus, Hannah was not fired due to her service in the Navy, but due to her service under Morissey, the former Commonwealth Attorney.[46]

2. Undue Hardship

Unlike impossibility, an employer may use the undue hardship defense to justify not moving an employee from his or her current job position to make room for the veteran. To prove undue hardship, an employer must show that the veteran is unable to perform the job he or she previously held.[47] The employer must, however, at least make reasonable efforts to place the veteran in a job that is comparable to the former position in both job description and job pay.[48] The case law on undue hardship is extremely rare, but there are a few cases that give details as to how the defense works. In *Pfeifer v. Caterpillar, Inc.*, for example, the plaintiff sued for violations of the Americans with Disabilities Act (ADA) and USERRA.[49] While *Pfeifer* deals with both the ADA and USERRA, the statutes are defined in essentially the same way, including possible factors to apply as well as placing the burden on the employer to prove undue hardship.[50] Greg Pfeifer worked as a welder for Caterpillar for 20 years. In 1991, Pfeifer was called to duty during Operation Desert Storm, where he injured his shoulder during combat. Upon return, Pfeifer retained his rating as a welder for Caterpillar.[51] In late 1993, Pfeifer injured his shoulder again on the job at Caterpillar, and after two physicians examined him, they advised him to quit welding. Caterpillar made several attempts to put Pfeifer in a position where he was able to work, including placing Pfeifer on the "minor module" and "Pending Job Reassignment" lists-- positions where an employee would work until a position suitable to his or her limitations was found.[52] These attempts, which had the effect of downgrading pay based on the type of work done, were ongoing through the outcome of the case.

---

[44] *Id*. at *8.
[45] *Id*.
[46] *Id*. at *9.
[47] 38 U.S.C. § 4312(d)(1)(B); 38 U.S.C. § 4312(d)(2)(B) (1998).
[48] 38 U.S.C. § 4312(d)(1)(B); 38 U.S.C. § 4312(d)(2)(B) (1998).
[49] Pfeifer v. Caterpillar, Inc., No. 98 C 542, 2000 U.S. Dist. LEXIS 5733 (N.D. Ill. Mar. 23, 2000).
[50] H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 73-75 (1999).
[51] *Pfeifer*, 2000 U.S. Dist. LEXIS 5733, at *2.
[52] *Id.* at *4-5.

One of Pfeifer's arguments in his suit was that Caterpillar violated USERRA by failing to place him in a job of like seniority and pay to the job he held prior to military service. In addition, he argued that Caterpillar failed to make reasonable accommodations for his disability. The district court disagreed with Pfeifer, stating that Caterpillar reemployed him as a welder upon his return. Furthermore, this reinstatement lasted for two years after Pfeifer returned. Regarding Pfeifer's claim that Caterpillar did not accommodate his disability, the court held that "reasonable accommodation [did] not encompass reallocation of essential job functions."[53] The court stated that if Caterpillar were to take Pfeifer's suggestions for accommodation (performing light welding only, doing administrative tasks, etc.), Pfeifer would have a complete other set of responsibilities and would not be a welder at all, but Caterpillar would still be forced to classify Pfeifer as a welder. The court concluded that, in light of the accommodations that were given, in addition to the time span between Pfeifer's return from service and his on-the-job injury, there was no reasonable connection between the downgrading of Pfeifer's job and his service in the military.[54]

Defenses such as these are determined on a case-by-case basis and there is meager case law giving interpretation to these rules. The issue now is how to refine the notice definition to provide better guidance for service members and employers.

III. THE BATTLES REGARDING NOTICE

Proper guidance must necessarily encompass advice regarding the notice required prior to the service member's departure from employment and the notice that the service member must provide upon return to civilian employment following military duty. Military members face a battle of how much notice they must give before they leave and in what form, as well as a battle of when and in what form they must inform their prior employer of their return. The rules set out so far have made it too cumbersome for a service member to understand what is required of him or her. Under 38 U.S.C. § 4312, there is a three-part test to ensure a veteran the ability to retain his job with his employer. The first part, § 4312(a)(1), requires a service member to give notice to his or her employer of upcoming military duties.[55] This notice can be verbal or written, but it should be consistent with the Congressional intent of keeping the employer abreast of when its employees will be able to be at work. The

[53] *Id.* at *13.
[54] *Id.* at *35.
[55] 38 U.S.C. § 4312(a)(1) (1994).

second part, § 4312(a)(2), involves the length of service limitation.[56] As mentioned previously, the length of time away from the employer normally cannot extend past a total of five years. There are rare exceptions, such as when a military member cannot be discharged due to a national emergency. The final part, § 4312(a)(3), delineates what notice is required of the veteran upon returning home.[57] No matter what amount of notice is given, § 4312 is to be construed in a light most favorable to the veteran.[58] If the notice requirements are met, there is an unqualified right of reemployment for the veteran by the employer.[59] However, notice may not even be necessary if giving that notice is impossible due to military necessity.[60] Nevertheless, barring that necessity, the case law shows that what is enough notice for one situation may not be enough for another.

A. Pre-service Notification

There are no clear-cut rules as to what constitutes proper notice. The prevailing view is that notice is determined on a case-by-case basis.[61] Each jurisdiction has its own view as to what makes notice adequate, depending on the intricacies of the case before it. Although the case law is meager as to any real description of how to define notice, there are a few examples of what some courts have found will suffice for proper notice.

1. Adequate Notice

A prime example of what may constitute adequate notice of impending service obligations is found in the U.S. District Court for the Southern Division of South Dakota's decision in *Novak v. Mackintosh*.[62] Rita Novak worked for Dakota Industries for several years, where Donald Mackintosh was president. During her employment, Novak was also a Supply Sergeant in the Army Reserve. Novak missed work several times due to her various military obligations, such as her annual two-week active duty training, military schooling, and active duty combat in the Middle East.[63] Novak informed Mackintosh that she would be gone for some active duty training. Another employee overheard Mackintosh stating to Novak, "If you are going to the Army thing, you are done."[64] Upon informing Mackintosh that she was indeed

[56] *Id.* § 4312(a)(2).
[57] *Id.* § 4312(a)(3).
[58] Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946).
[59] Jordan v. Air Products & Chemicals, 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002).
[60] 38 U.S.C. § 4312(b) (1994).
[61] Hayse v. Tenn. Dep't of Conservation, 750 F. Supp. 298, 303 (E.D. Tenn. 1989).
[62] Novak v. Mackintosh, 937 F. Supp. 873 (D.S.D. 1996).
[63] *Id*. at 876.
[64] *Id*. at 878.

"going to the Army thing," Novak was told to leave her keys on her desk. She later received a check from Dakota Industries with a signed statement from Mackintosh that "[t]his represents final and total payments for all amounts due from Dakota Industries."[65] Novak believed she was fired and subsequently filed a complaint with the Department of Labor Veterans' Employment and Training Service (VETS). The Department of Justice sued on behalf of Novak against Mackintosh and Dakota Industries.

Relying on the reasonableness standard set out in *Gulf States Paper Corp. v. Ingram* (the length of the leave, the reservist's actions in requesting leave, and the burden upon the employer in filling the reservist's position), Dakota Industries argued Novak failed to give Dakota notice within a timely manner.[66] The district court stated there was a presumption that the reservist's request was reasonable. The court emphasized that this presumption was consistent with Congress' intent to protect reservists through statutes like the VRRA and USERRA.[67] The court further stated that, in light of when Novak was given her orders (they were "cut" on January 16th, but she did not receive them until January 21st), a two-day notice for only one day's absence was reasonable.[68]

Although the decision in *King* stated that reasonableness was irrelevant,[69] the decision was made in light of the VRRA. Partially due to the Supreme Court's decision in *King*, Congress, in enacting USERRA, placed a five-year limitation on total service. This makes the ruling under *King* distinguishable from the ruling under *Novak*. The issue as to whether a determination based on reasonableness is allowed under USERRA has yet to be decided by the Supreme Court.

In addition to the conflict between statutes, the decision in *Novak* provides little guidance as to what constitutes adequate notice. It is clear that the ruling states that a two-day notice for a one-day absence is "reasonable." However, because reasonableness is not a factor under USERRA, or at least has not yet been determined as one, a reasonable notice may not necessarily be deemed adequate under the new guidelines. Furthermore, even if reasonableness were to become a factor under USERRA, the decision never discusses how far the concept of reasonable notice needs be taken. For example, would a four-day notice for a two-day absence be reasonable? Would a week's notice be reasonable for a two-week drill for a reservist? These questions are

[65] *Id*.
[66] *Id*. at 883.
[67] *Id*.
[68] *Id*.
[69] King v. St. Vincent's Hospital, 502 U.S. 215, 219-21 (1991).

not answered in *Novak* and, thus, the decision does little to assist a military member in deciding how he or she needs to go about informing his or her employer of the necessary absence.

2. Inadequate Notice

Notwithstanding the uncertainty of the application of *Novak*, there are cases where notice of service has been seen as certainly *not* adequate. In *Brooks v. Fiore*,[70] a reservist sued Nationwide Mutual Insurance Company for violating USERRA. Norman Brooks was an attorney for both Nationwide and the Air Force. Brooks refused to comply with various Nationwide policies, including using a computer system to log hours worked. In addition, Nationwide informed Brooks that his work deficiencies, along with his interpersonal problems, would prevent him from receiving a salary increase and possibly could lead to termination.[71] The military called up Brooks for duty while he was working for Nationwide. Several times before and after Brooks' service, Nationwide asked him to provide documentation regarding his service, as well as documentation of the aforementioned hours' log. Brooks refused to comply and subsequently sued Nationwide. Nationwide stated that such a lawsuit constituted disruptive behavior and unprofessional conduct, and later terminated Brooks.

The district court held that, although USERRA requires an employer to grant a military member's request for military leave, there is nothing in USERRA that prohibits an employer from asking for documentation or proof of that military service, or imposing other such procedures regarding notice.[72] According to Brooks, Nationwide violated his USERRA rights because they prevented him from serving. The facts, however, showed the opposite. Not only did Nationwide allow Brooks to serve, it paid him for his time away (in addition to his pay from the service), and even permitted him to receive continuing legal education (CLE) credits while on service.[73] USERRA specifically allows protection for a military member if, and only if, "the person . . . has given advance written or verbal notice of such service to such person's employer."[74] Not only did Nationwide want to comply with that provision, it also set out guidelines to help its company comply with the provision by asking for documentation of the leave time. Brooks' refusal to comply with that provision, in the court's view, was counter to what he claimed was a violation of his rights.

[70] Brooks v. Fiore, No. 00-803 GMS, 2001 U.S. Dist. LEXIS 16345 (D. Del. Oct. 11, 2001).
[71] *Id.* at *7.
[72] *Id.* at *26-27.
[73] *Id.* at *26.
[74] *Id.* at *27.

Although *Brooks* deals with USERRA, it provides no guidance regarding notice. USERRA does provide for protection if a service member has given notice prior to military duty, but there is, as stated previously, no requirement or prohibition of requiring proof of service. Furthermore, if a military member is not able to provide proof, for whatever reason, the decision seems to indicate that such non-compliance with a company's policies may be adequate grounds for refusal to re-hire. This is arguably contrary to the intent of USERRA. Its intent was to allow persons in the service to obtain prompt reemployment upon their completion of service for their county.[75] A requirement by an employer such as proof of service could hinder this intention.

Without regard to a proof of service requirement, *Burkhart v. Post-Browning* illustrates a case in which a service member provided inadequate notice. [76] Although the court in *Burkhart* decided the case under the VRRA, the court's analysis is still informative in understanding how to apply USERRA.[77] Burkhart was a member of the National Guard at the same time he worked for Post-Browning. He was given the opportunity to do additional duty for the Guard while at drill. Burkhart informed his employer of his desire to do the additional work (which would have amounted to three weeks out of the office) at 4:45 pm on July 8th, a Friday.[78] Post-Browning shut down for the day (and weekend) at 5 pm. This allowed the company approximately fifteen minutes to deal with replacing Burkhart for three solid weeks. Burkhart was terminated upon his return to work three weeks later.

After his claims were denied in state court, Burkhart filed suit in the U.S. District Court for the Southern District of Ohio.[79] The magistrate granted Post-Browning's motion for summary judgment and Burkhart appealed. Although the Sixth Circuit recognized that an employee who wants to serve in the Armed Forces is to be granted the leave requested, "at least some notice by the serviceman is implicit in its command that leave be given 'upon request.'"[80] The court held it was Burkhart's unprofessional conduct and reckless behavior, not the fact that he requested leave, that caused his termination.[81] Furthermore, the court noted that "a note or any other means designed to give prompt notice" would suffice.[82] In short, Burkhart's short notice was so reckless as to essentially *not* be notice at all.

---

[75] 38 U.S.C. § 4301(a)(2) (1994).
[76] Burkhart v. Post-Browning, 859 F.2d 1245 (6th Cir. 1988).
[77] Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act, 70 Fed. Reg. 75313 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).
[78] *Burkhart*, 859 F.2d at 1246.
[79] *Id*. at 1246-47.
[80] *Id*. at 1247.
[81] *Id*. at 1248.
[82] *Id.* at 1250.

Again, this holding gives little clarification to a service member or employer as to how to comply with the guidelines. The court's decision in *Burkhart* emphasizes the fact that other portions of the VRRA state reasons why a military member may be discharged, despite the notice issue. Burkhart's argument was that the language in the VRRA did not define the adequacy of notice necessary and, thus, any notice would be satisfactory.[83] USERRA requires a written or verbal notification of a duty (or intent to have a duty) to perform military services be provided to an employer. Nowhere in the definition, nor anywhere in the recent Department of Labor regulations, is there an explanation of when a verbal notification is more adequate than a written one, or vice versa, or by what time-frame the notification must be given. In essence, the court uses the reasonableness standard rejected under the VRRA, and states Burkhart was completely unreasonable in his request. Setting aside the issue of whether USERRA should adopt the reasonableness standard, *Burkhart* does not set out any guidelines for determining adequate notice. The case simply suggests that some behavior is okay and some is not, but does not inform the reader what those behaviors are.

B. Post-service Notification

As seen from the case law regarding notice of impending service obligations, how to adequately comply with the statutory rules is very difficult. However, the battle over whether adequate notice has been given does not stop there. As mentioned before, notice is not just about reporting upcoming military obligations. It is also about a veteran's desire to return to the job upon completion of military duties. The requirement under USERRA states: "except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e)."[84] Subsection (e) delineates the different time constraints regarding when that notice is to be given, depending on factors such as how long the veteran was gone for service, whether the veteran was hospitalized, etc.[85] Subsection (f) explains what is required to be presented to the employer in order to return to work, again depending on length of service, characterization of discharge, etc.[86] Documentation attesting to these facts is necessary. If, however, a returning veteran does not have the necessary documentation, the employer must still re-hire him or her until such documentation is received.[87]

---

[83] *Id.* at 1247.
[84] 38 U.S.C. § 4312(a)(3) (1994).
[85] *Id.* § 4312(e).
[86] *Id.* § 4312(f).
[87] Judge Advocate General's School, *TJAGSA Practice Note: Veterans' Law Note, USERRA: New Veterans' Reemployment Rights Legislation*, 1994 ARMY LAW. 39, 41 (1994).

Despite these requirements, courts have inconsistently applied them to individual cases so as to provide an incoherent set of guidelines for employers and employees to follow. Much like the case law for notice before service, notice after service includes more than mere notification and, depending on the situation, can be considered both adequate and inadequate.

1. Adequate Notice

USERRA's guidelines state that a request to return to work must be timely. However, as with defining notice itself, the statute does not define what constitutes "timely" notice. An example of such an issue can be found in *Clayton v. United Parcel Service*.[88] Otis Clayton was employed by United Parcel Service (UPS) when he joined the Air Force in 1974. He returned four years later. Clayton requested reemployment in August of 1978. At that time, his superior informed him that he could not have his job back without his DD 214, his military discharge certificate.[89] Clayton was not officially discharged until September 1, 1978. At that point, he searched for employment elsewhere, to no avail. He went back to UPS soon after, again looking for reemployment, and was informed he had to pass a physical to get the job. Clayton completed the physical in late November. Prior to that physical, Clayton had a reemployment interview with his past supervisor. The interview included discussions regarding seniority, vacation, and work assignments.[90] However, Clayton did not get re-hired. Almost a year later, Clayton contacted the Veterans Reemployment Rights Office and, based on its information, contacted UPS soon thereafter, again seeking his job. He was informed that "the job is still here for you."[91] Clayton started work in August of 1979, but subsequently sued for violations of the VRRA.

In Clayton's suit against UPS, the court found that Clayton had a prima facie case under the VRRA. A prima facie case required: 1) that the plaintiff was a permanent employee of the defendant at the time he left his job to enter military service; (2) the plaintiff received an honorable discharge from the military; and (3) the plaintiff sought reinstatement with his former employer within 90 days of his discharge.[92] The court stated the purpose for the deadline was to allow for the veteran to re-adjust to civilian life and that Clayton properly sought reinstatement within the 90-day deadline.[93] Clayton testified at trial that

[88] Clayton v. United Parcel Service, No. 81-2753, 1982 U.S. Dist. LEXIS 16099 (W.D. Tenn. Sep. 9, 1982).
[89] *Id.* at *2.
[90] *Clayton*, 1982 U.S. Dist. LEXIS 16099, at *4.
[91] *Id.* at *6.
[92] Duey v. City of Eufala, No. 79-149-N, 1979 U.S. Dist. LEXIS 8811 (M.D. Ala. Oct. 31, 1979).
[93] Clayton v. United Parcel Service, No. 81-2753, 1982 U.S. Dist. LEXIS 16099, *8 (W.D. Tenn. Sep. 9, 1982).

he did not contact UPS because he thought he failed the physical, not because he did not want his job back. The court found that Clayton provided timely notice to the company. The court also noted that the offer of reemployment must be affirmatively conveyed to the employee.[94] Since the supervisor at UPS told Clayton that he "would contact him," UPS had a duty to contact Clayton and convey the offer of reemployment. The court found that UPS's lack of contact to Clayton violated its duty under the VRRA and, thus, Clayton was entitled to a job of like seniority, status, and pay.[95] The requirements set out in *Clayton* were based on the rules in the VRRA. Although these rules have been refined with USERRA, the core of the requirements is still the same. That being said, some courts have found notice of returning to service to be inadequate under USERRA.

2. Inadequate Notice

Hayse v. Tennessee Department of Conservation is an example of inadequate notice upon a service member's return from service.[96] Vernon Hayse began working for the Tennessee Department of Conservation ("Department") in 1981. He originally gave his job application to his uncle, Carlton Parmley, also an employee of the Department. Parmley forwarded it on to his supervisor knowing that he (Parmley) did not have the authority to hire anyone.[97] In 1983, after having been employed by the Department for some time, Hayse joined the Army. A little less than a year before returning from a two-year tour of duty, Hayse contacted his uncle to inquire as to how to get his job back. Parmley repeatedly told Hayse that there were no positions available, but that Hayse should contact the supervisor that originally hired him to inquire as to what his benefits were.[98] Hayse never contacted that supervisor. In addition, Parmley gave Hayse the name of another supervisor, Christof, to contact about getting a job. Christof testified that had Hayse come to him, he would have given him a job. Hayse, however, never contacted Christof.[99] Hayse nevertheless sued the Department in federal district court.

The Department testified regarding its policies about how to get a job. Although a returning veteran had a right to reemployment, any person, whether seeking initial employment or reemployment, was required to fill out a written application for the Department. Hayse never did so.[100] The court reviewed all of Hayse's actions and found his notice to request his job back was inadequate

[94] *Id.* at *9.
[95] *Id.*
[96] Hayse v. Tenn. Dep't of Conservation, 750 F. Supp. 298 (E.D. Tenn. 1989).
[97] *Id.* at 299.
[98] *Id.* at 299-300.
[99] *Id.* at 300-01.
[100] *Id.*

for several reasons. First, the court conceded that what constitutes adequate notice can only be determined on a case-by-case basis and must be viewed through several factors (size of firm, number of employees, etc.).[101] However, the request for reemployment must be something more than a mere inquiry. A company cannot be expected to take every inquiry they receive as actual application for employment and, thus, Hayse's inquiry to his uncle about receiving a job was not enough.[102] In addition, the court found that Hayse's uncle was not the proper person Hayse was required to address regarding the inquiry. As previously stated, the uncle knew that he had no authority to hire anyone and he further testified that his job description did not include taking in job applications.[103] The court concluded Hayse's lack of proper application was tantamount to a failure to give adequate notice of his desire to return to work: "The Department has a right to expect that notice be received by someone who is in fact in a decision-making position, *i.e.*, someone who is able to hire the returning veteran."[104] In so saying, the court stressed that notification such as the one Hayse gave would not satisfy the post-service notice requirement.

The situation Hayse faced is not uncommon. Many service men and women come home from deployment and speak to those with whom they are most comfortable. Telling a veteran that not only do they have to give notice the *correct* way, but also to the *correct* person, in a confined amount of time, only adds to the stress the veteran is already under. In addition, the *Hayse* court suggested utilizing reasonableness and a set of factors to assist the veteran (and employer) as to how to determine whether notice is adequate. Yet the case was decided under the VRRA, not USERRA, and there has yet to be a case under USERRA that utilizes factors, and reasonableness has been expressly disavowed.[105] Although Congress has stated that VRRA cases shall be used in interpreting USERRA, *Hayse* adds little to an understanding of the statute and it contradicts many cases decided under the new rules.

Hayse is just one example of a lack of clarity in defining notice. Another example of an employee not properly contacting the employer to return to work is *McGuire v. United Parcel Service*.[106] David McGuire inquired with his supervisor regarding how to get his job back with UPS. The supervisor sent a letter to McGuire, stating "Dave -- The law specifies there are no requirements for reemployment. Please touch bases with Ed LeBel (HR) upon your return. Look to see you -- John Segovia."[107] McGuire took this letter to mean that UPS

[101] *Id*. at 303.
[102] Hayse v. Tenn. Dep't of Conservation, 750 F. Supp. 298, 303 (E.D. Tenn. 1989).
[103] *Id*. at 300.
[104] *Id.* at 304.
[105] King v. St. Vincent's Hospital, 502 U.S. 215, 222 (1991).
[106] 152 F.3d 673 (7th Cir. 1998).
[107] *Id.* at 675.

was not required to re-hire him. McGuire never followed up with the personnel in human relations. Instead, he filed suit. The district court granted summary judgment to UPS, and McGuire appealed.

The Seventh Circuit discussed the plaintiff's burden of proving reemployment entitlement and said proof requires meeting the three parts of section 4312, including proper notice to the employer upon return. The court found that the notice to employer requirement under section 4312(a)(3) needed to be reasonable "in light of all the circumstances."[108] The court noted that those circumstances will vary from case to case. Using the analysis in *Hayse* regarding circumstances in which the employer is as large as UPS, the court stated that an employer cannot be expected to have all of their supervisors knowledgeable about employment matters. The court determined that, since there was a human relations department and McGuire was informed to contact this department but failed to do so, the notice he gave to his immediate supervisor was not enough in this situation.[109] The *McGuire* court limited its holding, specifying that not *all* returning veterans *must* file an application for reemployment.[110] Rather, in the circumstances that were presented, the filing of an application was not found to be overly burdensome on the returning veteran.

Once more, the court puts the onus on a returning veteran to not only understand what the USERRA statute means, but also to address the proper person within an employer's organization to ensure that his or her job is secure. Returning veterans deal with a myriad of issues when they come home, including health care, possible relocation of families, dealing with "civilian life" again, and a host of other issues many people never face in a lifetime, let alone more than once. A veteran should not be faced with an additional issue of having to determine the proper person to speak with to ensure civilian reemployment. The *McGuire* court focused on the fact that UPS is an extremely large organization and that not everyone in such an organization will be versed in employment matters. That being said, upon her return, a veteran is far more likely to approach the last person she worked for, often her immediate supervisor, rather than going through a formal human relations department. In the end, the human relations department will probably need to speak with that supervisor to find out who the veteran is and what her responsibilities were prior to leaving for the service. This battle only delays the return to work further and puts the military member in the precarious situation of having to wait until the company is ready to re-hire, instead of being able to return to work promptly, which is contrary to the main objective of USERRA.

---

[108] *Id.* at 676-77.
[109] *Id.* at 677.
[110] *Id.* at 678.

IV. FROM BATTLE TO PEACE: CONGRESSIONAL SOLUTIONS

Although many of the foregoing cases gave examples of what courts have construed to be adequate notice, the battle has yet to be won. USERRA, for all of its faults, does have its strengths. Congress specifically created USERRA to expand on the rights found under the VRRA.[111] Congress also attempted to clarify the issue of adequate notice by giving broader directives based on length of service. However, the description of what notice should encompass (a "written or verbal notification")[112] is woefully inadequate. It provides no clear guidance, does not include any sort of identifiable standard, and is replete with exceptions. This section discusses these strengths and weaknesses in USERRA and argues that Congress and the courts should expand upon the statute to include a reasonableness standard and supply further meaning to USERRA.

A. Strengths of the Current Law

One major strength of USERRA is that it significantly expanded the VRRA. The problem with the VRRA was that it was both under-inclusive and over-inclusive in its rules regarding notice. One example of this was the fact that no limits were placed on length of service.[113] Essentially, a person could work for a company for six months, tell the company he was going into the service, spend 20 years in the service, retire, and then demand his job back. Conversely, companies argued that any service served *prior to* employment should count as service time and, thus, they did not have to re-employ *anyone* who served before they became an employee. USERRA helped eliminate these problems by adding in the five year limitation on service time.

For post-service notice, USERRA gives broader parameters, depending on the length of service completed. The length of time a returning veteran has to notify her employer that she wishes to return to work varies from the next work day to ninety days after return.[114] Sometimes coming home is a matter of driving from Chicago to Indianapolis after a drill weekend, and sometimes it is a matter of dealing with a permanent injury arising from a deployment in the Persian Gulf. These parameters allow for some leeway for a service member to adjust back to civilian life.

---

[111] Lapine v. Town of Wellesley, 970 F. Supp. 55, 58-59 (D. Mass. 1997)
[112] 38 U.S.C. § 4312(a)(1) (1994).
[113] Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 (1974).
[114] 38 U.S.C. § 4312(e) (1994).

In addition, Congress has made exceptions to this requirement, further helping veterans ensure reemployment. For example, section 4312(b) allows for the exception of not giving an employer notice of upcoming service obligations if "such notice is precluded by military necessity."[115] In light of the massive increase of reserve and national guard members serving on active duty since the September 11, 2001 attacks, many men and women are being forced to serve longer than the five-year limitation.[116] Adding this exception allows for those persons who are fighting for the United States to come back to a job they fully intended to keep in the first place.

B. Weaknesses of the Current Law

Although these additions have assisted employers and veterans, USERRA still has its flaws. Two of its major weaknesses are a lack of definition of notice and an ambiguous use of reasonableness that prevents anyone from knowing where the line should be drawn.

1. Definition

USERRA never defines "adequate" notice. The statue defines notice as "any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed."[117] This definition, while helpful, still does not provide employees and employers with real, concrete guidance. USERRA's lack of a concrete definition prevents an employer from creating handbooks and policies that conform to the law. Hence, there is no practical way for an employer to avoid concerns regarding adequate notice before service and must, therefore, deal with the issue only when an adverse employment action occurs. This forces employers to spend more time and energy defending their actions instead of giving them tools to take proper actions in the first place.

As stated previously, Congress has recently amended USERRA, adding requirements for informing employees of their rights. As big of an improvement as this is, it still does not answer the myriad of questions facing courts when a USERRA claim is brought. Although it delineates what requirements need to be met in order to qualify for benefits, it still does not adequately define the term "notice" and, thus, it leaves a military member at a

---

[115] *Id.* § 4312(b).
[116] New Army Stop-loss Policy, http://usmilitary.about.com/od/army/l/blarstoploss.htm (last visited May 10, 2006).
[117] 38 U.S.C. § 4303(8) (2006).

loss as to what is the correct action to take. Posting a notice that states what the rights *are*, but not defining how to *achieve* those rights, is not a benefit at all.

2. Reasonableness

In conjunction with a lack of definition, the issue as to whether the request for leave should be reasonable has yet to be resolved. Although the Supreme Court said in *King v. St. Vincent's Hospital* that reasonableness is not a factor in whether the request should be granted or denied,[118] *King* was decided pre-USERRA. Furthermore, Congress enacted the five-year limitation in direct response to the Court's decision. Subsequent to that amendment, additional cases have addressed the issue of reasonableness. There are no guidelines as to whether the request should be reasonable, but there have been cases that, when looked at individually, seem to say that one situation might be reasonable[119] and another may not.[120]

C. Proposal

In light of these concerns, and coupled with the decisions in the cases discussed above, it appears that there is no way to create a law that, to paraphrase Voltaire's Dr. Pangloss, would make the law the best of all possible laws.[121] However, there are changes Congress can do to make USERRA, a law that was enacted to clarify the VRRA, much clearer.

To combat the issue of employers and employees having to decipher the definition of notice, Congress may further the description under 38 U.S.C. § 4312 by adding a statutory amendment discussing how to implement the statute. Congress can help alleviate the battle between employers and employees by clarifying what it intended when it included the prerequisite of adequate notice prior to reemployment. For example, the court in *Burkhart v. Post-Browning* found that the fifteen minute notice for time off the following day was inadequate.[122] However, at a different company, under a different set of facts, before a different court, that may be enough. This confusion does not allow courts to have a defined test for what amounts to notice. An example of such clarification could be the following:

---

[118] 502 U.S. 215, 222 (1991).
[119] *See, e.g.,* Novak v. Mackintosh, 937 F. Supp. 873 (D.S.D. 1996).
[120] *See, e.g.,* Brooks v. Fiore, No. 00-803 GMS, 2001 U.S. Dist. LEXIS 16345 (D. Del. Oct. 11, 2001).
[121] FRANCOIS-MARIE AROET VOLTAIRE, CANDIDE (1759), *available at* http://www.online-literature.com/voltaire/candide/.
[122] *See* Burkhart v. Post-Browning, 859 F.2d 1245, 1250 (6th Cir. 1988).

> Notice: The term notice as used in this section shall be defined as a written or verbal statement given to an employer of intent to leave for or intent to return from military service. The statement, if prior to service, should include a date and, if possible, time of departure, and the estimated length of time away from civilian work. The employer should confirm this information with the military member and should give the military member information as to whom to contact upon return. If the statement is after service, beyond the guidelines set forth in 38 U.S.C. § 4312(e), the service member should report to whom the employer previously designated as the contact representative. If the employer fails to designate someone as the contact representative, then notice may be given to any employee of the employer.
>
> Reasonableness: The notice statements shall be reasonable in light of the circumstances. Courts should consider factors such as length of time away, the service member's position within the company, the ability of the service member to provide notification due to military commitments, the amount of notice that the service member was given, and other relevant issues. The factors listed herein are non-exclusive. Notice statements shall be presumed to be reasonable. The burden of showing a notification was unreasonable shall lie at all times with the employer. Notice of seven calendar days or more shall be considered reasonable in all circumstances.

An explanation such as the above corrects two of the flaws in the current statute. It allows for a much greater depth of detail in what a military member and an employer should do when leaving and returning from service. These guidelines will assist employers in creating employment manuals that comply with the law and are more understandable for the employee. It also allows for a reasonableness standard to be applied to the issue. By allowing such a standard, courts will have a better opportunity to review like cases in a like manner. It allows the court system to have more definitive rulings, again providing a better understanding for employers and employees.

New statutes such as those expressed above can tremendously help the battle of understanding USERRA. As stated earlier, Congress has enacted a statute to help veterans by requiring employers to post a notice delineating rights under USERRA.[123] The notice, unfortunately, simply reiterates what is already

[123] 38 U.S.C. § 4334 (2004).

in the statute and goes no further in answering the question of what it means to give "advance written or verbal notice." Congress could and should have gone further. The Department of Labor added a website address and phone number for persons to contact if they have questions.[124] However, upon review of the site, no clear explanation is provided.[125] No guidance is given to members on how to determine whether notice is adequate. Nor does the site illustrate examples of adequate notice. Adding in further guidelines would assist not only the military member, but would also allow the Department of Labor to create a better system of information provided on the Internet to assist other persons who have yet to deal with the issue of notice.

A statutory amendment can better facilitate employers. The information provided for employers on the DOL website is lacking. A question on the site states, "Did your employee or an officer of the uniformed service notify you of the employee's service-related absence (verbal or written) prior to leaving to perform, or make application to perform service in the uniformed services?"[126] The available answers are a simple "yes" or "no" and as indicated in the above-mentioned cases, is not enough to determine whether an employer must hold the veteran's job. By having the additional instruction, Congress gives the employer a more concrete base as to what it needs to do and what it should expect from the military member. Such an addition would solve the issue raised in *Hayse*.[127] It would give Hayse a specific person to report to upon return and would ensure that the Department would take a more active role in guaranteeing that a good worker was able to return after service. For example, had the Department designated Hayse's uncle (Parmley) as the reporting representative, Hayse's conversation with Parmley would have sufficed for adequate notice upon return.

Congress and the courts can further assist the employee and employer by allowing reasonableness as a factor. In spite of the fact that Congress specifically enacted parts of USERRA in direct response to the Supreme Court's opinion in *King*, Congress never specifically dealt with whether cases falling under USERRA should deal with reasonableness. Furthermore, cases that have been determined since the enactment of USERRA seem to have outcomes based on whether the particular court finds the notice to be reasonable under the facts presented. An approval of a reasonableness factor would enable courts to lighten their caseloads by allowing them to more adequately resolve disputes at

---

[124] DOL, Veterans' Employment and Training Service, 20 CFR Part 1002.210, Appendix (2005).
[125] U.S. Dep't of Labor, E-Laws: USERRA Advisor, http://www.dol.gov/elaws/vets/userra/mainmenu.asp (last visited May 10, 2006).
[126] U.S. Dep't of Labor, E-Laws: USERRA Advisor, http://www.dol.gov/elaws/vets/userra/emperob_4.asp (last visited May 10, 2006).
[127] *See* Hayse v. Tenn. Dep't of Conservation, 750 F. Supp. 298 (E.D. Tenn. 1989).

the preliminary hearing stage, rather than forcing these cases to go to trial each and every time. Furthermore, it would allow employees and employers to know what the parameters are, helping eliminate the need to go to court in the first place. This would work out the inconsistency faced from the decisions in *Novak v. Mackintosh*[128] and *King v. St. Vincent*,[129] and would essentially make the decision in *King* regarding reasonableness inapplicable.

These additions by Congress to USERRA would undoubtedly raise issues. In May of 2005, a USERRA case was brought where the military member sued for failure to reinstate employment.[130] Issues such as defining terms, knowledge of the rules, and exceptions to reemployment were all raised. The court recognized that not all companies would be intimately familiar with USERRA's guidelines; however, it stated that such a failure of knowledge should not delay a return to work just so an employer can research the law.[131] By adding in further explanations, Congress and the Department of Labor can make precise information readily available to employers, thus reducing any delay in prompt reemployment.

V. CONCLUSION

As of yet, there is no one solid rule regarding what is and what is not adequate notice. This has made for inconsistent case law and an inability for employees, employers, and courts to adequately comply with the rules. The multitude of cases presented here clearly shows the need for a more consistent set of guidelines. Congress and the Department of Labor should review the current definitions of notice and supply clarity to the law so as to assist all of those involved with a better way to handle the battle over notice. As of August 2, 2006, 107,647 reserve personnel were serving on active duty.[132] Those service members will, hopefully, be returning home soon. In the past, Congress has realized the need for protection of veterans when they come home. It is up to Congress and the courts to ensure that each individual service man and woman is given fair treatment and respect under the laws in USERRA. However, this cannot be done unless and until employees and employers know where the lines are drawn, what is required of each side, and how to better inform each other of their obligations. By adding the proposed or a similar amendment, the battle over whether notice was properly given and received will end in peace.

---

[128] Novak v. Mackintosh, 937 F. Supp. 873 (D.S.D. 1996).
[129] King v. St. Vincent's Hospital, 502 U.S. 215, 222 (1991).
[130] Haight v. Katch, LLC., No. 4:04CV3363, 2005 U.S. Dist. LEXIS 9919 (D. Neb. May 20, 2005).
[131] *Id.* at *14-15.
[132] U.S. Dep't of Defense, National Guard and Reserve Units Called to Active Duty (2006), http://www.defenselink.mil/news/Aug2006/d20060802ngr.pdf.

MURKY WATERS: THE LEGAL STATUS OF UNMANNED UNDERSEA VEHICLES

Commander Andrew H. Henderson, JAGC, USN*

> *[S]o far reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world.*[1]

I. Introduction

The Honorable Judge William H. Brawley[2] was not discussing a highly technical, undersea robot when he penned the above opinion in 1896 about the "progress of the world," but rather the mud dredge *Morgan*, operating in a Potomac creek near Washington, D.C.[3] Despite rapid technological advances in unmanned systems -- air, land, sea, and underwater
-- his observations nonetheless remain relevant over 100 years later.

Throughout the world, there are presently hundreds of Unmanned Undersea Vehicles (UUVs) commercially available or under development.[4] These modern machines could hardly be anticipated by the drafters of early

---

* Presently assigned as the Deputy Force Judge Advocate for Commander, Naval Air Forces, U.S. Pacific Fleet, in San Diego, California. LL.M. 2006, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; M.A. 2004, University of Redlands School of Business; J.D. 1993, Pepperdine University School of Law; B.A. 1989, Bates College. Previous assignments include Officer In Charge, Naval Justice School Detachment, San Diego, California, 2002-2005; Command Judge Advocate, USS JOHN C. STENNIS (CVN 74), San Diego, California, 2000-2002; Tort Claims Attorney, Office of the Judge Advocate General, Washington, District of Columbia, 1998-2000; Staff Judge Advocate, Naval Air Station, Brunswick, Maine, 1996-1998; Defense and Legal Assistance Attorney, Naval Legal Service Office Southwest, San Diego, California, 1994-1996. Member of the bars of California, the Court of Appeals for the Armed Forces, the Ninth Circuit, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] Saylor v. Taylor, 77 F. 476, 479 (4th Cir. 1896).

[2] *See* William Huggins Brawley–Biography, http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000775 (last visited Mar. 10, 2006). A Civil War veteran, Judge Brawley served in Congress from 1891-1894 before accepting an appointment to the bench in the United States District Court of South Carolina. *See id.*

[3] *See Saylor*, 77 F. at 479.

[4] BARBARA FLETCHER, SPACE AND NAVAL WARFARE SYSTEMS CTR., UUV MASTER PLAN: A VISION FOR NAVY UUV DEVELOPMENT, http://www.spawar.navy.mil/robots/pubs/oceans2000b.pdf (last visited Mar. 10, 2006).

treaties and statutes governing the operation of ships at sea however, and therefore -- Judge Brawley's foresight notwithstanding -- present unique challenges in the maritime legal landscape. Does extant maritime law treat a 25 pound swimming robot in the same manner as a 97,000 ton aircraft carrier? Is the UUV a sovereign extension of its state -- and thus immune from seizure by other nations? Must it operate on the surface in another nation's territorial sea? May it operate there at all? These are vital legal issues requiring careful examination as the mission of the UUV is formulated and these watercraft are more broadly deployed.

Ultimately, a review of domestic and international law on point reveals that at least some of the UUVs currently under development will likely fall outside the current parameters of maritime jurisprudence. However, in the interests of both uniformity and precedent under customary international law, the United States should treat all UUVs as vessels governed by the full range of domestic and international laws of the sea.

II. What are UUVs?

A. Physical Characteristics

For the purposes of this article, a UUV is defined as a "[s]elf-propelled submersible whose operation is either fully autonomous (pre-programmed or real-time adaptive mission control) or under minimal supervisory control and is untethered except, possibly, for data links such as a fiber optic cable."[5] But beyond that, rapid advancements in technology make both the description of, and uses for, UUVs somewhat mutable. First of all, there appears to be no consensus on what to call these robots. The term Unmanned Undersea Vehicle (UUV) is used herein, as it mirrors terminology utilized by the U.S. Navy.[6] Elsewhere these vehicles have additional monikers, including Autonomous Underwater Vehicles (AUVs),[7] Autonomous Marine Vehicles (AMVs),[8] and Remotely Operated Vehicles (ROVs),[9] to name a few.

---

[5] U.S. DEP'T OF NAVY, THE NAVY UNMANNED UNDERSEA VEHICLE (UUV) MASTER PLAN (Nov. 9, 2004) at 4, *available at* http://www.chinfo.navy.mil/navpalib/technology/uuvmp.pdf [hereinafter NAVY UUV PLAN].

[6] *Id.* at xiv.

[7] *See* Stephanie Showalter, *The Legal Status of Autonomous Underwater Vehicles*, 38 MARINE TECH. SOC'Y J. 80 (2004).

[8] *See* Michael R. Benjamin & Joseph A. Curcio, *COLREGS-Based Navigation of Autonomous Underwater Marine Vehicles*, Proceedings of the Institute of Electrical and Electronics Engineers (IEEE) Conference on Autonomous Unmanned Vehicles, at 32 (2004).

[9] *See* AMERICAN BUREAU OF SHIPPING, RULES FOR BUILDING AND CLASSING UNDERWATER VEHICLES, SYSTEMS, AND HYPERBARIC FACILITIES (2002), http://www.eagle.org/absdownloads/index.cfm (follow "Pub. #7" hyperlink) [hereinafter ABS RULES].

The physical characteristics of UUVs vary as much as the nomenclature. The U.S. Navy, for example, currently has plans envisioning four classes, each more or less resembling a torpedo or small submarine: Man Portable (25-100 lbs displacement); Light Weight (500 lbs displacement); Heavy Weight (3000 lbs displacement); and Large (20,000 lbs displacement).[10] But UUVs are by no means purely military concepts. Indeed, throughout the world, there are presently hundreds of UUVs commercially available or under development,[11] with product lines so diverse they even include robotic fish.[12] "The possibilities appear limitless and the benefits incalculable."[13]

B. Missions and Roles

The roles UUVs play in both the military and civilian sectors are equally diverse. Civilian scientists, for example, use UUVs to explore heretofore unreachable underwater canyons, hydrothermal vents, deep-sea wrecks, and ice-covered seas.[14] Commercial ventures include searching for offshore oil and mineral deposits, laying underwater cables, and conducting salvage operations.[15] The most advanced machine can descend up to 6,000 meters (20,000 feet) and "can hover mere centimeters above delicate sea-floor sites and reach down with its robotic arm to recover artifacts and samples without disturbing the surrounding environment."[16] Indeed, it was through the use of such robots that explorer Dr. Robert D. Ballard discovered wrecks like the *Titanic*, the *Lusitania*, and the *Bismarck*.[17] "This," remarked one robotics engineer, "is the golden age for robotic exploration vehicles."[18]

U.S. Navy plans for UUV use are divided into four main categories or "pillars" under its current UUV Master Plan: Force Net, Sea Shield, Sea Strike, and Sea Base.[19] The Force Net pillar deals with handling information and includes the UUV missions of Intelligence, Surveillance, and Reconnaissance (ISR) (information gathering), Communication/Navigation Network Nodes

---

[10] *See* NAVY UUV PLAN, *supra* note 5, at xvi.
[11] *See* FLETCHER, *supra* note 4, at 1.
[12] *See* Alison Ross, *New Breed of 'Fish-Bot' Unveiled*, BBC NEWS, Oct. 6, 2005, http://news.bbc.co.uk/2/hi/science/nature/4313266.stm.
[13] Showalter, *supra* note 7, at 80.
[14] *See id*.
[15] *See id.*
[16] Interview by Phil Sneiderman with Louis Whitcomb, Robotics Expert, Johns Hopkins University, in Baltimore, Md. (Aug. 14, 1997), http://www.jhu.edu/news_info/news/home97/aug97/robot.html.
[17] *See* Interview by Academy of Achievement with Robert D. Ballard, Ph.D, in Woods Hole, Mass. (Feb. 13, 1991), http://www.achievement.org/autodoc/page/bal0int-1.
[18] Sneiderman, *supra* note 16.
[19] *See* NAVY UUV PLAN, *supra* note 5, at xx-xxii.

(CN3) (information dissemination), and Oceanography.[20] Sea Shield is a defense-oriented pillar that contains the missions of Anti-Submarine Warfare (ASW), Mine Counter Measures (MCM), and Inspection/Identification (of vessels, landings, piers, etc.).[21] Sea Strike is an offense-oriented pillar that envisions deception roles through Information Operations (IO) (where UUV decoys project the acoustic signature of a full-sized submarine), as well as kinetic weapons delivery via Time Critical Strike (TCS) missions (missiles, torpedoes, etc).[22] Lastly, the Sea Base pillar envisions payload delivery by UUVs to support other missions.[23] And though not quite a UUV, the Navy is also presently developing the Cormorant, a submarine-launched autonomous seaplane that may operate in both reconnaissance and weapons-delivery modes.[24]

Navy utilization of UUVs is not a solely futuristic venture, however. In 2003, eighty-pound Remote Environmental Measurement Units Support (REMUS) UUVs covered 2.5 million square meters in mine-clearing operations during the early stages of Operation Iraqi Freedom.[25] And in August 2004, the world's first warship equipped with a UUV -- the destroyer *USS Momsen* (DDG 92) -- was commissioned with a Remote Minehunting System (RMS).[26] "The RMS provides the Navy with its first-ever organic mine reconnaissance capability using an unmanned, remotely operated vehicle."[27]

III. Applicable Laws

A review of the laws governing UUVs -- both domestically and internationally -- is crucial given their growing use around the world. While little precedent exists directly on point, an examination of various treaties, statutes, and regulations utilized in applicable cases is illustrative for determining what rules to employ in UUV operation.

---

[20] *See id*.
[21] *See id*.
[22] *See id*.
[23] *See id*.
[24] *See* Bill Sweetman, *The Navy's Swimming Spy Plane*, CNN.com, Feb. 24, 2006, http://www.cnn.com/2006/TECH/space/02/24/cormorant/index.html.
[25] *See* Chief Journalist Douglas H. Stutz, U.S. Navy, *UUV Use in Support of Operation Iraqi Freedom Recounted*, NAVSEA NEWS WIRE, Aug. 22, 2003, http://www.globalsecurity.org/military/library/news/2003/08/mil-030822-navsea01.htm.
[26] *See Unmanned Remote Minehunting System Installed for USS Momsen Commissioning*, SPACEDAILY, Aug. 31, 2004, http://www.spacedaily.com/news/uav-04zzo.html.
[27] *Id.*

A. Vessels

Whether in the form of a fake fish or an unmanned submarine, what does maritime law make of these machines? The key unit of measure, or "central talisman"[28] as it were, in evaluating the application of domestic and international laws to the governance of watercraft is "vessel";[29] thus a machine not labeled as such theoretically falls outside the jurisdiction of these regulations.[30] But determining whether a particular machine is in fact a "vessel" is not the straightforward proposition it would seem at first blush.

1. International Law

"International law is not a static body of rules but rather a living creature, continually forged and shaped to serve the needs of an international community that itself is constantly changing."[31] But the need to define that which is -- and is not -- a vessel under the law is as old as maritime commerce itself. Roman law, for example, explained "[*n*]*avim accipere debemus sive marinam, sive fluviatilem, sive in aliquo stagno naviget sive schedia sit*,"[32] literally translated, "we must accept a vessel whether of the sea or of the river, or that sails on some other piece of standing water, or if it should be a raft."[33] Thus the term "vessel" included everything that floated upon the waters and aided commerce.[34]

A more contemporary definition in the International Maritime Dictionary notes that "vessel" is "[a] general term for all craft capable of floating on water and larger than a rowboat. The term vessel includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water."[35] This definition is perhaps thought to be common knowledge in the international maritime community, for the term

---

[28] David J. Bederman, *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium*, 31 J. MAR. L. & COM. 189, 191 (2000).
[29] *See, e.g.*, 1 U.S.C.S. § 3 (2006) (definition of "vessel"); *see generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (discussing operation of vessels in national and international waters) [hereinafter UNCLOS].
[30] "At one time *vessel* differed from *ship* in that a ship was defined as a square-rigged vessel with three masts, distinguished from a brig, bark, schooner, snow, etc.. This distinction for ship no longer holds, although those for the others still do." CAPT JOHN. V. NOEL, JR., U.S. NAVY (RET.) & CAPT EDWARD L. BEACH, U.S. NAVY (RET.), NAVAL TERMS DICTIONARY 316 (4th ed. 1978) (emphasis in original).
[31] Horace B. Robertson, Jr., *Contemporary International Law Relevant to Today's World?*, 45 U.S. NAV. WAR COLLEGE REV. 89, 103 (Summer 1992).
[32] Raft of Cypress Logs, 20 F. Cas. 169, 170 (W.D. Tenn. 1876) (No. 11,527).
[33] Translated Dec. 2, 2005 by Mary Henderson, who paid more attention in Latin class than her brother, the author.
[34] Raft of Cypress Logs, 20 F. Cas. at 170.
[35] RENÉ DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY 890 (2d ed. 1961).

"vessel" goes undefined in the seminal 1982 United Nations Convention on the Law of the Sea (UNCLOS), which, among other things, defines territorial seas and proscribes rules for the navigation of vessels therein.[36] But following the International Maritime Dictionary's "rowboat rule," might large UUVs fall under one rule while light weight UUVs fall under another?

The International Regulations for Avoiding Collisions at Sea (COLREGS) provide some illumination, defining a vessel simply as "every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water."[37] This somewhat broader definition omits the size constraints put forth by the International Maritime Dictionary, but likewise contains the potentially confusing reference to a "means of transportation." Some UUVs, by design, will transport payloads or weapons systems.[38] Others, however, will merely transport their internal sensors. Should that alone invoke international jurisdiction?

Ultimately, the most helpful guidance comes from the 2004 proposals of the American Branch International Law Association (ABILA) Law of the Sea Committee.[39] Seeking clarification of terms not otherwise defined by UNCLOS, the Committee suggests "vessel" be defined simply as "a human-made device, including submersible vessels, capable of traversing the sea."[40] Though this proposal is in no way binding, its simplicity and straightforwardness make it an attractive suggestion.

2. United States Maritime Law

Congress codified the definition of "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[41] Virtually unchanged since its

---

[36] *See generally* UNCLOS, *supra* note 29.
[37] 28 U.S.T. 3459 (Oct. 20, 1972); *see also* International Navigational Rules Act of 1977, 33 U.S.C.S. § 1601 (2006) (adopting the International Regulations for Avoiding Collisions at Sea) [hereinafter COLREGS].
[38] NAVY UUV PLAN, *supra* note 5, at xxi.
[39] The International Law Association (ILA) was founded in Brussels in 1873, with the American Branch formally established in 1922. A non-governmental association with consultative status in the United Nations, the ILA is "considered the preeminent private international organization devoted to the development of international law." The study of international law is conducted by various committees composed of specialists selected from the membership. *See* American Branch -- International Law Association: History and Mission, http://www.ambranch.org/history.htm (last visited Mar. 10, 2006).
[40] George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention III: The International Hydrographic Organization ECDIS Glossary*, 34 CAL. W. INT'L L. J. 211, 238 (2004).
[41] 1 U.S.C.S § 3 (2006).

adoption in 1873,[42] this definition is reiterated -- and occasionally expanded upon -- in at least twenty-four federal maritime or maritime-related laws.[43] The same definition applies to the armed forces of the United States as well through the Manual for Courts-Martial.[44] It is also a regularly contested definition, with tort and/or financial liability often hinging on a court's proclamation that a watercraft "is" or "isn't." Consequently, in application, the definition of "vessel" sometimes appears malleable from one jurisdiction to another.[45]

In *Kathriner v. UNISEA, Inc.*,[46] for example, a permanently anchored liberty ship in Alaska, converted into a fish processing plant, was deemed not to be a vessel. Conversely in *Luna v. Star of India*,[47] a permanently anchored 100

---

[42] *See* Stewart v. Dutra, 543 U.S. 481, 490 (2005).

[43] *See* Digiovanni v. Traylor Bros., Inc., 959 F.2d 1119, 1124 (1st Cir. 1992) (Torruella, J., dissenting), *overruled by* Stewart v. Dutra, 543 U.S. 481 (2005).

[44] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 103(20) discussion § 3 (2005).

[45] There are many cases on both sides of this issue. *See, e.g.,* Stewart v. Dutra, 543 U.S. 481 (2005) (dredge was a vessel under Jones Act because it transported equipment and personnel over water); Senko v. La Crosse Dredging Corp., 352 U.S. 370, *reh'g denied*, 353 U.S. 931 (1957), *overruled in part by* McDermott Int'l Inc. v. Wilander, 498 U.S. 337 (1991) (Jones Act applicable though dredge was anchored to the shore at the time of the injury and was not frequently in transit); Manuel v. P.A.W. Drilling & Well Serv., Inc., 135 F.3d 344 (5th Cir. 1998) (work-over rig is vessel in navigation as it was constructed to transport equipment to various places across navigable waters); Tonnesen v. Yonkers Contracting Co., Inc., 82 F.3d 30 (2d Cir. 1996) (reversing summary judgment that held a stationary barge was *per se* not a "vessel in navigation"); Estate of Wenzel v. Seaward Marine Service, Inc., 709 F.2d 1326 (9th Cir. 1983) (reversing summary judgment that held a submerged cleaning and maintenance platform was *per se* not a vessel); Brunet v. Boh Brothers Constr., 715 F.2d 196 (5th Cir. 1983) (moored pile-driving barge used to transport and carry a pound crane may be considered vessel in navigation); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (reversing summary judgment that held a moored coal barge was *per se* not a vessel); The Showboat, 47 F.2d 286 (D. Mass. 1930) (schooner tied to wharf and used as a restaurant, but still equipped for sailing, is a vessel); The Ark, 17 F.2d 446 (D. Fla. 1926) (houseboat lacking motive power, but not permanently attached to the shore, is a vessel); Gallop v. Pittsburg Sand & Gravel, Inc., 696 F. Supp. 1061 (W.D. Pa. 1988) (dredging platform on which crane was located was vessel under the Jones Act); Uzdavines v. Weeks Marine, Inc., 37 B.R.B.S. 45 (2003) (Board affirms determination that dredge is a vessel in navigation); Foster v. Davison Sand & Gravel, 31 B.R.B.S. 191 (1997) (finding that a docked dredge on the Allegheny River is vessel). *But see* Burchett v. Cargill, Inc., 48 F.3d 173 (5th Cir. 1995) (holding that floating platform constructed and used primarily as a work platform is not a vessel in navigation); Ellender v. Kiva Constr. & Eng'g Inc., 909 F.2d 803 (5th Cir. 1990) (single construction barges, or several barges strapped together to form floating construction platform do not, as matter of law, constitute "vessels" under Jones Act as they have no independent means of navigation); Hurst v. Pilings & Structures, Inc., 896 F.2d 504 (11th Cir. 1990) (spud barge used as work platform not a vessel in navigation); Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 (5th Cir. 1989) (barge moored to shore and used as a stationary work platform was not a vessel); Bernard v. Binnings Const. Co., 741 F.2d 824 (5th Cir. 1984) (raft used as a small work platform was not a vessel); Taylor v. Cooper River Constructions, 830 F.Supp. 300 (D.S.C. 1993) (spud barge used as a work platform for bridge construction not a vessel); Presley v. Healy Tibbits Constr. Co., 646 F.Supp. 203 (D.Md. 1986) (barge used as work platform at a construction site not a vessel).

[46] 975 F.2d 657 (9th Cir. 1992).

[47] 356 F. Supp. 59 (S.D. Cal. 1973).

year-old merchant ship, converted into a maritime museum in San Diego, was found to be a vessel.[48] Both cases studied the term "vessel" through the lens of The Jones Act[49] to determine potential tort liability for injuries sustained aboard and utilized the same federal statutory definition referenced *supra*. But the crux of these decisions rested on whether something that clearly *was* a vessel remained such after a change in the use of the craft. More relevant to the application of law to UUVs are cases reviewing the vessel status of atypical watercraft operating as designed.

Such an atypical craft is the *Super Scoop*, which was used in the mammoth "Big Dig" construction project re-routing a major interstate in Boston, Massachusetts. "[O]ne of the world's largest marine dredges,"[50] the *Super Scoop* "is a massive floating platform from which a clamshell bucket is suspended beneath the water. The bucket removes silt from the ocean floor and dumps the sediment onto one of two scows that float alongside the dredge."[51]

In holding that the *Super Scoop* was indeed a vessel, the Supreme Court in *Stewart v. Dutra*[52] specifically disavowed lower court reliance on whether the primary purpose of the craft was navigation or commerce and whether the craft was actually in transit at the time of the incident.[53] Instead, the Court reiterated the importance of giving the words in a statute their "ordinary and natural meaning"[54] and therefore determined "the *Super Scoop* was not only 'capable of being used' to transport equipment and workers over water -- it *was* used to transport those things."[55] The Court went on to note, "[d]espite the seeming incongruity of grouping dredges alongside more traditional seafaring vessels under the maritime statutes, Congress and the courts have long done precisely that . . . ."[56]

But this still does not address all of the issues raised by the operation of UUVs. Of particular concern is the statute's requirement for the watercraft to be "a means of transportation." As discussed *supra*, some UUVs will, by design,

---

[48] For more case comparisons, *see* Jeff Nemerofsky, *What Is A Vessel? A Three Prong Approach*, 46 CLEV. ST. L. REV. 705 (1998); *see also* Matthew P. Harrington, *Jones Act: Navigation Is Only Incidental To The Function Of A Dredge, So The Dredge Is Not A Vessel, And A Worker Injured On Board Is Not For Jones Act Purposes A Seaman, That Is, A Member Of The Crew Of A Vessel*, 35 J. MAR. L. & COM. 293 (2004).
[49] 46 U.S.C.S. App. § 688 (2006).
[50] Massachusetts Turnpike Authority, http://massturnpike.com/html/bigdig/equipment/dutra.html (last visited Mar. 10, 2006).
[51] Stewart v. Dutra, 543 U.S. 481, 484 (2005).
[52] Stewart v. Dutra, 543 U.S. 481 (2005).
[53] *See id.* at 495.
[54] *Id.* at 494.
[55] *Id.* at 495 (emphasis in original).
[56] *Id.* at 497.

transport cargo payloads. Others, however, will not. And, as noted by the Court in *Stewart*, the capacity to transport equipment or workers is not the only factor; the Court in *Stewart* also referenced the *Super Scoop* having "certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area."[57]

Despite the Supreme Court's recent clarification in this area, there still exists the real possibility of incongruous results in similar cases. Noting the potential over-breadth of the federal definition, one jurist pondered its applicability to even a government-owned canoe, noting, "there is no limit as to the size or purpose of the vessel [in 1 U.S.C. §3]."[58] Other judicial musings envision the application of the "vessel" label to even more fantastic vehicles, such as spacecraft.[59] Additionally, of particular relevance to the case of UUVs, the statute's requirement that a watercraft be a means of transportation begs the question: transportation of *what*? Scholars of domestic maritime law struggle with these anomalies and, as in the international legal arena discussed *supra*, propose more straightforward definitions. The Naval Terms Dictionary suggests, "[a]ny vehicle in which man or goods are carried on water."[60] Emory law professor David Bederman proposes that a vessel simply be defined as "an object used as a conveyance or platform for a marine activity."[61] Nonetheless, if and until such a straightforward definition is codified, in the light of *Stewart*, where does that leave the UUV?

In 1938, perhaps as a precursor to the International Maritime Dictionary's "rowboat rule" (*supra*), the Fifth Circuit determined in *Lawson v. Maryland Casualty Co*.[62] that a rowboat was not a vessel within the meaning of federal law, despite the statute's broad definition.[63] In dicta, however, the court mused that the rowboat "belonged to the nearby dredge," which itself probably was a vessel.[64] The decedent in the case, who was killed while in the rowboat, was determined not to be a crew member of the dredge, but instead a visiting laborer working under control from the land, thus allowing recovery under the Longshoremen's and Harbor Workers' Compensation Act,[65] which utilizes the

---

[57] *Id.* at 484.
[58] United States v. Roach, 26 M.J. 859, 871 (C.G.C.M.R. 1988) (Bridgman, J., concurring) (discussing concern for potential abuse of military prosecutions for Hazarding a Vessel under UCMJ art. 110).
[59] *See* United States v. Buckroth, 12. M.J. 697, fn 1 (N.M.C.M.R. 1980) (discussing the probability of a variety of future military criminal prosecutions for Hazarding a Vessel under UCMJ art. 110).
[60] NOEL & BEACH, *supra* note 30, at 316 (quoting Dr. Samuel Johnson).
[61] Bederman, *supra* note 28, at 191.
[62] 94 F.2d 193 (5th Cir. 1938).
[63] *See id.* at 194.
[64] *See id.*
[65] 33 U.S.C.S. § 901 *et seq*. (2006).

same federal definition of "vessel" discussed *supra*.[66] But what if a member of the dredge's crew had been injured in the rowboat instead? The rowboat might then achieve some vicarious form of vessel status from the "real" launching vessel. This analysis is illustrative in the case of underwater vehicles -- particularly those launched from, or monitored via, traditional vessels.

B. Underwater Vehicles

1. Manned Vehicles

At present, there is no inherent legal precedent clearly defining the legal responsibilities in operating UUVs.[67] This is of course largely due to their novelty, but even more traditional manned underwater vehicles (submarines) posit interesting legal issues. In the traditional sense, the term "vessel" refers to a surface ship and "underwater vehicle" serves as the equivalent term for underwater applications.[68] Indeed, "[s]ubmarines are not directly referenced throughout the [COLREGS], as there are few private (or commercially operated) submarines in existence."[69] The COLREGS do, however, "apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels,"[70] and these rules have been interpreted to "apply to submarines when operating on the surface in the same manner as they apply to surface vessels."[71] The U.S. Navy endorses this view and further applies applicable portions of the COLREGS to submerged navigation.[72] UNCLOS approaches this vessel-submarine issue by requiring submarines -- and other underwater vehicles -- "to navigate on the surface" in another nation's territorial sea,[73] essentially making submarines behave as traditional vessels. This, too, is a practice followed by the U.S. Navy.[74]

Other treaties seek to eliminate the distinction between the crafts entirely. The International Convention for the Prevention of Pollution of Ships (MARPOL 73/78)[75] offers a broader definition in Article 2, regulating "a vessel

---

[66] *See Lawson,* 94 F.2d at 194.
[67] *See* Benjamin & Curcio, *supra* note 8, at 32.
[68] E-mail from Roy Thomas, Engineer, Ship Engineering Dept., American Bureau of Shipping (Sept. 19, 2005) (on file with author).
[69] Benjamin & Curcio, *supra* note 8, at 32.
[70] COLREGS, *supra* note 37, rule 1(a).
[71] Benjamin & Curcio, *supra* note 8, at 32.
[72] *See* e-mail from Lieutenant Commander Phillip Yu, U.S. Navy, Submerged Navigation Expert for Commander, Submarine Force, U.S. Pacific Fleet (Oct. 26, 2005) (on file with author).
[73] UNCLOS, *supra* note 29, art. 20.
[74] *See* U.S. DEP'T OF NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS -- ANNOTATED SUPPLEMENT, para. 2.3.2.4 (1997) [hereinafter NWP 1-14M].
[75] 1973 U.S.T. LEXIS 322 (U.S.T. 1973); 1978 U.S.T. LEXIS 322 (U.S.T. 1978). Adopted in 1973, the convention was modified by protocol in 1978 and is commonly referred to as MARPOL 73/78.

of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, *submersibles*, floating craft, and fixed or floating platforms."[76] Another example is from the Treaty of Montreux,[77] which is incorporated by UNCLOS.[78] Governing navigation in the Straits of Dardanelles, the Sea of Marmora, and the Bosphorus, this treaty defines submarines simply as "all vessels designed to operate below the surface of the sea."[79] Legally speaking then, submarines seem to exist in a sort of quasi-vessel status, depending on where they operate. But for all practical purposes, they are treated like any other ship on the seas.

2. Unmanned Vehicles

Though UUVs represent cutting-edge technology and present unique legal challenges, there are some parallels to be drawn from similar components that have been used by industry for years. The American Bureau of Shipping (ABS),[80] for example, categorizes a "remotely operated vehicle" as "an unmanned unit tethered to a support vessel or structure and designed for underwater viewing, cutting, cleaning or other underwater tasks."[81] It is not then a vessel itself, but rather an extension of the support vessel.

Similar logic was followed in a 1980 U.S. Customs Service decision that examined a tethered, submersible capsule used "as a component of an underwater service system designed to service well-heads located on the seabed, which cannot be used independently of the other system components located on a support vessel . . . ."[82] The U.S. Coast Guard had already categorized the capsule as a vessel for purposes of vessel documentation.[83] But in finding the capsule was not a vessel under tariff schedules, the Customs decision explained:

> Not every article which can move on or in water with persons or merchandise is considered a vessel. Although lack of self-propulsion, restricted mobility, or dependence upon outside

[76] *See id.*, art. 2 (emphasis added).
[77] Convention Regarding the Regime of the Straits, with Annexes and Protocol, Jul. 20, 1936, 173 L.N.T.S. 213 (1936) [hereinafter Treaty of Montreux].
[78] *See* UNCLOS, *supra* note 29, art. 35(c).
[79] *See* Treaty of Montreux, *supra* note 77, Annex II(B).
[80] Founded in 1862, the non-profit American Bureau of Shipping (ABS) is one of the world's leading ship classification societies, "setting safety standards for the marine industry through the establishment and application of technical standards . . . for the design, construction, and operational maintenance of ships and other marine structures." *See* ABS Company Overview, http://www.eagle.org/company/overview.html (last visited Mar. 10, 2006).
[81] ABS RULES, *supra* note 9, at 155.
[82] Classification of submersible capsule component of underwater wellhead service system, 15 Cust. B. & Dec. 884 (1980).
[83] *See id.*

> life support and communications systems by themselves may not necessarily prevent a craft from being considered a vessel, these factors, considered cumulatively, must be accorded great weight.[84]

The capsule, then, was a "component" of the support vessel. The decision went on, however, to specifically distinguish the tethered capsule from "a free-swimming submersible."[85] It also acknowledged that a watercraft could come within the statutory definition of vessel if it engaged in a maritime service and had "some relation to commerce or navigation, or at least some connection with a vessel employed in trade."[86]

Using analogous rationale in *Estate of Wenzel v. Seaward Marine Services, Inc*.,[87] the Ninth Circuit overturned a summary judgment that denied vessel status to a submerged cleaning and maintenance platform (SCAMP). Utilized to scrape and clean submerged seawater intake ports on ship hulls -- in this case the frigate *USS Rathburne* -- the SCAMP is a "saucer shaped unit which is six feet in diameter and twenty inches deep . . . equipped with an impeller . . . [and] can be operated by remote control or steered manually by divers."[88] The court explained the importance of a factual review in each case, holding:

> The fact that the SCAMP was constructed for a purpose other than the transportation of persons or things from one place to another does not mean that as a matter of law, it is not a vessel in navigation. Strange looking, special purpose craft for the oil and gas business, far different from traditional seafaring ships have sometimes been held to be vessels.[89]

Viewing these limited precedents together, there is a strong argument that UUVs should be considered vessels regardless of their size or mission under U.S. law. If construed a submarine, like the largest UUVs might, they would be treated as such and be deemed vessels. If not, then under "component" criteria, UUVs would gain "vicarious" vessel status from the launching and/or controlling vessel, as the UUV would be both engaged in a maritime service and have some relation to navigation -- or at least some connection with a vessel. Finally, adding the "SCAMP" rationale, the fact that "free-swimming" UUVs

---

[84] *Id.*
[85] *Id.*
[86] *Id.* (quoting Hitner Sons Co. v. U.S., 13 C.C.P.A. 216, 221 (1922)).
[87] 709 F.2d 1326 (9th Cir. 1983).
[88] *Id.* at 1327.
[89] *Id.* at 1328.

were constructed for a purpose other than the transportation of persons or things does not preclude outright vessel status. As such, even the most autonomous UUVs could be deemed vessels in their own right.

C. Warships

Submarines are warships,[90] and it is a well-established tenet of international law that warships are extensions of their respective states, enjoying "sovereign immunity from interference by the authorities of nations other than the flag nation."[91] As such, warships may not be seized, boarded, or searched without the permission of the commanding officer.[92]

A ship need not be armed, however, to be considered a warship.[93] Defined by UNCLOS, a warship is:

> a ship belonging to the armed forces of a State bearing external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.[94]

A UUV is, of course, unmanned by definition and therefore lacks a crew or commanding officer.[95] It cannot then be a warship *per se*, even if deemed a vessel in its own right. But under the "component" theory discussed *supra*, UUVs might still be considered extensions of the launching/controlling warship. As such, they would likewise enjoy the same level of sovereign immunity as the support vessel -- and also be immune from seizure.

If deemed vessels in their own right -- but not warships -- UUVs may still enjoy immunity as auxiliaries. "Auxiliaries are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are state owned or operated and used for the time being only on government noncommercial service, auxiliaries enjoy sovereign immunity."[96]

---

[90] *See* SAN REMO MANUAL ON INT'L LAW APPLICABLE TO ARMED CONFLICTS AT SEA 90 (Louise Doswald-Beck ed. 1995).
[91] NWP 1-14M, *supra* note 74, at para. 2.1.2.
[92] *See id.*
[93] *See* NWP 1-14M, *supra* note 74, at ch. 2, fn 2.
[94] UNCLOS, *supra* note 29, art. 29; *see also* NWP 1-14M, *supra* note 74, at para. 2.1.1.
[95] *But see* Jane Dalton, *Future Navies -- Present Issues*, 59 U.S. NAV. WAR COLLEGE REV. 17, 24 (2006) (suggesting a remotely-operated vehicle might be legally considered "commanded" and "manned" by the controlling vessel). *Id.*
[96] NWP 1-14M, *supra* note 74, at para. 2.1.3.

Thus, even if not a warship, a UUV should still be immune from seizure by a foreign state.

IV. Application of The Law at Sea

The legal classifications, or "regimes," of ocean areas determine the degree of control that a coastal nation may exercise over the conduct of foreign vessels within these areas.[97] These regimes have traditionally been classified under the broad headings of internal waters, territorial seas, and high seas.[98] Over the last several decades, additional regimes known as exclusive economic zones and archipelagic waters have also been added to the mix, all of which have been assimilated by customary international law[99] and codified in UNCLOS.[100] Though the United States has neither signed nor ratified UNCLOS, the regulations recited therein pertaining to navigation and the establishment of exclusive economic zones have been expressly endorsed by the President.[101] An overview of these regimes, and guidance for the operation therein of UUVs, follows.

A. High Seas and Exclusive Economic Zones (EEZ)

The high seas are international waters wherein complete freedom of navigation and overflight are preserved for the international community,[102] including "[m]ilitary maneuvers and activities that do not violate the [United Nations] Charter."[103] The EEZ, as the name implies, is a regime designed to protect the economic interests of a coastal state, including exclusive use of the natural resources found therein.[104] Extending out 200 nautical miles (NM) from the coastal state's low tide baselines,[105] the EEZ does not restrict navigation, so long as the foreign vessel poses no interference with coastal state resources.[106] As such, UUVs may operate freely in both the highs seas and the EEZ while

---

[97] *See id.* at para. 1.2.
[98] *See id.* at para. 1.1.
[99] *See id.*
[100] *See* UNCLOS, *supra* note 29, arts. 46, 55.
[101] *See* President's Message on the United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983); *see also* NWP 1-14M, *supra* note 74, at para. 1.2.
[102] *See* UNCLOS, *supra* note 29, art. 87; *see also* NWP 1-14M, *supra* note 74, at para. 1.5.
[103] Elliot L. Richardson, *Law of the Sea: Navigation and Other Traditional National Security Considerations*, 19 SAN DIEGO L. REV. 553, 574 (1982).
[104] *See* UNCLOS, *supra* note 29, art. 56.
[105] *See* UNCLOS, *supra* note 29, art. 57. For an excellent overview of the regimes and how to determine their boundaries, *see generally* NWP 1-14M, *supra* note 74, at ch. 1.
[106] *See* UNCLOS, *supra* note 29, art. 58; *see also* NWP 1-14M, *supra* note 74, at 1.5.2.

exercising the requisite due regard for the interests of other vessels[107] and posing no threat to the territorial integrity of the coastal state.[108]

B. International Straits and Archipelagic Sea Lanes

Ships and aircraft may navigate through established international straits exercising transit passage protocol,[109] which requires a vessel to "proceed without delay through or over the strait"[110] via "continuous and expeditious" transit.[111] The same holds true for navigation through established archipelagic sea lanes.[112] This protocol allows for a ship's operation in its normal mode,[113] which, for a submarine, is submerged.[114] Specifically prohibited, however, are research or survey activities without the consent of bordering nations.[115] Consequently, sweeping patterns that might be inherent in the operation of an intelligence-gathering or oceanographic research UUV, for example, would not likely be permissible in an international strait without consent.[116] Nor would a

---

[107] *See* UNCLOS, *supra* note 29, art. 87. *See generally* COLREGS, *supra* note 37.
[108] *See* UNCLOS, *supra* note 29, art. 301.
[109] *See* UNCLOS, *supra* note 29, art. 38. *But see id.* art. 45 (discussing innocent passage protocol (discussed *infra*) vice transit passage protocol, applicable to international straits which are: "(a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State").
[110] *See* UNCLOS, *supra* note 29, art. 39.
[111] *See* UNCLOS, *supra* note 29, art. 38. While in transit passage, ships and aircraft shall:

> (a) proceed without delay through or over the strait;
> (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
> (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
> (d) comply with other relevant provisions of this Part.

Id. art. 39(1).
[112] *See* UNCLOS, *supra* note 29, art. 53, 54; *see also* NWP 1-14M, *supra* note 74, at 1.4.3.1.
[113] *See* UNCLOS, *supra* note 29, art. 39.
[114] *See* NWP 1-14M, *supra* note 74, at 2.3.3.1; *see also* CDR Ronald I. Clove, U.S. Navy, *Submarine Navigation in International Straits: A Legal Perspective*, 39 NAVAL L. REV. 103, 105 (1990) (submerged status for submarines transiting international straits has taken on the status of customary international law).
[115] *See* UNCLOS, *supra* note 29, art. 40.
[116] *See* Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 846 (1984); *see also* Memorandum from Office of the U.S. Navy Judge Advocate General (International and Operational Law) to Program Executive Officer, Mine and Undersea Warfare, NAVSEA (PMS 490) 4 (Jun. 10, 2005) (on file with author) [hereinafter OJAG MEMO].

support vessel's stopping to launch or recover a UUV likely be considered continuous and expeditious.[117]

A state, however, always enjoys an inherent right to self defense. [118] Thus, during navigation through straits suspected to contain mines -- or some other threat -- a warship should be allowed to deploy a mine countermeasure UUV ahead of its path.[119] Indeed, transit passage protocol allows for "transit consistent with sound navigational practices and the security of the force,"[120] thus "sweeping" with a UUV for defensive, force-protection measures would arguably be authorized -- particularly given the geographic confines of a strait and the increased risk of asymmetric/terrorist attack.[121]

C. Territorial Seas

The sovereignty of a coastal state extends beyond its lands and internal waters into its territorial sea, measured 12NM from low tide baselines.[122] Navigation through the territorial sea by foreign ships is permitted, but only by means of innocent passage protocol.[123] Like the transit passage protocol discussed *supra*, innocent passage requires "continuous and expeditious" travel.[124] Innocent passage is far more restrictive, however, as it must be for a specific purpose,[125] and must not be "prejudicial to the peace, good order or security of the coastal State."[126] In addition, submarines and other underwater vehicles must "navigate on the surface and show their flag."[127]

---

[117] *See* OJAG MEMO, *supra* note 116, at 4; *see also* Dalton, *supra* note 95, at 24.
[118] *See* U.N. Charter, art. 51.
[119] *See* OJAG MEMO, *supra* note 116, at 4, fn 12.
[120] NWP 1-14M, *supra* note 74, at 2.3.3.1.
[121] *See* Dalton, *supra* note 95, at 23.
[122] *See* UNCLOS, *supra* note 29, art. 2, 3; *see also* NWP 1-14M, *supra* note 74, at 1.4.2.
[123] *See* UNCLOS, *supra* note 29, art. 17; *see also* NWP 1-14M, *supra* note 74, at 2.3.2.1.
[124] *See* UNCLOS, *supra* note 29, art. 18; *see also* NWP 1-14M, *supra* note 74, at 2.3.2.1.
[125] *See* UNCLOS, *supra* note 29, art. 18. Passage through the territorial sea may only be for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility. *Id.* art. 18.
[126] *See* UNCLOS, *supra* note 29, art. 19; *see also* NWP 1-14M, *supra* note 74, at 2.3.2.1. Activities considered prejudicial to peace, good order or security include the following:

> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
> (b) any exercise or practice with weapons of any kind;
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;

Under these restrictions, UUVs could potentially operate in a foreign territorial sea, but they would be required to navigate on the surface.[128] This poses both legal and practical challenges for the operator, however. From a legal standpoint, because some UUVs -- like Sea Strike TCS platforms -- will be weapons-delivery vehicles, it is feasible that a coastal state would view the UUV as a weapons system in-and-of-itself: A torpedo that launches other torpedoes, as it were. Though the determination of a vessel's "innocence" in transit should be discerned based on the conduct of a vessel and not its innate capabilities,[129] the unmanned characteristic of the UUV could make for a colorable coastal state protest.

From a practical standpoint, a UUV operating on the surface would still be required to observe the "rules of the road" enumerated in the COLREGS. Rule 22, for example, requires an inconspicuous, partly submerged vessel to display a white, all-round light visible for three miles.[130] UUVs over 12 meters in length would have to display lights on the side, stern, and on a masthead.[131] Under rule 33, vessels are also required to make various sound signals, depending on their size.[132] And even if determined not to be a vessel, a UUV

(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of willful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) any other activity not having a direct bearing on passage.

UNCLOS, *supra* note 29, art. 19(2).

[127] *See* UNCLOS, *supra* note 29, art. 20; *see also* NWP 1-14M, *supra* note 74, at 2.3.2.4.

[128] *See* Dalton, *supra* note 95, at 24.

[129] *See* NWP 1-14M, *supra* note 74, at ch. 2, fn 27 (citing *Status of the Law of the Sea Treaty Negotiations: Hearing Before the H. Comm. on Merchant Marine & Fisheries*, 97th Cong. (Jul. 27, 1982) (statement of Prof. H. R. Robinson); *see also* Oxman, *supra* note 116, at 855) (interpreting "innocent passage" under UNCLOS art. 19 to apply to specific conduct, rather than the class of ship); *see also* LCDR John W. Rolph, JAGC, USN, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137, 159 (1992) (warships enjoy a presumption of innocence when transiting foreign territorial seas until such time as non-innocence is clearly demonstrated).

[130] *See* COLREGS, *supra* note 37, art. 22.

[131] *See id.* art. 22.

[132] *See id.* art. 33. For a detailed review of the challenges of controlling UUVs in accordance with the COLREGS, *see also* Benjamin & Curcio, *supra* note 8. For more discussion of lighting and signal requirements for UUVs, *see also* Showalter, *supra* note 7.

would still have to be operated with due regard for the safety of others.[133] These challenges are not insurmountable by any means, but they will require the attention of UUV designers and operators alike.

V. Conclusion

This article examined the unique attributes of UUVs and how these novel watercraft may be viewed under both domestic and international maritime law. A strong case can be made under domestic law that UUVs are in fact vessels and, therefore, subject to all applicable rules for operation and navigation. This conclusion stems from the notion that most UUVs will either be considered components of their support ships, or be construed as vessels outright. It is conceivable that a UUV might fall through the legal cracks, so to speak, such as a non-payload UUV launched and operated from shore. This vehicle would have no support ship, nor would it technically be a means of transportation. But for the sake of uniformity and to avoid confusion, it is in the best interests of the United States to treat all UUVs alike.

This rationale holds particularly true in the international arena. With far less regulatory or statutory guidance available, the legal guidelines applicable to UUVs are even more fluid than domestic law. But perhaps more so than regulations or treaties on point, international law is built on the customary practices of nations.[134] And while it may be tempting for some to argue why UUVs should not be governed by maritime laws, the establishment of such a precedent poses a great danger to the United States. First, it is in the interest of the United States to establish the sovereignty of its UUVs to protect them from foreign seizure. Second, and more importantly, given the growing availability of these vehicles to other states throughout the world, the establishment of clear rules for their operation is of crucial importance for the security of United States -- because America has territorial seas, too.

[133] *See* COLREGS, *supra* note 37, art. 2; *see also* Dalton, *supra* note 95, at 25.
[134] GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 3 (1903).

MOSCOW'S CORRUPTION OF THE LAW OF ARMED CONFLICT: IMPORTANT LESSONS FOR THE 21ST CENTURY

Colonel James P. Terry, USMC (Ret.)*

I. Introduction: Understanding the Significance Moscow Places on the Role of Law

The great importance of examining the facts and rationale of post-World War II Soviet coercion lies in understanding the significance the former Soviet Union itself placed on the role of law as a useful implement in the execution of regime policies, a significance adopted by the Russian Federation and applied today by Vladimir Putin in Chechnya. The included case studies in the use of force and conflict resolution examine the characteristic differences between the legal systems of the then-Soviet Union, the current Russian state, and the United States and Western Nations as reflected in their respective approaches to international crises. More importantly, the corruption of law represented in the legal arguments used by Soviet leaders, and now by the Russian leadership in defense of military intervention, present important lessons for national leaders in the 21st century -- especially as President Putin attempts to reestablish the Russian Federation as an international power. In that regard, the final part examines Russian actions in Chechnya and Putin's reliance on similar arguments for the bold use of force within the Federation to those earlier claims made to justify Soviet aggression within the Warsaw Pact.

In their statements of international legality, the Soviets sought neither objectivity nor legal impartiality. Rather, they endorsed a biased and subjective legality masked behind the more objective sounding legal standard of 'peaceful

---

* Col James P. Terry, USMC (Ret.) is currently the Chairman, Board of Veterans' Appeals. He previously served as Principal Deputy Assistant Secretary and Deputy Assistant Secretary of State for Regional, Global and Functional Affairs within the Bureau of Legislative Affairs from 2001-2005. Prior to joining the Bureau of Legislative Affairs, Mr. Terry worked for the Interior Department, serving as the Deputy Director of the Office of Hearings and Appeals and as a Judge on the Board of Land Appeals. Mr. Terry's distinguished military career as both a Judge Advocate and infantry officer spanned 27 years, which included a tour as Legal Counsel to the Chairman of the Joint Chiefs of Staff under General Colin Powell. He is the author of more than 25 articles on coercion control and national security. His volume addressing contemporary issues in the law of armed conflict, THE REGULATION OF INTERNATIONAL COERCION, was published by the Naval War College Press in 2005.

coexistence.'[1] Because of the anomalous Soviet practice of fitting law to desired policy[2] rather than attempting to shape national policy to recognized international legal norms, as has been demanded by democratic nations, a constant review of Soviet, and now Russian, actions has been required to ensure to the greatest degree possible that their costs were high whenever self-serving policy decisions violated recognized norms.

In this review of the events and issues surrounding post-World War II Soviet, and then Russian, coercion, an effort has been made to examine the Soviet and Russian claims in terms of the common inclusive interests of all sovereign states in adhering to an international legal regime protective of the interests of the greatest number of state participants. To the extent that the Soviet and now Russian exclusive claims have been asserted irrespective of these interests, they must be rejected as no more than cosmetic devices for the ordering of power relationships with client states and republics.

This text first addresses the actions and claims of the former Soviet Union within its own sphere of influence between 1945 and 1991. These parts chronicle the Soviets' radical departure from accepted tenets of international law in maintaining control through their development of creative doctrines and their willingness to exercise the unlawful use of force over satellite regimes. The Soviet military interventions detailed include Hungary in 1956, Czechoslovakia in 1968, Afghanistan in 1979, and Poland through surrogates in 1981. Part VI addresses the pressures exerted on Lithuania in 1990-1991 as an example of the extreme attempts to retain control over a crumbling empire as the Soviet Union expired. The Soviet manipulation of international law to justify unlawful coercion in each of these incursions is reviewed against a backdrop of U.S. involvement in the Suez crisis in 1956, the Vietnam conflict in 1968, the Iranian hostage crisis in 1979, the unusual circumstances of the Polish crackdown in 1981, and the limitation on the U.S. ability to effectively project power into the

---

[1] *See* LEGALITY OF CZECHOSLOVAK INVASION in U.N. Special Committee on Principles of International Law, U.S. DEPT OF STATE BULL. 396-401 (Oct. 14 1968) for a discussion of this 'doctrine.' Article 1 of the Soviet-Czechoslovak Treaty on the Standing of Soviet Forces, in force Oct. 18, 1968, justified Soviet troops in then-Czechoslovakia "for the purposes of ensuring the security of the countries of the socialist commonwealth against the increasing revanchist aspirations of the West German militarist forces." Article 2 declared that their "temporary presence" did not violate the sovereignty of Czechoslovakia.

[2] *See* John N. Hazard, *Note*, 65 AM. J. INT'L L. 142, 148, on Soviet application of law:

> The concept of determining the nature of law by the purpose to which it is put is by no means new . . . . The emphasis given to the new Socialist international law suggests a resurgence among Soviet scholars of a disquieting sense that inroads are being made by hostile ideas into a region which during the early 1960s had been thought secure.

Baltic region in 1990-91, while already committed to Operations Desert Shield and Desert Storm in the Persian Gulf.[3]

In these crises perpetuated by Soviet military intervention, the Soviet employment of international law represented nothing more than a policy still in defense of unlawful aggression. Nevertheless, Moscow's consistent articulation of legal rhetoric (to include custom, convention, and U.N. Charter arguments) proved useful in ordering relationships with client states and Third World nations. The U.S. and Allied responses to these violations of the Soviets' obligations were seldom coordinated and were often inconsistent.

Part VII addresses both the initial Chechen crisis from 1994 to 1996, in which President Yeltsin wielded authority, and the current protracted struggle between Moscow and Grozny which began in 1999. Vladimir Putin, the second elected President of Russia who was initially sworn in as Acting President on January 1, 2000 (and who was elected to his first full term in March 2000), has used the self-serving rhetoric of former Soviet leaders in justifying Russian military actions to suppress Chechen opposition in the current crisis, while abusing traditional international law principals in the manner in which the military actions have been executed.

[3] *See* JAMES P. TERRY, THE REGULATION OF INTERNATIONAL COERCION (2005), at ch. VI (reviewing these U.S. military operations).

II. HUNGARY 1956: 'FRATERNAL ASSISTANCE' UNMASKED

A. The Soviet Decision-Making Process in Hungary

During the 36 years of the Warsaw Pact's existence (1955-1991), the importance of the alliance[4] to the former Soviet Union and to its client states increased dramatically over time. While the Soviet Union was clearly the dominant member of the Pact, the alliance was not and never had been simply a convenient tool in the hands of the Soviet leadership. Rather, it was the arena of a recurring struggle between the Soviets, who attempted to employ the Pact for their own ends, and the Eastern Europeans, who sought to use it as a means of increasing their autonomy with respect to Moscow. In the first major test of the alliance in Hungary in 1956, the areas of disagreement which were to emerge repeatedly over the next 35 years were observed. For the first time, Western leaders understood that the failures of the Soviet system could only be compensated for through the threat of, and the careful use of, Moscow's military power.

It also became apparent that the adverse effects of the comparison with alternative systems, especially those existing in contiguous areas, generated a Soviet imperative to continually expand in order to contain and mitigate the dangerous effects of this comparison. Thus, it could be argued that Soviet intervention in Hungary in 1956, and in other states thereafter, was seen as 'defensive' by the Soviets -- but not because Hungary in 1956 posed a military threat to the Soviet Union. Rather, the internal situation in Budapest was seriously degenerating with consequences not just for that country's continued membership in the Warsaw Pact but also for the unpredictable and dangerous effect this new-found independence would have on other members of the alliance.

The Soviet intervention in Hungary provided the first significant opportunity to evaluate Soviet interpretation of 'fraternal assistance' as enunciated in the Warsaw Pact.[5] Equally important, a thoughtful appraisal of the Hungarian incursion provided expectations of similar reactions in other countries under Soviet domination, particularly in East Central Europe.

---

[4] Treaty of Friendship, Cooperation, and Mutual, May 14, 1955, 219 U.N.T.S. 24 [hereinafter *Warsaw Pact*].
[5] *Id.* at art. 4.

B. Establishment of a Post World War II Security Perimeter Around the U.S.S.R.

The conclusion of World War II found the Soviet Army firmly in control of Hungary, Poland, Czechoslovakia, Rumania, Bulgaria, Estonia, Latvia, Lithuania, and portions of Germany. The February 1945 Conference at Yalta in the Russian Crimea -- attended by Roosevelt, Churchill, and Stalin -- resulted in a recognized Soviet sphere of influence in Poland as well as a Soviet commitment to allow self-determination in Hungary, Czechoslovakia, and in other areas where Soviet military control had been established.[6] This was accomplished through the signing of the Declaration on Liberated Europe[7] at Yalta. In return, the United States received a Soviet commitment to enter the Pacific War and to support the establishment of the United Nations.[8] The British and Churchill achieved the goal of reconstructing elements of a new balance of power in Europe and in preserving the integrity of the British Empire.[9]

When the Treaty of Friendship, Cooperation, and Mutual Assistance (Warsaw Pact) was signed 10 years later, the optimism and hopeful expectation which had marked the Yalta Conference had long since evaporated. Despite the Bandung Conference in Indonesia in 1955, in which the Soviets assured the world of self-determination among its East European allies,[10] the events in Hungary in 1956 indicated clearly that no such liberalization would actually be countenanced.

---

[6] *See* CHARLES E. BOHLEN, WITNESS TO HISTORY 1929-1969, 178-201 (1973) (discussing the Yalta Conference).

[7] The Declaration on Liberated Europe can be found with other documents of the Yalta Conference in U.S. FOREIGN RELATIONS, 1945, at 984.

[8] The Conference at Yalta was held in the shadow of discussions at Dunbarton Oaks, which ended in disagreement. A primary concern of President Roosevelt at Yalta was to gain Soviet acceptance of the American formula limiting the veto of the permanent members of the Security Council to substantive matters such as plans of actions. The Soviets conceded the issue as well as the question of membership for the 16 Soviet republics. Stalin finally acquiesced and accepted two. *See* HERBERT FEIS, CHURCHILL-ROOSEVELT-STALIN: THE WAR THEY WAGED AND THE PEACE THEY SOUGHT, ch. 57 (1957).

[9] WINSTON CHURCHILL, THE SECOND WORLD WAR: TRIUMPH AND TRAGEDY, 388-90 (1953). Churchill's concerns at Yalta did not center on Soviet participation in the Pacific war but rather on Britain's desire to maintain a balance of power in Europe in order to prevent Soviet domination. Accordingly, he fought hard to ensure a respectable post-war role for France, to block the dismemberment of Germany, to guarantee an independent Poland, and to prevent Soviet absorption of Eastern European states then controlled by Soviet troops.

[10] For the pronouncement of the Bandung Conference, *see* ANNUAL REGISTER OF WORLD EVENTS, 1955, 165-66 (1975).

The 1955 conference in Warsaw from which the Warsaw Pact draws its name was designed to establish a socialist military coalition which would counter 'possible aggression'[11] by providing that each signatory was bound to provide 'fraternal assistance' in the event of a threat to any other member.[12] From a political standpoint, however, the participatory role of Pact members during 1955-56 was very limited, with the Soviet Union taking all initiatives and providing policy guidance.[13] It must be remembered that the Warsaw Pact did permit the Soviet Union to station troops in Hungary, provided it was "in accordance with the requirements of their mutual defense."[14] The Warsaw Pact, like NATO and other collective self-defense agreements, contemplated collective action for defense, but only upon explicit request by a member state. A significant issue in this part, and an issue equally relevant to prior U.S. involvement in Lebanon, the Dominican Republic and Viet Nam, concerned the proper definition of a valid request for assistance.

C. The Seeds of Conflict

Hungary, following its defeat in World War I[15] with its extensive losses of territory under the Treaty of Trianon,[16] became a party to the Axis Pact in November, 1940.[17] The Horthy regime declared war on Russia in June of 1941,[18] and on Great Britain and the United States the following December. Hitler mediated a settlement between Hungary and Romania, restoring to Hungary some of the territory lost after World War I.[19] Military cooperation

---

[11] *See* THE MILITARY COMMONWEALTH OF THE FRATERNAL PEOPLES AND ARMIES 86, 90 (I. Yakuovski ed., 1975).
[12] *Warsaw Pact , supra* note 4, at art. 4.
[13] *See* Dale Herspring, *The Warsaw Pact at 25*, PROBLEMS OF COMMUNISM (Sept.-Oct. 1980) at 2 (stating that during the first five years of the Pact's existence, its highest political decision-making body, the Political Consultative Committee (PCC), met only three times).
[14] *Warsaw Pact , supra* note 4, article 4.
[15] *See generally* BENNETT KOVRIG, THE HUNGARIAN PEOPLE'S REPUBLIC (1970); PAUL IGNOTUS, HUNGARY (1972); PAUL ZINNER, REVOLUTION IN HUNGARY (1962); THE HUNGARY REVOLUTION OF 1956 IN RETROSPECT (Bela Kiraly & Paul Jonas eds. 1978); and FERENC VALI, RIFT AND REVOLUTION IN HUNGARY (discussing post-World War I events in Hungary).
[16] *See* Harold Temperley, *How the Hungarian Frontiers Were Drawn*, 6 FOREIGN AFFAIRS, 432-447 (1928) (asserting the Treaty of Trianon was no more than a punitive peace settlement which lacked a realistic demographic and ethnic foundation).
[17] Early in 1940, negotiations between Germany, Italy and Rumania in Vienna resulted in the return to Hungary of Transylvania as part of the Second Vienna Award. As a *quid pro quo*, Hungary agreed to adhere to the German-Italian-Japanese Tripartite Pact. *See* WINSTON CHURCHILL, THE GRAND ALLIANCE 168 (1950).
[18] It is interesting to note that the former Soviet Union bombarded the city of Kassa, Hungary, without provocation in June of 1941 prior to any declaration of hostilities. This precipitated the Hungarian declaration of war. While a declared participant, Hungary pursued a policy throughout the war calculated to achieve the minimum military involvement compatible with its status. *See* KOVRIG, *supra* note 15, at 47-48.
[19] CHURCHILL, *supra* note 17, at 168.

with Hitler was, however, half-hearted, and German forces occupied Hungary in the spring of 1944. Some half million Leftists, Liberals, Legitimists and Jews were imprisoned or executed.[20] Hungary's Regent, Nicholas Horthy, following an attempted surrender to the Allies in October 1944, was arrested by Hitler. The German-Hungarian Army then retreated, with many refugees and much looting.[21]

A provisional constitutional government made an armistice with the Allies in January of 1945. The Second Republic was proclaimed in January of 1946, and in February of 1947 a Treaty of Peace was signed. In the main, it reestablished the Trianon frontiers, and it imposed reparations and disarmament.[22]

The Soviet Union then began to apply pressure and the coalition Government of Hungary, which had made extensive land reforms, gave way in May of 1949 to a Communist dictatorship. Cardinal Mindszenty was condemned to life imprisonment for espionage, and a dictatorship under Kremlin direction attempted a program of industrialization and agricultural collectivization, causing considerable labor and peasant unrest.

The subsequent incorporation into the Soviet system and attempts to shape Hungary into the Stalinist mold followed a pattern that was familiar throughout Eastern Europe.[23] Relaxation of pressures followed the death of Stalin in March of 1953 and some increases in wages, in the production of consumer goods, and in housing indicated an effort to gain support for the government from the non-committed sector of the population.[24] This effort suggested that non-communist elements were still important, but later events would indicate that they were much stronger than even the Soviets had supposed. Hungary, it should be noted, had always differed from other Soviet satellites in Eastern Europe in that its population is not Slavic and had, in fact, dominated Slavic minorities in the past.

In early 1953, the Stalin-inspired economic program which called for extensive industrialization, and which was carried out with great brutality, led to riots and unrest in East Germany, Yugoslavia, and Hungary.[25] Nikita

---

[20] NICHOLAS HORTHY, MEMOIRS 323-325 (1957).
[21] *Id*. at 327.
[22] *See* KOVRIG, *supra* note 15, ch. 3.
[23] For general accounts of the area-wide process of incorporation, *see* H. SETON-WATSON, THE EAST EUROPEAN REVOLUTION (3d ed. 1956); H.G. SKILLING, THE GOVERNMENT OF COMMUNIST EAST EUROPE (1966).
[24] IGNOTUS, *supra* note 15, at 220-25.
[25] In Hungary, Imre Nagy, who assumed the Communist Party responsibilities of Rakosi and Gero in 1953, wrote:

Krushchev, in a June 1953 meeting with Hungarian Communist Party officials in Moscow,[26] ordered speedy reforms and declared that Party Chairman and Premier Matyas Rakosi must relinquish his premiership to Imre Nagy, who promised a 'New Course' for Hungary.[27] The shift to collective leadership, with Nagy as Prime Minister and Rakosi remaining as the Party leader, created an anomalous situation in which the former's ideological revisionism, sanctioned by Moscow, was countered at every turn by Rakosi, who retained the allegiance of most of the Party apparatus.[28]

In Budapest, the Central Committee met and approved a number of Nagy's reforms, which came to be known as the 'June Revolution.' Rakosi, however, was able to prevent their publication, and Nagy presented instead a somewhat watered down 'New Course' program to the National Assembly on July 4, 1953.[29]

Fraught with mishaps and procrastination, the 'New Course' nevertheless achieved some economic reforms by reversing virtually every trend that had characterized the Stalinist period. Membership in collectives declined from a high of 369,200 in 1950 to 230,000 in 1954, a drop of nearly forty percent, while the total number of collective farms fell by fourteen percent.[30] Productivity continued to be highest on individual farms and lowest on state farms.[31] Nagy tried to satisfy consumer demands by augmenting the supply of goods and by reducing prices. This resulted in an improved standard of living, with real wages rising by 18 percent in 1954.[32]

> Rakosi and Gero, in the years 1949 to 1953, brought the socialist reorganization to a dead end, bankrupted agricultural production, destroyed the worker peasant alliance, undermined the power of the People's Democracy, trampled upon the rule of law, debased the people's living standards, established a rift between the masses and the Party and government -- in other words, swept the country towards catastrophe.

IMRE NAGY, ON COMMUNISM 194 (1956).

[26] *See* TIBOR MERAY, THIRTEEN DAYS THAT SHOOK THE KREMLIN 7 (1959).

[27] NAGY, *supra* note 25, at 103.

[28] *See* ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, DOCUMENTS ON INTERNATIONAL AFFAIRS 1953, 177-81 (1956).

[29] *Id.* From documents collected by the Royal Institute, it is clear that Nagy felt the most important task of his new economic policy was a substantial all-around reduction in the pace of development of the national economy and investments. He declared in July of 1953 that the priority would shift from heavy to light industry and the production of consumer goods, and he went on to promise that the government would permit the closing of cooperative farms wherever the majority of membership wished it.

[30] *See* BELA BALASSA, THE HUNGARIAN EXPERIENCE IN ECONOMIC PLANNING 247-50 (1956).

[31] *Id.* at 250.

[32] *Id.* at 228 (asserting that despite the optimistic projections of the first Five Year Plan, the standard of living was still less than it had been in 1949).

Despite the progress made by the 'New Course,' the conflict between the rival factions headed by Nagy and Rakosi reached an impasse in November 1954. Rakosi traveled to Moscow in November and succeeded in convincing Krushchev that he represented the future of Hungary.[33] The extreme Stalinists, represented by Molotov, and the economic and political reformers, led by Malenkov, were losing ground to the Krushchev faction, which pressed for a resumption of the rapid expansion of heavy industry,[34] the same economic orthodoxy espoused by Rakosi.

In January 1955, Nagy was summoned to Moscow by Krushchev and informed he must step down as Premier in favor of Andras Hegedus. When he refused, he was charged with having pursued a "right wing policy of opportunist deviation,"[35] and in November 1955, he was expelled from the Hungarian Communist Party. Soviet expert Paul Zinner has claimed that Nagy's fortunes were directed from Moscow and that his rise and fall coincided with that of his Soviet mentor and economic ally Malenkov.[36] Nagy was apparently part of the of the Soviet's policy of concession while their own leadership problems were being solved, and this was why he had never been allowed to supplant Rakosi entirely.[37]

Once outside the Party, Nagy called for its moral and political regeneration, and denounced Rakosi's "futurism":

> As a result of the degeneration of power, individuals whose actions went counter to the morals of socialist society and to existing laws acquired positions in important fields of public life. It is not compatible to have in positions of leadership the directors and organizers of mass trials, those responsible for torturing and killing innocent men, organizers of international provocations, and economic saboteurs or squanderers of public property who, through the abuse of power, either have committed serious acts against the people or are forcing others to commit these acts.[38]

---

[33] *See* ZBIGNIEW BRZEZINSKI, THE SOVIET BLOC 166 (1967).
[34] *Id.*
[35] NAGY, *supra* note 25, at 103.
[36] *See* PAUL ZINNER, REVOLUTION IN HUNGARY 147 (1962).
[37] Krushchev explained his reinstatement of Rakosi by stating: "I have to keep Rakosi in Hungary, because in Hungary the whole structure will collapse if he goes." *Quoted in* GEORGE MIKIS, THE HUNGARIAN REVOLUTION 61 (1957).
[38] NAGY, *supra* note 25, at 13, 55.

Nagy also accused those in power of accepting "dependence, subordination, [and] humiliating slavery" and urged that Hungary remain neutral in competition between "power groups."[39] Rakosi retaliated with new censures against Nagy and the revisionist writers who supported him. As Bennett Kovrig explains, this was a serious miscalculation because it caused the public to follow the battle with growing excitement and enthusiasm.[40] Those most supportive of the revisionists and Nagy were the students, who viewed with great cynicism the sharp contrast between theory and reality.[41]

The atmosphere created by the new freedom of expression that intellectuals and students were claiming for themselves could not be tolerated by Rakosi. On June 30, 1956, the Hungarian Central Committee adopted a resolution condemning the "anti-Party manifestations," noting that certain speakers had gone as far as "to deny the leading role of the Party of the working class, and advocating bourgeous and counter revolutionary views," and alleging that the open opposition had been organized by a faction around Imre Nagy.[42]

Then, on July 16, Rakosi presented a plan to the Politburo to arrest the top four hundred agitators, including Nagy, to dissolve the writers' union, and to prepare a trial for the anti-Party conspirators.[43] This attempt by Rakosi to return to Stalinism was thwarted by the appearance on July 17, 1956, of Anastas Mikoyen, who unceremoniously ordered the replacement of Rakosi as First Secretary by Erno Gero. This change reflected Moscow's view that Rakosi was too unpopular both in Hungary and with President Tito in Yugoslavia to warrant further tenure, while Nagy was becoming too nationalistic to represent an acceptable alternative.[44]

---

[39] *Id.* at 24, 33-34.
[40] KOVRIG, *supra* note 15, at 108.
[41] *See* Elinor Murray, *Higher Education in Communist Hungary, 1948-1956*, THE AM. SLAVIC AND E. EUR REV., 19, No. 3, 395-413 (1960).
[42] NATIONAL COMMUNISM AND POPULAR REVOLT IN EASTERN EUROPE 329 (Paul Zinner ed., 1956).
[43] *Id.*
[44] President Tito of Yugoslavia recounted the following after the revolution:

> When increasingly strong dissatisfaction began to rise to the surface in the ranks of the Hungarian Communists themselves, and when they demanded that Rakosi should go, the Soviet leaders realized that it was impossible to continue in this way and agreed that he should be removed. But they committed a mistake by not also allowing the removal of Gero and other Rakosi followers who had compromised themselves in the eyes of the people. They made it a condition that Rakosi would go only if Gero remained. And this was a mistake, because Gero differed in no way from Rakosi. He pursued the same kind of policy and was to blame as much as Rakosi was.

Id. at 524.

Gero started out by promising to improve economic management and to maintain "socialist legality." He reshuffled the Central Committee, bringing in some of Rakosi's victims, such as Janos Kadar, who would shortly become Premier. He also expelled former Minister of Defense Mihaly Farkas from the Communist Party. Farkas was clearly the most hated member of the Rakosi government.[45] Unfortunately, it was not the person of Rakosi the Hungarian people had wanted to replace but rather the repressive philosophy of government held by both Rakosi and Gero. Gero attempted a variety of reforms, both material and cultural, including the discontinuance of police files on individuals, in his policy of the *Cleanleaf*.[46] But the classic symptoms of a pre-revolutionary period were already in evidence in August 1956.[47]

On September 28, 1956, the Central Council of Trade Unions adopted a resolution demanding more autonomy and greater benefits for workers,[48] just as Polish trade unionists would do 25 years later in 1981. In early October, the newly reactivated Petofi Circle of writers and intellectuals adopted a resolution listing ten demands. These included the reinstatement of Imre Nagy to the Government, revision of the Second Five Year Plan, expulsion of Rakosi from the Party, the public trial of General Farkas, publication of foreign trade agreements (including those covering the Soviet exploitation of Hungarian uranium), and freedom of expression in literature.[49]

In an effort to lessen the growing discontent, Gero decided to restore deceased Hungarian Communist leader Laszlo Rajk to a position of national honor and to rebury his remains in Budapest. Rajk was executed after a show trial in 1949 by Rakosi because Rajk advocated friendly relations with Yugoslavia.[50] His reburial and restoration to a position of honor were meant to be seen as a concession to the demand for change, despite the fact that Rajk and his henchman General Gorgy Palffy had been despised by most Hungarians for serving Soviet ends.[51]

Having fallen victim to Rakosian terrorism, however, Rajk and Palffy were transformed in 1956 into patriots and martyrs in the eyes of some

---

[45] These events are detailed in IGNOTUS, *supra* note 15, at 433-35.
[46] *See* VALI, *supra* note 15, at 243. Vali claims that these reforms were mainly cosmetic and that Gero had no real intention of making concessions that went beyond mere lip service. Vali further claims that Gero had been assured by the Kremlin of Soviet backing and that he merely intended to conduct a rear guard action until the time was appropriate to stop his opponents.
[47] *See* KOVRIG, *supra* note 15, at 111 (listing these symptoms as the alienation of the intellectuals, disorganization within the ruling circles, and widespread social unrest).
[48] Zinner, *supra* note 42, at 386-87.
[49] *Id*. at 391-92.
[50] VALI, *supra* note 15, at 60-63.
[51] *Id.*

Hungarians. Hungarian intellectuals applauded the rehabilitation and other acts of concession because they would create greater difficulties for the Communist regime with the Soviet Union.[52] Gero's strategy in acceding to the demands for rehabilitation of those prosecuted by Rakosi may have been based on a realization that their principal offense had been anti-Stalinism, a charge shared with Yugoslavia. Gero was attempting to ensure Yugoslav support for his regime, important because of Tito's renewed influence with Moscow.[53]

On October 22, 1956, at the Technical University in Budapest, the Hungarian intellectuals and students voiced their most critical demand—removal of Soviet troops. On the same day, the Budapest students' organization announced plans for a demonstration on October 23 to express their solidarity with the Poles, who were going through their own struggle for greater independence from the Soviet Union. Demonstrators met in front of the Writers' Union in Budapest and marched to the statue of Joseph Bem, the Polish general who fought in the 1848-49 Hungarian War for Independence.[54] Heavily supported, the demonstration showed the strength the popular uprising had gained.

On October 24, First Secretary Gero announced to the Hungarian Communist Party Central Committee that Soviet troops had been asked to intervene in the crisis. Simultaneously, he proposed inclusion of the opposition in the Central Committee and the election of a new Politburo. He also asked the Central Committee to recommend the promotion of Imre Nagy to the Premiership. The Central Committee immediately complied with all requests, and then proceeded to vote to enact a state of martial law.[55] Ferenc Vali convincingly argues that Gero orchestrated the appointment of Nagy as Prime Minister intending that he be used to appease the crowds but enjoy none of the real power of the office. As evidence of this, Vali notes that Gero did not allow Nagy to assume his duties in the Prime Minister's office in the Parliament building but instead placed him in a room inside the Communist Party Headquarters.[56]

---

[52] *See* COLUMBIA UNIVERSITY RESEARCH PROJECT ON HUNGARY (CURPH), INTERVIEW NO. 616 (1957) (discussing the strategy plotted by the Hungarian intellectuals in the Petofi Circle.

[53] *See* VALI, *supra* note 15, at 246-50.

[54] *See* IGNOTUS, *supra* note 15, at 237-38 (discussing these events). Ignotus asserts that when the newly resurrected Nagy attempted to calm the hysteria of the crowd during the demonstration by addressing them as "Comrades," they booed the use of that term and chanted *Ruszkik, haza!* -- "Russians, go home!" *Id.* at 237.

[55] *See* FRANCIOS FEJTO, BEHIND THE RAPE OF HUNGARY 187-90 (1957) (detailing an account of these events within the Party structure). *See also* Meray, *supra* note 26.

[56] VALI, *supra* note 15, at 282-83.

Unquestionably, the return of Nagy, whatever his role, only gave the insurgents greater courage to resist. On October 25th, at a rally of self-proclaimed freedom fighters in Parliament Square in Budapest, the newly-invited Soviet troops opened fire and killed between three hundred and five hundred, wounding five times that many.[57] These events prompted Hungarian Colonel Pal Maleter, in command of a Hungarian Peoples Army force with tanks attached, to join the revolutionary forces and to assume command of Kilian Barracks in the City of Pest, a barracks already in the hands of insurgents.[58]

Soviet leaders Anastas Mikoyan and Mikhael Suslov, recently arrived in Budapest, removed Gero as First Secretary immediately following the bloodshed on the 25th and replaced him with Premier Janos Kadar. Kadar, with Soviet approval, promised that "after order had been restored, the government would conduct talks with the Soviet government in the spirit of complete equality . . . for the equitable and just settlement of questions pending between the two socialist countries."[59] At least on the 25th, Mikoyan
and Suslov apparently had some solution in mind paralleling the Polish model: that is, wider internal autonomy for the Hungarian Party, measures of liberalization, "domesticism," and the eventual withdrawal of Soviet troops.[60]

With Gero's departure as First Secretary of the Party and his replacement by Kadar on the 25th, Prime Minister Nagy, rather than the Soviet-supported Kadar, was hailed by the Hungarian Central Committee as their leader. Nagy, who only two weeks before had not even held Party membership, was enjoying a rebirth of power which paralleled that of Gomulka in Warsaw. Unfortunately, despite Nagy's call on October 28th for a cease fire by the revolutionary forces led by Maleter, the strength and brazenness of the opposition only grew.[61]

---

[57] The Nagy government seemed even more undecided than the masses. On the 24th and again on the 25th, "unconditional surrender" was demanded from the insurgents, but the surrender order was extended again and again with understanding expressed for those who had up to then disobeyed orders. IGNOTUS, *supra* note 15, at 240-42.

[58] Maleter, sent to disarm the Barracks, came to the conclusion, as he reported to Defense Minister Istvan Bata, that these "were not bandits, but loyal sons of Hungary," that they as well as himself, wanted nothing but a "free, independent and socialist Hungary," and that he had therefore decided to go over to their side. Maleter was thereafter appointed Commander-in-Chief of the revolutionary forces. *See United Nations Report of the Special Committee on Hungary* 35-42 (1957) [hereinafter *UN Report*] (discussing the role of the Hungarian People's Army during the Hungarian Revolution).

[59] *Quoted from* radio broadcasts in VALI, *supra* note 15, at 285.

[60] *See* IGNOTUS, *supra* note 15, at 244-45 (suggesting the Soviets believed the Hungarians could be appeased as the Poles had been with the promise of greater autonomy).

[61] On November 1, 1956, the radio station in Eger announced the formation of an East Hungarian National Council with a seat in the City of Miskolc; and on the same day, the National Council of Debrecen sent its representatives to Gyor. The provinces were thus preparing to oppose the central

Instead of reacting violently, the Soviet Union issued a statement on October 30th which condemned the "violations and errors" committed "in the relations between socialist states," and continued:

> The 20th Congress of the Communist Party of the Soviet Union has resolutely condemned these violations and errors and has decided that the Soviet Union will hence forth base its relations with other socialist states on the Leninist principles of the equality of the rights of peoples. It has proclaimed the necessity of bearing in mind the history and peculiarities of every country which is in the process of building a new life . . . . Realizing that the maintenance in Hungary of Soviet divisions may serve as a pretext for aggravating the situation, the Soviet Government has given instructions to its military commander to withdraw its troops from the city of Budapest as soon as shall be considered essential by the Hungarian government. At the same time, the Soviet government is ready to undertake negotiations with the Peoples' Republic of Hungary and of other signatories of the Warsaw Pact concerning the presence of Soviet troops on Hungarian territory . . . .[62]

Consistent with the agreement Nagy had announced in his speech on 28 October, the withdrawal of Soviet troops from Budapest and other densely populated areas of the country had actually started when the Soviet statement of October 30 was released.[63] Throughout Hungary, Hungarians uniformly believed that the first major strides were being taken to make the country more independent of the U.S.S.R -- and ultimately, non-aligned.[64]

D. The Invasion

The Soviet troops had no sooner started pulling out than they prepared for reoccupation. Some Soviet forces were leaving the country; others were making huge circular movements; others were entering Hungary -- all at a time when Mikoyan had formally promised that Soviet forces which entered Hungary

---

government should it be unwilling or unable to accede to their wishes for ending monopolistic communist control. *See* VALI, *supra* note 15, at 295.

[62] *Quoted in* THE TRUTH ABOUT THE NAGY AFFAIR at 52 (published by the Congress for Cultural Freedom, 1959).

[63] Zinner, *supra* note 42, at 428-32.

[64] Throughout October of 1956, the intellectuals and writers of the Petofi Circle had adopted as their two primary demands and non-negotiable points, the non-alignment of Hungary and withdrawal from the Warsaw Pact. *See* VALI, *supra* note 15, at 245.

subsequent to the turmoil would be withdrawn.[65] It is apparent that by November 1st the Soviets had determined to enter Hungary in force and to install Kadar as head of a government owing allegiance to Moscow alone. Kadar and a few select Party officials were taken on the evening of November 1st to Uzhgorod for their instructions, returning to Budapest on November 3rd.[66]

The Soviet treachery, orchestrated by Yuri Andropov, the Soviet Ambassador and ultimate successor to Brezhnev, became apparent to Nagy on November 1st. The Hungarian government announced its withdrawal from the Warsaw Pact and appealed to the United Nations for a guarantee of Hungarian neutrality.[67] Anticipating this announcement, the Soviet Army moved to occupy all strategically important points of the country outside Budapest and to seal off the western border of Hungary.

Simultaneous with this military activity, Andropov invited the Hungarian government to appoint members of two delegations, one military and one political, to discuss the withdrawal of Soviet forces from Hungary and political problems that had arisen with regard to the Warsaw Pact.[68] In the meetings between the military leaders of Hungary and the Soviet Union on the evening of November 3, 1956 at Tokol, the entire military leadership of Hungary was arrested by Soviet troops—this in violation of their immunity under international law as negotiators accredited by their government.[69]

Four hours later, an all-out Soviet invasion was launched on Budapest. At 5:30 a.m. on November 4th, Imre Nagy made the following statement:

> This is Imre Nagy speaking, the President of the Council of Ministers of the Hungarian Peoples' Republic. Today at

---

[65] *See* Statement of General Pal Maleter on November 1, 1956, *in* MELVIN LASKY, THE HUNGARIAN REVOLUTION 176 (1957).

[66] VALI, *supra* note 15, at 370-72. The reasons for the selection of Kadar rather than Gero or Rakosi who were in the Soviet Union already are tied to the perceived acceptability of Kadar and the fact that Gero and Rakosi had been thoroughly discredited in the eyes of most Hungarians.

[67] IGNOTUS, *supra* note 15, at 249; *UN Report*, *supra* note 58, at 58.

[68] IGNOTUS, *supra* note 15, at 251.

[69] The scene of the arrest of the Hungarian military delegation in the Soviet Army Headquarters is fully described in the *UN Report*, *supra* note 58, at 45. Concerning Pal Maleter, later executed, a *Special Report of the United Nations Special Committee on the Problem of Hungary*, July 14, 1958, stated: "The Special Committee, as noted earlier, found that General Maleter was arrested on November 3, 1956, in the Soviet Headquarters in Tokol on Csepel Island, where as Minister of Defense in the Nagy Government, he was leading the Hungarian military delegation, which was negotiating with the Soviet Command, in which capacity he was entitled to special protection accorded under international law. It should be noted that at the meeting of the Security Council on November 3, 1956, the representative of Hungary declared, and the representative of the USSR confirmed, that these negotiations were taking place." *See also* Gyorgi B. Kiraly, *How Russian Trickery Throttled Revolt*, LIFE, Feb. 18, 1957, at 126.

> daybreak Soviet troops attacked our capitol with the obvious intention of overthrowing the legal Hungarian democratic government. Our troops are in combat. The government is at its post. I notify the people of our country and the entire world of this fact.[70]

The Hungarian National Guard and a few military units, outnumbered and outflanked by Soviet forces intent on ruthlessly crushing any armed resistance, fought for several days in Budapest and turned to guerrilla warfare thereafter. Workers' units put up heroic resistance in industrial suburbs and towns.[71] The invaders, ten divisions strong,[72] were prepared for all eventualities, including the coming winter. The number of freedom fighters killed in the resistance has been estimated at three thousand; those executed in the following period of repression at between four hundred and four hundred and fifty; those imprisoned at between ten and twelve thousand; and those who escaped to the West through Austria and Yugoslavia at two hundred thousand.[73]

E. The Soviet Rationale

There are three significant strands that must be addressed here. The first relates to the Soviets' perceived need to provide a lesson in Eurocommunist discipline at a time when significant unrest existed, both in Hungary and in Poland. The second strand relates to the changing Soviet relationship with Hungary's neighbor, Yugoslavia. The third link relates to the circumstances existing internationally at the time of the intervention, which gave Moscow assurance that there would be little, if any, reaction of significance from the major Western nations.

In examining why the Soviet Union chose to intervene in Hungary while simultaneously allowing liberalization in Poland and renewing efforts at accommodation with Yugoslavia's Tito, a review of those nations' relationships with the USSR in 1956 is required. Tito's ambition to participate in the leadership of world communism had been frustrated earlier by Stalin's veto and the Yugoslav Party's exclusion from the COMINFORM. In 1956, thanks to Krushchev's help, Yugoslavia seemed ready to return to the socialist camp.

---

[70] This is the translation given in the *U.N. Report*, *supra* note 59, at 45. *See also* Zinner, *supra* note 42, at 472.

[71] For a history of the fighting on November 4 and thereafter, *see* Bennett Kiraly, *Reconquest of Hungary*, *in* FACTS ABOUT HUNGARY 109-11 (Imre Kovacs ed., 1959); *also by* Kiraly, *Hungary's Army: Its Part in the Revolt*, EAST EUROPE, June, 1958, at 15.

[72] Approximately 130,000 ground troops; and together with Air Force, signaling and sapper units, about 150,000 men. Of the divisions, 75% were armored. *See* IGNOTUS, *supra* note 15, at 254.

[73] These figures are attributed to Dr. Peter Gosztomy and are *quoted in* IGNOTUS, *supra* note 15, at 254.

Richard Lowenthal asserts that Yugoslavia had been consulted by the Soviets prior to the November 4 intervention into Budapest, and that this explained the complacency shown by the Yugoslav government when the invasion occurred.[74] This consultation, according to Lowenthal, was made personally by Krushchev and Mikoyan on a visit to the Yugoslav leader in Belgrade on November 1st, and was designed to ensure there would be no interference in Soviet military activity.[75] Although the planned intervention may have been carefully outlined to the Yugoslav leadership, Ferenc Vali claims that the extreme ruthlessness of the Soviet military action nevertheless surprised President Tito and shocked Yugoslav public opinion.[76]

The unrest in Poland was no less a concern to the Soviet leadership in 1956 than ensuring there would be no Yugoslav opposition to Soviet policy in Hungary. Unlike Hungary, however, the character of Polish unrest related to efforts by the Polish Central Committee rather than the citizenry to gain greater autonomy from Moscow. The Polish Party was split like its Hungarian counterpart, but in the case of the Poles the cleavage had reached the upper echelons, including the Politburo.[77] The Central Committee and Politburo together, on October 19, 1956, confirmed Gomulka, the nationalist and evolutionist communist, as First Secretary without the prior approval of the Soviet Union.[78]

The direction toward nationalism and greater independence was favored by the majority of the Polish leadership, the Army, and the Internal Security Corps (secret police). Neither the threat of Soviet military intervention nor the unscheduled visit of an impressive Soviet delegation including Krushchev, Molotov, Mikoyan, and Kaganovich (two Stalinists and two anti-Stalinists) could deter the Poles from their decision; and the Soviet Presidium, finally persuaded to take a conciliatory course and convinced of Gomulka's loyalty to the Soviet Union, accepted the change on October 21, 1956.[79]

The Polish change in leadership and direction, albeit supported by the masses, was not a people's revolution in the sense of Hungary, or later upheavals in Czechoslovakia, Afghanistan, and Poland itself in 1981. It was rather a coup by the Polish Communist Party, which succeeded partly in loosening the shackles imposed by the previously controlling Soviet Party.[80]

---

[74] Richard Lowenthal, *Tito's Affair With Krushchev*, THE NEW LEADER, Oct. 6, 1958, at 12.
[75] *Id.*
[76] VALI, *supra* note 15, at 352.
[77] For an excellent analysis, *see* BRZEZINSKI, *supra* note 34, at 242-53.
[78] *Id*. at 251.
[79] VALI, *supra* note 15, at 263.
[80] *Id*. at 264.

Unlike Poland, the Hungarian Revolution was not a revolt focused solely against the supreme Soviet Party leadership, but a revolt of the masses both against their Hungarian Party government leadership and against Soviet domination. The contrast between events in Hungary and Poland is significant in view of the clear differences of method, personnel, and objective present in the two revolutionary actions, although a similarity of intent clearly existed between them. Polish sympathy for the Hungarian cause increased popular revolutionary fervor in Poland, but Gomulka was able to use the collapse of the Hungarian Revolution as a lever to restrain his compatriots.[81]

The third major concern bearing on Soviet decision-making in Hungary was the ongoing Suez crises, where Britain and France were about to introduce military force to preclude interference with traffic in the Suez Canal. These nations argued at the time that their actions were justified because they were intended to stop hostilities between Israel and Egypt, to prevent nationalization of the Universal Suez Canal Company by Egypt, and to establish a regime for the Canal assuring future freedom of traffic.[82] It was generally believed at the time that unspoken French and British motivations included the elimination of President Nasser from the government of Egypt, a determination to prevent Soviet influence from developing in that part of the Middle East, a determination to prevent a precedent which might encourage other Muslim states to nationalize oil wells and pipe lines, and, in the case of France, a determination to prevent propaganda inciting Algerian nationalism and encouraging aid to the insurgents there.[83]

The split among the Western nations concerning the Suez crisis had been precipitated on July 19, 1956, when the U.S. withdrew its support for the construction of the Aswan Dam, which the United States, the United Kingdom, and the World Bank had proposed in December 1955.[84] In apparent retaliation, President Gamal Abdel Nasser of Egypt announced on July 26, 1956, that the

---

[81] *See* BRZEZINSKI, *supra* note 33, at 259.

[82] In his address to the Security Council on October 30, 1956, Sir Pierson Dixson, the British representative, emphasized these objectives. *See* U.N. Doc. S/P.V. 749, at 1-5.

[83] In his address to the General Assembly on November 22, 1956, French Foreign Minister Christian Pineau emphasized the impotence of the United Nations in the Middle East, the Egyptian threat to Israel, protection of the Suez Canal, and the danger of Soviet intervention, adding: "We have been sharply criticized for taking the initiative in launching military operations when we have not been attacked directly. From a strictly formal point of view, I am willing to recognize the merit of this criticism." But, he added: "Everything leads us to believe that this stockpiled equipment (in the Sinai) was waiting for Soviet volunteers who at the chosen time, would have used it more effectively." *See also* speeches to the same effect by British Prime Minister Eden in the House of Commons and French Premier Guy Mollet in the French National Assembly on October 30, 1956, *printed in* NEW YORK TIMES, October 31, 1956, at 1.

[84] 33 U.S. DEPT OF STATE BULL. 1050 (1955); 35 *Ibid*. 188 (1956).

Universal Suez Maritime Canal Company had been nationalized.[85] The British claimed this violated an international obligation because the Treaty of 1888 gave international status to the company, and they reacted by openly discussing in Parliament the use of force against Egypt.[86]

Following Egypt's rejection of proposals for "internationalization" of the Canal, the matter was referred to the Security Council by both Britain and Egypt. The Soviet Union then, as if ingeniously insulating itself against future United States opposition to its impending intervention in Hungary, sided with the United States in debates over the Anglo-French resolution. After the Soviet Union vetoed the Anglo-French proposal, the Security Council unanimously accepted an October 13th resolution, drafted by the Secretary General, which was based on proposals made at the London Conference and which included six principles for negotiating a settlement.[87] When negotiations broke down between Egypt, Britain and France, the British and French intervened.

Just as world attention was drawn from Budapest by the Suez crisis when the British and French issued their ultimatum to Egypt on October 30, 1956, attention was diverted as well by an Israeli attack against Egypt in what was to become the second of the four Arab-Israeli wars (1947, 1956, 1967, and 1973). The Soviet Union also enjoyed a responsible role in this matter, because by arming and encouraging Egyptian "Fedayeen" to cross the armistice line into Israel, they stimulated violent Israeli retaliatory raids.[88]

Unquestionably, the Israelis were responsible for the deterioration of relations with the Arabs by refusing to negotiate the problem of Arab refugee resettlement, through their failure to fairly compensate for property loss and through their refusal to deal fairly with Jordan on the question of the use of the Jordan River. It was, however, Soviet encouragement which precipitated the "Fedayeen" raids, the blockade of Aqaba and the threats which were the immediate catalysts of the October 30, 1956, Israeli invasion.[89]

---

[85] Egyptian Law No. 285 of 1956, *included in* U.S. Dept. of State Publication, THE SUEZ CANAL PROBLEM 2 (1956).
[86] THE SUEZ CANAL PROBLEM, *supra* note 85, at 153, 173, and 233.
[87] These principles called for equal transit rights through the Canal according to the Convention of 1888, respect for Egyptian sovereignty, insulation of the Canal from the politics of any country, fixing of tolls by agreement between Egypt and the users, the application of a fair proportion of the tolls for development, and the settlement of disputes between the Company and Egypt by arbitration. Egypt accepted these principles.
[88] *See* U.N. Doc. S/3575 (1956) (discussing these Soviet efforts).
[89] *See* 34 U.S. DEPT OF STATE BULL. 628 (1956) and U.N. Doc. S/P.V. 749 at 8-18 (1956) (detailing the accounts of these precipitating factors).

It is hard to judge precisely what effect all these events had upon the Soviet leadership, but it can at least be argued that the knowledge that the Western powers were concerned elsewhere provided lubricant for the Soviet decision to intervene on November 4, 1956, in Budapest.

F. The Core International Law Issues in Hungary

An examination of the Soviet intervention in Hungary fifty years after the fact requires assessment of legal concerns beyond those normally associated with the use of force by one sovereign nation against another, as was likewise the case when coalition forces entered Iraq in 2003. While the armed incursion of November 1956 must certainly be examined in light of legitimate collective self-defense claims under Article 51 of the United Nations Charter and customary international law as it existed in 1956, an examination of the use of force which became the role model for Czechoslovakia in 1968 and Afghanistan in 1979 requires a broader legal review. Hungary must be examined in terms of whether the "fraternal assistance" rationale offered by the Soviets *could be* effective in securing those shared values within the United Nations Charter demanded by the Hungarian people.

The importance of the Soviet intervention in 1956 lay in its currency as a precedent for later unorthodox Soviet claims of justification in the use of force. At its core, the critical issue in Hungary was whether the legal doctrine of self-defense, either under customary or Charter law, had application to the protection of a collective system of government, vice protection of the sovereign rights of an independent state, as when the Hungarian people attempted to withdraw from intellectual bondage and exercise their right of self-determination. Stated conversely, the issue focused upon whether the Hungarian disavowal of a commitment to the socialist collective could be legally challenged through the Soviet use of force under a self-defense rationale.

Equally significant was the effect that the absence of community response to this Soviet intervention may have had on subsequent attempts to exercise control by Moscow. Just as 12 of 15 Security Council Members and three of five Permanent Members refused to confront repeated Iraqi violations of Chapter VII Security Council mandates in 2003, the Western powers failed to meaningfully address the 1956 Soviet invasion of Budapest. When the West ignored its commitment under Article 2, paragraph 4 of the United Nations Charter, it was reasonable for the Soviet Union to presume that no effective sanctioning regime would contest its actions. A community of nations unwilling to commit itself morally and physically to a system in which minimum world order is a reality has little basis, either in 1956 or 2003, to believe that international pariah nations can be controlled through *that* system.

G. Debunking the Legal Basis for Soviet Presence on Hungarian Soil

The first question that must be answered concerns the legal basis for the continued stationing of Soviet troops on Hungarian soil eleven years after the conclusion of World War II. Under the terms of the 1945 Armistice Agreement[90] ending the Second World War for Hungary, Russian troops could remain on Hungarian territory. The 1947 Treaty of Peace with Hungary, however, provided in Article 22:

> Upon the coming into force of the present Treaty all Allied forces shall, within a period of 90 days, be withdrawn from Hungary subject to the right of the Soviet Union to keep on Hungarian territory such armed forces as it may need for the maintenance of the lines of communication of the Soviet Army with the Soviet zone of occupation in Austria.[91]

The Treaty of Peace came into force on September 15, 1947.[92]

In accordance with the Four Power Agreement and the Staatsvenstrag with Austria of May 15, 1955,[93] Soviet troops left Austria. Why the signatories to the Peace Treaty did not invoke this provision and invite the Soviet Union to depart Hungary remains an open question. That the Hungarian government, representing a defeated nation, did not protest against the stationing of troops on Hungarian territory needs no explanation.

After the initial October 24, 1956, violence and the November 4 attacks, the world was told that these Soviet units were stationed under the Treaty of Friendship, Cooperation and Mutual Assistance signed at Warsaw on May 14, 1955.[94] Of course, while a government may ask for foreign armed assistance in repelling aggression from without, it is highly questionable whether such a treaty would permit a minority government to legally invite outside assistance to suppress its own repressed majority.

Additional Protocol I to the 1949 Geneva Conventions, a Protocol meant primarily to clarify the protections already afforded in the Conventions, certainly would recognize in Article 1(4) the right of the Pal Maleter-led freedom fighters to operate free from outside interference in their lawful quest to maintain control of the machinery of government. Likewise, the Charter of the

---

[90] *Included in* M. O. HUDSON, INTERNATIONAL LEGISLATION, Vol. IX, at 276-82 (1950).
[91] The 1947 Treaty of Peace is reproduced in AM. J. INT'L L. SUPP. 1948, at 225-51.
[92] *Id*.
[93] *See* AM. J. INT'L L. SUPP. 1955, at 162-94.
[94] The Warsaw Pact is reproduced in AM. J. INT'L L. SUPP. 1955, at 194-99.

United Nations[95] and Resolution 2625 (which codifies existing customary law and is therefore relevant although later in time) both recognize the right of peoples in their search for self-determination. Even the Warsaw Pact declared in its preamble its belief in the . . . respect for the independence and sovereignty and sovereignty of States and non-interference in their internal affairs.[96]

There was no provision in the Pact which would justify the stationing of one signatory's troops on the territory of another, although there was a provision for the Joint Command of armed forces.[97] That the Soviet Union realized it had no such authority became evident as it signed a special agreement with the Kadar government on May 27, 1957, relative to the stationing of Soviet troops in Hungary.

H. Absence of Legal Authority to Intervene under the Warsaw Pact

The second legal issue concerns the possible right of intervention pursuant to international agreement. One may safely discard the argument that Soviet troops intervened under the Warsaw Pact, however. First, there was no provision in the Pact that would justify intervention in the internal affairs of another signatory.

Article 1 of the Treaty reads as follows: "The Contracting Parties undertake in accordance with the Charter of the United Nations Organization to refrain in their international relations from threat or use of force, and to solve their international disputes peacefully and in such manner as will not jeopardize international peace and security."

Article 4 provided:

> In the event of armed conflict in Europe on one or more of the Parties to the Treaty by any State or group of States, each of the Parties to the Treaty . . . shall immediately, either individually or in agreement with other Parties to the Treaty, come to the assistance of the State or States attacked with all such means as it deems necessary, including armed force . . .

---

[95] Art. 1(2) provides that a primary purpose of the United Nations is "[t] o develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *See* Charter of the United Nations, 59 STAT 1031 (1945), T.S. No. 93. [hereinafter *UN Charter*].

[96] *UN Charter, supra* note 95, at 194.

[97] *Warsaw Pact*, *supra* note 4, Art. 5.

It is clear, therefore, that when Hungary was attacked by the Soviet Union on November 4, 1956, under the terms of Article 4, other signatories to the Warsaw Pact (such as Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Poland and Rumania) were under an obligation to "come to the assistance" of Hungary. But evidently, the signers of this agreement had not foreseen in 1955 such a paradoxical application of its provisions.

I. Legality Under the United Nations Charter

Both the former Soviet Union and Hungary were, and remain, Parties to the United Nations Charter. As such, specific principles were binding upon the Soviet Union in its actions with respect to Hungary: (1) One State may not use force against the territorial integrity and political independence of another State;[98] (2) a State may not intervene by force in the internal affairs of another State;[99] (3) all States must respect the principle of equal rights and self-determination of peoples;[100] (4) fundamental principles of human rights must be respected by all governments;[101] and (5) States must settle international disputes by peaceful means.[102]

It would appear that use of armed force by the Soviet Union in Hungary in violation of the above obligations of the Charter would constitute aggression provided that a finding to this effect had been made by a means which the accused State is bound to accept. The Charter certainly provides such a means. Article 39 provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the Peace, or act of aggression," and in Article 25 the Members "agree to accept and carry out the decision of the Security Council in accordance with the present Charter."

The General Assembly is authorized under Article 11(2) to make "recommendations" on any "question relating to the maintenance of international peace and security" brought before it by a Member or a non-Member, provided the Security Council is not "exercising in respect of any dispute or situation the functions assigned to it" by the Charter.[103] Through its "Uniting for Peace" Resolution of November 1950, the General Assembly asserted that it could assume such failure by the Security Council if, "because of a lack of unanimity of the permanent members," it "fails to exercise its primary

[98] *UN Charter*, *supra* note 95, at Art. 2(4).
[99] *Id*., Art. 2(7).
[100] *Id*., Art. 55.
[101] *Id*., Art. 1(3). *See also* Preamble to the U.N. Charter, *supra* note 95 (affirming "faith in fundamental human *rights*, in the dignity and worth of the human person, in the equal rights of men and of women and of nations large and small . . .").
[102] *UN Charter*, *supra* note 95, Art. 2(3) and Art. 33.
[103] *Id*., Art. 12.

responsibility for international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression."[104]

Article 40 authorizes the Security Council, before determining an act of aggression, to "call upon the parties concerned to comply with such provisional measures." The General Assembly has assumed that, if the Security Council fails to function, it can also recommend a ceasefire or other provisional measure. Failure of a state to accept a ceasefire has also occasioned formal declaration that the state is guilty of aggression. Such a declaration was made by the Security Council against North Korea in 1950[105] and by the General Assembly against the Soviet Union for its 1979 invasion of Afghanistan.[106]

In the Hungarian hostilities, as in the later interventions in Czechoslovakia and Afghanistan, the Soviet Union did not accept the General Assembly's ceasefire recommendation and was "condemned" for violation of the Charter.[107] The actual proceedings before the United Nations' political bodies provide a valuable insight into Soviet legal rhetoric. In vetoing the U.S. draft resolution[108] in the Security Council on November 4, 1956, Mr. Sobolev of the Soviet Union stated: "Soviet forces have been and remain on Hungarian territory pursuant to the Warsaw Pact. They are helping to put an end to the counter-revolutionary intervention and riots; the presence of Soviet forces serves the common interest of the security of all countries party to this Pact."[109]

When Henry Cabot Lodge of the United States then moved in the Security Council for a special session of the General Assembly in accord with Rule 8(b) of the Rules of Procedure of the General Assembly, Mr. Sobolev declared: "We have already stated that any explanation of the "situation in Hungary" in the Security Council is totally unjustified and constitutes an act of intervention in the domestic affairs of Hungary. The same criticism also applies to the proposal to refer the question to the General Assembly."[110]

Although Sobolev voted against this U.S. motion for an emergency session (made pursuant to the earlier "Uniting for Peace" Resolution), it

---

[104] U.N. Doc. A/1481, Nov. 4, 1950; 45 AM. J. INT'L L. SUPP. 1 (1951).
[105] Res. of June 25, 1950, S1501; SCOR, V. RESOLUTIONS AND DECISIONS, 1950 (S/INF/Rev. 1) at 4-5.
[106] UNGA (GAOR) Res. 461, Jan. 14, 1980.
[107] The General Assembly called for an immediate ceasefire and Soviet withdrawal in UNGA Res. 1004 (ES-II) on November 4, 1956. When that was ignored, the General Assembly "condemned" the Soviet Union for violation of the Charter in UNGA Res. 1131 (XI) on December 12, 1956, adopted by 55 votes to 8 with 13 abstentions; GAOR, XI, SUPP. 17 (A/3572) at 64.
[108] S/3730/Rev. 1; SCOR, XI, SUPP. for Oct.-Dec. 1956, at 125-26.
[109] Discussion in the Security Council, 2-4 November 1956, SCOR, XI, 752nd to 754 meetings, *quoted in* LOUIS B. SOHN, CASES ON UNITED NATIONS LAW, at 651 (2nd ed. rev. 1967).
[110] SOHN, *supra* note 109, at 652.

involved only a procedural matter and was therefore not subject to veto by a permanent member. In the November 4, 1956, Second Emergency Special Session of the General Assembly, which followed immediately, Mr. Sobolev then argued against United Nations jurisdiction:

> The Soviet union delegation objects to the inclusion in the agenda and to any discussion of the item entitled "The Situation in Hungary," on the ground that such a discussion would be gross breach of Article 2 of the United Nations Charter which prohibits any intervention by the Organization in the domestic affairs of Member States.
>
> With regard to Mr. Nagy's communications to the United Nations it must be born in mind that these were unconstitutional, and are therefore invalid. The Nagy government has in fact collapsed, and a Revolutionary Workers' and Peasants' Government has been formed, which includes several ministers of the Nagy cabinet who have remained loyal servants of the Hungarian people.
>
> This Workers' and Peasants' Government has sent the Secretary General a telegram to the effect that all communications with Mr. Nagy are invalid. The Government of Hungary, this declaration states, objects to any discussion of the situation in Hungary in the United Nations, either in the Security Council or in the General Assembly, since this is a matter within the domestic jurisdiction of Hungary.[111]

What these statements at the United Nations revealed was the naked Soviet intention to justify not only violations of Article 2(4) of the United Nations Charter but also provisions of the Treaty of Peace with Hungary of February 10, 1947, by contorted claims that the 1955 Warsaw Pact would authorize the intervention, a contention with no basis in fact.

J. Validity of the Kadar Request for Assistance

While one may safely discard the argument that Soviet troops "legally" intervened under the Warsaw Pact, there remains the question whether the effective Hungarian government had or had not called for the intervention. There is evidence that the first violence, occurring on October 24, 1956, erupted after Hungarian Communist Party officials requested that Soviet forces stationed

[111] Discussion at the Second Emergency Special Session, *quoted in* SOHN, *supra* note 109, at 653.

in Hungary intervene to suppress the growing tide of rebellion. It was at the request of Erno Gero, First Secretary of the Party, that this first intervention occurred. A Communist Party leader, however, has never been accorded diplomatic status under international law absent independent Government status.[112] In any case, this first intervention was condemned by the government of Imre Nagy and the request that Soviet troops withdraw was honored.

Similarly, the second intervention, which began in the early morning hours of November 4, and which resulted in the establishment of the Kadar regime, was also not requested by the recognized government of Imre Nagy. To the contrary, the Nagy government invited the Soviet Army to leave the country, and when the Budapest government opened negotiations to that effect, their official delegation was captured, illegally detained, and subsequently executed. There can be no doubt that when the second attack began, the Nagy government was the only effective government of Hungary and that no one questioned the legality of that government.

The suggestion that this second, decisive intervention in Budapest was requested was totally invalidated by the fact that the request came from the very government established by the intervention. International law could no more admit as legitimate an armed intervention by a foreign power supposedly requested by a government established by that use of force in 1956 than it did in 1979 in Afghanistan. Otherwise, the prohibition against intervention under international law could always be evaded by a powerful state's dominion over a weaker state in the form of an *ex post facto* request of the puppet government established through that illegal intervention.

K. Compliance with the Bandung Declaration of 1955

While the April 18-24, 1955, Afro-Asian Conference held in Bandung, Indonesia, did not result in an enforceable international agreement among the twenty-nine participating nations, it did engender the professed support of the participants for certain basic principles of friendly cooperation. Five of these principles were defined by the Soviet Union and its allies (including Hungary) as "principles of peaceful coexistence." These included: (1) respect for fundamental human rights; (2) respect for the purposes and principles of the Charter of the United Nations; (3) no intervention or interference in the internal affairs of another country; (4) refrain from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country; and (5) respect for the sovereignty of all nations.[113]

---

[112] Diplomatic privileges and immunities would only be accorded where some other "official" position within the government were also held.

[113] *See* note 10, *supra*.

The Soviet adoption of these principles in a joint statement by Nehru and Bulganin on June 22, 1955, in Moscow[114] gave rise to hope that a new era in Soviet-satellite relations was approaching. Unfortunately, these principles, so very relevant to the situation in Hungary, were trampled in the Soviets' rush to straighten up a straying socialist regime.

L. Role of Nationalism as an Indicator of Future Intervention Within the Collective

While the illegality of the Soviet actions was easily established, more important was an understanding of the circumstances the Soviet Union considered so threatening that unilateral or Warsaw Pact action was seen as necessary to ensure the continued integrity of the alliance. One could safely assume the existence, as reflected by the later Soviet experiences in Czechoslovakia in 1968 and Poland in 1981, of frustrations and resentments comparable to those felt in Hungary in 1956. The chief motivation for such resentment was to be found in offended national sentiment and, in varying degrees, the perceived lack of freedom deduced from exposure to the West and violation of human rights.

It is impossible to disagree with Djilas[115] that disaffection in the East Central European countries was a political factor which, as in the case of Hungary, and later Czechoslovakia and Poland, placed both Moscow and the West in agonizing legal dilemmas. But it was impossible at the time, looking at the situation from Washington, to accurately measure with precision the intensity of the resentment or the likely anti-Soviet reaction. The Hungarian experience did, however, suggest that similar reactions would occur again within the Soviet sphere.

Since the Soviet-bloc countries were bound together by certain experiences in their historic experience and by their desire for independence, an examination of why Hungarians behaved differently from those in other states under Soviet domination is important. As developed earlier in this part, the heightened resentment and aggressiveness in Hungary in 1956 was due to the tradition of Hungarian nationalism, the intensity of Soviet political domination, the frustrated hopes of Imre Nagy's first premiership, the obstinacy of Hungarian Communist leaders, and the blunders and provocations of the Soviet leadership.

---

[114] U.S. Dept. of State, DOCUMENTS ON INTERNATIONAL AFFAIRS, 1955, at 472-75 (1958).
[115] *See* Milovan Djilas, *The Storm in Eastern Europe*, THE NEW LEADER, Nov. 19, 1956, at 10.

Hungary's national character and history, and Hungary's different experience under Soviet rule may explain why Hungary reacted in one way and other satellite states in another. For example, a satisfactory answer to the question, "Why was Poland not invaded in 1956?" is that that nation was led by a unified communist party, seeking not to break with the communist movement but rather to secure greater national autonomy within that movement.

Additionally, unlike Hungary, the Poles under Gomulka understood the value of a tactical retreat to preserve a greater victory.[116] The Hungarians lacked such lessons, and were led to the decision to resist Soviet dominion by circumstances and events, analogous to those in Poland in 1981, which rendered them first unable, then unwilling, to stop in mid-course.

M. The Role of Western Response in Soviet Decision-Making

There exists a real sense of unease that the United States defaulted on its obligations to the free world in 1956. There was widespread feeling then, as now, that more should have been done for Hungary to stave off Soviet intervention. The question now, as then, remains, "What?"

The examination of any proposed course of action other than that pursued must be tested with regard to: (1) the then-existing U.S. foreign policy; (2) the circumstances on the ground; and (3) the expected reaction of the Soviet leadership.

Greater political pressure through the United Nations has been suggested as a possible approach the United States could have pursued. It is difficult to see how the United Nations could have involved itself, however, before November 1, 1956, when Premier Imre Nagy first appealed to Secretary General Hammarskjold "to put on the agenda of the forthcoming General Assembly the question of Hungary's neutrality and the defense of this neutrality by the four great powers." When the Soviet Union agreed to appoint a delegation to negotiate following the November 2 plea to the Security Council that it call for such negotiations between the parties, there was a genuine belief that a peaceful resolution was possible. When overt aggression became a matter of record on November 4, 1956, the General Assembly did, in fact, move with remarkable speed in passing a strongly worded Resolution. By then, however, the Soviet determination to crush the Hungarian revolt had been made.

---

[116] It is interesting to note that the situation in Poland in 1981 paralleled that of Hungary in 1956: little confidence in the Polish Part leadership; a belief that they were betrayed by former leader Gierek; a readiness to resist an external attack; and an unwillingness to be ruled any longer by a Soviet-style system.

Two approaches, divergent in character, might have proven effective if initiated prior to November 2, when Soviet policy appeared to have hardened as it recognized the complete lack of authority in the Hungarian Communist Party. The first would have offered the Soviet Union concessions in the form of a U.S. troop withdrawal from West Germany in return for a Soviet commitment not to intervene on Hungarian territory. The second would have advised the Soviet government of the grave risk of U.S. involvement if the Soviet Army interfered in the Hungarian insurgency.

The consideration of concessions mirroring the British approach to Germany in the Sudetenland in 1938 had to be rejected at the time as wholly disadvantageous to the United States and unrealistic in light of Soviet untrustworthiness, even in 1956.[117] The threat of U.S. military action, to be effective, would have had to be accompanied by an almost simultaneous deployment of forces from then-West Germany. An empty bluff without deployment, however, would have been the most disastrous course.

The question arises whether the United States was any more ready to take action in Hungary in 1956 than it was later in Czechoslovakia, Afghanistan or Poland. While John Foster Dulles had espoused the 'Doctrine of Liberation' for European satellite nations while campaigning for Eisenhower prior to the 1952 election, this was moderated after the election to the 'Doctrine of Peaceful Liberation.'[118] Despite occasional bluster, the policy of the United States during the mid-fifties was clearly one of avoiding international conflict.

There were other immediate constraints that complicated U.S. decision-making in November 1956. The absence of timely and accurate communications with Budapest, the confluence of the Hungarian revolt with the Suez crisis, the impending U.S. Presidential elections, and the serious illness of Secretary of State Dulles during the early part of November made for a complex situation which did not bode well for effective decision-making. In retrospect, desirable as it would have been for the United States to reach out to the Hungarians, the range of practical alternatives was as limited in 1956 as the alternatives were in Czechoslovakia in 1968 and Afghanistan in 1979.

---

[117] In 1956, the Soviet pressures successfully exerted on East Germany in 1953 during a similar attempt at loosening political shackles were vividly etched in the minds of the West's leaders.

[118] *See* remarks of Secretary John Foster Dulles at the annual Associated Press luncheon in New York, April 22, 1957, in U.S. Dept. of State, FOREIGN POLICY BULL., May 15, 1957, at 132.

III. CZECHOSLOVAKIA 1968: THE LAW OF COEXISTENCE IN CONFLICT WITH CONTEMPORARY INTERNATIONAL LAW

A. The Soviet Formulation of the Law of Coexistence

In the years following its intervention in Hungary, the Soviet Union sought to establish the law of coexistence as a universally relevant and objective standard of international law. The Soviet formulation of this law was tailored to its perceived foreign policy needs and involved different criteria for capitalist states and socialist states. Two fundamental principles of this law, peaceful coexistence and socialist internationalism, were developed to facilitate legal characterizations favorable to the Soviet Union in each case.[119] While Soviet legal scholars argued that the special legal relationships within the socialist collective authorized the use of force to protect the gains of socialism, a careful review of the Czechoslovak intervention in 1968 compels a different view.

When then-Czechoslovakia[120] denounced the occupation of Prague by Warsaw Pact forces as a violation of the recognized international legal obligations of those states, the Soviet leadership did not meet the charge directly. Instead the then-U.S.S.R. stated that in relations among 'fraternal socialist countries,' each socialist state had the duty to prevent every other socialist state from becoming a victim of counterrevolution. The 'defense of socialism,' the Soviet leadership stated, is a common international duty of all socialist states.'[121]

If the events of the 'Prague Spring' in 1968 established any precedent and if they can be shown to be related to the events in Kabul in 1979 and Warsaw in 1981, it could be argued that the international law of 'peaceful coexistence' governing the more difficult relations between socialist and capitalist states was replaced in relations between socialist states by a more informal, more intimate, and more paternalistic law of 'socialist internationalism' that permitted and legally justified intervention in order to save another socialist state from itself.[122]

---

[119] *See generally* Bernard A. Ramundo, *Czechoslovakia and the Law of Peaceful Coexistence: Legal Characterization in the Soviet National Interest*, 22 STAN. L. REV. 963 (1970).

[120] Following dissolution of the former Soviet Union in 1991, the Czechs and Slovaks established their separate states, dissolving the former Czechoslovakia.

[121] *See* TASS statement on military intervention in Czechoslovakia, August 21, 1968, 7 I.L.M. 1283 (1968).

[122] For an excellent discussion of the differences between peaceful coexistence and socialist internationalism, *see* Ramundo, *supra* note 119, at 966-67.

B. The Catalyst of Intervention: Domestic Ferment

In the early months of 1968, few inside or outside Czechoslovakia would have predicted the massive military invasion by forces of the Soviet Union and four other Warsaw Pact states later in August.[123] The seeds had been sown long before, however, in the liberalization allowed following Stalin's death in 1953 and in the economic crisis which first appeared in 1962. Elements of the Czech national character were also significant.

The history of Czechoslovakia had been marked by foreign domination, religious persecution, and political impotence. Although the Czechs and Slovaks established one of the earliest entities in Eastern Europe, these factors led to a basic national characteristic, "an attitude of acceptance (of authority) on the surface and of resistance within, with individual and national survival being the overriding aim."[124] Communism, then, had to be viewed in 1968 as the most significant authoritarian structure historically only because it was the most recent. In fact, for nearly twenty years following the 1948 *coup d'etat*, Czechoslovakia was the 'most pliant' of the Soviet satellites.

Following the death of Stalin in 1953, Soviet policy toward Czechoslovakia specifically and Eastern Europe as a whole moved toward economic reform and political liberalization. This resulted in such improvements as dissolution of the COMINFORM, an attempted reconciliation with Tito in then-Yugoslavia, institution of the Warsaw Treaty Organization and other measures designed to ease relations between the Soviet Union and the Eastern Bloc nations.[125] During this same period, power in Prague was concentrated in the hands of Antonin Novotny, who was First Secretary of the Czechoslovak Communist Party (CCP) Central Committee from 1953 to January, 1968, President of the Republic from 1957 to May, 1968, and Chairman of the National Front from 1959 until 1968. Under Novotny's guidance in foreign affairs, the "Czechoslovak regime did nothing unless told to do so by Moscow and . . . everything Moscow wanted it to do."[126]

Unlike the situation in Hungary, Poland and Rumania, for example, the trend toward de-Stalinization and polycentrism within the Soviet bloc in the late 1950s had little impact in Czechoslovakia. Open dissent and demand for reform

---

[123] These four states were East Germany, Poland, Bulgaria and Hungary.
[124] *See* Zedenek Elias & Jaromir Netik, *Czechoslovakia*, in COMMUNISM IN EUROPE, Vol. II at 155, 162 (William E. Griffith ed., 1967).
[125] *See Aspects of Intellectual Ferment and Dissent in Czechoslovakia* in STAFF REPORT OF SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITIES LAWS OF THE SENATE COMMITTEE ON THE JUDICIARY, 91st Cong., 1st Session (Comm. Print., 1969) at 15, *et seq*. [hereinafter *STAFF REPORT*].
[126] Elias & Netik, *supra* note 124, at 232.

were not heard within the intellectual community in Prague until the economic crisis of 1962-1963.[127] In 1965, in response to these demands and in spite of severe criticism from conservative elements within the Party bureaucracy, a new economic program was accepted by the Communist Party (CCP).

Professor Ota Sik, the author of the new economic plan, proposed a more flexible approach to economic planning and the elimination of the evils of over-centralized and over-detailed planning.[128] The implementation of these reforms, however, met with resistance from conservative forces. With little agreement between the reform element and the bureaucracy, 1967 began with a decline in both production and foreign trade and a rise in inflation.[129]

This continued economic deterioration and the political unrest that followed led to the fall of Novotny as First Secretary of the Party and the election of Alexander Dubczek in January, 1968. Two months later, Novotny was removed from his other position as President and replaced by Swoboda, a popular war hero. During the eight month 'Prague Spring' which followed, Czechoslovakia under Dubczek pursued two separate avenues of liberalization. Not only did the CCP seek a more equitable distribution of economic and political power by proposing a federalized state in which the Slovaks would enjoy greater political independence, but an effort followed to formulate and safeguard civil rights for the people of Czechoslovakia.[130]

This program of liberalization was adopted officially at the plenary session of the Central Committee of the Communist Party of Czechoslovakia on April 3, 1968. Designated the 'Action Program of the Communist Party of Czechoslovakia,[131] the plan attempted to insure that the National Assembly would in fact be the supreme political organ in Czechoslovakia and that the principal creative organ of the state would in reality be the Council of Ministers.[132] The *Action Program* not only encouraged workers to participate to

---

[127] For an in-depth treatment of the origins of the 'Prague Spring,' *see* H.G. SHILLING, CZECHOSLOVAKIA INTERRUPTED REVOLUTION (1976); GALIA GOLAN, THE CZECHOSLOVAK REFORM MOMENT: COMMUNISM IN CRISIS 1962-1968 (1971); GALIA GOLAN, REFORM RULE IN CZECHOSLOVAKIA: THE DUBCZEK ERA, 1968-1969 (1973); V. RUSIN, THE CZECHOSLOVAK REFORM MOVEMENT, 1968 (1973).

[128] *See* J. Burks, *The Decline of Communism in Czechoslovakia*, in 2 STUDIES IN COMPARATIVE COMMUNISM 21 (1968). The background of the economic crisis is thoughtfully presented in THE CZECHOSLOVAK CRISIS, 1968 (Institute for the Study of International Organizations, University of Sussex 1968).

[129] PAUL ELLO, CZECHOSLOVAKIA'S BLUEPRINT FOR FREEDOM 13 (1968).

[130] *See* Jan Triska, *Political Change in Czechoslovakia* in CZECHOSLOVAKIA: INTERVENTION AND IMPACT 8-9 (I.W. Zartman ed., 1970).

[131] The *Action Program of the Communist Party of Czechoslovakia* is translated in ELLO, *supra* note 129, at 129 [hereinafter *Action Program*].

[132] *Id*.

a greater extent in economic management but also promised the relative independence of economic enterprises from state organs.[133]

With the new program, the CCP also adopted liberal and, to the Soviet Union, astounding concessions to its civil servants and citizens. The Ministry of the Interior (Police Ministry) was no longer able to condemn without at least elementary due process,[134] and the legal policy of the Party was now proclaimed to be based in a legal system "independent of political factors and bound only by law."[135] The Communist Party's primary responsibility was recast as well. Instead of mimicking the Soviet line of practicing its leading role by ruling the society, the Czech Party committed itself to "devotedly serving [society's] free progressive socialist development."[136]

C. Developing Concern in the Warsaw Pact

After publication in Czechoslovakia of a 'Two Thousand Word Manifesto'[137] by leading public figures, criticism of the Czech reform movement intensified in other Communist states. Two critical meetings had occurred before the publication of the Manifesto on June 27, 1968. On March 28, Soviet leader Brezhnev asked First Secretary Dubczek to meet with leaders of Bulgaria, the Soviet Union, East Germany, Hungary and Poland in Dresden. All expressed their concern to Dubczek that there were serious potential effects of events in Prague in other socialist countries.[138] The following day, Brezhnev warned Moscow of the dangers of imperialist subversion in those states allied with the Soviet Union.[139]

During the first week in May, 1968, Brezhnev asked Dubczek and other Czech Party leaders to visit Moscow to discuss the "Action Program." Following this meeting, the Czech leadership claimed that while the Soviets were concerned over events in Prague, they had no intention in interfering in Czechoslovak internal affairs.[140] Just three days later, however, on May 8, 1968, leaders of the five Warsaw Pact powers that would later join in the invasion met in Moscow.[141]

---

[133] *Id*.
[134] *See* Edward Taborsky, *The New Era in Czechoslovakia*, in 2 EAST EUROPE 19, 23 (1968).
[135] *Action Program*, *supra* note 131, at 133.
[136] *Id*. at 110.
[137] *STAFF REPORT*, *supra* note 125, at 137. The document appears in full as Annex H to the REPORT. This Manifesto made an appeal for vigorous political action to remove all remnants of Communist orthodoxy in the country and called on the people to enforce the demand for the removal of discredited persons through strikes, boycotts, public criticism, resolutions and demonstrations.
[138] N.Y. TIMES, April 11, 1968, at 10, col. 4.
[139] *Id*., March 30, 1968, at 3, col. 2.
[140] *Id*., May 6, 1968, at 5, col. 3.
[141] *Id*., May 9, 1969, at 1, col. 4.

In July, more direct and heated confrontations occurred. On July 5, after tough public statements by Soviet leaders Brezhnev and Shelest the following day, the diplomatic missions of the Soviet Union, East Germany, Poland, Hungary and Bulgaria delivered letters to the Czech government criticizing the political developments in Prague and proposing a new joint conference in Warsaw.[142] On July 8, 1968, Brezhnev personally phoned Dubczek, inviting him to the meeting which was to be held on July 11th.[143] The meeting date was subsequently changed to July 15 to encourage a positive response by the Czechs.

On July 11th, the Soviet press PRAVDA published an article by I. Alexandrov that drew the first explicit analogy between the events in Czechoslovakia in 1968 and those in Budapest in 1956. The article described the Manifesto as a 'platform' for the 'counter-revolution' in Czechoslovakia, labeling it "evidence of the activation of the right wing and actually counter-revolutionary forces in Czechoslovakia which were evidently associated with imperialist reactions." Alexandrov claimed that the "healthy forces in the Party and the country regard the document as an open attack against the socialist system, against the leading role of the Czechoslovak Communist Party, and against the Czechoslovak's friendship with the Soviet Union and other socialist countries."[144]

The following day, July 12th, the Czechs determined in debate within their Presidium to refuse the invitation to meet with the leadership of the Warsaw Pact in Warsaw and to engage only in bilateral negotiations, and then only if they could be held on Czech soil.[145]

The Warsaw Summit, held on July 14-15 without Czech participation, resulted only in a decision to send an ultimatum, drafted jointly by the participating delegations, to the Czech Central Committee.[146] This Warsaw Letter contained an appeal to the 'healthy forces' in Czechoslovakia, but

---

[142] *See* JIRI VALENTA, SOVIET INTERVENTION IN CZECHOSLOVAKIA 5 (1979) (reporting that the letters revealed considerably differing viewpoints). For example, the letter from the East German leadership was markedly hostile, while that from the Hungarian Party was moderate.

[143] W. SHAWCROSS, DUBCZEK 286 (1970).

[144] I. Alexandrov, *The Attack Against the Socialist Foundation of Czechoslovakia*, PRAVDA, July 11, 1968, *quoted in* VALENTA, *supra* note 142, at 50. Alexandrov also claimed that "certain figures in Czechoslovakia who have made ambiguous statements in which they try to minimize the danger inherent in the counter-revolutionary Two Thousand Words by insisting that the fact of its publication should not be over-dramatized." *Id*.

[145] *See* ERWIN WEIT, AT THE RED SUMMIT: INTERPRETER BEHIND THE IRON CURTAIN, 190-206 (1973) (discussing these events in early July). Erwin Weit served as Polish Party leader Gomulka's interpreter and was present at the Warsaw Pact Summit which convened on July 14.

[146] *Id*. at 210-11.

asserted as well that the drafters had "no intention of interfering in affairs that are purely internal affairs" of Czechoslovakia, nor would they "interfere with the methods of planning and administration of Czechoslovak Socialist national economics."[147] The Pact Leaders did state, however, that "international tension is not waning . . . American imperialism has not renounced its policy of force and open intervention against peoples fighting for freedom . . . . The arms race has by no means slowed down."[148] (The text made no mention of the praise by Soviet leaders only two weeks earlier for the sincere U.S. efforts in on-going non-proliferation and SALT
talks.)

The letter further claimed that Dubczek had lost political control and that his reform-oriented supporters were 'outright champions' of the Two Thousand Words Manifesto which, it stated, was an "organizational political platform for counter-Revolution."[149] In addition to these charges, there was an ominous reminder to the Czechs of the obligation common to all communist countries of "not allowing the loss of revolutionary gains already achieved." Thus the defense of Czechoslovakia's socialist gains was declared to be not only the 'task' of Czechoslovakia but the mutual task of all Warsaw Pact states. The letter expressed support for and promised the "comprehensive assistance of the fraternal socialist countries for healthy forces . . . in Czechoslovakia . . . capable of upholding the socialist system and dealing a defeat to the anti-socialist elements."[150] It specified what the Czechoslovak anti-reformist coalition ('healthy forces') should do to satisfy its allies: reinstate censorship, ban political clubs, and repress 'rightist forces' within the Party.

Although the Czech leadership in its July 18, 1968, reply continued to emphasize both its loyalty to the Warsaw Pact and its determination to maintain the authority of the Party, the reply made it unmistakably clear that the 'Action Program' would be continued and implemented.[151] The failure of the Czech government to give unqualified assent to the demands in the Warsaw Letter left the Soviet Politburo with one of the most difficult decisions since 1956. Did the vitality of the socialist collective require that it intervene?

D. The Interventionists Versus the Non-Interventionists

Foreign policy formulation among Soviet leaders proceeded within the context of the organizations controlled and coordinated by the Politburo.

---

[147] Text of the Warsaw Letter is at 7 I.L.M. 1265 (1968).
[148] *Id*.
[149] *Id*.
[150] *Id.*
[151] Text of the July 18 Czech Response is at 7 I.L.M. 1268 (1968).

Besides the Politburo, the main organizational participants in the foreign policy decision-making process were the various departments of the Central Committee of the Communist Party and national security ministerial bureaucracies: the Ministry of Foreign Affairs, the Committee for State Security (KGB), and the Ministry of Defense.[152] The Politburo stood at the center of the decision-making process, where it made the final decision on any critical foreign policy or national security issue.[153] The Politburo thus made the crucial decision to intervene in Czechoslovakia.

The Soviet decision was perhaps more influenced by the style of Czech leadership than the perceived threat to the socialist community. Moreover, the Soviet responsive actions were based as much on political concerns as on a weighing of risks versus perceived needs. The decision-makers should not be seen as cast in the same mold. Often their backgrounds and areas of experience contrasted sharply, and their different administrative and bureaucratic responsibilities provided different domestic and personal interests.[154]

At the time of Stalin's death in March 1953, coalition politics, once so important,[155] had been dormant for two decades. In the decisions involving intervention after 1953 [Hungary 1956, Czechoslovakia 1968, Angola 1975, Ethiopia 1978, Afghanistan 1979, and Poland (by proxy) 1981], however, collective leadership was significantly involved. As an example, Michel Tabri

---

[152] *See* VALENTA, *supra* note 142, at 5 (describing in detail the interrelationships of these various organizations with a role in the decision-making process).

[153] On the mechanics of Soviet foreign policy decision-making, *see* Vernon Aspaturian, *Soviet Foreign Policy*, in FOREIGN POLICY AND WORLD POLITICS (Roy C. Macridis ed., 1962). *See also* JAN TRISKA and DAVID FINLEY, SOVIET FOREIGN POLICY (1968).

[154] *See e.g.*, FRED H. EIDLIN, THE LOGIC OF NORMALIZATION 24 (1980). He states:

> Some scholars have suggested that other socially constructive aspects of the 'problem of Czechoslovakia' widely distributed through the system, were sources of conflict and/or ambivalence rather than consensus. It has been suggested, for example, that the problem situations of categories of decision-makers included shared elements bound up with their institutional affiliations, functional interests, and generationally-related career experiences.

Id.

[155] Prior to Stalin's replacement of collective leadership with a dictatorship in the 1930s, coalition strategy was the accepted decisional process. The Brest-Litovsk debate serves as an example. In January-February 1918, a coalition of Soviet leaders led by Lenin advocated making peace with Germany and terminating Soviet involvement in World War I. This coalition was able to muster a "winning majority" only after weeks of bitter debate, several defeats in Politburo voting, and internal bargaining and maneuvering. The final vote (6-4) which finally brought victory to Lenin's coalition against advocates of continuing the war (led by Bukharin) came only with the abstention of several leaders such as Leon Trotsky, who had originally voted against Lenin's coalition. *See* STEPHEN F. COHEN, BUKHARIN AND THE BOLSHEVIK REVOLUTION: A POLITICAL BIOGRAPHY 1888-1938, at 214 (1974).

reported that during the Cuban missile crisis of 1962, the response to the United States quarantine action was decided by a kind of Soviet 'national security council' which paralleled, in some respects, Kennedy's inner circle.[156]

Just as there was division within the leadership of the Czech government during the crisis, there were strong divisions within the Soviet Union as to the proper course of action. Two coalitions can be readily identified: those advocating military intervention and those skeptical of military intervention. Equally important were the advocates and skeptics within the satellite nations.[157]

The advocates of military intervention within the Soviet politburo were led by Ukrainian party leader Shelest and Central Committee member Trapeznikoff and officials from the large cities of the Russian Soviet Federated Socialist Republic (RSFSR) (for example, candidate Politburo member and First Secretary of the Moscow Party Committee Grishin).[158] There were two diverse and contradictory motives underlying the support for intervention. The first and most obvious was the view that the situation in Czechoslovakia was "counter-revolutionary" and required the defeat of Dubczek and his supporters as the only viable option. Advocates of this view visualized the payoff from a military solution as the removal of the threat of Czechoslovak liberalism and experiments with federalism.[159]

The other motivation supporting intervention related to the perceived effect the suppression of economic liberalization in Czechoslovakia might have on the economic reform movement in the then-Soviet Union. Opponents of the new Soviet economic plan hoped that by the rejection of the Czechoslovak 'heretical' economic reforms associated with Ota Sik and by assertions that the Czech reforms were leading to a restoration of capitalism, they could provide additional ammunition against supporters of E.G. Liberman's proposed economic reform in the U.S.S.R., which, while more conservative than the Czechoslovak plan, was still unacceptable to them.[160]

---

[156] *See* MICHEL TATU, POWER IN THE KREMLIN FROM KRUSHCHEV TO KOSYGIN 282 (1969).
[157] *See* VALENTA, *supra* note 142, at 20-34, where the author describes the hardliners' belief that the payoff from a military solution would be the removal of the threat of Czechoslovak liberalism and experiments with federalism. Conversely, Valenta claims the skeptics of military intervention believed the proper course should include political bargaining and support for Dubczek against both extremes in Czechoslovakia: the supporters of Novotny as well as the anti-Soviet element.
[158] *See* SERGEI PAVLOVICH TRAPEZNIKOV, AT THE TURNING POINTS OF HISTORY 77-78 (1972).
[159] VALENTA, *supra* note 142, at 21.
[160] The Soviet press sharply criticized not only Sik's views (IZVESTIA, Sept. 20, 1968) but also Liberman's (VALROSY EKONOMIKI 21, no. 9 (Sept. 1968)) at 11-24.

In Eastern Europe, East Germany and Poland strongly believed that only through intervention could the threat posed by Czech liberalization to their own states be countered. East German leader Walter Ulbricht was especially concerned about the impact of Czechoslovak radio broadcasts and he ordered that all Radio Prague programs be jammed.[161] In Warsaw, First Secretary Gomulka was equally concerned over the emotional response of the Poles to the 'Prague Spring.'[162] Following student demonstrations of support for the Czech reform movement in the Spring of 1968, Gomulka ordered all Czech students and newspapermen expelled from Poland.[163]

In advocating intervention, Gomulka and Ulbricht were also seeking to counter the developing rapprochement between West Germany under Brandt and the Soviet Union.[164] The advantage of a military solution, then, for these leaders would be the inevitable hardening of West German policies toward the Soviet Union and the strengthening of the Pact alignment.[165]

The skeptics of the wisdom of intervention, both inside the Soviet Union and within the Warsaw Pact, advocated political bargaining and, if necessary, political and economic coercion.[166] Having weighed the pros and cons of intervention, Soviet officials such as Zagladin felt military action could only diminish the chances of regaining Czech confidence and of aligning her economic policies with the alliance. The Central Committee, led by Suslov, Pomonarev, and his deputy Zagladin, initially shared this view. It believed the situation in Prague should not be dramatized and should be compared not with Budapest in 1956 but rather with Poland that same year after Gomulka's election

---

[161] VALENTA, *supra* note 142, at 21.

[162] *See* NICHOLAS BETHELL, GOMULKA: HIS POLAND, HIS COMMUNISM (1969). Bethell explains that the first signs of the Prague Spring began to appear during the March 1968 student demonstrations in Warsaw. Demonstrators carried placards reading 'Bravo Czechs' and 'Polska czeba na swego Dubczeka' (Poland is waiting for its own Dubczek).

[163] VALENTA, *supra* note 142, at 24.

[164] It was not until October 1981 that stories in the Washington Post linked Brandt publicly with the Soviet KGB during World War II. *See* WASHINGTON POST, Oct. 17, 1981, at A-7.

[165] *See* Francois Fejto, *Moscow and Its Allies*, PROBLEMS OF COMMUNISM 17, No. 6 (Nov.-Dec. 1968) at 36.

[166] Dimitri K. Simes, *The Soviet Invasion of Czechoslovakia and the Limits of Kremlinology*, 8 STUD. IN COMP. COMMUNISM Nos. 1-2 (Spring/Summer 1975), at 177-78. Simes reports that the Soviet skeptics of military intervention were supported by certain government bureaucracies, such as several subdivisions of the Ministry of Foreign Affairs responsible for diplomacy with the West, and by some segments of the armed forces. One commander, Marshall N.I. Krylov of the Strategic Rocket Forces did not share the fear shared by colleagues in the Warsaw Pact Command and Soviet Ground Forces that in an age of intercontinental missiles, Czechoslovak reformism would seriously endanger the strategic position of the Soviet Union. *See also* John Erickson, *Toward a 'New' Soviet High Command: Rejuvenation Reviewed*, 144 ROYAL UNITED INST. JL., No. 655 (Sept. 1969) at 43.

as First Secretary of the Polish Party.[167] In Hungary, Janos Kadar, a supporter of the Hungarian economic reform movement, believed that a nonmilitary resolution would benefit the economic liberalization in Hungary and the cautious political reforms in the labor movement which had begun in late 1967.[168]

Unfortunately, neither of the non-interventionist coalitions completely understood the historical significance of the events in Prague as they related to the earlier events in Hungary and Poland and those in East Germany in 1953. Hungary in 1956 and East Germany in 1953 represented instances where the Party/government apparatus could no longer control the events in the country.[169] Poland in 1956 and the 1968 Czech situation, conversely, represented examples where the Party/government apparatus would no longer follow Soviet direction. It was the loss of loyalty in Czechoslovakia which ultimately led to serious consideration of intervention.

Yet there were significant differences in each of the prior crises which made comparative analyses by the Soviet leadership in 1968 more difficult. The Polish concerns in 1956 were limited to domestic matters. Hungary, conversely, announced withdrawal from the Warsaw Pact and a new status of neutrality, similar to that of Austria.[170] As the Czech crisis developed, these differences certainly were not lost on the Czechs. Dubczek carefully avoided criticism of the Soviet Union, discussion of neutrality or reliance on the West. Thus, on the major internal and external issues, the Czechoslovak case in 1968 fell somewhere between the Polish and Hungarian crises in 1956: a lesser challenge to Soviet supremacy than Hungary but well within the Soviet criteria for intervention.

E. The Decision to Intervene

In the period between the Czech response to the Warsaw letter and the end of July, the Soviet Politburo made the unprecedented decision not only to negotiate bilaterally with the Czechs but also to meet on the latter's soil at

---

[167] *See* the discussion in Part II*, infra*, which details the differences and similarities between the situations in Warsaw and Budapest in 1956.

[168] C.L. SULZBERGER, AN AGE OF MEDIOCRITY -- MEMOIRS AND DIARIES 1963-1972, 477 (1973). Sulzberger relates an interview with Kadar in which the leader stated: Success of the Czechoslovak reforms would undoubtedly mean new hope for development in Hungary. *Id.*

[169] The same scenario developed in Afghanistan in 1979 where rebels gained control of 22 of the 28 provinces before the Soviet Union intervened. *See* Part IV, *infra*, for a detailed discussion of these events.

[170] These events are detailed in Part V, *infra*.

Cierna-nad-Tisou on the Czechoslovak-Soviet frontier.[171] Concurrently, charges against the Czechoslovak government became so virulent in the Soviet and East German press that the possibility of Soviet military action was taken seriously by outside observers.[172] PRAVDA, for example, announced on July 19 that Czechoslovak security forces had discovered a cache of American weapons near the West German border. Upon investigation, however, it appeared that this negligible number of small arms was a staged plant by Soviet agents.[173]

For the Soviets, the decision to negotiate at Cierna symbolized the collective nature of post-Khrushchev top-level decision-making. As Richard Lowenthal explained:

> The Soviets were conscious that a new decision would have to be made at the end of the talks—the decision whether to regard their demands as satisfied, or whether to implement the ultimatum by giving marching orders to the allied armies kept in a state of readiness all around Czechoslovakia. Moreover, the members of the collective knew that some of them would apply more exacting standards of compliance than others, and they evidently could not agree on trusting a single leader, or even troika, with deciding in their name.[174]

The discussion at Cierna began with harsh accusations leveled at the Czechoslovak Presidium by the members of the Soviet Politburo, but by the fourth day of the meeting, a more conciliatory tone had been adopted.[175] The Czech negotiators, consisting of Dubczek, Smrkovsky, Cernik, and President Swoboda, agreed on August 1, 1968, to control the Czechoslovak press, to prevent the organization of any political groups outside the National Front, to strengthen the People's Militia and other security forces, to assure the protection of anti-reformist Communists opposed to the liberalization program, to end the

[171] The discussion of the events at Cierna is drawn primarily from Paul Tigrid's account of the negotiations in WHY DUBCZEK FELL (1971), an account which he states has been drawn from the minutes of the Conference.
[172] Although the evidence is not conclusive, the indications are that Dubczek, and probably many of his colleagues, never seriously considered that a Soviet invasion was likely. This confidence, which was very evident in Prague in July, goes some way to explain what appeared to many observers to be defiance of Soviet threats.
[173] *See* N.Y. TIMES, July 20, 1968, at 1, col. 6.
[174] Richard Lowenthal, *The Sparrow in the Cage*, 18 PROBLEMS IN COMMUNISM (Nov.-Dec. 1968) at 18.
[175] *See* THE CZECHOSLOVAK CRISIS IN 1968, 26 (Robert R. James ed., 1969).

published polemics against the Soviet Union, and to remove the two reformists, Kriegel and Cisar, from positions of responsibility.[176]

For their part, the Soviet team of Brezhnev, Suslov, Kosygin, and Podgorny promised that most of the charges in the Warsaw Letter would be forgotten, that all Soviet forces would be withdrawn from Czechoslovak territory, that the September Congress of the Czechoslovak Party would be approved, and that a loan to assist Czechoslovak's troubled economy would be considered.[177]

The outcome of the meeting at Cierna was a compromise, with both sides making only oral promises and neither willing to commit specific pledges to writing. The brief communiqué issued at the conclusion of the meetings on August 1st stated that 'a broad comradely exchange of opinions on questions of interest to both sides took place,' and that 'the participants in the meetings exchanged detailed information about the situations in their countries.' The communiqué stressed that the negotiations were conducted in 'an atmosphere of complete frankness, sincerity and mutual understanding.'[178]

While the details of the commitments made by both sides were not announced, a second conference was planned for August 3rd at Bratislava, the capital of Slovakia, to memorialize the agreement. The declaration agreed to at Bratislava,[179] however, made no specific reference to the situation in Czechoslovakia. It stressed that the internal policy of socialist countries should 'firmly and resolutely oppose with great vigilance and unshakable solidarity, all attempts at imperialism and all other anti-communist forces to weaken the guiding role of the working class and the Communist Parties.'[180] The socialist countries, it stated, 'will never allow anyone to drive a wedge between the socialist states or undermine the foundations of the socialist system.'[181]

Regarding internal Czech affairs, the Bratislava Declaration stressed that the Communist Parties should 'advance firmly along the path of socialism by strictly and consistently following the general laws governing the construction of a socialist society.' While this formulation could have been

---

[176] These concessions by the Czechs are reported in TED SZULC, CZECHOSLOVAKIA SINCE WORLD WAR II 364 (1971). Ted Szulc was the New York Times reporter in Czechoslovakia at the time and was informed of the concessions by a high Czech official.
[177] *See* TIGRID, *supra* note 171, at 87.
[178] *Joint Communique of the Meeting of the Politburo of the CPSU Central Committee and the Presidium of the CPC Central Committee*, PRAVDA, August 2, 1968, *quoted in* VALENTA, *supra* note 142, at 84-85.
[179] The text is translated in WINTER IN PRAGUE 256-61 (Robin Remington, ed., 1969).
[180] *Id.*
[181] *Id.*

interpreted as Czechoslovak consent to strictly follow the Soviet model of socialism, another portion of the declaration stressed that 'in so doing, every fraternal party, while creatively deciding questions of further socialist development, takes into account specific national features and conditions.'[182] This language could be interpreted as providing limited approval of Dubczek's program of domestic reform.

On balance, the Declaration 'served to paper over the differences not merely between Russians and Czechoslovaks, but within the Russian delegation: 'for while Suslov and the 'conciliators' presumably hoped it would help to avoid the odium of military action, the hardliners were certainly more skeptical.'[183] Unfortunately, this compromise was temporary and ambiguous. Military intervention had not been dismissed, only forestalled; and unfortunately, the Czech leadership 'had not prepared an alternative' should the situation suddenly change for the worse.[184]

In the five days following the Declaration, the Soviets assessed that the situation had worsened. Eidlin states that Brezhnev telephoned Dubczek daily, expressing concern over Czech delays in implementing the compromise. Dubczek explained that the CCP couldn't satisfy all the Soviet demands until the Central Committee Plenum met at the end of August, to be followed by the Party Congress.[185] This unfortunate response, coupled with the Soviet decision to temporarily withdraw Warsaw Pact forces from Czech territory[186] but not from the proximity of the Czech borders, were clear indicators that Brezhnev would intervene if necessary. By August 18th, it was clear that the provisional settlements worked out at Cierna and Bratislava could not be implemented to Soviet satisfaction by the Czech reformers.

A more analytical approach indicates the Soviet leadership also considered intervention from a cost/benefit analysis. The risk analysis which evolved in the Czech case certainly drew on past Soviet experience in Poland and Hungary in 1956, and even before that on difficulties with East Germany in 1953. The United States' 1965 intervention in the Dominican Republic also provided a revealing model for Soviet consideration and may have been instrumental in leading to parallel action in Czechoslovakia.[187]

---

[182] Remington, *supra* note 179, at 260.
[183] Lowenthal, *supra* note 174, at 19.
[184] TIGRID, *supra* note 171, at 90.
[185] Eidlin, *supra* note 154, at 106, n. 6.
[186] James H. Polk, *Reflections on the Czechoslovak Invasion, 1968*, 5 STRATEGIC REVIEW 32 (1977).
[187] *See* Thomas Franck & Edward Weisband, *The Johnson and Brezhnev Doctrines: The Law You Make May be Your Own*, 22 STAN. L. REV. 979 (1970), for a piercing look at the parallel nature of U.S. and Soviet ambits in intra-bloc coercion during the 1960s.

Because intervention is costly, both economically and politically, neither great power would intervene in its own sphere of interest during this period for casual reasons. Each had a threshold of toleration and would take military action only when that threshold was reached.[188] For example, Soviet military intervention in Cuba occurred before the 1962 missile crisis, but the United states chose not to make an issue of it. When the Soviets subsequently landed missiles that could only have an offensive purpose and thereby directly threatened the United States, however, it did intervene.[189]

In Czechoslovakia, the Soviet leaders understood that the costs associated with intervention would be high. For example, it would emphasize the true relationship between the Soviet Union and its East European client States. The hollowness of the claim of independence and the emptiness of the non-intervention pledges of the Warsaw Pact and in the recently signed Bratislava Declaration would be made evident, just as the intervention in Hungary in 1956 had revealed the hollowness of the Bandung Declaration of 1955.[190] Intervention would also have a troubling impact upon fledgling communist parties in developing countries, create future cleavages in Eastern Europe, and encourage the United States to pursue more strident policies within the NATO framework.[191]

F. The Intervention

During the late evening of August 20, 1968, waves of Soviet transport planes landed troops and armored vehicles at Prague Airport. The airport and the City of Prague were immediately placed under Warsaw Pact control without significant resistance. Simultaneously, an estimated 250,000 to 500,000 troops of the then-Soviet Union, Bulgaria, then-East Germany, Hungary, and Poland moved across the borders into Czechoslovakia and assumed substantial control of the entire country.[192] Almost at the precise moment of the invasion, the U.S.

---

[188] *See* A. Scott, *Military Intervention by the Great Powers*, in Zartman, *supra* note 130, at 98.
[189] *See* W. T. Mallison, *Limited Naval Blockade or Quarantine Interdiction: National and Collective Self-Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 347 (1962).
[190] *See* Part.II, *infra*.
[191] Fortunately for the Soviets, the significant U.S. military commitment in Viet Nam left them with no potential challenge to their role in Czechoslovakia and no danger of escalation. *See* D. McHeman, *United Nations Peacekeeping: An Alternative for Future Viet Nams* in RICHARD FALK, Vol. I, THE VIETNAM WAR AND INTERNATIONAL LAW 99 (1976) (commenting on such non-competitive intervention in the past). In Afghanistan in 1979, the Soviets were equally successful in taking military action in a scenario which effectively eliminated any challenge from the West. The Iranian hostage crisis effectively muted any possibility of response. *See* TERRY, *supra* note 4, ch. V.
[192] *See* N.Y. TIMES, Aug. 21, 1968, at 1, cols. 5-6, 98. Estimates of Warsaw Pact troops ultimately reached 650,000. *See also* Tad Szulc, *Prague Aides Say German Red Units Left by Third Day*, N.Y. TIMES, Sep. 3, 1968, at 1, col. 1.

Department of State and other NATO governments were informed by diplomatic note of the Warsaw Pact action.[193]

An initial goal of the Soviet leadership, just as in Hungary twelve years earlier and in Afghanistan eleven years later, was to effectively neutralize Czech leadership.[194] After interning Secretary Dubcek, Premier Cernik, National Assembly President Smrkovsky and Central Committee member Kriegel, the Soviet leadership directed Indra and Bilak, Soviet sympathizers and Central Committee members, to seek approval of a provisional "workers and peasants government" from President Svoboda.[195] Svoboda, one of the few top-ranking Czech officials not interned, refused to make any far-reaching decisions in Dubcek's absence, either with respect to a provisional government or with regard to Soviet demands made in Moscow. Goodman reported that the Soviets, in light of Svoboda's intransigence, then flew Dubcek, Smrkovsky, Cernik, and Kriegel to Moscow from their internment facility in Czechoslovakia.

In the negotiations which followed, so intense was the pressure on Czech officials that at one point Brezhnev threatened "absorption of Czechoslovakia into the Soviet Union, and the destruction of the 14 million inhabitants of Czechoslovakia."[196] Brezhnev's conduct throughout the negotiations was characterized by brutal attempts to extract concessions by threats and blackmail. "We have already got the better of other little nations, so why not yours too."[197] According to Smrkovsky, however, Brezhnev seemed to be less interested in investigating who was "personally responsible for the situation we were in," because "one might address it forever,"[198] and more interested in negotiating a political compromise. The negotiations, as in the prior bilateral negotiations at Cierna, were conducted by two bargaining teams of four -- the Soviets represented by Brezhnev, Suslov, Kosygin, and Svoboda.[199]

---

[193] *Id*.
[194] *See* R. Goodman, *The Invasion of Czechoslovakia: 1968*, 4 INT'L LAW. 42, 58 (1969). Professor Goodman explained that on August 21, Soviet troops entered the Central Committee Building and seized Dubcek, National Assembly President Smrkovsky, and Central Committee member Kriegel. Premier Cernik was arrested at his office, handcuffed, and -- like the others -- driven by armored car to an internment area. Treatment was so harsh during the ensuing period of internment that Premier Cernik "feared for (his) life and that of (his) comrades." *See also* Tad Szulc, *An Account of First Seven Days of the Soviet-Led Intervention in Czechoslovakia*, N.Y. TIMES, Sep. 2, 1978, at 6, col. 4.
[195] Szulc, *supra* note 194, at col. 4.
[196] Goodman, *supra* note 194, at 58.
[197] TIGRID, *supra* note 171, at 114.
[198] *Id.* at 219.
[199] VALENTA, *supra* note 142, at 151.

The Moscow Protocol which emerged from the August 23-26 negotiations consisted of 16 articles in a somewhat ambiguous text.[200] Soviet commitments in the Protocol were formulated as positive declarations: e.g., Moscow promised that Soviet troops would not interfere in internal Czech affairs, and that cooperation between the U.S.S.R. and Czechoslovakia would continue on the basis of "mutual respect and equality." These formulations initially led some members of the CCP leadership, as well as some groups of the population, to believe that genuine compromise had been reached.[201]

There was much more in the Protocol and in the communique which followed, however, which could only cause severe misgivings for the Czechs. The passages of the Protocol referring to controls over the communications media, investigation of the activities of Czech government leaders who were abroad at the time of the intervention, and the probation of Party members who had been unfaithful to "the principles of proletarian internationalism" could only create great concern for the reformists. Additionally, the Protocol foresaw the establishment of a juridical basis for the presence of Soviet troops on Czech territory through a future treaty between the U.S.S.R. and Czechoslovakia,[202] much the same as the one orchestrated with the Hungarians in 1957 to justify the continued occupation of Budapest.

---

[200] Text of PROTOCOL in TIGRID, s*upra* note 171, at 210-14. In the PROTOCOL, the Soviet Union expressed its agreement to the continuation of Czech policies based upon the CPCS Central Committee resolutions of January and May 1968. This statement was the source of many false hopes in Czechoslovakia, for it was interpreted as Soviet approval of the post-January line absent some of its more extreme aspects. In fact, however, the reference to the January resolution signified only that the Soviets recognized the finality of Novotny's demotion from his post as First Secretary of the CPCS and were not counting on his return to public life. As for the resolution of the May Plenum, the Soviets had good reason to approve it, since it had called attention to the danger of "rightwing and anti-socialist" forces in Czechoslovakia, thereby buttressing Moscow's claims about the threat to socialism in that country. Possibly the Soviets calculated this item of the resolution could be used as the basis for a future Czech admission that the existence of counterrevolution had justified the Soviet intervention. Significantly, the PROTOCOL failed to mention the April Plenum of the CC-CPCS which had formulated the basic principles of post-January policies, approved the Action Program of the Party, and decided on important appointments in the Party and government (including the election of Josef Smrkovsky and Dr. Kriegel to the Party Presidium and the designation of Smrkovsky as Chairman of the National Assembly, Cernik as Premier, Kriegel as Chairman of the National Front, and Ota Sik as Deputy Premier).

[201] Jan Provaznik, *The Politics of Retrenchment*, 18 PROBLEMS OF COMMUNISM, No. 4-5, July-Aug/Sep-Oct 1969, at 4.

[202] For a detailed discussion of the Protocol, *see* Provaznik, *supra* note 201. Provaznik explains that certain personnel changes were also agreed upon in Moscow, and that resignations followed in due course. These changes included the removal of Dr. Kriegel from the Party Presidium and the Chairmanship of the National Front, of Ota Sik as Deputy Premier, Josef Pavel as Minister of Interior, Jiri Hajek as Foreign Minister, Zdenck Hejzlar as Director of Czech Radio, and Jiri Pelika as Director of Czech Television.

Aside from the political aspects of the negotiations and the protocol which followed, the intervention resulted in severe restrictions upon the Czech people.[203] The Warsaw Pact forces seized all media facilities within the country and imposed strict censorship. While there was no open Czech resistance to the invasion in light of overwhelming odds, some seventy individuals died in consequence of the intervention.[204] Soviet-inspired trials were initiated against "counter-revolutionary elements" and Czech educators were forced to preach "a more favorable attitude toward the Soviet Union."[205] In the economic sphere, the Soviet invaders forced the Czech government to abandon plans which would have increased worker participation in factory management.[206] But if the intervention tore the country politically, it united the Czech and Slovak factions emotionally. Provaznik wrote in 1969:

> This, then, was the situation in the wake of the invasion: The CPCS Presidium had rejected the occupation in its proclamation adopted on the night of August 20-21. All other constitutional organs and social organizations had

---

[203] Several legislative measures passed by the Czech National Assembly in the Fall of 1968 illustrate the extent to which the Moscow agreements restricted Czechoslovak political independence and limited the policy alternatives open to the Czech leaders. A bill reinstating censorship gave the relevant "Office for Press and Information" the right directly or through authorized persons to prevent publication in the periodical press or other mass information media of information containing facts at variance with the vital interests of the domestic or foreign policy of the State. A "temporary measure to strengthen public order" authorized the Government to "dissolve" organizational meetings if a meeting might disturb "important state interests," or ran "counter to the law," or "was directed against the socialist order," or would "in any other way threaten public order."

Instruction No. 1 for press, radio and television also revealed the degree of force used by the then-Soviet Union during the Moscow negotiations and, at the same time, its intolerance of any publicity of its coercive techniques. This instruction, which Bratislava Pravda reprinted from the weekly POLITIKA, read in part:

> On the basis of the conclusions of the Moscow talks, the Government is laying down the following obligatory guidelines for directing the content of press, radio and television:
> 1. Not to publish anything that could be taken as criticism of the Soviet Union, the Polish People's Republic, the GDR, the Bulgarian People's Republic, the Hungarian People's Republic, or the communist parties in these countries.
> 2. Not to publish information and articles attacking the foreign military units on the territory of our state and causing conflicts and action against them.
> 3. Not to use the terms occupation and occupiers.

[204] Goodman, *supra* note 194, at 59.
[205] Clyde H. Farnsworth, *Soviet Warning on Czech Schools*, N.Y. TIMES, Oct. 13, 1968, at 1, col. 3.
[206] Goodman, *supra* note 194, at 60.

> categorically condemned the military intervention. The population stood united against the occupation forces. The foreign armies in Czechoslovakia had run up against a cold wall of silence and contempt.[207]

G. The Soviet Rationale

The Soviet rationale in defense of intervention was preceded, not surprisingly, by a claim that no justification was necessary because this was a matter within Czechoslovakia's domestic jurisdiction. As it had in 1956, the Soviet Union even expressed its vigorous opposition to consideration of the Czech situation in the Security Council since, it argued, Article 2(7) of the Charter precluded U.N. involvement in the domestic affairs of Czechoslovakia.[208] When pressed further by the United Nations and by public opinion in all sectors of the world community, the Soviets expressed a multiple rationale, touching on all aspects of permissible coercion, thus attempting a frontal attack in areas where it had suffered criticism following its earlier intervention into Budapest.

The Soviet's initial justification claimed a request for assistance by Czechoslovakia, "that Party and Government leaders of the Czechoslovak Socialist Republic have asked the Soviet Union and other allied states to render the fraternal Czechoslovak people urgent assistance, including armed forces."[209] This claim insisted that Czechoslovak authorities invited the Warsaw Pact allies to assist in the suppression of "counterrevolutionary" forces in Czechoslovakia.[210] When this claim was denounced by Czech Foreign Minister Hajek before the Security Council,[211] the Soviets were quick to advance alternative arguments. The Soviets' U.N. representative then claimed the intervention was justified to counter a U.S.-sponsored espionage network which had been encouraging opposition to the government in Prague.[212] When no

---

[207] Provaznik, *supra* note 201, at 3. Provaznik was the pseudonym of a well known Czech writer and former member of the Czech communist party (now deceased) who left Prague to settle in Western Europe shortly after Hasak's assumption of power in 1969.

[208] U.N. MONTHLY CHRONICLE No. 8, at 47 (1968).

[209] TASS statement on military intervention quoted in *Staff Report of Subcommittee on National Security and International Operations of the Senate Committee on Government Operations*, 91st Cong., 1st Sess., in CZECHOSLOVAKIA AND THE BREZHNEV DOCTRINE 13 (Comm. Print 1969). [Hereinafter *SENATE REPORT ON BREZHNEV DOCTRINE*].

[210] *See* the TASS statement on military intervention printed in PRAVDA and IZVESTIA, Aug. 21, 1968, at 1, and *reported in* Goodman, *supra* note 194, at 61.

[211] On Aug. 24, 1968, Hajek told the Security Council that the invasion did not take place upon the request of the Czech government or of any other constitutional organ of the Czechoslovak Republic. U.N. Doc. S/P 1445, Aug. 24, 1968, at 96.

[212] The Soviet representative charged that the plans of these counterrevolutionary circles provided for "revolt" against the existing governments of the socialist countries, and for the infiltration of

credible evidence could be presented of such espionage, the thrust of the Soviet position shifted yet again to a rationale emphasizing the right of peoples to individual and collective self-defense.

The circumstances of this intervention led Moscow to advance a very new principle of legality, altering the traditional concept of self-determination.[213] As developed in greater detail later in this part, the Brezhnev Doctrine advanced "the unsettling proposition that under the law of peaceful coexistence, force may validly be used against both capitalist and socialist states whenever it is deemed necessary in the interest of the Soviet Union."[214]

H. Soviet Legal Justification and Socialist International Law

The legal issues flowing from the articulation of the Brezhnev Doctrine as part of socialist international law following the August 20 intervention were as important with regard to the framework in which they were presented as they were significant for the legal commitments they arguably violated. Unlike the less blatant "Fraternal Assistance" formulation advanced in 1956, the "Brezhnev Doctrine" presented a more ambitious undertaking. Analogous to the earlier Monroe and Truman Doctrines of the United States as statements of policy intention, the Brezhnev Doctrine also included a supporting legal rationale.

States both within the Warsaw Pact and without found themselves questioning how the self-serving flexibility inherent in the Soviet law of peaceful coexistence (which the Brezhnev Doctrine explained) could be reconciled with the Soviet's international commitments under the U.N. Charter, especially those related to non-intervention, self-determination, and sovereignty. Of equal concern was the Soviet claim that the Czech incursion had a non-interventionist character because it served the inherently progressive cause of socialism. A review of the development of the Soviet law of peaceful coexistence is instructive in understanding its application in 1968 through the Brezhnev Doctrine.

Peaceful coexistence was initially conceived during the post-revolutionary period as a shield for a weak Soviet Union to defend itself against

---

opposition forces into the communist parties of the socialist countries, their security organs, the military, and other governmental institutions. U.N. MONTHLY CHRONICLE, No. 8, at 59 (1968).

[213] The "Brezhnev Doctrine" expanded the concept of lawful intervention to the defense of the entire socialist community. Brezhnev declared that the victory of the socialist order can be regarded as final "only if the party indefatigably strengthens the defense of the country . . . if it maintains itself and propagates amidst the people vigilance with regard to the class enemy." Speech by Leonid Brezhnev, General Secretary of the Soviet Communist Party, at the 5th Congress of the Polish United Workers' Party, Warsaw, Nov. 12, 1968.

[214] Ramundo, *supra* note 119, at 973.

a hostile front while consolidating its control.[215] Very little was heard of this construct during the post-World War II period of expansion. Krushchev resurrected the doctrine as a measure of active strength rather than as a safeguard for Soviet security.[216] Soviet leadership under Krushchev was more ambitious in doctrinal formulation than its predecessors, for it sought affirmatively to restructure the international legal order in the Soviet interest rather than merely lessen the international legal constraints upon the foreign policy of the Soviet Union.[217]

With legal theorist Tunkin providing the vehicle, socialist legal philosophy developed into a valuable but flexible framework from which regime policies could be explained and furthered.[218] Where previously the law of coexistence related only to the protection of socialism from external pressures, Krushchev championed the restructuring of the doctrine to further the interests of the then-Soviet Union in its relationships with socialist states as well. Dr. Ramundo explained that any review of the law of coexistence thereafter had to consider both the principle of socialist internationalism and the principle of peaceful coexistence. He stated in 1964:

> The principle of peaceful coexistence applies only to relationships with non-Socialist states and takes account of Soviet needs in waging the international class struggle with capitalist states. It outlaws nuclear warfare, a principle Soviet concern motivating the policy of coexistence, but otherwise permits revolutionary struggle and competition between the two camps. The principle of socialist internationalism governs relationships within the socialist camp and provides a legal cover for Soviet hegemony by requiring that socialist states structure their domestic and foreign policies with special deference to the needs of the camp as a whole. In effect, the principle of socialist internationalism licenses ordering of socialist camp relationships. Thus, the law of peaceful coexistence is structured to further the interests of the Soviet Union in its relationships both with capitalist and socialist states.[219]

---

[215] Alwyn V. Freeman, *Some Aspects of Soviet Influence on International Law*, 62 AM. J. INT'L LAW 713 (1968).
[216] *Id*.
[217] Leon Lipson, *Peaceful Coexistence*, 29 LAW AND CONTEMP. PROB. 879-80 (1964); *see also* BERNARD A. RAMUNDO, PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM 5-12 (1967).
[218] This theme pervaded Tunkin's lead article in the first yearbook published by the Soviet Society of International Law as the SOVIET YEARBOOK OF INTERNATIONAL LAW, 1959.
[219] Ramundo, *supra* note 119, at 973.

These flexible component principles had to be carefully understood if one were to demonstrate that Soviet claims in then-Czechoslovakia were inherently contradictory and that they had severely negative implications for the further development of international law and minimum world order. To fully comprehend the legal implications of the doctrine, knowledge of the ideological evolution of peaceful coexistence was necessary. This required an understanding that peaceful coexistence combined the announced goals of Soviet foreign policy, the juridical principles of Soviet international law, and an ideological sense of socialist development.

Lenin's concept of peaceful coexistence, as first propounded in 1917 during the revolution, contemplated a period when the 'revolutionary' socialist state and the capitalist states would exist in precarious non-violence side-by-side.[220] Contrary to Leon Trotsky's view of continuing revolution which left no opportunity for peaceful relations, Lenin saw peaceful coexistence as an objective transitional law which could be applied worldwide in the evolutionary period from capitalism through socialism to communism. Historical conditions formed the basis of Lenin's belief. He compared the isolation of the Soviet Union among the major Western powers to that of the French revolutionary government at the close of the eighteenth century. He recognized that if the new communist nation was to survive, greater emphasis had to be placed upon peaceful coexistence than upon the inevitability of war between the two opposing social systems.[221]

Lenin believed that during this era of coexistence, the socialist system could demonstrate its superiority over capitalism through peaceful economic competition. He stated: "We shall prove that we are stronger. We must show the significance of communism in practice, by example . . . . We are now exercising our main influence on the international revolution through our economic policy."[222]

In reality, however, the Soviet foreign policy of peaceful coexistence was more the product of Soviet weakness than of Soviet strength. Like Lenin, Josef Stalin recognized that this policy provided a measure of security for a weak and isolated Russia. Stalin implied this weakness when, in December 1925, he addressed the Fourteenth Congress of the Communist Party of the Soviet Union: "That which we once believed to be a short respite after the war

---

[220] *See* VLADIMIR I. LENIN, 23 LENIN'S COLLECTED WORKS(LCW) 79 (1969) and 21 LCW 342 (1969).
[221] VLADIMIR I. LENIN, 27 LCW 71 (1969).
[222] *See* G. TRUSH, SOVIET FOREIGN POLICY 108 (1970) (quoting Lenin's address to the Soviet Communist Party of December 6, 1920).

has turned out to be a whole period of respite. Hence a certain balance of power, a certain period of 'peaceful coexistence' between the world of the bourgeoisie and the world of the proletariat."[223]

Following World War II, a Soviet perception of 'capitalist encirclement' flourished in Moscow, and Stalin encouraged this belief in order to gain acceptance for the sacrifices needed to implement his rapid industrialization and agricultural collectivization programs.[224]

After Stalin's death in 1953, Nikita Khrushchev argued that espousing the theory of 'capitalist encirclement' was detrimental to Soviet efforts in the Third World.[225] Because the 'capitalist encirclement' theory by implication pitted the entire non-socialist world against Moscow, overtures directed toward those non-aligned developing countries without a strong socialist orientation required a more flexible doctrine.[226] That doctrine, of course, was a revitalized law of peaceful coexistence. The principles shaping this doctrine were first clearly articulated in 1954 in an agreement concerning Tibet between the Chinese Communists and India. That agreement, the PANCHA SHILA, listed its five primary principles as mutual respect for territorial integrity and sovereignty, nonaggression, non-interference in internal affairs, equality and mutual advantage, and peaceful coexistence.[227]

The following year, in 1955, the Soviet Union advocated similar principles at the Conference in Bandung and in its final declaration.[228] In 1962, G.I. Tunkin, the prominent legal scholar and legal advisor to the Soviet Foreign Office, expressed the view that the principle of peaceful coexistence had achieved the status of other important, closely related principles of international law. He stated:

> It [peaceful coexistence] expresses in general form the content of these principles but does not constitute a simple summary of them. Enriching the future development of international law, it at the same time contains the potential for a whole new

---

[223] *Quoted in* A. LOHDI, THE SOVIET CONCEPT OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 32 (1974) (unpublished manuscript, on file with the author).

[224] *See* S. RUBENSTEIN, FOREIGN POLICY OF THE SOVIET UNION 12 (1971) (explaining the theory of 'capitalist encirclement' perceived a fear of an imperialist attack against the Soviet Union as an apparent contradiction). Stalin stated shortly after the end of World War II that capitalism had suffered grievous wounds, politically and economically, as a result of the war and therefore was not likely to attack the Soviet Union. *Id*.

[225] *Peaceful Coexistence*, SOVIET LIFE (Apr. 1974) at 4-5.

[226] *Id*.

[227] Leon Lipson, *Peaceful Coexistence*, 29 LAW AND CONTEMP. PROB. 871 (1964). *See also* Ramundo, *supra* note 119, at 966.

[228] *See discussion* of the Bandung Declaration in Part II, *infra.*

> program for the progressive development of international law, and of many new principles and norms which are dictated by life and can be logically deduced from the principle of coexistence but which are still not generally recognized principles of international law.[229]

By keeping the concept of peaceful coexistence somewhat general and open-ended, legal support for new policy decisions with respect to the West simply required a restatement of these 'principles.'[230]

Unfortunately, even the flexibility of the doctrine of peaceful coexistence did not provide justification for Soviet intervention within the Soviet sphere of influence. Because the Soviets took the view that all norms which are inconsistent with peaceful coexistence had no juridical force,[231] the doctrine had to be carefully circumscribed to apply only to those states outside the Soviets' claimed sphere of influence. Within the Warsaw Pact, control of the member states was maintained under the appealing rubric of proletarian/socialist internationalism. This doctrine required that national interests, as determined by the member states, were subordinated to the more important international interests of the whole socialist community, as determined by the then-Soviet Union.

Proletarian internationalism emerged as a significant legal rationale for military intervention only after the invasion of Budapest in 1956. Prior to 1956, while the doctrine formed the underpinning of the theoretical subordination of national will to that of the international socialist movement, it

---

[229] G.I. Tunkin, *The Principle of Peaceful Coexistence: The General Line of the Foreign Policy of the CPSU and the Soviet State*, S.G.I.P. No. 7 (1969), at 32, *quoted in* BERNARD A. RAMUNDO, PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM 28 (1967).

[230] RAMUNDO, *supra* note 229, at 29, fn. 84. Ramundo explains that the rejection of aggressive war made possible the conversion of the political need for disarmament into a legal norm. Other principles or legal norms claimed to be part of the law of coexistence included peaceful settlement of disputes, self-determination of nations, prohibition of propaganda for war, illegality of regional and collective security arrangements not compatible with the Charter of the United Nations (e.g., NATO and OAS), the illegality of the arms race, unity of action and unanimity of the permanent members of the Security Council in maintaining peace and security, and active collaboration of the states of the two systems to eliminate all that interferes with peaceful coexistence. G.P. ZADOZOROZHNYI, PEACEFUL COEXISTENCE AND INTERNATION LAW 7 (1964), *as cited* in RAMUNDO, *supra* note 229, at 33.

[231] Western international law scholars universally viewed the law of peaceful coexistence as self-serving and so flexible as to render it unrecognizable as law. They properly viewed the doctrine as a Soviet foreign policy instrument designed, developed, and maintained solely to promote Soviet interests, not to ensure minimum world order. *See* Ivo LaPenna, *The Legal Aspects and Political Significance of the Soviet Concept of Co-Eexistence*, 12 INT'L AND COMP. L.Q. 737 (1963) at 762-65.

had never been advanced as justification for 'correcting' deficiencies within the socialist alliance by force.

The founders of the communist movement viewed the emancipation of the working class from the overbearing capitalists as a task international in scope. In fact, Marx and Engel regarded the betrayal of socialist internationalism as betrayal of the cause of socialism.[232] Lenin applied these principles vigorously in the post-revolutionary period.[233] He explained: "The bourgeoisie always places its national demands in the forefront, and does so in categorical fashion. With the proletariat, however, these demands are subordinated to the interests of the class struggle."[234]

The occupation of Budapest in 1956 and the Western criticism it evoked demonstrated the need for a new doctrinal formulation by the Soviet Union. The new approach would need to authorize freedom of action within the socialist collective to ensure the supremacy of socialist principles while at the same time preventing justification for a resort to force and intervention by outsiders against the Warsaw Pact membership or by the Western states against any non-aligned state.

The model for this legal formulation had been provided by the United States in Guatemala in 1954. Prior to the June revolution against the communist-oriented President Jacobo Arbenz Guzman,[235] the United States had claimed that whenever a threat from an alien ideology (in this case communism) appeared within the American hemisphere, this constituted aggression against the entire Inter-American system, justifying individual and collective measures.[236]

---

[232] I MARX AND ENGELS SELECTED WORKS 384-86 (1962).

[233] If the proletariat under Lenin favored the merging of nations, why, it was reasonable to ask, did it recognize their right to independence. Because, according to Lenin, it was only through the fulfillment of national aspiration that 'national divisions' are overcome. *See* A. LOHDI, *supra* note 223, at 98.

[234] 20 LENIN'S COLLECTED WORKS (LCW) 410 (1969).

[235] *See* N.Y. TIMES, Apr. 28, 1966, at 28, col. 1 (series on CIA operations). The TIMES series contained overwhelming evidence of CIA complicity in engineering the revolution against the leftist regime in Guatemala.

[236] *See* R. Bowdler, *Report of the Tenth Inter-American Conference*, 30 DEPT OF STATE BULL. 634 (1954). Bowdler explains that the U.S. rationale at the conference entailed two steps: Communism is aggression; therefore an attack on Guatemala is self-defense if it saves the Guatemalan people from their own leftist regime. Professor Thomas Franck subsequently placed this kind of legal reasoning in a more realistic perspective:

> This U.S.-initiated declaration asserted a new principle in postwar international relations: a regional organization may designate a particular sociopolitical ideology as exclusively indigenous to the region and may act collectively in self-defense of ideological conformity. It should not have been

Following this U.S. lead, the Soviets discarded the term 'proletarian internationalism' in the early 1960s[237] and renamed it 'socialist internationalism' in order to justify resort to force, if necessary, within the socialist community without providing any such justification for the use of force and justification by the West.[238] Claiming that "state sovereignty must be exercised with consideration of the general interests of the entire socialist camp as well as the national interest,"[239] a new and more limited definition of sovereignty, equality of states, and non-interference was advanced by the socialist community. Shurshalov justified this limitation as follows:

> The peoples sovereignty of the Socialist countries does not know that isolation and ethnic exclusivity of individual countries because it permits, in necessary circumstances, the subordination of the interests of an individual country to the more important international interests of the entire socialist commonwealth. . . . [S]tate sovereignty must be exercised with consideration of the general interests of the entire socialist camp as well as the national interest.[240]

In socialist internationalism, Shurshalov continued:

> The principle of non-intervention is harmoniously combined with the requirements of socialist internationalism. The independence of states and nations in the socialist commonwealth is dialectically connected with fraternal mutual assistance, socialist international division of labor, broad exchange of experience in economic and state organization, the coordination of national economic plans and specialization in production.
>
> [Socialist internationalism] is a correct combination of the national interests of the individual countries with the

---

> presumed that such a principle could be insisted upon by our regional organization without also being insisted upon by that of the Soviets.

Franck & Weisband, *supra* note 187.

[237] *See, e.g.*, V. M. Shurshalov, *International Legal Principles of the Collaboration of Socialist States*, S.G.I.P. No. 7 (1962) at 95; *See also* E.T. Usenko, *The Basic International Legal Principles of the Collaboration of Socialist States*, S.G.I.P. No. 3 (1961).

[238] Ramundo, *supra* note 119, at 969. Ramundo explains that for this double legal standard to succeed, the right of self-determination among the socialist states had to be effectively limited in the interests of socialism—and for the benefit of the Soviet Union. *Id*.

[239] V. M. Shurshalov, *supra* note 237, *quoted in* RAMUNDO, *supra* note 229, at 34.

[240] *Quoted in* RAMUNDO, *supra* note 229, at 104.

> international interests of the entire socialist camp and the observance of the strict independence of the individual countries coupled with the preservation of the indissoluble unity and monolithic nature of the commonwealth of socialist states.[241]

When one considers that the Soviets defined intervention to exclude interference within the socialist community,[242] it is easy to understand how its international legal principles could accommodate the situation in Prague.

I. Socialist Internationalism Applied to the Intervention in Czechoslovakia

Despite the participation of five Warsaw Pact states in the invasion force, the denunciation of the intervention by World Communist Parties and leaders from outside the Warsaw Pact was almost universal.[243] Reacting quickly to the criticism, PRAVDA published an article on September 25, 1968 entitled, "Sovereignty and the International Obligations of Socialist Countries in Czechoslovakia."[244] This article, authored by propagandist Sergei Kovolev, provided a legal and ideological defense to rebut the international claims. He wrote:

> The assertions, held in some places, that the action of the five socialist countries runs counter to the Marxist-Leninist principles of sovereignty and the rights of nations to self-determination, must be condemned.
>
> The groundlessness of such reasoning results primarily from the fact that it is based on an abstract, non-class approach to the question of sovereignty and the rights of nations to self-determination.[245]

---

[241] *Quoted in id*., *supra* note 230, at 184.
[242] The Soviet Dictionary of Political Terms defined 'intervention' as follows:
Intervention [is] the armed invasion or interference of one or several capitalist states in the internal affairs of another state aimed at the suppression of a revolution, seizure of territory, acquisition of special privileges, establishing domination, etc.
Quoted in RAMUNDO, *supra* note 229 at 96.
[243] Reaction ranged from a mild rebuke by the Mexican Communist Party, that "[w]e believe that this military intervention in Socialist Czechoslovakia will harm the cause of Communism in the world," to the vigorous denunciation by the Chinese Communist Party, that "[i]nternational dictatorship and limited sovereignty are the gangster theories of Soviet revisionist socialist imperialism." *SENATE REPORT ON BREZHNEV DOCTRINE*, *supra* note 209 at 37, 48.
[244] *Reprinted in* 7 I.L.M. 1323 (1968) [hereinafter *PRAVDA Justification*].
[245] *Id.*

The article proceeded to remind the world of the Marxist-Leninist principle that two opposing social systems exist and that "each man must choose between joining our side or the other side." Kovolev then stated:

> Naturally the communists of the fraternal countries could not allow the socialist state to be inactive in the name of an abstractly understood sovereignty when they saw that the country stood in peril of anti-socialist degeneration. . . . Formal observance of the freedom of self-determination of a nation in the concrete situation that arose in Czechoslovakia would mean freedom of 'self-determination' not of the popular masses, the working people, but of their enemies.[246]

The heart of the theory was then unveiled:

> Those who speak about the 'illegal actions' of the allied socialist countries in Czechoslovakia forget that in a class society there are not, and there can not be non-class laws. Laws and legal norms are subjected to the laws of the class struggle, the laws of social development. These laws are clearly formulated in the in the Marxist-Leninist teaching, in the documents jointly adopted by the Communist and Workers' Parties. Formal juridical reasoning must not overshadow a class approach to the matter. In doing so, one loses the only correct class criterion in assessing legal norms, and begins to measure events with the yardstick of bourgeois law.[247]

One week after publication of the PRAVDA legal justification, Andre Gromyko, in a speech at the United Nations, further developed the application of socialist internationalism in Czechoslovakia.[248] It was for Leonid Brezhnev,

---

[246] *Id*.
[247] *Id* .
[248] *SENATE REPORT ON BREZHNEV DOCTRINE*, *supra* note 209 at 18. In the October 3 speech at the U.N., Gromyko emphasized:

> The Soviet Union considers it necessary to state, from this tribune too, that the Socialist states cannot and will not allow the kind of situation in which the vital interests of socialism are infringed upon [or] encroachments are made upon the inviolability of the frontiers of the socialist commonwealth and so *ipso facto* upon the foundations of the international peace.

Id. Gromyko further stated that the Socialist commonwealth had:

however, in a speech before the Fifth Congress of the Polish United Workers, to completely unmask the Soviet national interest orientation of the law of coexistence. In what became known as the 'Brezhnev Doctrine,' the General Secretary claimed that the force employed in the occupation of Czechoslovakia was directed against the anti-socialist elements in the country and not against the people themselves, whose real interests, he claimed, were protected by the Soviet-led intervention.[249] This proposition was a particularization of the broader formulation that any action serving the cause of progress as defined by the Soviet Union was legal. Franck and Weisband, in fact, stated at the time that the Brezhnev Doctrine implied a number of legal propositions which went far beyond justification of the invasion of Prague. They claimed that for the first time, the Soviets were admitting by the defense of their activities in Prague, the following principles of Moscow-determined intra-bloc relationships:

a. A member nation could never withdraw from the community's jurisdiction.
b. The community could impose behavioral norms on its members in domestic and foreign policy.
c. Whether a member of the community was fulfilling these normative obligations or not was determined by the member alone, but rather by the other members of the community.
d. If the other members determined that one member was derelict in its duties, they could use force to alter the policies and, if necessary, the government of the

---

> Their own vital interests, their own obligations including those of safeguarding their mutual security and their own socialist principles of mutual relations based on fraternal assistance, solidarity, and internationalism. This commonwealth constitutes an inseparable entity cemented by unbreakable ties such as history has never known.

Id.

[249] *Id*. at 22-23. In the November 12, 1968, speech, Brezhnev announced:

> [W]hen the internal and external forces hostile to socialism seek to revert the development of any socialist country toward the restoration of the capitalist order, when a threat to the cause of socialism in that country, a threat to the security of the socialist camp as a whole emerges, this is no longer only a problem of the people of that country but also a common problem [and] concern for all socialist states. It goes without saying that such an action as military aid to a fraternal country to cut short the threat to the socialist order is an extra-ordinary enforced step, it can be sparked off only by direct orders of the enemies of socialism inside the country and beyond its borders, actions creating a threat to the common interests of the camp of socialism.

Id.

> delinquent. Such use of force was not aggression but collective self defense, an action by which the community defended its collective integrity against the encroachment of an alien ideology.
>
> e. Any socio-economic or political doctrine or system differing from that of the community was *ipso facto* alien, and its espousal, even by citizens and governments of a member of the community, constituted foreign subversion of and aggression against the community, in response to which collective force could be used in self-defense.
>
> f. The territory of a member state could be invaded by the armies of the other states acting collectively under the treaty of the community in response to a summons by any person the community designated as loyalist 'leader' of the invaded state, even though this was not recognized as the legal government of that state even by the other members of the community.[250]

This self-serving Soviet approach to international law and international politics emphasized that while socialist states might possess sovereignty, they were not able to exercise the 'independence' of sovereignty, as could non-aligned states. Injury to the socialist movement was used by the Soviets to justify this 'restriction.'[251] In the years following the invasion of Czechoslovakia, the Soviets made clear that the form or variety of socialism, to be legitimized, would be solely determined by Moscow.[252] For this, the Soviets

---

[250] Franck & Weisband, *supra* note 187 at 987.

[251] Ramundo called this approach to relations within the socialist community a "convenient, cosmetic device." He explained that it provided a "license for Soviet freedom of action in . . . relations with members of the . . . socialist camp. *Supra* note 228 at 36.

[252] The first real test for the Brezhnev Doctrine after Czechoslovakia came in Poland on December 17, 1970. Serious rioting had broken out in Gdansk and many other Polish towns against the Gomulka regime. The Polish Government declared a state of emergency and blamed 'adventurers and instigators' for exploiting the workers to protest against high food prices. *See* ROBIN A. REMINGTON, THE WARSAW PACT: CASE STUDIES IN COMMUNIST CONFLICT RESOLUTION 76 (1971). The Soviets watched the situation deteriorate and, as a result, the Gomulka regime fell with Gierek taking over. The Soviets then chose to save socialism in Poland with 'hard currency' and not intervention. It is probably correct to say that the decision-makers in Moscow had learned from the Czech invasion. It had split the international communist movement, been bitterly criticized by the West, and made lesser developed countries wary of too close a relationship with the then-Soviet Union.

In Afghanistan in 1978 and 1979, neither hard currency nor technical assistance to the brutal Taraki and Amin regimes could stem a growing revolt against a socialist government propped up by the Soviets. By the first of December 1979, twenty two of the twenty eight provinces were in rebel hands and the Soviets intervened. In extending the Brezhnev Doctrine for the first time to a socialist nation outside the Warsaw Pact, the Soviets had determined that the bitter criticism they had

came under bitter attack by nearly every communist party in the West, as well as socialist states like Romania, then-Yugoslavia and Albania. China denounced the Soviet invasion of Czechoslovakia as "fascist and imperialist" and further condemned Dubczek for failing to lead the Czechs in armed struggle.[253]

The concern of the non-socialist community focused upon the fact that the Brezhnev Doctrine sought to establish new rules of international conduct that violated existing international law and custom, that introduced a dangerous new element of unpredictability into international relations, and that sought to create an authoritarian bi-polar system repugnant to traditional concepts of national sovereignty and freedom. It is to these traditional concepts that we now turn.

J. The Brezhnev Doctrine in the Context of Contemporary International Law

Traditional concepts concerning the legality of the use of force by one nation against another are based upon twin realizations: First, that coercive response is often justified from the standpoint of 'minimum world order,'[254] and second, that all acts of coercion must operate under the constraint of international law. It is significant to note that the then-Soviet Union, in seeking to justify the application of force to support a policy determination in its interstate affairs in 1968, turned to international law to explain its actions. The Soviet claims, however, merely highlighted the difficulty during the Cold War of arriving at consensus concerning appropriate standards of international law, as between the Soviet Union and the Warsaw Pact states, and the world community generally.[255]

---

received in Czechoslovakia was an acceptable cost for maintaining control in Afghanistan. *See infra* Part IV.

From mid-1981 through early 1982, the mere threat the Soviets might exercise their license to intervene under the Brezhnev doctrine resulted in a Polish Government crackdown against Solidarity, a trade-labor movement demanding a greater voice in the nation's economic decision-making process.

[253] *SENATE REPORT ON BREZHNEV DOCTRINE*, *supra* note 209 at 37, 48.

[254] The intervention in Cuba by the United States in 1962 in what has been called the Cuban Missile Crisis is one such example. *See* Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFFAIRS 550 (1963).

[255] *See* EUGENE V. ROSTOW, LAW, POWER AND THE PURSUIT OF PEACE (1968) and GRENVILLE CLARK & LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW (1958). While ostensibly urging law as a means of producing world order, these works are dramatically opposed in their methods of application. The former advocates a balance of power while the latter proposes a more internationalist approach.

Similarly, the related customary principles of non-intervention, self-determination and sovereignty, as carefully formulated by the international community led by the Western nations, were neatly sidestepped by the Soviet Union in its claim that this law had no application to interactions among socialist states. By asserting that socialist states did not intervene within their own community but only render fraternal assistance, Moscow could argue that any popular uprising in a socialist state was presumed to be a counterrevolution. Professor Ramundo claims that the Soviets in 1968 then carried this rationale one step further:

> [T]he Soviets claim[ed] that such non-progressive uprisings, being counter-revolutionary, [were] not sanctioned by the principle of self-determination. Thus, the Soviets characterized the events in Czechoslovakia which led to the Soviet-led occupation as a counter-revolution contrary to the real interests of the Czech people and claimed that the Czech people's right of self-determination was not encroached upon.[256]

This was a clear attempt by the former Soviet Union to rewrite traditional concepts of international law with respect to permissible and impermissible coercion.[257] As an original member of the United Nations, the Soviet Union and its successor Russian Federation have accepted and are committed to its Charter. Those principles require, then and now, that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations."[258]

In 1967, the General Assembly had established a Special Committee on the question of defining aggression to clarify the lawful and unlawful means by which a state may take action to compel another state to respond in a particular manner.[259] While this Special Committee had not completed its work before the intervention in Prague, the Soviets themselves, in a 1969 draft proposal defining aggression, declared their actions in Czechoslovakia to be improper. Their draft proposal stated, in pertinent part:

---

[256] Bernard A. Ramundo, *Fraternal Assistance to Czechoslovakia: The Law of Fraternal Assistance Unmasked*, 4 J. L. AND ECON. DEV. (Spring 1969) at 21.

[257] The distinction between permissible and impermissible coercion is developed, comprehensively and with extraordinary insight, in MYRES MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961).

[258] *UN CHARTER*, *supra* note 95, Art. 2(3).

[259] The Special Committee on Aggression was established on December 18, 1967, by UNGA (GAOR) Res. 2330 (XXII). This resolution was printed in UN Doc. A/6988, Dec. 18, 1967.

> 1. Armed aggression (direct or indirect) is the use by a State, first, of armed force against another State contrary to the purposes, principles and provisions of the Charter of the United Nations.
>
> 2. In accordance with and without prejudice to the functions of the Security Council: . . .
>
> B. Any of the following acts, if committed by a State first, even without a declaration of war shall be considered an act of armed aggression: . . .
>
> 3. Invasion or attack by the armed forces of a State against the territory of another State, military occupation or annexation of the territory of another state or part thereof.[260]

Lest it be argued that this proposal represented a new found morality to be viewed prospectively only, the prior submissions of the Soviet Union bear scrutiny. In an attempt to provide a procedural mechanism whereby the League of Nations could implement the community consensus against aggression, the Soviet Union provided an even more enforceable standard than provided above. Its draft definition of aggression,[261] submitted to the Disarmament Conference of the League of Nations in 1933, made clear that an "aggressor" was that State which was the first to invade, bombard, or blockade a target state. Under the Soviet definition, armed attack was impermissible *per se* and could not be justified on the grounds that the target state repudiated its debts to the attacking state, infringed the privileges of the diplomatic representatives of that state, or illegally restricted the rights of the citizens of the attacking state.[262] Certainly, if an armed attack could not be justified under the rationale advanced by Moscow in 1933, then clearly a Soviet armed attack could hardly be justified if, as Soviet leaders claimed in 1968, the Czech government was merely restricting the rights of its own people by precluding the proper development of socialism.

While the Soviet Union was careful to define its actions in Prague as other than 'intervention,' the military movements of Pact forces would clearly meet the definition of 'intervention' provided by Professor William Bishop of

---

[260] Union of Soviet Socialist Republics, draft proposal on the question of defining aggression. UN Doc. A/AC134/L12, Feb 27, 1969, 1-3.

[261] *Reprinted in* J. STONE, AGGRESSION AND WORLD ORDER, 34-35 (1958). The former Soviet Union also concluded both bilateral and multilateral treaties prohibiting aggression. *See id*. at 212-13.

[262] *Id*. at 34-35.

the University of Michigan. He has defined this imprecise concept as a "forcible action . . . taken in the interference with the affairs of a State by another State, by several States or by a collectivity of States."[263] Brierly states that "it means dictatorial interference in the domestic or foreign affairs which impairs that State's independence."[264] Apart from these definitions, the United Nations Charter itself provides an international consensus concerning the impermissibility of armed interference in the affairs of a state except where absolutely required in self-defense. Article 2 (4) of the Charter requires that Members must "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State." That the coercive use of armed force is unlawful is clearly envisioned in the words "threat or use of force." This was emphasized in the report of the Rapporteur of Committee I to the Plenary Session in San Francisco when he stated that "the unilateral use of force or similar coercive measures is not authorized or admitted."[265]

The implicit declaration in the Brezhnev Doctrine that the socialist community had a special right to respond with force against a member unable or unwilling to redress a situation regarded by Moscow as a dereliction of the duties and norms of membership in the Pact ran counter to this Charter provision. In any conflict between a Charter provision and another provision of international law, however, the Charter controls.[266] Thus, the Brezhnev doctrine was clearly illegal.

Article 2, paragraph 7 is also pertinent: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the Charter." From this it is clear that what the United Nations could not do as a collective body, would be forbidden *a fortiori* to individual nations.[267]

---

[263] W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS (3RD ed. 1971).
[264] J. L. BRIERLY, THE LAW OF NATIONS 402 (6TH ed. 1963).
[265] Report of Rapporteur of Committee I to the Plenary Session, 6 U.N.C.I.O. 245, 247 (1945).
[266] *See UN CHARTER*, *supra* note 95, Article 103. While only obligations under other international agreements are mentioned, clearly customary international law must also yield to the Charter.
[267] Strangely enough, the Soviet view of their role in relation to this concept was that: "with regard to such a cardinal principle of international law as the principle of non-interference in the internal affairs of other states which had originated before the Soviet State came into existence, the latter has assumed the noble role of its guardian and of the champion of its strict observance." W. Masinovsky, *The Impact of Fifty Years of Soviet Theory and Practice on International Law*, 62 AM. SOC. INT'L PROC. 189, 193 (1968).

K. Soviet Claims Under the Law of Self-Defense

Absent the discredited moral and legal authority of the Brezhnev Doctrine, the only remaining legal authority available to Moscow was the justification afforded by Article 51 of the United Nations Charter. In the PRAVDA justification for this invasion issued on September 25, 1968, the Soviet Union contended for the first time that had Czech reformers prevailed, a resulting shift in the balance of power between the East and the West would have drastically affected the defensibility of the Soviet Union by removing the buffer then-Czechoslovakia represented between the Soviet Union and West Germany. To eliminate this threat, the argument continued, the Soviet Union and its allies exercised their inherent right of self-defense and invaded Prague.[268]

Prior to this claim, the Soviet Union had publicly offered only the less legally tenable claim that the Warsaw Pact invaders were defending Czechoslovakia against "external forces hostile to socialism" which were acting "in collusion" with "counter-revolutionary forces" in Czechoslovakia.[269] The subsequent self-defense claim concerning the threatened alteration in the European balance likewise found little international support.

Customary international law has never denied the right to self-defense. These were first clearly stated in *The Caroline*,[270] where it was held that recourse to self-defense, and anticipatory self-defense, was only permitted when the necessity was "instant , overwhelming, leaving no choice of means and no moment for deliberation." U.S. Secretary of State Daniel Webster's statement of clarification is no less significant. Webster claimed that actions taken in self-defense must involve "nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept closely within it."[271] Professor Goodman has stated that "[A]n anticipatory right of self-defense did exist in traditional international law, but actions in self-defense had to be in necessary response to actual coercion, and had to be reasonably related to the scope and degree of force employed by the attacking state."[272] These dual requirements of necessity and proportionality are as

---

[268] *PRAVDA Justification*, *supra* note 244. For a review of acceptable self-defense claims, s*ee generally*, 5 MARJORIE M. WHITEMAN, INTERNATIONAL LAW 971-1175 (1965); DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958); and Ian Brownlie, *The Use of Force in Self-Defense*, 1961 BRIT. Y.B. INT'L L. 183.

[269] *See* TASS statement translated in XX (34) C.D.S.P. at 3. (1968).

[270] 2 J. MOORE, INTERNATIONAL LAW 409-74 (1906); *see also* R. Jennings, *The Caroline and MacCleod Cases*, 32 AM. J. INT'L L. 82 (1938).

[271] *Quoted in* H. W. BRIGGS, THE LAW OF NATIONS 985 (1952).

[272] Goodman, *supra* note 194 at 64, *citing* BOWETT, *supra* note 268, at 269 and Brownlie, *supra* note 268, at 261.

applicable to pre-emptive acts of self-defense in response to an imminent threat as in response to armed attack.

The claims of the Soviet Union and its allies in 1968 simply failed to satisfy these legal requirements. The imminent threat of armed attack implicit in the concept of necessity was shown neither in the claims concerning "counterrevolutionary forces" and "hidden arms caches" nor in claims concerning the possible future threat to the Soviet Union and the Pact from then-West Germany should Czechoslovakia have become neutral. With respect to the former, Czech authorities themselves denied the existence of armed counter-revolutionaries and explained the so-called "hidden arms caches" as those belonging to their own People's Militia.[273]

The latter claim concerning a possible or potential threat to the Soviet Union should then-Czechoslovakia be lost as a buffer between Russia and then-West Germany was equally untenable. A speculative threat is far too remote to support the requirement of "imminence" included within the standard of 'necessity.' As noted earlier in this part, Czech actions prior to intervention had never once indicated withdrawal from the community, only an economic and social liberalization. Unlike Hungary in 1956, Czechoslovakia had neither renounced the Warsaw Pact nor declared her neutrality. Quite to the contrary, in developing its Action Program in the early months of 1968 which had incurred the wrath of the Soviets, Czech foreign policy was declared to be "in alliance and cooperation with the Soviet Union and other socialist states."[274]

Had the requirements of necessity been established, the intervention nevertheless failed to satisfy the strict standards of proportionality considering the fact that the Czech Army was loyal to the regime and could easily have defeated any indigenous or other armed opposition, had one existed. The fire power of the 250,000-500,000 force entering Czechoslovakia was vastly disproportionate to the illusory threat posed to the Warsaw Pact by the unspecified and unidentified "hostile external forces." Equally significant, if the real intent of the invasion was to protect the Soviet Union from the loss of a buffer between itself and West Germany, then a small force to seal the western border of then-Czechoslovakia would have been the only proportionate response. There was simply no basis for any claim to self-defense by the Soviet Union or any of its surrogates.

---

[273] *See infra* this Part.
[274] *Action Program*, *supra* note 131, at 173.

L. Regional Arrangements

In addition to these arguments presented which embraced the law of coexistence and customary international law as codified in the United Nations Charter, a third justification related to the claim that the deployment into then-Czechoslovakia was a lawful dispute-settling exercise of authority by a regional organization. While the Brezhnev speech of November 12, 1968, did not claim that the intervention was based directly on the Warsaw Pact or on specific bilateral agreements between the U.S.S.R. and the Eastern European nations, it did, as did the PRAVDA justification by Kovolev published on September 25, 1968, insist that the intervention was a legitimate action in collective self-defense, in conformity with existing treaty obligations.

Article 53 of the U.N. Charter, however, controlled, then as now, all "Regional Arrangements" in respect to any peace-keeping role they might affirm.[275] Paragraph 1 states that "[N]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." Since the Brezhnev Doctrine has already been found to have violated these principles, it could not be validated by any other treaty or arrangement.

Even if the U.N. Charter contained no prohibitions against the Soviet invasion of Czechoslovakia, the very terms of the Warsaw Pact precluded any violation of the sovereignty of socialist nations.[276] While the Pact did establish United Armed Forces within the Pact and took the first steps toward regularizing the status of Soviet troops in Eastern Europe,[277] Article 1 (forbidding the threat or use of force) and Article 8 (guaranteeing non-interference in internal affairs) clearly forbad the type of intervention proclaimed by Brezhnev as legally authorized. Only Article 4 foresaw the limited use of force, and then only "after an armed attack in Europe on one or several states that are signatories of the [Pact]."

It follows then, that a regional organization, unless acting in collective self-defense or pursuant to a Security Council resolution, may not lawfully

---

[275] *See* TERRY, *supra* note 3, at ch. IX (discussing the available regional authorities and their proper application under Chapter VIII of the U.N. Charter).

[276] *See* analysis of Warsaw Pact provisions in Part II, *infra*.

[277] "The disposition of the Soviet Armed Forces in the territories of the signatory states will be affected by the agreement among the states, in accordance with the requirements of their national defense." Such an agreement was ratified by the Soviet Union and Czech Assembly on October 18, 1956. This was similar to the agreement forced upon the Hungarians in early 1957 following that intervention.

direct armed attack against a target state. Any such employment of coercion would be inconsistent with Article 2(4) of the Charter. There was, of course, no Security Council authorization and no justification on the basis of self-defense. Indeed, in the U.N., a Soviet veto prevented a majority of the Security Council from condemning the invasion.[278] From this record, it is clear that the Warsaw Pact intervention was in violation of Article 2(4), and therefore illegal.

M. Assessing the Costs of Intervention

Substantial costs were borne by the then-Soviet Union as a consequence of its intervention into Czechoslovakia. The Czech case brought to informed legal practitioners and to Western decision-makers a new insight into the Soviet view that basic values and concepts of general international law would not be applied within the Warsaw Pact.

The intervention, in addition, immediately and adversely affected the Soviets' political posture with the West. These consequences included discontinuing Non-Proliferation Treaty (NPT) negotiations and putting on hold the planned Strategic Arms Limitation Talks (SALT) with the United States. The latter negotiations, planned to begin with a 1968 visit to Leningrad by President Johnson, were delayed until the fall of 1969, with President Nixon then in office. This delay, without question, required both nations, in the interest of parity, to begin testing and developing extremely expensive MIRV technology. Nor were the effects limited to U.S.-Soviet relations. An element of cohesion and reinvigoration was once again evident in NATO, a cohesiveness that had not been evident in years.

While the principles of socialist internationalism were not new to the socialist commonwealth, they were given new significance through their application during the 1968 invasion of Czechoslovakia. The Soviet law of coexistence as applied in Prague emphasized important socialist limitations on the recognized principles of international law, including such extra-legal factors as geographic proximity, the importance of the Soviet interest involved, and certainly, the expected reaction from the United States and other Western nations.

It was true that that the traditional doctrines of 'aggression,' 'intervention,' and 'self-defense' proved inadequate in a confrontation between

[278] The draft resolution, UN Doc. S/8761, Aug. 22, 1968, condemned the "armed intervention of the Union of Soviet Socialist Republics and other members of the Warsaw Pact in the internal affairs of the Czechoslovak Socialist Republic . . . ." The vote was ten (Brazil, Canada, China, Denmark, Ethiopia, France, Paraguay, Senegal, United Kingdom, United States) to two (Hungary, U.S.S.R.) with three abstentions (Algeria, India, Pakistan).

ideologies of East and West in 1968 in Czechoslovakia. The lesson from Czechoslovakia, then, was that principles of traditional and socialist international law could not be placed in parallel columns and compared based on the words alone. The purpose for which they were applied was determinative of their character, and those applied to foster the progress of socialism were dissimilar from those applied to prevent its advance, even though the same words were often used in both instances.

"The concept of determining the nature of law by the purpose it serves [was] by no means new to Soviet literature."[279] The Soviet interest in 1968, it could be argued, lay in the vigorous reassertion that, at this moment in history, the law of coexistence was required to assist in the defense of socialism and provide a vehicle for foreign policy decision-making.[280] The emphasis given to the new socialist international law following the invasion of Hungary and during the occupation of Czechoslovakia suggested a disquieting sense among Soviet scholars and lawyers that inroads were being made by hostile ideas into a realm of previously uncontested action which had been thought secure.[281]

In assessing the political costs of intervention, one must also conclude that Soviet perceptions of the risks involved in using force in 1968 had a major influence on decision-making. Although some legal scholars and political scientists believe that Dubczek's preparation for mobilization in the early stages of the crises may have triggered an earlier invasion, it was more likely that a firm Czech posture accompanied by credible demonstrations of the will to resist, consistently pursued -- as in the case of then-Yugoslavia in 1948-1949, Poland in 1956, Albania in 1961, and Romania in the mid-1960s -- would have considerably increased the risks of invasion to Moscow and even altered the debate within the Kremlin. The Soviet Politburo would then have had to choose between limited war against a "socialist ally" and non-intervention, with the problem of East European and domestic containment.

Not to be overlooked in the then-Soviet Union's calculations of risks involved in the use of force was its perception of the possible U.S. response. In the case of Czechoslovakia, as well as others (the Korean War of 1950, the Hungarian uprising of 1956, the Cuban Missile Crisis of 1962, and the 1975 Angolan Civil War, to name a few), suggest that U.S. policymakers should have been more aware that their sometimes unconscious signals were important factors in policy debates in the U.S.S.R. The U.S. 'hands-off' policy and its well-advertised non-involvement, accompanied by the belief on the part of President Johnson's advisors that there would be no invasion, apparently helped

[279] J. W. Hazard, *Renewed Emphasis on Soviet International Law*, 65 AM. J. INT'L L. 148 (1971).
[280] In Grozny, Chechnya, 35 years later, a very different vehicle would be required.
[281] Hazard, *supra* note 279.

the interventionist school prevail in the Soviet debate on the Czech issue. Had the signals about Czechoslovak non-resistance and a U.S. 'hands-off' policy been different, and had the reformists appeared to be in firm control, the invasion would likely not have occurred.

IV. AFGHANISTAN 1979: THE BREZHNEV DOCTRINE EXTENDED BEYOND THE WARSAW PACT

A. Introduction

Long before the Taliban's infamy in harboring al Qaeda prior to the September 11, 2001 attacks,[282] Afghanistan, for more than eight years, stood at the center of the world's attention as Afghan 'Freedom Fighters' fought bravely against a Soviet military force intent upon ensuring that a Southwest Asia socialist government did not stray from the Socialist Commonwealth.

Following the Second World War, the Soviet Union viewed Southwest Asia as a region of secondary concern. Unlike Central Europe and Northeast Asia which directly impacted vulnerable homeland borders, the countries of Southwest Asia offered Moscow little, if any, military challenge. While these nations were seen by the West as Soviet targets of opportunity, they were not viewed as areas where the Soviets were likely to intervene militarily.

The basis for this reasoning, prior to 1979, lay in the Soviet practice in developing states during the 1970s. Soviet involvement in Ethiopia, South Yemen, Angola, and during the coup attempt in Baghdad in 1978, was marked by technical assistance, economic aid, advisors, and arms to pro-Soviet elements, but not by use of Soviet military force.

Rather than as an outright departure from this policy, the invasion of Afghanistan in 1979 could be seen as an escalation of an existing policy trend, reflecting Moscow's belief that the United States lacked both the resolve and capability to respond to such a move, or that initial United States' threats would give way to accommodation, as in the case of Angola, the Horn of Africa, and the Soviet Brigade in Cuba.

Just as new political policies were being developed during the 1970s, the law of coexistence kept pace. General Secretary Brezhnev stated at the twenty-fifth CPSU Party Congress:

> Bourgeois politicians . . . raise a howl over the solidarity of Soviet Communists and the Soviet people with the struggle of the peoples for freedom and progress. This is either naiveté or, more likely, deliberate obfuscation. . . . Peaceful coexistence . . . does not in the slightest abolish, and it can not abolish or alter, the laws of the class struggle. . . . We make no secret of

[282] *See* TERRY, *supra* note 3 (discussing the Taliban in Afghanistan and their role in supporting al Qaeda prior to the September 11, 2001, attacks).

> the fact that we see détente as a path leading to the creation of more favorable conditions for peaceful socialist and communist constructions.[283]

The law of peaceful coexistence, in light of this claim by Brezhnev and subsequent Soviet actions, had to be seen thereafter as a dynamic approach favoring the revolutionary process outside the Pact as well as within. In fact, in a 1973 secret meeting with the leaders of the ruling Communist Party in Prague, Brezhnev labeled peaceful coexistence a "stratagem to allow the Soviets to build up their military and economic power so that by 1985 a decisive shift in the balance of world power that would enable [the Soviets] to exert their will wherever they wished."[284] It appeared in 1979, at least with respect to Afghanistan, that they had moved up their timetable considerably.

Coupled with their use of a legal theory to acquire unilateral advantage, the Soviets announced that their armed forces had entered a 'new stage' in which they had taken on an 'external function.' This new external function was to defend the 'Socialist Commonwealth' and assist in the successful development of anti-Western revolutionary liberation movements.[285] The 'external function' of the Soviet armed forces, the Soviet willingness to exercise that function, and the specious legal justification for intervention were all illustrated dramatically during the Christmas 1979 invasion of Afghanistan.

Soviet justification for this intervention was similar to that justifying their military support in Angola. The Soviets claimed their actions were taken at the request of the Afghan government in response to externally instigated threats of 'counterrevolution' against that government. This rationale was recognized almost universally as lacking credibility.[286] Indeed, the Soviet invasion could be viewed as part of a trend in Soviet behavior that confirmed their declaratory policy concerning the law of peaceful coexistence -- a law which operated

---

[283] PRAVDA, 25 Feb. 1976, *cited in* CURRENT DIGEST OF THE SOVIET PRESS, vol.. 28, no. 8 (Mar. 24, 1976) at 14.

[284] Former Air Force Secretary Thomas Reed discussed this speech by Brezhnev in the October 1, 1979, issue of AVIATOIN WEEK AND SPACE TECHNOLOGY. *See Oil Seen Spurring Soviet Mideast Move*, at 50. Thomas Reed thereafter served as Special Assistant to President Reagan. *See also* J. Finney, *U.S. Hears of Brezhnev's Assurances to Bloc that Accords Are a Tactic*, NEW YORK TIMES, Sept. 17, 1973, at 2, col. 1.

[285] *See* ANDREI GRECHKO, ON GUARD FOR PEACE AND THE BUILDING OF COMMUNISM (Moscow: Military Publishing House, 1971) in JPRS, No. 54602, Dec. 2, 1971 at 74, 78. *See also* A. Korkeshkin, *Strength of the Soviet Army*, SOVIET MILITARY REV., No. 11 (Nov. 1972) at 60, and S. G. GORSHKOV, THE SEA POWER OF THE STATE (Moscow, Military Publishing House, 1976), at 2, 268-69.

[286] Note the extremely lopsided U.N. General Assembly vote on Resolution 462 demanding the immediate withdrawal of Soviet forces from Afghanistan. *See infra*.

without regard to obvious conflicts with existing legal standards to which the Soviets themselves had pledged adherence.

B. Strategic Location and People

When Soviet forces rolled across their southwestern border on December 27, 1979, they were, for the first time since the Second World War, entering a 'friendly' nation without benefit of an international accord for justification. The previous incursions to straighten up straying allied regimes -- in Hungary and in Czechoslovakia -- had been effected under the guise of the Fraternal Assistance provision of the Warsaw Pact, an agreement to which Afghanistan had never subscribed.

Afghanistan's importance to Russia was that this small mountainous nation lay like a fortress protecting the southeastern flank of the 'oil crescent.' Lying between the unstable regimes of Ayotollah Khomeini in Iran and President Zia ul-Haq in Pakistan in 1979, the Afghan mountain passes led directly to the Iranian oil fields to the west and south to the dissident Pakistani province of Baluchistan, whose fiercely independent and anti-Zia tribesmen controlled the Port of Gwadar on the Arabian Sea. Control of the Port of Gwadar would provide access to the warm waters of the Persian Gulf, long a Soviet objective.

The mountainous state of Afghanistan had a population estimated at 21 million people in 1979 and it has an area of 260,000 square miles, about the size of Texas.[287] The terrain is largely mountainous, with peaks up to 25,000 feet high. Moreover, the arid desert areas are pocked with strategically located fertile valleys.[288]

The population of Afghanistan is a mix of Central Asian ethnic groups, dominated by the Pushtun and Tajilk tribes which make up eighty-five percent of the population. Uzbeks, Hazara and Turkomans are also represented.[289] The unifying force in the country is religion: ninety-nine percent of Afghanistan is Muslim, eighty percent of that Sunni and the rest Shiite.[290] It was the religious element which provided the greatest threat to the Socialist Amin regime in Kabul and which gave the then-Soviet Union, with a high Moslem population in

---

[287] *See Afghanistan: Mountainous Area of Invasion Turmoil*, WASHINGTON POST, Jan. 11, 1980, at A-23.
[288] *Id.*
[289] *Id*.
[290] Jiri Valenta, *From Prague to Kabul: The Soviet Style of Intervention*, INTERNATIONAL SECURITY (Fall 1980) at 118. *See also Series of Shocks Break Web of Détente*, WASHINGTON POST, Jan. 16, 1980, at 13.

its bordering republics, the greatest cause for alarm.[291] The regime of Hafizullah Amin, in power only three months, had shown the same lack of cohesion its predecessor regime had shown. In fact, when Amin assumed power in September 1979, it marked the third time in six years the government had changed hands by coup.[292]

To understand the thinking which apparently led to the Soviet decision to invade Afghanistan, an understanding of recent Afghan history is necessary. Following complete independence from British protectorate status in 1919, a status which had existed for thirty-nine ears, a democratic monarchy was established.[293] Between 1919 and 1973, the year the democratic monarchy of King Zahir Shah was overthrown by the moderate socialist Mohammed Daoud, the state of Afghanistan had maintained a posture of non-alignment.[294] In fact, when John Foster Dulles helped set up the Central Treaty Organization (CENTO) in 1955 as part of a global network of anti-Soviet alliances, Afghanistan was not included for just this reason. In keeping with Afghanistan's policy of non-alignment, it remained beyond the American security perimeter, which included neighboring Turkey, Iran and Pakistan.[295]

The 1973 bloodless coup, engineered by a coalition headed by Mohammed Daoud, established a socialist republic with Daoud as Prime Minister. The heads of the leftist political parties during the previous democratic monarchy quickly established themselves as the primary opposition to the neutralist policies of the Daoud regime.[296] The Daoud government lasted until April 1978, when the leftist opposition leaders, spearheaded by an uneasy alliance between Barbrak Karmal and his bitter political rival Noor Mohammed Taraki, toppled the republic and executed Daoud.[297] Taraki, Marxist leader of Maoist-leaning Khalq faction of the People's Democratic Party, claimed the Presidency of the new socialist democracy while Karmal, Marxist leader of the pro-Soviet Parcham wing of the same party, was installed as his (Taraki's) Deputy.[298] This alliance splintered only two months after the coup, and Karmal was first exiled as the Ambassador to Czechoslovakia, then stripped of his citizenship, and finally ordered home for what many believed to be his

---

[291] James Critchlow, *Minarets and Marx*, THE WASHINGTON QUARTERLY (Spring 1980) at 47. *See also Moscow's Bold Challenge*, TIME, Jan. 14 1980, at 13.
[292] U.S. Dep't of State, CURRENT POLICY NO. 459, April 10, 1980, at 2. *See also Moscow's New Stand-In*, TIME, Jan. 7 1980, at 23.
[293] *Id*.
[294] *Id.*
[295] G. MCMUNN, AFGHANISTAN 244 (1977). *See also* Strobe Talbott, *Who Lost Afghanistan?*, TIME, Jan. 28, 1980, at 23.
[296] *Id*.
[297] *Moscow's New Stand-In*, *supra* note 292, at 23.
[298] *Id.*

execution.[299] Karmal went into hiding in Moscow with other members of his pro-Soviet Parcham group.

Barely a year after the Communist takeover, Taraki's government was in trouble. There were rumblings of revolt among conservative Muslim tribesmen, unhappy with the proposed radical social and economic reforms.[300] When these reforms were implemented in January and February of 1979, the opposition developed into a full scale religious insurgency. In March, thousands of Afghans in Herat, a provincial capital four hundred miles west of Kabul, revolted against the Taraki government.[301] In suppressing this uprising, the Taraki regime was charged with the deaths of 20,000 civilians.[302]

By August 1979, twenty-two of the country's twenty-eight provinces were in rebel hands.[303] Prime Minister Hafizullah Amin, now second in command to Taraki, cracked down on the rebels, executing 2,000 political detainees and imprisoning 30,000 others.[304] Nevertheless, in September, Amin felt the government under Taraki was not taking sufficient steps to suppress the insurgents. He overthrew Taraki, had him executed, and assumed the Presidency.[305] In purges within the military that accompanied the takeover, the Afghan Army became demoralized and massive desertions and defections to the Moslim rebels were reported.[306] An army which once numbered 150,000 was reported at 50,000 as of mid-December 1979.[307]

It was against this backdrop that Soviet troops, more than five divisions strong by January 20, 1980, entered Afghanistan and installed the exiled Moscow-leaning Barbrak Karmal as President. This was the same Karmal who had served as Deputy to Taraki in 1978 and who had been involved in the earlier 1973 and 1978 coups.[308] Former U.S. Ambassador to Afghanistan Robert Neumann stated at the time: "Karmal is the original communist, a dyed in the wool article."[309] In entering the capital city of Kabul prior to the installation of

---

[299] V. Sidenko, *Two years of The Afghan Revolution*, NEW TIMES, 25 April 1980, at 18. *See also* R. Kaiser, *Afghanistan: End of the Era of Détente*, WASH. POST, Jan. 17, 1980, at A-1.
[300] V. Aspaturian, *Moscow's Afghan Gamble*, THE NEW LEADER. Jan. 28, 1980 at 7. *See also Steel Fist in Kabul*, TIME, Jan. 7, 1980, at 73.
[301] *Id.*
[302] Aspaturian, *supra* note 300, at 13.
[303] Kaiser, *supra* note 299, at A-1.
[304] *Steel Fist in Kabul*, *supra* note 300, at 73.
[305] *Id*. at 76.
[306] U.S. Dept of State, SPECIAL REPORT NO. 72, June 1980, at 2. *See also* W. Brannigan, *Afghanistan is Reluctant Costly Soviet Satellite*, WASH. POST, Jan. 22, 1980, at A-9.
[307] *Id*.
[308] *Moscow's New Stand-In*, *supra* note 292, at 73.
[309] Robert Neumann *quoted* in *id*.

the new regime under Karmal, Soviet troops killed Amin and more than three hundred members and supporters of his government.[310]

C. The Soviet Rationale for Intervention

In this, the third use of military force by the then-Soviet Union against another state since the Second World War, the Soviets acted primarily to meet a situation in Kabul they could no longer control through surrogates. The Soviet Union made its aggressive move in the shadow of the Iranian hostage crisis,[311] much as it had intervened in Hungary in 1956 while the Western powers were preoccupied with the Suez crisis and in Czechoslovakia in 1968 while the United States was mired in the Vietnam conflict.

The present incursion was different from either the Hungarian or Czech attacks, however. Afghanistan, while under communist rule since April 1978, was not a member of the Warsaw Pact, and thus the terms of the Brezhnev Doctrine that claimed for Moscow the right to intercede to support the socialist states of the Warsaw Pact would not seem immediately applicable. However justified, certain of the motives appeared relatively clear. As one Asian attache' grudgingly stated: "[S]horing up a doomed regime obviously was the Soviet's first priority."[312] Since the communists had come to power in April 1978, the guerrilla war being waged by Islamic rebels had had made it apparent that another rebel attack in the Spring of 1980 would have toppled the Amin government.[313]

Although William Brannigan reported at the time that Hafizullah Amin was less obedient to the Kremlin than either Taraki or then-strongman Karmal, he had nevertheless been firmly in the Soviet camp.[314] The problem was that ". . . Amin's brutal regime had alienated the public and his much-purged Army was losing more and more ground to the insurgents."[315] The Soviets were also aware of another important Afghan characteristic: their fierce love of freedom. As Afghan scholar Mohammed Ali observed in his 1969 history, "One of the most important characteristics of the Afghan is his indomitable love of independence."[316] These factors -- the weakness of the government and the army and the freedom-loving character of the Afghans -- convinced the Soviets

---

[310] William Brannigan, *300 Afghans Executed*, WASH. POST, Jan 11, 1980, at A-12.
[311] *See* TERRY, *supra* note 3, ch. V (discussing the November 1979 Iranian seizure of Americans in Tehran).
[312] Unnamed attaché *quoted in* Dept. of Defense, SELECTED STATEMENTS, Jan. 28, 1980, at 10.
[313] Brannigan, *supra* note 307, at A-9.
[314] *Id*.
[315] Kaiser, *supra* note 299, at A-16.
[316] M. ALI, THE HISTORY OF AFGHANISTAN, ix (1969). *See also* AREA HANDBOOK FOR AFGHANISTAN, Dept. of the Army Pam. No. 550-65, 3-5 (1969); MCMUNN, *supra* note 295, at 246.

of the need for drastic measures. According to former Ambassador Robert Neumann, the Russians had three choices: Let Afghanistan go, in which case the government would have failed within a week; introduce a massive Russian military infusion through which the Soviets would try to squelch the rebellion; or instigate a coup to install a puppet at the head of the government in the hope that he could bring things under control.[317]

The Soviets decided upon a combination of the last two options. There were other apparent reasons for the Soviet invasion. Any overthrow of a communist government in Afghanistan might arouse neighboring Muslim populations. "The Islamic fervor which had already shaken Iran might also spread across the border into the Central Asian Republic and stir unrest among their substantial Islamic populations."[318] A Soviet foreign affairs analyst told TIME magazine's Bruce Nelan in Moscow after the intervention that ". . . it was not. . . easy for us to make this decision, but we were committed in Afghanistan from the beginning. Whether we like it or not, we have to live with our commitments. We can't wash our hands of them. There was no other choice."[319] It was interesting to note at the time that this assessment reflected little concern for international legal standards that might have supported such coercive measures.

Of equal concern to students of international law were the long-term implications suggested by the 1979 intervention. A major fear was that the Soviet Union, then in control of areas which bordered Pakistan, might support a revolt in the southern Pakistan province of Baluchistan, which had been openly hostile to President Zia's government. A Russian supported secession by Baluchistan would give the Soviet union access to Arabian Sea ports, access to the Indian Ocean, and the opportunity to threaten the Persian Gulf oil supply routes.[320] Iran's position was certainly threatened by this Soviet coercion as well. A senior British official stated at the time:

> The Soviets have a vested interest in gaining an influence in Iran. The prize in political, economic, and military terms would be enormous. It would place them in a position of being able to turn off the oil tap for Western consumers almost at will when the oil shortage starts to really bite later in the 1980s. It would also put them in a position of having immediate access to the Gulf's rich petroleum reserves when,

---

[317] Robert Neumann, remarks in *Steel Fist in Kabul*, *supra* note 300, at 76.
[318] *Moscow's Bold Challenge*, *supra* note 291, at 12.
[319] *Quoted* in *id*., at 13.
[320] *See* U.S. Dept. of State, CURRENT POLICY NO. 135, Feb. 1, 1980 (discussing these and other dangers to Pakistan and other Near East Asia nations).

> in the next few years, their own output is expected to fall short of their internal needs.[321]

Additionally, the former Soviet Union may have intended the attack on Afghanistan to demonstrate to its other bordering states what could happen to unruly neighbors. Whatever short and long-term considerations were intended in the Soviet Union's decision to use force against the Afghanis, its failure to meet the minimum international legal requirements for military action may have had a greater political and economic cost than it had considered possible. In our legal analysis of its claim to legal justification at the time, any credibility which otherwise could have attached was severely impaired by its original claim that it had been invited by the Amin regime.[322]

On the day following the invasion, December 28th, the Soviet Union claimed it had intervened at the request of the Afghan government under the terms of a twenty-year friendship treaty signed in December 1978.[323] The absurdity of that rationale was obvious when one considers that one of the first acts of the invading army was to round up the Amin government and brutally execute President Amin and his government's officials.[324] If by its claim it meant it had intervened at the request of the new Karmal regime, one had only to recall that the airlift began two days before the coup which brought Karmal to power, thus making a mockery of that rationale as well.

D. The U.S. Response

The immediate United States response was one of denunciation. President Carter stated: "We are outraged that . . . armed forces of the Soviet Union have launched a massive invasion of the small non-aligned country of Afghanistan."[325] Then-Secretary of State Cyrus Vance's warning was equally stern:

> The Soviet Union clearly crossed a threshold in its action -- they are going to have to pay a cost as long as their troops stay in Afghanistan. In addition, they are going to have to realize that this kind of action is going to be met with by a firm and protracted response so that such adventures will not happen in the future.[326]

---

[321] Unnamed British official *quoted* in *Moscow's Bold Challenge*, *supra* note 291, at 13.
[322] *See* Brannigan, *supra* note 306, at A-12.
[323] *Steel Fist in Kabul*, *supra* note 300, at 73.
[324] *See* Brannigan, *supra* note 306, at A-12.
[325] Statement of President Carter to White House Conference on Small Business, *quoted in* Dept. of Defense, SELECTED STATEMENTS, *supra* note 312, at 8.
[326] *Quoted* in *id*., at 11.

These stern warnings were just the beginning, however. President Carter announced that he was ordering an embargo on the sale of $2.6 billion worth of corn, wheat and soybeans which the Soviet Union had ordered. Then on January 15, 1980, in compliance with the President's ban on the sale of priority items, U.S. officials suspended all shipments of sophisticated machinery, such as computers and drilling bits.[327] Simultaneously, the Administration cut the Soviets' fishing catch in U.S. waters from 435,000 tons to 75,000 tons.[328] Other measures included withdrawing an advance party of seven U.S. consular officials from Kiev and the expulsion of seventeen Soviet diplomats from a temporary consulate in N.Y. City.[329]

At the United Nations, the General Assembly condemned the Soviets in a resolution spearheaded by Ambassador McHenry of the U.S. but co-sponsored by Pakistan's Ambassador Agha Shahi. One hundred and four nations voted for the condemning resolution, eighteen voted against, eighteen abstained, and twelve nations did not vote. Of the members of the Non-Aligned Movement, fifty seven supported the resolution while only nine voted with the Soviet Union. Of the eighteen states opposing the resolution, only one -- tiny Grenada -- was not ruled by a communist government. Equally important was the fact that the following communist states voted against the Soviet Union and for the resolution: then-Yugoslavia, Albania, Cambodia, and China.[330]

This was especially significant in light of the resolution's language. It claimed the "armed intervention" was "inconsistent" with the U.N. principle of the "sovereignty, territorial integrity, and political independence of every state." It demanded "the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan," and called on U.N. members and international relief organs to help all Afghan refugees. The resolution also required the Security Council to "consider ways and means" to help enforce the resolution.[331]

There were other U.S. responses as well. On January 26, the United States Olympic Committee, at the urging of President Carter, voted to move, postpone, or boycott the Moscow Olympics if the Soviets were not out of

---

[327] R. Klose, *U.S. Moves Seen Boosting Influence of Soviet Hard Liners*, WASH. POST, Jan. 17, 1980, at A-17.
[328] U.S. Dept. of State, CURRENT POLICY NO. 162, Apr. 12, 1980, 1-3. *See also*, *Grain Becomes a Weapon*, TIME, Jan. 21, 1980, at 13.
[329] *See* Hearings Before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs, House of Representatives, EAST-WEST RELATIONS IN THE AFTERMATH OF THE SOVIET INVASION OF AFGHANISTAN, Jan. 24, 30, 1980, for a full discussion of these political moves.
[330] *See Wrongheaded and Unjustified*, TIME, 28 Jan. 1980, at 21, for a complete discussion of United Nations actions.
[331] Resolution is quoted in *id*, at 21.

Afghanistan by mid-February. When the Soviets had not withdrawn, President Carter announced the boycott. On January 23, 1980, President Carter delivered his third State of the Union message. While the 'Carter Doctrine' outlined in that address ultimately had little impact on the Soviets, at least Carter had indicated a new get-tough approach toward Moscow, with the threat of force if any further expansionist moves were undertaken.

E. Soviet Legal Claims

When the Soviet Union, through Boris Pomonarev, articulated an expanded Brezhnev Doctrine for Afghanistan in January 1980,[332] the Soviets were, in essence, asking the world to accept the rationale that political turmoil in Afghanistan and the real possibility of the overthrow of a communist regime could lawfully justify coercive action. In rejecting this claim, the Western nations reminded Moscow that Article 2(4) of the U.N. Charter committed member states to refrain from the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

When the Soviet armed forces first entered the territory of Afghanistan on December 27, 1979, this major world power was flexing military strength second to none against a small socialist state whose military and civilian technology could only be described as underdeveloped and largely dependent on gratuitous handouts, at least since April 1978, from the then-Soviet Union itself. The very fact that the Soviet Union gambled on the probability that they could not only successfully attack Afghanistan without significant opposition from within, and without inviting a United States' or Western military response, undermined the credibility of their attempt to justify the invasion as necessitated by a realistically perceived threat.

If the Soviets believed in 1979 that the lack of control exercised by the Afghan communist government posed a threat to the world communist movement, any legal justification on that basis had to subordinated to their solemn international obligation under the United Nations Charter to respect the right of self-determination of all people.[333] Additionally, Article 2(3) of the United Nations Charter obligates Members to first seek solutions to international

[332] Speech of Boris Pomonarev of Soviet Communist Party Secretariat, *republished in* TASS, the then-official news organ of the Soviet Communist Party on Jan. 10, 1980, and *quoted in* Joseph Kraft, *Playing by Moscow's Rules*, WASH. POST, Jan. 24, 1980, at A-19.
[333] *UN CHARTER*, *supra* note 95, art 1(2).

disputes by non-coercive means. This condition is consistent with the United Nations goal of minimizing international armed conflict.[334]

The credibility of the Soviet claim suffered when the facts of that attack were considered against the failure to exhaust peaceful remedies. There has been no evidence produced that the unrest in Afghanistan, if it did pose a threat to world peace and security, could not have been substantially reduced by action of the United Nations. Moreover, by not affording the available international machinery an opportunity to function, the Soviets had clearly indicated their primary concern was the imposition of their selected ruler on the Afghans, not with reducing tensions, minimizing violence, or assisting in an orderly self-determination process for Afghanistan.

In the geo-political context, the invasion of Afghanistan did little to protect and maintain existing values in the Soviet Union or the socialist collective of states. Had the Soviet Union been truly concerned with the maintenance of national security, it would never have invaded Afghanistan, since the U.S. Congress was then considering the SALT II Accord, which would have further limited weapons proliferation and thus provided greater security for the Soviet State. In addition, any aggressive action in the Middle East while 53 American hostages were being held by state terrorists in Iran would certainly be expected to exacerbate the already tense situation in Tehran.[335] If the Soviet motives were expansionist, however, the decision to invade while the world's attention was focused elsewhere helped explain the timing. Similarly, the Soviet execution of President Amin and three hundred Afghan officials could not reasonably be viewed as an action taken to protect the status quo, or to maintain a regime that, while struggling, was already in the Soviet camp.

The methods utilized by the Soviets in addressing the claimed threat were required to meet the international law requirements of proportionality.[336] Even if the Soviets had been acting to protect national security, the facts notwithstanding, the use of deadly toxic gas against Afghani citizens, in violation of international agreement,[337] did not meet even the broadest formulation of the proportionality test. In fact, even if one accepted Ponomarev's claim[338] that the threat to international socialism warranted intervention, it was difficult to accept this Soviet claim when the thrust of their

---

[334] *See* James McHugh, *Forcible Self Help in International Law*, 25 NAV. WAR COLL. REV. 76 (Nov.-Dec. 1972).
[335] *See* TERRY, *supra* note 3, ch. V; *see also* James P. Terry, *The Iranian Hostage Crisis*, NAVY JAG JL (Fall 1982), at 39.
[336] MCDOUGAL & FELICIANO, *supra* note 257, at 117.
[337] *Chemical War Issue Raised in Invasion*, WASH. POST, Jan. 25, 1980, at A-23.
[338] *See* Kraft, *supra* note 332.

attack was directed both against the socialist government in power and the forces that opposed it.

The methods employed by the Soviets were also required to meet the international law requirements of necessity. That is, because the conditions existing in Afghanistan with respect to the power of the participants, their objectives, their respective institutional structures, and the nature of the world order desired[339] indicated, upon careful assessment, the clear absence of any legitimate threat in terms of standards accepted by the world community, then all methods employed would be, and were, violative of international law. Furthermore, the objective of support for the socialist regime in Kabul as claimed by Ponomarev was clearly disavowed when President Amin was murdered by the Soviets.[340] Perhaps the real indication of the extent to which the Amin regime could have been considered a threat to Soviet security lay in the fact that neither of Afghanistan's other neighbors, Pakistan or Iran, supported the Soviet claim. Absent collective support from neighboring states in response to the unrest in Kabul, the unilateral assertion of necessity by the Soviet Union lost whatever credibility it might otherwise have had.[341]

Application of the above criteria to the Soviet claim of self-defense demonstrated the untenability of its position regarding necessity and proportionality. By comparison, an appraisal of the unrecognized anticipatory self-defense claims of Nazi Germany with respect to its invasion of Norway in 1940 is helpful in addressing Soviet actions. Assessment of the intentions of Germany in 1940 and those of the Soviet Union in 1979 reveals a militaristic oligarchy in the process of subjugating Europe to the command of a driven fascist and, respectively, a military giant intent upon improving its position with respect to primary Arabian Gulf sea lanes.

Clearly, the objectives of the Soviet Union closely paralleled those of Germany in the extension of German military power throughout nations such as Poland, Belgium, and France prior to its intervention in neutral Norway. Claiming self-defense after the fact, as did the Soviet Union in Afghanistan, the Germans claimed their invasion was anticipatory in that it prevented the use of strategic bases in Norway against Axis forces.[342] Evidence at the subsequent

---

[339] McDougal & Feliciano, *supra* note 257, at 230.
[340] *See* Kraft, *supra* note 332, at A-12.
[341] An example of a collective response in support of a unilateral assertion of self-defense can be found in the Resolution of the Provisional Organ of Consultation of the Organization of American States, promulgated during the Cuban Missile Crisis. The Resolution recommended that member states take all measures including the use of armed force to prevent the introduction of Soviet offensive weapons into Cuba. 47 U.S. DEPT. OF STATE BULL. 720-23 (Nov 12, 1962).
[342] International Military Tribunal (Nuremburg), *Judgment and Sentence*, Oct. 1, 1946, 41 AM. J. INT'L L. 173, 206 (1947) [hereinafter *Tribunal*].

war crimes trials clearly showed, however, that the invasion of this neutral state was planned to give a strategic advantage to the German war machine absent any real consideration of future allied actions.[343]

Even the methods of the Soviet Union in Afghanistan closely paralleled the earlier German invasion. The Soviets gave no warning and made no effort to eliminate the threat posed through non-coercive means, just as the Germans made no effort to ensure the neutrality of Norway and thereby limit the parameters of that conflict.[344] Finally, the reasoning behind the categorical rejection of the German claim by the Nuremburg Tribunal applies equally to the conditioning factors present in Afghanistan. That Tribunal stated:

> It must be remembered that preventative action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defense leaving no choice of means. . . . In light of all the available evidence . . . and in the opinion of the Tribunal, it was an act of aggressive war.[345]

The actions of the Soviet Union, when examined in the context of the U.N. Charter, revealed themselves as gross and blatant violations of United Nations Charter principles. What are those principles?

First, that one state must not use force against the territorial integrity and political independence of another state.[346]

Second, that that a state must not intervene by force in the internal affairs of another state.[347]

Third, that all states must respect the principle of equal rights and self-determination of peoples.[348]

Fourth, that fundamental principles of human rights must be respected by all governments.[349]

Fifth, that states must settle international disputes by peaceful means.[350]

---

[343] *Id.*
[344] *Id.*
[345] *Id*. at 205.
[346] *UN CHARTER*, *supra* note 95, art. 2(4).
[347] *Id.*, Art 2(7)
[348] *Id*., Art 55.
[349] *Id*., Art 1(3). *See also* the Preamble to the U.N. Charter, which reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ."

The Soviet claim that it was acting in furtherance of collective self-defense under Article 51 of the Charter was a perversion of that international agreement and an insult to the intelligence of the international community. Article 51 could be invoked only "if an armed attack occurs against a Member of the United Nations." No one could believe the claim that the Soviet Union had been requested by the Afghan government to intervene in Kabul in the manner in which it did, unless one also believed that President Amin invited the Soviet Union in to overthrow and execute him.

Article 51 of the Charter requires that measures taken by members in exercise of their right of self-defense:

> shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the . . . Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.

Neither the Soviet Union nor the puppet regime it installed ever gave the required notice to the Security Council under Article 51. This is itself evidence of the hollowness of the Soviet Union's refuge behind the Charter.

The United Nations Charter did not give the Soviet Union, or any nation, the right to take military action in another country or to replace its government because it disagreed with the policy or performance of the existing government. The fact remains that the Soviet Union flouted international law and violated regional and international peace and security. That the Soviet Union intervened with cold calculation and advanced planning in an area of the world already experiencing particular instability and tension made this act even more egregious and irresponsible.

Unfortunately, when the United States co-sponsored a draft resolution in the Security Council on January 7, 1980 calling for immediate Soviet withdrawal, that resolution was predictably vetoed by the Soviet Union.[351] The United States then sponsored Security Council Resolution 461 on January 9th, which called for an emergency special session of the General Assembly to examine the question contained in the earlier draft Security Council resolution 13729 which had been vetoed. As the call for a General Assembly Special Session involved a procedural matter, it was not subject to Soviet veto and passed despite an adverse Soviet vote.

---

[350] *Id*., Art 2(3) and Art 33.
[351] Draft Security Council Res. 13729, Jan. 7, 1980.

Precedent for General Assembly action in dealing with threats to the peace was established in 1950, when, to preclude possible stalemate on the question of Korea, the United States co-sponsored General Assembly Resolution 377V of November 3, 1950, which recognized the authority of the General Assembly to act upon threats to the peace when the Security Council had been precluded from acting as a result of a Permanent Member veto.

During the Emergency Special Session of the General Assembly called on January 14, 1980, that body deplored the armed attack on Afghanistan and called for the immediate, unconditional, and total withdrawal of Russian troops from that country. Unfortunately, those demands were ignored in Moscow.

F. Analysis of U.S. Actions Under the Law of Armed Conflict

United States responding actions had to meet the same requirements of necessity and proportionality applicable to the Soviet initiating coercion which had been based on a claim of self-defense.[352] The fact that one represented an anticipatory response to a claimed threat while the latter was a reaction to the initiating coercion was the only significant difference.

America's immediate but non-military response to the invasion of Afghanistan could, without careful examination, have appeared so innocuous as to render meaningless any discussion of necessity and proportionality in the context of a self-defense claim. It is important to note, however, that the use of force can mean economic or other non-violent force, if the resultant effect could alter territorial or political rights.[353] In fact, the Soviet Union proposed in the 1951 drafting conference for the unratified "Draft Code of Offenses Against the Peace and Security of Mankind" several items constituting ideological and economic aggression.[354]

The Bolivian draft definition at the same conference included terminology which reflected the inclusion of secondary methods of aggression which would implicate Article 2(4) and Article 51 of the United Nations Charter:

---

[352] *See* W. Thomas Mallison, *Limited Naval Blockade or Quarantine Interdiction: National and Collective Self-Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. at 347 (1962) (discussing the responding actions of the United States following the introduction of missiles into Cuba in 1962 as an excellent example of how those requirements can be satisfied).
[353] MCDOUGAL & FELICIANO, *supra* note 257, at 190-96.
[354] *Id*. at 195.

> [U]nilateral action whereby a state is deprived of economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defense or to cooperate in the collective defense of peace shall likewise be deemed to constitute an act of aggression.[355]

Article 16 of the Charter of the Organization of American States likewise defined aggression to include "the use of coercive measures of an economic or political character in order to fore the sovereign will of another State and obtain from it advantage of any kind."[356] From this, it would appear that the economic and political coercion effected by the United States in response to the Soviet armed attack must also adhere to the requirements of necessity and proportionality. The factors which Professor McDougal and Dr. Feliciano advanced are particularly relevant to an appraisal of United States claims.

In evaluating United States actions, it was first necessary to consider whether *any* response by the United States would have been legal under the circumstances. It could have been urged, as had Professor Hans Kelson, that unless an armed attack had been leveled at the responding state, no defensive measures under that particular rationale were warranted, because there existed no interest to protect.[357] Another concern centers on whether the economic measures imposed, the sports boycott, and the increased United States military presence in the Persian Gulf constituted coercion which could be justified under the terms of Article 51. Finally, if it were determined that the methodology employed constituted lawful defensive coercion, did it satisfy the requirements of necessity and proportionality?[358]

The United States was, and is, bound to "maintain international peace and security,"[359] as are all members of the United Nations family. Where that minimum world order represented by an international *status quo* is breached, all nations are affected,[360] some to a greater, some to lesser degree. Where a nation's security interests, in terms either of physical security or economic security are directly threatened by that breach, then the application of Article 51 of the United Nations Charter is triggered.

---

[355] The entire Bolivian Draft definition of aggression is found at U.N. Doc. A/AC. 66/L 9 (1953).
[356] U.N. Charter text is at 46 AM. J. INT'L L. SUPP. 43 (1952).
[357] H. KELSON, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 61 (1956).
[358] MCDOUGAL & FELICIANO, *supra* note 257, at 220.
[359] *UN CHARTER*, *supra* note 95, atr. 1(1).
[360] Myres McDougal, *The Soviet Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 598 (1963).

> As reviewed earlier in this text, Article 51 provides, in part:
>
> > Nothing in the present Charter shall impair the inherent right of Individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

While the United States had no collective defense agreement with Afghanistan, the United States was bound by a 1959 defense treaty with Pakistan.[361] In addition to its obligation to Pakistan, the direct interests of the United States were obvious. First, the right of transit through the Persian Gulf and the adjacent straits were vital to our ability to receive petroleum from area suppliers. Second, the threat of Soviet intervention in rebellious Baluchistan province in southern Pakistan would impact all oil-consuming nations. Access to the Port of Gwadar on the Arabian Sea in Baluchistan would have provided the Soviets with an opportunity for the first time to interfere with the oil flow through the Persian Gulf.

Finally, by their actions in invading Afghanistan, the then-Soviet Union directly violated Détente's main charter, the *Basic Principles of Relations Between the United States and the Soviet Union*, signed by President Nixon and Leonid Brezhnev at their Moscow Summit in May 1972.[362] That agreement stated that the two nations "will always exercise restraint in their mutual relations" and that "efforts to obtain unilateral advantage at the expense of the other, directly or indirectly, are inconsistent with these objectives."[363] The threat to United States interests created by the 1979 intervention was obvious.

Coercion in response to a threat of aggression runs counter to those who would claim, as did the late Quincy Wright, that unless the responding state or a state it is obliged by treaty to protect is attacked, no responding coercion in terms of Article 51 is warranted.[364] This view is inconsistent with the preparatory work of the drafters of the Charter, who had no intention of imposing new limitations on the traditional rights of states.[365] The traditional rights of states, as defined by Secretary of State Elihu Root in 1914, are still recognized: "The most common exercise of the right of self-protection outside of a state's territory and in time of peace is the interposition of objection to the

---

[361] U.S. Dept. of State, CURRENT POLICY NO. 135, *supra* note 320, at 2.
[362] For a discussion of this and other Soviet violations of Détente, *see Moscow's Bold Challenge*, *supra* note 291, at 12.
[363] *Id*.
[364] Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 560 (1963).
[365] *See* BOWETT, supra note 268, at 188.

occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement."[366]

As Professor Derek Bowett has summarized, the preparatory work with respect to Article 51 suggests "only that the Article should safeguard the right of self-defense, not restrict it."[367] The late Professor Myres McDougal made the legally sound argument that the Charter provisions must be read together and in a way that will give them reasonable meaning. He stated:

> The factitious character of a reading of Article 51 to restrict the customary right of self-defense becomes even more apparent when Article 51 is related to Article 2(4), embodying the Charter's principal prohibition of the use of force. Article 2(4) refers to both *the threat* and *use* of force and commits the Members to refrain from the 'threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations;" the customary right of defense, as limited by the Requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes the threat of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion.[368]

An equally important concept to the implementation of a viable minimum world public order system is the place of community response. Professor Brunson MacChesney states: "The thrust of the modern system is to substitute a community response for unilateral resort to coercion, but there remains the necessity of unilateral or collective response when the community response is unavailable."[369] Following the Soviet invasion, the United States made every effort to mobilize community action through the United Nations. The United States promoted a Security Council resolution demanding the immediate withdrawal of Soviet troops. The vote was 13 to 2 in favor of the

---

[366] E. Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427, 432 (1914); *see also* C.G. Fenwick, *The Quarantine Against Cuba: Legal or Illegal*, 57 AM. J. INT'L L. 592 (1963).
[367] BOWETT, *supra* note 268, at 188.
[368] McDougal, *supra* note 360, at 600.
[369] Brunson MacChesney, *Some Comments on the Quarantine of Cuba*, 57 AM. J. INT'L L. 595 (1963). While MacChesney was commenting on the Cuban Missile Crisis, these comments apply equally to the collective response by NATO nations in Kosovo in 1999 and in Iraq in 2003. *See* TERRY, *supra* note 3, chs. I and VI.

resolution, but the Soviet Union promptly exercised its veto.[370] The United States next proposed, in conjunction with Pakistan, a similar resolution in the General Assembly, which resulted in an overwhelmingly favorable vote of 104 for, 18 against, with 18 abstentions.[371] The General Assembly resolution, brought under the authority of the earlier *Uniting for Peace Resolution*,[372] while showing multilateral repugnance for the Soviet invasion, could do little other than demand withdrawal since the Karmal puppet government in Kabul claimed at the time that there was no unauthorized intervention.

After exhausting these avenues, the United States instituted the sanctions discussed earlier in this part. Economic measures such as the United States then announced[373] have been considered by the international community to constitute the 'use of force' as defined by Article 2(4). Professor McDougal emphasized that: "What is of particular importance for decision-makers is not the specific modality or even combination of modalities employed, but rather the level and scope of intensity achieved by the employment of any one or more modalities in whatever combination or sequence."[374]

The issue then in determining the character of participation of the United States as respondent lay not in the modality but in the reasonableness of that response. Tied very closely to the reasonableness question was the question of the participant's subjectivities as measured by the relative willingness of the international community to support, or at least not object, to the imposition of the responding measures. This reflects the fact that the reasonableness of a state's expectations as to the necessity of self-defense "is subject to review from both regional and world community perspectives."[375] In balancing the United States actions against each of these important criteria, the objectives, conditions, and methodologies used reflected measures consonant with the requirements of necessity and proportionality.

The United States, in announcing the new fishing restrictions, cancelled grain sales, technology embargo and proposed Olympic embargo, was acting directly in an attempt to pressure the Soviets to conform to the demands contained within the General Assembly resolution. Specifically, the United States was pursuing a shared community demand for the termination of Soviet military expansionism, effectuation of the withdrawal of Soviet troops from

---

[370] *See The Soviets Dig in Deeper*, TIME, Jan. 21, 1980, at 38.
[371] *See* discussion earlier in this Part.
[372] GAOR V, Plenary, pgs 23-24, Sept. 20, 1950. The Uniting for Peace Resolution recognized the right and obligation of the General Assembly to organize itself to discharge its responsibility if the Security Council was blocked by a veto of one of the great powers.
[373] The various economic measures are discussed earlier in this Part.
[374] MCDOUGAL & FELICIANO, *supra* note 257, at 196.
[375] Mallison, *supra* note 352, at 360.

Afghanistan, and the removal of the military threat to Pakistan and the Persian Gulf region. Another major concern involving inclusive community interests related to the continued security of vital sea lanes traversing the Gulf of Oman, the Persian (Arabian) Gulf, and the interconnecting straits.

While the United States' objectives appeared directed toward the *status quo* existent prior to the December 27, 1979, takeover of Kabul, their total lack of success can, in retrospect, be equated to other Carter actions designed for public consumption during an election year. President Carter appeared to awaken to the realities of Soviet expansionist motives with his pledge to 'draw the line' in his January 23, 1980, State of the Union address.[376] However, the three preceding years of benign neglect of U.S. defense needs precluded the opportunity for the United States to serve as a real force for the conservation of shared community values in Southwest Asia in the late 1970s.

Despite the weakness of the overall response, the United States' resort to coercive economic measures following the invasion of Afghanistan was certainly justified in light of circumstances which created the reasonable expectation of a response. The Soviet invasion posed a serious threat to the remaining non-aligned and non-communist nations of Southwest Asia, many of whom depended then and now upon the United States to maintain some sort of equilibrium between themselves and the then-Soviet Union in that part of the world. A non-response would have been interpreted as yet another indication of the United States' withdrawal and self-containment after Vietnam, and further reflect our inability or unwillingness to uphold free-world interests in the face of Soviet expansionism.

Unanswered Soviet aggression in Afghanistan, coupled with our earlier non-action in Angola and Ethiopia, would have spurred nations like Pakistan, India, and Iran to align themselves more closely with the Soviet Union as a matter of self-preservation. To a great extent then, the U.S. response, as weak as it was, was critical to maintaining an *appearance* of equilibrium and thus conserving to some degree an existing power balance between the two great powers.

[376] *See Taking Charge*, TIME, Feb. 4, 1980, at 12 (discussing this supposed new Administration approach).

V. POLAND 1981: SOVIET INTERVENTION 'BY PROXY'

The December 13, 1981, declaration of Martial Law in Poland culminated a 16-month search by the Soviet Communist Party for restoration of effective control in Warsaw.[377] While the crackdown had admittedly Polish roots, it accomplished the objective that the then-Soviet Union had been groping for since July 2, 1980, when strikes first broke out in the Ursus Tractor Factory in Warsaw. The labor unrest, although first appearing openly in 1980, was only the obvious symptom of an entire society in crisis. That crisis involved political as well as labor and economic elements.

In the months preceding martial law, the Polish Communist Party, with its ruling bureaucracy, remained the essential element of consultation with the workers -- and it had failed.[378]

Within the socialist collective under Soviet leadership, the masters subsidized the mastered through a unique economic system. While all participants contributed production, aid grants flowed back to the participants from Moscow. Even before the Polish labor unrest became visible on July 2, 1980, however, there was neither a significant economic nor political contribution to the collective from Poland. More importantly, the Polish Communist Party had been rejected by the workers themselves. This left the Soviet Union with but one course of action. It could not cut off all aid credits to Warsaw. Without economic aid, the Polish leadership would have faced political chaos at a minimum and possibly civil war. Both the Poles and the Soviets recognized the lack of alternatives in December 1981,[379]and the Polish ruling Communist Party, under its new leader Jaruzelski, acted as Soviet proxy to eradicate the threat to communist control.

For the United States government, apart from assisting the Polish people, an understanding of the events in Poland was critical to development of a strategy to address other workers' movements within the socialist collective.[380] The U.S. leadership understood there were competing concerns in each of the

---

[377] *See* Richard D. Anderson, *Soviet Decision-Making and Poland*, PROBLEMS OF COMMUNISM (March-April 1982) at 22-23 (claiming that by the time martial law was declared, the Soviet Union had previously undertaken preparation for intervention in December 1980 and in March 1981).
[378] Dimitri K. Simes, *Clash Over Poland*, 46 FOREIGN POLICY 57 (Spring, 1982).
[379] *Id.*
[380] *See* Bernard A. Ramundo, *Impressions of a Political Situation in Poland*, ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY INTELLIGENCE REPORT (Nov. 1980) at 2.

other Bloc nations where labor unrest existed. While the Communist governments in Hungary, Czechoslovakia and East Germany had liberalized to a degree to accommodate worker demands similar to those in Poland, there were Soviet pressures against such actions. The Soviets saw any such accommodation as merely spreading the 'malady.'[381]

What the United States attempted was to stress to Warsaw Pact nations a willingness to cooperate in development of their capacity for internal economic flexibility, realizing at once that anything touching external sovereignty would never be accepted by the Soviet Union. At the same time, the United States pressed the Soviets to adhere more closely to the legal obligations assumed in the Helsinki Final Act of 1975.[382] It was understood in Washington that pressure upon the Soviet Union to adhere and criticism when it did not would not, in every case, preclude Soviet aggression. Nevertheless, such criticism did have an important impact because of the influence of that criticism not only on the peoples of the nations involved, but also on lesser developed nations important to Moscow.

A. The Historical Record

Prior to the collusive invasion by Germany and the Soviet Union in 1939, Poland had been the victim of repeated partitions between Russia, Austria and Prussia.[383] Emerging from the Second World War as perhaps the most deeply scarred country in Europe -- with the exception of Germany itself -- Poland had lost six million people.[384] Poland lost far more than people in the war, however. As the focal point of Stalin's long-term plan of expansion, Poland was seen by the Soviets as critical to effective control over Hungary and East Germany. A non-communist Poland would have excluded the Soviet Union from Eastern Europe. Poland thus became both the fulcrum of the American-British-Soviet alliance as well as its point of conflict.[385] The Soviet long-term plan for Eastern Europe, and the helplessness of the Western allies in what had been the Soviet sphere of military operations, prejudged the fate of Poland in the years following World War II.

Prior to the Second World War, the Polish Communist Party had been an insignificant entity existing illegally with Mikolajczyk as its nominal leader. It was only after the German invasion of the Soviet Union that Polish

---

[381] *Id*.
[382] *Final Act of the Conference on Security and Cooperation in Europe*, concluded August 1, 1975, *reprinted in* 14 I.L.M. 1292 [herinafter *HELSINKI ACCORDS*].
[383] *See* GEORGE SCHOPFLIN, POLAND: A SOCIETY IN CRISIS (1979).
[384] WILLIAM E. SCHAUFELE, JR., POLISH PARADOX: COMMUNISM AND NATIONAL RENEWAL 19 (1981).
[385] G. BLAZYNSKI, FLASHPOINT POLAND xiii (1979).

communists began to make their influence felt in the underground movement in Warsaw. One of their first actions was to accuse the resistance Home Army of being anti-Soviet, a claim that was true in that the overwhelming majority of Poles were anti-communist.[386] The party organization, the Polish Workers Party (PPR), and its military arm, the People's Guard, were led by Marceli Nowotko, Boleslaw Molojec and Pawel Finder, who received their instructions from Moscow.[387] This new Soviet-directed party was almost immediately at odds with the Polish government in exile in London. This resulted from Soviet statements in 1943 that the U.S.S.R. intended to retain control of the Eastern territory of Poland after the war and by evidence of Soviet responsibility for the Katyn Forest massacre of Polish military officers.[388]

The Polish Workers Party, while attempting to exert influence in the underground, abstained from any real participation in the anti-Nazi effort pursued by the Home Army. This could only be explained by the Party's obedience to general COMINTERN directives which defined the war between Germany and the West as a basically imperialist conflict and appealed to the workers to refrain from any participation in the military activities.[389] When the Soviet army entered Poland in 1944, however, the officers of the communist People's Guard calmly assumed command of the remnants of Home Army units, whose officers were arrested and shot by the Red Army.[390]

With the support of the Polish Workers Party, the Soviet army managed to eliminate any national, independent groups in the country. The way was cleared for the complete Sovietization of Poland. Step-by-step, the country was transformed into the perfect satellite state, obedient to Moscow's orders, ruled by secret police and exploited by the Soviet Union as few colonies have ever been.[391]

B. The Gomulka Years

Before the Second World War, Wladyslaw Gomulka was imprisoned in Poland for his role in organizing a trade union of communist workers.

---

[386] *Id.* at xviii.
[387] JAN B. DE WEYDENTHAL, THE COMMUNISTS OF POLAND: AN HISTORICAL OUTLINE 37 (1978).
[388] In 1943, the Germans announced the discovery of mass graves of over 10,000 Polish officers executed by Soviet authorities in the Katyn Forest near Smolensk in 1940. The Polish authorities in London insisted on an investigation by the International Red Cross. The Soviets claimed the executions were the work of the Germans and used this demand as a pretext to break relations. The German version has been generally accepted in the West by objective observers. *See* SCHAUFELE, *supra* note 385, at 20.
[389] DE WEYDENTHAL, *supra* note 387, at 35.
[390] BLAZYNSKI, *supra* note 385, at xviii.
[391] *See* DE WEYDENTHAL, *supra* note 387, at ch. 3 (discussing events in Poland at the conclusion of the Second World War).

Following the German invasion of 1939, he escaped from prison and fled to the Soviet Union where he spent two years (1939-1941) with little involvement in communist affairs.[392] Gomulka returned to Poland in 1941 contemporaneously with the establishment of the Polish Workers Party. Appointed to a top executive position within the Party in 1942, he was tapped as Secretary in 1945.[393]

In the aftermath of the war, Gomulka served Soviet purposes in Poland well. Addressing the difficult task of imposing an alien form of government on his country, he served both as a driving force and as a lubricant. Despite his efforts, Gomulka realized that he would never be able to impose communism on Poland if the Party was to remain exclusively the guardian of Soviet interests.[394] He first expressed this sentiment in the summer of 1947, when he openly opposed the formation of the Communist Information Bureau (COMINFORM), designed to provide an institutional forum of policy coordination among separate parties.[395] It was not the rejection of common communist objectives or even of Soviet leadership for the movement as a whole that prompted this opposition. Rather, Gomulka's opposition reflected the conviction that the successful introduction of communism into Poland required specific policies and tactics that would correspond to Polish national and social traditions as well as its political history.[396]

Gomulka's influence in the Polish Workers Party declined after 1948, not only because of his support for a more independent "Polish Road to Socialism" but also because of his support for a more moderate stance toward Tito's Yugoslavia.[397] When he was arrested in 1951, he was not brought to trial for fear of what he might disclose about the past misdeeds of his Polish comrades. Instead, he was quietly exiled to a Warsaw villa maintained by the Polish secret police.[398]

---

[392] *Id*. at 40.
[393] *Id*.
[394] *See* RICHARD HISCOCKS, POLAND: BRIDGE FOR THE ABYSS, ch. 1 (1963).
[395] On Gomulka's opposition to the COMINFORM, *see* NICHOLAS BETHELL, GOMULKA 136-39 (1973); *see also* ZBIGNIEW BRZEZINSKI, THE SOVIET BLOC 53, 61-62 (1967).
[396] *See* DE WEYDENTHAL, *supra* note 387, at 54 (arguing that Gomulka's nationalism was a compromise between communism and his 'Polish Road').
[397] SCHAUFELE, *supra* note 384, at 24.
[398] BLAZYNSKI, *supra* note 385, at xiv. Blazynski explains that Gomulka was arrested by Lieutenant Colonel Swiatlo, deputy director of 'Department 10' of the Polish Ministry of Public Security, who defected to the West in December 1953 and disclosed all of the intimate details of the Party leaders' crimes and intrigues over several years. Department 10 was responsible for the ideological and political purity of the Party leadership: a counter-intelligence service against all sorts of 'deviations' -- actual, imaginary or simply fabricated for a specific purpose. Swiatlo was in charge of all the operations and files, and in emergencies could contact Beria directly. The picture he presented of personal relations between top communists and their attitude toward many innocent victims of their terror was particularly nauseating. The overwhelming impression was one of a group of utterly

The years 1948-1956 represented the nadir of communist Poland: the Sovietization of the country was never more pronounced than during this period. Not only was Poland denied the right to make independent decisions, even on internal matters, but it also suffered the ultimate indignity of having a Soviet marshall, Konstantin Rokossovsky, as minister of defense and commander-in-chief of the Polish People's Army. Soviet officers held other high positions in the Polish armed forces, and Soviet officials held top posts in the government, particularly in the security services.[399]

Then, in June 1956, Polish workers engaged in the first of the pre-cursors to the 1981 crisis by rioting in Poznan for better living conditions and greater economic and political freedom. For the Party, the Poznan revolt was a political disaster: Fifty-three were killed and over three hundred were injured. Local internal security forces had been unable to control the situation and the army had refused to fire on Polish workers.[400] The riots showed that the workers were bitter and ready to fight, that the people were solidly against the regime, and that the army and the uniformed militia were wholly unreliable.[401]

In October 1956, First Secretary Ochab bowed to the growing pressure from below and made a desperate call on Gomulka, only recently restored to Party membership, for help. As a result, Gomulka was reinstated as First Secretary.[402] This occurred without the prior approval of the Soviet leaders, who descended on Warsaw the following day, October 20. Krushchev, Mikoyen, Molotov and Kaganovich's visit coincided with the movement of Soviet troops toward Warsaw.[403] Heavily armed units of the Polish Internal Security Corps loyal to Gomulka immediately took up defensive positions, ignoring orders from their Minister of Defense Soviet Marshall Rokossovsky.[404]

Discussions between Krushchev and Gomulka satisfied the Soviet leader that the "Polish October" would not go beyond permissible limits. The Soviet troops were recalled and the Gomulka government was officially recognized.[405] The extent to which the mounting crisis in Hungary, which exploded only three days laer, may have affected the Soviet decision in Poland is uncertain.

---

ruthless and dishonest men who stopped at nothing in order to obey the orders of their Soviet masters and to foster their own private interests.

[399] SCHAUFELE, *supra* note 384, at 25.

[400] *See* BLAZYNSKI, *supra* note 385, at xv-xvi.

[401] *Id.*

[402] *See* BRZEZINSKI, *supra* note 395, at 242-53 for an excellent analysis.

[403] *Id*. at 251.

[404] BLAZYNSKI, *supra* note 385, at xvi.

[405] SCHAUFELE, *supra* note 384, at 27.

In Gomulka's "Polish Road" program, there were two categories of change: Those required to institute an individualized communist system in Poland; and those related to internal liberalization which were forced upon Gomulka by strong pressure from the Polish workers. In time, the first category of changes was essentially retained in a somewhat modified form. The changes in the second category were ultimately withdrawn, leading to the subsequent unrest in Warsaw.

C. Years of Crisis: 1968-1971

The second major antecedent to the 1981 Polish crisis occurred in 1970 during the Gdansk uprising. While this labor unrest represented the outward manifestation of total frustration with the Gomulka government, the seeds of turmoil were visible two years earlier. In March 1968, thousands of students demonstrated peacefully in Warsaw and other cities, demanding freedom of expression, the end of censorship, and shouting for a Polish 'Dubczek.' Warsaw writers publicly denounced Party interference in cultural activity and creative endeavors. Massive and brutal reprisals by the security police under General Moczar (Minister of the Interior) followed and, after several days, some order was restored. Nearly three thousand students were arrested.[406]

Two years later, on December 12, 1970, long-simmering public discontent over the shortage of basic foodstuffs and housing, dependence on the Soviet Union, and lack of freedom fomented open rebellion in Gdansk. Triggered by the announcement of a fifteen to thirty-percent increase in the price of food and fuel, protesters went to the streets.[407] Gomulka ordered an immediate crackdown. Thousands were wounded and several hundred were killed. Gomulka justified the brutal response with the claim that the workers' unrest was indicative of a 'counter-revolutionary' attack against the Party and the socialist system.[408] The brutality of Gomulka's repressive actions caused immediate concern among those in opposition to Gomulka in the Central Committee, especially when a wave of protests spread to other industrial centers. When Gomulka suffered a heart attack on December 19, 1970, he was forced to resign and Edward Gierek was elected as the new First Secretary.[409]

---

[406] These events are detailed in DE WEYDENTHAL, *supra* note 387, chapter 7.
[407] *Id*. at 145.
[408] For a comprehensive discussion of the suppression of this workers' revolt, *see* Jan B. de Weyenthal, *The Workers' Dilemma in Polish Politics*, EAST EUROPEAN QUARTERLY, vol. 13, no. 1, 1979, at 95.
[409] For a detailed analysis of political circumstances surrounding Gomulka's resignation, *see* Z. Pelczynski, *The Downfall of Gomulka*, in GIEREK'S POLAND 1-23 (Adam Bromke & John W. Strong, eds., 1973).

Gierek inherited a political tinderbox. His freedom to maneuver was complicated not only by Gomulka's mismanagement but also by the fact that, after two decades of intensive industrialization, Polish workers demanded more than hollow promises for their sacrifice.[410] The Party organization was torn by dissention and there was a concern that the Soviet Union could not be counted on to continue the unusual restraint shown during the December upheaval.[411]

Essentially, the new leader's policies consisted of four major elements: Stable prices for basic necessities; a better supply of consumer goods; increases in real wages; and modernization of the economy.[412] Initially, at least, Gierek was successful. The psychological atmosphere caused by the change in the regime and the concessions to consumerism led to growing expectations and hope for the future. When economic activity gradually increased in 1972, life for the Polish people actually appeared to improve. Unfortunately, the recession in the West in 1974-75, the Arab oil boycott, and the resultant reduced market for Polish goods saw these gains evaporate completely by 1976.[413]

D. Decline of the Gierek Economic Model

The power of the Polish workers and intellectuals and the extent of their disenchantment became obvious in 1975 when the Party attempted to alter the Polish Constitution by providing amendments that would have, in one case, institutionalized the predominant role of the Party and unbreakable ties with the Soviet Union. Anderson claimed that this particular proposed change was part of an ongoing ideological campaign which had been launched in 1974 to "bring Poland into line with the other East European countries in entrenching by constitutional provision the leading role of the communist party and the link with the Soviet Union."[414]

---

[410] *See* the discussion of Gierek's initial concerns in Adam Bromke, *A New Political Style*, PROBLEMS OF COMMUNISM (September-October 1972).

[411] This was especially true in light of Moscow's showing in Czechoslovakia that it would abandon overnight any ally unable to maintain order at home. In addition, the Soviet leadership could hardly have been pleased with some aspects of the new Polish program, including the legitimization of the workers' spontaneous action, the use of aid from Moscow to subsidize a wage scale higher than that in place in Moscow, and the continued pressure by the Polish people and the Party elite to make Poland more self-assertive internationally. *See* Blazynsky, *supra* note 385, at Chapter 3 (discussing these Soviet concerns).

[412] SCHAUFELE, *supra* note 384, at 31.

[413] *See* the discussion of these outside influences which affected the Polish economy negatively in the mid-1970s in DE WEYEBTHAL, *supra* note 387, chapter 8.

[414] Anderson, *supra* note 377, at 7.

On December 5, 1975, fifty-nine intellectuals had protested this proposed amendment with a strongly worded letter to the Polish Parliament (Sejm). The "Letter of 59"[415] argued that any greater link with the Soviet Union which further limited Poland's sovereignty was inappropriate in light of the ongoing Helsinki Summit, which had as its precept the guarantee of basic civil and human rights in practice.[416] When the constitutional amendments, including the most objectionable above, were finally presented to the Sejm in 1976, they had been substantially modified as a result of this pressure from below.[417]

Not only did the Gierek regime seriously miscalculate the opposition to the proposed constitutional changes,[418] but it also found itself unable to contend with the problem of increased prices for basic goods. Bialer has outlined the reasons for this dilemma as: (1) the increased cost of oil as a result of the energy crisis; (2) the recession in the West which slowed Polish export sales; (3) Gierek's ill-conceived financial program which channeled 40% of the national income into investment, the majority of which went to heavy and export industries; and (4) the failure to reform the antiquated and inefficient national planning and management process which might have better prepared the nation's economic mechanisms to cope with a system emphasizing intensive growth.[419]

The beginning of the end for Gierek came on June 24, 1976, when Prime Minister Jaroszewicz announced substantial price rises in basic foodstuffs -- up to sixty percent on many items.[420] There was a violent strike at the Ursus Tractor Factory in Warsaw, bloody rioting in Radom, and unrest in other major

---

[415] One of the most confusing practices of Polish political language was to name such protest documents by the number of signatories; hence the "Letter of 59." During the constitutional conflict, a second letter signed by fourteen people became the "Letter of 14." This document stated that the proposed amendments would be a derogation from state sovereignty "in blatant contradiction to the currents of our era." A third document, the "Letter of the 101," attacked the link between civil rights and the performance of duties: "Democracy in general, and hence socialist democracy too, assumes that the enjoyment of civil rights cannot be limited by special conditions, let alone conditions whose formulation is unclear and allows arbitrary interpretation by government officials." *See* an excellent discussion of this constitutional conflict in Anderson, *supra* note 377, at 6-8.

[416] *Id*.

[417] It is interesting how quickly Gierek's government slipped back into the bad habit of the Gomulka regime of disregarding pressures from below and distrusting the mass of the population. Gierek displayed a singular lack of finesse in forgetting what the workers had learned from their experience of 1970 -- that they had the power to remove a Party leader.

[418] One reason for the miscalculation may have been the nature of constitutions in communist political systems—essentially they were propaganda statements—and for this reason it apparently did not occur to Gierek that changes would trigger major confrontation between regime and the people.

[419] Seweryn Bialer, *Poland and the Soviet Imperium*, 59 FOREIGN AFFAIRS (No. 3) 525 (1980).

[420] SCHAUFELE, *supra* note 384, at 35.

cities. The price increases were rescinded.[421] The subsequent persecution of the strikers, however, led to a feeling of solidarity among all sectors of Polish society. The Party had managed to unify its opposition. The church, workers, students and intellectuals coalesced into what could only be considered a civil rights movement. Because both the regime and the opposition realized that each had the power to destroy the other but at a cost disasterous for all, a restrained tension existed from 1977 through 1979. All parties displayed a degree of restraint unusual to Polish politics.[422]

E. The 1980 Labor Unrest

The uneasy truce crumbled in 1980. Triggered by price increases which resulted in shortfalls in every area of the economy,[423] the first signs of transition from dissent to demonstration again erupted in the Ursus Tractor Factory where workers went on strike on July 2nd. They demanded increased wages and improved working conditions.[424] The Gierek regime, hoping to buy time and obtain further credits from the West, agreed to negotiate. On August 14th, more than 50,000 workers at the Gdansk shipyard went on strike, adding demands for rights accorded only in democratic countries. The "21 Demands" presented to Politburo member and negotiator Mielzstaw Jagielski included the right to organize independent trade unions, the release of political prisoners, the right to strike, access to the media for the Church, and the demand that the guarantees in the Constitution would be honored by the government.[425] When the Gierek regime conceded nearly all demands, Gierek was replaced by Stanislaw Kania in a move not unlike the departure of Gomulka in 1970. Kania, a long-time member of the Polish Politburo, had previously been responsible for defense and internal security.[426]

---

[421] Anderson, *supra* note 377, at 8.

[422] *See* THE ECONOMIST, Jan. 15, 1977, at 2 (reporting that a grudging half-tolerance of the opposition would continue because it was too strong to be put down by a quick campaign of suppression).

[423] In the second quarter of 1980 alone, according to official estimates, industrial production dropped 17 percent below the same period in 1979. Total production losses for the July-September period were estimated at $2.3 billion. For the coal-mining industry, one of the mainstays of the Polish economy, the shortfall was 10% of the total output. In the first three quarters of 1980, the plan for the construction industry was only 37% fulfilled. The grain harvest, which had been 21.3 million tons in 1978, declined to 17.3 million tons in 1980. This total was officially declared to be 8 million tons below domestic needs, requiring expensive large-scale imports. Meat production, which was 3.3 million tons in 1979, declined to 2.4 million in 1980. Potato production, the worst in 20 years, was down 40% from that of 1979. Figures reported in Bialer, *supra* note 419.

[424] SCHAUFELE, *supra* note 384, at 41.

[425] The "21 Demands" are reproduced as an Annex in the Appendix to JAMES P. TERRY, SOVIET INTERVENTION: THE RELATIONSHIP BETWEEEN LAW AND POWER (1982), SJD (dissertation on file at George Washington University Law Library).

[426] SCHAUFELE, *supra* note 384, at 41.

The tide of liberalism was not to be stemmed by a change in leadership, however. The independent trade union 'Solidarity' was born, with control vested in Lech Walesa, the workers' representative in the negotiation of the "21 Demands." Peasants and farmers organized "Rural Solidarity" and other groups organized their own non-socialist organizations. Enjoying excellent leadership and superb intelligence from sympathizers within the Party, the trade union "Solidarity" was able to anticipate and effectively counter efforts by the government to restrict their activities. With the right to strike secured, the threat of such action became more effective than the weapon itself. Schaufele correctly noted:

> The Party made concession after concession, changing its leadership at almost every level, tolerating strikes and demonstrations, and generally appeared unable to govern as it once did. The culmination of this process, in a sense, was the democratization of Party procedures with multi-candidate secret balloting for Party Congress delegates and secret votes in various Party organs.[427]

Building over several months, the abrupt end to this process came on December 13, 1981, with the imposition of martial law, the arrest of the leadership of Solidarity, and the end of the independent union movement. The crackdown and rollback of the gains of liberalization were preceded on October 17, 1981 by the replacement of Secretary Kania as Communist Party chief by General Jaruzelski, who had been serving as Premier. More importantly, it represented the sad fact that the Soviets ultimately controlled events in Warsaw.

F. The Soviet Role

There is no evidence that the Soviet Politburo ever considered allowing events in Poland to take their own course. Rather, after August 1980, Poland was subjected to an escalating campaign of pressures, threats and intimidation by Moscow, including military maneuvers. All these actions were explicitly designed to halt the process of reform.

The secret preparations were even more sinister. As early as March 1981, the Soviets were arguing for the imposition of martial law. In September 1981, the very martial law decree announced on December 13 was printed in the Soviet Union. And the Commander of the Warsaw Pact forces, Soviet Marshal

[427] *Id*. at 44.

Kulikov, was positioned in Poland both prior to and during the execution of martial law.[428]

Following the Gdansk Agreement of August 22, 1980, in which the Polish government accepted the "21 Demands," the Soviet official news agency TASS had charged that "anti-socialist forces" were trying to undermine socialism in Poland, trying to push it "off the socialist road it has chosen . . . which meets the vital interests of the entire Polish people."[429] On September 8, 1980, 40,000 Warsaw Pact troops began unscheduled four-day maneuvers in then-East Germany on the Polish border while, on the same date, a PRAVDA editorial reminded Poles of their obligation to the Warsaw Pact and to the Council of Mutual Economic Assistance.[430] On November 27, 1980, in its strongest attack to that point, RUDE PRAVO stated that there were limits to Solidarity's activities and drew an ominous parallel to Czechoslovakia's liberal upsurge in 1968 which was quelled by the Warsaw Pact invasion.[431] The pressure continued to build,[432] and by December 1980 Soviet spokesmen were advising the press that Polish communists had the "right and duty" to request Soviet assistance if socialism were endangered.[433]

Apparently, the Soviets did believe that socialism was endangered in Poland, for on February 10, 1981, the Pentagon noted that twenty-six Soviet divisions placed on alert in December 1980 remained in a high state of alert on the Polish border.[434] Later in February 1981, Brezhnev addressed the Communist Party of the Soviet Union and reasserted the applicability of the Brezhnev Doctrine to Poland. He stated:

> In fraternal Poland, . . . the enemies of socialism, with the support of outside forces, are creating anarchy and endeavoring to turn the development of events into a counterrevolutionary channel . . . . A threat to the foundation of the socialist state has arisen. . . . We will stand up for socialist Poland, fraternal Poland, and will not leave her in the lurch. . . . Communists have always boldly met the attacks of the adversary and won out. This is how it was and how it will

---

[428] A recitation of Soviet activities prior to martial law is found in U.S. Dept. of State, CURRENT POLICY NO. 362 (Jan 12, 1982) at 2 [hereinafter *Current Policy*].
[429] August 23, 1980, statement *quoted in* U.S. Dept. of State, SPECIAL REPORT NO. 94 (Jan. 1982) at 1 [hereinafter *Special Report*].
[430] *Id*.
[431] *Id.* at 2.
[432] All Soviet actions impinging upon the Polish right of self-determination are detailed in an Annex to the Appendix in TERRY, *supra* note 425.
[433] *Id.*
[434] *Id*.

> be, and let no one have any doubt about our common determination to secure our interests and defend the peoples' socialist gains.[435]

By the summer of 1981, it was clear to the Soviets that Communist Party chief Kania lacked both the authority and the backing to suppress the Solidarity movement. When Kania was reelected on July 19, Brezhnev sent a terse congratulatory message, lacking either praise or a statement of confidence.[436] On August 8, 1981, Marshal Kulikov, commander of the Warsaw Pact forces, visited Warsaw, and invited Premier Jaruzelski but not Kania to join him for talks.[437]

The following month, Soviet General Gibkov, Chief of Staff of the Joint Armed Forces of the Warsaw Pact, met with Jaruzelski again, apparently to fashion the terms of the martial law decree that would not be imposed until December 13th. In a speech at the International Press Center in Brussels on January 12, 1982, U.S. Secretary of State Alexander Haig related that the United States had been aware that the imposition of martial law had been planned by the Soviet Union early in 1981. He stated, "The secret preparations were even more ominous. It is known that as early last March the Soviets were arguing for the imposition of martial law. In September, the martial law decree itself was printed in the Soviet Union."[438]

During October, 1981, the Soviets continued their verbal assaults. PRAVDA carried an authoritative article on October 13 containing an implied threat of intervention,[439] and respected Soviet Politburo member Suslov

---

[435] Leonid Brezhnev's speech to CPSU Congress, *reported in* Feb. 24, 1981 PRAVDA and *quoted in Current Policy*, *supra* note 428.
[436] *Current Policy*, *supra* note 428, at 4.
[437] *Id*.
[438] *Quoted in Current Policy*, *supra* note 428, at 2.
[439] PRAVDA article under Aleksey Petrov pseudonym stated:

> The situation in Poland is growing more acute, increasingly alarming the Polish communists, the patriots of socialist Poland and all its friends . . . . The socialist foundations of Polish society are being eroded under the flag of the so-called 'renewal.'The anti-socialist forces are using Solidarity as a battering ram to destroy the foundation of the public ownership of the means of production with a view to switching the country onto the rails of the restoration of capitalism. . . . The enemies of socialism operating in Solidarity have disclosed the ultimate scheme of the imperialist circles, namely the shattering of the socialist community by beginning with Poland. The preservation of the revolutionary gains of the Polish people is not only their domestic question. It is the question directly affecting the vital interests of all the people and states which have chosen the road of socialism.

promised Poland on October 14, 1981, "the fraternal solidarity and support of the Soviet Union and other members of the Warsaw Pact."[440]

Soviet warnings in mid-October that economic assistance to Poland would be reduced and that Moscow would insist upon balanced trade beginning in 1982 prompted the Polish Communist Party to replace Kania with General Jaruzelski as First Secretary. Jaruzelski had been trained in the Soviet Union and had close ties to Marshal Kulikov and Soviet Politburo members. It took Jaruzelski only eight weeks to find the excuse[441] he needed to impose martial law, disband Solidarity, and intern the proponents of reform. It was the Soviet Union itself, in a TASS report on December 13 hours *before* the crackdown, which claimed that the 'patriotic forces' of Poland invited the military repression of the reform movement.[442] The use of force on a nationwide scale against the Polish people only occurred because the then-Soviet Union instigated it, supported it, and encouraged it.[443]

Quoted in Appendix to *Special Report*, *supra* note 429.

[440] *Quoted in Special Report*, *supra* note 429, at 4.

[441] In the eyes of Western observers, the justification relied upon by Jaruzelski was the unsubstantiated claim on December 7, 1981, that proof was held by the Party that Solidarity was truly an anti-communist political organization rather than a labor organization. Citing tape recordings allegedly made of Solidarity meetings in Radom, this was followed on December 11 with a TASS report from Moscow which stated:

> Leaflets have been disseminated in the Szczecin, Radom and some other voivodships (provinces) announcing December 20 to be "a Sunday of crushing the PZPR" (Polish Communist Party). Slogans are called to do away with communists. . . . Masowsze's leader, Bujak, said that they were planning to take over the premises of the central television and radio of Poland on December 17.

Quoted in Appendix to *Special Report*, *supra* note 429.

[442] TASS report on Poland, December 13, 1981: "Patriotic forces of Polish society increasingly more resolutely demand that a rebuff be given to the enemies of socialism, the rebuff which they deserve for their criminal actions. Fraternal countries of socialism side with the Polish people in their just struggle against counterrevolution." *Quoted in* Appendix to *Special Report*, *supra* note 429.

[443] Any thought that the brutality which began on December 13, 1981, was provoked by the excesses of Solidarity is a myth. U.S. Secretary of State Haig put it most succinctly:

> For months prior to the sudden imposition of martial law, Solidarity worked strenuously to halt strikes and prevent chaos. Lech Walesa traveled from city to city, from factory to factory, calling for people to return to work. His call was heard. After March 1981, strikes in Poland never exceeded a small fraction of the work force. After August 1981, the Polish Government's own statistics recorded increasing production. Solidarity's search for stability was not reciprocated. The Jaruzelski government had planned a different course.

Quoted in Current Policy, *supra* note 428, at 2.

U.S. Secretary of State Alexander Haig exposed the great myth of Poland (that the world witnessed a necessary alternative to an otherwise inevitable military intervention by Soviet military forces):

> A state supposedly founded on the workers' movement is actively suppressing a worker movement ten million strong. The Polish working man is the target -- and the victim. His voice has been silenced. His productive energies have been sapped. His chosen leaders have been imprisoned. His hopes are being sacrificed because they do not fit with Soviet plans for maintaining absolute control over the countries of Eastern Europe.[444]

In a cruel paradox, the world was asked to believe that martial law was acceptable because it was a lesser evil. This was the most sophisticated approach to intervention yet by the Soviet Union. Despite its apparent immediate success, the cumulative effects of Soviet betrayal of the right of self-determination throughout Eastern Europe were beginning to take their toll.

G. Soviets In Violation of Their Commitment to Self-Determination

The principle of self-determination has historically evoked questions and sustained discord. The principle was seen by some after Yalta as "the hope for the future of mankind,"[445] while skeptics of the principle disputed its vitality and labeled its proponents as "politically naïve."[446] Although international declarations and covenants spoke authoritatively of a right of self-determination,[447] the events in Poland emphasized its frailty within the socialist collective.

While self-determination has always been a protected right under the United Nations Charter,[448] its continued violation led the U.N. General Assembly in 1952 to consider its inclusion in the Covenants on Human Rights.

---

[444] *Id*. at 5.
[445] G. Arangis-Ruiz, *Codification of the Principles of International Law on Friendly Relations and Cooperation Between States*, RECUEIL DES COURS 14 (1972).
[446] R. Green, *Self -Determination and Settlement of the Arab-Israeli Conflict,* A.S.I.L. PROC. 40 (1971). Mr. Green concluded his paper with the following remark: It would appear that despite the fanfare of propaganda that has accompanied certain United Nations resolutions, there is at present no legal right of self-determination. *Id*. at 48.
[447] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. G.A.O.R. Supp. 16, at 66, U.N. Doc. A/4684 (1960); International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. G.A.O.R. Supp. 16, at 491, U.N. Doc. 6316 (1966) [hereinafter *UN Covenants*].
[448] *UN CHARTER*, *supra* note 96, art. 1(2).

Resolution 545(VI) added the following sentence to the Covenants: "All peoples have the right to self-determination."[449]

Interestingly, it was the Polish delegation to the Commission on Human Rights which proposed a formulation which emphasized the universal nature of the right of self-determination. The Polish proposal, supported by the Soviet Union, was adopted at the eighth meeting of the Commission on April 21, 1952.[450] Paragraph 1 of the resulting resolution provided: "All peoples in all nations have the right of self-determination, that is, the right to be free to determine their own political, economic, social and cultural status."[451] When the Covenants were finally adopted by the U.N. General Assembly, this language remained largely unchanged: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[452]

The importance of this provision in both U.N. Covenants lies in the term "right," which must be contrasted with Article 1(2) of the U.N. Charter, which only discusses "the *principle* of self-determination of peoples and nations." Similarly, Article 1 of the Covenants provides that "peoples" are the subject of the right whereas the more ambiguous term "nations" is included in the Charter provision. The significance, then, of the inclusion of this wording in the U.N. Covenants relates to its application to all peoples, regardless of the type of political system.

Prior to the 1976 implementation of the U.N. Covenants on Human Rights, self-determination was confirmed as an international legal right on two other occasions. The first, in 1970, saw the inclusion of this right in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.[453] The second instance was in the Declaration on Principles of the Final Act of the Conference for Security and Cooperation in Europe (CSCE) adopted at the summit meeting in Helsinki on August 1, 1975.[454]

---

[449] *Reprinted in* MARJORIE M. WHITEMAN, 5 DIGEST OF INTERNATIONAL LAW, Sect. 4: Self-Determination, at 69 (1965).
[450] *Id*. at 76.
[451] *Id*.
[452] Art. 1, *UN Covenants*, *supra* note 447.
[453] G.A. Res. 2625, 25 U.N. G.A.O.R. Supp. (No. 28) 121, U.N. Doc. A/8018 (1970) [hereinafter *DECLARATION*].
[454] *Supra* note 382.

The 1970 Declaration on "Friendly Relations" contains seven legal principles, the sixth of which comprises the right of self-determination and equal rights:

> . . . all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . . .[455]

The right of *external* self-determination, as included within Principle Six above, was always emphasized by the Soviet Union as one of the principles of the law of peaceful coexistence governing relations between capitalist and socialist states.[456] Conversely, the right of *internal* self-determination for peoples with respect to their governments was not recognized in the socialist system, but rather considered an unwarranted intrusion upon the authority of the Soviet Communist Party to provide 'guiding leadership' to the socialist collective. It was therefore not surprising that in the preliminary negotiations of the CSCE in Helsinki in 1973, the Soviets opposed the adoption of the Yugoslav proposal condemning "any form of subjugation or of subordination contrary to the will of the peoples concerned."[457] The Soviet Union and some other socialist states vigorously argued their view that, once a people had chosen a form of government or a certain social structure, their right to self-determination was to be considered as implemented.[458] Despite these Soviet efforts, the overwhelming sentiment in Helsinki was for a more broadly based definition resulting in a formulation which applied to both internal and external self-determination.[459]

---

[455] *DECLARATION*, *supra* note 453.
[456] For a discussion of the principles of the law of 'peaceful coexistence,' *see infra* the discussion in Part III.
[457] *Quoted in* HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORDS 97-99 (Thomas Buergenthal, ed. 1977) (explaining that in the Soviet view, internal self-determination for non-racist sovereign states is not relevant because the right of self-determination ceases to apply when a people has attained sovereignty).
[458] *Id*.
[459] *Id*. at 100.

The key portion of the Eighth Principle in the Declaration on Principles Guiding Relations between Participants that refers to equal rights and to the right of self-determination, now reads:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference and to pursue as they wish their political, economic, social and cultural development.[460]

The wording corresponds to the definition of the right of self-determination in Article 1 of the United Nations Covenants on Human Rights.[461] Since their entry into force in 1976, these 1966 U.N. Covenants have had a more binding effect in an international legal sense than the U.N. Declaration on Friendly Relations and the Final Act of the CSCE.

The significance of including the right of self-determination in the CSCE's Declaration on Principles should not be underestimated, notwithstanding its declarative nature. Its inclusion emphasized the importance of the right of self-determination for all peoples who had lost their political independence through force, or coercion of a political, economic or military nature. The Declaration on Principles of the CSCE offered these peoples a stronger platform upon which to claim the right to determine their internal political status and to demand protection within the U.N. framework when their political independence was denied.

H. Poland and the Right of Self-Determination

The development of the right of self-determination was particularly meaningful for the people of Poland, who had been deprived of a developing political independence as a result of the Soviet-supported martial law regime. The repression in Poland that existed after December 13, 1981, was in gross violation of fundamental component principles of self-determination provided in the Helsinki Final Act, a solemn international obligation which both the Soviet and Polish authorities signed in 1975.

---

[460] *Supra* note 382, at 1295.
[461] *UN Covenants*, *supra* note 447.

It is worth reviewing some of the specific provisions of the Helsinki agreement in the context of their application to Poland in 1981:[462]

--Principle I, 'Sovereign Equality,' which includes the provision that states will "respect each other's right freely to choose and develop its political, social, economic and cultural system as well as its right to determine its laws and regulations." Nothing could be more direct, or the Soviet treatment of it more cynical, than in Poland in 1981.

--Principle II, 'Refraining from the threat or use of force,' which includes the provision that states will "refrain from any manifestation of force for the purpose of inducing another participating sate to renounce the full exercise of its sovereign rights." The repeated and massive Soviet military preparations and exercises near the Polish frontiers spoke for themselves with respect to intimidation.

--Principle VI, 'Non-intervention in internal affairs,' which includes the commitment to "refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating state, *regardless of their mutual relations*." The last clause is especially significant, since it denied the validity of the 1968 Brezhnev doctrine, addressed in part III, which would have asserted for the Soviet Union a right to intervene in Poland because of the latter's membership in the Warsaw Pact.

--Principle VII, 'Respect for human rights and fundamental freedoms,' which includes the commitment to "promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his full and free development." The thousands of arrests in Poland after December 13, 1981, the suspension of dialogue, and the abrupt breaking off of the course of reform and renewal ran directly counter to this principle.

Not only were the Helsinki obligations with respect to self-determination ignored in practice by the Soviet Union, they were ignored as a matter of official Soviet policy as well. By its adoption of the Declaration of Principles of the CSCE in the foreign policy section of the 1977 Brezhnev Constitution, the Soviet Union incorporated the principles agreed upon in Helsinki -- save one. Principle VIII, regarding self-determination, was reworded to incorporate the language proposed in the Soviet June 4, 1973, draft and

[462] *HELSINKI ACCORDS*, *supra* note 382, at 1295. These provisions remain applicable and binding today.

rejected in the Helsinki negotiations.[463] At that time, the Soviet representatives urged that the language they had proposed, "right to decide their own destiny," referred only to external sovereignty.[464] That language, and apparently that interpretation, is now included in Article 29 of the 1977 Brezhnev Constitution.[465] More significantly, Article 30 of the Brezhnev Constitution specifically provided for foreign policy relationships within the socialist community, indicating that the rights in Article 29 applied only to relationships with capitalist states.[466]

Despite those disheartening indicators, U.S. NATO Ambassador W. Tapley Bennett claimed at the time that those who dwell on the fact that the Soviets were proving themselves to be "as unprincipled after Helsinki as before" had missed the whole point of the CSCE process.[467] Ambassador Bennett stated:

> There were, I am sure, no illusions on the Western side about the actual state of political or social relations in and among the States of the Soviet Bloc in 1975. There was, however, a desire to set forth a framework for the future -- to establish a standard -- which would, among other things, make Soviet observance of human and civil rights a significant element of

---

[463] Buergenthal, *supra* note 457, at 98-100.

[464] *Id*. *See* a discussion of the provisions incorporated in the 1977 Constitution in Bernard A. Ramundo, *The Brezhnev Constitution: A New Approach to Constitutionalism*, 13 J. INT. L. AND ECON. 41 (1978).

[465] The Helsinki Declaration on Principles is incorporated in Article 29 of the 1977 Constitution:

> Article 29: The U.S.S.R.s relations with other states are based on observance of the following principles: sovereign equality; mutual renunciation of the use or threat of force: inviolability of frontiers; territorial integrity of states; peaceful settlement of disputes; non-intervention in internal affairs; respect for human rights and fundamental freedoms; the equal rights of peoples and the right to decide their own destiny; cooperation among states; and fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the U.S.S.R.

[466] *See* Ramundo, *supra* note 464, at 78. The text of Article 30 provides:

> Article 30: The U.S.S.R., as part of the world system of socialism and of the socialist community, promotes and strengthens friendship, cooperation, and comradely mutual assistance with other socialist countries on the basis of the principle of socialist internationalism, and takes an active part in socialist economic integration and the and the socialist international division of labor.

[467] Address by Ambassador W. Tapley Bennett, Jr., Permanent Representative of the United States of America to the North Atlantic Treaty Organization, Copenhagen, March 2, 1982.

> East-West relations. There is no question but that this standard has been established. The Belgrade and Madrid follow-up meetings to Helsinki and the reaction to events in Poland are themselves evidence of the effective expansion of the East-West agenda.[468]

I. Western Response to Soviet Violations in Poland

> No one in Europe will forget either the uprisings and protests against Communist totalitarianism in Poland, East Germany, Hungary, or Czechoslovakia, or the skillful integration of ideology, military force, and semantic prowess that marked the crushing of these national and individual activities in furtherance of the "dignity of man." Nor has the fact been consigned to oblivion that the United States was politically and militarily passive. . . . Is the latest of our 'new' initiatives on behalf of human rights in this tortured European world designed to be more credible?[469]

The great difficulty in fashioning a Western course of action responsive to these demands for change by the Polish people lay in the fact that in closed societies the impact of significant economic or political pressures from the West tended to hurt most the peoples whose interests they were intended to benefit. The United States and its allies had, therefore, attempted a course of action designed to penalize the Polish Communist Government and the then-Soviet Union while at the same time indicating support for the Polish people.

On December 23, 1981, President Reagan announced that he had brought to President Brezhnev's attention our fundamental concerns.[470] The Soviet response was negative. On December 29, 1981, President Reagan initiated a of number of actions, primarily in the economic field, which were designed to penalize the Soviets and further signal U.S. concern.[471] Our allies in

---

[468] *Id*.

[469] A. Bozeman, *Understanding the Communist Threat*, HUMAN RIGHTS AND WORLD ORDER 151 (A. Said ed., 1978).

[470] President Reagan's Christmas Address, Dec. 23, 1981, reprinted in Annex C to Committee on the Budget, U.S. House of Representatives, *The United States and Poland: A Report on the Current Situation in Poland After the Declaration of Martial Law*, April 1982 (Committee Print).

[471] *See Current Policy*, *supra* note 428, at 3. The measures announced on December 29, 1981, included:

> (1) All Aeroflot service to the U.S. was suspended.
> (2) The Soviet Purchasing Commission was closed.

the North Atlantic Council likewise condemned developments in Poland and made clear that both the Soviet Union and the Polish Government had violated the Final Act of Helsinki and U.N. obligations.[472] Unfortunately, America's casual use of marginal sanctions did not send the effective message desired, because they did not involve a credible threat of escalation to a level sufficient to stop the offender. Similarly, the Western Europeans did not -- and were not expected to -- support the economic measures and this only further communicated America's impotence.

Professor Dimitri Simes claims that while the United States had only limited leverage to change Polish and Soviet policies, the careful use of that which we did have could have forced President Brezhnev and General Jaruzelski to exhibit greater flexibility.[473] He suggests that any subsequent economic aid to Poland should have been contingent upon the significant relaxation of police controls and the resumption of a meaningful dialogue with the opposition: Solidarity and the Catholic Church.[474] In addition, he states that the United States should have relied more heavily upon diplomacy:

> A postponement of the meeting between Haig and Soviet Foreign Minister Andrei Gromyko would definitely have attracted Moscow's attention. The argument that especially in times of crisis the White House and the Kremlin must engage in dialogue is unpersuasive. Poland is not a crisis in the U.S.-Soviet relationship that requires this kind of dialogue. For unlike the October 1973 Middle East war, the current events do not threaten a direct military confrontation between the superpowers.[475]

---

(3) The issuance or renewal of licenses for the export to the U.S.S. R. of electronic equipment, computers and other high technology materials was suspended.
(4) Negotiation of a new long-term grain agreement was postponed.
(5) Negotiations on a new U.S.-Soviet maritime agreement were suspended, and a new regime of port access controls was put into effect when the existing agreement expired on December 31, 1981.
(6) Imposition of a new license requirement for export to the Soviet Union for an expanded list of oil and gas equipment. Issuance of such licenses was suspended.
(7) Determination to not renew U.S.-Soviet exchange agreements coming up for renewal, including the agreements on energy and science and technology.

[472] North Atlantic Council Declaration, Jan. 11, 1982*, reprinted in Current Policy*, *supra* note 428, at 4.
[473] Dimitri K. Simes, *Clash Over Poland*, 46 FOREIGN POLICY 66 (Spring 1982).
[474] *Id*. at 65.
[475] *Id.* at 66.

When United States diplomatic and economic policy options were attempted in an effort to seek a convergence of Soviet policy and legal obligations, they had to, then as now, be meaningful and pragmatic to be successful. They were neither. In the summer of 1982, President Reagan threatened to withhold "trade and credits necessary to prop up the Soviet economy." These were to have been withheld in exchange for "meaningful Soviet actions that promote stability."[476] Despite much rhetoric, no "meaningful" Soviet actions were forthcoming and no tough U.S. actions were exacted to ensure "operational results." As Walter Lippman once wrote, "In foreign relations, as in all other relations, a policy has been formed only when commitments and power have been brought into balance."[477]

[476] *Quoted from* address by U.S. Presidential Advisor Thomas C. Reed before the Armed Forces Communications and Electronics Assoc, Wash., D.C. June 16, 1982.
[477] Walter Lippman, *quoted in* Henry Kissenger, *Continuity and Change in American Foreign Policy*, in HUMAN RIGHTS AND WORLD ORDER 161 (A. Said ed., 1978).

VI. Lithuania 1991: Intervention Gives Way to Independence

When Lithuania demanded its independence from Moscow on March 11, 1990, it was one of fourteen Soviet Republics and autonomous regions to make that claim under 'perestroika.'[478] Of all those asserting independence, however, the Baltic states of Lithuania, Estonia, and Latvia most nearly met the criteria for self-determination established by contemporary international law, as affirmed by the United States and the then-Soviet Union in the Helsinki Final Act of 1975.[479]

The official recognition of Lithuanian independence by Moscow on September 6, 1991, marked the successful culmination of a 52-year struggle to overcome forcible incorporation of this independent state by the Soviet Union. Credit for this achievement must be accorded first to the Lithuanian people, who persevered through decades of repression, and to their democratically elected leaders, who fought for their aspirations through peaceful means.

This Part examines the Lithuanian struggle, the successful application of the law of self-determination in the Baltic state in 1990-1991, and suggests a course for more effective support for other 'Lithuanias,' where the right of peoples to their own national identity is suppressed through illegal intervention, as occurred in Vilnius in 1940 and again in 1944.

A. Subjugation of Lithuania in Historical Context

The independence gained by the Lithuanian people in 1991 had been a right legally recognized by the United States since 1922.[480] Lithuanian independence from imperial Russia had actually been proclaimed on February 16, 1918, nearly four years before U.S. recognition. In 1920, after withdrawal of Communist forces from the Baltics, the new Soviet Government signed a peace treaty with Lithuania.[481] Article 1 of the Russo-Lithuanian Peace Treaty of July 12, 1920, provided:

---

[478] Declaration reprinted in *Parliament in Lithuania, 124-0, Declares Nation Independent*, N.Y. TIMES, Mar. 12, 1990, A-1, A-11. Independence was declared by fourteen other Soviet Republics and autonomous Regions on the following dates: Azerbaijan, Sept. 23, 1989; Estonia, Mar. 30, 1990; Latvia, May 1, 1990; Russia, June 12, 1990; Uzbekistan, June 20, 1990; Moldavia, June 24, 1990; Ukraine, July 16, 1990; Byelorussia, July 27, 1990; Armenia Turkmenistan, August 23, 1990; Tajikistan, Aug. 24, 1990; Kazakhstan, Oct. 25 1990; Georgia, Nov. 11, 1990; and Kirghizia, Dec. 12, 1990.

[479] The critical elements are addressed in detail in Part V, *infra*.

[480] The U.S. recognized the state of Lithuania on July 26, 1922, and continued that *de jure* recognition despite Soviet control over the Republic.

[481] 3 L.N.T.S. 94, at 122-37 (1922).

> Russia recognizes without reservation the sovereign rights and independence of the Lithuanian State with all the juridical consequences arising from such recognition, and voluntarily and for all time relinquishes all the sovereign rights of Russia over the Lithuanian people and their territory.
>
> The fact of the past subjection of Lithuania to Russia does not impose on the Lithuanian nation and their territory any liabilities whatever toward Russia.[482]

Lithuania's admission to the League of Nations was registered on September 22, 1921, and U.S. recognition followed in 1922. In 1928, Lithuania became a signatory of the Pact of Paris (known as the Kellogg-Briand Pact)[483] and of the Convention on the Definition of Aggression. These initiatives were designed to strengthen Lithuanian national security.

The years prior to World War II were peaceful. Lithuania concluded a Treaty of Good Understanding and Cooperation[484] with the other Baltic states in 1934 (to remain in effect for 10 years) to promote mutual understanding and friendship. The Treaty also created the Baltic Entente. When Latvia was unanimously elected to the Council of the League of Nations in 1936, the three Baltic nations felt their independence secure.

The outbreak of World War II proved otherwise. Lithuania and the other Baltic states declared themselves neutral. Immediately after the Soviet Union signed the Molotov-Ribbentrop Agreement with Germany in 1939 establishing European spheres of influence, however, Moscow dictated mutual assistance treaties with Lithuania and its Baltic neighbors. The Pact of Mutual Assistance with Lithuania, signed on October 10, 1939, decreed that all Lithuanian air and naval bases were to be transferred to Soviet control, and that Lithuania would garrison 25,000 Soviet troops.[485] Despite repeated assertions by the Soviet Government in early 1940, the Pact with Lithuania in no way implied the intrusion of the Soviet Union in the internal affairs of Lithuania,[486] Soviet pressures immediately began to increase. On June 15, 1940, under the pretext that Lithuania had violated the Mutual Assistance Pact by concluding a military alliance with Latvia and Estonia, a completely false assertion, Soviet

---

[482] *Id*.
[483] *See discussion* in TERRY, *supra* note 3, ch. III.
[484] *See* BRONIS J. KASLAS, THE BALTIC NATION: THE QUEST FOR REGIONAL INTEGRATION AND POLITICAL LIBERTY 176 (1976).
[485] Pact of Mutual Assistance, Oct. 10, 1939, Lithuania-U.S.S.R., *reprinted in* 3 SOVIET DOCUMENTS ON FOREIGN POLICY 1933-1941 (1953).
[486] *See text* of *Premier-Foreign Commissar Molotov's Report on Foreign Affairs to the Supreme Soviet*, N.Y. TINES, Nov. 1, 1939, at 8, col. 1.

forces occupied the country and deposed the government. The new Soviet puppet regime and its state security apparatus quickly ordered the arrest of the leaders and active members of all non-communist political parties and arranged for their immediate deportation to the Soviet Union.[487]

The Soviet occupation lasted only one year, from June 1940 until June 1941. Soviet forces then withdrew to protect the motherland as Germany launched a massive offensive. Only then was the duplicity of the Soviet Government in its repeated assurances of respect for Lithuanian self-determination during early 1940 fully revealed. One Soviet document, discovered as the Red Army withdrew, revealed that the Soviet Government planned and organized the Lithuanian occupation in 1939. The infamous "Serov Order," entitled "Procedure for Carrying Out the Deportation of Anti-Soviet Elements from Lithuania, Latvia and Estonia," was signed on October 11, 1939, by General Ivan Serov, then Soviet Deputy Commissar for State Security.[488]

Hitler's plan for the Baltic region called for the conversion of the Baltic states and Byelorussia into a German settlement area. A Nazi memorandum dated April 2, 1941, states that this goal would be achieved by a transfer of the bulk of the indigenous population to Russia and their replacement by educated, racially suitable German, Danish, Norwegian, Dutch, and even British farmers.[489]

Although the Lithuanian Provincial Government established during the Soviet occupation was dissolved by the Germans in August 1941, Lithuanian resistance groups announced in 1943 the establishment of a Supreme Committee for the Liberation of Lithuania to coordinate their actions. On February 16, 1944, the Committee issued an appeal to the Lithuanian nation which stated: "A Provisional Government of the Republic will be organized when the proper time comes . . . ." This Provisional Government was never formed because the German security forces arrested most of the Committee's members soon after, and the remaining officials went underground. Leaders of the underground resistance later served as the spearhead of opposition to the Soviet reoccupation forces.[490]

As the Wehrmacht withdrew from the Baltic states during September 1944, the reoccupying Soviet Army reinstalled a puppet regime in Vilnius, with no recognition of Lithuanian rights guaranteed in the 1939 Pact of Mutual Assistance. Between 1944 and 1949, the U.S.S.R. deported 250,000 Lithuanian

---

[487] J. Perandi, *Soviet Acts of Genocide Against the Baltic Nations*, 2/3 BALTIC REV. 25 (1954).
[488] Papers of the Latvian Legation, Washington, D.C. 37 (1976) [hereinafter *PAPERS*].
[489] JANIS RUTKIS, LATVIA, COUNTRY AND PEOPLE 253 (1967).
[490] *See* IX DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, 593 (1949).

citizens to gulags in Siberia. The resistance to Soviet occupation continued until 1952, eight years after the re-entry of the Soviet Army. Between 1952 and 1990, the Soviets pursued a conscious policy of forced Russification aimed at the eradication of the Lithuanian state. The religion, culture, and history of the Lithuanian people were suppressed. Nevertheless, the Soviet Union was unable to force acceptance of a totalitarian way of life among Lithuania's intensely nationalist population.[491]

B. Right of Self-Determination Applied to Lithuania

Quite apart from the Mutual Assistance Treaty signed by Lithuania and the Soviet Union in 1939 recognizing Lithuania's sovereignty, the international community had also developed a cogent body of law supportive of Lithuania's self-determination claim. The Atlantic Charter,[492] signed jointly by Roosevelt and Churchill in August 1941, and by Stalin one month later, pledged that the United States, Great Britain and the Soviet Union: (1) would seek no territorial changes that did not accord with the wishes of the people concerned; (2) would respect the right of all people to choose the form of government under which they would live; and (3) agreed to see sovereign rights and self-government restored to those who had been forcibly deprived of them. In its declaration of acceptance on September 23, 1941, the Soviet Union further stated it was "guided by the principles of self-determination, sovereignty, and equality of nations."[493]

The following year, 1942, the 26 nations united in combat against the Axis Powers, to include the United States and the Soviet Union, reaffirmed the principles articulated in the Atlantic Charter by signing the United Nations Declaration.[494] This was the first use of United Nations as a term reflecting unity among nation-states. When the United Nations Charter was adopted three years later, it was the Soviet Union that initiated inclusion of the principle of self-determination within the Charter framework.[495]

The United Nations Charter carefully defined the principle of self-determination in a manner tailored to the concerns of the Lithuanian people. According to Article 1, paragraph 2 of the Charter, the purpose of the United Nations is "to develop friendly relations among nations based on respect for the

---

[491] The refusal of the Lithuanian people to embrace the totalitarian puppet regime supported by the then-Soviet Union was the subject of the July 26, 1983, message to the Lithuanians from President Ronald Reagan marking the 61st anniversary of the U.S. recognition of Lithuania.
[492] U.S. State Dept. E.A.S. No. 236, 1 FOREIGN RELATIONS 1941, 368-69.
[493] D. Dallin, RUSSIEA AND POST-WAR EUROPE 136-37 (1944).
[494] *See discussion* in R. BENNETT, INTERNATIONAL ORGANIZATIONS 43 (1977).
[495] B. Meissner, *The Right of Self-Determination After Helsinki and its Significance for the Baltic Nations*, 13 CASE W. RES. J. OF INT'L L. 375 (1978).

principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen a universal peace." General Assembly Resolution 637A(VII), interpreting this Charter provision, further recommended that member states respect "the principle of self-determination of all peoples and nations."[496] In 1960, the General Assembly, with the U.S.S.R. voting affirmatively, again declared the principle of self-determination as part of the obligation stemming from the Charter, not as a 'recommendation,' but as a matter of authoritative interpretation.[497]

C. United States Support for Lithuania

The United States had remained vocal in its continuing support for Lithuanian self-determination. On July 23, 1940, Acting Secretary of State Sumner Welles summed up the U.S. position when he declared the President's resolve to adhere to a policy of supporting self-determination of Lithuania and non-recognition of the forcible, unlawful seizure of territory (known as the Stimson Doctrine).[498] Secretary Welles pointed out that the Soviet Union could not advance any substantive reason for breaching its legal obligations pursuant to the Pact of Mutual Assistance of 1939. Furthermore, he noted that the occupation of Lithuania and the other Baltic Republics was a breach of every major treaty signed between the Soviet Union and the Baltic states after recognizing their perpetual right to sovereignty and independence in the 1920s. Finally, he stressed that the use of force had been outlawed in Soviet-Baltic relations by the treaties of non-aggression and peaceful settlement of disputes of 1926 and 1932.[499] When U.S. officials bound the United States to the Atlantic Charter in August 1941, the American commitment was only reinforced.

United States resolve was evident in the courts as well. The Federal judiciary, relying upon an Executive Order signed by President Roosevelt on July 15, 1940,[500] precluded transfer of all property and assets of the Lithuanian Government or its citizens under U.S. control to the Soviet Union.[501]

---

[496] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 576 (1973).
[497] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 496, at 576.
[498] Statement of Acting Secretary of State Sumner Welles, July 23, 1940, *reprinted in* 3 U.S. DEPT. OF STATE BULL. 48. The Stimson Doctrine, named for former Secretary of State Stimson, articulates the principle of non-recognition for the forcible seizure of territory and the political and economic consequences thereof.
[499] *Id*.
[500] EXEC. ORD. 8484, 5 C.F.R. 2586 (1940). It is estimated that assets subject to the Order amounted to $12 million dollars at the time.
[501] *See* THE FLORIDA, 133 F.2d 719 (5th Cir.1943) (discussing the legal reasoning used by the courts in addressing these assets).

As World War II came to a close, the United States and Britain, knowing the Soviet desire to punish those who sympathized with Germany's anti-communist foreign policy, refused return of Lithuanians from within the allied military occupation zones of Central Europe. The United States and Britain refused to recognize Lithuanians and other Baltic citizens as 'Soviet Citizens' within the context of the 1945 Repatriation Agreement since the initial seizure of these countries was deemed illegal. This action alone is believed to have saved thousands of lives.[502]

In the post-war period, President Truman's position was clear. In a message sent to Lithuanian representatives in the United States on June 14, 1952, Truman said, in part:

> Coupled with revulsion at the acts of the occupying power, whose forcible incorporation of the Baltic states we have never recognized, we pay tribute to the determined endeavors of the diplomatic and other representatives of Estonia, Latvia, and Lithuania on behalf of their homelands. We shall not forget our Baltic friends.[503]

The Eisenhower and Johnson Administrations were also vocal in their support for Lithuanian self-determination. On January 6, 1957, President Eisenhower reaffirmed the Lithuanian right to independence in a statement to a joint session of Congress.[504] On behalf of President Johnson, Vice President Humphrey made a similar statement when proclaiming Baltic Freedom Day on June 12, 1966.[505]

In 1975, as U.S. representatives prepared to return to Helsinki for the final round of negotiations within the Conference on Security and Cooperation in Europe (CSCE), President Ford reassured concerned Lithuanians in the United States. He stated that a U.S. signature on the Final Act of the Helsinki Conference would not legitimize the Soviet annexation of Lithuania by a tacit recognition of post-World War II borders. The President explained that U.S. non-recognition of the annexation was not affected by the CSCE process, and that, conversely, the Declaration of Principles within the Helsinki Final Act provided that "no occupation or acquisition of territory in violation of

---

[502] Lithuanian Telegraph Agency Bull. (ELTA), at 1 (Jan. 20, 1962). The Soviet delegation to the Potsdam Conference demanded the return of "all Soviet citizen immigrants from the Baltic Republics and the Western Ukraine and Western Byelorussia." 2 U.S. FOREIGN REL. 1165 (1945).
[503] *PAPERS*, *supra* note 488, at 48.
[504] 36 U.S. DEPT. OF STATE BULL. 917 (Jan. 21. 1957).
[505] *PAPERS*, *supra* note 488, at 52.

international law will be recognized as legal."[506] This view remained the position of the United States Government during all future negotiations.

D. Soviet Commitments at Helsinki Affecting Lithuania

During the CSCE negotiations in 1975, the leaders of 35 nations, to include the United States and the Soviet Union, reached agreement on principles "guiding their mutual relations." For the United States, the importance of the Final Act of the Conference was the provision committing the participating states to protect human rights and fundamental freedoms, equal rights, and self-determination of peoples.[507] Although the Helsinki Declaration of Principles (as well as similar initiatives at the Belgrade, Madrid and Stockholm follow-up conferences) was not binding upon the participant states, the Declaration appeared to offer the Lithuanians a stronger position for claiming their right to determine their internal and external political status within the framework of international law.

In theory, Article 72 of the 1979 Soviet Constitution (known as the Brezhnev Constitution and discussed in Part V, *infra*) was designed to implement the self-determination provisions of the Helsinki Declaration. Article 72 guaranteed the right of secession to every constituent Republic of the Soviet Union; however, the Soviets proved the commitment to be merely illusory. When faced with the March 1990 declaration in Vilnius, coupled with similar demands by Georgia, Armenia, Moldavia, the Ukraine, Latvia and Estonia, Kremlin leaders announced a new Soviet law of secession. The new law required that two-thirds of a Republic's citizens vote for secession in a popular referendum in which no campaigning would be allowed. If the referendum was defeated, no new request for secession could be made for ten years. If the referendum succeeded, a five-year period would follow for negotiating a separate agreement with the seceding Republic.[508] (In effect, this law, if not mooted by the August 1991 failed coup attempt, could well have preserved the then-political alignment of the Soviet Union well into the future.)

After a vote by the full Soviet Duma on December 24, 1990, directing a March 17 nationwide referendum on preserving the Soviet Union as a federal state,[509] the Gorbachev regime attempted to reduce pressure in the economic arena. The January 3, 1991, provisional agreement with the larger Republics on

---

[506] GERALD FORD, 2 PUBLIC PAPERS 1032 (1975).
[507] *Historical Documents of 1975*, CONG. Q. 559 (1976).
[508] *See* Martha B. Olcott, *The Lithuanian Crisis*, FOR. AFF. 43 (Summer 1990) (discussing the new law of secession).
[509] Michael Dobbs, *Soviet Republics to Vote on Union*, WASH. POST, Dec. 25, 1990, at A-1.

funding the federal budget also addressed urgent economic stabilization measures.[510]

Just as these measures were addressing the concerns of the larger Republics, Gorbachev dispatched elite Interior Ministry troops to Vilnius to occupy Communist Party buildings.[511] This Soviet initiative in January 1991, which resulted in the loss of fourteen Lithuanian lives, spurred further Lithuanian demands for independence from Moscow and precipitated plans for a February 9th plebiscite on this question. On February 5th, Gorbachev issued a decree invalidating the planned plebiscite, ordering the Republic to instead participate in the March 17 vote.[512] The Soviet order was condemned and ignored in Vilnius. The February 9th plebiscite which followed clearly reflected Lithuanian demands, as more than 90 percent of the Lithuanian people voted for independence from Moscow.[513] This was followed by months of inaction on the part of the Soviet Government.

Fortunately for the Lithuanians, time was on their side: they clearly understood what they wanted; their cause was endorsed by the international community at large; and they had the overwhelming support of their own population. The Soviet leadership, conversely, had not agreed on a clear course of action in early 1991, politically or economically. Despite the demands for reform from both the leadership within the Republics and their own citizenry, former President Gorbachev was mired in bureaucratic malaise and economic strangulation. His strategy in Lithuania throughout early 1991 appeared to consist, alternately, of positive rhetoric followed by disciplinary military action. This pattern was clearly intended to gain time to implement reforms he hoped would induce the secessionist Republics, including Lithuania, to remain within the Union.

During this period, the United States continued to emphasize the legitimate claim to self-determination Lithuania enjoyed, while not jeopardizing Gorbachev's leadership role. The new Soviet rules for secession, designed to give the central authorities a veto over the will of the people, were addressed informally within the CSCE construct as potentially harmful to the lawful demands of the Republics. At the same time, the Bush Administration realized that the support provided to Gorbachev must not provide the 'cover' under which he could stonewall the Baltic independence initiatives. In this regard,

---

[510] Michael Dobbs, *Kremlin, Republics Agree to Resolve Budget Dispute*, WASH. POST, Jan. 4, 1991, at A-1.
[511] *Id*. at 22.
[512] *Gorbachev Seeks Support to Keep Union Intact*, PAC. STARS AND STRIPES, Feb. 8, 1991, at 5.
[513] *Lithuanians Go To The Polls*, PAC. STARS AND STRIPES, Feb. 11, 1991, at 5.

President George H. W. Bush decided to cancel the U.S.-U.S.S.R. Summit in early 1991 as a signal of our continued concern.

Until the August coup attempt against Gorbachev, the political choice for the Soviets in Lithuania and in the other secessionist Republics was between satisfying growing nationalist demands on the one hand and preserving the unity of the centrally controlled political system on the other. These policy alternatives, however, had to be viewed at the time in a broader context. In Lithuania, for example, the factories and other capital assets that the Soviet Union owned were valued at $33 billion.[514] The Soviets believed that a free Lithuania would be hard-pressed to pay off that amount, even if its demands for compensation for the thousands of Lithuanians sent to forced labor camps or killed after the Red Army returned during 1944 were met. More important, the Soviets depended on the Port of Klaipeda in Lithuania as the main port of entry for military supplies for the autonomous oblast (province) of Kaliningrad. This region, they argued, would be cut off from the rest of the Soviet Union by an independent Lithuania, absent some reasonable military use accommodation.

The failed August 1991 coup changed all sides of the equation. As President Gorbachev briefly returned to power in Moscow from his prison dacha in the Russian Crimea in late August, he denounced the KGB and distanced himself from the Communist Party. In the series of events which followed, a state machine, based on fear of the Secret Police and the repression of the Communist Party, was crippled. On September 6th, formal diplomatic recognition of Lithuania from the Soviet Union was announced by the then-Soviet President and the new State Council.[515]

E. Lithuania in Perspective

The tortuous path followed by Lithuania in regaining its independence from the former Soviet Union reflects the problems inherent in implementing the international law of self-determination. But for the overwhelming economic failure of the Soviet system and the resulting political collapse, the external pressures available through the United Nations and the CSCE would probably have been insufficient alone to effect the change in sovereignty demanded by the Lithuanians, at least in the near term. This is largely because the principles within the United Nations Charter are designed to protect the status and integrity of member-States *as they entered* the United Nations. While clearly the United Nations does recognize the rights of 'peoples', as evinced by numerous General Assembly Resolutions calling for Palestinian self-determination and recent U.N.

---

[514] *Two Liberations in Lithuania*, N.Y. TIMES, March 12, 1991, at A-20.
[515] Fred Hiatt, *Soviets Recognize Baltic Independence in First Meeting of New State Council*, WASH. POST, Sept. 7, 1991, at A-1.

initiatives on behalf of the Sudanese and Kosovars, the former Soviet Union's presence as a Permanent Member of the Security Council would have effectively forestalled any initiative to implement change on Lithuania's behalf during this crisis under Chapter VII of the United Nations Charter (actions authorized by the Security Council, including military actions, to ensure international peace and security).

In the bilateral and multilateral arenas, however, the United States has had, and will continue to have, opportunities to affect human rights which must not be squandered. As an example, the successes currently claimed by the United States and the Russian Federation in implementing the Agreement on Conventional Forces in Europe (CFE) were obtained under the same framework (CSCE) which gave birth to the Helsinki Final Act. Whether addressing trade or arms control issues, the United States must leverage its negotiating posture in a focused way in favor of human rights and encourage our friends and allies to do the same.

VII. CHECHNYA 2006: PUTIN'S DILEMMA

In the 16 years since the dissolution of the former Soviet Union and the formation of the Russian Federation, the Russians have elected two Presidents: Boris Yeltsin from 1991 until December 31, 1999, and Vladimir Putin, appointed by Yeltsin as Acting President on December 31, 1999, and elected to his first full term in March 2000. He was reelected in 2004.

It has been Putin, the ex-KGB colonel, however, who has best understood how to organize and lead this vast nation. The problem is, Putin has determined that the political system and the economy must be stabilized at all costs, with the obvious casualty being the fledgling democratic and legal values, once thought key to his successful tenure.

While the chaotic years of Boris Yeltsin's stewardship are behind Moscow, in one tragic respect, Putin's Russia, similar to that under Yeltsin in 1995, finds itself mired in an unpopular war against Chechen guerrillas with no apparent end in sight.

A. The Seeds of the Crisis with Grozny

The year 1990 represented an important chronological mark in Chechnya, a republic churning with anxiety as the U.S.S.R. began to experience unprecedented production shortfalls and economic concerns. In November, 1990, more than 1,000 delegates to the Congress of the Chechnyan People gathered in Grozny to exert pressure on Russian authorities to accelerate political change. Russian General Tokhar Dudayev, a native Chechen then commanding an Air Force division in Tartu, Estonia, addressed the Congress and advised that if they engaged the Russians in a fight for liberation, they had to understand that they had to commit for the duration of the struggle.[516]

The struggle was not all political, however. As Chechen political analyst Timur Muzayev described: "In Chechnya, economic growth had contrasted with great poverty within the villages. In the mountains, the poverty and unemployment were appalling. The political explosion combined with a social explosion. The spring was released."[517]

When the Soviet hard-liners' coup against Gorbachev as President of the U.S.S.R. failed in August 1991, retired-General Dudayev's National Radical

[516] C. GALL & T. DE WAAL, CHECHNYA: CALAMITY IN THE CAUCASUS 76 (1998).
[517] *Quoted in id*. at 77.

Party (Ispolkom) demanded that the members of the Chechen Supreme Soviet resign, since they had been unwilling to take a principled stand against the attempted coup, or conversely, to support 'perestroika.' This coincided with Yeltsin's (and his ally, Deputy Moscow City Council Chairman Sergei Stankevich's) withdrawal of support for Chechen Communist Party leader Zavgaev, who had advocated aggressive action against his opponents in Grozny, and more specifically, Dudayev. This ultimately provided the opening for Dudayev to deploy his national guard to eject Zavgaev from power on September 6, 1991. Despite threats from Yeltsin that if the Dudayev opposition did not immediately submit to the authority of the Russian Federation (RSFSR) Supreme Soviet, military action would follow, Dudayev calmly set October 27, 1991, as the date of elections for a republican parliament.[518]

When the election results were announced on September 30, Dudayev easily bested his two rivals. Although the anti-Dudayev Provisional Supreme Council of the Chechen-Ingush Republic Communist Party immediately declared the elections fabricated and unconstitutional as did the RSFSR Supreme Soviet, Dudayev ignored these pronouncements and issued a decree declaring the Chechen Republic to be a fully independent State on November 1, 1991.[519]

This was followed on the evening of November 8, 1991, by the insertion of Russian light infantry and paratroopers into Khankala Airport near Grozny. These Russian troops were immediately surrounded and arrested by Dudayev's forces. On the following day, November 9th, an agreement was reached with RSFSR officials in Moscow, and the Russian troops were released and unceremoniously bused back to Moscow. Gorbachev, who had returned to power after the failed coup, succeeded in getting Yeltsin to rescind his decree declaring a state of emergency in Chechnya. Then, on November 10, 1991, the newly revived Confederation of Mountain Peoples, consisting of the representatives of 14 nationalities from the North Caucasus Region, committed their support to the 'Chechen Revolution.'[520]

The period 1991-1994 was marked by Chechen quasi-independence, but with Dudayev facing one economic crisis after another. By the end of 1991, however, the 'revolution' had assumed its unique character, with local citizens regularly attacking various Russian military installations on Chechen soil.[521] Dudayev, meanwhile, ordered the RSFSR federal troops in Chechnya to leave immediately. On June 6, 1992, the Commander of the North Caucasus Military

[518] JOHN B. DUNLOP, RUSSIA CONFRONTS CHECHYA 112 (1998).
[519] *Id*. at 115.
[520] *Id*. at 122.
[521] VALERY TISHKOV, CHECHNYA: LIFE IN A WAR-TORN SOCIETY 63 (2004).

District directed the Russian Federation military commander in Chechnya, General Sokolov, to leave Chechen territory.[522] As Russian troops departed, Chechen forces, either through the threat of force or black market purchase, took possession of an enormous military arsenal which would radically change the dynamics of the conflict.[523]

As Dudayev consolidated power in 1992, new political and legal structures were required. Tishkov explains:

> Local intellectuals prepared a Constitution for the Chechen Republic (Ichkeria) imbued with a spirit of representative Democracy and secular law. Islam was relegated to a minor ritual role; the Constitution made no mention of Islam or Allah, and religious liberty was recognized for all citizens. The Constitution placed no restrictions on its citizens on the basis of ethnicity or religion.[524]

Economically, however, Dudayev's initiatives were a disaster. As Matthew Evangelista correctly notes: "In focusing on what he knew best -- war -- Dudayev neglected everything else that Chechnya would need to become a viable political and economic entity, including good relations with Russia."[525]

Once a reasonably prosperous region with petro-chemical and oil and gas industries in the major population centers, this republic of approximately 950,000 citizens witnessed a transformation in 1992-93 as it became one of the most economically challenged regions in Russia. Tishkov states:

> Overall production fell by about 60% per year in 1992 and 1993. . . . Concurrently, there was a mass exodus of the Russian population. These were generally the most qualified professionals in Chechnya, those on whom the Republic's oil and gas industries depended. According to the Federal Migration Service of Russia, from 1991 to 1993, more than 90,000 people left the Republic.[526]

As the economy plummeted, Dudayev and his circle had to change course from legal sources of revenue to more questionable ones. As Dunlop notes, "Chechnya was transformed into the largest center of counterfeit money

---

[522] *Id*. at 64.
[523] DUNLOP, *supra* note 518, at 123.
[524] TISHKOV, *supra* note 521, at 64.
[525] MATTHEW EVANGELISTA, THE CHECHEN WARS 21 (2002).
[526] TISHKOV, *supra* note 521, at 65.

and of false financial documents on the territory of the former USSR."[527] Weapons and narcotics were brokered and transshipped through the Republic by trafficking cartels.[528] Stephen Handleman has written that Russian officials estimated that more than 150,000 weapons were 'at large' in the city of Grozny, a city of 400,000.[529]

In early 1994, Boris Yeltsin' advisors urged military intervention in Chechnya, citing Chechnya's refusal to join the Russian Federation.[530] Russia was, at the time, also vying to participate in the Azerbaijani oil project and a peaceful Chechnya was required as the major pipeline involved ran through Chechnya.[531] After an unsuccessful attempt on Dudayev's life on May 27, 1994, Russia became actively engaged in supporting Dudayev's rivals in Chechnya. The Chechen Provincial Council, headed by Umar Avturkanov, was recognized as the "only legitimate power structure in Chechnya."[532] On November 28, 1994, the Russian Security Council met to discuss the Chechen situation and endorse the Yeltsin "force option."[533] On that same date, Russian fighters attacked and destroyed all Chechen aircraft under the control of Dudayev at the Khankala Air Base.[534]

B. The 1994 Russian Attack on Chechnya

The Russian ground attack on Chechnya had begun even before the Security Council vote on November 28, 1994. Two days before, on November 26th, a botched Russian-supported attack by Chechen opposition forces in Grozny led to the capture of 70 Russian officers and troops by Dudayev's forces.[535] The two-year war that followed has been labeled the 'War of Deceit.'[536] Intended to bolster Yeltsin's popularity at home, it would have the opposite effect.

On the morning of December 11, 1994, a Russian invasion force of 23,700 men, 80 tanks, and 208 armored vehicles entered Chechen territory in

---

[527] DUNLOP, s*upra* note 518, at 127.
[528] *Id*.
[529] STEPHEN HANDLEMAN, COMRADE CRIMINAL: THE THEFT OF THE SECOND RUSSIAN REVOLUTION 202-04 (1994).
[530] Tartarstan had also refused to join, but was treated differently, as part of Yeltsin's asymmetric federalism.
[531] *See* ROSE FORSYTHE, THE POLITICS OF OIL IN THE CAUCASUS AND CENTRAL ASIA (1996) (discussing the oil dimension of the December 1994 Russian military move into Chechnya).
[532] DUNLOP, *supra* note 518, at 197.
[533] *See* Maria Eismont, *The Chechen War, How It All Began*, PRISM, Part IV, Mar 8, 1996.
[534] *Id*.
[535] EVANGELISTA, *supra* note 525, at 39.
[536] *Id*.

three columns from Ingushetiia, North Ossetia, and Dagestan.[537] On New Year's Eve, Russian troops, who had been in blocking positions outside the capital city of Grozny, were unexpectedly ordered to assault the city in a four-columned attack within a few hours. The Russian forces, which were hastily assembled and consisted of poorly-trained conscripts, were opposed by a larger force of Chechens, many of whom had served in the Soviet Army. Against optimistic Russian expectations, the Chechens stoutly resisted and the Russian attack quickly became a military fiasco; over 2,000 Russian soldiers were killed in the first several days alone. It took the Russian Army until January 19th to capture the nearly-demolished Presidential Palace, having suffered tremendous losses.

During the initial operations in Chechny, the Russian Air Force bombed population centers indiscriminately, most notably in Grozny. As one expert explained: "the bombs had destroyed the electric and water systems, leading to further civilian deaths."[538] Although greatly outnumbered by the Russian occupiers, Chechen forces retained the support of the people, many of whom were native Russians, because of the atrocious behavior of the occupying troops in harassing and otherwise maltreating Chechen civilians.[539]

It was the responding terrorist practices of the Chechen forces, however, which ultimately led to an end of the conflict. Several incidents are significant. Shamil Basayev, a Chechen commander, led an attack on Budennovsk, a Russian town near the border with Chechnya. After seizing nearly 1,000 hostages and holding them in a civilian hospital, the Russian counter-attack resulted in the deaths of more than 120 of the Russian citizens.[540] Basayev justified the Chechen attack as retaliation for the Russian attack on the Chechen village of Vedeno the preceding month, where large numbers of civilians were killed, including 12 of his relatives, all women and children.[541] The stand-off which followed in Budennovsk resulted in a diplomatic victory for the Chechens, as Russian Prime Minister Chernomyrdin agreed to a cease-fire and follow-on peace talks.[542]

The peace talks broke down in August 1995 when Russian forces, without notice, resumed bombardment of Chechen villages in the mountains.[543]

---

[537] *See* Pavel Felgengauer, *The Chechen Campaign*, presented at NPG School, Monterrey, CA, conference entitled: "*The War in Chechnya: Implementation of Russian Security Policy*," 7-8 Nov. 1995.
[538] *Id*.
[539] *Id*.
[540] GALL & DE WAAL, *supra* note 516, at 257-59.
[541] *Id* at 259.
[542] *See Id*. at 270-80 (describing these events fully).
[543] *Id*. at 283 (explaining that the hawkish view was once again gaining control in the Kremlin).

This was followed by the car-bombing of Russian General Romanov in Grozny. Romanov was one of the Russian negotiators of the stalled peace talks and was committed to the success of the negotiations. While attributed to Chechen forces by Moscow, an inspection of the detonator mechanism suggested it was the work of hard-line elements in the Russian security forces anxious for the talks to fail.[544]

In January 1996, Chechen commander Salman Raduev conducted a raid similar to that carried out in Dudennovsk in Kizliar, on the Terek River in Dagestan, capturing the town hospital and taking in excess of 2000 townspeople hostage in that facility. After striking a deal for safe passage for his fighters in exchange for the safety of the hostages, the Russians reneged and attacked the Chechen convoy as it neared the Chechen border at the village of Pervomaiskoe. Raduev sought refuge in the village and maintained control of his hostages. Meanwhile, Turks of Chechen origin in the Baltic Sea port of Trabzon hijacked a passenger ferry and demanded the Russian Army free their 'Chechen brothers' in Pervomaiskoe.[545] The Russian Army responded by shelling Raduev and his hostages. Raduev and most of his fighters were able to escape their encirclement at Pervomaiskoe and return to Chechen territory, with their hostages. They then released the hostages to Dagestan authorities.[546] These raids showed the impotence of Russian security forces and the commitment of the Chechens.

A further element that would help draw the conflict to a close was the April 1996 Russian assassination of Dudayev. After arranging a negotiating session by cell phone with his Russian counter-part in Moscow, the Russians used the satellite signal to guide a missile to Dudayev's location.[547]

In the subsequent months, Yeltsin would first agree to a peace accord in May 1996, and then renege on that agreement in July 1996, after his re-election as President of the Russian Federation was secure. A renewed bombing campaign in the mountains followed. On August 6, Chechen fighters led by Aslan Maskhadov[548]attacked the Russian forces in Grozny and pinned down the 12,000 troops. The Russian commander Pulikovskii launched a disastrous counter-attack, during which the Russian forces suffered 494 dead, 1,407

---

[544] *Id* at 285.
[545] EVANGELISTA, *supra* note 525, at 41.
[546] *Id*.
[547] *Id*.
[548] *See* EVANGELISTA, *supra* note 525, at 44 (explaining that on July 29, 1996, after the full resumption of Russian attacks, Russian operatives attempted unsuccessfully to assassinate Maskhadov). Maskhadov had become the de-facto successor to Dudayev until his election in December 1996. Maskhadov was killed on March 8, 2005 under suspicious circumstances. BBC NEWS, http://news.bbc.co.uk/2/hi/europe/4330039.stm (last visited August 18, 2006)

wounded, and 182 missing, while causing approximately 2000 Chechen civilian deaths. More than 220,000 Chechens fled the city as refugees.[549]

The battle for Grozny, in which superior Russian forces were defeated, was the straw that convinced the leadership in Moscow to seriously negotiate an end to the conflict. This was accomplished under OSCE auspices.[550] Both sides signed an agreement "on the principles for the determination of the basis of relations between the Russian Federation and the Chechen Republic."[551] Named after the town where it was negotiated, the Khasaviurt Accord provided for the right of self-determination and for the rights of ethnic minorities.[552]

The first Russian war with Chechnya killed thousands of Chechen citizens, left thousands homeless, and drove thousands more into the North Caucasus as refugees. More than 6,000 Russian soldiers died. While the Federation forces failed to defeat the rebels, the Chechen forces carried the conflict to Russian soil and leveled devastating terrorist attacks on Russian villages. The successful Chechen campaign to recapture the capital city of Grozny in 1996 was the linchpin that convinced the Russians to negotiate the peace agreement at Khasaviurt with newly elected Chechen President Maskhadov.[553] The agreement provided for deferral of the determination of Chechnya's status within the Federation until 2001.[554]

C. The 1999 Chechen Crisis

Russia's second major war with Chechnya was ignited in late 1999 when Islamic Chechens spurred uprisings in Dagestan, the neighboring Russian Republic. Dagestan is home to 34 ethnic groups, with Dagens, Avars, Kumyks, Lezgins, and Laks comprising nearly 50% of the total. It is the animosity between Laks and Chechens in Dagestan which lies at the root of the current crisis. The Laks in Dagestan occupy land claimed by their Chechen brethren.

Compounding the ethnic tensions in the North Caucasus between Laks and Chechens and Kumyks and Avars, to name two, are the pervasive problems created in the region for Moscow by high unemployment, rapid population growth, and extreme poverty. The outpouring of refugees from Chechnya in the wake of Russian bombing during the first war had only exacerbated the crisis

[549] GALL & DE WAAL, *supra* note 516, at 350.
[550] *Id.* at 359.
[551] *Id*.
[552] EVANGELISTA, *supra* note 525, at 44-45.
[553] Maskhadov was killed on March 8, 2005 under suspicious circumstances.
[554] *See* discussion in Gall & de Waal, *supra* note 516, at 360.

and led each of the Caucasus Republics to question the underlying logic of their continued participation in the Russian Federation.

The specter of political Islam in the Caucasus had also become a force of great concern to Moscow. While the Muslim threat was submerged during the Soviet period by a heavy handed Soviet military presence in Chechnya, the corrupt successor Federation regimes have done little to address the underlying economic and social malaise, or address the poverty and inequality.

At the heart of this review of Russian actions in Chechnya after 1999 is Russian President Vladimir Putin. The totalitarian regime he has established in a pluralistic society has shown him to be far more than the contrived successor to Yeltsin that many believed him to be in January 2000. He has, in fact, become an incredibly strong leader unchallenged by oligarchs, legislators, or regional bosses, let alone a democratic opposition. In fact, as Richard Pipes so eloquently states, "Russia's democratic institutions have been muzzled, its civil rights restricted, and its cooperation with the international community far from assured."[555] As Pipes notes, Putin is popular primarily because he has reinstituted Russia's traditional model of government: an autocratic state where citizens are relieved of responsibility for politics and in which imaginary foreign enemies are invoked to forge an artificial unity.[556] Putin's popularity after the presidential election in 2004 can certainly be attributed in large part to his stated hard-line approach to shape up a straying republic in the Caucasus, just as his Soviet brethren saw their obligation in the Warsaw Pact era in Hungary, Czechoslovakia and Poland.

The seeds of the 1999 conflict, as noted above, lie in ethnic conflict. More than this, however, President Putin saw a renewed Chechen conflict as a way to ensure victory in his March 2000 Presidential race. As Peter Baker and Susan Glasser have noted concerning Putin:

> He could be brutal, as in waging a war in Chechnya that fueled his surprising ascension in 1999 and cost tens of thousands of lives. And he could be subtle, as when wooing his counterparts in the West, who embraced him as a new-generation leader only to be surprised by his old style tendencies. . . . Nationalists cheered his war in Chechnya and his vow to end the disintegration of the State.[557]

---

[555] Richard Pipes, *Flight from Freedom*, FOREIGN AFFAIRS 15, May-June 2004.
[556] *Id*.
[557] PETER BAKER & SUSAN GLASSER, KREMLIN RISING 6-7 (2005).

Baker and Glasser note that, upon his election in March 2000, Putin surrounded himself with former KGB (now FSB) members and trusted former military colleagues.[558] The Chechen crisis and the threat of terrorism that Putin would argue existed after the horrific slaughter of Beslin's school children in 2004, gave him the capital to cancel all regional gubernatorial elections in 2004 and claim the authority to appoint trusted governors as a counterterrorism measure to prevent further crises.[559] As Putin explained to President Bush in Santiago in November 2005, Russia is unique among nations and it needs to have "a style of government that is consistent with Russian history."[560]

D. The Rule of Law Trampled

Whatever Putin's view of the acts necessary to preserve the Russian Federation, the consequence of his over-reliance on military force and his inadequate attention to political and economic outreach in Chechnya has been exacerbated by his force's failure to pay even lip-service to the principles of the law of armed conflict. Russian forces, as are the military forces of all nations, are required to observe the laws of war, even in an internal armed conflict.[561] Article 15 of the 1993 Russian Constitution provides, for example:

> The commonly recognized principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty with the Russian Federation abides by rules other than those stipulated by law, the rules of the international treaty shall apply.[562]

As law professor Vladimir Galitskii of the Russian Academy of Military Sciences has observed: "Our state, acknowledging the priority of international law over national law, ratified all of the currently active international conventions on the laws and customs of war, defense of victims of war, and took upon itself the obligation strictly to observe them."[563]

The critical international law principles applicable to the two separate conflicts in Chechnya are found in the 1949 Geneva Conventions in Common

---

[558] *Id*. at 8.
[559] *Id*. at 9. The RSFSR Supreme Court affirmed Putin's authority to make this change in a December 2005 decision.
[560] *Quoted* in *id.* at 377.
[561] *See* Common Article 3 of the Geneva Conventions of August 12, 1949, which so provides with respect to internal armed conflict, as represented in Chechnya.
[562] Constitution of the Russian Federation (1993), sect. 1, chap.1, art. 15, pt. 4.
[563] V. Galitskii, *War in a Legal Vacuum: Laws Are Not a Hindrance But a Help in the Struggle with the Internal Enemy*, INDEPENDENT MILITARY REV., No. 21 (June 16, 2000).

Article 3 relating to internal armed conflicts and the principles enunciated in the two Additional Protocols to these Conventions negotiated in 1977.[564] The minimal protections afforded by Common Article 3, for example, include prohibitions on inhumane treatment of non-combatants, including members of the armed forces who have laid down their arms. Specifically forbidden are "murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment," and extrajudicial executions. Provision must also be made for collecting and caring for the sick and wounded.[565]

The 1977 Geneva Protocols had their roots in wars of national liberation following World War II. Colonial powers, to include the United States, Great Britain, and the Netherlands, had engaged these liberation movements militarily often with little regard for the law of armed conflict.[566] In the 1974 Conference hosted by the Swiss government in Geneva, the need to address conflicts of a non-international character was addressed in Article 96(3) of Protocol I and in Protocol II. At the Conference, the Swiss government invited members of National Liberation Organizations to participate, but not vote.[567]

The participation of non-state actors helped shape the drafting of Article 96, paragraph 3 of Protocol I. This section provides that a party to a conflict with a state army can unilaterally declare it wants the 1949 Geneva Conventions and the 1977 Protocols to apply. This would, of course, offer greater protection for members of National Liberation movements. Under Article 96, however, parties authorized make such a declaration had to establish that they were involved in "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[568]

While Dudayev and Maskhadov portrayed their fight as an anti-colonial struggle, Russia and the international community have never recognized the conflict as a war of national liberation or as an anti-colonial war. Nevertheless, even within the narrower scope of the protections afforded by Common Article 3 of the Geneva Conventions, as described above, the application of these limited protections by Russian forces would have eliminated the overwhelming

---

[564] 1949 Geneva Conventions and 1977 Additional Protocols are reproduced in NATIONAL SECURITY LAW DOCUMENTS (J.N. Moore et al. eds., 1995).
[565] *Id.*, Common Art. 3, at 185.
[566] *See* EVANGELISTA, *supra* note 525, at 143 (asserting these nations saw the insurgent as common criminals and terrorists, as did Putin in Chechnya).
[567] *See discussion* in W. Solf and E. Cummings, *A Survey of Penal Sanctions Under the Protocols to the Geneva Conventions of August 12, 1949*, CASE W. UNIV. J. INT'L L. (Spring 1977) at 205.
[568] Art. 96, para. 3, Protocol I.

pattern of abuse in Chechnya.[569] Even in cases not covered by Article 96(3), Article 1(2) of Protocol I states that "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."[570]

E. United States and Western Inaction

The U.S. responses to the first and second Chechen conflicts were tempered on the assumption that everything must be done to support Presidents Yeltsin and Putin as the best hope for Russian democracy.[571] President Clinton waited two months after the inception of hostilities in 1994 to address the fighting with President Yeltsin, and then only to address the humanitarian toll.[572] U.S. policy analysts saw the conflict as an internal matter and compared it to the U.S. Civil War, implying apparently that civilian casualties were to be expected and could somehow be justified if necessary to preserve the integrity of the State. Former Secretary of State Christopher concluded at the time that Russia was operating in a democratic context, therefore the United States should not "rush to judgment."[573]

After the Russian massacre at Samashki, where more than 200 unarmed villagers were slaughtered, the Clinton Administration did state publicly that Moscow had "not fulfilled all of its commitments under the OSCE and the Helsinki Final Act," but made no mention of war crimes.[574] The U.S. and Western responses to similar events in the second Chechen conflict have been equally subdued.

As an initial response to the Chechen conflict upon taking office on December 31, 1999, President Putin issued an ultimatum that if the Chechen fighters in Grozny did not surrender, they "all will be killed."[575] While President Clinton and EU leaders condemned this statement, when Russian forces began imploding Chechen civilian structures and collapsing basement shelters using controversial fuel-air explosives, the U.S. had only a muted

---

[569] Russian human rights activists have documented nearly all abuses and crimes committed by Russian forces. *See, e.g.*, Memorial (human rights group), RUSSIA-CHECHNYA: A CHAIN OF MISTAKES AND CRIMES (Moscow: Zvenia 1998).
[570] Art.1, para. 2, Protocol I.
[571] EVANGELISTA, *supra* note 525, at 145. *See also* E. Sciolino, *Administration Says No Choice But to Support Yeltsin*, N.Y. TIMES, Jan. 7, 1995, at A-1.
[572] GALL & DE WAAL, *supra* note 516, at 186.
[573] *Quoted* in EVANGELISTA, *supra* note 525, at 145.
[574] *See* S. Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, EUROPE-ASIA STUDIES, vol. 51 (Jan. 1999) at 85-100.
[575] *Quoted in* EVANGELISTA, *supra* note 525, at 149.

response. As Evangelista notes, this was probably due to our extensive use of the same weapon to collapse Iraqi bunkers with soldiers within along the southern edge of the Iraqi lines during the first Gulf War.[576]

When the Parliamentary Assembly of the Council of Europe (PACE) called upon Moscow to allow independent inquiries into allegations of human rights violations in April 2000, and to ensure access by all Chechen detainees to independent legal assistance, the Russian Committee of ministers declined.[577] While the PACE initiatives also regularly denounced acts of terrorism from the Chechen side, its critical reports had no noticeable effects on Russian policy.[578] After September 11, 2001, Russian authorities placed increasing emphasis on the need to counter the Chechen "terrorist threat." Unfortunately, this interpretation of the bloody events in the Northern Caucasus was not effectively contradicted by the United States, the EU, or any other important representative of the international community.[579]

For their part, the Chechens realized early on that the Russian army in Chechnya was so inexperienced and afraid of taking casualties that they manipulated information in order to preclude Russian attacks. Recognizing that their villagers would be wantonly attacked by the inexperienced and undisciplined Russian soldiers if they believed there were no Chechen fighters to protect them, village leaders instructed citizens to not deny the presence of fighters when questioned by Russian intelligence officers.[580] While this practice of deception would not violate the law of war, the Chechen fighters practice of operating firing points from civilian dwellings would eliminate the civilian character of those dwelling and make them legally susceptible to Russian shelling. Since the Russians exhibited no concern for the law of war, the Chechens apparently believed that effectiveness and surprise was more important than attempting to maintain a non-reciprocal relationship, especially since the Russians have engaged the unlawful presumption that all male Chechens over the age of 15 are guerrilla fighters.[581]

F. The Chechen Crisis in Perspective

The opportunity for a new characterization of the war by Russian

---

[576] *Id*.
[577] *See Conflict in Chechnya: Implementation by Russia of Recommendation 1444*, PACE Doc. 8700 (April 5, 2000).
[578] *Id*. *See also* EVANGELISTA, *supra* note 525, at 150.
[579] EVANGELISTA, *supra* note 525, at 150.
[580] *See* A. Lieven, review of J. Dunlop's RUSSIA CONFRONTS CHECHNYA in EUROPE-ASIA STUDIES, vol. 51 (June 1999) at 720-22.
[581] *See* discussion in EVANGELISTA, *supra* note 525, at 160-61.

leadership arose on September 11, 2001. Already struggling with the common perception in the West that the Chechen campaign was a human rights disaster, at best, and a deliberate condoning of war crimes and atrocities, at worst, the Putin government seized upon the September 11, 2001, attacks by al Qaeda as an opportunity to recast the war in Chechnya as a "counter-terrorist operation."[582] While prior to September 11th the view of the Chechen campaign was fairly clear in the West, after September 11th, Putin made the argument in every possible venue that the Russian effort in Chechnya was an acceptable and necessary part of the global war on terror.[583]

In Germany, Chancellor Gerhard Schroder was sympathetic. He stated: "there will be and must be a more differentiated evaluation in world opinion."[584] Other governments and human rights organizations did not change their views, however. PACE continued its tough reporting and continued to broadcast evidence of atrocities and war crimes in Chechnya. Human Rights Watch likewise reported new killings and disappearances caused by Russian forces.[585] The U.S. response contained in the U.S. Department of State's annual review of human rights was singularly unsympathetic to Moscow's line and devoted serious attention to abuses in Chechnya.[586] Russia's response to the continued U.S. criticism was heated. In response to the State Department report, the Russian Foreign Ministry proclaimed that Washington "should focus on its own domestic problems, primarily on the issue of capital punishment, prior to claiming the role of a judge in the sphere of how other countries should observe human rights."[587]

While Russian efforts to recast the military conflict in Chechnya were largely unsuccessful, its efforts after September 11 to refocus its economic relationship, and thus enhance its overall standing, with the United States and Western Europe were highly successful. Revoking its commitment to OPEC to limit oil production, it boosted production and thus helped lower energy prices in the United States and Europe during a very difficult period.[588] This priority

---

[582] *See* M. Lipman, *Popularity Without Much Else to Show*, INTERNATIONAL HERALD TRIBUNE, Apr. 25, 2002, at 2.
[583] *See* O. Antonenko, *Putin's Gamble*, SURVIVAL (Winter-Spring 2002) at 52.
[584] R. Eggleston, *Germany: Schroder Hints at Change in Opinion on Chechnya*, Sept. 26, 2001, *at* www.rferl.org (the website of Radio Free Europe and Radio Liberty).
[585] *See* Human Rights Watch, *New Killings and Disappearances in Chechnya*, March 23, 2002, and *Chechnya: Human Rights Commission Must Act, Russian Government Fails to Curb Atrocities for Third Year*, Mar. 26, 2002, both *available at* www.hrw.org/campaigns /russia/chechnya. *See also* P.E. Tyler, *Police in Chechnya Accuse Russian Troops of Murder*, N.Y.TIMES, Jan 25, 2002, at A-1.
[586] *See* U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices, Russia, 1995-2001 at* www.usis.usemb.se/human/.
[587] *See Russia Strongly Criticizes U.S. State Department Report on Human Rights*, RFE/RL NEWSLINE, vol. 6, no. 44, pt.1 (Mar. 7, 2002).
[588] *See Russia to End Curbs on Oil Export*, RFE/RL NEWSLINE, vol.6, no.76, pt.1 (Apr. 23, 2002).

on economic concerns on the part of the major nations and the parallel support by Moscow for the U.S. use of Uzbek and Kyrgyzstan air bases in Operation Enduring Freedom, led, as a direct *quid pro quo*, to the United Nations Commission on Human Rights failure to adopt a resolution on Chechnya. The resolution would have condemned Russia's human-rights abuses, required a national commission to investigate them, and urged Russia to cooperate fully with UN rights monitors.[589]

Unfortunately, the reality is that the United States and its Western allies have not made the Chechen conflict a major priority in their political relationship with the Russian Federation. Without that political emphasis, combined with economic, social and legal measures, there will be little opportunity to pressure Moscow to conform to norms of appropriate behavior in its conflict with Grozny.

This appeared especially true in the spring of 2002 when the Russian Federation re-exerted control over Ingushetiia, the territory adjacent to Chechnya which had been providing shelter to thousands of Chechen refugees. Since 2002, Russian troops have been forcing the return to Chechnya of its citizens from Ingushetiia by whatever means are necessary, including cutting off their food supplies.[590] What President Bush, Prime Minister Blair and other Western leaders must do if Chechnya and its people are to survive the torture, indiscriminate bombing and murder, is engage in tough dialogue using their political and economic capital, and leverage a resolution of the Chechen situation peacefully through negotiation.

[589] Members of the EU sponsored the resolution, which failed by a vote of 15 for, 16 against, with 22 abstentions.
[590] EVANGELISTA, *supra* note 525, at 193.

VIII. Observations and Conclusions: Moscow's Approach to International Law Commitments

In this review of the events and issues surrounding post-World War II Soviet, and then Russian, coercion, an effort has been made to examine Moscow's claims in terms of the recognized principles to which states are committed under the Geneva Conventions as well as the international legal regime represented in the United Nations Charter. To the extent that the Soviet and now Russian exclusive claims have been asserted irrespective of, and in contradiction of, these interests, they must be viewed as violations of the law of armed conflict.

This article first addresses the actions and claims of the former Soviet Union within its own sphere of influence between 1945 and 1991. These Parts chronicle the Soviets' radical departure from accepted tenets of international law in maintaining control through their development of creative doctrines and their willingness to exercise the unlawful use of force over satellite regimes. The Soviet military interventions detailed include Hungary in 1956, Czechoslovakia in 1968, Afghanistan in 1979, and Poland through surrogates in 1981. The pressures on Lithuania in 1990-1991 were an example of the extreme attempts Moscow exerted to retain control over a crumbling empire as the Soviet Union expired. The Soviet manipulation of international law to justify unlawful coercion in each of these incursions is reviewed against a backdrop of U.S. involvement in the Suez crisis in 1956, the Vietnam conflict in 1968, the Iranian hostage crisis in 1979, the use of Poland's own military forces during the Polish crackdown in 1981, and the limitation on the U.S. ability to effectively project power into the Baltic region in 1990-91, while already committed to Operations Desert Shield and Desert Storm in the Persian Gulf.[591] The events in Chechnya, where Russia intervened first under President Yeltsin in 1994 and under President Putin in an operation which began in 1999, reflect the failure of the application of Moscow's new doctrine of asymmetric federalism.

The 1956 Soviet intervention in Hungary provided the first significant opportunity to evaluate Soviet interpretation of 'fraternal assistance' as enunciated in Article 4 the Warsaw Pact. Equally important, a thoughtful examination of the Hungarian incursion provided expectations of similar reactions in other countries under Soviet domination, particularly in East Central Europe. In contrast to Poland in 1956, however, the Hungarian Revolution was not a revolt focused solely against the Supreme Soviet Party leadership, but a revolt of the masses both against their Hungarian Party government leadership

[591] *See* TERRY, *supra* note 3, ch. VI (2005) (reviewing these two U.S. military operations).

and against Soviet domination. The contrast between events in Hungary and Poland is significant in view of the clear differences of method, personnel, and objective present in the two revolutionary actions, although a similarity of intent clearly existed between them.

Unlike the situation in Hungary, Poland and Rumania, however, the trend toward de-Stalinization and polycentrism within the Soviet bloc in the late 1950s had little impact in Czechoslovakia. Open dissent and demand for reform were not heard within the intellectual community in Prague until the economic crisis of 1962-1963.[592] Yet there were significant differences in each of the prior crises which made comparative analyses by the Soviet leadership in 1968 more difficult. The Polish concerns in 1956 were limited to domestic matters. Hungary, conversely, announced withdrawal from the Warsaw Pact and a new status of neutrality, similar to that of Austria.[593] As the Czech crisis developed, these differences certainly were not lost on the Czechs. Dubczek carefully avoided criticism of the Soviet Union, discussion of neutrality or reliance on the West. Thus, on the major internal and external issues, the Czechoslovak case in 1968 fell somewhere between the Polish and Hungarian crises in 1956: a lesser challenge to Soviet supremacy than Hungary but well within the Soviet criteria for intervention.

The Soviet incursion into Kabul in 1979 was different from either the Hungarian or Czech attacks. Afghanistan, while under communist rule since April 1978, was not a member of the Warsaw Pact, and thus the terms of the Brezhnev Doctrine that claimed for Moscow the right to intercede to support the socialist states of the Warsaw Pact would not seem immediately applicable. However justified, certain of the motives appeared relatively clear. As one Asian attache' grudgingly stated: "[S]horing up a doomed regime obviously was the Soviet's first priority."[594] Since the communists had come to power in April 1978, the guerrilla war being waged by Islamic rebels made it apparent that another rebel attack in the Spring of 1980 would have toppled the Amin government.[595]

Within the socialist collective under Moscow's leadership in Eastern Europe, the Soviet Union subsidized Warsaw Pact members through a unique economic system. While all participants contributed production, aid grants

[592] For an in-depth treatment of the origins of the 'Prague Spring,' *see* H.G. SHILLING, CZECHOSLOVAKIA: INTERRUPTED REVOLUTION (1976); G. GOLAN, THE CZECHOSLOVAK REFORM MOVEMENT: COMMUNISM IN CRISIS 1962-1968 (1971); G. GOLAN, REFORM RULE IN CHECHOSLOVAKIA: THE DUBCZEK ERA, 1968-1969 (1973); V. RUSIN, THE CZECHOSLOVAK REFORM MOVEMENT, 1968 (1973).
[593] These events are detailed in Part II, *infra*.
[594] Unnamed attaché *quoted in* Dept. of Defense SELECTED DOCUMENTS, Jan. 28, 1980, at 10.
[595] Brannigan, *supra* note 306, at A-9.

flowed back to the participants from Moscow. Even before the Polish labor unrest became visible on July 2, 1980, however, there was neither a significant economic nor political contribution to the collective from Poland. More importantly, the Polish Communist Party had been rejected by the workers themselves. This left the Soviet Union with but one course of action. It could not cut off all aid credits to Warsaw. Without economic aid, the Polish communist leadership would have faced political chaos at a minimum and possibly civil war. Both the Poles and the Soviets recognized the lack of alternatives in December 1981,[596] and the Polish ruling Communist Party, under its new leader Jaruzelski, acted as Soviet proxy to eradicate the threat to communist control.

Until the August 1991 coup attempt against President Gorbachev, the political choice for the Soviets in Lithuania and in the other secessionist Republics was between satisfying growing nationalist demands on the one hand and preserving the unity of the centrally controlled political system on the other. These policy alternatives, however, had to be viewed at the time in a broader context. In Lithuania, for example, the factories and other capital assets that the Soviet Union owned were valued at $33 billion.[597] The Soviets believed that a free Lithuania would be hard-pressed to pay off that amount, even if its demands were met for compensation for the thousands of Lithuanians sent to forced labor camps or killed after the Red Army moved back in during 1944. More important, the Soviets depended on the Port of Klaipeda in Lithuania as the main port of entry for military supplies for the autonomous oblast (province) of Kaliningrad. This region, they argued, would be cut off from the rest of the Soviet Union by an independent Lithuania, absent some reasonable military use accommodation.

The failed August 1991 coup changed all sides of the equation. As President Gorbachev returned briefly to power in Moscow from his prison dacha in the Russian Crimea in late August, he denounced the KGB and distanced himself from the Communist Party. In the series of events which followed, a state machine, based on fear of the Secret Police and the repression of the Communist Party, was crippled. On September 6th, formal diplomatic recognition of Lithuania from the Soviet Union was announced by the then-Soviet President and the new State Council.[598]

During both the initial Chechen crisis from 1994 to 1996, in which President Yeltsin wielded authority, and the current protracted struggle between

---

[596] *Id.*
[597] *Two Liberations in Lithuania*, N.Y. TINES, March 12, 1991, at A-20.
[598] Fred Hiatt, *Soviets Recognize Baltic Independence in First Meeting of New State Council*, WASH. POST, Sept. 7, 1991, at A-1.

Moscow and Grozny which began in 1999 under Vladimir Putin, the Kremlin has used the self-serving rhetoric of former Soviet leaders in justifying Russian military actions to suppress Chechen opposition, while abusing traditional international law principals in the manner in which the military actions have been executed.

The Soviet and Russian military interventions within this text suggest that just as when faced with opposition from within the Soviet sphere of influence during the period of the Warsaw Pact, current Russian leadership under President Vladimir Putin has moved toward a one party system which allows them to react to opposition within the quasi-autonomous Republics of the Russian Federation with no opposition from a largely controlled fourth estate and with little opposition within the Duma. The lack of either an effective opposition party or free press suggests that "federalism may fail in the Russian Republic just as it failed in the Soviet Union as a whole, ground up between the millstones of imperial centralism and ethnic particularism."[599]

The concern of Russians and Westerners alike is that while Putin came to power advocating a "dictatorship of law," his effort to aggregate power and reestablish Moscow's influence on the regions[600] of the Federation appears strikingly like the centralized authoritarianism within the Warsaw Pact during the Soviet era.

[599] R. Daniels, *Democracy and Federalism in the Former Soviet Union and the Russian Federation*, in BEYOND THE MONOLITH: THE EMERGENCE OF REGIONALISM IN POST-SOVIET RUSSIA 243 (P.J. Stavrakis et al. eds., 1997).

[600] Putin also announced the creation of a new mutual defense alliance with former communist nations in Southwest Asia in late 2005. The West views this initiative as an attempt by Putin to establish a Southwest Asia Warsaw Pact with similar implications for future involvement by Moscow in the internal affairs of these states.

SELF-DEFENSE IN THE MARITIME ENVIRONMENT UNDER THE NEW STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE (SROE/SRUF)

Commander Sean P. Henseler, JAGC, USN*

In June 2005, the Chairman of the Joint Chiefs of Staff (CJCS) promulgated the much-anticipated *Standing Rules of Engagement/Standing Rules for the Use of Force* (SROE/SRUF) for U.S forces.[1] For those unfamiliar with the differences between ROE and RUF, their dual inclusion into the standing rules might seem redundant, since both offer guidance as to when and how U.S. forces can use force in self-defense and for mission accomplishment. However, closer inspection reveals that the SRUF (which essentially apply inside U.S. territorial seas) are actually more restrictive than the SROE (which essentially apply outside U.S. territorial seas) in that they establish a higher threshold that must be met before U.S. forces are authorized to act in self-defense, especially prior to employing deadly force. Additionally, the SROE/SRUF modify what had previously been set apart as the *individual* right of self-defense by making it a subset of *unit* self-defense and for the first time

* Commander Sean P. Henseler, JAGC, USN is a member of the faculty of the International Law Department of the Naval War College.

[1] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005) [hereinafter CJCSI 3121.01B], *canceling* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3123.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (01 Mar. 2002) [hereinafter CJCSI 3123.01B], *and* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.02, RULES ON THE USE OF FORCE BY DOD PERSONNEL PROVIDING SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTERDRUG OPERATIONS IN THE UNITED STATES (31 May 2000) [hereinafter CJCSI 3121.02], *superseding* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter CJCSI 3121.01A]. It should be noted that portions of each of these sources are classified. Additionally, sources that have been canceled or superseded have been ordered destroyed. As such, only unclassified, extant materials are pinpoint cited in this article. Also note that references to SROE and/or SRUF are references to CJCSI 3121.01B, while references to ROE and/or RUF refer to the canceled or superseded rules or to rules of engagement or rules on the use of force generally. Context will clearly indicate which is intended.

explicitly authorizing commanders to limit individual self-defense by members of their unit.[2]

This article provides insight and analysis to assist naval operators and judge advocates charged with putting the SROE/SRUF into practice in a maritime environment. After briefly discussing why a revision of the old ROE/RUF system was necessary, this article focuses on the different triggers for employing force in self-defense under the SROE and the SRUF and includes recommendations that might assist in determining hostile intent. Lastly, after considering the changed nature of an individual's right of self-defense under the SROE/SRUF, this article addresses the commander's responsibility to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.[3]

I. The Post 9/11 ROE/RUF System Was Not User Friendly

Just as most elder Americans remember exactly where they were when former President John F. Kennedy was shot, most people recall where they were on the morning of September 11, 2001. I was on the flight deck of the U.S.S. JOHN F. KENNEDY (CV-67) as it pulled away from the pier in Mayport, Florida to begin at-sea exercises. As the carrier was getting underway, a petty officer ran up and told me I had to go below and see the events unfolding on television. Like many, I looked on in confusion as one tower of the World Trade Center burned and newscasters struggled with initial reports that a small plane might have hit the national landmark. My confusion quickly turned into amazement, shock, and then horror as cameras caught a second plane slamming directly into the second tower. My speculation that our battle-group would not immediately be conducting exercises was proven correct when the order came in to defend the East Coast of the United States. Within minutes, I did all I could to obtain the ROE and determine whether, in a situation that would not constitute unit self-defense, a battle-group asset should take the previously unthinkable step of shooting down a civilian airliner in defense of the U.S. homeland. Rapidly obtaining this ROE was not a simple task.

Three weeks later, after completing our homeland defense mission and shortened exercise, the battle-group commander considered pulling into a U.S. territory in the Caribbean for liberty. At that time, I had my first encounter with the numerous instructions and policies that governed the use of force by U.S.

---

[2] CJCSI 3121.01B, *supra* note 1, para. 3.a, at A-3; CJCSI 3121.01A, *supra* note 1, para. 5.d, at A-4. The previous SROE provided separate definitions for National Self-Defense, Collective Self-Defense, Unit Self-Defense, and Individual Self-Defense. CJCSI 3121.01A, *supra* note 1, para. 5.e, at A-4.

[3] CJCSI 3121.01B, *supra* note 1, para. 1.b, at A-1.

troops inside U.S. territory. Shortly thereafter, as the battle-group steamed towards Mayport, which lies adjacent to the mouth of the heavily trafficked St. John's River, there was concern that terrorists might attempt to strike the carrier or a ship in company as we neared port. Once again, I and others had no choice but to analyze multiple sources to gain clarity concerning when U.S. forces could legally employ non-lethal and deadly force inside U.S. waters and in-port. Additionally, the U.S. Coast Guard's activation of Naval Vessel Protection Zones (NVPZs) pursuant to federal law necessitated the gathering of information for the ship's commanding officers (COs) on how NVPZs impacted the command's self-defense posture.[4]

In reaction to this initial confusion, as well as the heretofore radical notion that terrorists might actually have the capability and intent to strike U.S. assets inside our territorial seas (TTS) and in-port, the Navy began a movement to standardize Anti-Terrorism/Force Protection (AT/FP).[5] Part of this standardization involved the creation of a new breed of eager, oftentimes inexperienced, AT/FP officers. Not surprisingly, at the outset these AT/FP officers were confronted with figuring out when and how unit commanders and their assigned forces could employ force in self-defense and whether warning

[4] *See* 14 U.S.C. § 91(a) (2000); 33 C.F.R. §§ 165.2010–.2030 (2005). Following the terrorist attacks in New York and Washington DC on September 11, 2001, to provide for the safety and security of U.S. naval vessels in the navigable waters of the United States, the U.S. Coast Guard established Naval Vessel Protection Zones (NVPZs) under authority contained in 14 U.S.C. § 91(a). 14 U.S.C. § 91(a); 33 C.F.R. § 165.2010. NVPZs provide for the regulation of traffic in the vicinity of U.S. naval vessels in the navigable waters of the United States. 33 C.F.R. § 165.2010. A U.S. naval vessel is any vessel owned, operated, chartered, or leased by the U.S. Navy and any vessel under the operational control of the U.S. Navy or a unified commander. 33 C.F.R. § 165.2015. All vessels within 500 yards of a U.S. naval vessel must operate at the minimum speed necessary to maintain a safe course and proceed as directed by the official patrol. 33 C.F.R. §§ 165.2015, .2025(d), & .2030(d). Vessels are not allowed within 100 yards of a U.S. naval vessel, unless authorized by the official patrol. *Id.* Vessels requesting to pass within 100 yards of a U.S. naval vessel must contact the official patrol on VHF–FM channel 16. 33 C.F.R. §§ 165.2015, .2025(e), & .2030(e). Under some circumstances, the official patrol may permit vessels that can only operate safely in a navigable channel to pass within 100 yards of a U.S. naval vessel in order to ensure a safe passage in accordance with the Navigation Rules. 33 C.F.R. §§ 165.2015, .2025(f)(2), (4), .2030(f)(2) & (4). Under similar conditions, commercial vessels anchored in a designated anchorage area may be permitted to remain at anchor within 100 yards of passing naval vessels. 33 C.F.R. §§ 165.2015, .2025(f)(3), & .2030(f)(3). The official patrol may be a Coast Guard commissioned officer, a Coast Guard warrant or petty officer, or the Commanding Officer of a U.S. naval vessel or his or her designee. 33 C.F.R. §§ 165.2015.

[5] *See* OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF NAVY, NTTP 3-07.2.1 (REV. A), NAVY TACTICS, TECHNIQUES AND PROCEDURES FOR ANTITERRORISM/FORCE PROTECTION (Oct. 2003) [hereinafter NTTP 3-07.2.1 (REV. A)] (providing tactics, techniques, and procedures to deter, detect, defend against, and mitigate the damage cause by terrorist attacks against U.S. Navy forces); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF NAVY, NWP 3-07.2, NAVY WARFARE PUBLICATION FOR ANTITERRORISM/FORCE PROTECTION (Sept. 2001) [hereinafter NWP 3-07.2] (providing tactics, techniques, and procedures to deter, detect, defend against, and mitigate the damage cause by terrorist attacks against U.S. Navy forces).

shots could be employed inside U.S. TTS and in-port within the continental United States (CONUS). Unfortunately, because the answers lay in a jumble of Department of Defense (DoD), Secretary of the Navy, and other RUF instructions and policies in addition to the ROE, the ROE/RUF system was not user-friendly. As a result, operators and judge advocates new to the ROE/RUF system were forced to weed through a thicket of policies and instructions and at times arrived at differing interpretations of applicable law and policy.

II. Secretary of Defense (SECDEF) Directed Revision Results in Streamlined SROE/SRUF

Shortly after 9/11, apparently recognizing that the existing ROE/RUF system needed improvement, the SECDEF requested a revision of the ROE which had been promulgated in 2000. Drafters were directed to ensure that the entire DoD mission, including operations outside the continental United States (OCONUS), CONUS operations, and DoD military assistance to civil authorities, was incorporated into the same document. Additionally, they were asked to simplify ROE language to make it more easily transferable into operational guidance for men and women in the field. The new ROE was to have a reporting system to provide operational visibility of the ROE to senior decision makers. Finally, drafters were directed to integrate the new *Unified Command Plan*, including the U.S. Northern Command (USNORTHCOM) and its emerging homeland defense missions, into the new standing rules.[6]

In June 2005, after years of effort, the CJCS finally issued a single document containing the SROE and the SRUF. Guidance in the SRUF superseded that contained in the major DoD use of force directive previously in place.[7] Despite the fact that users now have the benefit of one-stop-shopping when it comes to ROE and RUF, there still exists a level of ambiguity vis-à-vis the requirements to use force in self-defense under the SROE vice the SRUF. Similarly, there appears to be some level of concern as to what the changes relating to an individual's right of self-defense actually mean now that unit COs can explicitly limit individual self-defense by members of their unit. It is this ambiguity and concern that this article intends to clarify.

---

[6] Joint Chiefs of Staff, Briefing at Joint Operational Law Course in Washington, D.C. (29 June 2005).

[7] CJCSI 3121.01B, *supra* note 1, para. 1.b, at L-1, *superseding* U.S. DEP'T OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (01 Nov. 2001, as amended 24 Jan. 2002).

III. Self-Defense Pursuant to the SROE

One key to understanding the difference between using force in self-defense under the SROE vice the SRUF is to realize where and when these separate but equal standing rules apply. The SROE apply during "all military operations and contingencies and routine Military Department functions. . . . [occurring] *outside* US territory and territorial seas."[8] Routine military department functions include AT/FP duties.[9] As before, under the SROE: "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent."[10]

Do sailors conducting routine AT/FP duties while pulling into a foreign port possess a right to act in self-defense of themselves or the unit? The answer is a resounding, "Yes!" "Military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent."[11] "When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense," and both unit and individual self-defense include "defense of other U.S. military forces in the vicinity."[12] However, unit commanders specifically "may limit individual self-defense by members of their unit."[13] This aspect of the new SROE/SRUF will be addressed in depth shortly.

It is important to remember that all necessary means available and all appropriate actions may be used in self-defense.[14] If time and circumstances permit, U.S. forces should attempt to warn the threatening entity and give it an opportunity to withdraw or cease its threatening actions.[15] However, if the circumstances dictate bypassing the warning step and warrant an immediate leap to the application of force, then unit commanders are obligated to take such

---

[8] CJCSI 3121.01B, *supra* note 1, para. 1.a, at A-1 (emphasis added). United States territory includes the fifty states, the Commonwealths of Puerto Rico and Northern Mariana, U.S. possessions, protectorates, and territories. "SROE also apply to air and maritime homeland defense missions conducted within US territory or territorial seas, unless otherwise directed by the SecDef." CJCSI 3121.01B, *supra* note 1, para. 1.a, at A-1.

[9] *Id.* ("This last category [routine Military Department functions] includes Antiterrorism/Force Protection (AT/FP) duties, but excludes law enforcement and security duties on DOD installations, and off-installation while conducting official DOD security functions, outside US territory and territorial seas.")

[10] *Id.,* para. 3.a, at A-3.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.,* para. 4.a, at A-4.

[15] *Id.,* para. 4.a.(1), at A-4.

action in self-defense. The use of force is authorized as long as the opposing force continues to commit hostile acts or exhibit hostile intent.[16]

As to the amount of force that may be employed in self-defense, put simply, U.S. forces do not have to bring a knife to a knife fight. Rather, commanders and individuals so authorized by their unit COs may use that force necessary to respond decisively and to dissuade further hostile acts or demonstrations of hostile intent. Indeed, the use of force in self-defense "may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required."[17]

Given the above guidelines, *when operating outside U.S. TTS*, unit commanders are obligated to use force in response to a hostile act or demonstrated hostile intent. Additionally, individual sailors and marines carrying out AT/FP duties may also act in defense of themselves and other U.S. forces in their vicinity unless restrained from doing so by their unit COs. While seemingly straightforward on its face, operators frequently, and quite justifiably, ask: What is *demonstrated hostile intent* such that the use of force in self-defense is authorized?

IV. Hostile Act and Hostile Intent Pursuant to the SROE

In the maritime environment, a hostile act is basically any attack on the platform -- ship, submarine, or aircraft -- or U.S. forces on or in the vicinity of the platform.[18] An attack can take many forms, from being shot at with mortars and rockets to being rammed with a boat full of explosives. Arguably, most military professionals know when they have been attacked and understand they have a right to respond in self-defense. However, as the COs and crews of the U.S.S. ASHLAND, the U.S.S. KEARSARGE, and the U.S.S. COLE can attest, it is not always easy or even possible to act in self-defense once attacked.[19]

---

[16] *Id.,* para. 4.a.(2), at A-4 to A-5.
[17] *Id.,* para. 4.a.(3), at A-5.
[18] *Id.,* para. 3.e, at A-4 ("Hostile Act. An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.").
[19] *See* Octavia Nasr et al., *Al Qaeda Claim for Red Sea Attacks*, CNN.COM, Aug. 19, 2005, http://www.cnn.com/2005/WORLD/meast/08/19/jordan.blasts/index.html/ (describing the August 19, 2005 terrorist attack on the U.S.S. ASHLAND and the U.S.S. KEARSARGE with rockets fired from a warehouse rented by persons of Iraqi and Egyptian descent in Aqaba, Jordan); SINFO.STATE.GOV, Attack on U.S.S. COLE, http://usinfo.state.gov/is/international_security/terrorism/uss_cole.html (last visited on Dec. 6, 2005) (describing the October 12, 2000 terrorist attack on the U.S.S. COLE while she was refueling in Aden, Yemen).

A more difficult issue is figuring out what constitutes a "demonstration of hostile intent." Strictly defined, hostile intent under the SROE is: "The threat of the imminent use of force against the United States, US forces or other designated persons or property."[20] Former Chief of Naval Operations Admiral Kelso maintained that the determination of hostile intent is the single most difficult decision that a commander has to make during peacetime. If that was true for seasoned commanders during the Cold War, it has become even more difficult for inexperienced seamen with their trigger fingers on crew-served weapons in foreign waters. Furthermore, the determination as to whether an inbound motor boat, dhow, jet ski, light aircraft, or fast approaching vehicle is demonstrating hostile intent is especially complex when dealing with non-state actors, i.e. terrorists. As a cruiser CO once remarked, when dealing with terrorists you can no longer factor into your self-defense decision-making process whether or not country *X* wants to go to war with the U.S. today.[21]

That said, there is no requirement that COs or their AT/FP watch-standers must sit back and hope that the inbound go-faster or low slow flyer (LSF) does not have hostile intent as it bears down on their unit. Hope is not a plan. First, commanders, and in reality all persons manning weapons that might be used in self-defense, should enter an area with extreme situational awareness (SA). With respect to determining hostile intent, this SA should include background intelligence as well as updated indications and warnings (I&W), the current geo-political situation, national policy, and all other relevant information concerning the capabilities of possible threats in the Area of Responsibility (AOR).

In addition to these *passive* steps, there are also *proactive* measures units can and should take to help them figure out the intent of the inbound speed boat or LSF. Carrier strike group (CSG), expeditionary strike group (ESG), and unit commanders should consider installing tactics, techniques, and procedures (TTP) designed to gain time and battle-space to ascertain intent. These TTP should be incorporated into pre-planned responses (PPRs) based on the most likely threats units will face given the AOR, whether it is a confined straits, the Persian Gulf littorals, or in-port overseas. These PPRs should then be practiced repeatedly. Proactive measures might include querying the inbound entity, keeping in mind the local languages and the likelihood the inbound entity will not have the capability to monitor radio voice communications. Aside from queries, commanders should consider visual cues designed to warn approaching surface and aircraft that proceeding further might place in them danger of U.S. defense measures. These visual signals could be flares, colored smoke, lights,

[20] CJCSI 3121.01B, *supra* note 1, para. 3.f, at A-4.
[21] Author interview with CAPT Rick Hoffman, USN, Former Commanding Officer, U.S.S. HUE CITY (CG-66), U.S. Navy.

signs, barriers, or even the deployment of helicopters or rigid hull inflatable boats (RHIBs). Other proactive measures such as maneuver, verbal warnings of likely U.S. defensive response, and warning shots with tracer rounds might also be considered.[22]

The purpose of taking proactive measures is threefold. First, if time and circumstances permit employing any or all of these measures, then commanders would be in compliance with the SROE guideline to de-escalate if possible. Second, the failure of an inbound surface or aircraft to heed any or a combination of these measures provides some circumstantial indication as to its intent, allowing for a more informed decision to respond with force. Lastly, if force is used to counter an inbound entity that has ignored these verbal and visual warnings, then any after-action inquiry would have to take into account the surrounding *objective* facts that led to the conclusion that hostile intent existed.

It is not suggested that commanders and individuals act only to the extent that they "cover their six" knowing that an inquiry into a use of force is likely. However, it is suggested that the natural byproduct of acting in accordance with the passive and active measures set forth above will be an increased likelihood that "Monday-morning quarterbacks" will determine that the defensive action was, at the very least, reasonable.

V. The Second Part of Hostile Intent under the SROE

Often overlooked, hostile intent also includes: "[T]he threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property."[23] Trying to glean what this means, given the various missions in which naval assets engage, is factually dependent. For example, if armed men attempt to preclude a boarding team from rescuing a vessel in distress, it stands to reason that the boarding team ought to be able to defend itself while carrying out its duty under international law to render assistance.[24] However, if during a period of heightened tensions between coastal nation *X* and the United States, *X*'s minelayers navigate through water that is being planned for use in a possible amphibious assault by an ESG

[22] *See* NTTP 3-07.2.1 (REV. A), *supra* note 5 (containing a more complete discussion of passive and proactive methods of determining the existence of a hostile intent).
[23] CJCSI 3121.01B, *supra* note 1, para. 3.f, at A-4.
[24] *See* U.S. DEP'T OF NAVY, REG. 0925, ASSISTANCE TO PERSONS, SHIPS AND AIRCRAFT IN DISTRESS para. 1.a (14 Sept. 1999) [hereinafter NAVREGS 0925]; *see generally* OCEANS L. AND POLICY DEP'T, CTR. FOR NAVAL WARFARE STUDIES, NAVAL WAR COLL., ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS paras. 3.1–3.11.6, at 3-1 to 3-34 (Thomas, A.R. and James C. Duncan eds., 1999) (discussing the affirmative obligation of mariners to go to those in danger of being lost at sea).

in the region, would their presence alone constitute a "threat of force to preclude or impede the mission" of U.S. forces? Would the situation be any different if surface search coordination (SSC) aircraft reported to the ESG commander that mine-like objects were being rolled off the aft end of the suspected minelayers? In that instance, would the ESG commander or unit CO steaming in the general vicinity of the minelayers have the authority to take out the suspected minelayers in self-defense? Would it make any difference if this activity was occurring in the coastal nation's TTS or an international strait bordering the coastal state?

Answers to the above questions require thoughtful analysis. On one hand, coastal nations have certain rights under international law to take measures in anticipatory self-defense, to include naval mining.[25] Then again, maritime nations have certain freedom of navigation rights as well as self-defense rights that also factor into the equation. At the end of the day, it is submitted that, while U.S. naval commanders overseas have traditionally acted with great independence, modern day warriors do not *make* U.S. foreign policy as much as they *carry out* U.S. foreign policy.

In the example above, neither the President nor the Combatant Commander would want an ESG or unit CO to destroy a suspected or even known minelayer in self-defense solely because it might "impede the mission." First of all, unless and until the mission is to actually conduct the amphibious landing, suspected minelayers would not actually be impeding the *current* mission. Second, once tasked with an amphibious landing, U.S. forces would likely have supplemental, mission specific ROE that would allow them to eliminate suspected minelayers. Lastly and perhaps most importantly, if a naval commander of his own volition sunk a suspected minelayer as described above without direction from the highest levels in the chain of command, such action might preclude diplomatic and other measures under consideration by the civilian leadership to influence the behavior of the coastal nation, assuming the minelayer is a state-actor.

VI. Self-Defense Pursuant to the SRUF

Recall that the SRUF essentially apply to U.S. forces acting *inside U.S. TTS* while the SROE apply *outside U.S. TTS*. At first glance there appears to be little difference between using force in self-defense under the SRUF vice the SROE. However, a careful reading of the definitions of *self-defense*, *hostile intent*, and *imminent threat,* as well as the procedures for using non-deadly and

[25] OCEANS L. AND POLICY DEP'T, *supra* note 25, paras. 9.1–.9 & annex A9-1, at 9-1 to 9-22 (discussing the law related to the laying of mines during peacetime and armed conflict).

deadly force in the SRUF, clearly shows that commanders and individuals must run through a different decision-making process when using force inside the TTS vice outside U.S. TTS.

According to the SRUF, "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent."[26] Moreover, unless otherwise directed by a unit commander, "service members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent."[27] Up to this point, the SRUF mirror the SROE. However, under the SRUF the definition of hostile intent is different. Per the SRUF, hostile intent is defined as "the imminent threat" of the use of force vice the "threat of the imminent use of force" under the SROE.[28] This seemingly subtle difference is actually quite significant, because the SRUF define "imminent threat." The SROE do no such thing.

VII. Hostile Intent, Imminent Threat, and Non-Deadly Force under the SRUF

The SRUF defines an "imminent threat" as:

> The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known to DoD forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous. *Individuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat*.[29]

First, note that the SRUF refers to death and serious bodily harm in its definition of imminent threat. The same cannot be said of the SROE. Second, apparently the SRUF drafters felt compelled to point out that the determination of what constitutes an imminent threat may be made at any level. Again, there is no such specificity in the SROE. Finally and perhaps most significant, per the SRUF a threat can be imminent, and thus justify a use of force in self-defense, only if the source of the threat has: (1) *the capability to inflict death or serious bodily harm* and (2) *the intent to inflict death or serious bodily harm*. Why is there a higher threshold that must be met before U.S. forces are authorized to use force in self-defense inside U.S. TTS of vice outside U.S. TTS?

---

[26] CJCSI 3121.01B, *supra* note 1, paras. 2 & 4.a, at L-2 & L-3.
[27] *Id.,* para. 4.a, at L-3.
[28] *Id.,* para. 4.d, at L-3.
[29] *Id.,* para. 4.b, at L-3.

Perhaps the first clue lies within the procedures listed in the SRUF for actually employing self-defense. Much like the SROE, the SRUF state: "When time and circumstances permit, the threatening force should be warned and given the opportunity to withdraw or cease threatening actions."[30] However, the SRUF then describes when "non-deadly" force may be used. *Nowhere do the SROE procedures for acting in self-defense discuss non-deadly force.* Per the SRUF, normally "force is to be used only as a last resort" and if used "should be the minimum necessary."[31] If force is *required*, "non-deadly force is authorized and may be used to control a situation and accomplish the mission, or to provide self-defense of DoD forces . . . ."[32] Moreover, the SRUF self-defense procedures specifically discuss the use of non-lethal weapons and riot control agents for use in operations other than war as well as warning shots.[33] The same cannot be said of the SROE.

Per the SRUF, as a general rule *deadly force* "is to be used only when all lesser means have failed or cannot reasonably be employed."[34] The SRUF then list various circumstances under which deadly force is authorized.[35] With respect to self-defense: "Deadly force is authorized when DoD unit commanders reasonably believe that a person poses an imminent threat of death or serious bodily harm to DoD forces."[36] Moreover, deadly force is authorized in defense of "non-DoD persons in the vicinity, when directly related to the assigned mission."[37]

Boiled down to its essence, much of the SRUF discussion on using force in self-defense is the language spoken by police officers every day in the United States. Perhaps the lessons learned by police departments around the country concerning the employment of force in self-defense should be taken into account as the Navy moves ahead training its young sailors to use force in self-defense while conducting AT/FP duties inside U.S. TTS.[38]

---

[30] *Id.,* para. 5.a, at L-4.
[31] *Id.,* para. 5.b(1), at L-4.
[32] *Id.*
[33] *Id.,* para. 5.b(2) & (3), at L-4.
[34] *Id.,* para. 5.c, at L-5.
[35] *Id.,* para. 5.c(1)–(5), at L-5.
[36] *Id.,* para. 5.c(1), at L-5. Note that individuals also possess an inherent right of self-defense under the new SRUF. *Id.,* para. 4.a, at L-3.
[37] *Id.,* para. 5.c(2), at L-5.
[38] *See* Major David G. Bolgiano et al., *Time to Tell Our Kids It's Okay to Shoot*, PROCEEDINGS, July 2005, at 13 (suggesting training techniques in light of lessons learned from law enforcement).

VIII. A Different "Trigger" to Act in Self-Defense inside U.S. TTS

A comprehensive analysis of the definitions and procedures set forth in the SRUF concerning the use of force in self-defense reveals that a different thought process is required when deciding whether or not to use force in self-defense inside U.S. TTS vice outside U.S. TTS. Simply put, there are more stringent requirements placed on U.S. forces before they can act in self-defense when in close proximity to U.S. citizens. Overseas, the "trigger" authorizing the use of force in self-defense is more liberal.

This should not be surprising. Historically our nation has been hesitant to authorize the military to use force against its own citizens. Instead, using force against U.S. citizens has generally been considered the purview of law enforcement -- action to be taken by local and state police and other federal agencies as a last resort when persons violate domestic law.[39] As such, prior to 9/11 there existed a hodge-podge of instructions and policies based on constitutional and federal law outlining when the U.S. military could employ force -- in self-defense or otherwise -- inside the United States.[40]

Based on the historical background and legal underpinnings of the SRUF, it makes sense that SRUF focus on the capability and intent of the individual to inflict death or serious bodily harm as the trigger authorizing the use of force in self-dense. However, overseas, where potential threats are not blanketed in constitutional protections, it seems appropriate that the SROE trigger to act in self-defense is somewhat less restricting. The SROE trigger for self-defense is comparatively easier to squeeze than the SRUF trigger as it allows more latitude in ascertaining hostile intent. While in practice unit commanders and individuals might only act in self-defense overseas if they reasonably sense that an inbound entity is likely to inflict death or serious bodily harm, there is no requirement that they make that assessment.

Given both the uncertainty that naturally surrounds attempting to assess whether an imminent attack will result in death or serious bodily harm and the reality that decisions to use force in self-defense are oftentimes made

---

[39] *See* James Jay Carfano, *Critics of the Hurricane Response Miss the Mark in Focusing on Posse Comitatus (The Heritage Found., Executive Memorandum No. 983, 2005)*, *available at* http://www.heritage.org/Research/HomelandDefense/em983.cfm (discussing the use of the military to enforce domestic law under the Posse Comitatus Act in the wake of Hurricane Katrina); Mark Sappenfield, *Disaster Relief? Call in the Marines.,* CHRISTIAN SCIENCE MONITOR, Sept. 19, 2005, at 1, *available at* http://www.csmonitor.com/2005/0919/p01s01-usmi.html (also discussing the use of the military to enforce domestic law under the Posse Comitatus Act in the wake of Hurricane Katrina).

[40] U.S. CONST. amend. V. ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

instantaneously and under stress, U.S. forces should take some measure of comfort knowing that they are not required to precisely calculate the level of damage that might be inflicted by an inbound threat before they are authorized to act in self-defense outside U.S. TTS, where, arguably, the threat level is greater than at home. The oft-repeated mantra, "You don't need to take the first hit," means just that when you are acting in self-defense overseas. However, when operating inside U.S. TTS, the slogan, "You don't need to take the first *deadly* hit," might be more appropriate insofar as it relates to the employment of deadly force in self-defense.

IX. The Individual's Right of Self-Defense in the Maritime Environment and the Unit Commander's Ability to Limit It

> *"When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit."*[41]

Those familiar with the previous ROE might recall that an individual's right of self-defense was specifically listed as one of the four basic types of self-defense -- national, collective, and unit self-defense being the other three.[42] The SROE/SRUF no longer lists individual self-defense as a separate term. Rather, the concept has been subsumed into unit self-defense.[43] Additionally, the previous ROE failed to clarify whether a unit commander could limit the individual's right of self-defense. In contrast, the SROE/SRUF *specifically* authorizes unit commanders to limit their troops' ability to act in self-defense. Finally, while the previous ROE labeled an individual's right of self-defense as "inherent," the SROE/SRUF does not.[44]

It would thus seem that the SROE/SRUF eliminates any and all doubt as to whether or not commanders can limit an individual's right of self-defense: they can! There still exists, however, plenty of room for interpretation in the new SROE/SRUF. As such, it is critical that commanders consider if, when, and how they might place limits on the rights of their sailors to act in individual self-defense and whether limitations would increase or decrease the unit's self-defense posture.

---

[41] CJCSI 3121.01B, *supra* note 1, paras. 3.a & 4.a, at A-3 & L-3 (emphasis added).
[42] CJCSI 3121.01A, *supra* note 1, para. 5, at A-4.
[43] CJCSI 3121.01B, *supra* note 1, paras. 3.a & 4.a, at A-3 & L-3.
[44] WEBSTER'S NEW WORLD COLLEGE DICTIONARY FOURTH EDITION 735 (Michael Agnes ed., 2001) (defining inherent as "existing in someone or something as a natural and inseparable quality, characteristic, or right; innate; basic; inborn"). Under the new SROE/SRUF unit commanders retain the "inherent right" of self-defense, and individual self-defense is a subset of unit self-defense. CJCSI 3121.01B, *supra* note 1, paras. 3.a & 4.a, at A-3 & L-3.

The purposely ambiguous individual self-defense language of the previous ROE was the language of compromise. The SROE evolved out of standing naval rules of engagement dating back to the late 1970s and early 1980s. These naval rules were decidedly platform-centric and actually made sense in the Cold War maritime environment where the main threats to battle-groups at sea were Soviet ships, submarines, and aircraft. In such circumstances, the weapons most likely to be fired in unit self-defense -- air-to-surface, surface-to-air (SAM), and surface-to-surface missiles -- rightly were under the control of experienced naval commanders. It would not be sound policy for Seaman Schmuckatelli to have the authority to launch a SAM if he personally felt threatened by a suspected military aircraft, recently launched from a dual-use airfield, headed toward his ship in the Persian Gulf.[45] However, might it make sense to allow Seaman Sally the authority to fire a 50-caliber machine gun, because she feels she and her unit are threatened by a manned jet-ski barreling down on her ship while in-port in the Persian Gulf?

Certainly, the nature of the threat has changed drastically since the blue-water, war-at-sea days of the Cold War; just ask the crew of the U.S.S. COLE. Today, AT/FP is the buzzword, not only in-port at home and abroad, but also in the context of operations in the littorals, where the most significant threat may well be individual terrorists with bombs in their boat. It is precisely both the changing nature of the threat and the likely weapons to be employed in self-defense that has placed new emphasis on the individual sailor's right to defend themselves and their units in the maritime environment.

It should be pointed out that the debate regarding the nature and extent of an individual's right to act in self-defense is not new, especially to ground forces.[46] Under the old rules, could a Marine squad leader leading a sweep through the streets of Fallujah lawfully order his men not to fire unless they were fired upon? If such an order was given, would a member of the squad be in violation of a lawful order if he shot and killed a young civilian who raised an AK–47 and pointed it at him or would the Marine simply be exercising his inherent right to defend himself which the commander could not limit?

---

[45] *See generally* John Barry & Roger Charles, *Sea of Lies,* NEWSWEEK, July 13, 1992, at 29 (covering the shoot-down of an Iranian Airbus commercial jet by the U.S.S. VINCENNES (CG-49)); Memorandum, Richard Grunawalt, Professor, Naval War College, to the Dean, Center for Naval Warfare Studies, subject: U.S.S. VINCENNES (CG-49) and the Shoot-down of Iranian Airbus FLT 655 (18 Sept. 1992).

[46] *Compare* Colonel W. Hays Parks, *Deadly Force is Authorized*, PROCEEDINGS, January 2001, at 32 (arguing that overly restrictive rules of engagement are responsible for needlessly placing sailors and soldiers in unsafe situations) *with* Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, but Also Trained,* 25 ARMY LAW. 1 (2001) (arguing that though the rules of engagement are not perfect, they do not need to be thrown out, as situational training rather than legal formulae provide what is of import in protecting U.S. sailors and soldiers).

Under the old rules, I heard Marines strenuously argue that in an ambush scenario the platoon leader had every right to order that his troops fire only on his command, even if they *personally* felt threatened. However, the same Marines would argue just as vehemently that a squad leader has no right to order "tail-end Charlie" on a neighborhood sweep for insurgents that he cannot fire unless fired upon, even if the motivation for the order was for the good of the overall strategic mission.

I would argue that under the old SROE, "tail-end Charlie" would have the inherent right to defend himself if a young man pointed a weapon at him. Furthermore, he would not be in violation of a lawful order that instructed him not to shoot unless fired upon. I have posed this very question to Marines and their response is that a Marine would never give an order to the effect of: "Don't shoot until fired upon." Theoretically, if a Marine did give such an order, then I would argue under the old rules that he has infringed upon an inherent right of the individual Marine who has been given the mission to sweep a dangerous neighborhood.

The above situation is a bit different from the "ambush" scenario. In the "ambush" scenario, I can understand why a Marine might order his men: "Don't shoot until I give the word." This might be done for tactical reasons, i.e. "Let's draw the enemy in close so we can take them out effectively with as much surprise as possible." If the Marines are well trained, then they will understand the mission and the significance of not popping off rounds early just because they personally feel threatened. Firing a weapon too early could compromise the tactical mission, and could even cause unnecessary casualties. Therefore, I believe the order is legitimate in the "ambush" situation even under the old rules. Furthermore, if Marines did lose their lives because someone fired their weapon too early without permission, his chain of command *might* seek to punish him as a deterrent. Lastly, I would like to recognize that all of the above scenarios are extremely factual dependent.

Bringing this debate into the maritime environment, could a ship CO order his in-port AT/FP watch-standers to hold fire under the old rules until he or the command duty officer gave the order to shoot at an incoming speedboat? If the 19-year old sailor manning the crew-served weapon independently decided to fire at an inbound speedboat headed straight for the ship after it had ignored queries and visual warnings, would he be in violation of a lawful order? Or would he be entitled to defend himself, the unit, and other U.S. forces in the vicinity? Wouldn't the arguments discussed above apply equally well to the maritime environment as well. Again, the debate regarding the nature and extent of an individual's right to act in self-defense is not new. What is new is

that there is now a clear answer under the new rules: a CO may lawfully limit an individual's right of self-defense, regardless of the type of mission.

However, in today's asymmetric threat environment, it would be wise for COs to realize that it would be for the good of their ship and crew if they delegated the authority to make use of force in self-defense decisions down the chain of command. Time simply does not exist in each and every situation for the CO to always make the call. The backbone for this delegation of authority to use force in self-defense situations is training. Sailors must be given the tools and wisdom to best accomplish their mission.

X. Only the Unit CO Needs to Understand the SROE/SRUF . . . NOT!

As noted, commanders of ships, aircraft, and submarines have historically been largely responsible for deciding whether to use force in self-defense of their *platform* or other U.S. platforms in the vicinity. As such, prior to 9/11, traditionally only officers received regular use of force in self-defense training prior to deployment. While it was universally accepted that unit commanders had an affirmative duty to read and comprehend the ROE, personal experience led me to conclude that some COs neither read the ROE nor fully understood the self-defense procedures required pursuant to their inherent authority and obligation to use force in self-defense. Despite this observation, I would submit that in the post-U.S.S. COLE, post-9/11 maritime environment, where terrorists can strike without warning worldwide, *every* sailor and Marine must understand the different requirements and procedures involved when using force in self-defense under the SROE OCONUS and the SRUF CONUS.

Ensuring that our most junior sailors understand the required decision-making process when using force in self-defense necessitates a cultural transformation, which already appears to be underway within our traditional blue-water, platform-centric Navy. This cultural shift is a reflection of the reality that time and circumstances might not always permit the CO to decide whether or not to employ force in self-defense of the unit, especially in the littorals and in-port. Beyond that, the SROE clearly state: "Unit commanders at all levels shall ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense."[47] Similarly, under the SRUF: "Unit commanders at all levels must teach and train their personnel how and when to use both non-deadly and deadly force in self-

[47] CJCSI 3121.01B, *supra* note 1, para. 1.b, at A-1.

defense."[48] As such, COs have an affirmative duty to train all their personnel, not just wardrooms and ready-rooms.

XI. Clarifying Expectations Up and Down the Chain of Command

Apart from weapons proficiency, the ultimate goal of self-defense training should be to ensure that every person in the unit has the same understanding of when and how their commander expects them to use force in self-defense. For example, unit COs home-ported on the East Coast and deploying to the Persian Gulf should be intimately familiar with the Second, Fifth, and Sixth Fleet policy statements regarding the Fleet Commanders' expectations as to the use of force in self-defense in their respective AORs. ESG and CSG commanders also often promulgate their expectations, placing a personal spin on their superior's guidance. Armed with these expectations, units, hopefully with the support of their assigned judge advocates, can develop a tailored training continuum designed to ensure all personnel are singing off the same sheet of music when it comes to using force in self-defense.

As a starting point, those charged with defending the unit, themselves, and U.S. forces in the vicinity must be proficient with whatever means of force are at their disposal, be they lethal or non-lethal. This is easier said than done for several reasons. First, many Navy recruits are neither comfortable nor proficient with handheld or crew-served weapons. Second, unlike the Army or Marine Corps, sailors do not get extensive training on various weapons before they join their ship, squadron, or submarine. Third, weapons training requires a commitment of time, money, and human resources that might conflict with other priorities. Lastly, the weapons training offered to our sailors often does not require them to act as they might in likely, real-world threat scenarios.[49]

Beyond weapons proficiency, COs must ensure that all of their forces participate in not only the basic, yearly general military training SROE/SRUF briefings, but also tailored briefings, table-top exercises, and practical, realistic training exercises incorporating red-cells acting as likely threats in-port and at-sea, CONUS and OCONUS.[50] COs should be present at some of these briefings and exercises, listening as the crew explain how they would react given certain scenarios. COs should then explain how they want the crew to respond given the facts and circumstances of the scenario. Moreover, COs and others senior in

---

[48] *Id.,* para. 1.c, at L-1.
[49] Bolgiano, *supra* note 39.
[50] The Center for Antiterrorism and Navy Security Forces (CENATNSF), located at 1575 Gator Boulevard, Suite 226, Norfolk, Virginia 23521-2751 and with a website at https://www.npdc.navy.mil/cenatnsf/default.cfm?fa=main.home, is one source for information regarding training materials, courses, and scenarios.

the chain of command should attend exercise debriefings to again hammer home their expectations regarding the use of force in self-defense. This type of personal engagement and emphasis not only signals that the CO takes his obligation to defend the unit very seriously, it also significantly increases the likelihood that all members of the chain of command understand in no uncertain terms if, when, and how the unit CO expects his troops to act in self-defense whether the unit is in-port CONUS, off the coast of Virginia, or in-port in the Persian Gulf.[51]

XII. Putting the SROE/SRUF into Practice in the Maritime Environment

The SROE/SRUF is a streamlined document that contains guidance on when U.S. forces are expected to use force in self-defense and for mission accomplishment. This user-friendly document promotes efficiency and is essentially the sole source U.S. forces must consult concerning the use of force in self-defense. The SROE, which essentially apply outside U.S. TTS, provide both commanders and individuals the right to act in self-defense in response to the threat of the imminent use of force. Inside U.S. TTS, the SRUF apply. More restrictive than the SROE, the SRUF set a higher threshold that must be met before U.S. forces are authorized to act in self-defense, especially before they employ deadly force. While commanders may limit their troops' individual right of self-defense, emerging non-state, asymmetric threats should cause commanders to carefully consider if, when, and to what extent they should limit individual self-defense. Lastly, given the nature of the most likely threats in the maritime environment, commanders must recognize that it is their obligation to ensure that all forces under their command are well-trained on if, when, and how to use force in self-defense pursuant to both the SROE and the SRUF.

[51] Operators in the Fifth and Sixth Fleets' AORs have observed that some crews pull into overseas ports and still think they are operating under the SRUF vice the SROE.

U.S.–JAPAN SOFA: A NECESSARY DOCUMENT WORTH PRESERVING

Lieutenant Commander Timothy D. Stone, JAGC, USN*

I. Introduction

The principles enshrined in Chapter II, Article 9 of Japan's post-war Constitution places its self-defense forces in a secondary role behind the United States military when it comes to security issues, both in Japan and the East Asian region.[1] Since the attacks of September 11, 2001, Japan has steadfastly supported the U.S. in the Global War on Terror[2] and has re-affirmed its security alliance with the U.S.[3] The U.S.-Japan alliance is at the forefront of the U.S. defense strategy in Asia, and critical to regional stability and the national security of both nations.[4] "The alliance is dedicated to preserving the status quo in the Far East, that is, deterring the use of force as a means of altering political borders."[5] The foundation of the alliance is the forward basing of American

---

* Presently assigned as a Prosecutor within the Office of Chief Prosecutor, Office of Military Commissions. LLM.(Military Law) 2005, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. M.P.A. 2000, Troy State University; J.D. 1993, Washburn University School of Law, Topeka, Kansas; B.A., 1990, Ottawa University, Ottawa, Kansas. Previous assignments include Staff Judge Advocate USS KITTY HAWK (CV 63), 2002-2004; Senior Defense Counsel, Naval Legal Service Office Pacific, Yokosuka, Japan, 2000-2002; Staff Judge Advocate, U.S. Naval Base, Guantanamo Bay, Cuba, 1997-2000; Staff Judge Advocate, Naval Station Pearl Harbor, Hawaii, 1996-1997; Legal Assistance and Defense Attorney, Naval Legal Service Office Northwest Pacific, Yokosuka, Japan, 1994-1996. Member of the bars of Kansas and the Federal District of Kansas. This primer was submitted in partial completion of the Master of Laws requirements of the 53d Judge Advocate Officer Graduate Course.

[1] Article 9 of the Japanese Constitution states: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of fore as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized." KENPO, art. 9, para. 1-2, *available at* http://www.indiana.edu/~japan/LP/LS36.html. *See* Yukio Okamoto, *Japan and the United States: The Essential Alliance,* WASHINGTON QUARTERLY, Spring, 2002, at 59.

[2] Japan modified its legal framework to deploy self-defense forces to Iraq to participate in non-combat reconstruction projects and deployed warships to the Indian Ocean to assist in Operation Enduring Freedom. Roderick Seeman's JapanLaw.info, *available at* http://www.japanlaw.info/lawletter/2003/2003_IRAQ_MILITARY_DISPATCH_LAW.html.

[3] In October 2004, the Council on Security and Defense Capabilities, a private advisory group to the Prime Minister of Japan, recommended Japan's security posture include closer ties to the United States. *Counsel on Security and Defense Capabilities Submits Report to Prime Minister Koizumi*, FOREIGN PRESS CENTER, Oct. 7, 2004, *available at* http://www.fpcj.jp/e/shiryo/jb/0441.html.

[4] Yukio Okamoto, *Japan and the United States: The Essential Alliance,* WASHINGTON QUARTERLY, Spring, 2002, at 60.

[5] *Id*.

military personnel in Japan. "The governments share the understanding that Japan's provision of bases to the United States, allowing those forces to implement the United States' strategic plan in the region, balances the U.S. commitment to defend Japan."[6] "That exchange is the core of the agreement, and neither side considers the arrangement unfair."[7]

If U.S. military presence is the foundation of the security agreement, the Status of Forces Agreement (SOFA) is the cornerstone of that foundation. "A SOFA is an agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state."[8] "SOFAs are integral parts of an overall base agreement that allows the sending state, United States, to operate within the host country, Japan."[9] These agreements include the day to day operations of facilities as well as complicated legal arrangements involving customs and taxes, employment issues, and criminal jurisdiction of service members and civilians accompanying the force. "The provisions describe how the authorities of a visiting force (U.S.) may control members of that force[10] and the amenability of the force or its members to the local laws or to the authority of local officials (Japan)."[11]

Despite the strength of the U.S.-Japan alliance, Japanese civilian resentment of the U.S. military's presence in Japan is routinely voiced by a segment of the Japanese population.[12] Further, critics assert the SOFA discriminates against Japan as it, "offends host nation dignity, is unnecessary

---

[6] U.S. military presence in Japan is approximately 47,000 shore-based and 12,000 afloat personnel. The largest contingent of personnel are stationed on Okinawa. The U.S. Navy homeports the SEVENTH Fleet, including the aircraft carrier USS KITTY HAWK (CV-63), at Yokosuka Naval Base. http://www.globalsecurity.org/military/agency/dod/usfj.htm.

[7] Okamoto, *supra* note 4, at 60-61.

[8] Department of Defense, Defense Technical Information Center, http://www.dtic.mil. (last visited Oct. 31, 2004).

[9] Press Release, Backgrounder: Status of Forces Agreements, A Summary of U.S. foreign policy issues (Apr. 12, 1996), http://www.194.90.114.5/publish/press/security/archive/april/ds2_4-15.htm.

[10] Article VI of Treaty of Mutual Cooperation and Security Between the United States and Japan, 1960, [hereinafter *The SOFA*], Art. I (a) and (b) define protected personnel as service members, government civilian employees, some approved contractor personnel, and the dependents of each that are deployed to Japan as part of the Treaty of Mutual Cooperation. Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 at 1-2.

[11] Project for Media and Democracy, *Status of Forces Agreements,* http://www.disinfopedia.org (last visited Dec. 6, 2004).

[12] The majority of resentment rests in Okinawa, where more than one-half of the total U.S. presence of over 70,000 are stationed. Vocal protests on Okinawa have subsided since over 80,000 people protested the continued presence of U.S. troops on Okinawa after the 1995 abduction and rape of a 12 year-old girl by two Marines and a Sailor. Jan Wesner Childs and Chiyomi Sumida, *Two Okinawa incidents set off calls for limits on U.S. presence*, STARS AND STRIPES, Pacific edition, January 17, 2001, *available at* http://www.stripes.com/article.asp?section=104&article=508&archive=true.

because of the professional Japanese criminal justice system and thwarts investigative and prosecutorial efforts of Japanese police."[13]

As Japan's primary alliance obligation is to station American military forces on its home soil, Japanese civilian repudiation of the current SOFA framework would shake the core of the alliance and a resulting U.S. withdrawal would destabilize the Asian region. Multiple predictions of calamity follow the proposition of a U.S. troop withdrawal. One chilling prediction amplifying this sentiment is from The Toothless Tiger, in which its author predicts:

> because Japan has been as quiet as a mouse for the last fifty years, it is ill equipped to engage in the propaganda wars that will ensue when the Seventh Fleet weighs anchor. Japan will wake up to find Uncle Sam's navy gone back to Hawaii and her own neighbors descending into anarchy. And Japan will be helpless to remedy the situation.[14]

While most predictions are not as foreboding, the general consensus is that the alliance is essential to both nations and will continue[15] because both nations see its continued existence as paramount. To date, discussions have focused on repositioning U.S. forces within Japan to reduce the American footprint in Okinawa -- and not on eliminating the presence of U.S. forces.[16] As recent as October 7, 2004, Prime Minister Koizumi told reporters he planned to pursue negotiations with local municipalities to secure their cooperation to reduce Okinawa's burden in hosting U.S. forces.[17] Yet, additional criminal acts against Japanese civilians by SOFA personnel may force the U.S. into the regrettable position of SOFA revision to preserve the alliance, a proposal routinely advocated by SOFA opponents.[18] In spite of the criticism, the U.S. asserts the current SOFA framework is necessary to ensure fair treatment of service members charged with criminal acts in the Japanese criminal system. To this end, each Article XVII SOFA protection is vital for protecting the rights of

---

[13] Jamie M. Gher, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to Be Learned from the United States-Japan Agreement*, 37 U.S.F.L. REV. 227 at 239-43, (2002).

[14] DECLAN HAYES, JAPAN: THE TOOTHLESS TIGER 9 (Tuttle Publishing 2001).

[15] Okamoto, *supra* note 4, at 72.

[16] The 1996 SACO committee was commissioned to find alternative land use agreements for U.S. forces to alleviate the pressure on Okinawa. The report announced a number of provisions regarding the relocation of troops and the return of some military land to the Okinawa prefecture. Special action committee on Okinawa, the SACO Final Report (Dec. 2, 1996), *available at* http://www.jda.go.jp/e/defense_policy/saco/final.htm.

[17] *Japan proposes moving U.S. military units out of Okinawa*, KYODO NEWS SERVICE, Oct. 7, 2004, www.home.kyodo.co.jp/all/display.jsp?an=20041007007.

[18] Gher, *supra* note 13, at 253.

service personnel suspected of committing crimes in Japan[19] and is worth preserving.

Roadmap:

The paper begins with overviews of U.S. SOFA policy and the Japanese criminal justice system, including some fundamental flaws that perpetuate concerns over whether sending state personnel would always be afforded a fair trial in a Japanese court. Next, we outline the SOFA provisions that moderate the Japanese criminal system--in an attempt to reduce concerns about the system's fundamental fairness toward defendants. Following this outline, we then examine recent concessions by both Governments that alter the SOFA regarding representation of U.S. service members taken into custody by the Japanese. We will then explore some of the potential advantages of this representation. Finally, the paper advocates a change to U.S. policy: namely, providing Japanese criminal legal representation at the earliest stages of investigation, instead of waiting for indictment as a means to insure the fairest possible treatment of U.S. personnel.

II. United States' SOFA Policy

A. United States Policy as a Visiting Force

1. Law of the Flag

Prior to SOFAs, "the prevailing international principle regarding legal rights of troops was known as the law of the flag."[20] The principle made service members stationed in a host country "completely immune from the law of the receiving state, and subject only to the military law of the sending state."[21] The prevailing justification was that subjecting visiting military personnel to the receiving state's laws would interfere with the military commander's ability to enforce good order among the unit. In turn, the "[Commander's] forces would cease to be an army and would become a mob."[22] "This notion became so firmly rooted in Western military thought that the custom ultimately evolved

[19] Hiroshi Matsubara, *Forces pact should underscore Japanese lack of rights: Lawyer*, THE JAPAN TIMES, July 15, 2004, *available at* http://search.japantimes.co.jp/cgi-bin/nn20040715f2.html.
[20] Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994).
[21] Steven G. Hemmert, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT'L L.J. 215, 218 (1999).
[22] Lepper, *supra* note 20, at 171 (citing King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 AM. J. INT'L L. 539 (1942)).

into formal agreements that gave sending states exclusive jurisdiction over the members of their forces."[23]

The law of the flag gave way to negotiated agreements after the end of World War II, when the U.S. and its allies negotiated the NATO SOFA in 1951. The result was the comprehensive declination of legal rights and responsibilities of military troops present on friendly alien territory. Thus, "today, it is widely agreed that in the absence of a treaty, jurisdiction over foreign forces rests exclusively with the host state."[24]

2. U.S. Policy Regarding Criminal Jurisdiction in SOFA Agreements

Department of Defense (DoD) policy is "to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and incarceration in foreign prisons."[25] Therefore, all SOFA agreements into which the United States enters, articulate the criminal jurisdiction of the host nation over deployed American forces.[26] The provisions "are vital as a method in which states can voluntarily cede jurisdiction of rights by agreements."[27]

> In SOFAs, foreign Governments agree that in certain types of cases they will forego exercising their jurisdiction and instead will permit the United States the primary right of jurisdiction. From this viewpoint it is clear that SOFAs do not decrease rights of U.S. servicemen but rather expand them by guaranteeing that in certain matters the foreign government will not act and that the United States alone will proceed.[28]

SOFAs "are negotiated to blend and accommodate the difference between the United States and a host nation's Governmental systems and cultures."[29] This is predicated on the concern "that United States personnel be

---

[23] *Id*.
[24] Lepper, *supra* note 20 at 170 (citing *Status of Forces of the North Atlantic Treaty: Supplementary Hearings Before the Senate Common Foreign Relations*, 83rd Cong., 1st Sess. 42 (1953)).
[25] Backgrounder, *supra* note 9.
[26] *Id*.
[27] Captain Richard J. Erickson, *The Military Decision Maker and Foreign Trails*, AIR U. REV. (May-June 1975), *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1975/may-jun/erickson.html.
[28] *Id*.
[29] Robert T. Mounts, United States SOFA Secretary and Colonel Uldric L. Fiore, Jr. United States Forces Korea, Staff Judge Advocate, United States Force Korea Press Release, *How Does the Status of Forces Agreement Really Work*, Release No. 000403, *available at* http//www.korea.army.mil/pao/news/000403.htm.

accorded minimum due process in a foreign prosecution."[30] While many SOFAs have similar provisions, the U.S. still negotiates separate SOFAs because "the same arrangements will not always work because situations are inherently different for each host country."[31]

III. The United States-Japan SOFA

The SOFA with Japan was signed in 1960, on the same day as the Mutual Defense Treaty between the two nations.[32] Like other SOFAs, it establishes the day-to-day working relationship of the U.S. presence and contains a wide variety of provisions that delineate the working relationship between the two Governments. Some provisions appear mundane; for example, in Article X(1), Japan agrees to honor the driver's licenses of sending state personnel.[33] On the other hand, Article XVII, the criminal jurisdiction provision, is complex and contentious because it is the mechanism the U.S. uses to meet its policy objectives by serving as a protector against the fundamental deficiencies of the Japanese criminal system.[34]

Article XVII pre-dates the SOFA as most of its provisions were first adopted as part of the 1952 Administrative Agreement between the two countries that helped define the end of post-war occupation.[35] The current criminal justice agreement took shape when the Protocol to Amend Article XVII of the Administrative Agreement was signed on September 29, 1953.[36] In addition to amending the agreement, the governments issued the Agreed Official

---

[30] Lepper*, supra* note 20, at 181.

[31] Yooh-Ho Alex Lee, *Criminal Jurisdiction Under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, Journal of Transnational Law and Policy, Fall 2003, Vol. 13-1, 237 (citing Song Hye-Min, *No More Empty Negotiations on SOFA*, THE ARGUS, English Newspaper of Hankuk University of Foreign Studies, Sept. 1, 2000, *available at* http://www.maincc.hufs.ac/kr/theargus/352/feature-2-3.htm (last visited Mar. 15, 2003)).

[32] *U.S. Forces, Japan,* www.globalsecurity.org/military/agency/dod/usfj.htm (last visited Dec. 6, 2004).

[33] The SOFA Article X(1) states: "Japan shall accept as valid, without a driving test or fee, the driving permit or license or military driving permit issued by the United States to a member of the United States armed forces, the civilian component and their dependents." *The SOFA*, *supra* note 10, at 11.

[34] The SOFA Article XVII(2)(a) states, "The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to the offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan." *The SOFA*, *supra* note 10, at 27-28.

[35] The Administrative Agreement was signed by the parties on February 28, 1952 and incorporated into the Security Alliance under Article III. Mounts, *supra* note 29, at 2.

[36] The implementation of the NATO SOFA was the primary justification for the Protocol. The preamble addresses the implementation of the NATO SOFA, stating "Whereas the 'Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces,' signed at London on June 19, 1951 . . . ." *Criminal Jurisdiction in Japan*, USFJ Pamphlet Number 125-1, Jan. 1, 1976 at 3.

Minutes that further clarified individual provisions. The Protocol also establishes the Joint Committee which serves as the primary negotiating body to address issues of SOFA interpretation.[37] When an interpretation is agreed upon, the Joint Committee issues a policy statement called an Agreed View. The Joint Committee issued fifty-one Agreed Views within fourteen months of the signing of the Protocol. Some Agreed Views place additional limits on Japanese sovereignty by establishing specific time limits for Japan to exercise its primary jurisdiction.

Article XVII of the Amended Administrative Agreement was incorporated by the SOFA and is still referred to as Article XVII. The Agreed Minutes to the Protocol, the Joint Committee structure, and the Agreed Views were also incorporated. Since the SOFA was adopted in 1960, only one additional Agreed View, in 1968, was issued. Prior to explaining how specific Article XVII provisions temper the application of Japanese justice, a brief explanation of the Japanese criminal procedure is presented.

IV. Japan's Criminal Justice System

Japan and the U.S. afford similar constitutional rights to criminal defendants; Japan's criminal system, however, functions differently from its American counterpart due to other historic influences. "Japan's criminal justice system is a blend of the Continental European civil law tradition, Japanese cultural influences, and American ideas regarding human rights and the rights of criminal defendants."[38] "Its code of criminal procedure retains in large measure the characteristic features of the continental legal system, but cardinal elements of the Anglo-American law have been incorporated at a number of significant points."[39] Supporters of the culture-centric school downplay the formal rule of law imported from the U.S. after World War II, in favor of Japan's culture as the primary force responsible for the conduct and success of the justice system. Specifically, "its low crime rate, heavy reliance on confessions, and apparent success at rehabilitation are a consequence of its homogeneous population, its shame culture, and its long standing practice of extracting expressions of remorse from wrongdoers."[40] A brief historical overview provides for better understanding.

---

[37] *U.S. Forces, Japan*, *supra* note 32.

[38] SHIGEMITSU DANDO, JAPANESE CRIMINAL PROCEDURE 17 (B.J. George trans., Rothman & Co. 1965).

[39] *Id*.

[40] Daniel H. Foote, *Reflections on Japan's Cooperative Adversary Process*, THE JAPANESE ADVERSARY SYSTEM IN CONTEXT, Preface xiv. (Malcolm M. Feeley and Setsuo Miyazawa ed., Palgrave Macmillan 2002).

A. Historic Influences

1. Feudalism and the Samurai Codes

"Japan has been heavily influenced by the Chinese legal system since the seventh century."[41] The "Taiho" and "Yoro" codes adopted in the seventh and eighth centuries from China required "judgment based on the defendant's confession or on the testimony of witnesses, and torture could be used under certain legal restrictions for the purpose of extracting a confession."[42] This system of code law disintegrated with the passage of time and was replaced by the samurai codes of feudal militarism, which continued to control through the middle ages and into modern times.[43] As late as 1867, criminal cases were adjudicated on official initiative by a Supreme Council and by commissioners of shrines and temples. Torture was administered on the basis of certain legal provisions.[44]

2. Introduction of European civil law

Emperor Meiji came to power in 1868 and within forty years transformed Japan into a world power.[45] In January 1882, the first Code of Criminal Procedure (originally developed by University of Paris Professor Boissonade) was adopted by the recently-created Diet (Legislature).[46] Contemporaneous with the introduction of a western-style constitution that further incorporated the principles of rule of law and representative government, the Code was revised in 1890.[47] The Meiji Constitution and the updated code of criminal procedure were heavily influenced by existing German laws.[48] Although the Constitution provided for the separation of powers and protection

---

[41] Yuichiro Tachi, *Prosecution Criminal Justice System in Japan,* Remarks at the Asia and Pacific Regional Conference of Far East Institute for the Prevention of Crime and the Treatment of Offenders (Feb. 16-18, 2003), *available at* http://www.iap.nl.com/speeches_asia_conference_2003/prosecution-criminal-justice-system-in-japan-by-juichiro-tachi.html (last visited Dec. 6, 2004).

[42] DANDO, *supra* note 38, at 12-13.

[43] *Id.* at 13.

[44] *Id*. at 14.

[45] In 1868 Japan was militarily weak and controlled by feudal lords. In 1912, when Meiji period ended, Japan had regained control of its foreign trade and legal system, won two wars (one against a European power, Russia), possessed a powerful military, a rapidly growing industrial sector with the latest technology, and had a highly educated population, with a highly centralized bureaucracy. *The Meiji Restoration and Modernization*, http://afe.easia.columbia.edu/japan/japanworkbook/modernhist/meiji.html.

[46] DANDO, *supra* note 38, at 15.

[47] *Id.* at 16-17.

[48] Tachi, *supra* note 41 at 4.

of civil liberties,[49] the 1882 code, the revisions of 1890, and the Constitution instituted the jury system as proposed by Professor Boissonade.[50] "The jury system was introduced in 1923, but it was rarely chosen by the defendant. It was suspended in 1943 and has never been reinstituted."[51]

3. Post-World War II American influence

Japan's defeat in World War II brought about the replacement of the Meiji Constitution with the "McArthur Constitution."[52] The McArthur Constitution was ratified in 1947 and has not been changed.[53] The new Constitution was heavily influenced by the U.S. and imported many American ideas regarding individual rights and liberties. "It prescribes the Emperor as a symbol of the state, and establishes a parliamentary democracy with an independent judiciary."[54] Articles 31-40 "create or strengthen constitutional safeguards for fundamental human rights."[55] Articles 31 through 35, 37 and 39 afford due process rights and search and arrest warrant procedure protections. Article 39 prohibits *ex post facto* prosecutions and double jeopardy. Articles 36, 38 and 40 provide protections against unlawful police coercion. Article 36 prohibits torture by police officers. Article 38 prohibits compulsory self-incrimination, and prevents convictions based solely upon a confession. Article 40 allows acquitted individuals the right to sue the Government for redress.[56]

---

[49]United Nations Asian and Far East Institute, *Criminal Justice in Japan*, *available at* www.unafei.or.jp/english/publications/criminaljustice.html (last visited Dec. 6, 2004).

[50] DANDO, *supra* note 38, at 18.

[51] *Id*. at 19. In 2009, Japan will reintroduce a limited, mixed jury system to its criminal justice system. While U.S. military leaders in Japan will confront a number of new issues, the vast majority of SOFA personnel facing criminal charges in Japan should be unaffected by this broad sweeping judicial change because, in part, trial by jury is jurisdictionally limited to seven crimes, virtually all involving the death of a victim. These crimes are homicide, robbery or injury resulting in death, causing the death of an individual during the operation of a motor vehicle and child abandonment resulting in death. The other two charges are arson and kidnapping for ransom. Robert M. Bloom, *Jury Trials in Japan*, Research paper No. 66, Mar. 16, 2005, *available at* http://ssrn.comn/abstract=688185 (last visited Aug. 2005).

[52] Nicknamed after General Douglas McArthur, who was in charge of the post-war occupation when the constitution was ratified.

[53] Tachi, *supra* note 41, at 4.

[54] U.S. DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, 2000, 1, (February 23, 2001), [hereinafter STATE DEPARTMENT HUMAN RIGHTS REPORT], *available at* www.state.gov/g/drl/rls/hrrpt/2000/eap/709.html.

[55] United Nations Asian and Far East Institute, *supra* note 49.

[56]Article 31: No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.
Article 32: No person shall be denied the right of access to the courts.
Article 33: No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, when the offense is being committed.

B. Japan's Prosecutorial Justice

Japan is widely recognized as one of the world's safest societies.[57] Champions of the system point to Japan's low crime rate, which is one of the lowest among industrialized nations[58] as an example of its effectiveness.[59] The Japanese system, however, is structurally deficient and incompatible with the American idea of due process and an individual's right to defend themselves. At least one critic has labeled the Japanese system "abnormal, diseased, and really quite hopeless."[60] At the heart of the Japanese system is the institutionalization

---

> Article 34: No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.
> Article 35: The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issue for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33. 2) Each search and seizure shall be made upon separate warrant issued by a competent judicial officer.
> Article 36: The infliction of torture by any public officer and cruel punishments are absolutely forbidden.
> Article 37: In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. 2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense. 3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.
> Article 38: No person shall be compelled to testify against himself. 2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. 3) No person shall be convicted or punished in cases where the only proof against him is his own confession.
> Article 39: No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he had been acquitted, nor shall he be placed in double jeopardy.
> Article 40: Any person may, in case he is acquitted after he as been arrested or detained, sue the State for redress as provided for by law.

KENPO, art. 31-40.

[57] Marc A. Mauer*, Comparative International Rates of Incarceration: An Examination of Causes and Trends*, Remarks to the U.S. Commission on Civil Rights (June 20, 2003), *available at* www.sentencingproject.org (last visited Oct 15, 2004).

[58] Australian Institute of Criminology, *International Data on Crime*, Chapter 6, *available at* http//www.aic.gov.au/pub/rpp/07/chap6 (last visited Mar. 19, 2005).

[59] Gher, *supra* note 14, generally.

[60] David T. Johnson, *Justice System Reform in Japan: Where are the Police and Why Does it Matter?*, HORITSU JIHO, Feb. 2004, at 4 (citing Hirano Ryuichi (1989)).

of near absolute prosecutorial power, a troubling prospect when "a single loss can end a prosecutor's career."[61] "While American prosecutors have tremendous discretion, the power of Japanese prosecutors is even more immense. Indeed, it is difficult to find a state agency -- inside Japan or out -- that wields as much power as Japan's procuracy."[62] Prosecutorial power is evident in the harsh investigatory methods and the pervasive failure of the adversary system to act as a legitimate counter to government authority. As such, "the vast majority of trials in Japan are little more than rituals for ratifying police and prosecutor decisions. The real substance of criminal procedure and the truly distinctive character of Japan's criminal process lie in the inquisitorial investigative stages that are dominated by the police (and prosecutors)."[63]

1. Confessions, Rehabilitation, and Guilt

"The fundamental orientation of Japanese criminal justice is rehabilitation and reintegration of offenders into society, rather than a punishment-based system."[64] Yet Japan's rehabilitative model begins at arrest, prior to the initiation of charges, not at the adjudication of guilt. To that end, "confession is regarded as the first step in the rehabilitative process."[65] Confessions "are single-mindedly pursued by police and prosecutors, they are practically required by judges in order to convict, and they are deemed by everyone involved to be the king and queen of evidence."[66] By simultaneously using a confession as evidence of rehabilitation and guilt, Japan eliminates the principle of innocent until proven guilty in its jurisprudence; in its place is prosecutorial discretion.

"Prosecutors have the exclusive power to decide whether or not to institute charges."[67] "Unlike other civil law countries Japanese prosecutors are not legally required to prosecute individuals, even if they have evidence to convict."[68] Article 248 of the Japanese Code of Criminal Procedure[69] provides guidance and authority to suspend prosecutions based on a number of factors.

---

[61] Hiroshi Matsubara, *Trial by Prosecutor, Up against Japan's 99.8 percent conviction rate*. LEGAL AFFAIRS, March/April 2003, *available at* http://www.legalaffairs.org/issues/March-April-2003/scene_marapr03_matsubara.html.

[62] DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 3 (Oxford University Press 2002).

[63] Johnson, *supra* note 60, at 4.

[64] Foote, *supra* note 40, at 37.

[65] STATE DEPARTMENT HUMAN RIGHTS REPORT, *supra* note 54, at 1.

[66] Johnson, *supra* note 60, at 7.

[67] JOHNSON, *supra* note 62, at 37.

[68] *Id*. at 37.

[69] Article 248 states, "In case it is unnecessary to prosecute according to the character, age and environment of an offender, the weight and conditions of an offense as well as the circumstances after the offense, the public prosecution may not be instituted." KENPO, art. 248.

Admitting guilt and making restitution (jidan)[70] are essential factors considered. Like confessing, payment is considered a primary way of demonstrating remorse and compensating the victim.[71] "Offenders make settling with victims a first priority."[72]

Confession and restitution are used to show remorse and the rehabilitative potential of the suspect prior to conviction, and in most cases, prior to the initiation of charges. To compound concerns regarding its fairness, prosecutors use the suspect's behavior during the early stages of the investigation as a guide to help decide whether to initiate charges. In a 1994-1995 survey, "Japanese prosecutors stated that victim compensation and repentance were always factors they considered when deciding to initiate charges."[73] Furthermore, a suspect's willingness to cooperate with investigators weighed heavily in a prosecutor's decision-making matrix. Eighty-four percent thought a suspect's willingness to cooperate with the system was sometimes or always important, and sixty-one percent thought willingness to cooperate with police either always mattered or sometimes mattered.[74] More troubling, perhaps, is that ninety percent of prosecutors surveyed thought social status and family ties of the suspect were either sometimes or always important regarding whether or not to suspend or not initiate a prosecution.[75]

Within this set of rules, prosecutors operate with a benevolence that tempers the harsh investigatory methods. This benevolence manifests itself through non-indictment, suspended and relatively light sentences. For example, in 1997,[76] prosecutors intentionally chose not to prosecute in thirty-one percent of all reported cases (approximately 650,265 people).[77] Of the individuals that were ultimately convicted, less then thirty-five percent were actually incarcerated.[78]

---

[70] Jidan is the cultural system of making restitution to the victim of a crime. It consists of a payment of money from a suspect to a victim in an attempt to settle the criminal matter outside the court system.

[71] JOHNSON, *supra* note 62, at 202.

[72] *Id*.

[73] *Id*. at 111.

[74] *Id*.

[75] *Id*.

[76] The general crime trend between 1997 and 2004 has been relatively stable, with only slight increases. *Id*. at 217.

[77] *A Guide to Court Procedure*, 1, *available at* http://courtdomino.courts.go.jp/criminal.nsf/ffc82a0a5fb61e504925648f00352937/ea49ffe1b3d4028449256739004dff2e?OpenDocument. This number reflects those cases that an official non-prosecution decision was made; this means a suspect had been identified, but a Prosecutor intentionally chose not to initiate charges.

[78] Bureau of Democracy (citing the 1998, Annual Report of Judicial Statistics for 1997).

Substantial debate exists whether this benevolence is equally applied to foreigners prosecuted in Japan. The United Nations has espoused concerns regarding Japan's harsh treatment of foreigners.[79] The substance of the debate is beyond the scope of this article; yet absent SOFA provisions, this is a justified concern for sending state personnel as foreign-born suspects do not fit within the original construct of the Japanese criminal system. "It is doubtful whether this kind of process is entirely appropriate for the crimes of foreigners in Japan whose culture, code of conduct and standard of living are completely different."[80] The foreign-born defendant, generally deported after completion of incarceration, clearly does not require rehabilitation into Japanese society. In addition, this foreign-born defendant does not possess the social status used by prosecutors for determining leniency. Also, the practices of victim compensation, repentance prior to an adjudication of guilt, the use of a suspect's demeanor, and willingness to cooperate with police during interrogation are incompatible with the thinking of many foreign suspects, including sending state personnel.

2. Daiyo-Kangoku (Substitute Detention)

The primary method of acquiring a confession is through the practice of Daiyo-Kangoku. Called substitute detention, this practice allows police and prosecutors to hold suspects for up to twenty-three days in local police facilities and interrogate the suspect without "a legitimate check on police power."[81] Article 203 of the Japanese Code of Criminal procedure requires the police to transfer the case to a prosecutor within forty-eight hours of arrest.[82] Article 205 requires the prosecutor to question the suspect and then release him, or seek a court order to retain him in custody within twenty-four hours of receipt of the case.[83] Article 208 establishes a maximum ten-day time period for extended confinement, but Article 208.2 allows a judge to further extend the period of

---

[79] UNITED NATIONS, 64TH SESSION OF THE HUMAN RIGHTS COMMITTEE, 4, Nov. 19, 1998, [hereinafter UNITED NATIONS REPORT], *available at* http://www.debito.org/CCPR1998.html.

[80] Sorimachi Katsuo, *Japan's Criminal Justice System and Crimes Committed By Foreigners*, *available at* www.lec-jp.com/speaks/info_013.html (last visited Jan. 2005).

[81] UNITED NATIONS REPORT, *supra* note 79, at 4.

[82] Article 203 reads, "A police official shall, when arrested the suspect under a warrant for arrest… shall forthwith release him in case he believes that it is not necessary to retain him; and shall, in case he believes that it is necessary to retain him, take such procedure as to send him to a public procurator within forty eight hours as from the time when the suspect was arrested." KENPO, art. 203.

[83] Article 205 reads, "A public procurator shall, in case he has received the suspect sent in accordance with the provisions of Article 203, give him an opportunity for explanation, and shall, when he considers that it is not necessary to retain him, immediately release him, and shall, when considers that it is necessary to retain him, request from a judge his commitment within twenty four hours as from the time when he received him." KENPO, art. 205.

pre-trial detention for an additional ten days.[84] Thus, the prosecutor is provided a total of twenty-three days detention before a prosecutor must either initiate charges or release the individual. While the criminal code establishes a process of judicial review, judges virtually never block a prosecutor's request to further detain a suspect. "Between 1987 and 1996, 99.5%- 99.7% of all detention warrants and extensions were granted by judges."[85]

The purpose of the detention is to gather facts from the suspect through interrogation. As a Japanese detective sees it, "there aren't any confessions that are really voluntary. They're told that if they won't talk, they won't eat, won't smoke, won't meet with their families."[86] Furthermore, while being detained and questioned "the suspect is not entitled to bail, there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect; there are serious restrictions on access to counsel and counsel cannot be present for interrogations."[87] It is not hard to imagine why "approximately ninety-three percent of all suspects confess"[88] and "Japan convicts over 99% of the cases that go to court."[89] Staggeringly, "between 1999 and 2001, Japan-wide there were only 128 partial acquittals among first-time offenders."[90]

Defenders of this system justify this practice because the "Japanese believe in a lengthy process of reasoning with a suspect to cause him to see the error of his ways and to lead him to try to restore the harmony of the society by acknowledging publicly what he has done."[91] Amnesty International and the United Nations disagree and criticize the practice as a substantial violation of human rights, due in part to the lack of government oversight on the methods police and prosecutors use to illicit a confession.[92] The Asian Human Rights Commission calls the practice "one of the gravest human rights problems in Japanese criminal procedure."[93] In addition, the 2000 U.S. Department of State

---

[84] Article 208.2 reads, "A judge may, when he deems that there exists an unavoidable cause, extend such period ... The extension of such period may not exceed ten days. KENPO, art. 208.2.

[85] Satoru Shinomiya, *Adversarial Procedure without a Jury: Is Japan's System Adversarial, Inquisitorial, or Something Else?*, THE JAPANESE ADVERSARY SYSTEM IN CONTEXT, *supra* note 40, at 117.

[86] JOHNSON, *supra* note 62, at 266.

[87] UNITED NATIONS REPORT, *supra* note 79, at 4.

[88] JOHNSON, *supra* note 62, at 267.

[89] Matsubara, *supra* note 61.

[90] Bureau of Democracy (citing the 2002, Annual Report of Judicial Statistics for 2002).

[91] Chalmers Johnson, *Three Rapes: The Status of Forces Agreement and Okinawa*, JAPAN POLICY RESEARCH INSTITUTE, 3, Jan. 2004, *available at* http://www.jpri.org/publications/workingpapers/wp97.html [hereinafter C. Johnson].

[92] UNITED NATIONS REPORT, *supra* note 79, at 4.

[93] Yasushi Higashizawa, *The Constitution of Japan and Human Rights*, *available at* http://www.ahrchk.net/charter/mainfile.php (last visited Jan. 8, 2004).

Report on Human Rights also condemns this process stating "credible evidence exists that suspects held in daiyo-kangoku have been the subject of physical violence such as kicking and beating from the police."[94]

3. Trial and the Unbalanced Adversary System

Beyond the pre-trial stage, prosecutorial control of the criminal process continues through the trial stage, where the rules and practice are at odds with American criminal jurisprudence. The aspect of this prosecutorial-controlled system is that prosecutors have the ability to withhold evidence and are empowered to create and introduce their own evidence at trial.

a. Absence of compulsory discovery

In Japan, a prosecutor can legally withhold multiple contradictory witness statements and marginalize a defense attorney's role in the determination of guilt because there is no functional equivalent to the American discovery rules of Brady v. Maryland.[95] In fact, compelled discovery is limited to the exact documents prosecutors intend to introduce in court.[96] Logistically, defense discovery is also onerous because a defense "attorney must obtain permission from the presiding judge before he is authorized to copy and inspect Prosecution documents."[97]

b. Power to introduce their own evidence at trial

"Public prosecutors can carry out their own investigation of criminal activity whenever they deem it necessary."[98] Prosecutors question suspects throughout their detention[99] and when it comes to presenting the results of these conversations, they "are given wide legal latitude to compose (confessions) in their own words and to use them as evidence at trial, even if the confessor subsequently recants all or part of the confession."[100] "Prosecutors are not required to make verbatim records of interrogations and are permitted to introduce mere summary statements of what the suspect says during interrogation in the manner the prosecutor chooses to present it."[101] "As a result, dossiers on which courts routinely rely to adjudicate guilt and issue a sentence,

---

[94] STATE DEPARTMENT HUMAN RIGHTS REPORT, *supra* note 54, at 1.
[95] Brady v. Maryland, 373 U.S. 83 (1963). It logically follows that withholding such evidence does not result in a due process violation and a remedy of dismissal of charges.
[96] JOHNSON, *supra* note 62, at 40-41.
[97] DANDO, *supra* note 38, at 110.
[98] *Id*. at 96 (citing Public prosecutor's Office law art. 6; Code article 191(1)).
[99] JOHNSON, *supra* note 62, at 243.
[100] *Id*. at 39.
[101] *Id*.

consist of prosecutor's redacted versions of various conversations."[102] In practice, this means that regardless of intent or motivation, if a prosecutor adds words or omits others, the substance goes unchallenged since he will not be subjected to cross-examination.[103] Unfortunately, prosecutors and ex-prosecutors admit to knowing of cases in which evidence was created to the defendant's detriment.[104] Not surprisingly, "appellations denouncing criminal trials for being merely paper proceedings are as numerous as they are colorful. Trial by dossier, formal ceremony, and empty shell are three of the most common."[105]

c. Subjugated role of defense representation

Even though an accused is appointed counsel upon indictment, defense representation provides little relief for a suspect since adversarial roles in Japan are highly unbalanced.[106] Defense attorneys do not act as real adversaries to the police and the prosecution.[107] Their role is "a cooperative responsibility . . . and occupies such a public position involving the public interest as he cooperates in the fair administration of criminal justice."[108] As such, defendant and defense counsel cooperate more than they fight and are more compliant than confrontational[109]; they rarely challenge the power of the prosecutor or the facts the prosecutor lays before the court. In a survey of defense attorneys, "sixty-six percent of the attorneys questioned replied that they had never advised their clients to remain silent or requested the production of a witness in court to challenge a dossier. Furthermore, seventy-five percent of the defense attorneys had never asked for discovery.[110] Most alarming of all, "ninety-five percent of all defense attorneys surveyed had never asked to attend an interrogation."[111]

---

[102] *Id*. at 248.
[103] Section 321 of Japanese Code of Criminal Procedure (CCP) provides, "If defense does not agree to the admission of a dossier, the prosecutor can call the victim or witness to testify. If the victim or witness gives contrary trial testimony or materially different testimony from the dossier, and if the court finds the previous statement (dossier) more credible than the trial testimony, the court can disregard the in court testimony in favor of the dossier." KEISOHO, Section 321.
[104] JOHNSON, *supra* note 62, at 249.
[105] *Id*. at 40.
[106] Setsuo Miyazawa, *Introduction: an Unbalanced Adversary System-Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective*, THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 2 (Malcolm M. Feeley and Setsuo Miyazawa ed., Palgrave Macmillan 2002).
[107] *Id*.
[108] DANDO, *supra* note 38, at 104.
[109] Miyazawa, *supra* note 106.
[110] Foote, *supra* note 40, at 31.
[111] *Id*.

4. Power to Appeal Acquittals and Retain Acquitted in Custody

In the rare case that an accused is acquitted, the prosecutor has the right to appeal the finding to the detriment of the accused, a fundamental principle that has no American counterpart. As such, the prohibition on double jeopardy is substantially watered down from its U.S. counterpart. "The public prosecutor, defendant, or any other person against whom a decision has been rendered has an individual right of appeal."[112] Thus, a prosecutor has the "right to appeal a not guilty finding or the appropriateness of a sentence twice, first to one of the High Courts, and then again to the Supreme Court."[113] The ultimate prosecutorial power is the ability to hold an acquitted accused in custody, pending the appeal. The plight of a Nepalese citizen named Govinda Mainali is an example of how extreme the Japanese appeal system can be.

> Mainali was arrested for overstaying his visa in March 1997, but was also a suspect in the murder of a prostitute. After originally denying knowing her, under interrogation he admitted to having intercourse with her within days of her death. Mainali never admitted to committing the crime and the only evidence that linked him to the prostitute was his admission and a condom at the scene that contained Mainali's semen. Mainali was acquitted. However, after his acquittal, a higher court ordered his detention while the finding was reconsidered. He was held in a detention center for eight months and convicted on retrial in December 2000. As of April 2003, he was still in the detention house awaiting a decision on his appeal, more than 5 years after his original acquittal.[114]

While the example may be extreme, it is not necessarily an aberration. "Between 1982 and 1991, seventy-five percent of prosecutor appeals were granted, either reversing a finding of not guilty or increasing a previously adjudicated sentence."[115]

V. SOFA PROTECTIONS

With limited exceptions, the SOFA does not prevent a U.S. service member from being prosecuted by Japanese authorities. At most, the SOFA

---

[112] DANDO, *supra* note 38, at 410, citing Code of Criminal Procedure articles 298, 400, 412, and 413.
[113] JOHNSON, *supra* note 62, at 41.
[114] Matsubara, *supra* note 61.
[115] JOHNSON, *supra* note 62, at 41.

places administrative requirements on Japan when prosecuting sending state personnel. In order to better understand SOFA protections for U.S. service members, this paper organizes the individual rights into sections below. The first section outlines the jurisdictional regime, followed by the protections afforded sending state personnel in Japanese custody, and finally, the additional protection for those in U.S. custody when the warrant is issued.

A. Jurisdiction

Jurisdictional provisions provide the widest protections for sending state personnel, and in limited situations can be a complete bar to host nation prosecution. While limited in number, they are important.

The jurisdictional outline delineates under what circumstances each nation has the ability to exercise exclusive or primary jurisdiction over offending personnel. The U.S.-Japan SOFA, similar to the NATO SOFA, gives each nation the ability to exercise exclusive jurisdiction over persons that commit crimes punishable only by the laws of that nation.[116] Thus, if a service member commits a crime that only violates Japanese law, Japan has the exclusive right to dispose of the case. Likewise, if a service member commits a uniquely U.S. military offense, Japan cannot prosecute. In all other circumstances the nations share concurrent jurisdiction.[117] The U.S. has the right to assert primary jurisdiction over sending state personnel that perpetrate:

> (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent; or
>
> (ii) offenses arising out of any act or omission done in the performance of official duty.[118]

The U.S. uses both provisions to effectively assert control over sending state personnel. Subsection (i) allows the U.S. to efficiently deal with those cases that arise between sending state personnel. Under this section, the U.S. can exercise jurisdiction over crimes such as assault and theft, regardless of location and without notifying Japanese authorities. The only restriction is the perpetrator and victim both must be sending state personnel. For example, if two Sailors fight in a local bar, the U.S. has jurisdiction over any ensuing assault

[116] *The SOFA*, Article XVII(2)(a), (b), *supra* note 10, at 27-28.
[117] *Id*., Article XVII(3) at 28-29.
[118] *Id*., Article XVII(3)(a)(i), (ii).

charges.[119] Without subsection (i), sending state personnel would be subject to the Japanese criminal system for crimes that have a greater impact on sending state forces. Moreover, the U.S. would lack the ability to investigate and punish this type of crime until Japan waives jurisdiction, resulting in an inefficient system that would restrict a commander's ability to enforce discipline upon his unit.

Subsection (ii) allows the U.S. to assert jurisdiction over acts committed by personnel while in the line of duty. This has been called the last vestige of the law of the flag because it allows the U.S. to assert jurisdiction, even when the victim is a host nation national.[120] A high-profile application of a similar SOFA section in the U.S.-Korea SOFA occurred in 2002 when a U.S. Army tank completing a training mission near Seoul ran over and killed two teenage girls walking on the side of the road. Amid a flurry of extensive protests, the U.S. asserted its primary jurisdiction over the incident[121] and the Tank Commander and Track Driver each stood trial at general court-martial for negligent homicide. The two soldiers were later acquitted.[122] In both cases, this provision allowed the U.S. to exercise exclusive control of the service members and remove them from a potentially politically-charged foreign criminal trial.

1. Double Jeopardy Provision

A lesser known, but important, jurisdictional provision prevents re-trial of an accused in Japan once tried by the other Government, regardless of outcome.[123] This provision prevents Japanese authorities from asserting jurisdiction over a criminal incident if dissatisfied with the American outcome. Absent this provision, sending state personnel could be retried by Japan if Japanese prosecutors were not satisfied with a particular outcome. The provision also prevents military authorities from referring service members to courts-martial in Japan for the same charge, after being tried by a Japanese court. Per paragraph 8 of Article XVII, the U.S. may take disciplinary action against the service member for uniquely military offenses arising out of the

---

[119] Japan retains primary jurisdiction over any disorderly conduct charge that may be associated with the incident. Agreed View Forty-Four authorizes the United States to proceed to prosecution first, effectively eliminating Japan's desire to further prosecute on a separate charge. United States Forces Japan, Pamphlet 125-1, Criminal Jurisdiction in Japan 26 (1 Jan 1976) [hereinafter USFJ Criminal Jurisdiction Manual].

[120] See Lepper, *supra* note 20, at 170.

[121] The relevant Korean SOFA provision is identical to the one with Japan. Treaty of Mutual Defense, U.S.-S. Korea, July 19, 1966, 11 U.S.T. 2348.

[122] For further information see: *Background on U.S. Tank Accident in Korea*, July 2002, *available at* http://www.koreawatch.org.

[123] *The SOFA*, Article XVII(8), *supra* note 10, at 31-32.

same transaction.[124] The practical effect is that a service member avoids receiving an American criminal record for criminal conduct but affords the U.S. with administrative remedies to characterize the misconduct.

2. Penal Code 211 and the Criminalization of Traffic Accidents

Another difference between the U.S. and Japanese criminal systems is the manner in which traffic accidents are handled in court. "Japanese law imposes a very heavy responsibility upon the operators of transportation conveyances, almost to the extent of absolute responsibility and subjects them to possible criminal prosecution under the provisions of Article 211 of the penal code for the failure to exercise necessary care."[125] Prosecutions resulting from traffic accidents causing death or bodily injury differ from common law vehicular or negligent homicide because Japan assesses criminal liability based on a mere negligence standard and not a wanton and reckless behavior standard used in the U.S.[126] This is because motor vehicle operation is defined as a professional or occupational skill,[127] and "the failure to use such care as required in the conduct of a profession or occupation which results in the death or injury to another, the person is considered to have committed a more serious offense and is dealt with more severely, and a person who is guilty of gross negligence is treated similarly."[128]

The case of Petty Officer Second Class Joel Beza, U.S. Navy, is an excellent example of this harsh standard. In March 2004, Petty Officer Second Class Joel Beza was sentenced to 3 years incarceration at forced labor by the Yokohama District Court for violating this statute in January 2004.[129]

> The accident took place at approximately 10:00 PM, when Beza, who was traveling approximately 50 miles an hour in a 38 mile per hour speed zone was unable to stop his vehicle when the traffic light turned red. He skidded into another

[124] In pertinent part, SOFA Article XVII(8) reads, "However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense which he was tried by the authorities of Japan." *Id.*

[125] In 2004, Japan there were over 7,300 deaths related to traffic accidents. In 1998, Japan prosecuted over 630,000 people for professional traffic law violations. GEORGE M. KOSHI, THE JAPANESE LEGAL ADVISOR, CRIMES AND PUNISHMENTS 161-62 (Charles Tuttle Company, 1970).

[126] MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, Article 134.

[127] KOSHI, *supra* note 125, at 162.

[128] Under Penal Code 211, the maximum punishment is 5 years confinement. Wanton and reckless conduct has a maximum punishment of 15 years confinement. *Id*. at 159.

[129] Nancy Montgomery, *Kitty Hawk Sailor faces 3 1/2 years in prison*, STARS AND STRIPES, Mar. 27, 2004, *available at* http://www.estripes.com/article.asp?section=104&article=20460&archive=true.

> vehicle, killing the driver. Beza's blood alcohol level was below the .03 blood alcohol limit for driving intoxicated, although he admitted to having a drink of wine with dinner, several hours before. The prosecutor had asked for a 4 1/2 year sentence, just 6 months short of the maximum, despite the fact Beza's insurance compensated the family and he showed remorse by paying the family approximately $1,000 for funeral expenses.[130]

By using an expansive definition of what constitutes line of duty conduct under subparagraph (ii) of paragraph 3(a), however, sending state personnel may be afforded immunity from Japanese prosecution for traffic accidents in some limited circumstances. As explained previously, if the alleged criminal conduct occurred in the line of duty, the U.S. has the right to assert primary jurisdiction over the conduct.[131] Official duty is defined as "any duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage."[132] Under this definition, the U.S. claims official duty status for sending state personnel operating privately-owned vehicles traveling directly between their off-base residence and duty station, called the home-to-work rule.[133] The Agreed Minutes to the 1953 Protocol give "commanding officers the ability to issue certificates of duty that are binding on Japanese courts, unless there is sufficient evident of the fact to the contrary."[134] While this exception only applies in limited situations, it nonetheless effectively prevents criminal prosecutions against sending state personnel for mere negligent acts that arise while operating a motor vehicle on duty or on their way to or from work.

In cases that do not qualify under the home to work rule, Agreed View Fifty-Two imposes a fifty (50) day statute of limitations on Japan to issue a

---

[130] *See* Nancy Montgomery, *Kitty Hawk Sailor apologizes for fatal accident in Japan*, STARS AND STRIPES, Mar. 18, 2004, *available at* www.estripes.com/articles (last visited Jan. 8, 2004).

[131] *The SOFA*, Article XVII(3)(a)(i), (ii), *supra* note 10, at 29-30.

[132] *The SOFA*, Agreed View Thirty-Nine. USFJ Criminal Jurisdiction Manual, *supra* note 119, at 22.

[133] COMMANDER, UNITED STATES NAVAL FORCES JAPAN INSTRUCTION 5820.16D, FOREIGN CRIMINAL JURISDICTION, (16 June 1992) para 0704b [hereinafter COMNAVFORJAPANINST 5820.16D].

[134] "Where a member of the United States armed forces or the civilian component is charged with an offense, a certificated issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved." USFJ Criminal Jurisdiction Manual, s*upra* note 119, at 8.

traffic accident indictment against sending state personnel.[135] The failure to indict means the loss of jurisdiction.[136]

B. SOFA Protections while in Japanese Custody

There is a clear preference for the U.S. to obtain custody of a suspect apprehended by Japanese Police, who faces charges over an incident for which Japan has primary jurisdiction. The Agreed Official Minutes Regarding the Amended Protocol requires Japan "to release the service member into the custody of the U.S., unless Japan deems there is adequate cause and necessity to retain such offender."[137] While the U.S. always asks for possession of detained personnel, the decision to relinquish the service member to U.S. custody rests with Japanese authorities.[138] If retained, the individual is subject to the entire brunt of the Japanese criminal process. In order to ensure the suspect is afforded the mandatory minimum standard of due process in these circumstances, the SOFA affords the individual the additional rights of notification, communication and interpretation. In doing so, it allows the U.S. to monitor the pre-trial detention and lengthy interrogations.

1. Notification upon Arrest

Paragraph 5(b) requires Japanese authorities to "notify promptly the military authorities of the United States of the arrest of any member…"[139] This requirement serves as a beginning point for all SOFA rights. It allows U.S. officials to track the process of the investigation and ensures service members are advised of their SOFA protections prior to interrogation.

---

[135] *The SOFA* Agreed View Fifty-Two states in pertinent part, "if Japan determines to exercise jurisdiction by bringing an indictment in the case, it shall, through the Ministry of Justice, advise the Legal Office of the competent headquarter in Japan of the Army, Navy, or Air Force to which the suspect's assigned to that effect. Notwithstanding the provisions of Agreed View Number 40, the period within which advice shall be given by Japan of the exercise of its jurisdiction by bringing an indictment in any such cases will be fifty (50) days, counting from the day after the date of the original notification of the alleged offense." *Id*. at 30-31.

[136] Pertinent part of *The SOFA* Agreed View Fifty-Two reads, "If the above advice is not received by the Legal Office concerned within the period set forth above that Japan will exercise its jurisdiction by bringing an indictment . . . the United States may exercise jurisdiction in any such case." *Id*. at 31.

[137] *Id*. at 9.

[138] E-mail from LCDR (Sel.) Justin Clancy, JAGC, USN, Foreign Criminal Jurisdiction Attorney, Commander, U.S. Naval Forces, Japan, to LCDR T. D. Stone, JAGC, USN (Oct. 19, 2004)(on file with author) [hereinafter Clancy e-mail].

[139] *The SOFA*, Article XVII(5)(b), *supra* note 10, at 30.

2. If Necessary, the Services of a Competent Interpreter

Article XVII, paragraph 9(f), affords the sending state suspect the right to a competent interpreter during questioning.[140] While interpreter services seem essential to ensure a fundamentally fair interrogation, they are not otherwise provided; SOFA personnel are the only foreigners are afforded this right. The Japanese Ministry of Justice reported that in 1998, nearly one of every eight foreign suspects was convicted without the services of an interpreter.[141] A British citizen, Nick Baker, currently has an appeal pending before the Japanese Supreme Court challenging his conviction for drug smuggling charges. One of the issues raised in his appeal is the language barrier between him and the airport interrogator, in which it is alleged the interrogator mistranslated Mr. Baker's answers.[142] The appeal also alleges that "Mr. Baker was forced to sign a confession written only in Japanese and without translation."[143] Whether Mr. Baker[144] is to be believed is not the issue; the operative point is that only because of the SOFA, interpreter services is not an issue for sending state personnel.

3. To Communicate with a U.S. Representative and to have a Representative Present at Trial

Article XVII, paragraph 9(g), affords the suspect the right to communicate with the U.S. Government and have a trial representative present for all trial proceedings. This right begins with the presentation of SOFA rights by military authorities prior to any questioning.[145] Upon request, U.S. authorities have the right to visit detained personnel at any time.[146] However, the right to access historically has not included the presence of U.S. authorities during interrogation. The open line of communication between suspect and military authorities allows the service member to voice any grievance or

---

[140] *The SOFA*, Article XVII(9)(f), *supra* note 10, at 32.
[141] *A Guide to Court Procedure*, *supra* note 77, at 1.
[142] Matt Goerzen, *Baker case Highlights Human Rights Violations,* THE FOREIGNER, *available at* www.theforeigner-japan.com/ (last visited Jan. 8, 2005).
[143] William Hollingworth, *Drug Smuggler Baker's appeal to test Japan's judicial system*, JAPAN TODAY, Jan. 10, 2004, *available at* http://www.japantoday.com/ (last visited Jan. 8, 2005).
[144] Mr. Baker was sentenced to 14 years in prison for attempting to smuggle, 41,120 tablets of ecstasy and 990 grams of cocaine into Narita Airport in April 2002, using a suitcase with a false bottom. Mr. Baker alleged that he was carrying the bag for a travel companion and he did not know the drugs were in the suitcase. Coincidentally, his travel companion was subsequently arrested in Brussels on smuggling charges and the indictment included his duping individuals to carry suitcases of drugs in them. *Id*.
[145] COMNAVFORJAPANINST 5820.16D, supra note 133.
[146] Paragraph G (2) of the Official Minutes Regarding the Amended Protocol states, "The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority." USFJ Criminal Jurisdiction Manual, *supra* note 119, at 10.

problem associated with the detention. Conceivably, this right may also implant limits on the physically aggressive prosecutor or police interrogator.

C. Protections when in the Custody of the United States

Article XVII, paragraph 5(c) states, "the custody[147] of an accused member of the United States armed forces or the civilian component, whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan."[148] Thus, the U.S. must relinquish physical control of the service member only upon indictment.

Paragraph 5(c) does not prevent a Japanese prosecution and is limited by paragraph 6(a), which requires the U.S. to assist Japan in carrying out all necessary investigations into offenses.[149] Practically, this means that the U.S. delivers the sending state suspect to Japanese authorities for questioning, whenever requested.[150] At the termination of the day's interrogation, the suspect is returned to military control[151] and remains with the U.S. until indicted or another request to interrogate him is made.[152] If requested, the suspect will be returned the next day.

Since the purpose of the detention is to ensure a confession, while tedious, this provision limits the onerous effects of daiyo-kangoku by breaking the dominating control Japanese authorities have over pre-trial detainees. The sum total is to reduce the likelihood of a coerced confession. The practice may also deter the use of physical coercion because it can be reported directly to American officials. In doing so, the provision helps afford the sending state suspect the minimum due process required.

---

[147] Agreed View Five (b) expands the definition of in United States custody to include those situations where law enforcement officials from both nations are concurrently present at the scene of a crime. *Id*. at 13.

[148] *The SOFA*, Article XVII(5)(c), *supra* note 10, at 30.

[149] Paragraph 6(a) of Article XVII reads, "The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them." *Id*.

[150] Clancy e-mail, *supra* note 138.

[151] Return to military control rarely means the service member is free of military restrictions. All services have instructions to incarcerate personnel pending Japanese charges to ensure their presence at trial. For a critical analysis of the practice see, Major William K. Lietzau, U.S. Marine Corps, *A Comity of Errors: Ignoring Constitutional Rights of Service Members*, 1996 ARMY LAW. 3.

[152] Clancy e-mail, *supra* note 138.

As this provision directly undercuts the police's most important tool for garnering a confession, critics claim it frustrates police investigations and obstructs justice.[153] The perception has made paragraph 5(c) "by far the greatest SOFA-related popular outrage in Japan."[154] This provision is the focal point of protest for SOFA reformers and is the one SOFA provision that has been modified: once in 1996 and again in 2004. In 1996, the U.S. agreed to give sympathetic consideration to requests to transfer custody of suspected sending state personnel to Japanese authorities pre-indictment, when personnel are suspected of the heinous crimes of murder and rape.[155]

1. Sympathetic Consideration for Pre-Indictment Turnover

On September 4, 1995, two Marines and a Sailor stationed in Okinawa kidnapped and repeatedly raped a 12 year-old Okinawan girl.[156] Because the service members were under U.S. control when the investigation began, they remained in U.S. custody until indictment. Japanese investigators claimed the inability to retain the suspects meant the U.S. military was obstructing their investigation. The allegation of obstruction led to massive public protests demanding the removal of U.S. Forces from Okinawa and SOFA revision.[157]

In an attempt to quell public outcry, through the Joint Committee, the U.S. conceded in future cases it would give "sympathetic consideration" to requests that a military suspect be handed over to Japanese authorities prior to indictment, when suspected of committing especially heinous crimes.[158] The phrase "heinous crimes" was not defined and the decision to turnover individuals remains with the U.S. Government.[159] The concession did, however, set up a framework for U.S. authorities to use when deciding when to waive Article XVII, paragraph 5c. First, by definition, the suspect has to be in U.S. control when an allegation is received by local police. The type of crime alleged must be heinous, e.g., "believed to be murder or rape."[160] If Japan asks for pre-indictment transfer, the U.S. decides if the specific facts of the allegation warrant turnover. Thus, even if confronted with a rape allegation, the U.S. authorities may still deny the request.

---

[153] Gher, *supra* note 13, at 227.
[154] Johnson, *supra* note 91, at 6.
[155] Gher, *supra* note 13, at 227.
[156] Johnson, *supra* note 91, at 4.
[157] Gher, *supra* note 13, at 227; The Japan Times, *Kawaguchi vows Okinawa effort*, Feb. 3, 2003, *available at* http://www.japantimes.co.jp.
[158] Johnson, *supra* note 91, at 4.
[159] Clancy e-mail, *supra* note 138.
[160] Gher, *supra* note 13, at 227.

This decision process creates a hole in the U.S. practice to protect, to the maximum extent possible, the rights of sending state personnel. Its undefined nature gives the impression of host country mob rule by fostering the belief that "if the local community's negative reaction is strong, they [U.S. military] will turn over suspects. And if not, they won't turn over the suspects."[161] Moreover, it gives Japanese officials complete control over sending state personnel in advance of the treaty obligation, knowing an involuntary confession is a distinct possibility, especially given the politically sensitive and heinous nature of the crimes that qualify.

From inception until 2004, the U.S. has rarely granted the concession.[162] Pre-indictment turnover, however, is not without precedent. "Prior to the pre-indictment turnover of Air Force Staff Sergeant Timothy Woodland,[163] on July 6, 2001 for the rape of a 20 year-old Japanese woman in Okinawa, the United States had turned over only one other person to Japanese authorities."[164] Two years later, the U.S. turned over Lance Corporal Jose Torres, USMC, after an arrest warrant was issued for him in connection with the rape and physical assault of a nineteen year-old Japanese woman near Camp Hansen, Okinawa on May 25, 2003. Torres was turned over two days after the request.[165]

Unlike Woodland, who never confessed to the crime, Torres originally denied committing the rape, stating he paid the woman for sexual intercourse. After days of interrogation, however, he confessed to raping and punching the victim in the face, and breaking her nose.[166] At court, LCpl Torres pled guilty to rape and assault and was sentenced to three and a half years confinement.[167]

2. Mutual Concessions of April 2004

After nine years of negotiation spurred on by the pre-indictment turnover of LCpl Torres,[168] in April 2004, the governments compromised

---

[161] Johnson, *supra* note 91, at 5 (citing Asahi Shimbun, *U.S. Serviceman Turnover: SOFA Revision Not Touched Again,* June 19, 2003.)
[162] Clancy e-mail, *supra* note 138.
[163] SSgt Woodland was convicted of rape, primarily based on the testimony of Marine Lance Corporal that said he witnessed the rape. Woodland was sentenced to 2 years and 8 months incarceration. Johnson, *supra* note 91, at 5.
[164] *Id*.
[165] *Japan court jails US marine for rape in Okinawa,* CHINA DAILY, Sept. 12, 2003, *available at* http://www.chinadaily.com (last visited Dec. 6, 2004).
[166] Johnson, *supra* note 91, at 8.
[167] *Top Stories of the Year*, STARS AND STRIPES, Jan. 1-2, 2004, *available at* www.estripes.com/articles (last visited Mar. 18, 2005).
[168] Johnson, *supra* note 91, at 5.

regarding the turnover of personnel and interrogation of suspects.[169] The ensuing agreement affects only the treatment of personnel transferred pre-indictment; it also adds attempted murder and arson to the list of heinous crimes (rape and murder already considered heinous) that could trigger a pre-indictment transfer.[170] Further, the U.S. is to be more flexible when granting pre-indictment transfer requests and Japan agreed to allow a U.S. representative to be present during all stages of interrogation of a pre-indictment transferee.[171] While the U.S. originally pushed during bilateral negotiations for a lawyer to be present during interrogations, the final agreement only allows for a U.S. representative to be present to facilitate the investigative process[172] and may not act on behalf of the suspect.[173]

Although imperfect, this agreement alleviates pressure on both Governments to revise the SOFA. On the other hand, the U.S. can more readily turnover suspects of heinous crimes without the specter of physical violence being used against a suspect during interrogation. Conversely, while "local police officials still view the presence of a U.S. military representative as an obstacle to interrogations,"[174] the agreement gives Japan the ability to possess the suspect and subject him to their normal detainment and questioning. Thus, the agreement meets Japan's goal of gaining an increased ability to control criminal matters within its own borders.

Whether subjected to pre-trial detention or not, U.S. policy is to request command presence during interrogations of all service member suspects. However, local authorities have the ability to deny such requests, and the 2004 agreement keeps this mechanism in place. In a country that prevents retained legal counsel from sitting in on interrogations,[175] it would not be surprising if local authorities continue to deny these requests. "The first reported request, after the 2004 agreement, seeking to have a representative present during a questioning of a non-pre-indictment transferee, was denied by local authorities in June 2004."[176]

---

[169] Ryukyu Shimpo, "*Improving" the U.S.-Japan SOFA*, RYUKYU SHIMPO INTERNET WEEKLY NEWS SERVICE, April 15, 2004, at 1, *available at* http://www.ryukyushimpo.co.jp/english/enews (last visited Oct. 6, 2004).
[170] *Id*. at 2.
[171] Clancy e-mail, *supra* note 138.
[172] *Japan, U.S. agree on troop crime suspects*, THE JAPAN TIMES, March 29, 2004, *available at* http://www.japantimes.com/print/news/nn03 (last visited Dec. 8, 2004).
[173] Hiroshi Matsubara, *U.S. Presence in grillings unfair scrutiny?*, THE JAPAN TIMES, July 15, 2004, *available at* http://www/japantimes/print/news/nn07-2004 (last visited Dec. 8, 2004).
[174] *Id*. at 2.
[175] Yasushi Higashizawa, *The Constitution of Japan and Human Rights*, ASIAN HUMAN RIGHTS COMMISSION 3, *available at* http://www.ahrchk.net/charter/mainfile.php (last visited Jan. 8, 2004).
[176] Matsubara, *supra* note 173.

VI. Toward a New Policy Approach

Current U.S. military policy requires commanders to provide sending state suspects free defense representation when indicted.[177] Component commanders are authorized to retain civilian defense services prior to indictment if the case warrants an assignment.[178] In the majority of cases, however, counsel is only provided after indictment.[179] The right to counsel under Article 34 of the Japanese Constitution affords criminal suspects the right to counsel when arrested or detained.[180] The SOFA, through Article XVII, paragraph 9(e) [181] and paragraph G[182] of the Agreed Minutes to the Amended Protocol, applies Article XXXIV to sending state suspects. While prosecutors and police control access times for counsel, the Japanese police do not deny U.S. service members the right to confer with counsel when not being interrogated. The right to seek counsel is codified within the Japanese Constitution.[183] In the absence of appointed counsel, the U.S. provides sending state suspects the following SOFA rights warning as the only guidance on whether the suspect should provide a statement:

> You have the absolute right under Article 38 of the Constitution of Japan to remain silent. This is similar to rights guaranteed under Article 31, Uniform Code of Military Justice and the Fifth Amendment, U.S. Constitution; however, there are some differences that you should discuss with the installation legal office or other representative designated by your installation commander. You and you alone must decide whether you will answer all, some, or no questions. While Japanese authorities are usually favorably influenced by a

---

[177] UNITED STATES FORCES JAPAN INSTRUCTION 51-701, INTERROGATION BY FOREIGN AUTHORITIES 3.1.1 (June 1, 2001); Commander United States Naval Forces, Japan, 5820.16D, Foreign Criminal Jurisdiction in Japan, Section 1001, June 1992.

[178] Clancy e-mail, *supra* note 139.

[179] *Id*.

[180] KENPO, art. 34.

[181] Article XVII, paragraph 9(e) states, "Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan." *The SOFA*, Article XVII(9)(e), *supra* note 10, at 32.

[182] Paragraph G, Agreed Minutes to the Amended Protocol states, "The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution." USFJ Criminal Jurisdiction Manual, s*upra* note 119, at 9.

[183] Article 34 of the Japanese Constitution authorizes the suspect to seek legal assistance. KENPO, art. 34.

> cooperative attitude, anything you say may be used either for or against you.[184]

This policy fails to avail sending state suspects of the full protections available under Japanese law and the SOFA. For arrested or detained personnel, this policy creates a window of up to twenty-three days (the maximum length of time of the daiyo-kangoku) where sending state suspects could receive the benefit of Japanese counsel, but, through U.S. policy, do not. This policy has a disparate impact on detained personnel that do not receive the protections of the April, 2004, agreement, because a U.S. representative will not be present during interrogations. While the right to meet with a U.S. representative still applies, the U.S. representative will not provide specific counsel to the suspect because the representative continues to be bound by U.S. Forces Policy.[185]

It is the author's view that the U.S. should provide criminal defense representation to all sending state suspects prior to indictment, and in accordance with Japanese law. Doing so will further ensure the U.S. fulfills its policy requirement of ensuring sending state suspects are afforded minimum due process. It may seem that advocating the early appointment of civilian representation is paradoxical to the assertion that the lack of an adversary system fails to provide adequate due process. However, there is no entity in a better position than local counsel to provide a suspect specific legal advice on how to proceed during interrogations carried out by Japanese officials, which will be used ultimately in a Japanese criminal process. Providing assigned counsel to pre-indictment suspects closes the knowledge gap without impacting either sovereign's ability to dispose of the case or meet its stated objectives.

For Japan, the assignment and meeting with counsel is in accordance with Japanese law. U.S. efforts to obtain jurisdiction over the offense is not affected by a defense counsel's active assistance to the suspect because the defense attorney's goal is not mutually exclusive with that of the U.S. For the Japanese defense attorney, his "pre-trial defense work is two-fold: to make the prosecutor dismiss the charge or to get a summary conviction."[186] "He will do this by trying to find exonerating factors or create mitigating circumstances, such as the payment of civil compensation."[187] Even if the defense attorney cooperates with prosecutors to put the accused in the most favorable light, it enhances U.S. efforts to ensure minimum due process; or, in the case of a non-

---

[184] UNITED STATES FORCES JAPAN INSTRUCTION 51-701, INTERROGATION BY FOREIGN AUTHORITIES 3.1.(June 1, 2001).

[185] Depending on the status of the representative, they may also be bound by Ethical Rules for Attorneys.

[186] Masayuki Murayama, *The Role of the Defense Lawyer in the Japanese Criminal Process*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT, *supra* note 64, at 49.

[187] *Id*.

indictment, the service member would be returned to the custody of the U.S. to face court-martial or discipline under the Uniform Code of Military Justice. In the case of a suspended sentence, the U.S. would be precluded from prosecuting on the same charge, but the U.S. maximizes control over the service member because the service member is not confined in a foreign prison, and the U.S. still has administrative remedies available to separate the convicted member from the service.

VII. Conclusion

The U.S.-Japan alliance shows no real signs of weakening, but one of the greatest challenges to the foundation of that alliance is crime committed by SOFA personnel. While U.S. military presence and SOFA revision remain at the forefront of Okinawan politics,[188] both national governments continue to deal with SOFA issues using the current framework. The Japanese Ambassador to Okinawa, Minister Yuriko Koike, recently stressed, "the central government's stance of working to improve ways to implement it (SOFA) continues and it has an eye to revising it if improvements are insufficient."[189] Unfortunately, because of the volatile nature of the crime issue, the idea of SOFA revision will never be more then one heinous crime away. The willingness of both nations to work within the SOFA framework is reassuring for sending state personnel because the umbrella of SOFA protections appear safe, for now. It is this author's belief that the U.S. representative present during the interrogation of pre-indictment transferees is an important step to further insure fair treatment of our personnel. If the U.S. provided Japanese legal representation to all sending state suspects at first opportunity, sending state suspects would have the entire criminal justice rights and SOFA rights available to them, making a difficult situation more acceptable.

---

[188] *Kawaguchi vows Okinawa effort*, THE JAPAN TIMES, Feb. 3, 2003, *available at* http://www.japantimes.co.jp. In 1997, the National Government of Japan created the post of Ambassador to Okinawa, one of its own prefectures, to focus on Okinawa issues including the heavy military influence.

[189] *Japan Proposes moving U.S. military units out of Okinawa*, KYODO NEWS SERVICE, Oct. 7, 2004, *available at* http://www.home.kyodo.co.jp.

THE EVOLUTION OF UNIVERSAL JURISDICTION OVER WAR CRIMES

Lieutenant Commander James Paul Benoit, JAGC, USN*

I. INTRODUCTION

Professor Dinstein asserts that "[s]ince time immemorial, international law has allowed other States[1] . . . to prosecute persons . . . for war crimes."[2] Of course this simple assertion raises two further questions: (1) What are "war crimes"? (2) Under what theory of jurisdiction may any State prosecute war criminals?[3]

In response to the first question, Article 8(2) of the 1998 Rome Statute, establishing the International Criminal Court (ICC), "contains an extensive[4] list of acts constituting war crimes over which the ICC has jurisdiction."[5] The list includes: eight "[g]rave breaches of the Geneva Conventions";[6] twenty-six "[o]ther serious violations of the laws and customs applicable in international armed conflict";[7] four "serious violations" of common article 3 for non-

* The positions and opinions stated in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Navy. Lieutenant Commander Benoit is an active duty Navy judge advocate who recently completed his LL.M. in International Law at the George Washington University School of Law. He also possesses a J.D. from University of the Pacific, McGeorge School of Law, an M.B.A. from Cornell University, Johnson Graduate School of Management, and a B.S. from Cornell University.

[1] This article uses the term "State" to refer to a country or nation-State.

[2] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 228 (Cambridge University Press 2004).

[3] It is important to distinguish between "war criminals" (universal jurisdiction over which is the topic of this article) and "unlawful combatants" (which is beyond the scope of this article). *Id*. at 233-37.

[4] Professor Dinstein considers Article 8(2)'s list "[t]he most recent – and most detailed – definition of war crimes. . . ." *Id*. at 230.

[5] DOCUMENTS ON THE LAWS OF WAR 668 (Adam Roberts and Richard Guelff eds., Oxford University Press 3rd ed. 2000). *See also Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session*, 6 May-26 July 1996, GAOR, 51st Sess., Supp. No. 10, at 41, U.N. Doc. A/51/10 (1996), Art. 20, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf (last visited Apr. 10, 2006) [hereinafter *ILC 1996 Draft Code*].

[6] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, Art. 8(2)(a), *available at* http://www.un.org/law/icc/statute/romefra.htm (last visited Apr. 10, 2006) [hereinafter Rome Statute].

[7] *Id*. at Art. 8(2)(b).

international armed conflicts;[8] and twelve "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character."[9]

Regarding the jurisdictional basis for any State to prosecute war crimes, "[i]t is generally agreed that customary international law imposes limits on a nation's prescriptive jurisdiction" to five principle jurisdictional bases[10]: (1) territoriality;[11] (2) nationality;[12] (3) protective principle;[13] (4) passive personality;[14] and (5) universality.[15] The first four types of jurisdiction are

---

[8] *Id*. at Art. 8(2)(c).

[9] *Id*. at Art. 8(2)(e). It is interesting to note that in the Rome Statute, Article 8 is by far the longest and most detailed article defining the crimes within the ICC's jurisdiction. The other crimes currently within the jurisdiction of the ICC are genocide (Article 6), crimes against humanity (Article 7), and the crime of aggression, the latter of which is, as of yet, undefined. *Id*. at Art. 5(2). The length and level of detail in Article 8 defining war crimes appears to be primarily due to the complexity and breadth of the modern Law of War (a.k.a. Law of Armed Conflict (LOAC), a.k.a. *jus in bello*) as it has evolved via the entry into force of multilateral treaties and crystallization of customary international law, and less due to the intent of the Rome Conference to "single out" war crimes for special attention.

[10] CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW, 534 (2003). *See* United States v. Yunis, 681 F. Supp. 896, 899-903 (D.D.C. 1988) (describing the five traditional bases of jurisdiction over extraterritorial crimes). This very brief summary of jurisdictional bases necessarily conflates "prescriptive" jurisdiction with "enforcement" jurisdiction, which are, from a theoretical basis, quite distinct.

> "Jurisdiction may describe a state's authority to make its law applicable to certain actors, events, or things (legislative [a.k.a. prescriptive] jurisdiction); a state's authority to subject certain actors or things to the processes of its judicial or administrative tribunals (adjudicatory jurisdiction); or a state's authority to compel certain actors to comply with its laws and to redress noncompliance (enforcement jurisdiction)."

Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

[11] Territorial jurisdiction can be further broken down into "objective" territorial jurisdiction, based on conduct occurring within a State's territory, versus "subjective" territorial jurisdiction, based upon conduct occurring outside a State's territory, but which has, or intends to have, a substantial effect within the State's territory. David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

[12] A State may prescribe law with regard to the conduct of its own *nationals*, both within and outside its territory. *Id*. "Under customary international law, nations have almost unlimited authority to regulate the conduct of their own nationals around the world." BRADLEY & GOLDSMITH, *supra* note 10, at 535.

[13] BRADLEY & GOLDSMITH, *supra* note 10, at 534; David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

[14] BRADLEY & GOLDSMITH, *supra* note 10, at 534; David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

> The most controversial category of prescriptive jurisdiction is the passive personality category, which would allow nations to assert jurisdiction over aliens who injure their nationals abroad. Historically the United States disputed the validity of this category of jurisdiction, but in recent years, the

subject to a nexus or "reasonableness" requirement, which is that the State's exercise of jurisdiction must be "reasonable" vis-à-vis another State's desire to exercise jurisdiction.[16] However, the exercise of *universal* jurisdiction need not be "reasonable,"[17] (or at least need not show a nexus in order to be reasonable) because, "[u]niversal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim."[18] This is because "the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have

---

> United States and other countries have increasingly relied upon this category of jurisdiction as a basis for regulating terrorist attacks on their citizens.

BRADLEY & GOLDSMITH, *supra* note 10, at 535.

[15] A State may prescribe law with regard to certain criminal acts recognized by the international community, such as piracy, slavery, genocide, aircraft hijacking, and possibly terrorism after the attacks on 11SEP2001. David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005). *See, e.g.*, *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 558 (ND OH 1985), *affirmed sub nom.* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986) (finding that Israel had properly asserted jurisdiction over "Ivan the Terrible" under the protective, passive personality, and universality principles).

[16] Factors to be considered in assessing the reasonableness of a particular exercise of jurisdiction would include:

> the connection between the regulating state's territory and the regulated activity, the connection between the regulating state and the person being regulated, the importance of the regulation to the regulating state, the importance of the regulation to the international political, legal or economic system, the extent to which the regulation is consistent with the traditions of the international law system, the extent to which another state may have an interest in regulating, and the likelihood of conflict with the regulations of another nation.

BRADLEY & GOLDSMITH, *supra* note 10, at 535. Although most States are circumspect in exercising jurisdiction over non-nationals under the theory of reciprocity, if a State was to assert a form of jurisdiction that was perceived to be unreasonable, other States could assert diplomatic protests or *demarches* in response.

[17] Chandra L. Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 316 (2003). *Accord* BRADLEY & GOLDSMITH, *supra* note 10, at 536 (noting that only universal jurisdiction does not require a territorial or nationality connection between the regulating nation and the conduct, offender or victim). *See also* Randall, *supra* note 10, at 788. However, at least one author sees the exercise of universal jurisdiction as an "abrogation of sovereignty," at least as applied by domestic courts. M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1127-29 (1999).

[18] Randall, *supra* note 10, at 785. *See also* BRADLEY & GOLDSMITH, *supra* note 10, at 536 (noting that "most U.S. criminal statutes expressly or implicitly require a connection to the United States or a U.S. national and thus do not assert universal jurisdiction."); *id*. (noting that although a U.S. federal torture statute asserts universal jurisdiction by criminalizing "acts of official torture committed in foreign nations by foreign citizens . . . But there are no reported cases applying that statute.").

condemned."[19] Each State is essentially acting to vindicate the international community's interests in prosecuting these offenses.[20] Thus, the *sine qua non* of exercising universal jurisdiction would seem to be the punishment of *international crimes*.[21]

This raises the further question of which specific crimes may be considered international in scope, and therefore justify the application of universal jurisdiction by any State? Some commentators define the crimes that are subject to universal jurisdiction as "certain heinous and widely condemned offenses"[22] or "the most atrocious offenses."[23] Of course, the mere fact that every State criminalizes certain conduct (e.g. rape and murder) is not a sufficient condition—the crime must threaten the international system as a whole if it were to go unpunished,[24] or the prohibited acts must be of an international character[25] and of serious concern to the international community as a whole.[26] Although

---

[19] Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 384 (2001).
[20] Sriram, *supra* note 17, at 316.
[21] *See, e.g.*, Rome Statute, *supra* note 6, at Preamble: "*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." *See also*, Randall, *supra* note 10, at 827-829; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 reporter's note 1 (1987); *Report of the International Law Commission on the work of its second session*, 5 U.N. GAOR, Supp. 12, pt. 111, U.N. Doc. A/1316 (1950) (The "Nuremberg Principles" describe crimes against peace, war crimes, and crimes against humanity as "international crime[s]").
[22] DUNOFF, RATNER & WIPPMAN, *infra* note 181, at 353.
[23] Brief of Amicus Curiae Human Rights Watch, Doe v. Karadzic, No. 93 Civ. 0878 192 F.R.D. 133 (S.D.N.Y. 2000), *available at* http://www.yale.edu/lawweb/avalon/diana/karadzic/1june.htm (last visited Apr. 10, 2006).
[24] Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (joint separate opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (last visited Mar. 12, 2006).
[25] Some writers argue that universal jurisdiction exists only over *jus cogens* (a.k.a. peremptory) norms. *See, e.g.*, Chibundu, *supra* note 17, at 1131-33; Garland A. Kelley, *Does Customary International Law Supersede A Federal Statute?*, 37 COLUM. J. TRANSNAT'L L. 507, 517 (1999); Stephanie L. Williams, *Your Honor, I Am Here Today Requesting The Court's Permission to Torture Mr. Doe": The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of Jus Cogens Norms Under Customary International Law*, 12 U. MIAMI INT'L & COMP. L. REV. 301**,** 324 (2004); Randall, *supra* note 10, at 829-831. However, this merely seems to be overstating the requirement that such crimes be of an international character, as does characterizing the perpetrator of such crimes as being *hostis humani generis* (i.e. an enemy to all of mankind). United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980); *In re* Extradition of Demjanjuk, 612 F. Supp. at 556; Randall, *supra* note 10, at 832, 834. Nor does stating that the obligation to prosecute international criminals is *erga omnes* (i.e. "flowing to all") seem particularly helpful. *Id*. at 829-31. *But see Id*. at 841 ("Universal crimes, obligations *erga omnes,* and peremptory norms [a.k.a. *jus cogens*] may be viewed as doctrinal siblings, sharing the common lineage of a modern world legal order concerned with global peace and human dignity.").
[26] DUNOFF, RATNER & WIPPMAN, *infra* note 181, at 353. *See also* Chibundu, *supra* note 17, at 1132.

piracy[27] and the slave trade,[28] may be the traditional exemplars,[29] modern lists[30] of such universal crimes would also include war crimes,[31] genocide,[32] torture,[33] attacks on, sabotage of or hijacking aircraft,[34] and perhaps even apartheid,[35] terrorism, [36] and other human rights violations.[37] The assertion of universal jurisdiction for many of these international crimes is based upon multilateral treaties that provide for "domestic jurisdiction over extraterritorial offenses regardless of the actors' nationalities," and thus implicitly allow for universal jurisdiction, despite the fact that they lack "any reference to the universality principle."[38]

---

[27] *In re* Extradition of Demjanjuk, 612 F. Supp. at 556. However, the current definition of piracy "Requir[es] that piratical acts be committed for private ends, [under] both the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea." Randall, *supra* note 10, at 797-98. Thus, a crime committed on the high seas for other than private ends, such as the *Achille Lauro* hijacking where "the hijackers' immediate objective was the release of certain Palestinian terrorists imprisoned in Israel," would not fall within the modern definition of piracy, and thus would not be subject to universal jurisdiction unless the hijackers committed another universal crime. *Id*. This assumes, of course, that the modern treaty-based definition of piracy has supplanted the earlier and arguably broader customary international law definition. *Cf*. John Cerone, American Society of International Law, 100th Annual Meeting, Wash., DC [hereinafter ASIL 100th Mtg.], "The Status of the Individual in International Law," Mar. 31, 2006 (arguing that although piracy was recognized as an international crime subject to universal jurisdiction, it was always criminalized by domestic statutes). *See infra* notes 408-11 (discussing the "universal jurisdiction plus" concept).

[28] DUNOFF, RATNER & WIPPMAN *infra* note 181, at 353.

[29] Dem. Rep. Congo v. Belg., 2002 I.C.J. 121. *See also* Randall, *supra* note 10, at 788.

[30] *See, e.g.*, Randall, *supra* note 10, at 839; Sriram, *supra* note 17, at 305.

[31] DINSTEIN, *supra* note 2, at 236: "When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals." *Id*.

[32] Randall, *supra* note 10, at 834-37. The Genocide and Apartheid treaties are the only two that declare violations to be international crimes *per se*, versus calling for States to criminalize the behavior domestically. *ILC 1996 Draft Code*, *supra* note 5, at Commentary para. 4 to Art. 8. Yet the Genocide and Torture Conventions did not foresee international prosecutions, calling instead for domestic prosecution or extradition. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

[33] Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on The Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 120 (1995). Randall, *supra* note 10, at 819.

[34] Randall, *supra* note 10, at 818, 826.

[35] *In re* Extradition of Demjanjuk, 612 F. Supp. at 556; Chibundu, *supra* note 17, at 1132; Randall, *supra* note 10, at 819.

[36] David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005). *Compare* Peter Raven-Hansen, National Security Law lecture at the George Washington University School of Law (Feb. 22, 2006) (universal jurisdiction depends on a universal definition of what is prohibited, and no such universal definition of terrorism exists) *with* Randall, *supra* note 10, at 795, 796-97, 815 (a lack of a common definition of "piracy" in the early 20th century did not stop it from being considered a universal crime subject to universal jurisdiction).

[37] Randall, *supra* note 10, at 789, 815, 837-39.

[38] *Id*. at 819-20. Ironically, although these multilateral treaties (e.g. war crimes, hijacking, terrorism, and torture conventions) do not mention universal jurisdiction, their requirement to "prosecute or extradite" alleged offenders in their custody essentially transforms universal jurisdiction from a

This article will focus on universal jurisdiction as it is applied to war crimes under the Law of War[39] (a.k.a. *jus in bello*),[40] versus peacetime atrocities.[41] First, it will offer a brief history of the application of universal jurisdiction over war crimes,[42] beginning with the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo, and then considering the two current *ad hoc* international tribunals for Yugoslavia and Rwanda. Next the article will provide a summary of the current status of universal jurisdiction over war crimes, which will necessarily include the ICC's jurisdiction[43] over State parties to the Rome Statute, but also universal jurisdiction as a matter of customary international law. Finally, the article will offer a few brief conclusions regarding universal jurisdiction over war crimes.

II. HISTORY OF UNIVERSAL JURISDICTION OVER WAR CRIMES

> The Law of War can be traced back to ancient times. The Sumerians, Hammurabi King of Babylon, Cyrus I King of the Persians, and the Hittites all formulated rules or codes that were designed to regulate and provide structure to armed

---

permissive basis of jurisdiction to a *mandatory* one for State parties. *Id*. at 820-21. However, non-party States may be able to claim the "*jurisdictional right*" to prosecute or extradite under these multilateral treaties without being under a "*jurisdictional obligation*" to do so. *Id*. at 824, 826-27, 829-34, 837.

[39] This article will occasionally reference the (as of yet) undefined crime of aggression, which is technically a matter of when States resort to the use of force, or *jus ad bellum*. Although the way in which governments decide to go to war (*jus ad bellum*) influences how the war is waged (*jus in bello*). Sir Franklin Berman, The George Wash. Univ. Law Sch. Symposium: Lawyers and Wars: A Symposium in Honor of Edward R. Cummings [hereinafter Cummings Symposium], Sep. 30, 2005. Moreover, the distinction between *jus ad bellum* and *jus in bello* may be dissolving. ASIL 100th Mtg., *supra* note 27, "The Relationship Between *Jus Ad Bellum* and *Jus In Bello*: Past, Present, Future," Mar. 30, 2006.

[40] Of course, "War crimes are not the only crimes against international law that can be committed in wartime. The war itself (if it is waged contrary to the *jus ad bellum*) may constitute a crime against peace, a.k.a. crime of aggression. In addition, acts committed in the course of the war may amount to crimes against humanity or to genocide. However these crimes – which can also be committed in peacetime – transcend the compass of LOIAC [Law of International Armed Conflict]." DINSTEIN, *supra* note 2, at 233. *See also*, Randall, *supra* note 10, at 834-35.

[41] Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 371 (1999).

[42] "The approaches to the doctrines of sovereign immunity and universal jurisdiction, and the issue of superior orders all derived from Nuremberg." Henry T. King, Jr., Remarks at 5, Georgetown Univ. Law Ctr. Symposium: Nuremberg and the Birth of International Law: A Day to Commemorate the 60th Anniversary of the Trials at Nuremberg [hereinafter 60th Nuremberg Anniversary], Nov. 11, 2005.

[43] This article will not discuss the other crimes currently within the ICC's jurisdiction, namely genocide, or crimes against humanity, both of which may be "prosecuted even if they are committed outside an armed conflict." ROBERTS & GUELFF, *supra* note 5, at 668.

> conflict. The idea that war should adhere to rules evolved throughout the subsequent centuries.[44]

Despite the fact that the *Law of War* has an ancient lineage, Professor Dinstein cites no authority for his assertion that *war crimes* have been subject to prosecution *by other States* under international law "[s]ince time immemorial."[45] However, it is possible to find a few historical examples of (at least *attempted*) universal jurisdiction, broken down into the periods of Antiquity, World War I Era, and Post-World War II. More recently, various States have enacted domestic legislation providing for universal jurisdiction over war crimes, and international tribunals have been given universal jurisdiction over war crimes. Each of these time periods or topics will be considered in turn.

A. Antiquity

> The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits – sacrifice.[46]

Even before the medieval ages, there were "certain acts committed during war, including the deliberate murder of civilians" and perfidy that were widely regarded as morally wrongful, and as an affront to the professional character of an honorable soldier.[47] "The medieval code of chivalry . . . further developed this martial code"[48] of the law of arms or "*jus armorum*."[49]

---

[44] Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 177 (2000).
[45] DINSTEIN, *supra* note 2, at 228.
[46] Statement of General Douglas MacArthur in Confirming the Death Sentence Imposed by a United States Military Commission on Japanese General Tomayuki Yamashita for Command Responsibility in the Murder of U.S. POWs (October 1946), quoted in William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZ. ST. L.J. 1243, 1276 n.185 (2004).
[47] Bradford, *supra* note 46, at 1275. *See also* Theodor Meron, *Crimes And Accountability In Shakespeare*, 92 AM. J. INT'L L. 1, 6 (Jan. 1988). *See generally* MAURICE H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965).
[48] Bradford, *supra* note 46, at 1275. *Cf.* Judge Theodor Meron, Cummings Symposium, *supra* note 39, Sep. 30, 2005 (noting that chivalry was the basis for international humanitarian law, and that honor and shame played a vital role).
[49] Theodor Meron, *Shakespeare's Henry The Fifth and The Law of War*, 86 AM. J. INT'L L. 1, 3 (Jan. 1992).

Violations of the medieval law of chivalry (a.k.a. "law of arms")[50] were punishable by having one's knighthood stripped.[51] Moreover, a knight who violated the laws of honor could be tried and punished by any court of honor.[52] Arguably[53] the first 'international war crimes' trial was in 1474 of Peter von Hagenbach for his violations of the law of war. Von Hagenbach was made governor of the city of Breisach by Charles the Bold, Duke of Burgundy, and he subsequently proceeded to rape, murder, confiscate private property, and illegally tax . . . its citizens. The court . . . [rejected] Von Hagenbach['s] . . . 'superior orders' defense . . . and he was convicted. He was condemned to death, but first "deprived of his knighthood" and then executed.[54]

"By the Renaissance a set of norms, internalized by a transnational professional caste requiring, *inter alia*, minimization of civilian casualties consistent with military objectives as a matter of honor, had perfused warfare."[55] This martial code was based on the "conception of the foe as a fellow professional," and thus "directed the honorable soldier to renounce treachery and criminality in combating him."[56] These martial norms were passed along via a "collective narrative developed to inform soldiers in the discharge of their duties; when in doubt, soldiers conformed to 'stories about the great deeds of honorable soldiers' drawn from the 'collective narrative of [their] corps.'"[57] This transnational martial code shared by the professional caste of soldiers was

---

[50] Major Gerard J. Boyle, USMC, "Humanity In Warfare: The Law Of Civil War," 2 Apr. 1984, War Since 1945 Seminar, Marine Corps Command & Staff Coll., Marine Corps Dev. & Educ. Command, Quantico, Va. [hereinafter Humanity in Warfare], *available at* http://www.globalsecurity.org/military/library/report/1984/BGJ.htm (last visited Mar. 7, 2006).

[51] Bradford, *supra* note 46, at 1275.

[52] Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006). *Contra* Noone, *supra* note 44, at 181 ("These courts judged the accused knight on their manner with which they treated fellow knights, and not on any number of other 'lowly' combatants."). *Cf. id*. at 185-86; Judge Theodor Meron, Cummings Symposium, *supra* note 39, Sep. 30, 2005 (noting that chivalry had a very narrow scope in that it only protected: (1) knights, not peasants; (2) *Christian* knights; and (3) rape of *Christian* women). *Accord* Meron, *supra* note 49, at 3; Chris af Jochnick and Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 61 (1994). Of course, despite the limited protections of chivalry, it still was an early example of universal jurisdiction enforced by States that might bear no relation to the crime.

[53] Some commentators would put the first recorded international war crimes trial as *circa* 1376, for the war crimes committed by the Duke of Lorraine during the invasion of Alsace. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Sep. 21, 2005 & Nov. 15, 2005). Obviously neither of these would be the first recorded episodes of war crimes *having been committed*. For example, despite immunity of envoys as a principle of international law going back to the Romans, the Vatican's execution of Ghenghis Khan's envoy prompted his worst abuses. *Id*. (Nov. 17, 2005).

[54] Noone, *supra* note 44, at 181-82 & n.25.

[55] Bradford, *supra* note 46, at 1275.

[56] *Id*. at 1276.

[57] *Id*.

the primogenitor for twentieth century conceptions of universal jurisdiction over war crimes.

By the end of the Renaissance in the sixteenth century, the concept of universal jurisdiction over piracy was also starting to take hold.[58] Shortly after the end of the Renaissance, the watershed Treaty of Westphalia,[59] which ended the Thirty Years War in 1648, marked the formation of a community of sovereign States, and hence the foundations of modern public international law.[60] Hugo Grotius "considered the father of international law, had published his Law of War and Peace [*De Jure Belli Ac Pacis Libi Tres*]"[61] in 1625 during the Thirty Years War, in response to the atrocities he witnessed.[62] Grotius put forth general principles for the law of war (and hence war crimes, as violations of the law of war),[63] that were gradually accepted as customary international law.[64] Grotius addressed the concept of universal jurisdiction as follows:

> The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. . . . Truly it is more honourable to avenge the wrongs of others rather than one's own.[65]

During the middle of the nineteenth century, the principles developed by Grotius were incorporated into various military manuals.[66] By the nineteenth century, universal jurisdiction over slave trading[67] was also recognized. This ended what Professor Randall has coined the first of "three evolutionary stages" of universal jurisdiction.[68]

---

[58] Randall, *supra* note 10, at 791-95, 839.
[59] Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, signed Oct. 24, 1648, *reprinted in* 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F. L. Israel ed., 1967), *available at* http://www.yale.edu/lawweb/avalon/westphal.htm (last visited Mar. 7, 2006).
[60] William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L L. REV. 647, 652 n.12 (2001).
[61] Major Gerard J. Boyle, USMC, Humanity In Warfare, *supra* note 50.
[62] Noone, *supra* note 44, at 187-88.
[63] H. GROTIUS, RIGHTS OF WAR AND PEACE, 361-67 (A. Campbell trans. 1901).
[64] Major Gerard J. Boyle, USMC, Humanity In Warfare, *supra* note 50.
[65] Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT'L L. 110, 112 (1991).
[66] Major Gerard J. Boyle, USMC, Humanity In Warfare, *supra* note 50.
[67] Randall, *supra* note 10, at 796-800.
[68] *Id*. at 839.

B. World War I Era

Although "no *specific* precedent existed prior to the Second World War for subjecting war crimes and crimes against humanity to the universality principle,"[69] there had been repeated attempts to establish a competent tribunal of universal jurisdiction extending back to the nineteenth century. In 1872, the "President of what was to be later called the ICRC [International Committee of the Red Cross], proposed the establishment of an international criminal court to adjudicate violations of the 1864 Geneva Convention."[70] "At the 'First Peace Conference' in the Hague in 1899, [the] founder and President of the American Society of International Law . . . was a strong advocate for international tribunals."[71]

Even as late as the first third of the twentieth century, before the commencement of World War II, there had been repeated attempts at establishing a competent tribunal of universal jurisdiction. In 1915, Great Britain, France and Russia denounced Turkey's massacre of its Armenian minority population as "crimes against humanity,"[72] leading to President Woodrow Wilson's proposal "to maintain peace via a League of Nations."[73] Because Turkey submitted to Allied demands and prosecuted two Turkish officials for the Armenian massacre,[74] calls for an international court were stillborn.[75]

"Legal experts appointed by the League [also] concluded that an international criminal court should be created to hold accountable those responsible for Germany's aggressions and atrocities [during World War I]."[76] In "1920, the Allied Powers presented a list of 854 individuals for [international] trial to the new German government . . . [but t]he German government . . . made a counterproposal 'that those accused of war crimes be tried before the German Supreme Court in Leipzig' [to which t]he Allied Powers ultimately agreed."[77] Thus, calls for an international war crimes tribunal over alleged Turkish and

---

[69] *Id*. at 803 (emphasis added).
[70] ROBERTS & GUELFF, *supra* note 5, at 667.
[71] Benjamin B. Ferencz, *Misguided Fears About The International Criminal Court*, 15 PACE INT'L L. REV. 223, 241 (2003).
[72] *Id*. at 241-42. *See also* Noone, *supra* note 44, at 201.
[73] Ferencz, *supra* note 71, at 241-42.
[74] Both Turkish officials were convicted, and one was sent to the gallows. Noone, *supra* note 44, at 201.
[75] The two Turkish officials who were convicted were the only two held accountable for the Armenian massacre, and the other alleged perpetrators were granted amnesty in the 1923 Treaty of Lausanne. Noone, *supra* note 44, at 201.
[76] Ferencz, *supra* note 71, at 242.
[77] Noone, *supra* note 44, at 200.

German war criminals after World War I nevertheless gave precedence to national courts, foreshadowing the complementarity principle of the International Criminal Court (ICC).[78]

As Professor Ferencz so succinctly summarized: "World War I inspired efforts to put the [German] Kaiser on trial for aggression and to hold German officers accountable for their atrocities. The efforts failed."[79] The Kaiser was not indicted for specific war crimes committing during World War I, but for general violations of the law of nations, and dictates of the public conscience, which was a direct reference back to the Martens[80] clause in the 1907 Hague Regulations.[81] However, in perhaps another foreshadowing of the ICC (this time of the United States' objections thereto), "[i]n 1919, in Paris, it was the American delegates at the War Guilt Investigation Committee who opposed most strongly any legal sentence on the Kaiser for the very reason of the incompatibility of such a procedure with the sovereignty of the State."[82] Ultimately, the indictment of the Kaiser for war crimes committed during World War I failed, not because of any lack of support for an international tribunal to resolve the case, but because the Netherlands (to which the Kaiser escaped after the war) refused to extradite him.[83] The Kaiser's indictment for war crimes laid the groundwork for the Nuremberg trials after World War II, and yet the failure of the Kaiser's indictment also foreshadowed the Article 98 agreements that the United States has championed in an attempt to thwart the potential jurisdiction of the ICC over American nationals.[84]

---

[78] *See infra* Parts II.E.4 and III.D.

[79] Ferencz, *supra* note 71, at 243.

[80] Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention IV]:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Id. at preamble para. 8.

[81] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Sep. 21 & Nov. 15, 2005).

[82] International Military Tribunal, Nuremberg Trial Proceedings Volume 17*,* One Hundred And Seventy-First Day, Thursday, 4 July 1946, Morning Session*,* Professor Dr. Hermann Jahrreiss (Counsel for Defendant Jodl), *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm) (last visited Apr. 10, 2006). *See also* Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

[83] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Sep. 21 & Nov. 15, 2005).

[84] *See infra* Part II.E.4.

Subsequent attempts after World War I to establish a permanent international criminal court also failed.

> A French proposal to the League of Nations in 1934 for the creation of a permanent international criminal court was aimed at punishing acts of political terrorism [e.g. assassinations] rather than war crimes and, in [any] event, the two treaties defining the crimes and establishing the court adopted at a diplomatic conference in 1937 never entered into force.[85]

"The United States, catering to strong isolationist sentiments, remained aloof."[86] Unfortunately, America's isolationism after World War I led to the rise of Adolf Hitler in a disgruntled Germany.[87] "The failure to hold high-ranking criminals accountable [after World War I] was recalled years later by Adolf Hitler, who commented contemptuously when launching the Holocaust: 'Who remembers the Armenians?'"[88]

C. Post-World War II

After World War II, Winston Churchill and Joseph Stalin recommended summarily executing the Nazi leaders as war criminals.[89] "But [U.S. Supreme Court Justice] Robert Jackson and U.S. Secretary of War Henry L. Stimson felt there was a better way – a legal way – to deal with the Nazi leaders for their crimes. They wanted fairness rather than vengeance to be the order of the day."[90] Besides the initial war crimes tribunals in Nuremberg and Tokyo, subsequent trials were conducted years later as fugitive Nazi leaders were found and brought to justice. Jurisdiction in each of these trials was premised, at least in part, on universal jurisdiction.[91]

---

[85] ROBERTS & GUELFF, *supra* note 5, at 667. *See also* Ferencz, *supra* note 71, at 242.
[86] Ferencz, *supra* note 71, at 242.
[87] Father Robert F. Drinan, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.
[88] Ferencz, *supra* note 71, at 242. Ferencz offers no source for this attribution, but it is commonly attributed to Hitler. The Committee for Open Debate on the Holocaust Web page contains a discussion of the alleged statement, describes circumstances surrounding it, and offers evidence that it may not have actually been made. http://forum.codoh.com/viewtopic.php?p=3709
[89] Sean D. Murphy, The George Wash. Univ. Law Sch.: "Should the U.S. Join the International Criminal Court?" A Moderated Panel Discussion [hereinafter ICC Panel], Feb. 13, 2006; Henry T. King, Jr., Remarks at 5, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005; ABA President-Elect Karen Mathis, *Id*. *Cf. In re* Extradition of Demjanjuk, 612 F. Supp. at 558 (noting that "It is a historical verity that the victors in war have meted out punishment to the vanquished in the name of justice.").
[90] Henry T. King, Jr., Remarks at 5, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.
[91] Randall, *supra* note 10, at 800. *See also* Demjanjuk v. Petrovsky, 776 F.2d at 582.

1. Nuremberg

Justice Jackson was granted leave from the Supreme Court to serve as the lead U.S. prosecutor at the International Military Tribunal (IMT) in Nuremberg,[92] which was administered jointly by the four Allied powers.[93] The IMT was responsible for prosecuting the major German war criminals,[94] which included the "German leaders responsible for planning or perpetrating the aggressions, crimes against humanity and war crimes committed in flagrant violation of existing international laws."[95] Justice Jackson was careful to put together overwhelming proof of the alleged war criminals' guilt, realizing that this was an historic endeavor: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."[96]

Historically, the IMT is generally viewed as the commendable exercise of universal jurisdiction[97] over Nazi war criminals,[98] and that "[a]t Nuremberg, the rule of law took a step forward."[99] "Hitler and his henchmen had been warned in 1942 that they would be held accountable for the atrocities being committed by Nazi Germany,"[100] and so they were. All but three of the Nazi defendants were convicted after receiving putatively fair trials; seventy-one were hung, but many were imprisoned, and eventually released after having been pardoned.[101] "Nuremberg was designed to replace the 'law of force' with

---

[92] Ferencz, *supra* note 71, at 225.
[93] United States, Great Britain, France, and Russia. Besides the four Allied powers, "[n]ineteen other states assented to the London Agreement" which established the IMT." Randall, *supra* note 10, at 801.
[94] *Id*.
[95] Ferencz, *supra* note 71, at 225.
[96] *Id*. at 225-26.
[97] Demjanjuk v. Petrovsky, 776 F.2d at 582. *Cf.* Randall, *supra* note 10, at 800, 805-06 (noting that the Allies could also have based jurisdiction on the territoriality, nationality, and passive personality principles, and that "while many sources view the IMT's proceedings as being partly based on the universality principle, the IMT's judgment and records actually evidence little or no explicit reliance on universal jurisdiction"). However, the perception that the IMT exercised universal jurisdiction grew out of its attempts to define crimes of universal condemnation, for which the international community could not rely on domestic courts to resolve.
[98] *See* Randall, *supra* note 10, at 803-04 (comparing the Axis offenses to piracy in order to justify the application of universal jurisdiction over the former). *Cf. id*. at 804 (recognizing that "the Allies' partial reliance on the universality principle . . . represents a marked expansion of universal jurisdiction").
[99] Ferencz, *supra* note 71, at 226.
[100] Ferencz, *supra* note 71, at 225.
[101] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; ABA President-Elect Karen Mathis, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

the 'force of law,'"[102] which it accomplished merely by providing judicial process instead of turning the "final solution" back against the Nazi leaders themselves, as the British and Russians proposed. Even the German people eventually came to regard the IMT prosecutions as a just result for the holocaust, although this took decades to come about.[103]

Yet the IMT is today (and was then) not without its critics. Professor Wedgwood has pointed out that only the leaders and members of the Axis powers were ever held accountable for potential war crimes, such as the firebombing of Dresden.[104] Despite Justice Jackson's role as chief U.S. prosecutor, the remainder of the justices on the U.S. Supreme Court considered the IMT to be "victors' justice."[105] In fact, Chief Justice Harlan Stone called the IMT, "Jackson's high lynching expedition."[106] In addition, Justice "Jackson did not have support of much of the organized bar of the United States and Nuremberg [and] was excoriated by Senator Robert A. Taft . . . . But Jackson withstood the slings and arrows of his countrymen and held fast to his belief in the legitimacy of Nuremberg."[107]

The IMT "was a long time coming. But it was only a beginning."[108] After the IMT (generally known as "The Nuremberg Court")[109] tried the major Nazi officials, the Allies created "courts within the four occupation zones of post-war Germany which tried lesser Nazis,"[110] again basing jurisdiction on universality.[111] The United States conducted its twelve subsequent trials of lesser Nazis in the same court in Nuremberg that had housed the IMT.[112] The International Military Tribunal for the Far East (IMTFE) conducted similar trials of Japanese war criminals in Tokyo,[113] ultimately convicting twenty-eight of them for war crimes committed against Allied troops, and for offenses committed in various Japanese-occupied territories.[114]

---

[102] Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.
[103] Michael Scharf, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005. Professor Scharf predicted that it may take equally long for the ICTR and ICTY to change people's minds. *Id*.
[104] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[105] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.
[106] Henry T. King, Jr., Remarks at 7, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.
[107] *Id*.
[108] Ferencz, *supra* note 71, at 225.
[109] Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.
[110] Demjanjuk v. Petrovsky, 776 F.2d at 582; Randall, *supra* note 10, at 801.
[111] Randall, *supra* note 10, at 806-10 ("The proceedings of the zonal tribunals . . . contain more explicit references to the universality principle").
[112] Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005; Ferencz, *supra* note 71, at 225.
[113] Ferencz, *supra* note 71, at 243; DINSTEIN, *supra* note 2, at 10; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.
[114] Randall, *supra* note 10, at 802.

2. Eichmann

Years after the end of World War II, related war crimes trials were still being conducted under the rubric of universal jurisdiction as alleged war criminals were discovered hiding, often under assumed names, in foreign countries.[115] The first prominent example of such a belated war crimes trial was Israel's prosecution of Adolph Eichmann[116] in 1961, after having abducted him from Argentina.[117] The Israeli government sent a *note verbale* to the Argentine Government, expressing its "hope that Argentina would overlook this violation of its sovereignty given 'the special significance' of bringing to trial the man responsible for the murder of millions of Jewish people."[118] Although obviously "the universality principle did not permit Israel to transgress Argentina's sovereignty," and thus "[r]eturning Eichmann to Argentina might have been the proper remedy for the illegal abduction," which Argentina initially demanded.[119] Nevertheless, "Argentina eventually waived its right to protest Israel's jurisdiction over Eichmann,"[120] thus paving the way for Israel to bring Eichmann to justice. "Israel based its jurisdiction under international law on the passive personality, protective, and universality principles."[121]

However, Eichmann's trial was not without its own hurdles. The first hurdle was Eichmann's claim that his irregular rendition from Argentina violated his rights and deprived the Jerusalem court of jurisdiction. Yet "under Israeli law, the 'irregularities' of Eichmann's apprehension did not entitle him to challenge the court's jurisdiction," which is consistent with U.S. law as well.[122]

---

[115] *Id*. For example, Adolph Eichmann was discovered in "Buenos Aires living under the alias of Ricardo Klement." Biography of Simon Wiesenthal, *available at* http://www.jewishvirtuallibrary.org/jsource/biography/Wiesenthal.html (last visited Apr. 10, 2006).

[116] Adolph Eichmann was the SS Lieutenant Colonel in charge of the Nazi Gestapo "Jewish Section," and thus responsible for supervising the "final solution of the Jewish Question." Randall, *supra* note 10, at 810. *See also* Biography of Adolf Eichmann, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichmann.html (portraying Eichmann as more of a bureaucrat than an anti-Semitic ideologue; last visited Apr. 10, 2006); Doron Geller, *The Capture of Adolf Eichmann*, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichcap.html ("at all the Nuremberg trials of Nazi war criminals [Eichmann] was pointed to as the head butcher"; last visited Apr. 10, 2006).

[117] Randall, *supra* note 10, at 802, 810 (1988). *See also* Biography of Adolf Eichmann, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichmann.html (last visited Apr. 10, 2006).

[118] Randall, *supra* note 10, at 812 & n. 171.

[119] *Id*. at 813 & n. 174.

[120] *Id*. at 813 & n. 175.

[121] *Id*. at 811, 814.

[122] *Id*. at 813 & n. 176 (1988). *See also* Frisbie v. Collins, 342 U.S. 519 (domestic interstate seizure), *reh'g denied,* 343 U.S. 937 (1952); Ker v. Illinois, 119 U.S. 436 (1886) (international seizure).

The second hurdle at trial was the fact that the State of Israel did not exist when Eichmann committed his crimes during World War II.[123] "Because Eichmann's victims were not Israelis when Eichmann acted and because Eichmann never threatened Israel's security, Israel's reliance on the passive personality and protective principles expanded those jurisdictional bases [considerably]."[124] However,

> the fact that Israel was not a state when Eichmann acted does not affect the legitimacy of Israel's jurisdiction under the universality principle. The basic premise of universal jurisdiction holds that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern. Logically, that sovereign interest is not limited to states that existed when the international crimes occurred. . . . When *any* state captures and punishes a universal offender, all states benefit. In light of the universality principle's purpose of redressing a special category of offenses, Israel's universal jurisdiction was valid despite Israel's lack of existence when Eichmann acted.[125]

Israel's claim to universal jurisdiction was also bolstered by the enactment of "several significant multilateral treaties, including the [four] Geneva Conventions of 1949 and the [Genocide] Convention . . . [which] confirmed the global condemnation of crimes such as Eichmann's, thus lending additional authority to Israel's use of universal jurisdiction."[126] Thus, Israel's jurisdiction over Eichmann was more firmly based on universal jurisdiction than the earlier Nuremberg trials.[127]

The third hurdle at Eichmann's trial was more of a matter of comity between States than jurisdiction: the possibility of extradition back to Germany to stand trial.

> The usual limitation is that the state which has apprehended the offender must first offer his extradition to the state in which the offense was committed. This limitation has no place in the circumstances of this case. This limitation was a practical one, based on availability of witnesses and evidence

---

[123] Randall, *supra* note 10, at 814 & n. 177 (noting that the State of Israel was not proclaimed until May 14, 1948).
[124] *Id*. at 814 & n. 178.
[125] *Id*. at 814.
[126] Randall, *supra* note 10, at 814-21.
[127] *See supra* Part II.C.1. *But see In re* Extradition of Demjanjuk, 612 F. Supp. at 556-57.

> and therefore it becomes the *forum conveniens* for the conduct of the trial. Here the great number of witnesses and documentary evidence is in Israel.[128]

Thus, the Israeli courts were not obligated to extradite Eichmann to Germany.[129] After a thirteen-day trial, "[t]he District Court of Jerusalem convicted Eichmann and [subsequently] sentenced him to death, and the Supreme Court of Israel affirmed."[130] Eichmann's conviction and execution put one more nail into the coffin of World War II atrocities, but it was not to be the final nail.

3. Demjanjuk

The second prominent (and more recent) example of a war crimes trial held decades after the end of World War II is the trial of John (Ivan) Demjanjuk (a.k.a. "Ivan the Terrible of Treblinka"), also held in Israel.[131] Demjanjuk was a Ukrainian who was conscripted into the Soviet Red Army in 1940. He was captured by the Germans in 1942 and volunteered for service in the SS [*Schutzstaffel*]."[132] Demjanjuk allegedly served as an SS guard at various concentration/extermination camps, where he operated the gas chambers, "euthanizing" untold numbers of Jews.[133] After World War II, Demjanjuk departed Europe, and emigrated to the United States in 1952, where he became a naturalized citizen residing near Cleveland, Ohio.[134]

---

[128] Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (Isr. Sup. Ct. 1962). *See also* DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 353-56, 368-70 (providing excerpts of the Israeli Supreme Court's decision in the *Eichmann* case).

[129] This is consistent with the general principle of "prosecute *or* extradite" that is found in most multilateral conventions. Prosecution and extradition are viewed as alternatives, not as steps to be followed *seriatim*, with extradition necessarily being of primary importance or consideration. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[130] Randall, *supra* note 10, at 811; Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd,* 36 I.L.R. 277 (Isr. Sup. Ct. 1962). An unofficial translation of the district court opinion prepared by the Israeli Government is available at 56 AM. J. INT'L L. 805 (1962). The supreme court opinion is available at 45 PESAKIM MEHOZIIM 3, *published in part in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1657 (L. Friedman ed. 1972).

[131] Randall, *supra* note 10, at 802.

[132] *The Demjanjuk Case: Factual and Legal Details*, July 28, 1993, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk2.html (last visited Apr. 10, 2006); Demjanjuk v. Petrovsky, 776 F.2d at 575.

[133] At the Treblinka extermination camp where Demjanjuk allegedly operated the gas chambers, it is estimated that "700,000 Jews were killed [t]here by carbon monoxide" in a seventeen-month period between July 1942 and November 1943. *Killing People Through Gas In Extermination and Concentration Camps*, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/gascamp.html (last visited Apr. 10, 2006). This was the same time period that Demjanjuk allegedly operated the gas chambers at Treblinka. *In re* Extradition of Demjanjuk, 612 F. Supp. at 551.

[134] *In re* Extradition of Demjanjuk, 612 F. Supp. at 546.

In 1975, "there came into the possession of certain members of the U.S. Senate a list of Nazi war criminals living . . . in the U.S."[135] Demjanjuk's name was on the list.[136] After conducting an international investigation, the Immigration and Naturalization Service (INS) instituted denaturalization proceedings against Demjanjuk in 1977, although his trial was delayed until 1981.[137] In 1983, while Demjanjuk's appeals were pending, the State of Israel requested his extradition "to stand trial in Israel for murder and other offenses alleged under the Nazis and Nazi Collaborators (Punishment) Law."[138] The federal district court for the Northern District of Ohio found that Demjanjuk "had made material misrepresentations in his visa application by failing to disclose his service for the German SS at the Trawniki and Treblinka prison camps in 1942-43, [and] … ordered that [Demjanjuk]'s United States citizenship be revoked and his certificate of naturalization cancelled."[139] The federal district court also certified to the U.S. Secretary of State "that Demjanjuk was subject to extradition [to Israel] . . . on the charge of murder."[140]

On appeal, the Sixth Circuit Court of Appeals upheld the district court's extradition certification, because all of the extradition requirements were met, including the fact that "the State of Israel has jurisdiction to punish for war crimes and crimes against humanity committed outside of its geographic boundaries" based on universal jurisdiction, which the U.S. also recognizes.[141]

Demjanjuk was finally extradited to Israel in 1986,[142] where he was tried and convicted on all counts after a thirteen-month trial (versus Eichmann's thirteen-day trial), and sentenced to death.[143] "After spending five years on death row, the Israeli Supreme Court ruled [in 1993] there was reasonable doubt that he was Ivan [the Terrible of Treblinka][144] and ordered that he be

---

[135] *The Demjanjuk Case: Factual and Legal Details*, July 28, 1993, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk2.html (last visited Apr. 10, 2006).
[136] *Id*. "The information listed evidently emanated from material collated in the Soviet Union, consisting of authentic German documents captured by the Red Army when occupying territories under Nazi control in the summer of 1944." *Id*.
[137] *Id*.
[138] Demjanjuk v. Petrovsky, 612 F. Supp. at 572.
[139] *In re* Extradition of Demjanjuk, 612 F. Supp. at 546; United States v. Demjanjuk, 518 F. Supp. 1362 (N. D. Ohio, 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).
[140] *In re* Extradition of Demjanjuk, 612 F. Supp. at 571.
[141] Demjanjuk v. Petrovsky, 776 F.2d at 583. *See also* Randall, *supra* note 10, at 790 & n.26.
[142] *The Demjanjuk Case: Factual and Legal Details*, July 28, 1993, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk2.html (last visited Apr. 10, 2006).
[143] *Id*.
[144] Israeli prosecutors had obtained additional evidence from the former Soviet Union (which the Soviet Army had seized after World War II), including a number of written depositions that Ivan the Terrible of Treblinka was named Ivan Marchenko, not Ivan Demjanjuk. Asher Felix Landau, *The*

released."[145] The Israeli Supreme Court held that although evidence of other crimes committed by Ivan Demjanjuk had been found, "a change in the basis of the extradition, more than seven years after the proceedings against [Demjanjuk] were opened, would be unreasonable."[146]

Demjanjuk returned to the U.S., where his U.S. citizenship was reinstated in 1998, but then stripped again in 2002,[147] because although Demjanjuk apparently wasn't "Ivan the Terrible of Treblinka," he had been a guard at other Jewish concentration camps, and thus had still lied on his U.S. naturalization application.[148] Demjanjuk (now eighty-five years old) recently was ordered deported to his native Ukraine on December 28, 2005.[149] Demjanjuk plans to appeal the immigration judge's order.[150] The conclusion of Demjanjuk's case may very well mark the end to Professor Randall's second of "three evolutionary stages" of "universal jurisdiction over war crimes, crimes against humanity, and other Axis offenses following the Second World War."[151]

D. Domestic Statutes

The State of Israel based its jurisdiction over Demjanjuk's trial on its domestic "Nazis and Nazi Collaborators (Punishment) Law."[152] Although Israel's domestic universal jurisdiction statute is, by definition, limited to Nazi offenders, other States' have enacted domestic statutes that are more broadly defined, taking their cue from international treaties that purport to extend "universal jurisdiction over grave breaches of the Geneva Conventions, hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture, genocide, and possibly other offenses." [153] This is what

---

Demjanjuk Appeal, July 29, 1993, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk3.html (last visited Apr. 10, 2006).

[145] *Demjanjuk Loses U.S. Citizenship*, Feb. 21, 2002, *available at*, http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk4.html (last visited Apr. 10, 2006).

[146] Asher Felix Landau, *The Demjanjuk Appeal*, July 29, 1993, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk3.html (last visited Apr. 10, 2006).

[147] *U.S. Court Rules John Demjanjuk Was Nazi Guard*, Apr. 30, 2004, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk5.html (last visited Apr. 10, 2006).

[148] *Demjanjuk Loses U.S. Citizenship*, Feb. 21, 2002, *available at*, http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk4.html (last visited Apr. 10, 2006).

[149] *Demjanjuk Ordered Deported*, Dec. 28, 2005, *available at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk6.html (last visited Apr. 10, 2006).

[150] *Appeal Possible for Alleged Nazi Guard*, http://www.msnbc.msn.com/id/10630835/ (last visited Apr. 10, 2006).

[151] Randall, *supra* note 10, at 839.

[152] Demjanjuk v. Petrovsky, 612 F. Supp. at 572.

[153] Randall, *supra* note 10, at 839. *Cf.* Bruno Simma & Andreas L. Paulus**,** 93 AM. J. INT'L L. 302, 214 (Apr. 1999) (noting that while universal jurisdiction for genocide and crimes against humanity seems almost universally accepted, universal jurisdiction for grave breaches of the Geneva

Professor Randall calls the final of "three evolutionary stages" of universal jurisdiction.[154]

Within this "general revival of the concept of universal jurisdiction,"[155] is the specific notion that "any nation has the right to try and prosecute war criminals."[156] The four Geneva Conventions of 1949 specifically provide for universal jurisdiction under domestic statutes for "grave breaches" of the Geneva Convention:

> The High Contracting Parties undertake to *enact any legislation necessary to provide effective penal sanctions for persons committing . . . any of the grave breaches* of the present Convention . . . [and] to search for persons alleged to have committed . . . such grave breaches, *and shall bring such persons, regardless of their nationality, before its own courts*. It may also . . . hand such persons over for trial to another High Contracting Party concerned.[157]

Thus, many States have enacted domestic legislation providing for universal jurisdiction over war crimes, or at least those war crimes that represent "grave breaches"[158] of the 1949 Geneva Conventions.[159] As Professor Dinstein

---

Conventions is only "increasingly accepted," and universal jurisdiction over human rights violations, such as torture or forced disappearances, is only provided for "in some instances").

[154] Randall, *supra* note 10, at 839.

[155] Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006).

[156] *Id*.

[157] Geneva Convention IV, *supra* note 129, at Art. 146 (emphasis added). *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

[158] Article 147 of the Fourth Geneva Convention of 1949 contains the following list of "grave breaches":

> wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial . . ., taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention IV, *supra* note 129, at Art. 147.

explains, "self-discipline by a belligerent Party is not enough," and thus military and political leaders should anticipate that if they are unwilling to do so, other States will prosecute their nationals for war crimes, which they have done "since time immemorial."[160]

For example, Spain "requested extradition of General Pinochet [former President of Chile] from England to Spain for the murders of Spanish civilians in Chile in violation of the Convention Against Torture to which both England and Spain were signatories."[161] Spain asserted jurisdiction under both universal jurisdiction and the "passive personality" theory,[162] because the victims were Spanish. The English House of Lords held that Pinochet could be extradited under universal jurisdiction under the Convention Against Torture.[163] However, if each State decides for itself when another head-of-state's act constitutes an international crime, that could disrupt diplomatic relations – this being one of the main justifications for creating the International Criminal Court (ICC).[164]

"Belgium enacted a law allowing for [universal] jurisdiction over certain egregious violations of international law committed anywhere in the world, and convicted four Rwandan Hutus of committing genocide in Rwanda."[165] "A later [Belgian] decision held that a suspect had to be physically present in Belgium in order to be investigated and tried," thereby negating the possibility of *in absentia* trials.[166] Belgium also tried to establish universal

---

[159] Nicole Barrett, *Holding Individual Leaders Responsible For Violations Of Customary International Law: The U.S. Bombardment Of Cambodia And Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 469-70 (Spring 2001).

[160] DINSTEIN, *supra* note 2, at 228.

[161] Barrett, *supra* note 159, at 430 n. 6.

[162] Sriram, *supra* note 17, at 317; Barrett, *supra* note 159, at 472 & n. 183; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005). *See generally* Sriram, *supra* note 17, at 318-31 & n. 53.

[163] Barrett, *supra* note 159, at 430 n. 6. *Contra* Sriram, *supra* note 17, at 323-25, 355-56 & n. 76-81, 225 (stating that universal jurisdiction was not "the central basis for the House of Lords' willingness to extradite").

[164] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005). *See infra* Part II.E.4.

[165] BRADLEY & GOLDSMITH, *supra* note 10, at 536. *See also* Barrett, *supra* note 159, at 470 & n. 176; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the four Rwandan Hutu defendants had been Belgian residents, and that Belgium had also been the colonial power in Rwanda, thus arguably supporting nationality jurisdiction as well).

[166] BRADLEY & GOLDSMITH, *supra* note 10, at 537. *Accord* Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (reporting a Belgium court's ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), *available at* http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Mar. 27, 2006). Requiring physical presence of the defendant before exercising universal jurisdiction could be seen as simply requiring personal (vs. subject matter) jurisdiction, rather than requiring some nexus to the State, such as that required for territorial jurisdiction (i.e. conduct occurring within the State, or having an

jurisdiction over the Foreign Minister of the Democratic Republic of the Congo (DRC) for alleged genocide and crimes against humanity; the International Court of Justice (ICJ) dismissed the claim based on the Minister's immunity, rather than addressing the universal jurisdiction issue.[167]

In an unrelated case, *Republic of the Congo (ROC) vs. France*, France sought to establish universal jurisdiction as a matter of customary international law[168] over the ROC President and other high-ranking ROC officials for alleged crimes against humanity and torture.[169] The ICJ again ducked the issue of universal jurisdiction by refusing to intercede at such a preliminary stage in France's investigation.[170] Spain, Belgium and France are not alone in seeking to exercise universal jurisdiction over war crimes and other international crimes:

> Other states, including the Netherlands, Switzerland, Denmark, Australia, and Germany have recently used the Geneva Conventions to prosecute war criminals for acts committed by non-nationals against non-nationals living abroad. England has similarly adopted an act easing the procedure necessary to bring a case under the Geneva Conventions.[171]

---

effect therein). *See also* Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the Belgian law has been changed to now require a link to Belgium, and that individuals can no longer initiate investigations, but only a Belgian prosecutor can). *Cf.* Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (noting that "[t]he cases have been an embarrassment for the Belgian Government, which has promised to make it harder for international claims to be launched in Belgian courts"), *available at* http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Mar. 27, 2006). International comity would seem to limit *in absentia* trials, particularly with regard to sitting heads of State.

[167] Dem. Rep. Congo v. Belg., 2002 I.C.J. at paras. 41, 42, 43 & 45. *Accord* Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (reporting a Belgium court's ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), *available at* http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Mar. 27, 2006). *See also* Barrett, *supra* note 159, at 470 & n. 176; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (despite the fact that the parties requested that the ICJ not address the viability of universal jurisdiction, there appeared to be a fairly even split between the ICJ judges on the issue).

[168] *See* DINSTEIN, *supra* note 2, at 228.

[169] Certain Legal Proceedings in France (Dem. Rep. Congo v. Fr.), 2003 I.C.J. 129, paras. 10 & 11 (July 11), *available at* http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.PDF (last visited Mar. 12, 2006).

[170] *Id*. at paras. 35, 37, 38 & 41.

[171] Barrett, *supra* note 159, at 471-72. *See also* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, *93 AM.J.INT'L L. 291,* 297-98 (Apr. 1999). *Cf.* Sriram, *supra* note 17, at 317-31 (noting that Spain, Belgium, the United Kingdom, France, Switzerland, Germany, Ecuador, Amsterdam and Chile all had complaints filed against General Pinochet for crimes during his rule, asserting universal jurisdiction *inter alia*). *See*

By contrast, most U.S. criminal statutes either expressly or implicitly require a connection to the United States or to a U.S. national, and thus do not assert universal jurisdiction.[172] Even the federal genocide statute requires that the offense occur in the United States or that the offender be a U.S. national.[173] A federal torture statute does assert universal jurisdiction in that it criminalizes acts of official torture committed in foreign nations by foreign citizens, but there are no reported cases actually applying that statute.[174] In terms of *civil* cases, a number of U.S. courts have asserted universal jurisdiction in the context of international human rights litigation.[175] Thus, the United States does not appear as willing as European States to assert extraterritorial *criminal* jurisdiction under the rubric of universality, and yet appears more willing to assert extraterritorial *civil* jurisdiction.

E. International Tribunals

The IMT in Nuremberg after World War II was the first modern *ad hoc* international tribunal for the prosecution of war crimes, crimes against humanity, and the crime of aggression. It was *ad hoc* because it was created after the atrocities had been committed, and because it was not a permanent court – thus its jurisdiction was limited both geographically and temporally.[176] It was *international* because it was run by the four Allied powers, and because it was supported by nineteen other signatories to the London Agreement.[177] Therefore, it is perhaps not overly surprising that when the need next arose for international *fora* to adjudicate claims of genocide, crimes against humanity, and war crimes, the United Nations (UN), also a product of the Second World War, would fall back on the *ad hoc* Nuremberg model. Of course, no *permanent* International Criminal Court (ICC) yet existed, and arguably, perhaps, there was insufficient support for the establishment of a permanent ICC at the time.[178]

---

generally id. at 318-55 (discussing various cases where universal jurisdiction was asserted in a number of countries).

[172] BRADLEY & GOLDSMITH, *supra* note 10, at 536.

[173] *Id*.

[174] *Id*.

[175] *Id*. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[176] *Cf. supra* note 104 and accompanying text (Professor Wedgwood's criticism of the IMT for not considering the *Allied* war crimes). Perhaps this is more of a "victor/vanquished" limitation than a geographical limitation. Of course, the IMT was limited temporally to those atrocities committed during the hostilities of World War II, beginning in 1939 and ending in 1945.

[177] Randall, *supra* note 10, at 801.

[178] After coalition forces drove Saddam Hussein out of Kuwait in the First Gulf War in 1991, the lack of an international criminal court prevented any type of war crimes trial for atrocities committed by Saddam. Professor Ferencz has described this as a "political blunder," where "[p]olitics prevailed over principle." Ferencz, *supra* note 71, at 227. Instead, a civil compensation commission was

Thus, the *ad hoc* international tribunals may be viewed as preliminary efforts at establishing a more permanent ICC, or as the UN 'testing the waters.'

1. ICTY

The next occasion after the IMT when another international criminal tribunal was both necessary and feasible[179] was when "[t]he mass rapes and genocidal acts in Yugoslavia induced the [UN] Security Council to set up a special [*ad hoc*] tribunal in 1993 to punish those responsible."[180] Before the UN Security Council (UNSC) decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, Netherlands, other options were considered, including the use of domestic criminal tribunals. These were judged to be of limited utility because of the destruction of the physical and human resources necessary for complex criminal trials, and due to divergent concerns that either hostile courts would afford too *little* due process to defendants, or that sympathetic governments would *shield* defendants from trial, perhaps by granting amnesty.[181]

Therefore it was recognized that an *international* criminal tribunal, such as the IMT at Nuremberg, needed to be established, with primacy over domestic courts.[182] However, instead of pursuing this new international criminal

---

created to provide civil remedies for people harmed in the war. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005). However, war crimes proceedings were initiated in Belgium courts under the rubric of universal jurisdiction over Saddam Hussein, as well as Israeli Prime Minister Ariel Sharon, Palestinian leader Yasser Arafat, Cuban President Fidel Castro, and Ivory Coast President Laurent Gbagbo. Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002, *available at* http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Mar. 27, 2006).

[179] An international tribunal was not feasible until the end of the Cold War stalemate on the United Nations Security Council. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; Ferencz, *supra* note 71, at 226: "The ideological war between the Soviet Union and the United States influenced every decision. United Nations committees operated on the principle of consensus; that meant, in effect, that every member could veto anything." Another explanation for the resurrection of international *fora* was the sense that a "climate of impunity" had developed, whereby despised dictators made amnesty for their offenses the price of their stepping down from power (e.g. Uruguay, Argentina, & Chile). Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005). "When domestic leaders exempt themselves from liability, all you can do is hold individuals accountable at the international level." *Id*.

[180] Ferencz, *supra* note 71, at 243. *See also* ROBERTS & GUELFF, *supra* note 5, at 565 (describing the series of wars associated with the breakup of the former Socialist Federal Republic of Yugoslavia as "consist[ing] as much of successive actions against civilians as of organized combat between armed forces," and thus "necessarily involv[ing] violations of the laws of war").

[181] JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, 600 (2002).

[182] Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY Statute], S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808, arts. 9 & 10

tribunal through the customary, tedious treaty process (by which the IMT Charter had been created), interested governments and non-governmental organizations (NGOs) jump-started the process by convincing the UNSC to create the new international criminal tribunal pursuant to Chapter VII of the UN Charter.[183]

On May 25, 1993 the UNSC established the ICTY by *fiat*, prescribed its structure, defined its jurisdiction, and instructed all UN-member States to cooperate with the new court by turning over custody of suspects, evidence and witnesses.[184] More specifically, the UNSC established the ICTY's jurisdiction over grave breaches of the four 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed since January 1, 1991 in the territory of the former Socialist Federal Republic of Yugoslavia.[185] The second category of "violations of the laws or customs of war" was included to ensure that the ICTY could prosecute individuals for war crimes not rising to the level of *grave breaches* of the four 1949 Geneva Conventions.[186] A former prosecutor at the Nuremberg war crimes trials opined that the ICTY "was a long-overdue building block on the edifice started at Nuremberg."[187]

(1993), *annexed to Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* U.N. Doc. S/25704 & Add. 1 (1993); ROBERTS & GUELFF, *supra* note 5, at 568.

[183] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 600. Thus, the *consent* of States to support this new tribunal (e.g. by entering a multilateral treaty establishing the court) was deemed less important than establishing the ICTY efficiently and effectively. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW, 260 (2002).

[184] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 601. *See also* ROBERTS & GUELFF, *supra* note 5, at 566.

[185] ICTY Statute, *supra* note 182, at Arts. 2–5, 8. The UNSC did not include the crime of aggression within the ICTY's jurisdiction because the topic was too politically-charged. Sean D. Murphy, International Organizations lecture at the George Washington University School of Law (Oct. 31, 2005). The fact that the UNSC included grave breaches of the four 1949 Geneva Conventions within the ICTY's jurisdiction supports the view that these rules had become rules of customary international law, because after the breakup of the former Yugoslavia, it was unclear that all of the new national entities had acceded to the four 1949 Geneva Conventions, and thus would not have been bound by their provisions as a matter of treaty law. Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Feb. 21, 2006). It is also interesting to note the fact that the UNSC did *not* include violations of Additional Protocol I (AP I) to the Geneva Conventions within the ICTY's jurisdiction, thus supporting the U.S. view that provisions of AP I have *not* risen to the level of customary international law. *Id*.

[186] ICTY Statute, *supra* note 182, at Art. 3. This was particularly important for atrocities committed during those periods and locations of the Balkan conflict that were considered to be under civil war, because only common Article 3 of the four 1949 Geneva Conventions would apply to such a non-international armed conflict. By including this category of "violations of the laws or customs of war," the UNSC was forestalling the possible defense, raised at Nuremberg, of *nullum crimen sine lege* (no crime without law). DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 582-83. *See also* ROBERTS & GUELFF, *supra* note 5, at 566-67.

[187] Ferencz, *supra* note 71, at 228.

The ICTY has carefully chosen which alleged crimes to investigate and to prosecute,[188] both to maintain the court's legitimacy, and to maintain the support of States upon which it relies to secure custody over criminal defendants, since the ICTY lacks its own international police force.[189] The ICTY has successfully completed criminal proceedings against eighty-five defendants,[190] although its highest profile defendant, former Yugoslav president Slobodan Milosevic, recently died in captivity on March 11, 2006 while his trial was ongoing.[191]

2. ICTR

Only a year after the UNSC had established the ICTY to prosecute atrocities in the former Yugoslavia, atrocities in another war-torn country presented the need for the formation of a second international criminal tribunal:

> In 1994, over half a million people were brutally butchered during ethnic conflicts and genocidal slaughter in Rwanda. The massacres could have been prevented but those with the power to halt the killings lacked the will, wisdom or political courage to take the military risks. Instead, in response to justified cries of universal indignation, the Security Council promptly created another ad hoc tribunal [nearby in Arusha, Tanzania] for crimes committed in Rwanda.[192]

---

[188] For example, the ICTY prosecutor elected not to investigate alleged excessive environmental damage (caused by the North Atlantic Treaty Organization (NATO) bombing of Kosovo) as a war crime, because of lack of specificity in defining this as a war crime. Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Feb. 7, 2006); Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 8, 2000.

[189] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

[190] *ICTY At a Glance*, *available at* http://www.un.org/icty/glance-e/index.htm (last visited Apr. 10, 2006: Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005); DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 380-382, 589-594; KLABBERS, *supra* note 183, at 183-85.

[191] *Milosevic Found Dead in His Cell*, *available at* http://news.bbc.co.uk/2/hi/europe/4796470.stm (last visited Apr. 10, 2006).

[192] Ferencz, *supra* note 71, at 228, 243. *See also* ROBERTS & GUELFF, *supra* note 5, at 615 (noting that "[d]uring the three-month period from April to July 1994 an estimated half million to one million people were killed in Rwanda in massacres widely viewed . . . as the clearest case of genocide since the Second World War."); Justice Anthony Kennedy, ASIL 100th Mtg., *supra* note 27, Plenary Address, Mar. 30, 2006 ("the world was warned, but waited, watched, and wept but little [regarding Rwanda]").

There are important similarities between the International Criminal Tribunal for Rwanda (ICTR) and its predecessor, the ICTY. On November 8, 1994, the UNSC established the ICTR again by *fiat* acting under Chapter VII of the UN Charter, prescribing a similar structure,[193] defining similar primary jurisdiction over genocide and crimes against humanity, and similarly directing UN-member States to cooperate with the new court.[194] Both courts lack the death penalty, which is particularly ironic for the ICTR, since lesser cases of genocide were prosecuted in domestic Rwandan courts, leading to the execution of those convicted.[195]

Although the ICTR was patterned after the ICTY, there are also important differences. The ICTR has a more restrictive temporal limit on its jurisdiction (only covering offenses committed in 1994 versus offenses committed after January 1, 1991 for the ICTY), but a more relaxed geographical jurisdiction (territory of Rwanda plus Rwandan citizens committing genocide and other violations in the territory of neighboring States versus merely the territory of the former Yugoslavia for the ICTY).[196] Many of the differences between the ICTR and ICTY arise from the fact that the conflict in Rwanda was almost exclusively an internal conflict, whereas the conflict in the former Yugoslavia was both an international and a non-international armed conflict.[197] Therefore the ICTR Statute does not require a connection between crimes against humanity and armed conflict as does the ICTY Statute,[198] and the ICTR refers to violations of Common Article 3 of the four 1949 Geneva Conventions and the 1977 Additional Protocol II to the Geneva Conventions (covering non-international armed conflict) rather than to violations of the laws and customs of war as does the ICTY Statute.[199] Although the focus in Rwanda (like the former Yugoslavia) was on criminal punishment, there was also a parallel process of "Truth and Reconciliation" in Rwanda to deal with the 100,000 criminal

[193] Initially the ICTY and ICTR even shared the same prosecutor, and they continue to share the same appeals chamber. Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR Statute], S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, arts. 12 & 15 (1994).

[194] *Id*. at Arts. 2, 3 & 8; ROBERTS & GUELFF, *supra* note 5, at 616. Although Rwanda, who happened to be serving on the UNSC at the time, was in favor of establishing an international tribunal, it cast the sole opposing vote for a number of reasons, including the fact that the ICTR lacked the death penalty and was based outside Rwanda. *Id*.

[195] ROBERTS & GUELFF, *supra* note 5, at 616, 617.

[196] ICTR Statute, *supra* note 193, at Preamble & Art. 7.

[197] ROBERTS & GUELFF, *supra* note 5, at 616.

[198] *Compare* ICTR Statute, *supra* note 193, at Art. 3 *with* ICTY Statute, *supra* note 182, at Art. 5. *See also* ROBERTS & GUELFF, *supra* note 5, at 616; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

[199] *Compare* ICTR Statute, *supra* note 193, at Art. 4 *with* ICTY Statute, *supra* note 182, at Art. 3. *See also* ROBERTS & GUELFF, *supra* note 5, at 616.

suspects in custody[200] as well as creating an acknowledged record of the atrocities.[201] The ICTR has successfully completed criminal proceedings against twenty defendants.[202]

3. Effectiveness of ICTY and ICTR

Reviews of the effectiveness of the two *ad hoc* international criminal tribunals have varied in their level of praise or criticism. On the one hand are commendatory claims that "[d]espite initial start-up problems, the ad hoc tribunals have been functioning reasonably well and have been creating important precedents to uphold and expand international humanitarian law,"[203] and at least one claim that the number of internal armed conflicts has declined substantially since the formation of the ICTY and ICTR.[204]

However, on the other hand are a variety of criticisms of the two *ad hoc* international criminal tribunals: whether the UNSC had the authority to create judicial sub-organs in the first place;[205] whether *ad hoc* courts are effective as a deterrent, since many of the most serious atrocities occurred in the former Yugoslavia *after* the ICTY had been established;[206] whether the two international criminal tribunals are too far removed from the citizenry[207] and too inefficient,[208] which has led for a push for them to complete their temporary

---

[200] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005). *See also* ROBERTS & GUELFF, *supra* note 5, at 617. *Cf.* Sriram, *supra* note 17, at 385 (noting that "[t]ruth commissions may be one tool to address the pain of the victims").

[201] United States Institute for Peace, *Rwanda: Accountability for War Crimes and Genocide*, *available at* http://www.usip.org/pubs/specialreports/early/rwanda3.html (last visited Apr. 10, 2006); Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005).

[202] *ICTR Status of Cases*, *available at* http://65.18.216.88/ENGLISH/cases/status.htm (last visited Apr. 10, 2006).

[203] Ferencz, *supra* note 71, at 228.

[204] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005).

[205] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 601; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005); KLABBERS, *supra* note 183, at 183-85.

[206] ROBERTS & GUELFF, *supra* note 5, at 567.

[207] Sriram, *supra* note 17, at 312-14 (concluding that "[p]ursuing such "globalitarian" concerns may come at the cost of local needs," and that mixed tribunals may pursue international justice while still pursuing local needs). *Accord* Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005) (promoting "mixed tribunals," like the one in Sierra Leone, which uphold international accountability as well as helping to remedy the defects in the domestic criminal system, rather than establishing an international tribunal in another country with international judges, which only leaves a broken and corrupt domestic judicial system).

[208] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005) (promoting "mixed tribunals" as being more efficient than UN-

mandates and be brought to an end;[209] and even whether the two *ad hoc* tribunals invade the province of military commanders if they engage in "micro-fact-finding" of operational law versus enforcing "massacre law."[210] Thus, the two *ad hoc* international criminal tribunals would appear to be at most a partial success. However, the geographically and temporally limited jurisdiction of the *ad hoc* tribunals, as well as their inefficiency,[211] provided the incentive for finally establishing a permanent International Criminal Court,[212] which would "obviate[e] the need to create such *ad hoc* tribunals in the future."[213]

4. ICC

Although there is a long history of efforts to establish a permanent International Criminal Court (ICC),[214] the lessons learned from the ICTY and ICTR provided the necessary impetus to finally bring the concept of an ICC into reality.[215] Modern efforts to establish an ICC began with, and naturally followed from the International Military Tribunals at Nuremberg and Tokyo. France proposed such a court in 1947, and when the UN General Assembly adopted the Genocide Convention in 1948, it asked the International Law Commission (ILC) to study the possibility of establishing an ICC for the punishment of genocide and other crimes. [216] The ILC submitted its report in 1950, concluding that the establishment of such a court was possible, but by then the Cold War had begun, and "consideration of the question proved to be complex and contentious."[217] Specifically, "[t]he absence of an agreed upon definition of aggression was the excuse given for lack of progress toward an international criminal court. Debates were interminable and inconclusive."[218]

---

sponsored *ad hoc* tribunals because of the voluntary contributions for mixed tribunals, which place a premium on efficiency). In the ten years since their creation, each of the *ad hoc* tribunals has completed no more than half of their respective caseloads. *Compare Key Figures of ICTY Cases*, *available at* http://www.un.org/icty/glance-e/index.htm (last visited Apr. 10, 2006) (89 cases completed out of 161 indictments for the ICTY) *with ICTR Status of Cases*, *available at* http://65.18.216.88/ENGLISH/cases/status.htm (last visited Apr. 10, 2006) (20 cases completed out of 58 indictments for the ICTR).

[209] DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, *available at* http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006).

[210] Ruth Wedgwood, Cummings Symposium, *supra* note 39, Sep. 30, 2005.

[211] Ferencz, *supra* note 71, at 228; Barrett, *supra* note 159, at 470.

[212] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005).

[213] ROBERTS & GUELFF, *supra* note 5, at 667.

[214] *See supra* Part II.B.

[215] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *Contra* Ruth Wedgwood, *id*.

[216] ROBERTS & GUELFF, *supra* note 5, at 667.

[217] *Id*.; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

[218] Ferencz, *supra* note 71, at 226.

Almost four decades later in 1989, Trinidad and Tobago revived the concept by making the relatively modest suggestion of establishing an ICC to only handle international drug trafficking cases – the UN General Assembly again passed the idea to the ILC for study.[219] The implosion of the former Soviet Union in 1990 had two repercussions vis-à-vis the ICC: first, the lack of US/USSR pressures led to outbreaks of violence (e.g. in Yugoslavia) and hence revealed the *need* for international *fora*; second, East-West tensions eased, thereby removing the major *obstacle* to the ICC.[220] The UN Security Council primed the ICC pump by establishing the two *ad hoc* international tribunals in 1993 and 1994.[221] The ILC kept the process going by submitting its draft statute for the ICC to the UN General Assembly in 1994.[222] The next year, the UN General Assembly established a "Preparatory Committee on the Establishment of an International Criminal Court," which met six times from 1996 to 1998 to prepare a draft convention "for consideration by an international conference in 1998, which would coincide with the fiftieth anniversary of the 1948 Genocide Convention."[223] Thus the stage was set for the Rome Conference.

The Rome Conference was a "final frenetic month of negotiations,"[224] culminating in the final vote on the Statute of the ICC:

> On 15 June 1998, delegations from 160 states . . . (with thirty-one intergovernmental organizations . . . and 135 non-

[219] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606. *Cf.* ROBERTS & GUELFF, *supra* note 5, at 667 (noting that UN consideration of an ICC was within the framework of the ILC's discussion of a draft Code of Offences Against the Peace and Security of Mankind, until the two issues were separated in 1992). The ILC forwarded its draft Code of Offences Against the Peace and Security of Mankind to the UN General Assembly in 1996, but by that time, preparatory work for the ICC was in full swing, and the draft Code was overcome by events. Randall, *supra* note 10, at 827-28.

[220] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

[221] *Id*. *See supra* Part II.E.1-2.

[222] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.

[223] ROBERTS & GUELFF, *supra* note 5, at 667. *See* Ferencz, *supra* note 71, at 228; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.

[224] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606. *Cf.* Ferencz, *supra* note 71, at 229. Besides the desire to complete the ICC Treaty to coincide with the fiftieth anniversary of the 1948 Genocide Convention, there was also a push to "finish by the millennium," and "gotta get it done in five weeks." Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. Thus "the whole atmosphere in Rome was wrong," and major States did not join (Russia, India, China, US). *Id*. Ambassador Scheffer, the lead U.S. representative at the Rome Conference, agrees that there was a "rush to judgment" in Rome and that the fair request by the United States for an extension of time should have been granted. Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006. He also noted that the "U.S. team had deep disappointment in the rush for gratification of concluding the treaty conference on time [when] often treaty conferences extend their deadline[s]." *Id*. The "rush to judgment" in Rome also led to the UN Secretary General, as the Depositary, needing to correct approximately seventy "technical errors" in the text of the Rome Statute. ROBERTS & GUELFF, *supra* note 5, at 668, 671.

> governmental organizations attending as observers) met in Rome at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to finalize the Statute, which was adopted on 17 July 1998 with a vote of 120 in favour, seven against and twenty-one abstentions, and opened for signature on the same day.[225]

The negative vote by the United States was a disappointment to the rest of the Rome Conference for two reasons: first, the United States had been a somewhat consistent supporter of the ICC over the years,[226] and second, because many concessions had been made to satisfy U.S. concerns.[227] The Rome Statute garnered another 19 signatures by the end of 2000,[228] including that of Ambassador Scheffer of the United States.[229] However, the United States subsequently expressed its intent not to ratify the treaty, and its belief that the United States was therefore under no legal obligations arising from Ambassador

---

[225] ROBERTS & GUELFF, *supra* note 5, at 667. *Cf.* DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 609 (noting that because the vote was not officially recorded, there is some uncertainty as to which States other than the United States voted no, but most lists include China, Iraq, Israel, Libya, Qatar & Yemen).

[226] *Compare* Ferencz, *supra* note 71, at 243 ("For almost a century, the United States government was in the forefront of those advocating an international criminal jurisdiction.") *and* ROBERTS & GUELFF, *supra* note 5, at 668 (U.S. opposition to ICC was ironic in having been an early and leading proponent of such a court and a continuing strong supporter of the ICTY and ICTR) *and* Ferencz, *supra* note 71, at 228 ("In 1997, President Clinton addressed the United Nations and called for the early establishment of a permanent International Criminal Court.") *with* Ferencz, *supra* note 71, at 226 (U.S. support for the ICC vacillated during the Cold War) *and* Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006 (US was for the ICC originally, but a modest ICC to include UNSC referrals only).

[227] Ferencz, *supra* note 71, at 229.

[228] Rome Statute, *supra* note 6, at Art. 125(1); Associate Dean Susan L. Karamanian, ICC Panel, *supra* note 89, Feb. 13, 2006.

[229] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611-12. *See also* Ferencz, *supra* note 71, at 237-38:

> After careful consideration in the White House, President Clinton instructed United States Ambassador David Scheffer to sign the Rome Statute just as the deadline was about to expire on December 31, 2000. Israel promptly followed suit. Signing was a reaffirmation of America's historical commitment to international accountability ever since Nuremberg. Knowing that there was no prospect of getting two-thirds of the Senators to consent, Clinton, seeking to mollify both right-wingers and human rights activists, said he would not recommend that it be submitted for ratification. He wanted the United States to stay engaged in order to help shape the Court and remain a key player.

Scheffer's signature.[230] Nevertheless, the sixtieth State ratified the Rome Statute on April 11, 2002,[231] and the Convention entered in to force on July 1, 2002.[232]

Before discussing the U.S. objections to the ICC, it is important to note the five significant hurdles that must be overcome before a case can be brought before the ICC. First, temporally the ICC only has jurisdiction over war crimes and other offenses committed after the Rome Statute entered into force on July 1, 2002, or when a State subsequently signs the treaty, unless a State agrees to apply the Rome Statute retroactively.[233] This period can be delayed by seven years specifically for war crimes, as France has so elected.[234]

The second significant jurisdictional hurdle for the ICC is geographical: generally, the crime either has to have been committed within the territory of a

---

[230] *Press Statement*, Richard Boucher, Spokesman, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm (last visited Apr. 10, 2006). *Accord* Ferencz, *supra* note 71, at 238; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612. Not too unsurprisingly, President Bush had the protégé of Senator Jesse Helms (a staunch opponent of the ICC) write the letter to the UN Secretary General. *Press Statement*, Richard Boucher, Spokesman, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm (last visited Apr. 10, 2006). That protégé was, of course, John Bolton, who is now the U.S. Ambassador to the UN. *Announcement of Nomination of John Bolton as U.S. Ambassador to the UN*, *available at* http://www.state.gov/secretary/rm/2005/43062.htm (last visited Apr. 10, 2006). Ambassador Bolton apparently believes that "international law is not really law since it is not binding or enforceable" and "[h]e considered the Rome Statute too vague." Ferencz, *supra* note 71, at 233-34. The purpose of "unsigning" the Rome Statute was in order not to be bound by the requirement not to defeat the object and purpose of the treaty, which is required by treaty signatories even before ratification, pursuant to Article 18 of the Vienna Convention of the Law of Treaties. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. Although the United States is not a party to the VCLT, it considers the VCLT to represent customary international law. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See infra* note 314. This "unsigning" may have been in anticipation of a more active opposition to the ICC, such as entering Article 98 agreements with other States to circumvent the ICC's jurisdiction. Ferencz, *supra* note 71, at 236. *See infra* Part II.E.4. However, the fact that the United States is still technically a signatory to the Rome Statute means that it retains the right to sit as an observer in the Assembly of States Parties. Rome Statute, *supra* note 6, at Art. 112(1). *See infra* note 323 and accompanying text.

[231] Ferencz, *supra* note 71, at 238; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612. *See also* Rome Statute, *supra* note 6, at Arts. 11, 126(1). Ninety-four States had ratified the Rome Statute by May 3, 2005. Associate Dean Susan L. Karamanian, ICC Panel, *supra* note 89, Feb. 13, 2006. Requiring sixty States to ratify the Rome Statute before it went into force was a fairly high threshold, comparable to "the 1982 Convention on the Law of the Sea and close to the sixty-five [ratifications necessary] for the 1993 Chemical Weapons Convention." ROBERTS & GUELFF, *supra* note 5, at 668.

[232] Ferencz, *supra* note 71, at 238; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612.

[233] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

[234] Rome Statute, *supra* note 6, at Arts. 8 & 124; ROBERTS & GUELFF, *supra* note 5, at 670; Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

State party,[235] or committed by a national of a State party.[236] The only two exceptions to this general geographical rule are if a non-party State enters into an *ad hoc* agreement to allow crimes committed within its territory or by its nationals to go to the ICC,[237] or if the UN Security Council, acting under Chapter VII of the UN Charter, refers matters to the ICC, regardless of whether the State involved is a party to the treaty or not.[238]

The third important hurdle before a case can be brought before the ICC relates to subject matter jurisdiction: Article 5 of the Rome Statute provides that "[t]he jurisdiction of the Court shall be limited to the *most serious* crimes of concern to the international community as a whole," and then lists only four general crimes:

> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression.[239]

Only the first three crimes are defined with any more specificity.[240] The second paragraph of Article 5 notes that the crime of aggression is as of yet undefined—the earliest this could happen would be in the year 2009, when State parties may first revise the Rome Statute, but the definition of the crime of aggression would not apply to State parties who do not ratify the amendment.[241]

---

[235] Rome Statute, *supra* note 6, at Art. 12(2)(a); Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

[236] Rome Statute, *supra* note 6, at Art. 12(2)(b); Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. Thus, technically the ICC itself does not rely upon the principle of universal jurisdiction, but on the more traditional jurisdictional bases asserted on behalf of its State parties.

[237] Rome Statute, *supra* note 6, at Art. 12(3). For example, the Democratic Republic of Congo (formerly Zaire) entered into such an *ad hoc* agreement in April 2004. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.

[238] Rome Statute, *supra* note 6, at Art. 13(b). For example, in March 2005, the UN Security Council referred Sudan to the ICC. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. The United States agreed that genocide was being committed in Darfur, and therefore it and the other three non-parties to the Rome Statute on the UN Security Council abstained from voting on the matter. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).

[239] Rome Statute, *supra* note 6, at Art. 5(1) (emphasis added). *See also id*. at Art. 17(1)(d) (noting that the ICC shall rule a case inadmissible if it "is not of sufficient gravity to justify further action by the Court").

[240] Rome Statute, *supra* note 6, at Arts. 6-8. *See supra* note 9 and accompanying text.

[241] Rome Statute, *supra* note 6, at Arts. 5(2), 121, 123; Henry T. King, Jr., Remarks at 3-4, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005; ROBERTS & GUELFF, *supra* note 5, at 670. Another irony of the ICC is that while Justice Jackson thought the crime of aggression was the most serious crime at the IMT in Nuremberg (Ferencz, *supra* note 71, at 225; Henry T. King, Jr., Remarks at 3, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005), it was also the excuse given during the Cold War for lack of progress towards an ICC (*see supra* note 220 and accompanying

The fourth major hurdle to ICC jurisdiction is the principle of complementarity: unlike the ICTY and ICTR, which have primacy over domestic courts,[242] the ICC turns primacy on its head by giving precedence to domestic courts.[243] The ICC will not assert jurisdiction over a case if:

> (a) *The case is being investigated or prosecuted* by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) *The case has been investigated* by a State which has jurisdiction over it *and the State has decided not to prosecute the person* concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; [or]
>
> (c) *The person concerned has already been tried* for conduct which is the subject of the complaint.[244]

"Unwillingness" is defined as either shielding the person from criminal responsibility, or unjustifiably delaying or conducting the proceedings in a way "inconsistent with an intent to bring the person concerned to justice," or not conducting the proceedings in an independent and impartial manner.[245] "Inability" is defined as the "total or substantial collapse" of the domestic judicial system to the point where the State can either not gain custody over the accused, or the necessary evidence and testimony, or otherwise is unable to carry out its proceedings.[246] A person who has "already been tried" is subject to similar requirements as the definition of unwillingness.[247]

A fifth principal hurdle to ICC jurisdiction is that the ICC prosecutor may only take action on a case if referred by: (a) the UN Security Council acting under Chapter VII of the UN Charter, as already noted,[248] (b) one of the

---

text), and yet the crime of aggression remains "inherently politicized" and is a "huge albatross around the ICC's neck, which could kill it," (Sir Franklin Berman, Cummings Symposium, *supra* note 39, Sep. 30, 2005) and is one of the arguments the United States puts forth in opposition to the ICC (*see infra* notes 311-16 and accompanying text).

[242] *See supra* notes 184, 194 and accompanying text.

[243] Rome Statute, *supra* note 6, at Art. 17; ROBERTS & GUELFF, *supra* note 5, at 668-69.

[244] Rome Statute, *supra* note 6, at Art. 17(1) (emphasis added).

[245] *Id*. at Art. 17(2).

[246] *Id*. at Art. 17(3).

[247] *Id*. at Art. 20(3).

[248] *Id*. at Art. 13(b). *See supra* note 238 and accompanying text.

State parties to the Rome Statute,[249] or (c) the prosecutor acting *proprio motu* (on his own accord).[250] The ICC Prosecutor must "conclude[] that there is a reasonable basis to proceed with an investigation" before submitting an investigation authorization request to the Pre-Trial Chamber.[251] A majority of a panel of the Pre-Trial Chamber must determine "that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court" before authorizing the ICC Prosecutor to commence the investigation.[252] The ICC Prosecutor must then "notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned."[253] A State has thirty days to inform the ICC "that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes [within the ICC's jurisdiction] and which relate to the information provided in the notification to States," and to request that the ICC Prosecutor defer his investigation.[254] "[T]he Prosecutor shall defer to the State's investigation of those persons unless a majority of the seven judges on the Pre-Trial Chamber, on the application of the Prosecutor, decides to [nevertheless] authorize the investigation," in which case the State concerned may appeal to the Appeals Chamber on an expedited basis.[255] The State concerned may again subsequently challenge the admissibility of the case before the ICC will hear the

[249] Rome Statute, *supra* note 6, at Arts. 13(a) & 14.
[250] *Id*. at Arts. 13(c) & 15.
[251] *Id*. at Arts. 15(3) & 53(1). In fact, it appears that the Chief Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, has carefully exercised his responsibilities to ensure an investigation is warranted. In response to over 240 communications regarding alleged war crimes committed in Iraq, Mr. Moreno-Ocampo wrote a ten-page, carefully considered letter explaining the limits of his and the ICC's mandate, and concluding that "the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed" with regard to targeting of civilians or clearly excessive attacks. ICC Chief Prosecutor Luis Moreno-Ocampo, *Iraq Response letter* [hereinafter Iraq Response Letter] at 4-7, Feb. 9, 2006, *available at* http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited Apr. 10, 2006). With regard to allegations of "wilful killing or inhuman treatment of civilians," Mr. Moreno-Ocampo "concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed" for "four to twelve victims of wilful killing" and less than twenty victims of inhuman treatment. *Id*. at 7-8. Nevertheless, Mr. Moreno-Ocampo concluded that the alleged willful killing and inhuman treatment were not "committed as part of a plan or policy or as part of a large-scale commission of such crimes" as required by Article 8(1) of the Rome Statute before the ICC will exercise its jurisdiction over alleged war crimes. *Id.* at 8. Moreover, he found that the number of victims was of a much smaller magnitude than the three situations his office was investigating in Uganda, the Democratic Republic of Congo, and the Darfur region of Sudan, and thus "did not appear to meet the required threshold of the Statute." *Id*. at 9. Without addressing complementarity, Mr. Moreno-Ocampo noted that "national proceedings had been initiated with respect to each of the relevant incidents." *Id*.
[252] Rome Statute, *supra* note 6, at Arts. 15(4) & 57(2)(a).
[253] Rome Statute, *supra* note 6, at Art. 18(1).
[254] *Id*. at Art. 18(2).
[255] *Id*. at Arts. 18(2), 18(4), 57(2)(a) & 82.

case.[256] Finally, the UN Security Council, acting under Chapter VII of the UN Charter, may defer the investigation or prosecution of any case for renewable twelve-month periods.[257] Despite these extensive controls on the ICC Prosecutor's discretion, the fear that he might conduct politicized investigations remains one of the U.S. concerns about the ICC.[258]

5. U.S. Objections to the ICC

The United States has a number of objections to the ICC, which appear to fall into four broad categories: (a) contrary to U.S.-centric view; (b) criminal exposure of U.S. servicemembers; (c) criminal exposure of U.S. civilian and military leaders; and (d) efficiency.[259] Each of these will be examined in turn.

a. Contrary to U.S.-Centric View

As one of the permanent five members[260] of the UN Security Council, the United States can remain above the international fray, knowing that it effectively possesses a unilateral veto[261] over any substantive actions taken by the UN Security Council, which has "primary responsibility for the maintenance of international peace and security."[262] Thus, not too surprisingly, the United States initially proposed that the ICC only have jurisdiction over matters referred to it by the UN Security Council, essentially making the ICC a permanent version of the two *ad hoc* tribunals with their limited mandates.[263] Most other States and NGOs pressed for a court *independent* of the UN Security Council and the veto of the permanent members.[264] The U.S. argued in support

---

[256] *Id*. at Arts. 19(2)(b) & 19(4).
[257] *Id*. at Art. 16.
[258] Bureau of Political-Military Affairs, U.S. Department of State, *Fact Sheet, The International Criminal Court* [hereinafter ICC Fact Sheet], Aug. 2, 2002, *available at* http://www.state.gov/t/pm/rls/fs/2002/23426.htm (last visited Apr. 10, 2006). Professor Ferencz has noted that "no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute." Ferencz, *supra* note 71, at 231. *See infra* notes 301, 305-06 and accompanying text.
[259] *See generally* Jennifer Elsea, *U.S. Policy Regarding the International Criminal Court* [hereinafter U.S. ICC Policy], September 3, 2002, *available at* http://fpc.state.gov/documents/organization/13389.pdf (last visited Apr. 10, 2006).
[260] U.N. Charter art. 23(1). The permanent five (or P-5) members are: "The [People's] Republic of China, France, the [former] Union of Soviet Socialist Republics [now Russia], the United Kingdom of Great Britain and Northern Ireland, and the United States of America." *Id*.
[261] U.N. Charter art. 27(3). Technically, each of the permanent members does not possess a *veto* over substantive decisions made by the UN Security Council. However, their "concurring votes" are required for decisions on any non-procedural matters. *Id*.
[262] U.N. Charter art. 24(1).
[263] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606; Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See also* U.S. ICC Policy, *supra* note 259.
[264] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.

of its proposal that an ICC prosecution may delay or complicate the peace process,[265] particularly if amnesty is the only means to achieve peace.[266] However, as previously noted, the UN Security Council may defer the investigation or prosecution of any case for renewable twelve-month periods,[267] which logically should allay U.S. concerns about interference with the UN Security Council's control over the peace process.

A second U.S.-centric concern is the progressive development of international humanitarian law as interpreted by the ICC. The ICC's interpretation of international humanitarian law might perhaps be at variance with the U.S. view, particularly in areas of non-international armed conflict, the unsettled tension between human rights law and the law of war, or customary international law as it is developed by State practice.[268] Ambassador Scheffer's response is that the two *ad hoc* tribunals have effectively dealt with the issue of the progressive development of the law,[269] and thus there is no reason to expect that the ICC would be any different.

A third U.S.-centric concern is that U.S. nationals would not receive a fair trial as guaranteed by the U.S. Constitution.[270] Yet the due process guarantees of the Rome Statute far exceed what would otherwise be available in domestic courts of foreign nations for war crimes committed abroad, and more closely mirror those guaranteed by the U.S. Bill of Rights than the rights guaranteed by other States.[271] An accused person is presumed innocent, and the ICC Prosecutor has the burden to prove guilt beyond a reasonable doubt.[272] In addition, the accused has the following rights:

> 1. In the determination of any charge, the accused shall be entitled to a public hearing . . . to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

---

[265] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.
[266] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[267] Rome Statute, *supra* note 6, at Art. 16. *See supra* note 257 and accompanying text.
[268] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[269] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.
[270] Ferencz, *supra* note 71, at 231-32. *Accord* Secretary of Defense Donald Rumsfeld, *Statement on the ICC Treaty* [hereinafter SECDEF ICC Statement], May 6, 2002, *available at* http://www.defenselink.mil/releases/2002/b05062002_bt233-02.html (last visited Apr. 10, 2006); U.S. ICC Policy, *supra* note 259. There may be at least some indication that "[t]he majority of the American people do not agree with the position on the ICC taken by the Bush Administration." Ferencz, *supra* note 71, at 245.
[271] Ferencz, *supra* note 71, at 231-32.
[272] Rome Statute, *supra* note 6, at Art. 66.

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) . . . to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

> 2. . . . the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.[273]

Even with respect to admissions of guilt, the Rome Statute ensures that the admission was voluntarily made, is supported by the facts, and that the accused understands the nature and consequences of his admission.[274] The ICC has rules of evidence to ensure relevancy and admissibility of evidence, as well as rules of procedure.[275] There are also provisions for appeals of convictions.[276] The only two significant incidents of U.S. jurisprudence missing at the ICC are jury trials and the death penalty. Jury trials would likewise be missing in many foreign domestic criminal trials for war crimes committed abroad, to which the protections of the U.S. Constitution also would not apply.[277] Although the ICC lacks the death penalty,[278] the penalties imposed by the ICC do not "affect[] the application by States of penalties prescribed by their national law," which would arguably include the imposition of the death penalty.[279] The absence of jury trials and the imposition of the death penalty do not otherwise detract from the fairness of ICC trials.

A fourth U.S.-centric concern is the possibility of domestic tribunals "dumping" their cases on the ICC rather than dealing with them directly.[280] However, the ICC will find that a case is inadmissible if "[t]he case is not of sufficient gravity to justify further action by the Court."[281] Moreover, this would seem to be, at this point, merely a theoretical concern since the ICC

---

[273] Rome Statute, *supra* note 6, at Art. 67.
[274] *Id*. at Art. 65.
[275] *Id*. at Arts. 68-74, 76-78.
[276] *Id*. at Arts. 81-85.
[277] Ferencz, *supra* note 71, at 233.
[278] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[279] Rome Statute, *supra* note 6, at Art. 80; ROBERTS & GUELFF, *supra* note 5, at 670.
[280] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *Cf.* Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the ICC will often have more available resources and targeted expertise than that found in most national governments, particularly those of developing countries, and thus successful prosecutions may be more likely under the ICC; therefore, governments now have an added tool to increase leverage on groups within their countries by initiating ICC proceedings).
[281] Rome Statute, *supra* note 6, at Art. 17(1)(d).

currently has only had four situations referred to it.[282] Should this problem present itself at some point in the future, it could be addressed at that time.

The fifth and final U.S.-centric concern is that the ICC judges are unqualified, or as Professor Wedgwood put it so succinctly: "can a panel of criminal law, human rights, and civil judges make the correct decisions?"[283] This statement implies that the "correct" decisions are those that are in accordance with U.S. views. The eighteen judges currently serving on the ICC were required to either:

> (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
>
> (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.[284]

The ICC judges were nominated and elected by State parties to the Rome Statute,[285] and appear to have a wealth of experience in international humanitarian law, international human rights law, international criminal law and public international law.[286] Nine of the eighteen ICC judges have prior judicial experience (four on their country's highest court and six on either the ICTY or the ICTR), nine are former law professors, three are former ministers of government, two are former attorneys general, one is a former national vice president, and one is a former law school dean.[287] The ICC judges appear to be at *least* as qualified as judges within the United States' federal judicial branch, the vast majority (if not all) of whom are political appointees.

---

[282] *ICC Situations and Cases*, *available at* http://www.icc-cpi.int/cases.html (last visited Apr. 10, 2006) (noting that the Republic of Uganda, the Democratic Republic of Congo, and the Central African Republic have referred situations to the ICC, and that the UN Security Council has referred the situation in the Darfur region of the Sudan to the ICC).
[283] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[284] Rome Statute, *supra* note 6, at Art. 36(3)(b).
[285] *Id*. at Art. 36(4)-(7).
[286] ICC, *The Judges – Biographical Notes*, *available at* http://www.icc-cpi.int/chambers/judges.html (last visited Apr. 10, 2006).
[287] *Id*.

b. Criminal Exposure of U.S. Servicemembers

Besides the U.S.-centric concerns, another major fear has been exposing U.S. military servicemembers to potential criminal liability for military-related activities committed abroad, such as the detainee abuse at Abu Ghraib prison.[288] More specifically, the fear is that the principle of complementarity may be insufficient to protect U.S. servicemembers from ICC jurisdiction.[289] However, "[t]he duty not to commit the crimes is not new; only the mechanism for enforcement is being added via the ICC."[290]

In addition to exposure for obvious war crimes, the United States is troubled by potential criminal liability where U.S. interpretations of the Law of War differ from that of other countries. Although the general Law of War has fairly clear principles, "applications of the Law of Armed Conflict are mixed questions of fact and law, which are murky; for example, the 1999 NATO Intervention [in Kosovo, specifically regarding] . . . choice of targets in an air war," or shooting "technicals" in Somalia on sight, or when conducting a freedom of navigation operation in the Gulf of Sidra, firing back in response to being "painted with fire control radar."[291] Under the U.S. Rules of Engagement (ROE), responding to being "painted" with fire control radar is an act of self-defense, whereas the British ROE require an actual attack before you can respond in self-defense.[292] Professor Wedgwood suggests that perhaps the ICC would side with the United Kingdom's view on self-defense.[293]

Ambassador Scheffer has two responses to this concern about the criminal exposure of U.S. servicemembers due to conflicting interpretations of the Law of War: first, *ad hoc* tribunals have successfully dealt with the issue of conflicting ROE,[294] and there is no indication that the ICC would not follow their lead; second, Title 18, the Crimes and Criminal Procedure section of the United States Code, "requires modernizing amendments to more accurately define prosecution for crimes against humanity, genocide, and a fuller definition of war crimes," as well as "looking at the UCMJ [Uniform Code of Military

[288] Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See generally* Wikipedia, *Abu Ghraib Torture and Prisoner Abuse*, *available at* http://en.wikipedia.org/wiki/Abu_Ghraib_torture_and_prisoner_abuse (last visited Apr. 10, 2006) (discussing detainee abuse that occurred at Abu Ghraib prison in Iraq).
[289] ICC Fact Sheet, *supra* note 258. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *Accord* SECDEF ICC Statement, *supra* note 270.
[290] Ferencz, *supra* note 71, at 233-234.
[291] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[292] *Id*.
[293] *Id*.
[294] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

Justice] regarding exposure symmetry."[295] The United States is significantly behind other countries in revising our law.[296] If we take these steps, Ambassador Scheffer is confident that "complementarity would work."[297] A third response might be that one hundred States[298] have decided they are comfortable with the principle of complementarity, including many strong U.S. allies such as Australia, Canada, New Zealand, and the United Kingdom, which may indicate that the United States is "out of line" with the rest of the world on this issue.[299]

Besides differing interpretations of the Law of War, the United States is worried that its servicemembers face greater potential criminal exposure for two reasons: first, "no other State regularly has 200,000 troops outside its borders";[300] second, that U.S. servicemembers may be subjected to politically motivated prosecutions, despite the United States not being a party to the Rome Statute.[301] In response to fears that U.S. troops engaged in UN peacekeeping efforts potentially would be subjected to ICC jurisdiction, the United States pressured[302] the UN Security Council "to request the ICC Prosecutor to defer for one year (with the possibility of renewal) any investigation into crimes by members of UN operations who are nationals of states not party to the Rome Statute."[303]

---

[295] *Id*. *See also* Ferencz, *supra* note 71, at 233 (citing Chief Judge Everett on the Court of Appeals for the Armed Forces as "suggest[ing] that Federal Statutes could be amended to completely cover all the crimes under ICC jurisdiction").

[296] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006. Other States have begun to revise their criminal laws, in order "to conform to their obligations as signatories to the . . . ICC[] Statute; Belgium and Canada are among the nations that have already made such revisions." Sriram, *supra* note 17, at 310.

[297] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

[298] The States Parties to the Rome Statute [hereinafter ICC State Parties], *available at* http://www.icc-cpi.int/asp/statesparties.html (last visited Apr. 10, 2006).

[299] Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).

[300] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 609. Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

[301] ROBERTS & GUELFF, *supra* note 5, at 669. *Accord* SECDEF ICC Statement, *supra* note 270; U.S. ICC Policy, *supra* note 259; Sean D. Murphy & Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606, 610.

[302] The "pressure" was in the form of vetoing a resolution that "extend[ed] the mandate of United Nations peacekeeping operations in Bosnia." Ferencz, *supra* note 71, at 239; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 612.

[303] S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, *available at* http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006); Rome Statute, *supra* note 6, at Art. 16. The one-year deferral was renewed in 2003. S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003); DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, *available at* http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006). *See supra* notes 257, 267 and accompanying text. The U.S. tactic was seen as an act of

The greater exposure due to the sheer number of deployed U.S. servicemembers could be mitigated by ensuring proper pre-deployment training on the Law of War, and enforcing the high moral standards of the U.S. military within the military justice system, which would then trigger the complementarity principle of the ICC.[304] Moreover, as previously discussed, "no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute."[305] In addition to those procedural controls previously discussed:

> The ICC is under the complete control of the very many countries that form the Assembly of State Parties. . . . They control the budget and can fire anyone who might be tempted to politicize the office. . . . The ICC has no police force or other effective enforcement mechanism. The acceptance of its judgments depends upon the Court's reputation for integrity and competence. A frivolous Prosecutor could not remain in office. Politi[ci]zation of the Court would amount to its suicide. . . . It should be noted that early United States demands that only the Security Council could authorize prosecutions, were turned down by the others because they insisted upon an independent Prosecutor free of political influence.[306]

Another way to phrase this particular concern is arguing that exposing U.S. servicemembers to criminal liability at the ICC for alleged war crimes committed abroad detracts from U.S. sovereignty because the United States is not a party to the Rome Statute.[307] However, in the absence of the Rome Statute, U.S. servicemembers would still be criminally liable in foreign domestic

---

defiance against the ICC, since the Rome Statute was due to enter into force the following day. Ferencz, *supra* note 71, at 239.

[304] *See* notes 242-47 and accompanying text. Ambassador Scheffer argues that the United States "has to be willing to submit to some risk [of criminal exposure for its servicemembers] to ensure the ICC reviews courts-martial of other States' military justice systems, which may not be as well managed." Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

[305] Ferencz, *supra* note 71, at 231. *See supra* notes 248-58 and accompanying text. *Contra* Secretary of State Condoleeza Rice, ASIL 100th Mtg., *supra* note 27, "A Conversation with Secretary of State Condoleeza Rice," Mar. 29, 2006.

[306] Ferencz, *supra* note 71, at 232. *See also supra* note 251 and accompanying text (summarizing the Chief Prosecutor to the ICC's carefully considered response to over 240 communications regarding alleged war crimes in Iraq).

[307] ROBERTS & GUELFF, *supra* note 5, at 669. *Accord* SECDEF ICC Statement, *supra* note 270; ICC Fact Sheet, *supra* note 258; U.S. ICC Policy, *supra* note 259; Sean D. Murphy & Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606, 610.

courts for alleged war crimes committed abroad, under either the territoriality or universality principles.[308]

> Many treaties, such as hijacking or anti-terrorism conventions, provide for states other than state of nationality to exercise jurisdiction over persons accused of having committed serious crimes within their scope. These treaties, like the ICC treaty, do not require the state of nationality be a party to the treaty or consent to prosecution. The United States has in fact exercised jurisdiction over non-U.S. nationals in a number of cases on the basis of treaty provisions empowering it to do so. U.S. courts do not consider that the non-ratification of the relevant treaty by the suspect's state of nationality might somehow render overreaching or otherwise questionable the exercise of U.S. jurisdiction.[309]

Moreover, the lesson of the IMT at Nuremberg is that sovereignty cannot be used as a defense to war crimes.[310]

The United States is also concerned about potential criminal exposure under newly defined crimes (such as the crime of aggression).[311] However, as previously noted, the earliest that definitions or elements of ICC crimes could be amended would be in the year 2009.[312] Moreover, the crimes, as amended, would not apply to State parties who do not ratify the amendment.[313] Thus, somewhat ironically, the United States would be more protected against any amendments to the definitions of ICC crimes if it were to ratify the Rome Statute before 2009, since after that date, it would appear to be bound by the amended treaty.[314] To the extent that the United States is concerned that its

---

[308] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611. *See supra* notes 11-21 and accompanying text. *Contra* Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006 (noting that the traditional architecture for Status of Forces Agreements (SOFAs) for NATO and UN Peacekeeping operations is that the sending State has responsibility for prosecuting war crimes, and the receiving State has responsibility for prosecuting off-duty crimes).

[309] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611.

[310] Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.

[311] Ferencz, *supra* note 71, at 233-34. *See supra* notes 239-41 and accompanying text.

[312] *See supra* note 241 and accompanying text.

[313] Rome Statute, *supra* note 6, at Arts. 5(2), 121, 123. *Accord* ROBERTS & GUELFF, *supra* note 5, at 670; ICC Fact Sheet, *supra* note 258.

[314] The Rome Statute itself is silent on whether States that ratify the treaty after it has been amended are bound by the amendments. *See generally* Rome Statute, *supra* note 6, at Arts. 121-23, 125. However, the Vienna Convention on the Law of Treaties (VCLT) is fairly clear that "[a]ny State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State . . . be considered as a party to the treaty as amended." VCLT, *supra* note 230, at Art. 40(5). Since no reservations to the Rome Statute may be made (Art. 120), it would appear that the United States would be bound to accept any amendments

servicemembers would be exposed to criminal liability for newly defined crimes in States that do ratify the amendments, or for crimes committed in States that have ratified the treaty but delayed its jurisdiction for seven years,[315] this is the same sovereignty argument as previously addressed.[316]

c. Criminal Exposure of U.S. Civilian and Military Leaders

The United States' unease about how the ICC might define the crime of aggression goes beyond concern for its servicemembers, and extends to trepidation about the "command responsibility" of U.S. civilian and military leadership.[317] As previously noted, the crime of aggression was the most serious charge at the IMT in Nuremberg,[318] and if it is defined by the State parties to the Rome Statute,[319] *de facto* "State-to-State" complaints would be permitted.[320] High-ranking civilian and military leaders would not be able to shield themselves from criminal liability beneath the banner of "head of State immunity," because the Rome Statute, as the Statute of the IMT before it, considers official capacity to be irrelevant.[321]

---

to the Rome Statute if it ratified the treaty afterwards. Again, although the United States is not a party to the VCLT, it considers the VCLT to represent customary international law. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006. *See supra* note 230.

[315] *See supra* note 234 and accompanying text.

[316] ROBERTS & GUELFF, *supra* note 5, at 670. *See supra* notes 307-310 and accompanying text.

[317] ICC Fact Sheet, *supra* note 258. *Accord* Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006; SECDEF ICC Statement, *supra* note 270. *See also* Benjamin B. Ferencz, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005 (noting that "perhaps the U.S. has reason to worry about the ICC shining the 'crime of aggression' spotlight on the U.S. . . . in Iraq II, the U.S. jumped the gun, which was the supreme crime of aggression"); ASIL 100th Mtg., *supra* note 27, Resolution, Mar. 30, 2006 (stating seven foundational concepts of international law, including "[i]n some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates). *Cf.* Philippe Sands, "*Lawless World*" Presentation, Oct. 25, 2005 (arguing that the U.S. removal of Saddam Hussein was "done in a bad way" [i.e. without UN Security Council approval], and that by March 2003, "there was no longer a good reason to get rid of Saddam"). Ironically, "Saddam's trial will be the first prosecution for the crime of aggression since Nuremberg." Michael Scharf, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005. *Accord* Henry T. King, Jr., Remarks at 3, *Id*.

[318] *See supra* note 241 and accompanying text.

[319] *See supra* notes 241, 311 and accompanying text.

[320] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. Although technically only *individuals* are subject to the ICC's jurisdiction, a State party could refer another State's Secretary of War or Head of State to the ICC Prosecutor for investigation based on the alleged crime of aggression. This would be a *de facto* State-to-State complaint.

[321] Rome Statute, *supra* note 6, at Art. 27. Official immunity and "merely following orders" were also rejected as defenses at the IMT in Nuremberg. *See* Report of Justice Jackson to President Truman, June 6, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm (last visited Mar. 26, 2006):

Ambassador Scheffer agrees that:

> The United States should be most worried about the definition of the crime of aggression and should want U.S. input regarding referral [of the crime of aggression] to the ICC, and how the crime of aggression is defined for individual criminal responsibility, instead of taking the position of total resistance to the ICC and having a policy of denial.[322]

Rather than continue in our "policy of fear," Ambassador Scheffer argues that the United States should exercises its heretofore unexercised right to be present as an observer at the Assembly of States Parties to the Rome Statute.[323]

d. Efficiency

The final U.S. objection to the ICC is also made about the two *ad hoc* tribunals: lack of efficiency.[324] With an estimated total annual budget of $150 million,[325] and approximately 475 staff members[326] in addition to the eighteen sitting judges,[327] the ICC has achieved the following progress in approximately three years of operations:[328] the initiation of three investigations into four situations,[329] and the recent indictment and arrest of the ICC's first criminal

---

> With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.

Accord Sriram, *supra* note 17, at 316 (2003).

[322] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

[323] *Id*.; Rome Statute, *supra* note 6, at Art. 112(1); U.S. ICC Policy, *supra* note 259. *See also* Philippe Sands, "*Lawless World*" Presentation, Oct. 25, 2005 (noting the "climate of fear" within the current U.S. administration); Judge Buergenthal, Mar. 28, 2006 (noting that both the ICC and the United States would benefit from U.S. participation). *See supra* note 230 and accompanying text.

[324] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *See supra* note 211 and accompanying text.

[325] Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005).

[326] ICC Newsletter, *Latest Recruitment Figures*, Nov. 2005, *available at* http://www.icc-cpi.int/library/about/newsletter/index_30.html (last visited Apr. 10, 2006).

[327] ICC, *The Judges – Biographical Notes*, *supra* note 286.

[328] ICC, *Historical Introduction*, *available at* http://www.icc-cpi.int/about/ataglance/history.html (last visited Apr. 10, 2006).

[329] ICC, *Report on the Activities of the Court*, Sep. 16, 2005, *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf (last visited Apr. 10, 2006). *Accord ICC Situations and Cases*, *supra* note 282.

defendant,[330] "Mr. Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC),"[331] a militia that conscripted child soldiers in the Ituri region of the Democratic Republic of the Congo.[332] Of course, the depth and breadth of the ICC investigations is belied by these simple statistics.[333]

The U.S. concerns about the ICC appear related to its general distrust of international organizations, and international courts in particular. As Judge Buergenthal, the American judge on the International Court of Justice, recently remarked, the United States has very little experience dealing with international courts compared to European States, and thus is more critical of international courts.[334] However, Ambassador Scheffer points out that:

> the ICC was initially a force protection objective of the U.S., to hold militaries accountable to the Law of War. The dominant issue during the ICC negotiations was not the potential U.S. liability, but "atrocity lords" who seek to massacre people. We cannot be obsessed with U.S. concerns and overlook the fundamental purpose of the ICC, which was [addressing] war atrocities.[335]

---

[330] The ICC had previously issued arrest warrants against five other defendants involved in the Uganda situation. D.R. Congo: ICC Arrest First Step to Justice, *available at* http://hrw.org/english/docs/2006/03/17/congo13026.htm (last visited Apr. 10, 2006) (noting that "On October 14, 2005, the court unsealed its first arrest warrants, for Joseph Kony, Vincent Otti and three other officers of the Lord's Resistance Army (LRA) in Uganda. To date they have not been apprehended.").

[331] *First Arrest for the International Criminal Court*, Mar. 17, 2006, *available at* http://www.icc-cpi.int/press/pressreleases/132.html (last visited Apr. 10, 2006). *Accord* D.R. Congo: ICC Arrest First Step to Justice, *available at* http://hrw.org/english/docs/2006/03/17/congo13026.htm (last visited Apr. 10, 2006).

[332] *Statement by ICC Chief Prosecutor Luis Moreno-Ocampo*, *available at* http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20060318_En.pdf (last visited Apr. 10, 2006). *Accord* D.R. Congo: ICC Arrest First Step to Justice, *available at* http://hrw.org/english/docs/2006/03/17/congo13026.htm (last visited Apr. 10, 2006).

[333] *Statement by ICC Chief Prosecutor Luis Moreno-Ocampo*, *supra* note 332, at 2 (noting that "[s]ince the Court's jurisdiction began in July 2002, 8,000 people were killed in the [Ituri] region, and 600,000 people displaced."). *Accord* D.R. Congo: ICC Arrest First Step to Justice, *available at* http://hrw.org/english/docs/2006/03/17/congo13026.htm (last visited Apr. 10, 2006) (noting that the violence in the Ituri region is part of a broader conflict in the Great Lakes region).

[334] Judge Thomas Buergenthal, Cummings Symposium, *supra* note 39, Sep. 30, 2005.

[335] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.

6. U.S. Opposition to the ICC

Besides raising a number of concerns, the United States has *actively opposed* the ICC in a variety of ways. As previously discussed, the United States "unsigned" the Rome Statute,[336] and pressured the UN Security Council to request one year deferrals from the ICC Prosecutor before he investigates any crimes allegedly committed by members of UN peacekeeping operations who are nationals of States not party to the Rome Statute.[337] The United States also cut off any funding or other support of the ICC,[338] and introduced legislation "to prohibit and penalize any cooperation with the ICC."[339]

In addition, the United States launched "[a] worldwide campaign . . . to obtain bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court."[340] Ambassador Bolton collected these bilateral agreements[341] pursuant to Article 98 of the Rome Statute, which prevents the ICC from requesting a State party to surrender an accused if doing so would require it to act inconsistently with other international obligations it might have with regard to a third State.[342] Under these "Article 98 agreements" as written, the U.S. President may waive their prohibition against cooperating with the ICC with respect to a particular named defendant for renewable one-year periods.[343] To date, the United States has entered into one hundred Article 98 agreements with other States; thus there are

---

[336] *See supra* note 230 and accompanying text.
[337] *See supra* note 303 and accompanying text.
[338] Ferencz, *supra* note 71, at 236, 239.
[339] *Id*. at 236.
[340] *Id*.
[341] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *Accord* Ferencz, *supra* note 71, at 240.
[342] Rome Statute, *supra* note 6, at Art. 98. Article 98 had been inserted into the Rome Statute at United States insistence, in order to respect pre-existing treaty obligations known as Status of Forces Agreements (SOFAs), which "require[] American soldiers arrested for crimes committed on foreign soil to be surrendered to the United States for trial rather than being tried under the local national laws." Ferencz, *supra* note 71, at 240. *See generally Status-of-Forces-Agreements (SOFA)*, *available at* http://www.globalsecurity.org/military/facility/sofa.htm (last visited Apr. 10, 2006) (explaining SOFAs). Arguably, these Article 98 agreements are perceived as contrary to the spirit and intent of the Rome Statute, if not the letter. Ferencz, *supra* note 71, at 231, 240. *Contra* Bureau of Political-Military Affairs, U.S. Department of State, *Fact Sheet, Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (ICC)* [hereinafter ICC FAQs], July 30, 2003, *available at* http://www.state.gov/t/pm/rls/fs/23428.htm (last visited Apr. 10, 2006).
[343] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.

now as many Article 98 agreements as there are State parties to the Rome Statute.[344]

Article 98 agreements are offensive to other States, particularly to European States, for at least three reasons. First, they are written expansively in overbroad[345] terms to include not only U.S. servicemembers deployed overseas and engaged in official duties, but also "current or former officials, employees (including contractors), military personnel and all other U.S. nationals"[346] acting even in their private capacities.[347] Second, the Article 98 agreements serve as a kind of U.S.-created loophole or double standard because the United States appears to have one standard for foreigners, and a higher one for U.S. citizens.[348] The United States is willing to send suspected foreign war criminals to the *ad hoc* and other international tribunals, including the ICC,[349] but not Americans.[350] This argument that Americans are somehow above international law is what Europeans find particularly offensive.[351] Third and finally, the fact that the United States has openly expressed its opposition to the ICC, and is willing to pull the levers of economic and military assistance to enforce its will, illustrates that the United States is using its clout to influence other States' behavior.[352] The European Union grudgingly agreed on a set of "Guiding Principles" whereby its member-States could enter into these Article 98 agreements, so long as: (1) they only applied to nationals of non-parties to the Rome Statute, (2) they only applied to persons sent by the United States on official business, and

---

[344] *Compare Press Statement*, Richard Boucher, Spokesman, *U.S. Signs 100th Article 98 Agreement*, May 3, 2005, *available at* http://www.state.gov/r/pa/prs/ps/2005/45573.htm (last visited Apr. 10, 2006) *with* ICC State Parties, *supra* note 298.

[345] ASIL President-elect Jose Alvarez, ASIL 100th Mtg., *supra* note 27, "A Conversation with Secretary of State Condoleeza Rice," Mar. 29, 2006.

[346] DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, *available at* http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006). *Accord* Philippe Sands, "*Lawless World*" Presentation, Oct. 25, 2005.

[347] Philippe Sands, "*Lawless World*" Presentation, Oct. 25, 2005. *Accord* ICC FAQs, *supra* note 342; Sean D. Murphy, "*Lawless World*" Presentation, Oct. 25, 2005; Ferencz, *supra* note 71, at 246.

[348] Philippe Sands, "*Lawless World*" Presentation, Oct. 25, 2005. *Accord* Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005). *Cf.* Ferencz, *supra* note 71, at 231 ("Those who oppose the ICC insist upon absolute guarantees in advance that no United States nationals will ever come under its jurisdiction"). *Contra* ICC FAQs, *supra* note 342.

[349] *See supra* note 238 and accompanying text.

[350] Philippe Sands, "*Lawless World*" Presentation, Oct. 25, 2005.

[351] *Id*. ICJ President Judge Rosalyn Higgins, ASIL 100th Mtg., *supra* note 27, "A Conversation with Secretary of State Condoleeza Rice," Mar. 29, 2006. *Contra* ICC FAQs, *supra* note 342.

[352] Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005); ASIL President-elect Jose Alvarez, ASIL 100th Mtg., *supra* note 27, "A Conversation with Secretary of State Condoleeza Rice," Mar. 29, 2006.

(3) the United States agreed to conduct *bona fide* investigations of crimes committed by Americans that would otherwise fall under ICC jurisdiction.[353]

The final significant move by the United States in opposition to the ICC was enacting the "American Servicemembers Protection Act (ASPA) of 2002," otherwise known as "The Hague Invasion Act."[354] The ASPA essentially serves as an umbrella framework for opposition to the ICC, combining:

> (1) cutting off all U.S. cooperation to the ICC (no funding, court assistance, assistance with investigations, etc.);
>
> (2) barring U.S. military assistance and economic support to ratifying States unless they are either
>
> a. a fellow NATO member;
> b. the President waives the prohibition; or
> c. if the State signs an Article 98 bilateral agreement not to surrender U.S. citizens[355]
>
> (3) the United States refuses to provide UN peacekeepers unless there is an assurance of no potential liability for U.S. military
>
> (4) the President may use all means necessary to free any U.S. person detained by the ICC (hence the nickname "Hague Invasion Act").[356]

The ASPA was "meant to emphasize how serious the United States was . . . about no third party liability."[357]

Although U.S. opposition to the ICC was not unexpected after the numerous concerns it raised, "no one anticipated the vehemence of [U.S.] efforts to abort the court or cripple it in its cradle."[358] The irony of U.S. opposition to the ICC is readily apparent:

---

[353] DUNOFF, RATNER & WIPPMAN, *supra* note 181, Updates, Chapter 9, *available at* http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006).
[354] U.S. ICC Policy, *supra* note 259; Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006. *Accord* Ferencz, *supra* note 71, at 236. Apparently President Clinton had opposed the ASPA and "headed it off" twice before. Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.
[355] *See supra* notes 340-53 and accompanying text.
[356] American Servicemembers' Protection Act of 2002, 22 USCS §§ 7401 *et seq*. (2006), *available at* http://www.state.gov/t/pm/rls/othr/misc/23425.htm (last visited Apr. 10, 2006). *See also* Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.
[357] Ruth Wedgwood, ICC Panel, *supra* note 89, Feb. 13, 2006.
[358] Ferencz, *supra* note 71, at 229.

> It is indeed ironic that the United States, which led the world in creating the Nuremberg principles, is now fighting so vehemently against the International Criminal Court which would institutionalize those principles, whereas Germany, whose leaders were the target of Nuremberg, is in the forefront of the fight to sustain the Nuremberg principles in today's world.[359]

Although Professor Dinstein argues that the "[p]rospects of [the ICC's] success are still a matter of conjecture,"[360] Ambassador Scheffer argues that it is time for the United States to accept the existence of the ICC and stop opposing it, because the ICC is "here to stay."[361] As he so succinctly put it, "the ICC is here to stay – get over it, get used to it, and get on with it."[362] Instead, Ambassador Scheffer argues that the United States needs to remain engaged in order to affect how the ICC is implemented, and to assist in managing the future cases and situations referred to it.[363]

One final comment with regard to the ICC: it is important to remember the big picture, that the target of the ICC is not the United States, with its established domestic and military justice systems that are largely effective in punishing the occasional war criminal. Instead, the ICC is focused on the "'atrocity lords' who seek to massacre people [by the thousands]. We cannot be obsessed with U.S. concerns and overlook the fundamental purpose of the ICC, which was war atrocities."[364]

> Since genocide, crimes against humanity and major war crimes are almost invariably committed with the connivance and support of a government, the absence of any international tribunal will almost surely mean that, unless the guilty regime is overthrown, the perpetrators will never be tried. . . . the time has come for such impunity to end. . . . a country torn by civil strife will lack the political will or legal institutions needed to try wrongdoers. If tyrants are able to evade justice, their victims will seek vengeance and take the law into their

---

[359] Henry T. King, Jr., Remarks at 4, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005. *Accord id*. at p. 5 (providing that the "Nuremberg principles . . . are good principles and they must guide our behavior by adherence to them – with no country exemptions (including the U.S.)").
[360] DINSTEIN, *supra* note 2, at 229.
[361] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.
[362] Ambassador David Scheffer, 60th Nuremberg Anniversary, *supra* note 42, Nov. 11, 2005.
[363] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.
[364] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006. *See also* note 335 and accompanying text.

> own hands. Thus, there can be no justice without peace and no peace without justice.[365]

III. CURRENT STATUS OF UNIVERSAL JURISDICTION OVER WAR CRIMES

In order to assess the current status of universal jurisdiction over war crimes, let us assume the following hypothetical[366]: an uncooperative Afghan detainee is being held by U.S. personnel at the American military base in Bagram, Afghanistan in December 2005.[367] The American personnel strip the detainee of his clothing, strike him repeatedly with their rifle butts on his torso and legs, drag him around on the cold, damp floor of his cell, chain him to the concrete floor, and leave him there overnight in an unheated cell without any blankets—by the next morning the Afghan detainee has died of hypothermia. Assuming the Geneva Conventions apply to U.S. forces present in Afghanistan in 2005,[368] this would appear to be a relatively clear case of a "grave breach" of

---

[365] Ferencz, *supra* note 71, at 230.

[366] This incident is truly intended as a hypothetical, although certain facts have been borrowed from earlier allegations of detainee abuse. *See, e.g.*, U.S. Army News Release, *Fact Sheet* [hereinafter Army Fact Sheet], March 3, 2005, *available at* http://www4.army.mil/OCPA/read.php?story_id_key=6955 (last visited Apr. 10, 2006); Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, *available at* http://www.nytimes.com/2005/05/22/international/asia/22abuse.html?ex=1274414400&en=35951e72c65a2185&ei=5088&partner=rssnyt&emc=rss (last visited Apr. 10, 2006); Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, March 3, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html (last visited Apr. 10, 2006); Shafiq Rasul, The George Wash. Univ. Law Sch. Symposium: Voices of Guantanamo, Mar. 20, 2006.

[367] It is important to note that Afghanistan acceded to the Rome Statute on February 10, 2003. ICC State Parties, *supra* note 298 (follow "Afghanistan" hyperlink).

[368] Common Article 2 of the Geneva Conventions provides that the Convention applies in international armed conflict, and "to all cases of partial or total occupation." *See, e.g.*, Geneva Convention III, *supra* note 157, at Art. 2. Even if the continued U.S. involvement in Afghanistan does not rise to the level of "partial occupation," Common Article 3 of the Geneva Conventions extends the following minimum level of protection to non-international armed conflicts:

> Persons taking no active part in the hostilities, including … those placed hors de combat by . . . detention . . . shall in all circumstances be treated humanely . . . . To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

See, e.g., Geneva Convention III, *supra* note 157, at Art 3. The U.S. administration has admitted that the Geneva Conventions applied to Taliban forces fighting in the conflict in Afghanistan, although not to al Qaeda forces. Office of the Press Secretary, The White House, *Fact Sheet: Status of Detainees at Guantanamo,* (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Apr. 10, 2006); Secretary of State Condoleeza Rice, ASIL 100th Mtg., *supra* note 27, "A Conversation with

the "Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949" (Third Geneva Convention),[369] and thus constitute a war crime.[370] We will use this hypothetical to review the current status of universal jurisdiction vis-à-vis the other relevant traditional jurisdictional bases.

A. Nationality Jurisdiction

Where "all States are empowered to try and punish war criminals," the nationality of the perpetrator is a sufficient "linkage" to establish jurisdiction over the alleged war criminal.[371] This is true as a matter of "customary international law, [where] nations have almost unlimited authority to regulate the conduct of their own nationals around the world."[372] Thus, in general terms, the United States would have jurisdiction to enforce its national laws against the American personnel who abused the detainee in the above hypothetical. Moreover, the U.S. jurisdiction arguably would be predominant or "[i]n the first instance."[373]

More specifically, the Geneva Conventions obligate "High Contracting Parties" to criminalize grave breaches of the Conventions.[374] Having ratified the four Geneva Conventions,[375] the United States fulfilled its commitment to

---

Secretary of State Condoleeza Rice," Mar. 29, 2006. Further consideration of this issue is beyond the scope of this article. *Compare* William H. Taft, *Symposium: The* ***Geneva Conventions*** *and the Rules of War in the Post-9/11 and Iraq World: Keynote Address*, 21 AM. U. INT'L L. REV. 149 (2005) (arguing that the Geneva Conventions do not apply) *with* Evan J. Wallach, *War Crimes Research Symposium: "Terrorism on Trial": The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 541 (2005) (arguing that the Geneva Conventions do apply). *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 549-50 (2004) (Souter, J., concurring in part and dissenting in part) (suggesting that the United States Government may be violating Article 5 of the Third Geneva Convention by not treating captives as prisoners of war until their status has been determined by a competent tribunal).

[369] Article 130 of the Third Geneva Convention defines grave breaches to include "torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health" to a "protected person." Geneva Convention III, *supra* note 157, at Art. 130.

[370] Is every violation of the Law of War a war crime, or only serious violations? *Compare* U.S. Dep't of Army, Field Manual 27-10, The Law of Land Warfare para. 499 (1956) ("Every violation of the law of war is a war crime.") *with* Yoram Dinstein, *The Universality Principle and War Crimes*, in 71 International Law Studies, The Law of Armed Conflict: Into The Next Millennium, 17, 21 (Michael Schmitt & Leslie Green, eds., 1998) (State practice only supports serious violations of the Law of War, such as the grave breaches of the Geneva Conventions, as constituting war crimes, and not mere technical violations). *Accord* DINSTEIN, *supra* note 2, at 229.

[371] *Id*. at 236.

[372] BRADLEY & GOLDSMITH, *supra* note 10, at 535. *See supra* note 12.

[373] *ILC 1996 Draft Code*, *supra* note 5, at Commentary para. 1 to Art. 9.

[374] *See, e.g.*, Geneva Convention III, *supra* note 157, at Art. 129.

[375] The Unites States ratified all four Geneva Conventions on August 2, 1955. ROBERTS & GUELFF, *supra* note 5, at 361, 368.

criminalize "grave breaches" by enacting the War Crimes Act.[376] The War Crimes Act covers grave breaches of the four 1949 Geneva Conventions,[377] as well as violations of Common Article 3.[378] It would appear that the United States could charge any American *civilians* involved in the detainee abuse hypothetical with having committed a war crime in violation of the War Crimes Act.

In addition, the United States could charge any American *servicemembers* involved in the detainee abuse hypothetical with having committed various crimes under the Uniform Code of Military Justice.[379] Specifically, any American servicemembers involved in the detainee abuse hypothetical above could be charged with conspiracy,[380] failure to follow orders,[381] dereliction of duty,[382] cruelty and maltreatment,[383] murder,[384] manslaughter,[385] assault,[386] and "conduct of a nature to bring discredit upon the armed forces."[387] While these various crimes would not carry the moniker of "war crimes," they would collectively carry a maximum punishment of life imprisonment, total forfeitures of all pay and allowances, and a Dishonorable Discharge from the military.[388] Thus, the United States could effectively establish traditional nationality enforcement jurisdiction over any Americans involved with the detainee abuse hypothetical above, be they civilians or military servicemembers.[389]

---

[376] 18 USC § 2441 (2006).
[377] 18 USC § 2441(c)(1) (2006).
[378] 18 USC § 2441(c)(3) (2006).
[379] 10 USC §§ 801 *et seq*. (2006)
[380] *Id*. § 881.
[381] *Id*. §892(1).
[382] *Id*. §892(3).
[383] *Id*. at §893.
[384] *Id*. at § 918(3).
[385] *Id*. at §919(b).
[386] *Id*. at §928.
[387] *Id*. at §934.
[388] Appendix 12, MANUAL FOR COURTS-MARTIAL (2005). The charge of murder by being "engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life" alone may be punished by life imprisonment. 10 USC § 918(3) (2006); Uniform Code of Military Justice Art. 118(3), MANUAL FOR COURTS-MARTIAL (2005). Even without a conviction on the murder charge, the remaining charges carry a maximum punishment of over thirty years of confinement. *Id*.
[389] In addition to the War Crimes Act and the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act (MEJA) provides jurisdiction over anyone "employed by or accompanying the Armed Forces outside the United States," or for members of the Armed Forces after they have left active duty for crimes committed abroad while they were on active duty. 18 USC §§ 3261 *et seq*. (2006). *See generally* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55 (2001).

B. Territoriality and Passive Personality Jurisdiction

Just as the nationality of the perpetrator is a sufficient "linkage" to establish jurisdiction over an alleged war criminal,[390] so too is the fact that the war crime was committed within a State's territory.[391] Territoriality is perhaps the most widely accepted basis for jurisdiction.[392] Just as the United States has extended jurisdiction over crimes committed within its territory,[393] so too may Afghanistan extend jurisdiction over crimes committed within its territory, such as the detainee abuse hypothetical.[394]

Under the "passive personality" form of jurisdiction,[395] the United States extends jurisdiction over war crimes committed against U.S. *victims* pursuant to the War Crimes Act.[396] Afghanistan would likewise be legally justified in extending jurisdiction over perpetrators of war crimes against Afghan nationals. Nationality of the victim is therefore a sufficient linkage to establish jurisdiction.[397] Thus, Afghanistan would be justified in extending its jurisdiction over the Americans involved with the detainee abuse hypothetical, under either the territoriality or passive personality principles.

One complicating factor for the exercise of either territoriality or passive personality jurisdiction by Afghanistan over the Americans involved with the detainee abuse hypothetical above, would be the presence of a Status of Forces Agreement (SOFA) between Afghanistan and the United States, whereby Afghanistan may have agreed to limit its otherwise legitimate jurisdiction over U.S. personnel.[398] As far as is publicly known, there is no SOFA between Afghanistan and the United States.[399] However, even in the absence of a SOFA, any Afghan attempt to exercise jurisdiction over the Americans involved with

---

[390] *See supra* note 371 and accompanying text.
[391] DINSTEIN, *supra* note 2, at 236.
[392] *See supra* note 11 and accompanying text.
[393] *See, e.g.*, 18 USC § 7 (2006) (defining the "special maritime and territorial jurisdiction of the United States").
[394] *See supra* notes 366-70 and accompanying text.
[395] *See supra* note 14 and accompanying text.
[396] 18 USC § 2441(b) (2006).
[397] DINSTEIN, *supra* note 2, at 236.
[398] There are apparently 110 permanent SOFAs between the United States and other nations. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).
[399] Anthony Dworkin, *Not Above the Law: U.S. Special Operations in the War on Terror*, Crimes of War Project, September 20, 2004, *available at* http://www.crimesofwar.org/special/afghan/notabovethelaw.html (last visited Apr. 10, 2006). *Contra* Draft Plaintiffs' complaint, Idema *et al*. v. Afghanistan, No. _____ (S.D.N.Y. 2005), *available at* http://www.superpatriots.us/aboutthecase/karzaisuit.htm (last visited Apr. 10, 2006) (conjecturing that a classified SOFA exists between the United States and Afghanistan).

the hypothetical would depend on a number of factors, including: whether Afghanistan had physical custody over the Americans involved, existing diplomatic relations between Afghanistan and the United States, diplomatic pressures brought to bear between Afghanistan and the United States, and whether the United Nations Security Council decided to intervene.[400]

C. Universal Jurisdiction

Despite the proliferation of international tribunals, domestic prosecutions are still possible for certain universal crimes, including war crimes.[401] As mentioned earlier, a few States have either exercised, or sought to exercise, universal jurisdiction over crimes committed abroad, either as a matter of customary international law or pursuant to domestic statutes.[402] One commentator has categorized three distinct approaches taken by States with regard to universal jurisdiction: "pure universal jurisdiction," "universal jurisdiction plus," and "non-use."[403]

"Pure universal jurisdiction" is evidenced when a court does not feel the need to rely on any additional *domestic* legislation in order to establish jurisdiction over an international criminal, such as an alleged war criminal.[404] The exercise of universal jurisdiction, even in its purest form, does not detract from other States' sovereignty, since "recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity."[405] The State exercising such pure universal jurisdiction over war crimes need not bear any relation to the conflict itself, and could even be a neutral State.[406] Nevertheless, "[t]hese [pure] cases represent the boldest use of universal jurisdiction," and thus, not too surprisingly, are relatively rare.[407]

The second approach, "universal jurisdiction plus," links universal jurisdiction with more traditional bases of jurisdiction: "Judges in national courts have usually been more comfortable combining what is to them a novel

---

[400] *See, e.g.*, DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 911-23 (UN Security Council intervening in trial of the alleged skyjackers involved in the *Lockerbie* case. *Accord* S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992); Case Concerning Questions of Interpretation and Application of the 1971 Montréal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. Rep. 114 (Apr. 14).
[401] DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 611.
[402] *See supra* notes 152-75 and accompanying text.
[403] Sriram, *supra* note 17, at 358-67.
[404] Sriram, *supra* note 17, at 310, 359-60.
[405] Sosa v. Alvarez-Machain**,** 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment).
[406] DINSTEIN, *supra* note 2, at 236.
[407] *Id*.

basis for jurisdiction with more familiar bases like those linked to a state's territory or interests."[408] However, even Belgian law requires "that a suspect be physically present in Belgium in order to be investigated and tried."[409] So if a State like Belgium, which has domestic legislation supporting the exercise of universal jurisdiction, were to gain physical custody over any of the Americans involved with the detainee abuse hypothetical,[410] that State could exercise "universal jurisdiction plus" over the alleged grave breaches of the Geneva Conventions.[411]

The third and more common approach is the "non-use" of universal jurisdiction altogether, in the absence of domestic legislation supporting its exercise.[412] Thus, the courts in most States would rather rely on traditional bases for jurisdiction, such as nationality and passive personality,[413] than rely exclusively on universal jurisdiction.[414]

D. ICC Complementarity

Under the principle of "complementarity,"[415] the International Criminal Court (ICC) would first give "precedence to national courts"[416] exercising one of the five principle jurisdictional bases.[417] Thus, for the detainee abuse hypothetical[418]: the State of *nationality* of the accused (United States), the State in whose *territory* the incident occurred (Afghanistan), the State of nationality of the victim, a.k.a. "*passive personality*" (Afghanistan), or some other State under the principle of *universality* (e.g. Belgium) would all have precedence before the ICC would consider prosecution.[419] Only if these States were "unwilling or unable genuinely to carry out the investigation or prosecution"[420] would the case be admissible before the ICC.[421]

---

[408] Sriram, *supra* note 17, at 310. *See generally id*. at 360-66. *See also* Barrett, *supra* note 159, at 470.
[409] BRADLEY & GOLDSMITH, *supra* note 10, at 537. *See supra* note 166 and accompanying text.
[410] *See supra* notes 366-70 and accompanying text.
[411] *See supra* notes 371-72 and accompanying text.
[412] Sriram, *supra* note 17, at 311.
[413] *See supra* parts III.A & III.B.
[414] *See generally* Sriram, *supra* note 17, at 366-67; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM.J. INT'L L. 316, 330 (Apr. 1999).
[415] Rome Statute, *supra* note 6, at Arts. 1, 17.
[416] ROBERTS & GUELFF, *supra* note 5, at 669, 672.
[417] *See supra* notes 10-21.
[418] *See supra* notes 366-70 and accompanying text.
[419] The remaining jurisdictional basis, "protective principle," would not seem to apply to this detainee abuse hypothetical, because the detainee abuse is neither directed against the security of the State, nor does it threaten the integrity of governmental functions. *See supra* note 13.
[420] Rome Statute, *supra* note 6, at Art. 17(1)(a).
[421] *Id*. at Art. 17; ROBERTS & GUELFF, *supra* note 5, at 669.

More specifically, the ICC Prosecutor:

> is required to consider three factors. First, [he] must consider whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the [ICC] has been . . . committed. . . . [Second, he] must then consider admissibility before the [ICC], in light of the requirements relating to gravity and complementarity with national proceedings. Third, . . . [he] must give consideration to the interests of justice.[422]

In the detainee abuse hypothetical, it would appear at first blush that the ICC Prosecutor should have little difficulty in determining that the first factor has been met, since the language of the 1998 Rome Statute defining "war crimes" mirrors that of the relevant Geneva Conventions.[423] However, the Rome Statute adds an additional requirement that the war crimes be "part of a plan or policy or as a part of a large-scale commission of such crimes."[424] There was no evidence in the hypothetical that the detainee abuse met these requirements.[425] Thus, not even the first factor would be met, and the ICC could not assert jurisdiction over the Americans involved in the detainee abuse hypothetical.

The second factor of admissibility is the specific articulation of the principle of complementarity[426] in terms of the ability and willingness of a State to genuinely investigate, and if warranted, prosecute the individuals involved.[427] If the United States military responded to the hypothetical detainee abuse similarly to other allegations of detainee abuse,[428] this would arguably demonstrate a genuine ability and willingness to investigate and prosecute, and

---

[422] Iraq Response Letter, *supra* note 251, at 4-7.
[423] Rome Statute, *supra* note 6, at Art. 8.2(a) & (c). *See supra* notes 368-70 and accompanying text.
[424] Rome Statute, *supra* note 6, at Art. 8.1. *See generally supra* note 251.
[425] Secretary of State Rice has stated that the vast majority of U.S. soldiers serve honorably, and that there are usually only a few people involved in detainee abuse. Secretary of State Condoleeza Rice, ASIL 100th Mtg., *supra* note 27, "A Conversation with Secretary of State Condoleeza Rice," Mar. 29, 2006.
[426] *See supra* notes 242-47 and accompanying text.
[427] Rome Statute, *supra* note 6, at Art. 17.
[428] *See, e.g.* Army Fact Sheet, *supra* note 366 (noting that of 109 cases with substantiated allegations of detainee abuse, 32 went to courts-martial, 56 were handled by non-judicial punishment, and there were 32 related administrative actions, totaling 120 actions). *But see, e.g.* Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006 (arguing that the United States did not properly investigate alleged detainee abuse in Afghanistan, and that the United States would have to submit to some risk in order to ensure that the ICC is able to review the courts-martial of other States).

would thus satisfy the ICC's principle of complementarity.[429] Thus, the second factor considered by the ICC Prosecutor would likewise fail to support ICC jurisdiction over the Americans involved in the hypothetical detainee abuse.

The third and final factor for the ICC Prosecutor to consider is: "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[430] The detainee abuse hypothetical is of even less gravity than the 240 actual communications received by the ICC Prosecutor concerning, *inter alia*, allegations of willful killing of four to twelve victims, and the inhuman treatment of less than twenty civilians in Iraq.[431] The ICC Prosecutor found that even this more significant number of alleged victims "did not appear to meet the required threshold of the Statute," and refused to seek authorization to initiate an investigation.[432] Similarly, the third factor of "interests of justice" is not satisfied, under the broader rubric of complementarity. This does not even consider the moderating influence that Article 98 agreements[433] and the "Hague Invasion Act"[434] would have on the ICC's decision to seek to impose jurisdiction over the Americans involved.

IV. CONCLUSIONS

States have asserted universal jurisdiction over war crimes "[s]ince time immemorial,"[435] even without a *nexus* to "either the crime, the alleged offender, or the victim."[436] The universal condemnation of war crimes justifies their prosecution[437] by any State in order to vindicate the international community's interests in prosecuting these offenses.[438] Although authors may quibble on the margins, the core definition of war crimes would seem to be fairly well established, particularly in light of the general acceptance by one hundred State parties of the ICC's definition.

Historical efforts at establishing an international tribunal to prosecute war crimes culminated in the International Military Tribunal (IMT) in

---

[429] This deference to State investigations and prosecutions was supposed to reassure the United States, with its established military justice system. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006.
[430] Rome Statute, *supra* note 6, at Art. 53(1)(c).
[431] Iraq Response Letter, *supra* note 251, at 7-8.
[432] *Id*. at 9.
[433] *See supra* notes 340-53 and accompanying text.
[434] *See supra* notes 354-65 and accompanying text.
[435] DINSTEIN, *supra* note 2, at 228.
[436] Randall, *supra* note 10, at 785.
[437] Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 384 (2001).
[438] Sriram, *supra* note 17, at 316.

Nuremberg following World War II. Recognizing the tribunal's place in history, IMT chief prosecutor Justice Jackson ensured that the rule of law supplanted mere victors' justice. However, the IMT's jurisdiction was relatively short-lived, and States subsequently intent on prosecuting war criminals had to resort back to universal jurisdiction to do so. The fact that the State of Israel successfully prosecuted Adolph Eichmann for his war crimes during World War II, and yet ultimately failed to convict John (Ivan) Demjanjuk for his alleged involvement in Nazi extermination camps, reinforces the legitimacy of universal jurisdiction as having the rule of law as its foundation.

For a myriad of reasons, there has been a "general revival of the concept of universal jurisdiction."[439] Many States enacted domestic legislation providing for universal jurisdiction over war crimes that represent "grave breaches" of the 1949 Geneva Conventions. A handful of European States have gone further to authorize universal jurisdiction over lesser war crimes and other international crimes, even those committed by non-nationals against non-nationals in foreign territory. The United States is more restrictive in asserting extraterritorial *criminal* jurisdiction under the rubric of universality (requiring some nexus to the United States), and yet is more willing to assert extraterritorial jurisdiction in *civil* suits seeking monetary damages.

Ad hoc international tribunals served as preliminary efforts at establishing a more permanent ICC in 2002, which both supports and supplants the domestic exercise of universal jurisdiction over war crimes. The ICC *supports* the application of universal jurisdiction domestically by enforcing the primacy of domestic courts over the ICC via its complementarity principle, by only considering the most serious, systematic and factually supported allegations of war crimes, and by imposing a number of substantial hurdles before the ICC can assert its jurisdiction, including placing significant controls on the ICC Prosecutor. The ICC *supplants* the application of universal jurisdiction domestically for States that are either unable or unwilling to *genuinely* investigate or prosecute alleged war criminals found within their jurisdiction. Yet by supplanting a State's inaction or inability to exercise universal jurisdiction over alleged war crimes, the ICC is in effect bolstering the application of universal jurisdiction by ensuring that the most heinous war criminals neither continue to commit atrocities with impunity, nor escape responsibility for their past war crimes.

The U.S. objections to the ICC do not seem particularly well-founded. U.S.-centric concerns have either been adequately addressed (e.g. non-interference with the UN Security Council's control over the peace process), are

[439] Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006).

unrealistic (e.g. the absence of jury trials and the death penalty when the ICC's due process guarantees otherwise closely mirror those of the United States), or are patently wrong (e.g. inadequate qualifications of the ICC judges). The concern that U.S. military servicemembers would be exposed to potential criminal liability at the ICC for military-related activities abroad ignores the fact that in the absence of the Rome Statute, U.S. servicemembers already would be criminally liable in *foreign domestic* courts for alleged war crimes committed abroad. Ironically, the concern about potential criminal exposure for U.S. civilian and military leaders for the as-of-yet undefined crime of aggression could be more effectively addressed if the United States were to ratify the Rome Statute *before 2009* (when the State parties could first potentially amend the Rome Statute to define the crime of aggression), since after that date, the United States could be bound by the amended treaty. Perceived inefficiency may be a valid objection, but it would seem to be somewhat premature. Finally, the U.S. objections appear to be myopic, and ignore the fact that the ICC's impetus was not to impose potential liability on Americans, but to deal with war crimes committed by "'atrocity lords' who seek to massacre people" on a wide scale.[440]

Objections to the ICC have led to a campaign of active U.S. opposition, including using economic leverage to deny support to the ICC, domestic legislation to penalize cooperation with the ICC, and strong-arming allies into signing Article 98 "bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court."[441] These Article 98 agreements are overbroad (protecting all Americans acting even in their private capacities (e.g. American tourists) versus merely U.S. servicemembers engaged in official military duties), serve as a double standard (since the United States is willing to send suspected *foreign* war criminals to the ICTY, ICTR, and the ICC, but not Americans), and reveal that the United States is willing to use its economic and political clout as blunt instruments to influence other States' behavior. The "American Servicemembers Protection Act (ASPA) of 2002" (a.k.a. "The Hague Invasion Act") merely 'adds fuel to the fire.' All of these opposition efforts are diplomatically offensive and bitterly ironic, given the United States' nurturing support for the IMT at Nuremberg, and earlier efforts at establishing an ICC.

A simple detainee abuse hypothetical[442] reveals why the United States should have little reason to fear the ICC (other than possibly defining the crime of aggression in 2009, for which U.S. interests would be better served by ratifying the Rome Statute before then as previously discussed).[443] If the

[440] Ambassador David Scheffer, ICC Panel, *supra* note 89, Feb. 13, 2006.
[441] Ferencz, *supra* note 71, at 236.
[442] *See supra* notes 366-70 and accompanying text.
[443] *See supra* notes 239-41, 311-14, 317-22, and text preceding note 440.

detainee abuse hypothetical had occurred *before* the advent of the ICC in 2002, both the United States would have jurisdiction (based on the nationality of the alleged American perpetrators), and Afghanistan would have jurisdiction (based on either the territoriality or passive personality principles). Neither the ICC nor the U.S. opposition measures (i.e. Article 98 agreements and "The Hague Invasion Act") have affected the primacy of domestic jurisdiction over the alleged war crimes. In fact, the ICC principle of complementarity has *reinforced* the primacy of domestic jurisdiction.[444]

Another State could also assert universal jurisdiction over the alleged American war criminals in the detainee abuse hypothetical, which has likewise not been affected by the ICC.[445] Only if the United States, Afghanistan, and another State asserting universal jurisdiction (e.g. Belgium) were either unable or unwilling to *genuinely* investigate or prosecute the alleged war criminals found within their jurisdiction would the case be admissible before the ICC, and then only if the alleged war crime was sufficiently serious (i.e. part of a plan, policy, or large-scale commission of such crimes),[446] and the alleged war crime could surpass the other hurdles to ICC jurisdiction.[447] Thus, despite the U.S. concerns and active opposition, the ICC does not operate as a usurper of domestic jurisdiction, but rather as a safety net for when domestic jurisdiction fails.

As Professor Dinstein so eloquently commented:

> Absent effective mechanisms of supervision and dispute settlement, there is no way to guarantee that [the Law of International Armed Conflict, or LOIAC] is actually implemented. . . . There is a growing acknowledgement of the need to ensure individual penal accountability of war criminals for serious breaches of LOIAC, but the future of the International Criminal Court is still shrouded in doubt.[448]

The continued application of universal jurisdiction over war crimes by States' domestic courts, and international tribunals such as the ICC, would appear to fill "the need to ensure individual penal accountability of war criminals for serious breaches"[449] of the Law of War.

---

[444] *See supra* notes 415-34 and accompanying text.
[445] For example, if Belgian authorities arrested the alleged American war criminals while they were transiting through Belgium en route to the United States, Belgium could assert universal jurisdiction over them. *See supra* notes 408-11 and accompanying text.
[446] Rome Statute at Art. 8(1).
[447] *See supra* notes 233-58 and accompanying text.
[448] DINSTEIN, *supra* note 2, at 257.
[449] *Id*.

PUBLIC PRAYER IN THE NAVY: DOES IT RUN AFOUL OF THE ESTABLISHMENT CLAUSE?

Lieutenant Steven R. Obert, USN*

I. Introduction

The United States Navy has long given an official role to public religious expression. At the United States Naval Academy in Annapolis, Maryland, midshipmen stand and observe prayer before the noontime meal. Warships at sea often broadcast an evening prayer before the end of the day's work. And naval ceremonies and official functions, from retirements to changes of command to formal celebrations, are frequently opened with an invocation and concluded with a benediction. These public prayers are usually presented by Navy chaplains and addressed to an audience of service members whom haven't specifically assented to them.[1] While the Supreme Court has never addressed the issue of public prayer in the military context, layers of jurisprudence at both the Supreme Court and various circuit courts of appeals suggest that these public religious expressions may run afoul of the First Amendment's Establishment Clause.[2]

The Establishment Clause, which prohibits the government from making "any law respecting an establishment of religion,"[3] aims to circumvent the danger that the government's alignment with a particular religion or set of beliefs may effectively exclude others, leading to their hatred, ostracism, or

---

* The positions and opinions stated in this essay are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Navy. Lieutenant Obert is an active duty Naval Officer enrolled in The George Washington University Law School (J.D. 2007) under the Law Education Program. He obtained a B.A. *with honors* from Northwestern University (1999), and qualified nuclear engineer officer in the fast attack submarine *U.S.S. Hampton (SSN 767)*.

[1] The Navy Chaplain Corps is established under 10 U.S.C. § 5142 (1998) as a staff corps of the Navy. Under 10 U.S.C. § 6031 (1998), officers in the Chaplain Corps are authorized to conduct public worship. Chaplains also frequently deliver prayers, invocations, and other "religious elements" at official functions. *See* Secretary of the Navy Instruction (SECNAVINST) 1730.7C, Religious Ministry Within the Department of the Navy, ¶ 6.c. (Feb. 21, 2006).

[2] The concept of military chaplains has been subject to constitutional scrutiny under the establishment clause. In *Katcoff v. Marsh*, the Second Circuit Court of Appeals upheld the constitutionality of the Army chaplain corps, even though it raised establishment clause questions, because it was necessary for the free exercise of religion by soldiers and because it was relevant to national defense. 755 F.2d 223, 233-37 (2d Cir. 1985)

[3] U.S. CONST. amend. I.

persecution.[4] Although the Navy has directed that religious elements outside of denominational services should be "nonsectarian in nature," this may not be sufficient to circumvent an Establishment Clause violation.[5] The Supreme Court has held that prayers of a secular nature do not pass under the Establishment Clause radar.[6]

Complicating the analysis, however, are two factors. First, the powers to "provide and maintain a Navy" and to "make Rules for the Government and Regulation of the . . . naval forces" are explicit in the Constitution.[7] The Supreme Court has typically deferred to the judgment of the military in running its own affairs.[8] Second, many of the Navy's publicly sanctioned prayers are steeped in tradition. Midshipmen have sat for prayer since the founding of the Naval Academy in 1845.[9] Sailors have gathered together for religious services at sea since at least 1799.[10] When scrutinizing Establishment Clause claims, the Supreme Court has made it clear that such traditions are significant.[11] Thus, these two factors -- deference to the military and deference to tradition -- might serve to insulate public religious expression in the Navy despite the fact that such prayer has already been barred from many civilian government institutions.[12]

This essay will examine the intersection of the Armed Forces powers[13] and the First Amendment's Establishment Clause as it relates to public prayer in the Navy.[14] Part II will lay out the various analyses that the federal judiciary has

---

[4] *See* Engel v. Vitale, 370 U.S. 421, 429-33 (1962); Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281, 284 (2003).

[5] *See* Secretary of the Navy Instruction (SECNAVINST) 1730.7C, Religious Ministry Within the Department of the Navy, ¶ 6.c. (Feb. 21, 2006).

[6] Lee v. Weisman, 505 U.S. 577, 610 (1992) (holding that the establishment clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be).

[7] U.S. CONST. art. I, § 8, cls. 13-14.

[8] *See, e.g,,* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

[9] *Naval Academy Will Continue to Say Grace*, Associated Press, Aug. 13, 2005.

[10] Act of March 2, 1799, ch. 24, 1 Stat. 709 (1799).

[11] *See* Marsh v. Chambers, 463 U.S. 783, 786 (1983).

[12] *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2742 (2005) ("[t]he prohibition on establishment covers a variety of issues from prayer in widely varying government settings . . .to comment on religious questions.").

[13] "Armed Forces powers" refers to the powers granted in the Constitution to the Executive and Legislative branches to provide, maintain, regulate, and operate the Army and Navy. *See* U.S. CONST. art. I, § 8, cls. 13-16; U.S. CONST. art. II, § 2, cl. 1.

[14] For this purpose, "public prayer" is defined narrowly as that prayer that is led by an individual, usually a chaplain, and that is said before groups of people who do not have the opportunity -- at least practically speaking -- to "opt-out," or choose not to participate in the prayer. It is a settled issue that individuals who desire to pray in groups may do so freely, given that to deny them this right would run afoul of the establishment and free exercise clauses, since the government would be denying them the right to practice their religion. *See also* Rigdon v. Perry, 962 F. Supp. 150, 165

used to evaluate Establishment Clause cases. Part III examines the Armed Forces power and determines how, if at all, judicial deference to the military might save public prayer from running afoul of the Establishment Clause. Part IV applies both of these frameworks to each of the three examples mentioned above -- prayer at sea, during official functions, and at the Naval Academy -- and analyzes how each scenario might implicate different balances between these Constitutional provisions. The essay concludes with the challenges that judicial regulation of prayer in the Navy might present.

In short, the analysis will show that there is no simple way that public prayer in the Navy can be either broadly allowed or broadly proscribed. As the examples below demonstrate, each situation represents a unique intersection of Constitutional law. Some differences are striking, while others are more subtle. Prayer in certain traditional military contexts, such as an invocation at a retirement ceremony or military funeral, presents far fewer Establishment Clause issues than would a denominational prayer at a routine civic event. This essay will also confront squarely the uncertainties in such a determination -- the most important being that the Supreme Court has not opined on Establishment Clause jurisprudence in the military context. There is certainly a balance somewhere between the Establishment Clause and the Armed Forces power as it relates to public religious expression. This essay aims to make that intersection more clear.

II. Judicial Standards in Establishment Clause Jurisprudence

This section examines the various frameworks that the federal judiciary has used to analyze Establishment Clause cases. The First Amendment begins, "[c]ongress shall make no law respecting an establishment of religion . . . ."[15] The Supreme Court's application of this phrase, however, has evolved steadily over the years and has resulted in considerable legal scholarship. Entire works are devoted to analysis of the various tests the Court has used to determine whether a given regulation violates the Establishment Clause.[16] This section will briefly examine four different frameworks that the Supreme Court has employed, starting first with the one that has figured most prominently in modern cases -- the test put forth in *Lemon v. Kurtzman*.[17] The analysis will then turn to the alternative frameworks that the Court has applied: the coercion test, the endorsement test, and the *Marsh* exception.[18]

(D.D.C. 1997) (holding that speech by chaplains *to inform their congregants* could not be restricted; doing so would violate the free exercise and establishment clauses (emphasis added)).

[15] U.S. CONST. amend. I.

[16] *See* David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395 (1989).

[17] 403 U.S. 602 (1971).

[18] Marsh v. Chambers, 463 U.S. 783 (1983).

These various tests for Establishment Clause violations will be illustrated by examining how they were applied in *Mellen v. Bunting* -- a 2003 decision by the Fourth Circuit Court of Appeals that ordered a stop to mandatory mealtime prayer at the Virginia Military Institute (VMI).[19] Finding that the prayer violated the Establishment Clause, *Mellen* is a useful starting point for the analysis of military prayer. In that case, the court of appeals considered each of the respective frameworks in turn and applied them to a set of facts that has many parallels to various types of public religious expression in the Navy.

A. The Lemon *Test*

The most prominent of the Establishment Clause tests was established in 1971 by the Supreme Court in *Lemon v. Kurtzman*.[20] Though originally constructed to determine whether a statute unconstitutionally established religion, the three-part *Lemon* test has also been applied to evaluate government action not pursuant to statute.[21] The Court articulated the test as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[22]

Although the Court has considered the *Lemon* criteria in most Establishment Clause analyses,[23] it is not always used.[24] Recent commentators have suggested that the Court might continue to downplay the *Lemon* test -- not necessarily overruling it, but not applying it either.[25] The Supreme Court's most recent Establishment Clause decisions seem to confirm this continued move

---

[19] Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).
[20] 403 U.S. 602 (1971); Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281, 284 (2003).
[21] *See* Widmar v. Vincent, 454 U.S. 263 (1981) (using *Lemon* analysis in evaluating policies of university that were not product of legislative enactments); Graham v. Cent. Cmty. Sch. Dist., 608 F. Supp. 531 (S.D. Iowa 1985) (evaluating recitation of prayer at public high school graduation); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982) (analyzing public high school policy of posting announcement of and requiring singing of prayer on school grounds).
[22] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[23] Some commentators have found an additional layer of complication regarding the *Lemon* analysis in the sense that it is difficult to determine a doctrinal viewpoint to use in the analysis. The Court has set forth three separate doctrinal viewpoints of establishment analysis: strict separation, accommodation, and pluralism. *See* David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395 (1989).
[24] *See*, *e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).
[25] *See* David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 413-17 (1989).

away from the *Lemon* test toward more individualized determinations.[26] The test is still good law, however, and circuit courts regularly apply the framework.[27]

The Fourth Circuit Court of Appeals applied it in the *Mellen* case, concluding that a *de facto* mandatory suppertime prayer for VMI cadets violated the Establishment Clause.[28] Applying the three-pronged test, the court first looked at the subjective intentions of the government. While VMI proffered several secular purposes for the prayer, including serving "an academic function by aiding VMI's mission of developing cadets into military and civilian leaders,"[29] they were not taken at face value. The court opined that the official school prayer seemed "plainly religious in nature."[30] Although skeptical, it went on to hold that the state's categorization of the purpose was entitled to deference and thus did not violate the first prong of the *Lemon* test.[31]

The *Mellen* court did determine that VMI had violated the second prong of the *Lemon* test.[32] Refusing to accept VMI's arguments that the mealtime prayer had neither the purpose nor effect of advancing religion because it is both inclusive and non-denominational, the court instead found that an objective analysis yielded the conclusion that the prayer "sends the unequivocal message" that the institution "endorses the religious expressions embodied in the prayer."[33]

Moving to the third and final prong of the test, the court held that it, too, was violated by the prayer. Excessive government entanglement was evidenced by the fact that VMI, a government institution, "has taken a position on what constitutes appropriate religious worship."[34] The court noted that VMI "composed, mandated, and monitored" prayer.[35] Thus, the court in *Mellen* concluded that VMI's prescriptive prayer violated the second and third prongs

---

[26] *See, e.g.,* Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (holding that the status of a passive monument under the establishment clause would be governed by the monument's nature and our nation's history, not the *Lemon* test).
[27] *See, e.g,* Mellen v. Bunting, 327 F.3d 355 (2003); Tanford v. Brand, 932 F Supp. 1139 (1996).
[28] Mellen v. Bunting, 327 F.3d 355, 360 2003).
[29] *Id.* at 373 (quoting appellants brief at 47) (internal quotation marks omitted).
[30] *Id*. at 373-74.
[31] *Id*. at 374.
[32] *Id*. at 374.
[33] Mellen v. Bunting, 327 F.3d 355 (2003); The establishment clause prohibits a state from sponsoring any type of prayer, even a nondenominational one. Lee v. Weisman, 505 U.S. 577, 610 (1992).
[34] Mellen v. Bunting, 327 F.3d 355, 375 (2003).
[35] *Id*.

of the Lemon test, which was sufficient for it to be an unconstitutional violation of the Establishment Clause.[36]

B. The Coercion Test

Since the announcement of the *Lemon* test, courts have recognized its various shortcomings. Specifically, the test does not explicitly consider whether the government's actions *compel* religious activity.[37] The Supreme Court has considered separately whether the activity "coerce[s] anyone to support or participate in a religion or its exercise . . . ."[38] In *Lee v. Weisman*, the Court invalidated a public high school's practice of inviting a member of the clergy to deliver a nonsectarian prayer at a commencement ceremony.[39] Although attendance at the ceremony was not a condition for receiving a diploma, the Court noted that it was "in a fair and real sense obligatory," and that the commencement prayer improperly coerced religious worship.[40]

Although the Court has implied that the coercion test may be confined to the elementary and secondary school contexts,[41] the Fourth Circuit in *Mellen* specifically analogized VMI cadets to secondary school students.[42] Despite the recognition that they are not minors, the court found that VMI's adversarial method of education emphasizing "detailed regulation of conduct and the indoctrination of a strict moral code" constituted a "coercive atmosphere" that "preclude[d] school officials from sponsoring an official prayer, even for mature adults."[43]

It is possible that this line of reasoning employed by the *Mellen* court could be analogized to Navy sailors listening to public prayers. Sailors are subject to detailed regulation of their conduct. They work in an environment where discipline and some conformity are important. Thus, they might also be susceptible to coercion.

---

[36] Mellon v. Bunting, 327 F.3d 355 (4th Cir. 2003). Only one of the prongs needs not be satisfied for a regulation or statute to fail the *Lemon* test. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[37] *See* Lee v. Weisman, 505 U.S. 577, 586-87 (1992).
[38] *Id.* at 587.
[39] *Id*. at 599. The Court additionally held that the school's involvement in influencing the content of the prayer was problematic. *Id*. at 588. This does not, however, suggest that a denominational prayer would be any less coercive or violative of the establishment clause, but rather demonstrates the school officials' improper influence over the prayer.
[40] *Id*. at 586.
[41] *Id.* at 593 ("We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the [e]stablishment [c]lause, place primary and secondary school children in this position."). *See also* David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman*, 76 EDUC. L. REP. 913, 926-27 (1992).
[42] Mellon v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003).
[43] *Id*. at 371-72.

The analogy to VMI, however, is far from exact. The level of control over the lives of sailors in the Navy probably does not rise to the same level as the adversarial education that characterizes life at VMI.[44] The composition of any group of sailors will likely be varied in age and experience, and not necessarily as homogenous as a group of college-age cadets. Additionally, VMI is a school, and the *Lee* Court was particularly attentive to coercion in educational institutions.[45] While certain aspects of the Navy might mirror the situation at VMI more than others, the level of similarity would ultimately depend on the facts in each instance.

C. The Endorsement Test

A government action that has the effect of *endorsing* religion, whether intentional or not, violates the Establishment Clause regardless of its secular purpose.[46] The endorsement test has been interpreted by some as slightly altering the first two prongs of the *Lemon* framework.[47] Under this test, an action constitutes a wrongful government endorsement of religion if it "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[48]

The endorsement test was used by the Supreme Court in finding that invocations[49] at public school events violated the Establishment Clause, even when those messages, and the speakers who delivered them, were elected by a majority of the students.[50] The perceived endorsement of the message by the school was critical in the Court's fact-intensive analysis.[51] In *Santa Fe*

---

[44] *Id*. at 361-62.
[45] Lee v. Weisman, 505 U.S. 577, 592 (1992) ("The concern regarding coercion may not be limited to the context of schools, but it is most pronounced there." (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989))).
[46] *See* Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J. concurring). The Court later adopted this test in County of Allegheny v. ACLU, 492 U.S. 573, 595-97 (1989).
[47] Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 271 (2003) (discussing Justice O'Connor's reformulation of the *Lemon* test).
[48] Lynch v. Donnelly, 465 U.S. 668, 688 (1984). *See generally* Engel v. Vitale, 370 U.S. 421, 429-33 (1962) (outlining the effects of government endorsement of a religion).
[49] The Court defined "invocation" as, "a term that primarily describes an appeal for divine assistance." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-07 (2000); Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship.").
[50] *See* Santa Fe Indep. Sch. Dist., 530 U.S. 290, 307-08 (2000). The Court recognized the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a "part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment." *Id.* at 307.
[51] *Id*.

Independent School District v. Doe, the invocation delivered was "to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property."[52] The relevant question for the court was "whether an objective observer . . . " would perceive a state endorsement of prayer in public schools.[53] In holding that the invocation violated the endorsement test, the Court found that an objective high school student would unquestionably perceive the prayer as "stamped with her school's seal of approval," regardless of the listener's support for, or objection to, the message."[54]

The Fourth Circuit in *Mellen* also held that VMI endorsed religion through public prayer. The court followed the lead of at least one other circuit and treated the endorsement test as a "refinement of *Lemon's* second prong" -- that the government action did not advance nor inhibit religion.[55] Because VMI "promot[ed] religion by authoring and promoting prayer," it failed both the second prong of the *Lemon* test and the endorsement test.[56]

D. The Marsh *Exception*

An alternative Establishment Clause test has been used to *validate* government activities that, although religious, are "deeply embedded in the history and tradition of this country."[57] In *Marsh v. Chambers*, the Court validated daily prayer at the opening of state legislative sessions.[58] The unique facts of *Marsh* make it unclear, however, how far this doctrine extends. The Court was specifically influenced by the fact that, in 1789, Congress referred the First Amendment to the states at the same time it appointed a chaplain for each house of the legislature.[59] It has since emphasized that the *Marsh* exception is applicable only in narrow circumstances,[60] plainly stating that a historical pattern standing alone does not justify a governmental religious activity.[61]

---

[52] *Id*. at 307.
[53] *Id*. at 308 (citing Wallace v. Jaffree*,* 472 U.S. 38, 73-76 (1985)).
[54] Sant Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).
[55] Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003) (treating "the endorsement test as a refinement of the second *Lemon* prong" (citing Adland v. Russ*,* 307 F.3d 471, 479 (6th Cir. 2002)).
[56] Mellen v. Bunting, 327 F.3d 355, 375 (4th Cir. 2003).
[57] Marsh v. Chambers, 463 U.S. 783, 786 (1983).
[58] *Id*. at 790.
[59] *Id*.
[60] In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court recognized that the *Marsh* decision "relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights." *Id.* at 602. The Court expressly declined to interpret *Marsh* to mean "that all accepted practices 200 years old and their equivalents are constitutional today." *Id.* at 603.
[61] Marsh v. Chambers, 463 U.S. 783, 790 (1983).

The Fourth Circuit declined to extend the exception in the *Mellen* case. It found that the VMI mealtime prayer did not share *Marsh's* "unique history"; specifically, public universities and military colleges did not exist when the Bill of Rights was adopted.[62] Because this contemporaneous understanding was not present, the *Marsh* exception was insufficient to overcome the court's conclusions that the public prayer at issue violated the Establishment Clause.[63]

III. The Armed Forces Powers and Judicial Deference

In typical cases involving public religious expression, the only constitutional provision implicated is the Establishment Clause. The frequent cases involving religion in public education, for example, raise no competing areas of constitutional concern. Public prayer in the Navy, however, must be analyzed differently. In the Navy, the Establishment Clause cannot be applied in a vacuum.[64] It must be balanced against other constitutional powers – collectively, the Armed Forces powers.[65] The President and the Congress are both given specific constitutional authority over the Army and the Navy.[66] This section will examine the nature of those powers, how courts have interpreted them, and why they might need to be balanced with the Establishment Clause in cases involving public prayer in the Navy.

A. The Armed Forces Powers

The Constitution grants Congress the power to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the . . . naval Forces."[67] When regulating in this area, the Supreme Court has consistently "recognized Congress' broad constitutional power."[68] As the Court noted in *Orloff v. Willoughby*:

> [J]udges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary

---

[62] Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003).
[63] *Id*.
[64] If the Navy prayer presents no establishment clause violation *per se*, however, then the Armed Forces power will presumably not be implicated.
[65] "Armed Forces Powers" refers to the powers granted in the Constitution to the Executive and Legislative branches to provide, maintain, regulate, and operate the Army and Navy. *See* U.S. CONST. art. I, § 8, cls. 12-15; U.S. CONST. art. II, § 2, cl. 1.
[66] *See id.*
[67] U.S. CONST. art. I, § 8.
[68] Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (quoting Schlesinger v. Ballard, 419 U.S. 498, 510 (1975)) (internal quotation marks omitted).

> be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[69]

The *Orloff* opinion has been frequently cited when courts defer to the government's characterization of its interest in maintaining armed forces.[70] Although some commentators have questioned whether it has come too far in its deference to the military, the Court has continuously granted a wide berth.[71] But while the judicial deference accorded the Armed Forces powers has been significant, it has not been absolute.

One area in which judicial deference to the Armed Forces power has sometimes given way is in the case of government action challenged as violative of the Bill of Rights.[72] The Supreme Court has, under limited circumstances, recognized the First Amendment rights of service members against the Armed Forces power. In *Parker v. Levy*, however, it held that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."[73] In situations where the rights of service members have been upheld, it has generally been the case that the interest of the government in carrying out its military mission has been slight, and the burden on the service member by the deprivation of First Amendment rights has been significant.[74]

This conflict between the Armed Forces powers and the First Amendment has also been illustrated in congressional statutes. The Armed Forces power has been used by Congress in instituting regulations for the conduct of religion in the Navy. In 1860, Congress enacted a statute that allowed an officer in the Chaplain Corps to "conduct public worship according to the manner and forms of the church of which he is a member."[75] The legislature went further in 1950, stating in federal law "it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God."[76] While these statutes may come into conflict with the Establishment Clause, they have not

---

[69] 345 U.S. 83, 93-94 (1953).
[70] *See* Crawford v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976); Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Rostker v. Goldberg, 453 U.S. 57, 66 (1981); Dep't of Air Force v. Rose, 425 U.S. 352, 367 (1976); Parker v. Levy, 417 U.S. 733, 744 (1974).
[71] *See* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. Rev. 1, 47-48 (2002).
[72] Chappell v. Wallace, 462 U.S. 296 (1983); Gilligan v. Morgan, 413 U.S. 1, (1973); Laird v. Tatum, 408 U.S. 1, (1972); Crawford v. Cushman, 531 F.2d 1114 (2d Cir.1976).
[73] *See* Parker v. Levy, 417 U.S. 733, 758 (1974).
[74] *See* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).
[75] 10 U.S.C.. § 6031(a) (1998).
[76] *Id*. at § 6031(b) (1998).

been challenged in court. Indeed, the Supreme Court has not addressed where the proper intersection between the Establishment Clause and the Armed Forces power lies.

This is not because the Supreme Court has not had occasion to do so. Two decisions have been made at the circuit court of appeals level that found an intersection between the Armed Forces power and the Establishment Clause. One case, *Anderson v. Laird*, struck down mandatory church attendance at the Naval Academy.[77] In another case, *Katcoff v. Marsh,* the court upheld the constitutionality of military chaplains.[78] Neither of these cases made it to the Supreme Court.[79] The Court has, however, reviewed the intersection between the Armed Forces power and the Free Exercise Clause in *Goldman v. Weinberger*.[80] These three cases are reviewed here in an attempt to piece together where courts have found the intersection between the religion clauses and the Armed Forces power.

B. Katcoff v. Marsh

The constitutionality of the Army Chaplain Corps was challenged in *Katcoff v. Marsh*.[81] In that case, two individuals brought an action as taxpayers challenging that the government practice of furnishing chaplains to the Army violated the Establishment Clause.[82] The Second Circuit found that, if viewed in isolation, there would be "little doubt" that the Army chaplaincy would fail to meet the *Lemon* test.[83] Though a seeming violation of the Establishment Clause, the court did not stop there.[84] Two other provisions of the Constitution were implicated -- the Free Exercise Clause and the Armed Forces power.[85] The court held that "the Establishment Clause must . . . be interpreted to accommodate other equally valid provisions of the Constitution,"[86] and went on to uphold the Army chaplaincy because it was both a valid exercise of Congress's power to regulate the Army and to provide for the free exercise of

[77] *See* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).
[78] *See* Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).
[79] *See* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972), cert. denied, 409 U.S. 1076 (1972). A petition for certiorari was not filed in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).
[80] 475 U.S. 503 (1986).
[81] Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).
[82] *Id.*
[83] *Id.* at 232.
[84] *Id.* at 233.
[85] *Id.* at 233-34.
[86] Katcoff v. Marsh, 755 F.2d 223, 233 (2d Cir. 1985)(citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

religion by soldiers.[87] Those additional factors rendered the *Lemon* test inappropriate to apply "in a sterile vacuum."[88]

The *Katcoff* decision might have limits in extending its reasoning to public religious expression in the Navy. Summarizing the balance between the Constitutional provisions involved, the court concluded that the chaplaincy program was "relevant to and reasonably necessary" for the Army's conduct of our national defense.[89] Whereas the *Katcoff* court balanced three separate powers -- Armed Forces and Free Exercise on one side, Establishment on the other -- public religious expression implicates only two. Being forced to listen to public prayer does not reasonably put the Free Exercise Clause on the side of the government. Individuals can always pray and worship in groups of those who want to pray. If at all, the Free Exercise Clause would be invoked by those sailors who don't want to be subjected to public prayer.[90] Even if the *Katcoff* court did not engage in the same balancing that an analysis of public religious expression would require, the case is useful for its logical demonstration of how the Armed Forces power and the religion clauses of the First Amendment intersect.

C. Goldman v. Weinberger

The Supreme Court balanced the Free Exercise Clause and the Armed Forces power in *Goldman v. Weinberger*, coming down on the side of the military in finding that an Air Force officer could be prohibited from wearing a religious head covering while in uniform.[91] In *Goldman*, the Court suggested that a rational basis test will govern conflicts between the Armed Forces power and the First Amendment.[92] If the military is acting rationally, the First Amendment rights of the service member will subside. The Court held that the "First Amendment does not require the military to accommodate" religious practices that detract from regulations that "reasonably and evenhandedly" regulate dress.[93] The member argued that a "clear danger" of undermining discipline was required in order to infringe on his free exercise rights, but the Court rejected this invitation for a heightened standard of review.[94] The form of

[87] Katcoff v. Marsh, 755 F.2d 223, 233 (2d Cir. 1985). The Supreme Court has cited *Katcoff* favorably in determinations regarding chaplains in other government institutions. Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).
[88] Katcoff v. Marsh, 755 F.2d 223, 232-33 (2d Cir. 1985).
[89] *Id.* at 235-38.
[90] Two groups might be offended -- those who want to listen to devout, sectarian prayers and are offended by pluralistic reference to God, and those who desire to exercise their desire to not be subjected to prayer.
[91] 475 U.S. 503, 509-10 (1986).
[92] *Id*.
[93] *Id*.
[94] *Id*. at 509.

rational basis review that *Goldman* embodied can be seen elsewhere in cases involving deference to the Armed Forces power.[95]

D. Anderson v. Laird

The D.C. Circuit has balanced the Establishment Clause and the Armed Forces power -- a juxtaposition most relevant to the analysis of public religious expression.[96] In *Anderson v. Laird*, the court invalidated a rule that required midshipmen at the Naval Academy to attend church services on Sundays.[97] Even though the midshipmen could choose which service to attend and procedures existed for being excused from the service, the court held that, since no conflict with the Free Exercise Clause existed and there was only a minimal government interest at stake, the church service could not be compelled.[98]

The *Anderson* court did recognize that deference to the Armed Forces powers of the government can cause Establishment Clause concerns to give way.[99] Finding that "deference to military decisionmaking has been justified by the military's role, its mandate to prepare for the waging of war, and the necessity of this mandate for our national security," the court went on to examine just what that national security interest was in that case.[100] Although the government stated that its interest was the effective training of military officers,[101] this was not taken at face value.[102] The court recognized that some weight must be accorded the military judgment that familiarity with religion is necessary for the all around officer, but went on to determine that such a goal could be satisfied by alternatives to "compulsory attendance at the regular chapel services of a single denomination."[103] Thus, the government's proffered interest was not sufficient to overcome establishment concerns.

The dissenting judge in *Anderson*, however, accorded a significantly greater weight to the government's stated interest.[104] Finding that the majority overly stressed "the application of the First Amendment" and failed to "recognize the Nation's inherent military power," he stressed the importance of moral and character development in the preparation of young men for assuming

---

[95] *See, e.g.,* Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985); Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).
[96] Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).
[97] *Id*. at 285.
[98] *Id*. at 295-97.
[99] *Id*. at 294-95.
[100] *Id*. at 295.
[101] Anderson v. Laird, 316 F. Supp. 1081, 1090 (D. D. C. 1970).
[102] Anderson v. Laird, 466 F.2d 283, 293-94 (D.C. Cir. 1972).
[103] *Id*. at 296-97.
[104] *Id*. at 306-09.

the grave responsibilities of military leadership.[105] He listed several factors that militate in favor of deference to the government's position, including that the regulation is fully disclosed to applicants prior to entering the academies, belief or non-belief is not imposed, and mere attendance is required -- not participation.[106] As the dissent in *Anderson* shows, judges have disagreed about where the proper accommodation between the Establishment Clause and the Armed Forces power lies.

Although the majority and the dissent differ in their application of the facts, both seem to adopt a rational basis type of review when approaching the constitutional issues at play. The majority was prepared to defer to the government's characterization of its interest, but that interest, for them, simply did not rise to the level of a reasonable national security interest that could justify infringement on First Amendment freedoms.

IV. The Constitution Meets Public Prayer in the Navy

Just as each case that comes before a court presents a unique set of facts, so too does each instance of public prayer in the Navy. Various scenarios implicate different balances between the Establishment Clause and the Armed Forces power -- and possibly the Free Exercise Clause. The following three scenarios are analyzed because they seem to represent the situations in which public religious expression in the Navy is most typical. In each case, a brief factual background is presented, followed by analysis under the Establishment Clause doctrine and the Armed Forces power.

A. Prayer at Sea

The Navy has traditionally provided for public religious services at sea.[107] In 1800, Congress mandated that religious services should be attended by "all, or as many of the ship's company as can be spared from duty."[108] Today, Navy warships at sea loosely follow a program of evening prayer.[109] After the evening meal, the ship's chaplain says a prayer over the ship's general

[105] *Id*. at 306-07.
[106] *Id*. at 307.
[107] The Act for the Government of the navy of the United States required that commanders of all ships in the navy "having chaplains on board, are to take care that divine service be performed twice a day, and a sermon preached on Sundays, unless bad weather, or other extraordinary accidents prevent." 1 Stat. 709, ch. XXIV, § 1, art. 2 (1799).
[108] Act for the Better Government of the navy of the United States, 2 Stat. 45, ch. XXXIII, § 1, art. 2 (1800).
[109] According to several chaplains, there is no formal policy establishing evening prayer above the level of the sea-going vessel. The commanding officers of most ships with a chaplain embarked honor what is regarded as a Naval tradition. Ships that don't have chaplains embarked, including submarines and small surface ships, generally do not have daily prayer.

loudspeaker. Typically, individuals from various denominations are invited to give the prayer and it usually is not denomination-specific. And while a sailor does not have to observe it -- he or she is generally free to move about and do other things -- one cannot avoid it. The same general loudspeaker is used to announce emergencies. Turning it off would not only be a violation of orders, it would be unsafe. The prayer is also a daily occurrence. While certain prayers may mark special occasions, it is usually a routine part of the day at sea.

1. The *Lemon* Test

Daily prayer at sea would likely fail the *Lemon* test. To be upheld it would have to meet all three of *Lemon*'s prongs; it is unlikely that prayer at sea could pass any. First, the prayer does not have a clear secular purpose. The strongest argument for the prayer being non-religious seems to be that it would instill camaraderie and make the crew a more effective fighting force.[110] While this may have been true at some point in our nation's history, it is much more debatable today. Individuals join the Navy from diverse religious backgrounds, including some who profess no faith at all. A strong argument could be made that daily confrontation with prayer, even if such prayer were non-denominational, would be divisive and lead to unnecessary tension among the crew regarding religion. The Supreme Court has held that the Establishment Clause is intended to "guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate . . . ."[111] Although the government's proffered purpose would be entitled to some deference, it seems that an objective analysis would yield the conclusion that the prayer does not serve a rational secular purpose.

Public prayer at sea also likely runs afoul of the second prong of the *Lemon* test. Like the daily prayer at VMI, a court would probably conclude that it has the "primary effect of promoting religion."[112] Forcing the entire crew to listen to a prayer sends a message likely to be interpreted that the Navy endorses the prayer, a factor that the Fourth Circuit identified in *Mellen*.[113] The final prong of the *Lemon* test, excessive government entanglement with religion, seems equally difficult to avoid. The religious prayer is being broadcast over a government loudspeaker with a government-provided preacher.[114] Thus, it is

[110] While it could be proffered that the secular purpose would be honoring tradition, that would fall under *Marsh* exception analysis. See discussion in section IV.A.4 of text.
[111] McCreary County v. ACLU, 125 S. Ct. 2722, 2742 (2005).
[112] Mellen v. Bunting, 327 F.3d 355, 374 (4th Cir. 2003).
[113] *Id*.
[114] Although chaplains hold rank without command and have religious authority only, they do wear military uniforms and are employees of the government. In *Santa Fe Independent School District v. Doe*, the relevant question was the perception of the "independent observer", not the objective positional authority of the speaker. 530 U.S. 290, 307-08 (2000).

difficult to see how public prayer would satisfy any part of the *Lemon* test, let alone each of them as the Court's jurisprudence requires.[115]

2. The Coercion Test

Daily public prayer could be interpreted as coercive. The repetitive nature and routine characteristic of the prayers could be seen as, day by day, subtly manipulative in coercing a sailor to adopt a certain form of religion. It is not clear whether this argument would be found compelling by the Court under current coercion doctrine, however. The Court has thus far narrowly applied the coercion test only in cases of school prayer.[116] Other Establishment Clause frameworks seem more appropriately tailored to the facts presented by public prayer at sea.

3. The Endorsement Test

Public prayer at sea would probably rise to the level of an official endorsement of religion. Much as Justice O'Conner described such an endorsement as sending "a message to nonadherents that they are outsiders,"[117] it is reasonable to expect that sailors being forced to listen to a religious message they do not agree with would feel ostracized. This is especially the case when an individual is in his work space with another who fully observes the prayer by bowing his head or otherwise taking part. One sailor is participating in the practice, and the other doesn't belong. It is difficult to see how this could not be considered an official endorsement of religion.

4. The *Marsh* Exception

Probably the best argument *for* the constitutionality of public prayer at sea is contained in the *Marsh* exception, but it is not without problems. The prayer can be considered traditional. In 1799, while there were still a number of the same members of the 1791 House of Representatives that sent the First Amendment to the states, Congress enacted the Act for the Government of the navy.[118] This required that "[t]he commanders of the ships of the United States, having on board chaplains, are to take care, that divine service be performed twice a day, and a sermon preached on Sundays, unless bad weather, or other extraordinary accidents prevent."[119] This rich tradition of religious practice on

[115] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[116] Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1358 (2005).
[117] Lynch v. Donnelly, 465 U.S. 668, 688 (1984); *See also* Engel v. Vitale, 370 U.S. 421, 429-32 (1962) (outlining the effects of government endorsement of a religion).
[118] 1 Stat. 709, ch. XXIV, § 1, art. 2 (1799).
[119] *Id.*

board Navy ships -- going back to at least the nation's birth -- could cause prayer at sea to rise to the level of tradition that the Court found in *Marsh.* At the very least, it would be reasonable to think that the Court might accept such an argument.

The argument has two problems, however. First, the tradition of public prayer over a shipboard loudspeaker cannot go back to any time before the invention of electricity. In *Marsh*, the Court emphasized that it was carving out a narrow exception and focused specifically on the fact that the legislature instituted an opening prayer contemporaneously with the Bill of Rights.[120] Second, in *Marsh* the prayer was not mandatory. Individuals were free to come and go from the legislative chambers during the prayer. At sea, a sailor cannot tune out the general shipboard loudspeaker. To do so would be both unwise and unsafe.

Thus, although it is widely recognized that prayer at sea is considered a Naval tradition, it is less clear that this tradition would be sufficient to be upheld under the *Marsh* exception. Should *Marsh* apply, however, the prayer would be upheld under the Establishment Clause and no deference to the Armed Forces power would be necessary.

5. The Armed Forces Power

If public prayer at sea were rationally related to a legitimate government interest, the Armed Forces power would likely be sufficient to preserve its constitutionality despite any incidental Establishment Clause violation. When defending public prayer at sea, the Navy is likely to advance two arguments. First, it is possible that group prayer enhances morale and discipline by bringing the crew closer together during extended deployments away from home. Second, the Navy can contend that maintaining tradition is a valid military interest. In this context, such an interest in tradition would not need to rise to the level required to invoke the *Marsh* exception.[121] Courts are likely to defer to these interests,[122] and, since the First Amendment is involved, turn to whether prayer at sea is a reasonable means of advancing them.[123]

It is not clear what the effect of the prayers would be. In some circumstances, public prayer might enhance morale and discipline. However,

---

[120] Marsh v. Chambers, 463 U.S. 783, 790 (1983).
[121] Here, the maintenance tradition is being invoked as a military interest under the Armed Forces power, not as a possible narrow exception to the Establishment Clause under *Marsh v. Chambers*, 463 U.S. 783 (1983).
[122] *See* Orloff, v. Willoughby, 345 U.S. 83 (1953).
[123] *See* Anderson v. Laird, 466 F.2d 283, 293-96 (D.C. Cir. 1972).

any claim that the prayers may further morale may be countered by increased grumbling and protests among crew members that feel slighted by the announced prayers, which may actually incite rifts in the crew and accentuate the differences between the churched and the unchurched. A court could find that improved discipline and morale might not rationally result from public prayer.

The second reason, adherence to tradition, is a much more rational military interest that would probably pass review. The Navy's characterization of the rituals that are part and parcel of the seafaring tradition are likely to earn the deference of courts, which would probably recognize their improper role in passing judgment on this area of tradition.[124] Nonetheless, an objective analysis of the implementation of such tradition might raise questions. Most Navy ships do not observe the practice. Indeed, less than a third of all combatant vessels even have a full-time chaplain embarked.[125] While it is not doubted that prayer at sea is a tradition, that tradition has a limited scope of application in today's Navy, as well as a limited history of including prayer over the general shipboard loudspeaker.

This prayer does not invoke Free Exercise concerns. Nothing prevents individuals at sea from gathering together at a convenient time and praying together. In fact, gathering together for prayer would probably help individuals to cope with long deployments away from loved ones. Praying together as a group of willing individuals would also allow those individuals more freedom to pray as they want, because the Navy impetus to make public prayers pluralistic and inclusive might not satisfy their own religious needs.

On balance, the government interest in maintaining public prayer at sea would probably pass constitutional muster only when framed as a military tradition entitled to deference. Establishment Clause concerns are raised by such religious expression. Prayer at sea probably violates not only the *Lemon* test, but each of the other Establishment Clause frameworks as well. Although its history is probably not sufficient to invoke the narrow holding of the *Marsh* exception, the tradition, when categorized as a legitimate interest under the Armed Forces power, would likely pass rational basis review. The only way that such deference might be overcome is if a court were convinced that such prayer has more of a divisive effect and a detrimental impact on morale than it

[124] *See* Orloff v. Willoughby, 345 U.S. 83 (1953).

[125] Destroyers (DD and DDG), Frigates (FFG), and Submarines (SSBN and SSN), as well as other small ships, accounting for about 75% of the Navy's warships, do not have a chaplain embarked and most do not have evening prayer. Additionally, the Navy's trend toward smaller, leaner ships, such at the Littoral Combat Ship, may further reduce the penetration of the Chaplain Corps in the operational fleet. *See generally* Navy Fact File, http://www.navy.mil/navydata/fact.asp.

makes a ship at sea a better fighting force. Currently, to the best of the author's knowledge, there is no regulation that either requires nor bans prayer at sea over the shipboard loudspeaker. A regulation that prayer is encouraged in gatherings among willing individuals might be more consistent with Constitutional jurisprudence and Naval tradition, as well as better policy.

B. Official Navy Functions

Beyond worship, Navy chaplains are called on to say prayers in wholly secular situations, including change of command ceremonies, retirements, graduations, formal dinners and celebrations, and other civic events.[126] A typical scenario might be as follows. The commanding officer of a ship is turning over his responsibilities to a new commander. The crew assembles in formation on the pier in full dress uniform. A tent is set up and guests -- both military and civilian -- take their seats. The old and new commanders, a guest of honor, and a chaplain take their seats on stage next to the podium. As part of the opening sequence of the ceremony, usually alongside the national anthem, the chaplain, dressed in full uniform as everyone else, rises to the podium and gives an invocation -- a religious prayer. At the conclusion of the ceremony, the chaplain normally rises again to deliver a benediction. The Navy has long encouraged prayer at official functions to be pluralistic and inclusive, [127] and a recent directive by the Secretary of the Navy has officially implemented that policy.[128]

There is no formal rule or regulation, however, *directing* that such public prayer be performed.[129] Commanders "determine whether a religious element is appropriate" at official functions,[130] but prayer at such events nonetheless happens frequently and is largely considered customary.[131] The change of command example above is just one of the many official functions that usually includes public prayer. While many of these functions are not *per se* mandatory, attendance at some of them is arguably coerced.[132] Events likely run the gamut from required to completely optional, with a change of command

---

[126] William A. Wildhack, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 NAVAL L. REV. 217, 245 (2005).
[127] Letter of the Chief of Chaplains of May 26, 1998 (on file with author).
[128] *See* Secretary of the Navy Instruction (SECNAVINST) 1730.7C, Religious Ministry Within the Department of the Navy, ¶ 6.c. (Feb. 21, 2006) (directing that religious elements for a command function that is not a divine/religious service, absent extraordinary circumstances, should be non-sectarian in nature).
[129] *See* Chief of Naval Operations Instruction (OPNAV) 1730.1D, Religious Ministry in the Navy (May 6, 2003).
[130] Secretary of the Navy Instruction (SECNAVINST) 1730.7C, Religious Ministry Within the Department of the Navy, ¶ 6.c. (Feb. 21, 2006).
[131] Wildhack, *supra* note 126, at 245.
[132] *Id*. at 246.

on the "mandatory" end of the spectrum, and an optional crew picnic on the other. The diverse nature of these events presents difficulties for a broad analysis. Clearly, there will be fact-specific elements that might tip the scales for or against different factors in each of the various tests. For these reasons, official functions will be analyzed more broadly, focusing on what factors might weigh in for or against the constitutionality of prayer at a public event.

1. The *Lemon* Test

Significant problems exist in trying to justify prayer at official government functions under the *Lemon* framework. First, the prayer might not have a clear secular purpose. In *Anderson*, the D.C. Circuit rejected the argument that requiring midshipmen to attend services advanced the secular purpose of providing an "overall training program designed to create effective officers and leaders . . . ."[133] One member of the three judge panel, in an impassioned dissent, argued that this constituted a legitimate secular purpose because "[n]o religious belief is forced or sought to be compelled," and "actual participation is purely voluntary."[134] Indeed, the fact that a prayer at an official function is short and not recited in unison might cause a court to conclude that any religious element is *de minimis*. Such a prayer can be seen as simple ceremonial deism that doesn't rise to the level of religious participation that was problematic in *Anderson*.[135] Pluralistic and inclusive prayer can be seen as increasing the solemnity of the event -- a legitimate secular purpose.[136]

More difficult for the government is the second prong of the *Lemon* test. Public prayer at official functions would likely have the "purpose or effect of advancing religion." Forcing an assembled crowd of individuals to listen to a prayer sends a message likely to be interpreted that religion is better than no religion, as identified in section IV.A.1 herein, in the analysis of prayer at sea. A court could find, however, that the nature of prayer at official functions is distinguishable. It takes place at infrequent events vice on a daily basis, a factor that might make the religious element of the prayer less significant.

---

[133] Anderson v. Laird, 466 F.2d 283, 285 (D.C. Cir. 1972) (quoting Anderson v. Laird, 316 F. Supp. 1081, 1090 (D.D.C. 1970)).
[134] *Id*. at 310-11
[135] *Id*. at 283.
[136] The religious element might trump the secular, however, if a denominational prayer is given at official public functions. Restriction to inclusive prayers might be necessary, therefore, to preserve the constitutionality of such prayers, even though such restrictions might approach the level of government interference with prayer that was found problematic in *Lee v. Weisman*. 505 U.S. 577, 599 (1992). Additionally, 10 U.S.C. § 6031(a) (1998) cannot be invoked to justify denominational prayer at such events because the secular purpose of public prayer at official functions makes it most likely that it not rise to the level of "public worship." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

The final prong of the *Lemon* test, excessive government entanglement with religion, seems equally difficult to avoid. The religious prayer is being spoken by a uniformed officer, albeit a chaplain, on a stage alongside the national ensign at an official event. Even though such a prayer is shorter and less involved than a worship service, it is *de facto* mandatory. Thus, although there might be a legitimate secular purpose for the public prayer, the final two prongs of the *Lemon* test are not likely satisfied.

The analysis above assumes that an official event requires attendance by the service member. If the event is optional, the *Lemon* concerns become significantly less pronounced. An official retirement ceremony or military funeral, for example, is usually only attended by those service members and civilians close to the individual being honored. In such a case, the religious elements at the function can be considered more of a reflection on that individual than on the government. An analogous situation would be a presidential inauguration.[137] The focus is on the individual being honored, and any civic deism at such an optional event can be reasonably interpreted as reflecting on that person.

2. The Coercion Test

Public prayer at mandatory official functions might be found to coerce service members "to support or participate in a religious exercise."[138] In *Lee*, the Court invalidated a school's practice of inviting a member of the clergy to deliver a nonsectarian prayer at a commencement ceremony.[139] The ceremony in *Lee* can be analogized to an official Navy ceremony, such as a change of command. Both are "in a fair and real sense obligatory."[140]

The distinction from *Lee* would probably lie in whether or not the audience at such a ceremony would be susceptible to coercion. Although the Court has implied that the coercion test may be confined to the elementary and secondary school contexts,[141] the Fourth Circuit in *Mellen* specifically analogized cadets at VMI to those students[142].

---

[137] Presidential inaugurations have included public prayer since George Washington was inaugurated in 1789. *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2106-07 (1996).
[138] Lee v. Weisman, 505 U.S. 577, 587 (1992).
[139] *Id*. at 599.
[140] *Id*. at 586.
[141] *See id.* at 593 ("[w]e do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the [e]stablishment [c]lause, place primary and secondary school children in this position."); David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman*, 76 EDUC. L. REP. 913, 926-27 (1992).
[142] Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003) ("Although VMI's cadets are not children, in VMI's [adversative] educational system they are uniquely susceptible to coercion.").

Unlike at VMI, there is no stereotypical crowd at Navy functions. A service school or boot camp graduation presents a much more analogous situation to the court's posturing in *Lee* and *Mellen* than does a retirement ceremony or funeral. Although it is not clear that the coercion test could ever be used successfully to invalidate public prayer at official naval functions, it seems that the more analogous the situation is to that in *Lee*, the more it would likely constitute coercion.

3. The Endorsement Test

Even if public prayer at official functions were found to have a secular purpose, such prayer would still violate the Establishment Clause if it has the effect of endorsing religion.[143] The Supreme Court has used the endorsement test to hold unconstitutional invocations[144] at public school events, and this holding could conceivably extend to official military functions.[145] Because military chaplains wear uniforms and their chaplain insignia might not be discernable to civilians, and even service members who are far enough away, an "objective observer" might find the prayer stamped with the military's "seal of approval."[146] This type of objective analysis is suggested by the Court in *Santa Fe Independent School District v. Doe*,[147] even though chaplains subjectively hold rank without command and speak for their faith group, not for the government.[148]

4. The Armed Forces Power

The military interest in including prayer at official functions would primarily be one of ceremonial deism. Public prayer, in the form of a simple invocation or benediction, could have the effect of making official occasions more solemn and helping to heighten their significance in the eyes of service members and guests. Such prayers also carry on long standing Navy traditions.[149] It is likely that a court would find these interests to be reasonable,

---

[143] *See* Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring). The Court later adopted this test in *County of Allegheny v. ACLU*. 492 U.S. 573, 595-97 (1989).

[144] The Court determined that "invocation" is "a term that primarily describes an appeal for divine assistance." Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-07 (2000) (citing Webster's Third New International Dictionary 1190 (1993), which "define[s] 'invocation' as 'a prayer of entreaty that is usually a call for the divine presence and is offered at the beginning of a meeting or service of worship.'").

[145] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307-08 (2000).

[146] *Id*.

[147] *Id*.

[148] *See* 10 U.S.C.A. §§ 3581, 6031, 8581 (2003).

[149] It is possible that, in certain circumstances, such tradition will be sufficient to avoid establishment clause concerns by meeting the criteria that the Court has set forth for the *Marsh* exception. *See*

especially considering the traditional deference given to the military and the broad scope of the Armed Forces power.[150]

Although there are legitimate Establishment Clause concerns, it is likely that the reasonable military interests involved are significant enough to overcome them, at least in the case of optional events. There are two key distinctions between daily prayer at sea and public prayer at ceremonial functions that make the latter less constitutionally problematic. First, whereas prayer at sea can be interpreted as subtly coercive and routine, prayer at official functions is infrequent and used at special, ceremonial events. Second, prayer at an official function is almost always far from the primary purpose for assembling, whereas prayer at sea is an evolution in and of itself. In this sense, the Establishment Clause concerns of coercion and endorsement become slightly less problematic, and the government interest enjoys a more compelling role. This could have the effect of tipping the balance in favor of a *de minimis* encroachment on religion by allowing a brief, non-sectarian prayer to coincide with an official function.

The nature of such prayer, however, might still present factual nuances that could cause the balance to be upset. One of the factors that might tip the balance away from a constitutional harmony would be if the prayers were overly deferential to one denomination, or singled out specific beliefs. Although the Navy has mandated that public prayers, when given, should be inclusive,[151] some chaplains have expressed their discontent with this policy, citing the right to give prayers in public specific to their own denomination.[152] If that were allowed, it would be much more difficult for the government to assert that such prayers have a secular purpose, and the balance might tip toward a violation of the Establishment Clause.

Some chaplains claim that a federal statute permits them to pray denominational prayers in public. The statute, 10 U.S.C. § 6031(a), states that chaplains may conduct "public worship" in accordance with the "manner and forms of the church of which he is a member." There are, however, two alternative interpretations of this statute that avoid obvious Establishment Clause concerns, and thus might preserve the statute's constitutionality.

Marsh v. Chambers, 463 U.S. 783, 786 (1983). This section, however, will analyze whether tradition that does not meet such a high standard can nonetheless be characterized as a legitimate government interest under the Armed Forces powers.

[150] *See* Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

[151] See Secretary of the Navy Instruction (SECNAVINST) 1730.7C, ¶ 6.c., Religious Ministry Within the Department of the Navy (Feb. 21, 2006).

[152] *See, e.g.*, Eric Pfeiffer, *Navy Rule on Prayer Ignites a Debate*, WASH. TIMES, Mar. 23, 2006, at A01.

Because these interpretations could justify maintaining secular prayer at official functions, the government would likely endorse them.

First, a public prayer at an official function does not rise to the level of "public worship," and thus the statute is not implicated. An official Navy function is not public worship. It is, rather, a military exercise at which a chaplain is invited to give a brief prayer for the secular purpose of increasing the solemn nature of the event.

Second, courts can employ the Supreme Court's avoidance canon.[153] It is possible to interpret "manner and forms" to mean the framework and structure of the prayer, not its religious teachings. The statute does not say that chaplains can preach publicly according to the religious doctrines of their denomination. "Manner and forms" implies that the government cannot require a chaplain preach in an area that is *outside* his denomination, not that a chaplain may, when called upon, advance his own narrow theological viewpoint.

Some chaplains might claim that this interpretation amounts to nothing more than censorship of their prayers, but there is nothing that prevents them from praying however they wish in front of a willing audience of members of their own faith group. Chaplains join the Navy with the understanding that they are providing faith services to individuals of many different faiths.[154] The pluralistic environment of military service demands such cooperation. Such deference might be necessary if the government interest in maintaining tradition and solemnity at official functions is to be saved from an attack that denominational prayers violate the Establishment Clause. Thus far, the government interest seems to focus correctly on inclusiveness.[155]

C. Prayer at the Naval Academy

Each day during the academic year, midshipmen assemble in the dining hall at the United States Naval Academy and stand for prayer before the noon meal. They are not required to recite the prayer or to bow their heads in observance, but they must remain standing during its recitation and cannot move

---

[153] *See, e.g.,* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995).

[154] Chaplains are employees of the federal government. The Supreme Court has held that "a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public." San Diego v. Roe, 543 U.S. 77, 80 (2004). In the context of the military, the government interest in restricting speech would likely receive more deference than that accorded to civilians. Additional analysis of the free speech concerns of chaplains who would challenge such requirements are beyond the scope of this essay.

[155] *See* Secretary of the Navy Instruction (SECNAVINST) 1730.7C, ¶ 6.c., Religious Ministry Within the Department of the Navy (Feb. 21, 2006).

about or attend to other matters. The noontime prayer is a tradition that may date back to the Academy's founding in 1845.[156] Recently, some interest groups, such as the American Civil Liberties Union (ACLU) and the Anti-Defamation League (ADL), have called on the Navy to stop this practice.[157] In doing so, these groups have cited parallels between the Academy prayer and the group prayer at VMI -- prayer that the Fourth Circuit found unconstitutional in *Mellen*.[158] While there are some parallels with the *Mellen* case, it is reasonable for academy officials to downplay its significance in their decision to keep noontime prayer. First, the Fourth Circuit decision is not binding on the Naval Academy. As an institution of the federal government they are instead bound by the D.C. Circuit. And second, a reasonable interpretation of that Circuit's decision in *Anderson* provides a possible constitutional foothold for the noontime prayer.[159]

1. The Establishment Clause Tests

When the Armed Forces power is not concomitantly analyzed, public prayer at the Naval Academy probably violates the Establishment Clause. The noontime prayer at the Academy is analogous to the mealtime prayer at VMI that the *Mellen* court considered. Both involve *de facto* mandatory prayer preceding a meal at a military-focused and disciplined institution of higher education.[160] The *Mellen* court's analysis is set forth in Part I, *supra*. Because the Establishment Clause issues are so similar, this analysis will focus on the difference between *Mellen* and Naval Academy prayer: the application of the Armed Forces power.

2. The Armed Forces Power

One of the strongest arguments that the Naval Academy prayer passes constitutional muster, even given a possible violation of the Establishment Clause, is judicial deference to the Armed Forces power and to the government's characterization of military necessity. The Fourth Circuit could not give such deference in *Mellen*.[161] VMI falls under the authority of the State of Virginia, not the Department of Defense. As such, it is not entitled to

---

[156] Bradley Olson, *Academy Will Continue Lunch Prayers*, BALT. SUN, Aug. 31, 2005, at 1B.
[157] *Id*.
[158] *Id*.
[159] Anderson v. Laird, 466 F.2d 283 (D.C. Cir.1972).
[160] It is reasonable for the Department of Defense's categorization of a military interest to be entitled to a greater level of deference by the courts than VMI's. However, this is not immediately relevant to the policy's success or failure under the Lemon test because both share the same secular purpose of training military officers. *See* Mellen v. Bunting, 341 F.3d 312, 323 (4th Cir. 2003) (Wilkinson, J., dissenting from the denial of rehearing en banc).
[161] Mellen v. Bunting, 327 F.3d 355, 371-72 (4th Cir. 2003).

deference under the Armed Forces power.[162] The Naval Academy, on the other hand, would likely be able to avoid constitutional scrutiny under the Establishment Clause if its noontime prayer were rationally related to a legitimate government interest.

First, it is necessary to determine whether the prayer is unconstitutional under *Anderson,* the case that proscribed mandatory chapel attendance for midshipmen.[163] One of the holdings in *Anderson* was that the "government may not require an individual to engage in religious practices or be present at religious exercises."[164] When looking at Naval Academy prayer, the government would contend that it is not a 'religious exercise' that rises to the level of a chapel service. First, the purpose of the gathering is to eat, not to conduct religious worship. Second, the *Anderson* court analyzed the history of the First Amendment and concluded that the framers sought to abolish compulsory church attendance.[165] Public prayer before a meal probably does not rise to this level of compelled worship. At least one judge has called prayer "the most benign form of religious observance."[166] Thus, the Naval Academy prayer probably does not rise to the level of a 'religious exercise', and would most likely be constitutional under *Anderson*.

Next, the analysis must turn to whether there is a threshold below that articulated in *Anderson* that might still cause the Academy prayer to fail. In addition to the establishment concerns being less significant for such prayer than for compelled worship, the government interest is greater, and there is a more concrete nexus between the proffered interest and the public prayer. The balance tips much more toward upholding the mealtime prayer.

The government might advance several interests under its Armed Forces power that militate in favor of the public prayer.[167] The prayer might advance the Academy's purpose of developing military leaders by teaching them the importance of religion in a sailor's life. Additionally, it encourages religious tolerance, aids students in reflecting on their own beliefs, and allows midshipmen to celebrate the American tradition of expressing thanksgiving.[168]

---

[162] It can be argued that VMI should be entitled to some deference because it sends many of its graduates into the military, but this would likely fail because neither Congress nor the Department of Defense have control over VMI.
[163] Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972). This case is controlling authority for the Naval Academy.
[164] *Id.* at 291.
[165] *Id*. at 286.
[166] Mellen v. Bunting, 341 F.3d 312, 318 (4th Cir. 2003) (Wilkinson, J., dissenting from the denial of rehearing en banc).
[167] *See id.* at 319-25.
[168] *Id*.

It is likely that a court would find these interests to be reasonable, especially considering the traditional deference given to the military and the broad scope of the Armed Forces power.[169] As in *Anderson*, the court would likely next look at the nexus between these interests and public mealtime prayer at the Academy.

The public prayer seems reasonably tailored to accomplish the proffered government interests. Prayer is not the purpose of the gathering, but rather a cursory solemnization of it. Participation is not required, but rather mere silence. Prayers are pluralistic and inclusive and do not overtly advance a particular religious viewpoint. Furthermore, life at the Naval Academy is inherently different than a civilian institution in terms of the level of control that is exercised in the life of the individual. Any infringement on the liberty of the midshipmen should be viewed in that unique context. Thus, a reasonable nexus exists between the short public prayer and the secular government interests that such prayer advances.

These interests must still be sufficient to overcome any violation of the Establishment Clause. In *Goldman*, the Supreme Court ruled in favor of the military when balancing the Armed Forces power against the Free Exercise Clause, largely because the military was legitimately advancing a reasonable interest.[170] The situation is directly analogous. Public prayer at the Naval Academy likely has a sufficient nexus to the advancement of legitimate, secular government interests. Thus, the Armed Forces power would probably be sufficiently invoked to overcome the Establishment Clause concerns and allow the Academy to maintain its tradition of public prayer.

V. Conclusion

The Supreme Court's Establishment Clause jurisprudence has been extensively criticized. Commentators have called it "chaotic, doctrinal gridlock, a legal quagmire, contradictory and unprincipled, ad hoc, intuitive, and a maze."[171] Each of the three scenarios analyzed in this essay -- public prayer at sea, at official functions, and at the Naval Academy -- presents factual nuances that place it in a slightly different location within Establishment Clause jurisprudence. The fact that many circuit court opinions are relied upon creates an additional layer of complication to the analysis.

Add to this Establishment Clause confusion a second interest -- the Armed Forces power. It is categorized by the deference it is warranted, but

[169] *See* Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).
[170] *See* Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986).
[171] Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 124 (2000).

leaves uncertainty as to where the intersection between it and the religion clauses lies. The military power of the legislative and executive branches is much more certain when it comes to training and equipping forces and determining the proper role of armies and navies than it is when determining how -- and when -- they should pray.

Take these two competing interests, together with the apparent reluctance of the Supreme Court to hear cases involving religion in military contexts, and it is not difficult to see how confusion can ensue. Sorting out the intersection can be a mind-boggling dissection of circuit court cases that can cut either broadly or narrowly; impassioned dissents that interpret laws radically differently than the majority; and a society whose attitudes about the separation of church and state have evolved radically over the past half-century.

Categorizing the interest of the Navy in continuing ceremonial deism also presents unique challenges. Promoting religion in the armed forces might be a legitimate government interest. Those who have strong beliefs might fight harder or believe that their cause is more just. But in today's pluralistic military, it remains to be seen how much advancing religion is a good idea -- or how much it might unnecessarily divide the troops. There might come a point where making public prayer too inclusive offends individuals across the board. Evangelicals might be offended because they believe that they should be able to pray "In Jesus' name." Individuals from less-represented sects may feel marginalized and not part of the larger team. Agnostics and atheists may be offended and disenfranchised by any prayer. Thus, it is possible to see that there comes a point where the proffered justification for public prayer works against the furtherance of the legitimate interest behind it, not for it.

These challenges indicate that the government interest in advancing religious expression in the Navy might evolve. Religion is important -- both to America's history and to the personal lives of countless service members and veterans. The military, however, exists to fight and win wars. Following the most effective way of accomplishing that mission will ensure that future generations can attend whatever church they want.

BOOK REVIEW
GULAG: A HISTORY[1]

Commander Andrew H. Henderson, JAGC, USN*

> *We forget everything. What we remember is not what actually happened, not history, but merely that hackneyed dotted line they have chosen to drive into our memories by incessant hammering.*[2]

In schools, in the media, even in Hollywood, the atrocities committed by the Nazis at *Auschwitz* are well-documented and oft-discussed.[3] And they should be, for this dialogue is essential to understand the sources of such evil and to avoid the danger of history repeating itself. But how many know about the terrors inflicted inside the *Kolyma* camps of the Russian Far East or on the *Solovetsky* archipelago in the White Sea for most of the twentieth century? Despite the vastness of a wicked system that ground through 28.7 million forced laborers and killed millions,[4] the expanse of the Soviet system of repression remains grossly underreported both in and out of Russia. Anne Applebaum's Pulitzer Prize-winning *Gulag: A History*, is a strident tome that ardently begins to fill this void for a new generation in a historically complete -- though unabashedly passionate -- manner.

The list of evils man has proved both willing and able to inflict on fellow human beings is as lengthy as it is astonishing. Be it torture, slavery, or genocide, every century seems to produce another chapter of infamy. But in the brief history of the Union of Soviet Socialist Republics (USSR), all of these horrors (and more) were combined under the vast network of labor camps operated by the Main Camp Administration -- in Russian, *Glavnoe Upravlenie Lagerei*. The acronym GULAG came, over time, to refer not only to the camp administrative body, but also to all permutations of Soviet slave labor: labor camps, punishment camps, criminal and political camps, women's camps,

---

[1] ANNE APPLEBAUM, GULAG: A HISTORY (2003).

[*] Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[2] ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO 299 (Thomas P. Whitney, trans., Harper & Row 1974).

[3] *See* David Remnick, *Seasons in Hell; How the Gulag Grew*, THE NEW YORKER, Apr. 14, 2003, at 78, *available at* http://www.newyorker.com/ printables/critics/030414crbo_books.

[4] APPLEBAUM, *supra* note 1, at 582-83. Poor and/or deceptive record-keeping, lost data, and deaths technically "outside the system" preclude a complete and accurate accounting of the dead. *See id*. at 584-85.

children's camps, and transit camps.[5] "Gulag" has also come to mean the entire system of Soviet repression -- from arrest to interrogation, transport to enslavement, and exile to possible death.[6] Or as one survivor described the Gulag, it was the Soviet "sewage disposal system" down which its leadership dumped not just people, but entire nations.[7]

Gulag: A History follows the system from Lenin's creation of concentration camps for bourgeoisie during the Red Terror of 1918[8] to Gorbachev's pardon of the last political prisoners in 1986.[9] But *Gulag: A History* does more than merely describe the evolution -- or metastasis[10] -- of the camps. Applebaum explains in exacting detail the mechanics of Gulag operations, prisoner collection, and labor projects, all through an overlay of Soviet history and world events, enabling even an eastern European history novice to keep everything in historical perspective. Then Applebaum goes further, poignantly revealing names and faces of victims -- men, women, and children -- typically incarcerated "not for what they had done, but for who they were."[11] Finally, and perhaps most ambitiously, Applebaum attempts to ascribe a motive to the Gulag's creators in the hopes of teaching others how to avoid the sins of the past.

Anne Applebaum is a columnist and member of the editorial board for the *Washington Post* who began working as a journalist in 1988. A former Deputy Editor of *Spectator* magazine in London, she has published extensively in both European and American periodicals.[12] She also wrote the award-winning *Between East and West: Across the Borderlands of Europe*[13] in 1994 and covered Eastern Europe for *The Economist* during the collapse of Soviet-run communism.[14] It is with this resumé and reporter's pedigree that she approached writing on the Gulag, exhaustively researching the subject and drawing from a staggering array of sources, including official archives,

---

[5] *Id.* at xv.
[6] *See id.* at xvi.
[7] SOLZHENITSYN, *supra* note 2, at 24.
[8] *See* APPLEBAUM, *supra* note 1, at 9.
[9] *See id*. at 559.
[10] Remnick, *supra* note 3.
[11] APPLEBAUM, *supra* note 1, at 6.
[12] Anne Applebaum – biography, http://www.anneapplebaum.com/bio.html (last visited August 26, 2005).
[13] ANNE APPLEBAUM, BETWEEN EAST AND WEST: ACROSS THE BORDERLANDS OF EUROPE (1994). *Between East and West* won an Adolph Bentinck prize for European non-fiction in 1996. Applebaum biography, *supra* note 12.
[14] *Worked to Death*, THE ECONOMIST, Apr. 5, 2003, *available at* http://www.economist.com/books/displaystory.cfm?story_id=1682166.

memoirs, personal interviews, published and unpublished writings, and histories in many languages.[15]

The first of the book's three main sections, "The Origins of the Gulag," begins with Lenin's early plans to organize the segregation of, and obligatory work duty for, the wealthy and other "class enemies" amidst a backdrop of the pandemonium surrounding the Bolshevik Revolution. The disarray that ensued when the ill-equipped Bolsheviks created an *ad hoc* government was reflected in the initial establishment and management of the labor camps.[16] This haphazard management proved thematic throughout the camps' existence.[17] It is particularly fascinating to track the history of the Gulag alongside Soviet history because, as Applebaum notes, "the Gulag did not emerge, fully formed, from the sea, but rather reflected the general standards of the society around it."[18] Thus, as the new government did away with "class enemies" like bourgeoisie, entrepreneurs, bankers, merchants, landowners, industrialists, scholars, and anti-Soviet military officers,[19] it effectively removed society's best and brightest. In this light, the ultimate outcome of Soviet communism amidst this leadership vacuum is less surprising. The ensuing barbarism of the Gulag is perhaps foreshadowed as well.

As the character of the Soviet Union changed with the power transition from Lenin to Stalin, so too did the nature of the Gulag. Early in the camps' history, their purpose was at least ostensibly for "the ideological re-education of the bourgeoisie"[20] by teaching them to appreciate a hard day's work and the importance of working for the state's welfare.[21] But as Stalin's power grew, the focus of the camps became purely one of economic output[22] and propaganda about re-education "ground to a halt."[23] Criminal and political prisoners alike were considered "units of labor,"[24] and camp commanders were under intense pressure from Moscow to minimize expenses while maximizing production.[25] What the camps produced depended largely on their location. It was no coincidence that they were typically built by prisoner "colonists" near abundant natural resources like gold in *Kolyma*, nickel in *Norilsk*, and timber in the

---

[15] *See* Remnick, *supra* note 3.
[16] *See* APPLEBAUM, *supra* note 1, at 7.
[17] *See generally id.* at 73-91, 217-41.
[18] *Id.* at xxvii.
[19] *See id.* at 9.
[20] *Id*. at 9.
[21] *Id.* at 9-10.
[22] *See id*. at 34-35.
[23] *Id*. at 100.
[24] *Id*. at 102.
[25] The pressure was certainly intense. During the Great Terror of 1937, for example, Stalin eliminated many camp administrators -- who were arrested (and often executed) for poor performance -- calling them saboteurs who hindered economic growth. *See, e.g., id*. at 95-99.

Kraslag region.[26] But camps were located throughout the country -- including Moscow[27] -- and their industries also included assembly lines, farms, and even the construction and operation of a nuclear power plant.[28] Prison labor, in fact, was utilized "to build everything from children's toys to military aircraft."[29]

Camp populations grew as well. Twenty-one camps in 1919 grew to 107 by 1920.[30] There were 300,000 prisoners in the Gulag system by 1930,[31] a million by 1934,[32] and 1.8 million by 1938, with another million exiles living on the camps' fringes.[33] By 1950, the population had exploded to over 2.5 million prisoners in the camps, with roughly the same number living in exile.[34] But a nagging question lingers as to Stalin's motivation behind the exponential expansion of the Gulag. Applebaum queries whether the growth of the camp population was a consequence of the Soviet communist process -- or whether the surge of arrests was a volitional move by Stalin to increase the pool of slave labor for his industrial goals?[35] Or was it simply a matter of appeasing Stalin's ego?[36] The author explores each option, disclosing evidence in support of each, but appears to lean toward the conclusion that no option is mutually exclusive of the other, and each is somewhat applicable.[37] The random and often wholly illogical rationale behind so many arrests seems to belie a master plan for *all* arrests, but the convenient arrests of mining experts and a hydraulic engineer, for example, to oversee the *Kolyma* goldmines is but one of many such situations where coincidence seems unlikely.[38]

While the purpose of *Gulag: A History* is not to contrast Soviet and Nazi concentration camps, some degree of comparison is inevitable; for while the ultimate results were the same (millions of deaths) the means of operating the respective systems varied.[39] One area of particular note was the application of the rule of law. Whereas Hitler's "Final Solution" never tried or sentenced Jews for their "crimes," Soviet prisoners were nearly all interrogated, tried, and

---

[26] *See id*. at 113. *See also Worked to Death, supra* note 14.
[27] *See* APPLEBAUM, *supra* note 1, at 116-17. The author provides a map of all known camps from 1939-1953, at the Gulag's zenith. *Id.*
[28] *See id* at 217.
[29] *Id*. at 114.
[30] *See id*. at 9.
[31] *Id*. at 73.
[32] *Id*. at 91.
[33] *Id*. at 113.
[34] *See id*. at 463.
[35] *See id*. at 50.
[36] *See id.* at 52.
[37] *See id*. at 56.
[38] *See generally id*. at 50-57.
[39] *See Worked to Death, supra* note 14.

sentenced.[40] This "legal system," however, should not be confused with one premised in due process, logic, or fairness to the accused. Guilt by association, nationality, or the subjective whims of the government was commonplace, as were tortured "confessions," fabricated evidence, and trials *in absentia*.[41] Three-man teams -- *troikas* -- which acted as the investigative, prosecutorial, and sentencing bodies, typically spent three minutes or less on each case.[42]

Applebaum's exploration of the Soviet legal system is somewhat cursory, however. More detailed case studies are supplied by Gulag survivor Aleksandr Solzhenitsyn in his seminal work *The Gulag Archipelago*, which was surreptitiously sent abroad and published shortly before Solzhenitsyn was expelled from the Soviet Union.[43] Solzhenitsyn recounts therein many specific prosecutions and explores the "maturation" of the law as criminal statutes became more subjective,[44] trials more illusory, and Soviet citizens more and more numb to the growing tyranny and culture of fear.[45] Or as one commentator summed it up, "the main trait of the Soviet penitentiary regime [was] its systematic intensification, [and] gradual introduction of unadulterated, arbitrary sadism into the status of the law."[46] But ultimately, the question of why the USSR retained this semblance of a legal system is not addressed by Applebaum and goes unexplained. Was the government so naïve as to think the population remained under the impression the system was fair or just? This seems unlikely, as even a fourteen-year-old Soviet girl observed at the time, "[e]very honest man is sure to go to prison."[47]

The more plausible explanation lay in the Soviet dealings with other nations, including the United States. The Gulag's economic output was not just for domestic consumption. Stalin's Five Year Plan for industrial growth needed capital,[48] which meant exports were vital. Amidst international investigations and threats of tariffs or outright boycotts of products created by Soviet slave labor,[49] Stalin went to great pains to conceal Gulag conditions from foreign eyes. To this end, prisoners were transported in windowless cargo trucks with

---

[40] *See* APPLEBAUM, *supra* note 1, at 122.
[41] *See generally id*. at 122-27.
[42] *See id*. at 107.
[43] *See id*. at 526. *See also* SOLZHENITSYN, *supra* note 2, at vi; Remnick, *supra* note 3.
[44] SOLZHENITSYN, *supra* note 2, at 60-67. The infamous Article 58 of the Soviet Criminal Code, which defined "counter-revolutionary" crimes, grew from a few paragraphs to fourteen sections in 1926. *Id.*
[45] *See generally id.* at 299-431.
[46] APPLEBAUM, *supra* note 1, at 192 (quoting JAQUES ROSSI, THE GULAG HANDBOOK 307 (William H. Burhans trans., Paragon House 1989)).
[47] SOLZHENITSYN, *supra* note 2, at 12.
[48] *See* APPLEBAUM, *supra* note 1, at 45.
[49] *See id.* at 60.

"bread" or "produce" labels on the sides;[50] tens of thousands of prisoners were bureaucratically re-designated "free-workers" (though they remained incarcerated); prisoners were marched into the woods (where hundreds died) as empty camps were shown to foreign journalists; some camps were re-labeled "corrective labor" vice "concentration" camps and others were removed from the maps altogether.[51] So effective was the ruse that when United States Vice President Henry Wallace visited *Kolyma* in 1944, he was unaware that the "free workers" he met were prisoners.[52] He was also not told that much of the slaves' mining equipment, administrators' new boots, and new dresses worn by top officials' wives were acquired with American Lend-Lease dollars meant to assist the USSR in its defense against Germany.[53] The show-trials, then, may have also been part of the charade put on for the benefit of the international community.

In the second section of *Gulag: A History*, "Life and Work in the Camps," Applebaum follows the prisoner experience, literally, from cradle to grave. The author paints a detailed, haunting picture of the dehumanizing transformation from Soviet citizen to prisoner -- or *zek*.[54] The change began at arrest, which often took place *en masse* and was typically executed at night, in secrecy.[55] As an old Soviet proverb quips, "[t]hieves, prostitutes, and the [KGB] work mostly at night."[56] Arrestees were swiftly transported to regional prisons where interrogations would last days, months, or sometimes years before transfer to a labor camp. Small cells, extreme temperatures, and rotten food were the norm, as were enforced silence, sleep deprivation, and torture.[57] In describing the human need for communication and companionship, Applebaum describes the evolution of a kind of prisoner social hierarchy, code of conduct, and a type of "Morse" code between inmates.[58]

Transport to the camps -- via railcars and cargo ships -- was inhuman, with the norm being extreme temperatures, overcrowding, minimal food or sanitation, and corresponding high mortality rates.[59] The situation on the cargo

---

[50] *See id.* at 161.
[51] *See id*. at 60-62, 101.
[52] *See id* at 442.
[53] *See id*. at 443.
[54] *Id*. at 101.
[55] *See id*. at 127-28.
[56] *Id*. at 127.
[57] *See id*. at 147-52.
[58] *See id*. at 155-56. The author augments the text with a deciphering chart of tap sequences, which bears an unsettling resemblance to codes utilized by American POWs in Vietnam. *See* Bobby Wagnon, *Communication: The Key Element to Prisoner of War Survival*, 27 AIR UNIVERSITY REVIEW 4 (1976), *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1976/may-jun/may-jun76.html.
[59] *See* APPLEBAUM, *supra* note 1, at 163-66, 169-72.

ships was even worse, with rapes and beatings of both men and women being commonplace.[60] One survivor wrote, "[a]nyone who has seen Dante's hell would say that it was nothing beside what went on in that ship."[61] Camp conditions for prisoners who survived the trip were abysmal. Shelter was typically inadequate,[62] while food of poor quality was typically meted out in quantities varying according to work performance, ensuring that the weak got weaker.[63] Applebaum vividly brings the reader inside camp culture, describing how societies and cultures emerged within the camps, including gangs with special slang and distinctive clothing.[64] Camp administration was even known to curry favor with certain gangs, using them as enforcers to control other prisoners.[65]

Too many deaths reflected poorly on a camp commander because each death was a lost unit of labor. As such, it was not uncommon for the dying to be released early, so as not to be a camp mortality statistic.[66] But in describing this, and many other callous practices, Applebaum is particularly careful not to paint prison guards and camp commanders with too broad a brush. She neither vilifies nor pities them collectively, noting that "[m]ost of the time, the camp administration was not trying to kill prisoners; they were just trying to fulfill impossibly high norms set by the central planners in Moscow."[67] Guards were at the bottom of the Gulag administrative hierarchy, with meager salaries, minimal education, and poor living conditions.[68] But in no way does Applebaum portray the guards or commanders as victims of a corrupt system, somehow unaccountable for their actions. Instead, the entire camp system is ultimately reminiscent of a colonial empire, with standards dictated from the seat of power (Moscow) but subjectively interpreted and disparately executed by colony governors (camp commanders). Thus, while one camp commander might allow prisoner theater groups and orchestras,[69] another would disregard Moscow rules on labor limits and crush prisoners with sixteen-hour days.[70]

Applebaum then transitions to the book's third and final section: "The Rise and Fall of the Camp-Industrial Complex, 1940-1986." The Gulag population swelled during the war because, while there were technically

---

[60] *See id*. at 171.
[61] *Id*. at 172.
[62] *See id*. at 195. Prisoners often slept in the open as they constructed rudimentary barracks in new camps. *Id.*
[63] *See id*. at 179, 355.
[64] *See id*. at 291.
[65] *See id*. at 283.
[66] *See id*. at 341.
[67] *Id.* at 350.
[68] *See id*. at 260-61.
[69] *See id*. at 268.
[70] *See id*. at 192.

separate prisoner of war (POW) camps, the distinction between the two systems was unclear and POWs frequently found themselves in the Gulag.[71] Foreign civilians, too, were swept into the Gulag -- for crimes such as owning a radio -- as the Red Army moved across Europe.[72] But it is particularly troubling how, despite this wartime influx of prisoners, the peak population of the Gulag did not come until 1953, when 2,561,351 people were imprisoned[73] and another 2,753,356 lived in exile.[74] With revelations of *Auschwitz* and smiling handshakes with "Uncle Joe" Stalin at the Yalta Conference only a recent memory, the West seemed largely ignorant of -- or unmoved by -- the plight of millions in Eastern Europe.

Perhaps the most surprising revelation by Applebaum, however, is that while Stalin's death in 1953 ended the massive use of slave labor in the USSR, it did not altogether eliminate the camps.[75] Terminologies changed as the criminal code became more liberal and "enemies of the people" became "dissidents."[76] But many of these changes were cosmetic[77] and in fact the early 1980s under Yuri Andropov are considered "the most repressive era in post-Stalinist Soviet history."[78] From brutal punishment cells[79] to electroshock and drug "treatments" at "special psychiatric hospitals,"[80] questioning the *status quo* remained a dangerous practice for Soviet citizens until Mikhail Gorbachev pardoned all Soviet political prisoners in 1986.[81] This end of Soviet political repression, however, does not end the story for Applebaum.

The author concludes *Gulag: A History* with a final comparison of the Nazi concentration camps to the Gulag. Whereas the former has been publicly scrutinized, its leadership punished, and its ancestors duly remorseful, the latter largely remains an unpleasantness best left alone in Russia.[82] Applebaum is highly critical of this reticence, admonishing that the failure to repent "weighs like a stone" on Russia,[83] and that the past is like "a great, unopened Pandora's box" that "lies in wait for the next generation."[84] Some of Applebaum's closing rhetoric borders on the melodramatic and seems overly provocative in an

---

[71] *See id*. at 434.
[72] *See id*. at 432.
[73] *See id*. at 579.
[74] *See id*. at 581.
[75] *See id*. at 528.
[76] *See id*. at 530.
[77] *See id*.
[78] *Id.* at 553.
[79] *See id*. at 544.
[80] *See id*. at 547-51.
[81] *See id*. at 559.
[82] *See id.* at 569. *See also* Remnick, *supra* note 3.
[83] APPLEBAUM, *supra* note 1, at 571.
[84] *Id*. at 575.

otherwise reverent treatment of such an inconceivable period of history. Besides, Nazi Germany has been gone for sixty years, while the USSR is a recent memory. But on the other hand, perhaps sixty years is too long to wait. Indeed, Applebaum has presented 28.7 million reasons to be provocative in the present.

INFORMATION FOR AUTHORS

Authors are invited to discuss prospective articles with the NAVAL LAW REVIEW Editor-in-Chief at (401) 841-3155 ext. 152 or DSN 948-3155 ext. 152 or by writing to Editor-in-Chief, NAVAL LAW REVIEW, Naval Justice School, 360 Elliot Street, Newport, RI 02841-1523.

The Editor-in-Chief, in conjunction with article editors, carefully reviews each manuscript for clarity, accuracy, and scholarly merit. The Editor-in-Chief reserves the right to make editorial changes to a manuscript selected for publication. Manuscripts will not normally be altered in a manner inconsistent with the substance of the author's position. Where practical, the board will notify the author of any substantive changes before publication. There are no specific guidelines on manuscript length: brevity is not an obstacle to publication of a quality manuscript.

Manuscripts must be typed. The author should also submit a disk in a Microsoft Word compatible format. Authors should include an abstract of the proposed article, a short biography, and a statement as to whether the manuscript has been submitted elsewhere for publication. Per current directives, authors are solely responsible for security review. Authors may take a different position from that held by the government; when the author purports to state the views of the Department of the Navy or another governmental entity, however, security review is essential to ensure that the official position is stated accurately. No compensation can be paid for any articles published.

Articles should conform to the current edition of *A Uniform System of Citation* (18th ed.) and *Military Citation* (7th ed.). Authors should consult the *United States Government Printing Office Style Manual* (rev. ed. 1984), on matters not addressed in *A Uniform System of Citation* (the "Bluebook").