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Volume 107

Winter 1985

Pamphlet

No. 27-100-107

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., *Winter 1985*

MILITARY LAW REVIEW—VOL. 107

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1968. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. The subscription price is \$14.00 a year for domestic mailing, and \$17.60 for foreign mailing. A single copy is \$6.60 for domestic mailing and \$6.90 for foreign mailing.

Publication exchange subscriptions are available to law schools and other organizations which publish legal periodicals. Editors or publishers of such periodicals should address inquiries to the Editor of the *Review*.

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CITATION: This issue of the *Review* may be cited as 107 Mil. L. Rev. (number of page) (1986). Each quarterly issue is a complete, separately numbered volume.

The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and are replaced by a cumulative index in volume 96. A cumulative index for volumes 97-101 appears in volume 101. Volumes 101 to 111 will be indexed in volume 111.

Military Law Review articles are also indexed in the *Advanced Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.); Index to Legal Periodicals; Monthly Catalog of United States Government Publications; Law Review Digest; Index to U.S. Government Periodicals; Legal Resources Index*; two computerized data bases, the *Public Affairs Information Service* and *The Social Science Citation Index*; and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche*, by Infodata International Incorporated, Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

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MILITARY LAW REVIEW

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BACK ISSUES: Copies of recent back issues are available in limited quantities from the Editor of the *Review*. For individual military personnel on active duty, recent back issues are also available from the U.S. Army AG Publications Center, ATTN: Distribution Management Division, 2800 Eastern Boulevard, Baltimore, Maryland 21220.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

CONTEMPORARY INTERNATIONAL LEGAL ISSUES: AN INTRODUCTION

by Captain Stephen J. Kaczynski*

The first half of the decade of the 1980s has already witnessed myriad international episodes and crises, many of which were attended by international legal issues. From the clash of arms of the South Atlantic to the massacres of the Middle East, to the crisis of conscience occasioned by the American Bishops' pastoral letter on nuclear weapons, to the destruction of an unarmed civilian airliner, events have caused international lawyers of all persuasions to attempt to apply, or revise, the customary international law norms to the challenges of the 1980s. This issue of the *Military Law Review* is dedicated to a discussion of several of those events and issues accompanying them.

On 2 April 1982, the armed forces of Argentina invaded the Falkland Islands of the South Atlantic and overran a small British garrison that had been present in that colonial outpost of the Empire. Following failed mediation by the United States and the United Nations Secretary-General, Great Britain lay siege to and retook the Islands by force of arms. The Organization of American States condemned the British attack; the United States supported it. The relative Argentine and British claims to the Falklands and the propriety of the use of force to resolve the conflict are discussed in the lead article.

As the Falklands conflict subsided from the international public eye, attention was focused upon the Middle East, where, in the latest episode of violence that plagued that troubled region, the Israeli Defense Forces, on 6 June 1982, invaded Lebanon and pressed their advance to Christian-controlled East Beirut. Following a siege and bombardment of West Beirut, an agreement to allow for the protected evacuation of troops of the Syrian and Palestine Liberation Organization armies was reached. A multinational force, consisting of American, French, and Italian troops, served as a buffer between the Israelis and Christians in East Beirut and the exiting Syrians and Palestinians in West Beirut. When the exodus had been

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completed, the force departed Lebanon. Within a week of the departure of the last elements of the force, however, reports began to reach the press of a massacre of Palestinians in the refugee camps of Shatila and Sabra. No one accused the Israelis of perpetrating the massacre, yet it was beyond doubt that the Israeli command had allowed Christian Phalange militia into the camps in the frenzied aftermath of the assassination of the Lebanese Christian President Basir Gamayel. The second article of this issue examines the customary international law standards of command criminal responsibility and posits an application of those standards to the Israeli commanders in charge of the Lebanese operation.

Not all crises of the still-young decade were fostered by force of arms. On 19 May 1983, despite Cabinet-level lobbying from the Reagan Administration, the American Roman Catholic Bishops issued a pastoral letter entitled "The Challenge of Peace: God's Promise and Our Response." Directed toward the nation's Roman Catholics, the letter condemned any use of nuclear weapons and tolerated their possession only as a step toward negotiations leading to their elimination as weapons of war. The dilemma posed by this letter for Catholics in the armed forces and the general status of nuclear weapons and methods of nuclear targeting under customary international law are examined in *Nuclear Weapons: The Crisis of Conscience*.

Finally, on 31 August 1983, Korean Airlines Flight 007, a Boeing passenger jetliner enroute to Seoul, Republic of Korea from New York, disappeared from the radar screen somewhere over the Sea of Japan. As the facts became known, the world was horrified at what had transpired; air forces of the Soviet Union had shot down an unarmed civilian passenger plane, causing the death of all 269 people on board, including a United States congressman. The Soviets at first denied the attack, later justified its defense of its "sacred borders," and, most recently, have accused the United States of using the plane on an espionage mission. *Aerial Intrusions By Civil and Military Aircraft in Time of Peace* studies the KAL incident in light of the international responses to unauthorized overflights in the past. The most recent activity of the International Civil Aviation Organization in addressing this issue is also discussed.

This issue is designed to acquaint the judge advocate with the role of law in those international disputes. While not the sole determinant of what action a nation might take in furtherance of its perceived self-interest, the legal status of that action will certainly impact upon the degree of support, or condemnation, that a state

receives for its activity. Contrast, for example, the support in the United Nations received by Great Britain in the Falklands/Malvinas dispute with the widespread criticism of the Soviet Union that took place after the shooting down of KAL-007. The international legal issues that attend each of these crises do not necessarily immediately strike the observer. With this issue, the Editorial Board hopes to instill in the judge advocate an awareness of the role of international law in contemporary world affairs.

THE FALKLAND (MALVINAS) ISLANDS: AN INTERNATIONAL LAW ANALYSIS OF THE DISPUTE BETWEEN ARGENTINA AND GREAT BRITAIN

by Major James Francis Gravelle*

Then, too, in the case of a state in its external relations, the rights of war must be strictly observed. For since there are two ways of settling a dispute, — first by discussion; second by physical force; and since the former is characteristic of man, the latter of the brute, we must resort to force only in case we may not avail ourselves of discussion.

Cicero (B.C. 106-43)

I. PROLOGUE: PURPOSE AND METHODOLOGY OF THE ANALYSIS

On April 2, 1982, the armed forces of Argentina invaded the Falkland (Malvinas) Islands.¹ Argentina and Great Britain faced each

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¹Washington Post, Apr. 3, 1982, at A1, col. 1. Throughout this article, the Falkland Islands will be referred to as "the Islands." The United Nations, when referring to the Islands, includes the word "Malvinas" in parenthesis. Malvinas is the title for the Islands generally used in countries where Spanish is spoken. This is done as a result of a decision in 1964 by the Special Committee in the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. See 19 U.N. GAOR Annex 8 (Agenda Item 21, addendum item part 1), at 439, U.N. Doc. A/5800/Rev. 1 (1964-65). The Special Committee, also known as the Committee of 24 because of the number of members, was established by the General Assembly in 1961 and has been the operative committee since that time, concerning territories under foreign domination. See G.A. Res. 1654, 16 U.N. GAOR Supp. (No. 17) at 65, U.N. Doc. A/1500 (1962), which established the Special Committee.

other in an international armed conflict for ten weeks. The human loss and destruction of property were calamitous. The dispute leading to the eruption of this violence had been festering for almost 150 years. Peaceful attempts to settle the dispute had failed.

This article will discuss the acceptability to the world community of the claims of Argentina and Great Britain concerning the dispute, particularly those claims relating to the use of armed force. The dispute concerning the right of sovereignty over the Islands and the applicability of the principle of self-determination to the peoples that inhabit the Islands will be discussed. In regard to the use of armed force, that both states base their use of armed force upon the right of self-defense, each state claiming the other was the aggressor, will be examined. Discussion of the claims will overlap, as they are interrelated, and a correct legal conclusion respecting one of the claims would be difficult absent an understanding of the others. Additionally, the methodology used to analyze the claims of Argentina and Great Britain will emphasize the facts and history of the Islands. Detail in this area is necessary for purposes of perspective and because of the extent to which the facts are disputed.²

While analysis of these substantive issues is the main purpose of this article, another inquiry that will be made may be even more significant. The article will examine the failure of the procedural aspects of peacefully resolving the dispute. Why had a dispute lasting almost 150 years not been settled by peaceful means? Were the peaceful means available inadequate, or was the problem a failure of the participants to properly make use of the available means? Answers to these questions are important to the resolution of the dispute under examination and other disputes, current and future. The use of force to resolve disputes not only can be indicative of the failure of the community's methods of settling disputes, but, in addition, can result in an undesirable precedent.

11. THE CENTRAL LEGAL ISSUES

The dispute between Argentina and Great Britain concerning the Islands raises four major legal issues, three substantive, and one procedural.

²An example of this is that, based on its sources, the *Christian Science Monitor*, Apr. 5, 1982, at 3, col. 3, has stated that the Islands were discovered by the English in 1592. On the other hand, the Inter-American Juridical Committee on the Problem of the Malvinas, has claimed that the Islands were discovered earlier by the Spanish. *See* Declaration of the Inter-American Juridical Committee on the Problem of the Malvinas, 31 GAOR Supp. (No. 23) at 188-90, U.N. Doc. A/31/23/Rev. 1 (1976).

First, the bases for the territorial claims of Argentina and Great Britain must be examined to determine if they conform to the recognized legal modes on which a state may base its claim that territory was acquired or lost. The applicability of legal modes not directly raised will also be examined.

Second, the applicability of the principle of self-determination will be examined. Because self-determination is a relatively recent principle of international law and still in an evolutionary state, its development will be reviewed. The issue of whether or not the Islanders qualify as peoples to which the principle can be applied will then be examined. The expressions of the United Nations concerning the criteria necessary to qualify as a people to which the principle of self-determination should be applied and the past application of the principle of self-determination, generally, and specifically to the Islanders, will be discussed.

Third, the use of armed force by Argentina and Great Britain will be examined in terms of the applicable international law. An assessment of the competing claims of Argentina and Great Britain, both based upon the right of self-defense, will be analyzed in light of the legal requirements of necessity and proportionality. Specific criteria will be applied to determine if the use of armed force by Argentina or Great Britain can be justified on the basis of self-defense.

Fourth, the procedural issue of the failure of the peaceful means of settling disputes will be examined. The examination of this issue is particularly critical concerning the Islands, for, although some peaceful means were attempted in an effort to settle the dispute, the situation ultimately erupted into a serious disruption of international peace. Whether the failure was a result of ineffectiveness of the methods or a lack of desire or inability on the part of the participants to properly use the available means is the critical question, the answer to which will be valuable in resolving the issues surrounding this particular situation and other disputes.

111. SIGNIFICANT FACTS AND HISTORY

Having the necessary facts is as important as applying the right law in reaching a correct legal conclusion.³ In this section, the facts necessary to reach correct legal conclusions concerning the issues

³Having an understanding of the correct facts cannot be overemphasized in this case. As will be seen in the analysis, there has been quite a problem in determining the correct facts, as well as the applicable law.

will be set forth. These facts will be pertinent later to discussion of the issues of sovereignty, self-determination, aggression, and self-defense. In addition to the facts directly bearing on the issues, some facts of a tangential nature are to place the situation in its proper perspective.*Of course, some of the facts presented have changed since April 2, 1982.

A. GEOGRAPHY

1. Location and Land Area

The Islands are located in the South Atlantic Ocean approximately 500 miles off the east coast of Argentina and approximately 8,000 miles from Great Britain. The Falklands consist of about 200 islands.⁵ The largest of these Islands are East and West Falkland. The total land area of the 200 islands is approximately 4,700 square miles.⁶

2. Topography, Climate, Flora and Fauna

The Islands are generally hilly, with elevations as high as 2,312 feet.⁷ The coastlines are rugged, resulting in many excellent harbors.*The Islands experience a narrow temperature range, with the mean temperature being 49 °F in the summer and 36 °F in the winter.⁹ The winds are strong, the skies are almost never free from clouds, and overcast days are common.¹⁰ Rainfall is relatively light, about twenty-five inches a year, although light snowfall has been recorded in each month of the year.¹¹ Fog is rare.¹² Generally, the weather conditions are much like those experienced in England and Scotland.¹³

As could be expected after reviewing the climate conditions, trees are a rarity on the Islands.¹⁴ The vegetation is mainly grass, with some smaller shrubs.¹⁵ The native animal life is composed of "geese,

⁴This also is the reason for setting forth the facts in this section, and then repeating some of them when discussing the legal issues in later sections.

⁵British Central Office of Information, *The Falkland Islands and Dependencies* 1 (No. 152/82/Revised, 1982) [hereinafter cited as British Information Office].

⁶*Id.* The Islands Dependencies, which consist of South Georgia, the South Sandwich Islands, the Shag Rocks and Clerke Rocks, are not being considered here.

⁷I. Strange, *The Falkland Islands* 25 (1972) [hereinafter cited as Strange].

⁸*Id.*

⁹*Id.* at 17.

¹⁰*Id.*

¹¹*Id.* at 17-18.

¹²*Id.* at 18.

¹³*Id.*

¹⁴British Information Office, *supra* note 5, at 1.

¹⁵*Id.*

penguins, seabirds, and seals.¹⁶ Land mammals are not native to the Islands.¹⁷

3. *Inhabitants*

The 1980 census reflected that there were 1,813 people living on the Islands.¹⁸ This compares to a total population of 1,957 in 1972, as reflected in that census.¹⁹ In 1980, the census also indicated that 1,360 of the inhabitants were born in the Islands; only 302 of them were born in Great Britain.²⁰ Generally, the majority of the inhabitants have ancestors who had lived on the Islands in the nineteenth century.²¹ In 1980, 1,050 of the inhabitants lived in Stanley, the capital and only town.²² The second largest concentration of people is the settlement of Goose Green, also on East Falkland, which was then inhabited by 95 people.²³ The Islanders speak English and there are "Anglican, Roman Catholic and Nonconformist churches."²⁴

4. *Administration and Defense*

The Islands are administered as a non-self-governing colony, with the governing bodies consisting of an Executive Council and a Legislative Council; each body contains some elected members.²⁵ The Governor is an appointed member of the Executive Council.²⁶ The Islands have had universal suffrage since 1949.²⁷ The most recent constitution came into effect in 1977.²⁸ The Judiciary consists of a Supreme Court and two inferior courts.²⁹ The Chief Justice is a non-resident and the appellate court for the colony is located in London.³⁰ Prior to April 2, 1982, the Islands were defended by a part-time voluntary militia, which was trained by a resident Royal Marine Detachment.³¹

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

¹⁹Falkland Islands (Malvinas), Working Paper Prepared by the Secretariat 2, U.N. Doc. A/AC.109/67 (1981).

²⁰British Information Office, *supra* note 5, at 1.

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵Strange, *supra* note 7, at 36.

²⁶*Id.*

²⁷*Id.*

²⁸British Information Office, *supra* note 5, at 3.

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

5. *Economy*

Sheep farming is almost totally the mainstay of the economy of the Islands.³² There are approximately 660,000 sheep on the Islands.³³ The economy is closely tied to the Falkland Islands Company, which owns approximately one-half of the sheep and land.³⁴ It also is in control of other economic institutions, such as the banks.³⁵ The Islanders depend upon Great Britain for most of their imports and exports.³⁶ Efforts to diversify the economy, such as to establish a fishing zone or obtain investment capital, had been stymied by the political situation.³⁷ It has been realized that closer economic ties with Argentina would be very advantageous to the economy, but, although efforts have been made along these lines, little progress has been realized.³⁸

B. HISTORY

1. *History of the Dispute Concerning Sovereignty Over the Islands*

Basically, history is nothing more than an accumulation of facts set forth seriatim. It in itself is not necessarily relevant to the legal analysis of a particular situation. However, the building blocks of history, the relevant facts, are of equal importance with the applicable law in making a legal analysis. The following historical material is set forth to provide the basic facts for a legal analysis and for the purpose of perspective. It is important to make clear that not all the historical facts that could possibly be set forth are contained in the following material, but only those that are considered significant to this legal analysis. Most of the facts raised in the official statements of the participants' claims are included, but some facts, although raised by publicists or by one claimant or the other, are deemed not to be relevant and may only be mentioned or not raised at all.³⁹

³²Falkland Islands (Malvinas), Working Paper Prepared by the Secretariat 8, U.N. Doc. A/AC.109/67 (1981).

³³*Id.*

³⁴*Id.* at 9.

³⁵*Id.*

³⁶*Id.* at 10.

³⁷British Information Office, *supra* note 5, at 3.

³⁸*Id.* at 7.

³⁹*See, e.g.,* J. Arce, *The Malvinas: Our Snatched Little Isles* 13 (1951), wherein the author attributes some significance to the discovery of America by Christopher Columbus in 1492 as giving initial title to the Islands to Spain.

2. *Period of Discovery (1492-1763)*

Generally, it is an accepted fact that Christopher Columbus was the explorer that discovered America.⁴⁰ There is no evidence that he sighted the Islands in 1492 or at any other time. In fact, suggestions as to who was the first explorer to discover the Islands have not been supported by any satisfactory factual basis, so little weight can be given to those suggestions. Some writers claim that the Islands were discovered in 1592 by John Davis, an English navigator, when his vessel, the *Desire*, was forced near the Islands.⁴¹ However, other authors set forth evidence showing that the Islands were discovered prior to 1592 by others, especially Spanish explorers.⁴² These same authors question the grounds for concluding that Davis discovered the Islands.⁴³

The available evidence concerning discovery cannot be used to conclusively determine who discovered the Islands. The evidence does appear to lead to the conclusion that either the Spanish or the English discovered the Islands in the 16th Century. Any other claims to first discovery would automatically come into question. However, Dutch sailors recorded their "discovery" in 1600 with such accuracy that there is little doubt that they actually visited the Islands.⁴⁴

During this same period of history, Papal declarations were issued. For example, the Papal bull *Dudum Sequidem* of 1493 was issued to divide jurisdiction over newly discovered territory between Spain and Portugal.⁴⁵ Additionally, treaties between Great Britain and Spain were concluded concerning the sovereignty over territory possessed by each party in America.⁴⁶ However, these legal expressions are not given much weight. The Papal declarations are not considered a basis for obtaining sovereignty. As to the treaties, none of them specifically mentioned the Islands and, at the time the treaties

⁴⁰There are theories concerning possible earlier discoveries, such as those by Viking sailors.

⁴¹Strange, *supra* note 7, at 47.

⁴²J. Goebel, *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* 1-34 (1927) [hereinafter cited as Goebel].

⁴³*Id.* at 34-44.

⁴⁴*Id.* at 45.

⁴⁵This document is discussed in *id.* at 53-56.

⁴⁶See *e.g.*, The Treaty of Madrid of 1670, which was signed by Spain and Great Britain in that same year. Under the provisions of that treaty, Great Britain was to have sovereignty over all the territory in America that it held and possessed at that time. On the other hand, Great Britain was to refrain from sailing into or otherwise having intercourse with Spanish possessions. There were reciprocal requirements for Spain, and procedures for obtaining permission to trade with the other's possessions. This treaty is contained in 11 C. Parry, *The Consolidated Treaty Series* 383-401 (1969).

were entered into, it can hardly be said that either nation possessed the Islands.

3. *Settlement, Possession and Assertions of Sovereignty (1764-1833)*

Although there is disagreement on the issue of who discovered the Islands, there appears to be no question as to which country first settled them. The first settlement was not established by either the Spanish or the English, but by the French in 1764.⁴⁷ Even earlier, French sailors and merchantmen had become familiar with the Islands and had named them “Les Malouines” after a French town; hence the origin of the Argentinian name for the Islands, the Malvinas.⁴⁸ In 1764, Louis-Antoine De Bourgainville established a settlement on East Falkland and, in the same year, formally took possession of the Islands in the name of Louis XV.⁴⁹

The French settlement was, however, of relatively short duration. The Spanish protested almost immediately to France concerning the settlement. The protests were based on such grounds as proximity to other settlements.⁵⁰ In addition to protesting, the Spanish offered to purchase the settlement.⁵¹ Arrangements were made, the acceptable sum of money was paid, and, on April 1, 1767, the Spanish took possession of the settlement.⁵² Thus, the French settlement had ended and the first Spanish settlement, as a new colony, was established immediately.⁵³

While the Spanish and the French were sorting out their problems pertaining to the settlement of East Falkland, the British were establishing a settlement on West Falkland. In 1765, the Islands were claimed for England by Commodore John Byron,⁵⁴ but a settlement was not established until January 8, 1766.⁵⁵ Chronologically, the settlement on West Falkland occurred after the French settlement on East Falkland, but before the French settlement was ceded to the Spanish. The British settlement, like the French settlement, was short-lived. In 1770, the Spanish, by force, ousted the British.⁵⁶

⁴⁷Goebel, *supra* note 42, at 225.

⁴⁸*Id.*

⁴⁹*Id.* at 226.

⁵⁰*Id.* at 228.

⁵¹*Id.*

⁵²*Id.* at 229-30.

⁵³*Id.* at 230.

⁵⁴*Id.* at 232.

⁵⁵*Id.* at 238.

⁵⁶*Id.* at 277.

After much negotiation and almost the advent of war, Spain and England agreed to the restitution of the former British settlement to England, which event took place on September 15, 1771.⁵⁷ In 1774, the British took formal leave of the Islands.⁵⁸

After the British had departed, the Spanish settlement continued to exist and, from 1776 until 1811, it was governed as part of the viceroyalty of Buenos Aires.⁵⁹ The settlement was never a success and suggestions were made to abandon it.⁶⁰ During this time period, as during the discovery period, treaties affecting the holdings in America of Spain and Great Britain were concluded. The effect of these treaties on the Islands is questionable. For example, in 1790, Spain and Great Britain entered into the Nootka Sound Convention.⁶¹ By the terms of this convention, *inter alia*, it was agreed that Great Britain would respect the territory occupied by Spain in South America, including the coastal islands.⁶² However, as with the earlier treaties, the Islands were not specifically mentioned and the question of who was occupying the Islands at that time is disputed. Thus, the convention, just as the earlier treaties, is not considered determinative of legal issues concerning the Islands.

The Spanish settlement was discontinued in 1811.⁶³ In 1816, the viceroyalty declared its independence from Spain as the United Pro-

⁵⁷*Id.* at 407. It is an issue whether or not the intention of the parties was to return to the *de jure* status quo that existed prior to the ousting of Great Britain, or that it was a recognition of Great Britain's right to possession, or that it was an agreement for temporary possession by Great Britain. This issue, as with many others based on cloudy and ancient facts, may never be satisfactorily answered. *See id.* at chs. VI-VII for a discussion of this issue.

⁵⁸*Id.* at 410. Whether or not the British intended to abandon their "rights" to the Islands is subject to different interpretations. It is a fact that the commander of the settlement left a metal plaque at the site, which was engraved as follows:

Be it known to all nations that the Falkland Islands, with this fort, the storehouses, wharfs, harbours, bays, and creeks thereunto belonging are the sole right and property of His Most Sacred Majesty George the Third, King of Great Britain, France and Ireland, Defender of the Faith, etc. In witness whereof this plate is set up, and his Britanic Majesty's colours left flying as a mark of possession.

By, S. W. Clayton,
Commanding Officer at Falkland Islands
A.D. 1774

See id. at 410, where the inscription is set forth.

⁵⁹*Id.* at 433.

⁶⁰Strange, *supra* note 7, at 55.

⁶¹This treaty is discussed in Goebel, *supra* note 41, at 425-49.

⁶²*Id.* at 431.

⁶³*Id.* at 433.

vinces of the Rio de la Plata.⁶⁴ In 1820, the Islands, which had not been subsequently settled by any other country, were formally occupied by Colonel Daniel Jewitt of the viceroyalty.⁶⁵ In 1823, a governor was appointed over the Islands and a colony was established in 1826.⁶⁶ In 1827, the government of Buenos Aires issued a proclamation claiming it had succeeded to all the rights of Spain over the Islands.⁶⁷ This proclamation was protested by the British.⁶⁸

During this period of time, seals were being taken from the Islands by foreign ships.⁶⁹ After being warned by the governor that their activities were illegal, two sealing ships from the United States were seized.⁷⁰ As a consequence of this seizure, in 1831, the *U.S.S. Lexington* devastated the settlement, proclaimed the Islands free from government, and departed.⁷¹ Later, in 1885, President Cleveland, in his first annual message to Congress, rejected Argentina's claim for indemnity for the incident based upon the piratical nature of the colony and the "derelict condition of the islands before and after their alleged occupation by Argentine colonists."⁷²

In 1832, the Argentine government dispatched a frigate to protect the Islands.⁷³ Later in that same year, the British returned to re-establish their former settlement in West Falkland and, in 1833, the British, with force but no violence, took possession of the Spanish settlement on East Falkland.⁷⁴ Argentina immediately protested this action.⁷⁵ By the end of 1833, the British, over the protests of Argentina, possessed the Islands.

4. *Possession and Colonization by Great Britain, and Protestation by Argentina (1833-April 1, 1982)*

The British have possessed and continuously occupied the Islands since 1833.⁷⁶ The Islands were managed by naval personnel from

⁶⁴*Id.*

⁶⁵*Id.* at 434.

⁶⁶*Id.* at 434-35.

⁶⁷*Id.* at 437.

⁶⁸*Id.* at 442.

⁶⁹*Id.* at 438.

⁷⁰*Id.*

⁷¹*Id.* at 444.

⁷² J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 325 (1898).

⁷³ Goebel, *supra* note 42, at 454.

⁷⁴*Id.* at 455-56.

⁷⁵*Id.* at 456.

⁷⁶ British Foreign and Commonwealth Office, *The Falkland Islands: The Facts 2-3 (1982)* [hereinafter cited as *British Foreign Office*].

1834 until 1842 and, in 1842, the Islands were officially colonized.⁷⁷ They have continued to exist in colonial status since that time.

Starting with its protest in 1833, Argentina has continued to raise the issue of sovereignty over the Islands in various arenas. Argentina has continuously proclaimed its sovereignty during the United Nations' discussions dealing with decolonization of the Islands⁷⁸ which began in the early 1960s. It is clear that Argentina has continuously notified Great Britain and other nations of its claim of sovereignty over the Islands from 1833 to April 1, 1982.

5. Invasion by Argentina and Subsequent Matters (From April 2, 1982)

On April 2, 1982, an Argentine force consisting of approximately 2,000 marines and a dozen ships took Port Stanley.⁷⁹ The invasion came shortly after Britain demanded that Argentina remove its salvage workers from South Georgia Island, a dependency of the Islands.⁸⁰ The Argentine reaction was to send ships to defend the workers.⁸¹ This was not the first time in recent years that Argentina and Great Britain had had a serious confrontation concerning the disputed areas. For example, as recently as 1976, Argentina had fired a shot across the bow of a British ship sailing in disputed waters.⁸² That the dispute ripened into a full-scale conflict in 1982 may not have been a matter of happenstance. Evidence indicates that it may have been a goal of the Argentine government to take

⁷⁷Strange, *supra* note 7, at 60-61.

⁷⁸See statement by the Representative of Argentina, Dr. Jose Maria Ruda, before the Special Committee, *reprinted in* 19 U.N. GAOR Annex 8 (Agenda Item 21, addendum item part 1), at 440-42, U.N. Doc. A/5800/Rev. 1 (1964-65) [hereinafter referred to as Dr. Ruda]. Copies of this important statement are distributed by the Argentine Embassy when inquiries are made concerning Argentina's legal claims pertaining to the Islands. The statement also is referred to when discussions are held at the United Nations. Dr. Ruda currently is a judge on the International Court of Justice.

⁷⁹Washington Post, Apr. 3, 1982, at A1, col. 3.

⁸⁰*Id.* at A24, col. 1.

⁸¹Christian Science Monitor, Apr. 6, 1982, at 3, col. 1. The Christian Science Monitor proposes that three factors may have prompted the attack on the Islands at this time: politics, oil, and opportunity. Regarding the political factor, the military junta may have been trying to draw attention away from the slow political reform and the economic problems for which it is blamed. The emotionalism of the retaking of territory allegedly taken illegally from Argentina fostered the cohesiveness of nationalism. Like other nations, Argentina needs oil. With the possibility of rich deposits of oil around the Islands, possession of the Islands would be important. The opportunity to retake the Islands arose with an incident concerning salvage operations on South Georgia Islands. Argentina could have seen this as an opportunity to turn the incident into a resolution of the sovereignty issue.

⁸²*Id.* at 3, col. 3.

control of the Islands before the end of **1982**, the year which marked the sesquicentennial of the British ejection of the Spanish from the Islands.⁸³ Advance intelligence immediately before the attack indicated that the invasion was not spontaneous; President Reagan held a 50-minute telephone conversation with Argentine President Leopoldo Galtiere, requesting him "not to go forward" with the invasion.⁸⁴

Immediately after the Argentine attack, Great Britain broke off diplomatic relations with Argentina and asked the United Nations Security Council to demand that Argentina immediately withdraw its forces.⁸⁵ In addition, Britain began gathering a large naval force.⁸⁶ British Prime Minister Thatcher labeled the invasion an act of aggression⁸⁷ and Foreign Secretary Lord Carrington stated that, although diplomatic measures would be attempted to obtain the withdrawal of Argentina, "the U.N. Charter gives the members 'the inherent right to take action in self-defense. . . to expel or repel [an invader] by force.'"⁸⁸ President Galtieri, at that time facing domestic political unrest, stated that the Islands were part of Argentina and that force ~~was~~ necessary because Great Britain had "perpetrated its rule over the Islands 'through an interminable succession of delays and evasions' during diplomatic negotiations over the past **15 years**."⁸⁹

The day after the invasion, the United Nations Security Council adopted Resolution 502, which stated:

The Security Council,

Recalling the statement made by the President of the Security Council at the 2345th meeting of the Security Council on **1 April 1982** (5/14944) calling on the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to refrain from the use or threat of force in the region of the Falkland Islands (Islas Malvinas),

Deeply disturbed at reports of an invasion on **2 April 1982** by armed forces of Argentina,

⁸³*Id.* at col. 1.

⁸⁴Washington Post, Apr. 3, 1982, at A1, col. 4.

⁸⁵*Id.* at cols. 2-3.

⁸⁶Washington Post, Apr. 4, 1982, at A1, col. 5.

⁸⁷Washington Post, Apr. 3, 1982, at A24, col. 1.

⁸⁸*Id.*

⁸⁹*Id.* at A1, col. 4.

Determining that there exists a breach of the peace in the region of the Falkland Islands (Islas Malvinas),

1. *Demands* an immediate cessation of hostilities,
2. *Demands* an immediate withdrawal of all Argentina forces from the Falkland Island (Islas Malvinas),
3. Calls on the Governments of Argentina and the United Kingdom to seek a diplomatic solution to their differences and to respect fully the purposes and principles of the Charter of the United Nations.

Argentine Foreign Minister Nicanor Costa-Mendez stated that the illegal action by Great Britain in 1833 could not give rise to a legality at this **time**.⁹⁰ He also stated that the U.N. Charter provision barring the use of force to settle disputes cannot apply to illegal actions that predate the signing of the **Charter**.⁹¹ Prime Minister Thatcher indicated that negotiations would be attempted, but that a British naval force of forty ships could be expected to reach the Islands in two **weeks**.⁹² On April **5**, a naval force of thirty-six ships departed from Portsmouth, **England**.⁹³

During the next three weeks, many significant events, mainly in the realm of negotiations, were to take place. On April **5**, Foreign Minister Mendez, through the Organization of American States sought United States and Latin aid under the Rio **Treaty**.⁹⁴ At the direction of President Reagan, Secretary of State Alexander Haig, on April 7, began shuttling between Argentina and Great Britain **as mediator**.⁹⁵ The following day, Great Britain announced that, under Article **51** of the United Nations Charter and effective after midnight on Easter Sunday, a 200-mile maritime exclusion zone would be established around the **Islands**,⁹⁶ applying to Argentine naval

⁹⁰S/P.V. 2350 at 11 (Apr. 3, 1982).

⁹¹*Id.*

⁹²Washington Post, Apr. **4**, 1982, at A1, col. 6.

⁹³Washington Post, Apr. 6, 1982, at A1, col. 6.

⁹⁴*Id.* at col. 1. There is some question, concerning the applicability to the armed conflict, of the North Atlantic Treaty (6 Stat., pt. 2, at 2241 (1949)), and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), (General Secretariat, O.A.S., Basic Instruments of the Organization of American States 55, Treaty Series No. 61 (OEA/Ser. X/11 (English) (1981)). Although a thorough analysis of the applicability of these treaties is beyond the scope of this paper, it is this author's opinion that they do not apply. See North Atlantic Treaty, **art.** 5, which provides that it applies only to North America, the North Atlantic, and **Europe**. See Rio Treaty, **art.** 3, which limits the applicability of the treaty to self-defense situations. **As** it is this author's conclusion that Argentina was the aggressor, the treaty does not apply.

⁹⁵Washington Post, Apr. **7**, 1982, at A16, col. 1.

⁹⁶Washington Post, Apr. 8, 1982, at A1, col. 1.

vessels.⁹⁷ On April 10, the European Economic Community banned sales of arms to Argentina and, on April 11, the Community established a ban on imports from Argentina.⁹⁸

During the diplomatic efforts of Secretary Haig, the key obstacle to any agreement concerning withdrawal and administration over the Islands was the issue of sovereignty. Dispute over this issue had caused earlier negotiations to fail. Generally “Argentina’s insistence on—and Britain’s refusal to accept—an implicit recognition in any agreement of Argentina’s sovereignty over the Islands”⁹⁹ could not be reconciled. Great Britain emphasized that any agreement would require that the wishes of the Islanders, who were to remain associated with Great Britain, be given priority. Great Britain insisted that the principle of self-determination be applied to the Islanders.¹⁰⁰ Two days after British troops attacked and regained control of South Georgia,¹⁰¹ Argentina rejected Secretary Haig’s visit for the purpose of bringing new proposals concerning settlement of the situation¹⁰² and U.S. efforts to mediate ceased.

On April 28, Great Britain announced that on Friday, April 30, the 200-mile exclusionary zone existing around the Islands would include aircraft.¹⁰³ On April 29, Argentina established an exclusionary zone covering Argentina, the Islands, and South Georgia.¹⁰⁴ The United States imposed economic and military sanctions against Argentina on May 1.¹⁰⁵ On the same day, the British bombed three airfields on the Islands and Argentine planes attacked British warships.¹⁰⁶ On May 2, the United Nations Secretary General Javier Perez de Cuellar proposed a peaceful solution.¹⁰⁷ but his efforts subsequently failed when, on May 20, Britain halted negotiations.¹⁰⁸

The military effort to take the Islands intensified during May. The British naval force moved into sight distance of the Islands on May 10.¹⁰⁹ On May 14, British Commandos made a raid on an airstrip on

⁹⁷*Id.* at col. 4.

⁹⁸Washington Post, Apr. 11, 1982, at A1, col. 1.

⁹⁹Washington Post, Apr. 19, 1982, at A1, col. 1.

¹⁰⁰Washington Post, Apr. 23, 1982, at A25, col. 3.

¹⁰¹Washington Post, Apr. 27, 1982, at A1, col. 2.

¹⁰²Washington Post, Apr. 28, 1982, at A1, col. 3.

¹⁰³Christian Science Monitor, Apr. 30, 1982, at 1, col. 3.

¹⁰⁴Washington Post, Apr. 29, 1982, at A1, col. 4.

¹⁰⁵Washington Post, May 1, 1982, at A1, col. 5.

¹⁰⁶Washington Post, May 2, 1982, at A1, col. 1.

¹⁰⁷Christian Science Monitor, May 7, 1982, at 1, col. 1.

¹⁰⁸Washington Post, May 21, 1982, at A1, col. 5.

¹⁰⁹Washington Post, May 11, 1982, at A1, col. 5.

the **Islands**.¹¹⁰ British troops invaded the Islands on **20 May**.¹¹¹ After armed conflict lasting ten weeks, the British took the Islands; the Argentine commander surrendered on June 14.¹¹²

The casualties resulting from the war were numerous. Estimates of Argentina's casualties exceed 1,700, including 650 listed as dead or missing.¹¹³ British casualties are estimated to exceed 575, with 243 listed as dead or missing.¹¹⁴ The loss of military equipment, including naval vessels and aircraft, was enormous.¹¹⁵ The conflict resulted in political casualties as well; President Galtieri was forced to resign on June 17.¹¹⁶

IV. THE OPPOSING ARGENTINIAN AND BRITISH CLAIMS TO SOVEREIGNTY OVER THE ISLANDS

A. *BASES IN INTERNATIONAL LAW FOR CLAIMS TO ESTABLISH EXCLUSIVE APPROPRIATION OVER TERRITORY*

Twelve modes of acquiring or losing territory have generally been recognized in international law: discovery, occupation, accretion, erosion, avulsion, cession, conquest, prescription, abandonment, revolution, succession, and annexation.¹¹⁷ Additional modes espoused by some publicists and claimants generally have not been recognized in international law. For example, in *The Island of Palmas Case*,¹¹⁸ contiguity was argued as a basis for a claim to territory.¹¹⁹ However, the arbitrator held that sovereignty based on contiguity is not recognized in international law.¹²⁰ Argentina and Great Britain have not argued all of the twelve recognized modes in

¹¹⁰Washington Post, May 16, 1982, at A1, col. 5.

¹¹¹Washington Post, May 22, 1982, at A1, col. 3.

¹¹²Washington Post, June 16, 1982, at A1, col. 6.

¹¹³Washington Post, Jul. 3, 1982, at A1, col. 2.

¹¹⁴Washington Post, June 16, 1982, at A17, col. 2.

¹¹⁵Washington Post, Jul. 3, 1982, at A1, col. 2.

¹¹⁶Washington Post, June 18, 1982, at A1, col. 1.

¹¹⁷These twelve modes of acquiring or losing sovereignty over territory are discussed in 1 G. Hackworth, *Digest of International Law* §§ 58-66 (1940) [hereinafter cited as 1 Hackworth].

¹¹⁸*The Island of Palmas Case*, (U.S. v. Neth.), 2 U.N. Reports of Int'l Arbitral Awards 829 (1928) [hereinafter cited as *Palmas*].

¹¹⁹*Id.* at 837.

¹²⁰*Id.* at 869.

support of their claims. On the other hand, contiguity, generally unrecognized in international law, has been argued by Argentina.¹²¹ The modes of acquiring or losing territory that have been raised by Argentina and Great Britain as bases are discussed below.

B. EXAMINATION, ASSESSMENT, AND COMPARISON OF THE BASES FOR THE TERRITORIAL CLAIMS OF ARGENTINA AND GREAT BRITAIN

1. Methodology

A three-part process will be used to appraise the validity of the claims of Argentina and Great Britain. First, each basis of both claimants will be examined. The basis of the claim will be set forth as expressed by the claimant and then applied to the factual situation. The validity of using each basis to support a claim of sovereignty will be analyzed in light of established international law concerning that particular basis.

Second, the validity of Argentinian and British claims to sovereignty will be assessed individually based on the aggregate of all modes raised by each claimant.

Third, a comparative appraisal will be made of the competing claims of Argentina and Great Britain.

2. Examination of the Individual Bases For the Territorial Claim of Argentina

(a) Discovery

Argentina claims sovereignty over the Islands as a result of the discovery of the Islands by Spain.¹²² Argentina contends that Spain, through which Argentina maintains it has acquired its rights, discovered the Islands.¹²³ The general rules pertaining to discovery are set forth in *The Islands of Palmas Case*.¹²⁴ *Palmas* involved a dispute between the Netherlands and the United States concerning an island located between the Philippines, at that time a part of United States territory, and the Netherland Indies. The arbitrator held that mere

¹²¹Dr. Ruda, *supra* note 78, at 442.

¹²²Dr. Ruda, *supra* note 78, at 441.

¹²³*Id.*

¹²⁴*Palmas*, *supra* note 118.

discovery without further action on the part of a state vests no more than an "inchoate title," subject to becoming a "definitive title of sovereignty," by accomplishment of a further act within a reasonable time, indicating an intention to assume sovereignty.¹²⁵ Such subsequent action would create this "definitive title" and bar an interloping state from obtaining such title first. The *Clipperton*¹²⁶ case modifies this general rule. The case involved a dispute between France and Mexico over certain uninhabited islands.¹²⁷ *Clipperton* held that little more than mere discovery would suffice to establish sovereignty when islands are indisputably at the absolute disposition of the discovering country.¹²⁸

Based on the general rule as expressed in *Palm*, the mode of discovery would give Argentina no more than an inchoate title. Evidence of further acts indicating sovereignty would be necessary to create a definitive title. Under the rule as modified by *Clipperton*, Argentina could claim a definitive title if she could show indisputable control over the Islands after discovery.

Therefore, Argentina's claim to inchoate or definitive title to the Islands is justifiably disputed by Great Britain. Historically, whether the English or the Spanish discovered the Islands has not been established conclusively and Argentina cannot show that the Islands have been indisputably at her absolute disposition or that of Spain. Discovery is not sufficient to support Argentina's claim to sovereignty over the Islands.

(b) *Occupation*

Argentina claims sovereignty based on Spanish and Argentine occupation of the Islands.¹²⁹ Spain had settlements on the Islands during the period of 1767-1811.¹³⁰ Argentina had settlements during the periods of 1823-1824,¹³¹ 1826-1831,¹³² and 1832-1833.¹³³ Argentina formally took possession of the Islands in 1820.¹³⁴ Argentina argues that these periods of occupation support her claim of sovereignty.

¹²⁵*Palmas*, *supra* note 118, at 845.

¹²⁶Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island, 2 U.N. Reports of Int'l Arbitral Awards 1105, 26 Am. J. Int'l L. 390 (1931). [hereinafter cited as *Clipperton*].

¹²⁷*Id.* at 390.

¹²⁸*Id.* at 394.

¹²⁹Dr. Ruda, *supra* note 78, at 441.

¹³⁰Goebel, *supra* note 42, at 228, 433.

¹³¹*Id.* at 434-36.

¹³²*Id.* at 440.

¹³³*Id.* at 467.

¹³⁴*Id.* at 434.

Two requirements must be met for a country to acquire sovereignty by occupation.¹³⁵ The territory must be *res nullius*, that is, it belongs to no one, either because it originally was never taken or that it has been abandoned.¹³⁶ The *Palmas* case held that, for occupation to vest title, it must be "effective."¹³⁷ The arbitrator indicated that the country occupying the territory must be able to perform the rights and duties that are required of a sovereign in relation to its territory for the occupation to be "effective." The International Court of Justice in the *Eastern Greenland* case,¹³⁸ concerning claims of sovereignty by Norway and Denmark to parts of Eastern Greenland, set out required elements for claims to sovereignty, based on modes showing a continuing display of authority, such as occupation,¹³⁹ rather than modes such as treaties. Claims based on such modes require "the intention and will to act as sovereign and some actual exercise or display of authority."¹⁴⁰ Expressed in other terms, there must be a degree of administration and possession.¹⁴¹

Additionally, the court in *Eastern Greenland* held that the extent of the claim of sovereignty by another power must be considered in evaluating claims based on a continuing display of authority.¹⁴² The extent of control necessary to constitute effective occupation depends on the facts of each case. For example, in a situation where a state has undisputed disposition over the territory, such as in the *Clipperton* case, minimal acts indicating occupation would be necessary. Where competing claims are involved, evidence showing more extensive control or authority over the territory would be required to acquire sovereignty based on a mode such as occupation. The amount of territory over which a country can claim sovereignty based on an area of occupation depends on the nature of the occupation in relationship to the territory.¹⁴³ A settlement on a small island would be more likely to suffice as effective occupation of an island than would the same size settlement on the coast of a continent. A

¹³⁵2 M. Whiteman, *Digest of International Law* 1030 (1963) [hereinafter cited as 2 Whiteman].

¹³⁶*Id.*

¹³⁷*Palmas*, *supra* note 118, at 846.

¹³⁸*Legal Status of Eastern Greenland*, (Den. v. Nor.) 1933 P.C.I.J., ser. A/B, No. 63 [hereinafter cited as *Eastern Greenland*].

¹³⁹*Id.* at 45.

¹⁴⁰*Id.* at 46.

¹⁴¹I H. Lauterpact, *Oppenheim's International Law* 557 (8th ed. 1955) [hereinafter cited as 1 Lauterpact].

¹⁴²*Eastern Greenland*, *supra* note 128, at 46.

¹⁴³W. Hall, *A Treatise on International Law* 129 (A. Higgins ed., 8th ed. 1924) [hereinafter cited as Hall].

country can be considered to occupy the amount of territory which logically is a part of its immediate territory and is necessary for its security.

Applying this logic to Argentina's claim to sovereignty based on occupation, it is clear that Argentina had not "effectively" occupied the Islands. For example, it cannot be said that the Islands were *res nullius* when the Spanish drove the French out of East Falkland in 1767. In 1767, the British had a settlement on West Falkland. Neither Spain nor Britain has a sufficient factual basis to support a predominant claim of discovery. Therefore, at that time, 1767, Great Britain had as much a claim to the Islands as Spain. Consequently, Argentina cannot show that the Islands were *res nullius*.

Even conceding that the Islands were *res nullius* in 1767, "effective" occupation by Spain over the Islands would be questionable. East Falkland was possessed and administered, to a limited extent, by Spain and, subsequently, Argentina, during the period of 1767 to 1833. However, it is questionable whether Argentina "effectively" occupied all of the Islands. In fact, the settlements on the Islands were generally ineffective and failures. In addition, Great Britain had a settlement on West Falkland from 1765 until 1774. Through 1774, Spain did not "effectively" occupy the Islands.

During the period of 1774 until 1833, the Spanish and, subsequently, the Argentinians, had a settlement on the Islands, even though it was limited to East Falkland and was generally unsuccessful. However, Argentina's taking of the American sailing ships in 1831 does show an assertion of authority and attempt to control all the Islands. This display by Spain and Argentina of possession and administration is some support for the mode of occupation. However, the "effectiveness" of this occupation is still questionable.

Reasonable men may differ as to the validity of Argentina's use of the basis of occupation. In any case, it is clear that, even interpreting the evidence in a light most favorable to Argentina and by applying the rules pertaining to occupation in a manner also most favorable to Argentina, it cannot be concluded that the occupation was such as to give Argentina definitive title. The evidence of Great Britain's sovereignty cannot be ignored. Great Britain left the Islands in 1774 for economic reasons. However, a plaque was left on West Falkland indicating that only a temporary absence was intended. Other nations questioned Argentinian authority over the Islands. For example, Argentinian attempt to restrict the taking of seals from the Islands resulted in the incident with the United States. With an impartial analysis of the evidence, one must conclude that Argentina,

as a successor to Spain, did not obtain definitive title by occupation of the Islands prior to 1833.

(c) *Prescription*

The evidence on which Argentina relies to show occupation could also be used to raise the mode of prescription as a basis for its claim to sovereignty.¹⁴⁴ Prescription entails a possession of territory of such length that it is conceded that the possessor has title to the territory. One publicist has stated that “prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first existence being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so.”¹⁴⁵ The international law principle of prescription is similar to the principle of prescription with which municipal lawyers are familiar, although the purpose of prescription in international law is to maintain minimum world order and inclusive values, rather than to protect the legal rights of a sovereign and exclusive values.¹⁴⁶

Actually, there are two forms of prescription. These forms have been labeled as “acquisitive” and “extinctive” prescription.¹⁴⁷ Acquisitive prescription involves the long-term peaceful possession of territory with no other claimant protesting the possession. In the *Palmus* case, the arbitrator recognized acquisitive prescription and set forth guides concerning its applicability, such as in cases of open and notorious possession.¹⁴⁸ Acquisitive prescription gives any state possessing a claim the opportunity to raise it. Extinctive prescription involves the possession, although originally wrongful, of such a long term that it ultimately stops the deposed state from asserting its claim.¹⁴⁹ No exact rules exist regarding either type of prescription. The period of time necessary to vest title in the possessor has not been established. Whether title has vested must be determined by an analysis of the facts in each case.

¹⁴⁴Dr. Ruda, *supra* note 78, at 441.

¹⁴⁵Hall, *supra* note 143, at 143.

¹⁴⁶*Id.* Whether a value is considered exclusive or inclusive depends on the extent to which the value is shared with all or a portion of the world community. A value that is shared by a large portion of the world community is inclusive; one shared by a small portion of the world community or only one nation is considered to be exclusive. *See* M. McDougal & F. Feliciano, *Law and Minimum World Public Order* 182 (1961) [hereinafter cited as *McDougal & Feliciano*].

¹⁴⁷Whiteman, *supra* note 125, at 1062.

¹⁴⁸*Palmas*, *supra* note 118, at 868.

¹⁴⁹J. Brierly, *The Law of Nations* 169 (H. Waldock ed. 6th ed. 1963) [hereinafter cited as *Brierly*].

Diplomatic protests can be a sufficient means of impeding the application of the mode of prescription.¹⁵⁰ How long such protest will delay the application of this mode is not clear. However, if an established international body before which cases involving questions of sovereignty can be brought is available and only diplomatic protests are continually asserted with no attempt to bring the case before the body, such protests will not stop the state in possession from gaining title by application of the mode of prescription.¹⁵¹ For example, in 1955, Great Britain filed a unilateral application with the International Court of Justice to stop Argentina and Chile from obtaining any rights by prescription over the dependencies of the Islands.¹⁵² This application was withdrawn after Argentina and Chile declined to respond.¹⁵³

When applying the rules of prescription, it is helpful to apply the rules of acquisitive and extinctive prescription separately. Looking first at the rules of acquisitive prescription, the extent of possession by Spain and Argentina is the determinative issue. Although Spain and Argentina had consecutive settlements on the Islands from 1767 until 1833, it is questionable if they actually had possession of the Islands during this period. Great Britain had a settlement on West Falkland from 1767 until 1774. Additionally, when the British withdrew from West Falkland in 1774, a plaque was left announcing Great Britain's claim to the Islands. The Spanish settlement on East Falkland was not successful and generally ineffective. In fact, as evidenced by President Cleveland's statement, the settlements before and after Argentina succeeded to Spain's rights to the Islands were generally piratical and derelict. Although the state of the settlement would not necessarily detract from its official status as a government settlement, it does belie Argentina's claim of "open and notorious" possession. The settlements on East Falkland were so ineffective and unsuccessful that it was unnecessary for Great Britain to state its claim. Argentina's claim, under the rules applicable to acquisitive prescription, is not supportable.

The same conclusion results when the rules concerning extinctive prescription are applied. Even if the original possession by Argentina, as to Great Britain, was wrongful, extinctive prescription can be applied if the requirements for its application can be met. How-

¹⁵⁰ Hackworth, *supra* note 117, at 442.

¹⁵¹ *Id.*

¹⁵² Brierly, *supra* note 138, at 171. This case is reported as *Anarctica Cases (U.K. v. Arg., U.K. v. Chi.)*, 1956 I.C.J.

¹⁵³ *Id.* at 105.

ever, there is no evidence that Argentina's possession was wrongful. The problem is that the possession by Spain and Argentina was such that it was ineffectual to extinguish Great Britain's claim to sovereignty. The possession by Argentina was not sufficient to bar Great Britain's subsequent claim to possession. There was no need for Great Britain to protest the settlement. Neither acquisitive nor extinctive prescription give Argentina a basis for its claim to sovereignty.

(d) Abandonment

Argentina claims that Great Britain abandoned her rights to the Islands when she removed the settlement on West Falkland in 1774.¹⁵³ Abandonment requires that the country intend to relinquish sovereignty and actually abandon the territory.¹⁵⁴ When the British left West Falkland in 1774, a plaque was left patently stating the intention not to abandon the Islands. Although Great Britain removed the settlement in 1774, it cannot be established that she abandoned the Islands. The mode of abandonment does not support Argentina's claim to sovereignty over the Islands.

(e) Succession and Revolution

Argentina relies heavily upon the mode of succession¹⁵⁵ as a basis to support its claim to sovereignty over the Islands.¹⁵⁶ Argentina contends that it inherited whatever rights Spain had to the Islands when Argentina received its independence from Spain, as the Islands were part of the viceroyalty of Argentina. However, although succession and revolution are valid means of gaining title to sovereignty,¹⁵⁷ Argentina's title could be no greater than the title Spain held. Since Spain, at the time of Argentina's independence, had questionable title, Argentina's use of the modes of succession and revolution are ineffective, except for the purpose of showing the derivation of its claims to title.

(f) Conquest

The mode of conquest is discussed only to show its inapplicability. Argentina does not claim that title to the Islands was obtained by the Spanish conquest over the British in 1770. Nor does she claim that her invasion on April 2, 1982 results in title by conquest. Great

¹⁵⁴Ruda, *supra* note 78, at 441.

¹⁵⁵Lauterpact, *supra* note 131, at 580.

¹⁵⁶Ruda, *supra* note 78, at 441.

¹⁵⁷1 Hackworth, *supra* note 117, at 444.

Britain does not claim title by conquest as a result of her reoccupation of the Islands in 1833, though Argentina has felt obligated to denounce the use of force in 1833 as an act designed to obtain title.¹⁵⁸

In 1770, when Spain drove England from West Falkland, and, in 1833, when England drove the Argentinian settlement out of East Falkland, acquisition of territory by conquest was recognized by states and by the preponderance of international legal writers.¹⁵⁹ Therefore, some argument could be, but has not been, made by the evicting party that, in 1770 or in 1833, a conquest took place. In 1982, however, after the denunciation of the use of war as a means of effecting rights in the Covenant of the League of Nations¹⁶⁰ and the Charter of the United Nations,¹⁶¹ the use of conquest to change established rights would be considered illegal. This may be a factor in the failure of Argentina and Great Britain to raise the mode of conquest as a basis for their claims to sovereignty over the Islands. In any event, claiming title by conquest would admit that another state held title to the territory, a point which neither state wishes to concede.

(g) *Contiguity*

Argentina has impliedly raised contiguity¹⁶² as a basis for its claim to sovereignty over the Islands when stressing the physical proximity of the Islands to Argentina.¹⁶³ Not raising contiguity directly may be because it is the most controversial basis for Argentina's claim. In fact, contiguity has generally not been recognized in international law as a mode of acquiring territory.¹⁶⁴ Assuming *arguendo* that contiguity is a proper mode of obtaining sovereignty, it does not support Argentina's claim. The Islands are an identifiable independent unit lying 500 miles from Argentina. Even considering that there is some value to the Islands in maintaining certain ties to Argentina, such as an economic relationship, the Islands are too remotely located to support a claim of sovereignty by contiguity.

¹⁵⁸Ruda, *supra* note 78, at 441.

¹⁵⁹1 Lauterpact, *supra* note 131, at 570.

¹⁶⁰League of Nations Covenant, arts. 11, 12, 15.

¹⁶¹U.N. Charter, art. 2, paras. 3, 4.

¹⁶²Contiguity applies to islands, while continuity is applied to territory that is not separated by water. 1 Hackworth, *supra* note 117, at 407.

¹⁶³Ruda, *supra* note 78, at 442.

¹⁶⁴Palmas, *supra* note 118, at 869.

3. *Assessment of the Totality of Argentina's Claim to Sovereignty*

Argentina does have some grounds upon which to present a claim of sovereignty over the Islands. For example, Spanish explorers may have discovered the Islands. Spain and, subsequently, Argentina did have settlements on the Islands for a significant number of years. Argentina is entitled to claim whatever rights in the Islands that Spain held immediately prior to Argentina's independence. But, after critically reviewing the bases for Argentina's claim to sovereignty, one must conclude that Argentina never developed definite title to the Islands. None of the bases argued by Argentina are conclusive in establishing sovereignty. However, Argentina's claim cannot be considered in a vacuum, but must be compared with Great Britain's claim before a correct conclusion can be made regarding what country has the predominant claim over the Islands. Before these competing claims can be compared, the bases of Great Britain's claim to sovereignty must be evaluated individually.

4. *Examination of the Individual Bases for the Territorial Claim of Great Britain*

(a) *Discovery*

Great Britain, as Argentina, argues that the mode of discovery supports its claim of sovereignty over the Islands.¹⁶⁵ The primary basis for this argument is that the Englishman, Captain Davis, probably was the first to sight the Islands in 1592.¹⁶⁶ However, as seen in analyzing Argentina's claim of discovery, whether the English, Spanish, or a third nation discovered the Islands cannot be established conclusively. Even assuming that Great Britain did discover the Islands, under the *Palmas* case, this would at best establish only an inchoate title. Definitive title would have to be established using other modes. Great Britain's claim of sovereignty based on discovery is no stronger than Argentina's claim based on this same mode.

(b) *Occupation*

Great Britain has relied upon the mode of occupation to bolster its claim to sovereignty.¹⁶⁷ Since first settling the Islands in 1766, Great Britain has occupied the Falklands for approximately 157 of the last 216 years. However, for occupation to establish sovereignty, Great Britain must show that the Islands were *res nullius* at the time of occupation and that occupation was effective. However, the Islands

¹⁶⁵British Information Office, *supra* note 5, at 2.

¹⁶⁶*Id.*

¹⁶⁷British Foreign Office, *supra* note 76, at 2-4.

were not *res nullius* in 1766. The French had a settlement on East Falkland and, at the same time, the Spanish were asserting their claim. The Islands did not attain *res nullius* status in 1833, when the British evicted the Argentine settlement. Any claim by Great Britain based on the mode of occupation is defective for failure to meet this first element. Great Britain's occupation of the Islands from 1766 to 1774 was not effective because the French and, subsequently, the Spanish, were also exercising control over the Islands during this period. From 1774 until 1833, the period of British absence from the Islands, the effectiveness of occupation by them over the Islands is questionable. Britain showed the intent and will to act as a sovereign over the Islands by leaving a plaque asserting her sovereignty, but there is no evidence of actual exercise or display of that authority. Assuming that Great Britain's occupation since 1833 has been effective, Great Britain's argument is still defective for failure to meet the first requirement, that the territory be *res nullius* at the time of discovery.

(c) *Prescription*

Great Britain depends heavily on the mode of prescription to support her claim to sovereignty over the Islands.¹⁶⁸ The British argue that they have been in peaceful and continuous possession of the Islands since 1833, a period of 149 years. They contend that continuous possession for such a long period conclusively proves their right of sovereignty over the Islands.

In analyzing Great Britain's claim of sovereignty by prescription, the rules pertaining to acquisitive and extinctive prescription will be applied separately. Acquisitive prescription, the long-term peaceful possession of territory with no other claimant protesting the possession, does not support Great Britain's claim. Great Britain has been in continuous possession of the Islands since 1833. This possession has been open and notorious. Argentina at the same time has continuously protested Great Britain's possession.¹⁶⁹ Since Argentina has continued to protest, Great Britain's possession has not been peaceful as is required for obtaining sovereignty by acquisitive prescription. Even though Great Britain has possessed the Islands for 149 continuous years, her claim is not supported by acquisitive prescription.

¹⁶⁸*Id.* at 4.

¹⁶⁹The fact of protesting, not the possible claim to title that Argentina had in 1833, is the key factor in keeping alive the claims of Argentina under the mode of prescription.

Applying the rules concerning the mode of extinctive prescription to Great Britain's claim results in a different conclusion. Extinctive prescription involves possession, although originally wrongful, of such a long term that it precludes the deposed state from asserting its claim. As the rules pertaining to extinctive prescription allow for the original possession of the territory under consideration to be wrongful, it will be assumed for purposes of this analysis, that Great Britain's taking of the Islands in 1833 was the original possession and that such possession was wrongful. Further, it is assumed that Argentina was wrongfully evicted from the Islands in 1833.

Though Great Britain has been in open and notorious possession of the Islands since 1833, it has been conceded that Argentina has continuously protested Great Britain's presence. Acquisition of sovereignty by extinctive prescription can be stopped for a period of time by diplomatic protests from the deposed country. However, there is a time limit as to how long such protests will delay the extinction of the claim of the deposed country. From 1833 until the inception of the League of Nations, the only method of peaceful protest generally available to Argentina was through diplomatic channels. Argentina could not have been expected to do more than protest. Neither could she have been required to do more from a military standpoint, as a nation is not required to resort to aggression and disrupt world order to keep a claim alive. Arguably, between 1833 and the establishment of the League of Nations, Great Britain could not cause the extinction of Argentina's claim and did not acquire sovereignty through prescription. However, since this was such a long period of time, exceeding eighty years,¹⁷⁰ one could conclude under general principles of international law¹⁷¹ that this was a sufficient period to extinguish Argentina's claim in spite of her diplomatic protests.

Regardless of the conclusion reached above, however, the establishment of the world courts changed the situation so that diplomatic protests were no longer sufficient to keep Argentina's claim to sovereignty alive.¹⁷² The League of Nations and, later, the United Nations provided bodies capable of adjudicating the competing

¹⁷⁰Argentina and Great Britain were both admitted as members of the League of Nations on Jan. 10, 1920. *See* Information Section of the League of Nations Secretariat, *Essential Facts About the League of Nations* 38 (3d ed. rev. 1939). The Permanent Court of International Justice was open to all members without condition. *Id.* at 110. Argentina and Great Britain became members of the United Nations in 1945. *See* 1A *Comprehensive Handbook of the United Nations* 457-59 (K. Min-Chaun ed. 1978).

¹⁷¹J. Brownlie, *Principles of Public International Law* 148 (1966).

¹⁷²*Id.*

claims between Argentina and Great Britain. To avoid losing her claim by extinctive prescription, Argentina should have submitted her claim to the League of Nations, the Permanent Court of International Justice or the International Court of Justice. Argentina did not.

Argentina did make statements concerning its claims of sovereignty as early as 1964, during the discussion of decolonization of the Falkland Islands before the Special Committee at the United Nations. Of course, the Special Committee is not an adjudicating organ of the United Nations. Such statements would not keep the claim from being extinguished. In addition, Argentina entered into bilateral negotiations with Great Britain concerning the question of sovereignty over the Islands. This is a means of settling disputes specified in Article 33 of the United Nations Charter. As such, bilateral negotiations may, depending upon the facts, be enough to stop extinguishment, or at least delay it. In this case, however, Argentina made it clear that "the dispute with the United Kingdom can be settled only by the restoration of the Islands to the national heritage of the Argentina Republic."¹⁷⁴ On the other hand, Great Britain has stated that it "cannot agree to any settlement of those differences which is not in accordance with the wish of the Islanders. . . . [and it]. . . . is not questioned that it is the firm wish of **the** Islanders to remain British."¹⁷⁵ The positions are irreconcilable. The issue had not been settled in 149 years, and the recent **armed** conflict has shown that, in this case, bilateral negotiations were futile. The two nations have taken positions that realistically cannot be settled, unless they are brought before an adjudicating body. Bilateral negotiations at least under the circumstances existing in this dispute are not sufficient to stop the extinguishment of Argentina's claims of sovereignty.

In 1955, Great Britain unilaterally filed an application with the International Court of Justice to stop the encroachments on the Islands' Dependencies by Argentina and Chile. Argentina did not apply to the Permanent Court of International Justice or International Court of Justice even at this time. For over 50 years prior to the

¹⁷³Ruda, *supra* note 78, at 442.

¹⁷⁴Letter dated Mar. 25, 1975, from the Permanent Representative of Argentina to the United Nations Addressed to the Secretary-General, *reprinted in* 31 GAOR (1055th and 1056th mtgs.) Supp. (No. 23) at 193, U.N. Doc. A/31/23 Rev. 1 (1976).

¹⁷⁵Letter dated Mar. 3, 1976, from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the Chairman of the Special Committee, *reprinted in* 31 GAOR (1055th and 1056th mtgs.) Supp. (No. 23), at 195-96, U.N. Doc. A/31/23 Rev. 1 (1976).

armed conflict of April 2, 1982, Argentina failed to submit the dispute to a body capable of adjudicating the competing claims. There is no evidence that Argentina was in any way impeded from taking the issue of sovereignty over the Islands before these courts. One must conclude that Argentina failed to do so through neglect. Argentina's failure to use available world courts greatly enhances Great Britain's claim to sovereignty through extinctive prescription. It is reasonable to assume that Great Britain acquired definitive title to the Islands at this time.¹⁷⁶ However, in any case, there is little reasonable doubt that Great Britain acquired definitive title to the Islands by prescription before 1982.

The purpose of the mode of prescription supports this conclusion. Prescription assists in maintaining minimum world order and protecting inclusive values.¹⁷⁷ The intent is to preserve world order even if a nation fulfills some exclusive values by committing wrongful acts. To foster the minimum world order system, the claims of a deposed country are assumed to be extinguished after a period of time. Applying the purpose of prescription to this case compels the conclusion that Argentina's claim was extinguished long before 1982. World order was disrupted by Argentina's invasion of the Islands. The disruption potentially could have been much greater if other nations had become involved.

5. *Assessment of the Totality of Great Britain's Claim to Sovereignty*

Upon reexamination, none of the recognized legal modes, except prescription, gives Great Britain a conclusive claim to sovereignty. Discovery, which would have given Great Britain inchoate title at most, is easily attacked since discovery of the Islands is factually in dispute. The mode of occupation does not give Great Britain definitive title as the Islands were not *res nullius* when occupied by Great Britain in 1833 and Great Britain's occupation prior to 1833 was not effective.

Only by extinctive prescription can Great Britain claim definitive title to the Islands. Even though Great Britain may have illegally occupied the Islands in 1833 and Argentina has continuously protested

¹⁷⁶As Great Britain rightly could consider that it had acquired title to the Islands by the mode of extinctive prescription, it had no need to file a brief concerning the Islands. It was concerned about Argentina and Chile acquiring title by prescription to the Islands Dependencies; therefore, Great Britain took the necessary action to stop the maturing of title by filing the application with the International Court of Justice.

¹⁷⁷Hall, *supra* note 143, at 143.

Great Britain's possession diplomatically, Great Britain has acquired title to the Islands by extinctive prescription. Argentina did not take advantage of the available international bodies for peaceful adjudication of the disputed title.

6. Comparison of the Competing Claims of Argentina and Great Britain

In comparing the competing claims of Argentina and Great Britain, it must be conceded that both countries have a basis for their claims to sovereignty over the Islands. Both nations can offer factual support for more than one legally recognized mode. Each can show some factual support for the modes of discovery, occupation, and prescription. However, except for Great Britain's basis of extinctive prescription, neither country's evidence supporting those legal modes is stronger than the other's. Assuming that Argentina acquired definitive title to the Islands by occupation or prescription before 1833, Great Britain's claim to sovereignty by extinctive prescription since 1833 is stronger.

When a comparison of the competing claims of Argentina and Great Britain is made, it is conclusive that Great Britain had, under the doctrine of extinctive prescription, conclusively acquired definite title to the Islands before 1982.

V. APPLICABILITY OF THE PRINCIPLE OF SELF-DETERMINATION

Because self-determination is a relatively recent principle of international law and is still in an evolutionary stage and subject to conflicting opinions, it is necessary to review its development and understand its current meaning prior to attempting to apply the principle to the dispute over the Islands. The review will consist of an examination of the principle before the establishment of the United Nations, application of the principle by the United Nations generally, and specific expressions by the United Nations concerning applicability of the principle to the Islands. After this review, the competing claims of Argentina and Great Britain concerning the application of the principle of self-determination will be analyzed.

A. SELF-DETERMINATION PRIOR TO THE ESTABLISHMENT OF THE UNITED NATIONS

1. The Origin and Early Development of Self-Determination

The concept of self-determination had its origin in the French and

American revolutions.¹⁷⁸ At that time, the concept was a “simple corollary for democracy.”¹⁷⁹ This developed as the Divine Right of Kings was transformed into the Divine Right of People.¹⁸⁰ The people, who before were considered individual members, were now considered a distinct group, clothed with sovereignty, labeled a nation, and linked to a state.¹⁸¹ The right of this group to chose its own governing process extended to the right to determine whether to be a part of a state, or an independent state.¹⁸² This transformation has been stated as follows:

The effect of Revolutionary ideology was to transfer the initiative in state-making from the government to the people. Nation states had formerly been built up, in the course of centuries, from above, by the influence of government: henceforth they were to be made much more rapidly from below by the will of the people. The logical consequence of the democratisation of the idea of the state by the revolutionaries was that nationalism took the form of the theory of national self-determination.¹⁸³

The nineteenth century, with its struggles against autocratic states, saw the marriage of the nationalistic and democratic movements within the concept of self-determination.¹⁸⁴ In this regard, the “nation state was recognized as the political expression of the democratic will of the people.”¹⁸⁵

2, *Self-Determination as a Concept in International Law*

Prior to the twentieth century, the principle of self-determination was generally limited to the concern of individual nations. In the early years of the twentieth century, its entry into the international sphere was initiated by the vicious clashes in Europe between nationalistic groups attempting to gain the power to chose their own governing process and the effects of World War I.¹⁸⁶ World War I, “a particularly catastrophic war which shook the peace and security of the entire world, was the result of the consequences of self-determination on an international level.”¹⁸⁷

¹⁷⁸J. Saxena, *Self-Determination: From Biafra to Bangladesh* 2 (1978).

¹⁷⁹A. Cobban, *The Nation State and National Self-Determination* 114 (1970).

¹⁸⁰*Id.* at 40.

¹⁸¹*Id.* at 40-41.

¹⁸²*Id.* at 41.

¹⁸³*Id.*

¹⁸⁴*Id.* at 43.

¹⁸⁵*Id.*

¹⁸⁶W. Ofuately-Kodjoe, *The Principle of Self-Determination in International Law* 183 (1977).

¹⁸⁷*Id.*

In 1918, President Woodrow Wilson, a leading proponent of the concept of self-determination, in a presentation to Congress, set forth the principle giving a relatively clear statement of the concept: "National aspiration must be respected, peoples may now be dominated and governed only by their consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril."¹⁸⁸ It is interesting to note that the concept did not attain such an explicit expression in the Covenant of the League of Nations. It was, however, widely accepted after World War I.

Although the principle of self-determination became a recognized concept in the international sphere and a relatively clear expression of it was available, its applicability was not evident. It was accepted that the principle was to apply to "natural" political units.¹⁸⁹ However, the composition of these "natural" political units were not specifically defined. It was generally accepted that the units would be "self-evident entities," or "nations, as history had delimited them."¹⁹⁰ Application of this principle to certain units, such as those of an ethnic nature,¹⁹¹ created a problem which was not resolved before World War II. Abuse of the principle added to the difficulty of determining its applicability. For example, Adolf Hitler espoused the principle of self-determination and then used it as a basis for his territorial expansion immediately prior to World War II.¹⁹²

During World War II, as in World War I, one of the purposes for which the Allies fought was to further the principle of self-determination.¹⁹³ The focus of the principle at that time was still on the national unit.¹⁹⁴ This emphasis was to see a change with the establishment of the United Nations.

¹⁸⁸Address by President Wilson to Congress, Feb. 11, 1918, reprinted in H. Johnson, *Self-Determination within the Community of Nations* 33 (1967).

¹⁸⁹L. Buchheit, *Succession: The Legitimacy of Self-Determination* 6 (1978).

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²Schoenberg, *Limits on Self-Determination*, 6 *Israel Y.B. On Human Rights* 91, 99 (1976).

¹⁹³H. Johnson, *Self-Determination within the Community of Nations* 34 (1967).

¹⁹⁴*Id.* at 36.

B. SELF-DETERMINATION UNDER THE UNITED NATIONS

1. Generally.

It was at the San Francisco Conference in 1945 that there appeared to be a change in the focus of the principle of self-determination from the emphasis on national self-determination to that of self-determination of peoples. Among the goals of the United Nations was to provide for the respect of the "self-determination of peoples."¹⁹⁵ The official interpretation of the Coordination Committee concerning the insertion of the phrase, although actually of limited aid in interpreting its insertion, was:

The Committee understands that the principle of equal rights and that of self-determination are two complementary parts of one standard of conduct;

that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace;

that an essential element of the principle in question is a free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years.¹⁹⁶

The official interpretation does make it clear that the principle of self-determination was deemed crucial to friendly relations and world peace. The phrase was adopted as part of Article 1(2) of the United Nations Charter, with no clear understanding "of the difference, if any, among 'nations,' 'peoples,' and 'states' . . ."¹⁹⁷ This phrase remained to be clarified by subsequent actions and interpretations of the United Nations.

Article 55 of the Charter also specifically declares the principle of self-determination of the peoples. Article 55 states in part: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall. . . ."

¹⁹⁵U.N. Charter art. 1, para. 2.

¹⁹⁶Documents of the United Nations Conference on International Organization, San Francisco, 1945, 455 (1945).

¹⁹⁷R. Russell, A History of the United Nations Charter 813 (1968).

The principle of self-determination of peoples is noted in Article 73, concerning the administration of non-self-governing territories, and in Article 76, concerning trust territories. Article 73b provides that one of the ends of the administration system for non-self-governing territories is “to develop self-government. . . [by taking into account]. . . the political aspirations of the peoples. . . .” Article 76b states that one of the basic objectives of the trusteeship system is to progress “towards self-government or independence. . . [taking into consideration]. . . the freely expressed wishes of the peoples concerned. . . .”

In addition to the United Nations Charter, other expressions of the United Nations contain statements of the principle of self-determination of peoples. For example, Article 21 of the Universal Declaration of Human Rights¹⁹⁸ reads in part: “The will of the people shall be the basis of the authority of government.” In addition, the concept of self-determination was specifically made a fundamental human right in 1961 in General Assembly Resolution 1514(XV), entitled “Declaration on the Granting of Independence to Colonial Countries and Territories.”¹⁹⁹ The resolution states in part:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.
2. All peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

That self-determination ~~was~~ a right of peoples was reinforced in 1966, when the General Assembly adopted Resolution 2200(XXI)²⁰⁰ which contained the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The identical Article 1 of each covenant reads in part:

1. 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.

¹⁹⁸G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948).

¹⁹⁹G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16), at 66, U.N. Doc. A.4683 (1961).

²⁰⁰G.A. Res. 220, 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1967).

....

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the United Nations Charter.

Following the adoption of this and previous resolutions, there was left no doubt that self-determination is a right of the peoples.

The next major step was taken by the General Assembly by consensus in 1970 with the adoption of Resolution 2625(XXV), entitled 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.'²⁰¹ This resolution recognized the concept of self-determination as a principle of international law, and in pertinent part states:

The General Assembly,

....

Convinced that the subjection of people to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitute a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter,

....

Considering that the progressive development and codification of the following principles:

²⁰¹G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), at 121, U.N. Doc. A/8028 (1971).

(a) The principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

. . . .

(b) The principle of equal rights and self-determination of peoples. . . .

so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among states,

1. *Solemnly proclaims* the following principles: *The principle that states shall refrain in their 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*

. .

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, 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, in order:

(a) To promote friendly relations and co-operation among states; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory

without distinction as to race, creed or colour,

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.

General Part

2. Declares that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles,

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter, taking into account the elaboration of these rights in this Declaration,

3. Declares further that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all states to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

One aspect of the applicability of the principle of self-determination that was not made clear in the Declaration is that of determining what entity composes a "people." In fact, there exists no clear definition of what entity comprises a "people." Elements have, however, been compiled from discussions of the United Nations on the subject of the definition of "people" that are helpful for determining the eligibility of an entity for the application of the principle of self-determination:

These elements can be taken into consideration in specific situations in which it is necessary to decide whether or not an entity constitutes a people fit to enjoy and exercise the right of self-determination:

(a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;

(b) It implies a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population;

(c) A people should not be confused with ethnic, religious, or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights.

With regard to minorities, there is one principle of special importance. This is the principle developed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625(XXV)), first proclaimed in the Declaration on the granting of independence to colonial countries and peoples; it was subsequently echoed in many other resolutions of the United Nations General Assembly. This principle reads as follows:

Nothing in the foregoing paragraphs [formulating the principle of equal rights and self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

Thus, according to this text, the principle of self-determination cannot be regarded as authorizing dismemberment or amputation of sovereign States exercising their sovereignty by virtue of the principle of self-determination of peoples.²⁰²

In addition to the restrictions on the definition of the word "peoples," there is a restriction on the general applicability of the principle of self-determination; self-determination generally is not applicable when it involves the territorial integrity of a nation. In addition to its expression in other documents, such as the Declaration on Principles of International Law Concerning Friendly Relations

²⁰²A. Cristescu, *The Right of Self-Determination* 41 (1981)

and Co-operation Among States in Accordance with the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Territories, Article 2(4) of the United Nations Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity. . . of any state. . ."

That the principle of territorial integrity could take precedence over self-determination was clearly stated in an advisory opinion of the International Court of Justice.²⁰³ The Court had been asked to opine whether neighboring Morocco and Mauritania had any claim, based on territorial integrity, that would bar the application of the principle of self-determination under General Assembly Resolution 1514(XV) to the Western Sahara. Although the court held in that particular case that self-determination would take precedence over the claims of territorial integrity, it is significant that the court stated:

The materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the court has not found legal ties of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara, and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the **territory**.²⁰⁴

Therefore, it appears that territorial integrity can render the principle of self-determination inapplicable in a situation where the facts call for such an outcome.

A gauge to determine whether or not a peoples have attained political self-determination have been set forth in General Assembly Resolution 2625(XXV). Resolution 2625(XXV) in pertinent part states: "The establishment **of** a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." It immediately becomes apparent that the type of government attained must be based on the free will of the people. Second, self-determination does not necessarily require the establishment of a separate state; the type of political entity is to be the choice of the people.

²⁰³Advisory Opinion on Western Sahara (Spain v. Morocco v. Mauritania), 1975 I.C.J.

²⁰⁴*Id.* at 68.

Before examining the actions of the United Nations that are particular to the Islands, it is helpful to further analyze the application of the principle of self-determination to determine its general purpose. The principle of self-determination has many facets. The general purpose behind the concept of self-determination is the development of friendly relations between nations and universal peace. This was the purpose that was expressed in its early development and is still the prime consideration as expressed in the recent resolutions. Therefore, any analysis of the application of the principle of self-determination must take this primary purpose into consideration.

This completes the analysis of the development of the principle of self-determination in the United Nations. Before applying the results of this analysis to the Islands, it is important to see what action has already been taken by the United Nations concerning the Islands. This will facilitate an evaluation of the action that already has been taken, and a determination of what further actions should be undertaken.

2. *As applied to the islands*

In addition to the general resolutions discussed above, the United Nations has adopted specific resolutions pertaining to the Islands. Almost five years after Resolution 1514(XV) was adopted, the most significant resolution specifically concerning the Islands was adopted. Resolution 2065(XX), entitled "Question of the Falkland Islands (Malvinas)" was adopted on December 16, 1965,²⁰⁵ and states in pertinent part:

Noting the existence of a dispute between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the said Islands,

1. *Invites* the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to proceed without delay with the negotiations recommended by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United Nations and of General Assembly resolution

²⁰⁵G.A. Res. 2065, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/4354 (1966).

1514(XV) and the interests of the population of the Falkland Islands (Malvinas);

The Conclusions and Recommendations of the Special Committee noted in the Resolution read:

(a) The Special Committee examined the situation in the Non-Self-Governing Territory of the Falkland Islands (Malvinas) and heard the statements of the representative of the Administering Power and the representative of Argentina;

(b) The Special Committee confirms that the provisions of the Declaration on the Granting of Independence to Colonial Countries and Peoples apply to the Territory of the Falkland Islands (Malvinas);

(c) The Special Committee notes the existence of a dispute between the Government of the United Kingdom of Great Britain and Northern Ireland and that of Argentina concerning sovereignty over the Falkland Islands (Malvinas);

(d) The Special Committee invites the Governments of the United Kingdom and Argentina to enter into negotiations with a view to finding a peaceful solution to this problem, bearing in mind the provisions and objectives of the United Nations Charter and resolution 1514(XV) (of 14 December 1960), the interests of the population of the Islands and the opinions expressed during the course of the general debate;²⁰⁶

Reading the resolution and the recommendations and conclusions of the Committee together, several matters become apparent. One is that Resolution 1514(XV) applies to the Islands. Another is that the issue of sovereignty is considered the most significant issue regarding the settlement of the dispute and that the method selected to resolve the dispute is bilateral negotiations between the two countries. Furthermore, the wording of the documents and the emphasis placed on the sovereignty issue appear to deemphasize the principle of self-determination. In this regard, the wording emphasized that the "interests" of the Islanders and not their "wishes" are to be considered. Therefore, even though Resolution 1514(XV), presu-

²⁰⁶19 U.N. GAOR Annex 8 (Agenda Item 21, addendum item part 1), at 439, U.N. Doc. A/5800/Rev. 1 (1964-65).

ably including the principle of self-determination, is to be applied, the emphasis is not in that direction.

In 1973, almost eight years after Resolution 2065(XX) was adopted, the General Assembly adopted Resolution 3160(XXVIII), entitled "Question of the Falkland Islands (Malvinas)." In this resolution, the General Assembly, after recalling Resolutions 1514(XV) and 2065(XX) and expressing concern that eight years had passed since 2065(XX) had been adopted, stated in pertinent part:

Mindful that resolution 2065(XX) indicates that the way to put an end to this colonial situation is the peaceful solution of the conflict of sovereignty between the Governments of Argentina and the United Kingdom with regard to the aforementioned islands;

...

2. *Declares* the need to accelerate the negotiations between the Governments of Argentina and the United Kingdom of Great Britain called for in General Assembly resolution 2065(XX) in order to arrive at a peaceful solution of the conflict of sovereignty between them concerning the Falkland Islands (Malvinas);²⁰⁷

.....

The resolution, as well as the resolution of the Special Committee upon which it was based, also made reference to the "interests" and "well-being" of the Islanders. However, as with Resolution 2065(XX) and the companion Conclusions and Recommendations of the Special Committee, the emphasis is on solving the sovereignty issue. The application of the principle of self-determination is raised by reference to Resolution 1514(XV) and the Charter of the United Nations. Bilateral negotiations were still being encouraged as the method to solve the sovereignty issue, although it had been admitted that not much progress has been made.

The situation had not improved before the armed conflict began on April 2, 1982. The bilateral negotiations had not proved to be helpful to any significant extent. The last General Assembly Resolution on this matter stated:

The General Assembly decided to defer until its thirty-seventh session consideration of the question of the Falk-

²⁰⁷G.A. Res. 3160, 28 U.N. GAOR Supp. (No. 30) at 108-09, U.N. Doc A/9030 (1973).

land Islands (Malvinas) and requested the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to continue to keep the situation in the territory under review and to report thereon to the Assembly.²⁰⁸

The situation was no closer to being solved in 1982 than it had been seventeen years earlier when Resolution 2065(XX) had been adopted and bilateral negotiations undertaken. Further, there did not appear to be a solution in sight.

Both the general and specific resolutions of the General Assembly concerning the Islands emphasized the issue of sovereignty over the issue of the applicability of the principle of self-determination. However, because the resolutions refer to Resolution 1514(XV), it cannot be said that the principle of self-determination was wholly inapplicable.

C. EVALUATION OF THE COMPETING CLAIMS OF ARGENTINA AND GREAT BRITAIN

1. The claim of Argentina.

Argentina claims that the principle of self-determination does not apply to the Islands. Its claim is generally based upon the following reasons.

First, because Argentina lost the Islands in 1833, allegedly due to an illegal act, the principle of territorial integrity is asserted to take precedence over the principle of self-determination, as required by paragraph 6 of Resolution 1514(XV).²⁰⁹ Second, if the illegal expulsion is accepted by the world community, the unacceptable conclusion would follow that it is proper to replace the indigenous population with the colonial populace.²¹⁰ Third, the population is of such a composition so as to make the principle of self-determination inapplicable. For example, forty percent of the population consists

²⁰⁸G.A. Res. 36/416, 36 GAOR Supp. (No. 48) at 511, U.N. Doc. A/36/48 (1981).

²⁰⁹Letter dated May 6, 1976, from the Permanent Representative of Argentina to the Chairman of the Special Committee, *reprinted in* 31 GAOR (1044th and 1056th mtgs.) Supp. (No. 23) at 200, U.N. Doc. A/31/23/Rev. 1 (1976).

²¹⁰*Id.*

of British civil servants and employees of a private company which owns nearly 50 percent of all property in the Islands.²¹¹ In addition, unlike anywhere else in the Americas, the population is declining.²¹² Fourth, Resolutions 2065(XX) and 3160(XXVIII) “clearly refer to the ‘interests’ of the population of the islands and not to its ‘wishes.’”²¹³ Finally, the location and economic aspects of the Islands are such as to make them logically part of Argentina.²¹⁴

Generally, the Argentine position concerning the applicability of the principle of self-determination can be summed up as follows:

. . . this principle of self-determination of peoples, recognized in Article 10, paragraph 2 of the Charter, should in such exceptional cases be viewed in the light of circumstances. Indiscriminate application of the principle of self-determination to Territories *so* thinly inhabited by nationals of the colonial Power would place the destiny of such a Territory in the hands of the Power which had installed itself there by force, in violation of the most elementary rules of international law. The fundamental principle of self-determination must not be utilized in order to convert illegal possession into full sovereignty under a mantle of protection to be provided by the United Nations.²¹⁵

An analysis of Argentina’s claim shows that it recognizes the principle of self-determination. The issue is the application of the principle to the Islands. The claim of Argentina can be summarily dismissed if the conclusions concerning the competing claims to sovereignty are accepted. If Great Britain has attained sovereignty over the Islands, the Argentine claim to sovereignty is not a bar to the application of the principle of self-determination. On the other hand, Argentina argues that, if it is entitled to sovereignty over the Islands, the principle of territorial integrity would take precedence over the principle of self-determination. This conclusion is based on the *Western Sahara* opinion and the applicable resolutions, including Resolution 1514(XV) and 2625(XXV).

It is understandable why the United Nations placed so much emphasis on the settlement of the sovereignty issue. With this issue set-

²¹¹*Id.*

²¹²*Id.* at 201.

²¹³*Id.* at 200.

²¹⁴Dr. Ruda, *supra* note 78, at 442.

²¹⁵*Id.*

tled, determining the applicability of the principle of self-determination would be significantly easier. The most difficult problem is determining the applicability of the principle prior to settling the sovereignty issue.

In determining the applicability of any principle, it is generally advisable to start with the general purpose of the principle. The general purpose of self-determination is to develop friendly relations and universal peace. If Argentina and Great Britain cannot settle the issue of sovereignty, it would seem that the application of the principle of self-determination would be beneficial for world order.

The reasons Argentina uses to support its claim, relating to the Islanders themselves, are related to the issue of determining whether or not they are a "peoples." Although the term "peoples" has not been well-defined, it is clear, by using the available criteria, that the Islanders are an entity, although not a completely stable one. On the other hand, most of the Islanders trace their roots to the Islands; the Islands are their home and source of livelihood. Even conceding that their ancestors may have wrongfully replaced other settlers 149 years ago, the principle should apply. In this regard, if every nation were to try to reorder the current political divisions based upon a determination of the "peoples" a century and a half ago by using current criteria, it is obvious that a turbulent situation would result.

Furthermore, if the Islanders are not to be considered the "peoples" for the purpose of self-determination, there is currently no other entity available that would qualify. No portion of the population of Argentina, apart from the sovereignty claim, has such ties to the Islands as to give it a status as a "peoples". The Islanders, therefore, are the entity to be considered as a peoples for the purpose of self-determination.

That Resolutions 2065(XX) and 3160(XXVIII) refer to the interests, rather than the wishes, of the "peoples" does not bar the application of the principle of self-determination. Article 73 of the Charter also addresses the "interests of the inhabitants," although Resolution 1514(XV) states that self-determination is the method of assuring those interests. In addition, Resolutions 2065(XX) and 3160 (XXVIII) make reference to Resolution 1514(XV). Other resolutions, such as Resolution 2625(XXV), consider the principle of self-determination as it exists under the Charter to be applicable to the decolonization process. To allow a nation rather than the people to determine its own interests would be a change from the past procedures of the decolonization process and, in essence, would allow for a new form of

colonization by the determining nation. Therefore, the practice of determining the interests of a "peoples" must be consistent with ascertaining their wishes under the principle of self-determination.

The Islands' economic ties and location adjacent to Argentina are not sufficient factors to bar the application of the principle of self-determination. These factors would be present in most decolonization situations. In fact, the relationship with Argentina, with the acknowledged resulting benefits, would be an advantage to the Islanders regardless of the type of state status they chose, whether independent or dependent. Whatever the outcome, it is hoped for the benefit of the Islanders, such relationship can continue.

Argentina's claim, therefore, can only be sustained if it were to prevail upon the issue of sovereignty. In all other cases, however, the principle of self-determination should be applicable. When applicable, it should be applied to the Islanders as the appropriate "peoples". In that way, the general purposes of the principle of self-determination, friendly relations and peace, could be achieved.

2. *The claim of Great Britain*

Great Britain asserts several reasons to support its contention that the principle of self-determination applies to the Islands. First, the evidence does not show that there was an illegal eviction of the Argentine settlers in 1833.²¹⁶ In support of this assertion, the Permanent Representative from Great Britain has stated:

It may also be helpful if I comment on the incident in **1833**, . . . when British sovereignty was confirmed. In January **1833**, a British naval vessel peaceably reasserted British sovereignty, which was first established in **1765**. There is no substance in the suggestion that a British corvette ousted by violence the Argentine authorities established in the Islands. The only persons sent back to Argentina under duress were the ringleaders of a mutiny that had occurred at the small Buenos Ayrean settlement. The mutineers had killed their commander. The commander of a Buenos Ayrean schooner, which was there at the time, had placed these mutineers in irons aboard a British schooner, and they were, at his request, taken to

²¹⁶Letter dated Mar. 3, 1976, from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the Chairman of the Special Committee, reprinted in 31 GAOR (1055th and 1056th mtgs.) Supp. (No. 23) at 196, U.N. Doc. A/31/23 Rev. 1 (1976).

Buenos Aires. Some of the civilian inhabitants elected to be repatriated and some chose to stay behind. Not a shot was fired on either side.²¹⁷

Second, the principle of self-determination has previously taken precedence as the procedure favored in decolonization.²¹⁸ Third, the use by the United Nations of the term “interests” rather than “wishes” does not mean that the principle of self-determination does not apply.²¹⁹ Fourth, the application of the principle of self-determination is not barred despite the Islands’ small population, economic and geographic relationship to Argentina,²²⁰ and the Islanders wish to retain their ties with Great Britain and not become independent.²²¹ Finally, the “essential point” in the view of Great Britain, is that the Islanders and their ancestors have been in possession of the Islands for 149 years.²²²

An analysis of Great Britain’s claim shows that the sovereignty claim should not prevail over the principle of self-determination. Great Britain took issue with the Argentinian claim that there was an illegal eviction in 1833 and emphasized that the Islanders have been in continuous possession of the Islands for 149 years. In addition, Great Britain’s claim reflects the principle of self-determination, that the wishes of the people should prevail. Furthermore, the claim recognizes that the “peoples,” whose “wishes” should be respected, are the Islanders. Although the argument can be made that this conclusion is self-serving, Great Britain’s claim in this regard is correct. The Islanders are the proper entity to be classified as the “peoples” for the purpose of applying the principle of self-determination; there is no other logical entity. Great Britain is also correct in its assessment of the economic and geographical factors. While these factors are to be considered, they are not determinative when considering the applicability of the principle. Great Britain recognizes that the principle of self-determination requires that the people, and not another nation, must determine its wishes.

Great Britain’s claim, therefore, is supported by factors that are in accordance with the general purpose of the principle of self-determination and is in conformance with the past practice of the United

²¹⁷*Id.*

²¹⁸British Foreign Office, *supra* note 76, at 6.

²¹⁹*Id.*

²²⁰*Id.*

²²¹*Id.*

²²²Letter dated Mar. 3, 1976, from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the Chairman of the Special Committee, reprinted in 31 GAOR (1055th and 1056th mtgs.) Supp. (No. 23) at 196, U.N. Doc. A/31/23 Rev. 1 (1976).

Nations' decolonization process. In addition, the claim recognizes that the wishes of the "peoples" is the key consideration and that the interests are not determinative. Generally, Great Britain's claim reflects the principle of self-determination.

D. COMPARISON OF THE COMPETING CLAIMS OF ARGENTINA AND GREAT BRITAIN

Sovereignty is the key consideration in comparing the competing claims of Argentina and Great Britain. If it is determined that the Islands comprise a part of the territorial integrity of Argentina, then Argentina's claim that the principle of self-determination does not apply should prevail. This would be consistent with the opinion of *Western Sahara* and Resolutions 1514(XV) and 2625(XXV). However, if it is determined that the issue of sovereignty should be determined in favor of Great Britain or that the issue cannot be determined then the claim of Great Britain should be persuasive. In either of these latter two cases, the principle of self-determination should be applied to the Islands. However, if it can be shown that the Islands are part of the territory of Argentina, the principle of self-determination should not apply. Since this fact cannot be established, the principle should be applied with the Islanders determining the outcome.

VI. ASSESSMENT OF THE COMPETING CLAIMS OF ARGENTINA AND GREAT BRITAIN CONCERNING THE USE OF ARMED FORCE

A. METHODOLOGY

The competing claims of Argentina and Great Britain concerning the use of armed force beginning on April 2, 1982 and continuing thereafter will be discussed in this section. Each state claims that the 'otherstate was the aggressor and that its own military action was taken in self-defense. The task in this section will be to analyze the claims of both states and determine whether or not either claim can be justified based upon the international law pertaining to self-defense.

The methodology that will be used to analyze the claims will be as

follows. First, the claims of each of the participants will be set forth. Second, the applicable international law pertaining to self-defense will be determined and examined. Third, the international law pertaining to self-defense will be used to critically analyze the claims. The multifactor analysis of Professor Myres McDougal and Mr. Florentino Feliciano will be employed to accomplish this analysis.²²³ Using the specific criteria of the multifactor analysis, a determination of the validity of the respective claims will be made. Fourth, a critical comparison of the claims of Argentina and Great Britain will be performed. By using this methodology, a well-grounded conclusion should be attained regarding each party's justification for its resort to armed force on the basis of self-defense.

B. STATEMENT OF THE CLAIMS

1. *The claim of Argentina.*

The claim of Argentina was stated by Dr. Nicanor Costa-Mendez, the Argentine Minister of Foreign Affairs, at the United Nations Security Council. Mr. Mendez stated that the use of armed force by Argentina on April 2, 1982 was justified on the basis of self-defense of its territorial rights, **as** the Islands are part of the territory of **Argentina**.²²⁴ According to Mr. Mendez, the necessity for the use of force was supported by many factors, including the illegal use of force by Great Britain 149 years ago to usurp the Islands and its subsequent use of force, under the guise of colonialism, to perpetuate the illegal occupation of the **Islands**.²²⁵ In addition, significance **was** attached to the recent incidents between Argentina and Great Britain concerning the **Islands**.²²⁶ Further, Mr. Mendez has stated that there can be no statute of limitations on Great Britain's illegal act in 1833²²⁷ and that the United Nations Charter cannot be used to legalize an illegal act that took place before its adoption.²²⁸ In regard to this latter point, Mr. Mendez stated:

Furthermore, we have been accused in this chamber of violating Article 2(3) and (4) of the United Nations Charter. No provision of the Charter can be taken to mean the legitimization of situations which have their origin in wrongful acts, in acts carried out before the Charter was

²²³M. McDougal & F. Feliciano, *supra* note 146, at chs. 2, 3.

²²⁴S/P.V. 2350 at 11 (Apr. 3, 1982).

²²⁵S/P.V. 2366 at 56 (May 23, 1982).

²²⁶S/P.V. 2350 at 11 (Apr. 3, 1982).

²²⁷S/P.V. 2366 at 56 (May 23, 1982).

²²⁸S/P.V. 2350 at 11 (Apr. 3, 1982).

adopted and which subsisted during its prevailing force. Today, in 1982, the purposes of the Organization cannot be invoked to justify acts carried out in the last century in flagrant violation of principles that are today embodied in international law.²²⁹

Mr. Mendez also asserted that Argentina had not been hasty in resorting to self-defense. He stated that Argentina has attempted to solve the situation by the use of peaceful procedures since the Islands were first usurped by Great Britain in 1833. Because of the unyielding attitude of Great Britain, however, the negotiations have not resulted in any significant progress.²³⁰ Argentina's claim for its use of armed force in self-defense is based upon the initial and continuous use of aggression by Great Britain and the lack of effective peaceful means of settling disputes to resolve the situation.

2. *The claim of Great Britain.*

Great Britain's claim for use of armed force is also based upon the right of self-defense. Great Britain issued a statement in May 1982 which set forth its justification:

Argentina is in flagrant and open violation of the fundamental principles of the UN Charter by its unprovoked attack and subsequent military occupation of the Islands. Article 2 of the Definition of Aggression states that 'the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression. . .' (UN General Assembly Resolution 3314). These unlawful Argentine acts give Britain the right to use force in self-defence. This right, first exercised at the time of the invasion by the small detachment of Royal Marines on the Islands, extends to terminating the illegal occupation. It is expressly recognized by Article 51 of the UN Charter, which makes it clear that the right of self-defence is 'inherent' and that nothing in the Charter is intended to impair it. In compliance with its obligations under Article 51, the British Government has reported all measures of self-defence to the Security Council.

Security Council Resolution 502 recognizes that Argentina was responsible for the breach of the peace; it does not seek to inhibit Britain from exercising her inherent

²²⁹*Id.*

²³⁰*Id.*

right of self-defence. Article 51 preserves the right 'until the Security Council has taken measures to maintain international peace and security'. The Security Council decision has clearly so far not proved effective to achieve its stated objective, since Argentina during April, far from withdrawing her forces in accordance with the Resolution, sent reinforcements to the Islands. Agreement by Argentina to withdraw her forces, and to negotiate without preconditions for a diplomatic solution to the underlying dispute, as required by the Resolution, would remove the major obstacle to its complete implementation.

Britain remains fully committed to the search for a diplomatic solution to the crisis, which is obviously preferable to military confrontation. Nevertheless, failing such a solution, Britain is fully justified in exercising her inherent right. Her use of military force is governed by the principles of necessity and the use of force proportionate to the threat, as required by international law. British forces have been deployed with the sole limited objective of securing, with minimum casualties on both sides, the withdrawal of Argentine forces from the Islands, as called for by SCR 502. They form part of the graduated pressure—diplomatic, economic and military—to induce Argentina to return to the negotiating table.²³¹

Great Britain has based its justification for use of armed force on the necessity to react to the use of armed force by Argentina. Therefore, like Argentina's claim, the validity of Great Britain's claim must be examined in the context of the applicable international law of self-defence. The task now is to determine and examine that law.

C. THE RIGHT OF NATIONAL SELF-DEFENSE

1. *Undercustomary international law*

In order to maintain a minimum world order system, illegal coercion must be prohibited. At the same time, however, this prohibition must be balanced with the right to self-defence. The purpose of such

²³¹British Foreign Office, *supra* note 76. at 9-10.

a system is to deter aggression and to protect the inclusive interests of states. Such a system was developed by the nation states as a part of customary international law.

Under customary international law there existed four recognized methods of self-help:²³² retorsion, reprisals, intervention, and self-defense.²³³ Prior to a state resorting to the contemplated measures of self-defense, the situation must be examined to see if two principal requirements are met. These requirements are necessity and proportionality. A third requirement, that actually is a corollary to necessity, is the requirement to initially make use of any available peaceful procedures.

The requirements of self-defense under customary were demonstrated in the much-cited *Caroline case*.²³⁴ In that case, insurgents in Canada in 1837 had been receiving men and equipment from the American side of the Niagara River. The *Caroline* was a steamer that was being used to transport the men and equipment. The United States government did not, because of inability or lack of desire, take action to stop the trips of the *Caroline*. On December 29, 1837, Canadian soldiers crossed the river to the American side, attacked the *Caroline*, and set her adrift. This action resulted in casualties among the United States citizens defending the vessel. In addition, the *Caroline* was destroyed on the Niagara Falls.

Some Canadians had been captured in the assault. In its request for their release, Canada claimed that it had been justified in having taken armed action based upon the right of self-defense. In the ensuing negotiations, both governments had agreed upon the existence of a principle of self-defense, but the United States denied its applicability in this instance. The case was finally settled by an apology from the British Minister, but with no acts by Britain or the United States that would indicate that the armed action taken in self-defense had not been justified.²³⁵

Explicit statements concerning the requirements of self-defense may be found in communications from Secretary of State Daniel Webster to the British Minister. Concerning the requirement of necessity and peaceful means, Secretary Webster stated:

²³²Brierly, *supra* note 138, at 398.

²³³*Id.*

²³⁴1 C. Hyde, *International Law* 239-40 (2d ed. 1945) [hereinafter cited as 1 Hyde].

²³⁵See Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L. Rev.* 335, 348 (1962) [hereinafter cited as Mallison], wherein the same conclusion is drawn.

Undoubtedly, it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for **deliberation**.²³⁶

This definition, especially the phrase “no moment for deliberation,” has been criticized as being too **restrictive**.²³⁷ The criticism is particularly telling today. The present era of potential warfare with limited warning time and extreme destruction makes states on opposite sides of the world closer than neighboring states would have been in Secretary Webster’s time. Other portions of the definition remain valid. The corollary requirement of seeking to take advantage of the available peaceful means of settling disputes can be seen in the words “leaving no choice of means.” Secretary Webster has also set forth the requirement of proportionality; he stated that the method employed for self-defense must entail “nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.”²³⁸

In sum, the requirements of self-defense are necessity, including the corollary requirement of the need to take advantage of the available peaceful means of settling disputes, and proportionality. Although it may be questionable whether or not the facts of the *Caroline* case could actually meet the strict legal requirements of the necessity standard, the proportionality requirement was clearly followed. The response of taking the measures necessary to destroy the vessel was proportionate to the military objective that had sought to had been accomplished. The *Caroline* case provides an explicit expression of the legal requirements of the customary international law concerning self-defense.

2. Under the United Nations Charter.

The United Nations Charter contains a codification of the customary international law of self-defense. The Charter establishes a minimum world order system by requiring the use of peaceful means in settling disputes, condemning aggression, and authorizing the right to resort to the use of the inherent right of self-defense. Article

²³⁶Quoted in 1 Hyde, *supra* note 220, at 239.

²³⁷See, e.g., L. Oppenheim, *The Collected Papers of John Westlake on International Law* 117-18 (1914); Mallison, *supra* note 235, at 348.

²³⁸Quoted in Brierly, *supra* note 138, at 406.

2(3) of the Charter requires the resolution of disputes by peaceful means: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 2(4) condemns aggression by stating: "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." That the inherent right of self-defense continues to exist is made clear by Article 51, which states:

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. Measures taken by Members in the exercise of this 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 present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

These three Articles must be read together to ascertain the proper balance of this world order system. The Articles reveal that force is only to be employed under the inherent right of self-defense. The use of force, based upon the customary law of self-defense, is not affected; this is an "inherent right." The condemnation of force under Article 2(4) does not apply to force actually being used in self-defense, thereby meeting the requirements of necessity and proportionality. The correctness of this conclusion is shown by the Travaux Préparatoires of Committee I at San Francisco, which state, concerning Article 2(4), that "the use of arms in legitimate self-defense remains admitted and unimpaired. . . ."²³⁹ The key factor that must be understood is that the law of self-defense that existed under customary international law survives intact under the United Nations Charter.

It is helpful to briefly examine the antithesis of self-defense, which is aggression. Although Article 2(4) condemns aggression, aggression is not defined anywhere in the Charter. Resolution 2625(XXV), as it relates to the principle of self-determination, sets

²³⁹6 Documents of the United Nations Conference on International Organization, San Francisco, 1945, 446 (1945).

forth some guidance concerning aggression. In pertinent part, the Resolution, in addition to proclaiming that aggression is a violation of international law, states:

Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state or **as** a means of solving international disputes, including territorial disputes and problems concerning frontiers of states.

. . . .

Every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Under Resolution **2625(XXV)**, force should not be used to settle disputes over territory or to impede the application of the principle of self-determination to deserving peoples.

It is interesting to review the guidance set forth in Resolution **2625(XXV)** concerning the settlement of international disputes by peaceful means. In this regard, the Resolution states:

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, **as** well as other states, shall refrain from any action which may aggravate the situation **so as** to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

Besides condemning the use of force in international disputes, the Resolution requires the states to take advantage of more than one peaceful means of settling disputes and to refrain from aggravating the situation.

A definition of aggression is found in Resolution 3314(XXIX).²⁴⁰ The Resolution also sets forth additional guidance concerning aggression. The Resolution contains eight articles. Article 1 defines aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations. . . .” Article 2 establishes a presumption concerning the first use of armed force by stating that “[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression. . . .” Article 3 sets forth typical acts of aggression, including invasion of the territory of another state and blockade. Article 4 provides that the Security Council may determine acts to be aggressive even though they are not listed in Article 3. Three extremely significant provisions are contained in Article 5. The first provision disallows any justification for aggression. The second makes clear that wars of aggression are international crimes. The third provision provides that no advantages gained by aggression will be recognized. Article 6 reaffirms the use of lawful force or self-defense. Article 7 provides that nothing in the definition could be used to the prejudice of the right of self-determination, especially as it concerns peoples under colonial domination. The last article provides that the first seven articles are interrelated and should be read as a unit.

The next logical inquiry is to determine who is to decide whether or not an act is aggression or self-defense. This is a critical inquiry because “aggressive war has been designated an international crime and nearly every aggressive act is sought to be portrayed as an act of self-defense.”²⁴¹ The answer to this inquiry lies in Article 51 of the

²⁴⁰G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142-44, U.N. Doc. A/9631 (1974). Historically, there has been an on-going debate regarding the utility of defining aggression. There was concern that, because the definition would necessarily be somewhat vague and not capable of predetermining decisions, it would not aid decision-makers. Others felt that the purpose of the definition would not be to predetermine decisions, but to give more meaningful criteria to decisionmakers than the general rules available under articles 2(4) and 51 of the Charter. In addition, according to this latter view, these criteria would be applied to the facts to obtain reasonable, responsible decisions, which could more readily be analyzed because they would have to be justified based upon these criteria. See McDougal & Feliciano, *supra* note 146, at 143-55, for a discussion of the arguments. It is beyond the scope of this article to endeavor to prove one position or the other. However, it is interesting to note that the definition has been raised by the participants in the Iraqi-Iranian Dispute, see Ministry of Foreign Affairs of the Republic of Iraq, *The Iraqi-Iranian Dispute: Facts v. Allegation 10-13 (1981)*, and in the dispute under study, see, British Foreign Office, *supra* note 76, at 9. Perhaps the use of the definition by these participants lends credence to the position that the definition has merit.

²⁴¹Brierly, *supra* note 138, at 406.

United Nations Charter. Under that Article, the state must report whatever action it has taken to the Security Council, which then has the authority to determine the character of the initial action. Therefore, although the state making the initial decision must be the judge **as** to whether or not the aggressive act it encounters is such to justify its use of self-defense measures, it is the community of nations that must ultimately determine if the use was justified under all the circumstances. If ~~this~~ were not *so*, acts of aggression could be justified on any grounds and the legal rules of self-defense and the minimum world order system would become meaningless.

In summary, the right of self-defense under the Charter is the same as it was under customary international law. The use of force in self-defense must meet the requirements of necessity, including taking advantage of available peaceful means of settling disputes, and proportionality. Use of force in any other manner would be characterized **as** aggression. Although the state acting in self-defense must be the initial judge of the justification of using force, it is the community of nations that ultimately must be the final determining authority.

D. ANALYSIS OF THE CLAIMS OF ARGENTINA AND GREAT BRITAIN

1. Use of the multifactor analysis.

The claims of Argentina and Great Britain concerning their use of armed force will be analyzed using the multifactor analysis of Professor McDougal and Mr. Feliciano. The specific criteria that will be used in the analysis are participants, objectives, methods, conditions, acceptance or rejection of community procedures, and effects secured. It is important to understand that these are "contextual factors" and that each one must be evaluated with all circumstances being regarded **as relevant**.²⁴² The goal of this analysis is to evaluate the claims to determine if they meet the requirements necessary for the use of force in self-defense.

2. Analysis of the claims of Argentina and Great Britain using specific criteria.

(a). Characteristics of participants.

The purpose of this factor is to determine how the nature of the

²⁴²*Id.* at 406-07.

²⁴³McDougal & Feliciano, *supra* note 146, at 167.

state bears its claim of justification of the use of force.²⁴⁴ In this case, Argentina is a significant state in the southern hemisphere, while Great Britain is a significant state in the northern hemisphere. On the other hand, Great Britain is classified with the world leaders, while Argentina is not. Although both have significant military forces, only Great Britain has nuclear capabilities. Generally, the presumption as to which state is the aggressor would be against Great Britain. However, the characteristics of the participants is a contextual factor requiring the examination of all the circumstances. Does the situation concerning the Islands contain circumstances that could overcome this presumption? The answer is yes. For Argentina to overcome its military disadvantages, it would have to carefully plan a strategy giving it a definite initial tactical advantage; the Islands involved such a situation. Argentina could entrench itself on the Islands so that only a significantly superior force could evict it. An alternative to this use of force, an Argentine naval blockage, would have been foolhardy. In addition to these military considerations, there were other considerations that overcome this presumption. The political unrest in Argentina lent itself to adventurism; the political leaders may have felt that such an operation would unify the country. Moreover, there existed a possibility of oil deposits around the Islands. Finally, the upcoming one hundred-and-fiftieth anniversary of the occupation of the Islands by Great Britain proved an auspicious occasion for the reassertion of Argentine sovereignty. Therefore, the factual analysis indicates that Argentina, in light of all circumstances, would be considered the aggressor.

Conversely, the facts would indicate that Great Britain acted in self-defense. Britain reacted to an attack upon an Island that it had held for 150 years; it did not use first force. Although Great Britain had the capability of using greater force than required, its use of force was limited to that actually necessary to retake the Islands. Applying these circumstances to Great Britain, its use of force would appear to have been as a measure of self-defense.

(b) The objectives of the participants.

The objectives of the participants will be analyzed in terms of extension or conservation of values, consequences of the values conserved, and the extent of the inclusiveness and exclusiveness of the values conserved.

²⁴⁴*Id.* at 171-72

(1) *Conservation or extension of values.*

The object of using this criterion is to determine whether or not the claimant is interested in extending or conserving values.²⁴⁵ The protection of territorial sovereignty from unlawful aggression is a significant aspect of the conservation of values. The use of armed force by Argentina and Great Britain was based upon the protection of territorial sovereignty. By undertaking the invasion of the Islands, however, Argentina used armed force to resolve a dispute that was based upon a questionable claim. The use of armed force to attain such a goal amounts to an extension of values, rather than conservation of values. The use of armed force cannot be based upon such nebulous claims. On the other hand, Great Britain had reacted with armed force to an attack upon territory that it had held under a claim of sovereignty for 150 years. While it may be argued that it has no greater claim to sovereignty over the Islands, its use of force was in reaction to an attack on its forces and evidenced a desire to return to the status quo pending peaceful resolution of the dispute. Such is the nature of the right of self-defense.

(2) *Consequences of the values conserved.*

Whether the objective of the participant is conservation or extension of values is not in itself decisive as the lawfulness of the coercion; other considerations must be analyzed, such as the consequences of the values desired to be conserved.²⁴⁶ Argentina claims that it resorted to armed force to protect a fundamental value, its territorial integrity. Great Britain also claims that it was protecting its territorial integrity. Territorial integrity is so fundamental to the survival of a state that the imperative of conserving it has generally justified the use of self-defense by the state under attack. Although the territorial integrity of a state is fundamental, however, the circumstances involving the Islands caused the consequentiality of this value to be such as to not justify the use of armed force by Argentina. These circumstances are that the Islands have been a subject of dispute for over a century, that they had been possessed by Great Britain for 149 years; and that they were the subject of an attempted peaceful solution under the procedures of the United Nations. Under these circumstances, the nebulous claim of Argentina reduces significantly the need to resort to armed force. The consequences to Great Britain, because of the immediacy of the situation and its 150 years of possession, are sufficient to justify the use of self-defense.

²⁴⁵*Id.* at 181-82.

²⁴⁶*Id.* at 224-25.

(3) *Inclusiveness or exclusiveness.*

The inclusiveness or exclusiveness of the values conserved, that is, the extent they are shared by the world community, is also a factor.²⁴⁷ The protection of territory from an aggressor is a concern of the world community; even though only one country's territory is being protected, the value is shared by the nations of the world. However, Argentina created a situation that endangered the maintenance of international peace and security in furtherance of a goal that was based upon a questionable claim. Rather than the value being inclusive to the world community, it is exclusive to Argentina. No necessity existed justifying Argentina's disruption of world peace and security. Great Britain's use of force to evict a recent foreign occupier complied with the requirements of the necessity of self-defense, an inclusive value.

(c). *Methods of response.*

The methods used to respond to coercion can be useful when determining the validity of the use of self-defense.²⁴⁸ Argentina's response was not indicative of self-defense, as it acted on its own initiative and merely entrenched itself on the Islands. The reaction by Great Britain was limited solely to the retaking of the Islands; this is indicative of self-defense. Although Great Britain had the capability to increase the level of intensity, and thereby violate the requirement of proportionality, it did not do so. The use of economic coercion, which involved the aid of the European Community, and the establishment of a maritime exclusionary zone reduced the intensity of the conflict. The response by Great Britain met the requirement of proportionality.

(d). *Conditions.*

The conditions under which the right of self-defense is exercised are also relevant.²⁴⁹ In the case of self-defense, it is especially important to examine the conditions of necessity. Although Argentina expressed frustration with the delay in resolving the Islands' sovereignty dispute, there was no expectation of an attack or other armed coercion that would have caused it to be fearful. The dispute was before the United Nations and peaceful means were being attempted to resolve it. More progress had been made in the last twenty years than had been made in previous years. Thus, not all the

²⁴⁷*Id.* at 182.

²⁴⁸*Id.* at 228.

²⁴⁹*Id.* at 229.

available means of peacefully settling disputes had been exhausted and the conditions of necessity were not met. The use of force by Great Britain, on the other hand, was in reaction to a current attack on territory; since no other state had a greater claim, the necessity test was satisfied.

(e). Acceptance or rejection of community values.

The use of available peaceful procedures to settle disputes can be indicative of the purpose behind the use of coercion by a participant.²⁵⁰ For example, where peaceful procedures are initiated, but later rejected without adequate reason by a contending party, it is evidence that coercion was not used in self-defense. In this case, the United Nations was attempting to resolve the dispute through the peaceful means of bilateral negotiations. Negotiation is a commonly accepted method of settling disputes. The frustration of Argentina did not justify its actions. The relatively short period of time during which the negotiations were undertaken is not long compared to the length of time Great Britain has held the territory. In addition, other peaceful methods could have been attempted. For example, the issue could have been submitted to the International Court of Justice, as Great Britain attempted to do in 1955 regarding the Dependencies. Further, Argentina could have proposed that the General Assembly request that the International Court of Justice render an advisory opinion concerning the issues.²⁵¹ The problem with the use of these peaceful measures is that Argentina stated that it would not accept any solution that would not give it sovereignty over the Islands. Argentina's Permanent Representative, Mr. Eduardo Roca, stated at the United Nations Security Council, "Everything is negotiable—except sovereignty."²⁵² The fact that Argentina resorted to armed force rather than make use of the available peaceful means, even if those means would have caused an adverse decision to Argentina on the sovereignty issues, is indicative of aggression. If states only resorted to peaceful means when it was certain that the result would be favorable to them, peaceful means would be used infrequently. By using armed force, Argentina aggravated the situation; this is prohibited under Resolution 2625.

Great Britain had accepted the peaceful measure of negotiations. It did emphasize that the principle of self-determination must be applied to the Islanders, as it had been in previous cases of decoloni-

²⁵⁰*Id.* at 203.

²⁵¹See U.N. Charter art. 96, para. 1.

²⁵²S/P.V. 2346 at 7 (Apr. 2, 1982).

zation. After Argentina's invasion on April 2, 1982, Great Britain's initial use of force was acceptable. It had the right to defend territory to which it had an equal or greater right than any other state.

(f). *Effects secured.*

The effects that are actually or are to be foreseeably achieved are extremely important indicators.²⁵³ The actual effect of Argentina's actions resulted in a disruption of the world order system, including the loss of many lives and an enormous destruction of property. Its claim has not been advanced and, indeed, may have suffered a reversal. Any leverage that Argentina previously had has dissipated in its defeat. Even if Argentina had managed to defend the Islands, it is foreseeable that the conflict would have continued for a long period of time. The Islanders loss of economic benefits recently received from Argentina is also significant. After considering all these facts, it can be concluded that Argentina's action was impermissible.

The effect of Great Britain's action was quite different; it was merely to return the situation to the status quo that existed before the invasion took place on April 2, 1982. The response by Great Britain did not deprive Argentina of anything that it had possessed before the armed conflict, except those things lost as a result of the means used in self-defense. The intensity of the response was maintained at a level so that only the objective of self-defense was attained.

E. COMMENT ON THE COMPETING CLAIMS OF ARGENTINA AND GREAT BRITAIN

The competing claims of Argentina and Great Britain are based upon the right of self-defense. This inherent right is part of the current minimum world order system and is contained in Article 51 of the United Nations Charter. However, because this right allows a state to initiate coercion, it is, and must be, limited. Argentina has exceeded the parameters of the right of self-defense. When the world community provides peaceful means by which to resolve disputes and especially when the dispute involves such a questionable claim as does Argentina's claim to sovereignty, the use of coercion in the name of self-defense is not acceptable. There was no showing of the necessity of resort to force. The dispute had existed for a long period of time and all progress was recent. There was no imminent

²⁵³McDougal & Feliciano, *supra* note 146, at 196.

danger to Argentina. The status quo was secure and time was not of the essence. Other methods of peacefully resolving disputes could have been attempted. The current prohibition against aggression does not, as Argentina claims, render the acts that Great Britain committed in 1833 legal. Only aggression is outlawed, while peaceful means of resolving disputes are encouraged. If Great Britain's action in 1833 was illegal, the International Court of Justice could have so decided. The resort to illegal coercion by Argentina would not, had it prevailed, resolved the issue; it would only have changed the status quo. The claim of Argentina that it acted in self-defense is not valid. This fact was recognized by Resolution 502, wherein the Security Council demanded an immediate withdrawal of the Argentine forces from the Islands.

Great Britain's claim, also based on self-defense, is supportable. The action of Argentina would appear to Great Britain to constitute aggression. It was the first use of force. The invasion was into territory Great Britain had held for 149 years. Argentina had no stronger claim to the territory than Great Britain. Peaceful methods of settling the dispute were being attempted. The invasion by Argentina constituted a rejection of these means. Under such conditions, Great Britain could validly justify its use of armed force in self-defense. The subsequent action it took was proportionate to the action of Argentina. The action of Great Britain met the requirements of self-defense.

VII. THE LEGAL IMPLICATIONS DERIVED FROM THE ANALYSIS OF THE DISPUTE BETWEEN ARGENTINA AND GREAT BRITAIN: CONCLUSIONS AND RECOMMENDATIONS

The legal implications derived from this analysis are extremely significant.²⁵⁴ Most important is the need to understand and apply the correct legal principles to disputes. This will facilitate the ascertainment of correct legal conclusions. Legal principles have been virtually ignored in all aspects of the dispute between Argentina and Great Britain. Although, when the contending parties needed a basis upon which to support their claims, some legal principles have been referred to by name or description, an in-depth analysis of the prin-

²⁵⁴In addition to the "legal" implications, this analysis has shown the necessity of having the significant facts pertaining to any situation that is under study.

ciples and their applicability was not made. For example, in the case of the dispute concerning sovereignty, the legal principle of prescription was described vaguely and not named, yet it is of the utmost importance. The same deficiency appears in the context of the dispute concerning the applicability of the principle of self-determination. When stating whether or not self-determination applies to the Islands, each claimant based their conclusion on a description of the Islanders. Neither claimant first determined the legal criteria to be applied, nor applied them. The same holds true for the use of armed force by the participants. The right to self-defense under Article 51 of the United Nations Charter does not of itself justify resort to the use of armed force. The right of self-defense is a limited one. Its parameters must be defined so that it can be determined by the participant if the proposed action will meet the requirements of necessity and proportionality. Learning the need to understand and apply legal principles to disputes will be beneficial to participants in planning their actions and to the world community, which must be the ultimate judge of those actions.

Another legal implication is the need for participants to fully utilize the available peaceful means of settling disputes and to carefully choose the means that will be effective in a particular situation. In this case, the contending parties, prior to using armed force, did make use of one peaceful means of settling disputes, bilateral negotiations. However, the unyielding position of each state guaranteed that such means would be ineffective. Neither state was willing to compromise; therefore, the negotiations were relatively fruitless. The solution would have been to choose a more effective means of peacefully settling disputes. For example, the voluntary submission of the issues concerning sovereignty and self-defense to the International Court of Justice would have been a more likely means of resolving the dispute. If this could not have been accomplished, the requesting of an advisory opinion by the General Assembly from the International Court of Justice should have been undertaken. A well-reasoned legal opinion from such a respected and impartial organization would have done much to avert the disaster of an armed conflict. In the future, not only must the participants be willing to seriously attempt the resolution of disputes by peaceful means, but the means to be chosen must be evaluated so that the ineffective ones can be avoided.

The implications bearing on the minimum world order system may have been more significant if Argentina had been successful. There is truth to the maxim that success is the best teacher. Regardless, the causes of failure of the peaceful means of settling disputes must be

taken into consideration when undertaking the settlement of disputes. That Argentina used armed force to pursue a questionable claim stands **as** a warning to the world community that it must remain vigilant for disputes that could lead to armed conflicts. There are other states with claims that may resort to armed force, especially if they felt they could prevail or if they became frustrated with the failure of peaceful means of settling disputes. The world community must continue to strive for an effective world order system to avert these potentials for disaster.

The major conclusions drawn from these implications are that the principles **of** law pertaining to a particular situation must be understood and correctly applied. The secondary conclusion, but perhaps **as** important, is the need to choose a peaceful means **of** resolving disputes that will prove effective in resolving the particular dispute. Because these factors were generally neglected in the dispute over the Falklands between Argentina and Great Britain, the international armed conflict that may have been averted was not.

COMMAND RESPONSIBILITY AND A CASE STUDY OF THE CRIMINAL RESPONSIBILITY OF ISRAELI MILITARY COMMANDERS FOR THE POGROM AT SHATILA AND SABRA

by Lieutenant Commander Weston D. Burnett*

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.

—From the order of General of the Army
Douglas MacArthur, Jr. confirming the death
sentence of General Yamashita¹

I. INTRODUCTION

In Dubno in the Ukraine on October 5, 1942:

Without screaming or weeping these people undressed, stood around in family groups, kissed each other, said farewells and waited for a sign from another SS man, who stood near the pit, also with a whip in his hand. During the fifteen minutes that I stood near I heard no complaint or plea for mercy. I watched a family of about eight persons, a man and a woman both about fifty with their children of

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¹Order of General Douglas MacArthur confirming death sentence of General Tomoyuki Yamashita, February 6, 1946, *reprinted in* 2 L. Friedman (ed.), *The Law of War: A Documentary Study* 1598-99 (1972)

about one, eight and ten, and two grown-up daughters of about twenty to twenty-four. An old woman with snow-white hair was holding the one-year-old child in her arms and singing to it and tickling it. The child was cooing with delight. The couple were looking on with tears in their eyes. The father was holding the hand of a boy about ten years old and speaking to him softly; the boy was fighting his tears. The father pointed to the sky, stroked his head, and seemed to explain something to him. At that moment, the SS man at the pit shouted something to his comrade. The latter counted off about twenty persons and instructed them to go behind the earth mound. I well remember a girl, slim and with black hair, who, as she passed close to me, pointed [to] herself, and said, "Twenty-three". I walked around the mound and found myself confronted by a tremendous grave. People were closely wedged together and lying on top of each other so that only their heads were visible. Nearly all had blood running over their shoulders from their heads. Some of the people shot were still limbering and moving. Some were lifting their arms and turning their heads to show that they were still alive. The pit was already two-thirds full. I estimated that it already contained about 1,000 people. I looked for the man who did the shooting. He was an SS man, who sat at the edge of the narrow end of the pit, his feet dangling into the pit. He had a tommy gun at his knee and was smoking a cigarette. The people, completely naked, went down some steps which were cut in the clay wall of the pit and clambered over the heads of the people lying there, to the place to which the SS man directed them. They laid down in front of the dead or injured people; some caressed those who were still alive and spoke to them in low voice. Then I heard a series of shots. I looked into the pit and saw that the bodies were twitching or the heads lying motionless on top of the bodies which lay before them. Blood was running away from their necks.²

The disturbing and evocative image depicted here brings home only too vividly the horror of the holocaust. In the years immediately following World War II, the Allied Powers in the war crimes trials at Nuremberg, Tokyo, and elsewhere assessed criminal responsibility for the war crimes committed against noncombatants. Particular at-

²P. Calvocoressi, Nuremberg—The Facts, The **Law** and The Consequences 55-57 (19481).

tion was devoted in those trials to the responsibility of German and Japanese military commanders for crimes committed by troops under their control.

The Germans and the Japanese, though, have not been the only ones capable of slaughtering innocent noncombatants. In Vietnam in 1969, the story leaked that American military personnel in the village of Son My on March 16, 1968 had engaged in wholesale slaughter of non-combatants, as illustrated by the following passage:

Then Meadlo and several other soldiers took a group of civilians—almost exclusively women and children, some of the children still too young to walk—toward one of the two canals on the outskirts of Xom Lang. “They had about seventy, seventy-five people all gathered up. So we threw ours in with them and Lieutenant Calley told me, he said, ‘Meadlo, we got another job to do.’ And so he walked over to the people and started pushing them off and started shooting.”

Taking his cue from Calley, Meadlo and then the other members of this squad “started pushing them off and we started shooting them. So altogether we just pushed them all off and just started using automatics on them. And somebody told us to switch off to single shot so that we could save ammo. So we switched off the single shot and shot a few more rounds.”

And all the time the Vietnamese at the canal were screaming and pleading with the Americans for mercy.³

The atrocities at Son My led to a vast outpouring of legal writings in the United States concerning the responsibility of senior American commanders in Vietnam for war crimes committed by American troops.⁴ A popularly held perception at that time was that a military commander under international law was absolutely liable for the war crimes of his **subordinates**.⁵

³R. Hammer, *One Morning in the War: The Tragedy at Son My* 134-35 (1970).

⁴See, e.g., R. Falk, G. Kolko, & R. Lifton (eds.), *Crimes of War* (1971); T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970) [hereinafter cited as T. Taylor]. See also Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99 (1972) [hereinafter cited as Paust]; Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 Akron L. Rev. 43 (1972) [hereinafter cited as Solf].

⁵R. Campbell, Jr., *Military Command Liability for Grave Breaches of National and International Law: Absolute or Limited?* 3-5 (1974) [hereinafter cited as Campbell].

With the end of the Vietnam War, the issue of command responsibility quietly slipped from public gaze only to resurface once again in 1982. On 18 September 1982, reports began to filter out of Beirut that a Christian militia force had been introduced by the Israeli Defense Forces (IDF) into the Palestinian refugee camps of Shatila and Sabra in West Beirut and that a massacre of 800 Palestinians had ensued. From within the refugee camps:

There were only the sounds of mourning and the bodies, sprawling heaps of corpses: men, women and children. Some had been shot in the head at pointblank range. Others had had their throats cut. Some had their hands tied behind their backs; one young man had been castrated. Middle-aged women and girls as young as three, their arms and legs grotesquely splayed, were draped across piles of rubble. Portions of their heads were blown away. One woman was found clutching an infant to her body; the same bullet that tore through her chest had also killed the baby. Said a Lebanese Army officer: "There is so much butchery the mind cannot comprehend it."⁶

Nor can the mind readily forget it. The specter of a mini-holocaust was to prove particularly troublesome to the State of Israel, the self-proclaimed home for the Jewish victims of the holocaust.

As news of the massacre spread, the Israeli government tried initially to deny responsibility for the deaths. The Israeli Cabinet issued a statement branding the suggestion that the Israeli Army had done anything, but intervene to halt the massacre, a blood libel.⁷ The government took out a full page advertisement in the *New York Times* and *Washington Post* stressing Israel's innocence.⁸ A military spokesman claimed that Phalangist Christian militia forces had broken into the Shatila camp and started the killings, at which time Israeli troops intervened and stopped the massacre.⁹

Later, when news reports of the Israeli role in the Phalangist entry into the refugee camp surfaced, the Israeli Chief of Staff stated: "The IDF had no knowledge until Saturday morning of what was go-

⁶"God—Oh, My God!" *Time*, Oct. 4, 1982, at 20, col. 2 [hereinafter cited as *God—Oh, My God!*].

⁷*Washington Post*, Sept. 30, 1982, at A1, col. 4.

⁸*Crisis of Conscience*, *Time*, Oct. 4, 1982, at 15, col. 3 [hereinafter cited as *Crisis of Conscience*].

⁹*The New Lebanon Crisis*, *Time*, Sep. 27, 1982, at 20, col. 1 [hereinafter cited as *The New Lebanon Crisis*].

ing on. We don't give the Phalangists orders and we're not responsible for them. The Phalangists are Lebanese and Lebanon is theirs and they act as they see fit."¹⁰ The Defense Minister later stated: "[I]n my name and on behalf of the entire defense establishment. . . no one foresaw—nor could have foreseen—the atrocities committed in the neighborhood of Sabra and Shatila."¹¹

Both the claim of lack of control over the Phalangists and the claim of lack of knowledge as to the killings and their foreseeability met with some skepticism. Israeli opposition Labor Party leader Shimon Peres declared: "You don't have to be a political genius or a famed commander. It is enough to be a country cop in order to understand from the outset that those militia which were emotional more than ever following the murder of their leader [Bashir Gemayel], were likely to commit atrocities against innocent people."¹² The Arab press carried suggestions that Israel had ordered, or at least knowingly participated in, the actual slaughter.¹³

The Soviet Union issued a statement which compared the carnage in Beirut with the massacre at Babi Yar in 1941 of about 200,000 persons, mostly Ukrainian Jews, by Nazi troops and concluded that "what Israel is doing on Lebanese soil is genocide. Its aim is to destroy the Palestinians as a nation."¹⁴

The leader of the Palestinian Liberation Organization, Yassar Arafat, subsequently spoke on British television: "I'm asking the whole international public opinion to take it into consideration and to have an international court, like the Nuremberg court, . . . for the Israelis. . . ."¹⁵ The General Assembly has passed a resolution calling unanimously for an international inquiry into the massacre, but the Security Council has been unable to pass a resolution for the launching of such an investigation.¹⁶ The only investigations conducted, to date, have been the Israeli Commission of Inquiry into the

¹⁰*Israel in Lebanon: The Report of the International Commission to Enquire into Reported Violations of International Law by Israel During its Invasion of the Lebanon 168* (1983) [hereinafter cited as *International Commission Report*].

¹¹Washington Post, Oct. 26, 1982, at A1, col. 6.

¹²*Mission Impossible? U.S. News & World Report*, Oct. 4, 1982, at 20, col. 1 [hereinafter *Mission Impossible*].

¹³Jansen, *The Kahan Report: Contrary Evidence*, *Middle East Int'l*, Feb. 18, 1983, at 5.

¹⁴Washington Post, Sept. 20, 1982, at A19, col. 1.

¹⁵Washington Post, Feb. 9, 1983, at A24, col. 6.

¹⁶Washington Post, Oct. 1, 1982, at A20, col. 3; Washington Post, Sept. 20, 1982, at A19, col. 1.

Events at the Refugee Camps in Beirut'' and the International Commission to enquire into reported violations of Private International Law by Israel during its invasion of Lebanon.¹⁸

11. SCOPE AND METHODOLOGY

This article consists of a contemporary international law analysis of the criminal responsibility of Israeli military commanders for the massacre at Shatila and Sabra. The article is divided into the following sections: first, a comprehensive analysis of the relevant customary and conventional international-legal norms pertaining to command responsibility; second, a case study of the pogrom at Shatila and Sabra which includes: a description of the events leading up to and inclusive of the massacre with particular attention to the role of Lieutenant General Rafael Eitan, IDF Chief of Staff, Major General Amir Drori, General Officer Commanding Northern Command, and Brigadier General Amos Yaron, IDF Division Commander in West Beirut; and an evaluation of the extent and nature of the criminal responsibility of each of those general officers under international law for the massacre; and, third, conclusions and recommendations concerning the role of command responsibility as an international criminal sanction for the enforcement of the international law of armed conflict.

Command responsibility, by way of introduction, may be defined as the responsibility of military commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control.¹⁹ In assessing the criminal responsibility of a military commander for the actions of subordinates, it should be recognized that the requirements of a modern military organization call for a large degree of decentralization and delegation of authority and control and, as a consequence, the military commander's responsibility under international law hinges, to a great extent, on the degree of effective control actually wielded by the commander over the detailed activities of his subordinates.²⁰ The principle of military necessity, then, frequently described as one of the two basic prin-

¹⁷Y. Kahan, A. Barak & Y. Efrat, Final Report of the Commission of Inquiry Into the Events at the Refugee Camps in Beirut (1983) (authorized translation) [hereinafter cited as Final Report].

¹⁸International Commission Report, *supra* note 10.

¹⁹U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 501 (1956) [hereinafter cited as Field Manual].

²⁰M. McDougal & F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 698-99 (1961).

ciples of the law of war, figures very prominently in the legal framework of command responsibility.

The second principle of the law of war, humanity, serves as a counterweight to the requirements of military necessity. Specifically, the promotion of effective enforcement of the law of war demands that military commanders, who are realistically in a position to exact compliance with the rules of warfare, be required to take reasonable measures to control and discipline their soldiers²¹ and that a military commander's failure to do should be punishable as a war crime.

These principles of military necessity and humanity reflect the basic value interests at stake in armed conflicts. On the one hand, there is the nation-state's interest in protecting the integrity of its fundamental bases of power through the maintenance of an effectively organized armed force. At the same time, the nation-state's interests and individual's interests also call for minimizing the possible destruction of human beings and material as a consequence of armed conflict.

This article, in essence, examines the balance that has been struck between the value-laden principles of military necessity and humanity in defining the juridical concept of command responsibility. To analyze adequately that balance, therefore, requires an examination not only of "black letter" law, but also of the underlying values at issue.

III. DOCTRINAL DEVELOPMENT OF COMMAND RESPONSIBILITY FOR WAR CRIMES

A. CUSTOMARY INTERNATIONAL LAW

1. *Early Practices and Concepts*

In 1474, the Archduke of Austria ordered the trial of Peter von Hagenbach, who had presided over a reign of terror on behalf of Charles of Burgundy in newly-acquired territory on the Upper Rhine. Von Hagenbach's trial, although not a "war crimes" trial, since the Swiss-Burgundian War did not break out until two years later, was before a tribunal of twenty-eight Swiss, Alsatian, and Ger-

²¹*Id.* at 699.

man judges of the Holy Roman Empire for the crimes of rape, murder, perjury, and other crimes against "the law of God and man." The defense of superior orders was raised by von Hagenbach, but rejected by the tribunal, which proceeded to convict von Hagenbach for committing crimes which he had a duty to prevent.²² Von Hagenbach was then executed.

A century and a half later, Grotius declared that "a community, or its rulers may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it."²³ Roughly contemporaneously, the Articles of War promulgated by King Adolphus of Sweden in 1621 directed in article 46 that "[n]o Colonel or Captaine [sic] shall command his souldiers [sic] to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges. . . ."²⁴ Almost seventy years later, in 1689, the seige commander of Calvinist Londonderry, Colonel Rosen, was reprobated and relieved by the exiled James II of his military duties for his outrageous seige methods including the killing of noncombatants.²⁵

In 1779, during the American Revolution, a British Lieutenant Governor in Detroit, Henry Hamilton, fell into American hands and was indicted for crimes against noncombatants by Indians under his control.²⁶ Even though the British military opinion of the Indians was not high, Hamilton had employed the Indians along the frontiers of Virginia and Pennsylvania to weaken the main American army by compelling it to deploy forces to meet the Indian threat. In fact, one senior officer, General Carleton, reportedly recognized that the Indians could not be controlled and insisted that they be used only for "defensive purposes, lest the innocent suffer with the guilty."

Although the Indian parties sent by Hamilton were instructed to act humanely, they preferred to attack isolated, inoffensive families rather than people in arms. Unlike other British commanders, Hamilton had failed to provide positive incentives to encourage the Indians to avoid atrocities. Significantly, the language of the indictment of Hamilton held that the acts of the Indians were the acts of

²²Campbell, *supra* note 5, at 105-06; Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 4-5 (1963) [hereinafter cited as Parks]; Paust, *supra* note 4, at 112.

²³2 Grotius, *De Jure Belli Au Pacis* Tres 523 (L.I.E.P. ed. Kelsey trans. 1925).

²⁴Parks, *supra* note 22, at 5.

²⁵Hargreaves, *The Rule Book of Warfare*, *Marine Corps Gazette*, Aug. 1970, at 44, 47.

²⁶Coil, *War Crimes of the American Revolution*, 82 Mil. L. Rev. 171, 193-97 (1978).

Hamilton and that he was considered personally liable for the acts of the Indians. Hamilton, however, was never tried on the charges. Instead, he was exchanged **as** a prisoner of war in 1781.

Thirty years later, during the War of 1812, several American soldiers were found responsible for needlessly burning **some** buildings in Upper Canada at St. David's.²⁷ As a consequence, the American commander was summarily dismissed from the service. For a similar occurrence at Long Point, in the same district, another commander was brought before a United States military **tribunal**.²⁸

In 1846, the Kearny campaign into Mexico resulted in a civil trial and judgment against one officer in the campaign, Colonel D. Mitchell, where the officer was held responsible for certain illegal **acts**.²⁹ Those acts included the passing on to subordinates of illegal orders from his immediate superior and, in some cases, personally executing the superior's illegal orders.

The American Civil War saw the adoption by the United States of General Order No. 100, the Lieber Code, which provided in article 71 for punishment of any commander ordering or encouraging the intentional wounding or killing of an already wholly disabled enemy. At the conclusion of the war, the Commandant of the Confederate prisoner-of-war camp in Andersonville, Georgia, Captain Henry Wirz, was charged and convicted under the Lieber Code of having ordered and committed the torture, maltreatment, and death of prisoners of war in his **charge**.³⁰

The duties owed by a military commander occupying enemy territory to the occupants of towns and villages were defined in 1886 by Winthrop as follows: "It is indeed a chief duty of the commander of the army of occupation to maintain order and the public safety **as** far **as** practicable without oppression of the population, and **as** if the district were a part of the domain of his own **nation**."³¹

Winthrop's definition of the duty of a commander was tested in the early 1900s when the United States became embroiled in counterinsurgency operations in the Philippines. In 1901, insurrectionist First Lieutenant N. Valencia was convicted and sentenced to

²⁷Colby, *War Crimes*, 23 Mich. L. Rev. 482, 501 (1924-25).

²⁸*Id.* at 501-02.

²⁹*Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128-37 (1851).

³⁰The Trial of Captain Henry Wirz, 8 American State Trials 66 (1865), *reprinted in* 1 L. Friedman (ed.), *The Law of War: A Documentary History* 783-98 (1972).

³¹W. Winthrop, *Military Law and Precedents* 1247 (2nd ed. 1896) (footnotes omitted).

death for illegally ordering the murder of a noncombatant.³² The following year, American Brigadier General J.H. Smith, U.S. Army, was convicted of inciting, ordering, and permitting subordinates to commit war crimes. Subsequently, President Theodore Roosevelt in approving General Smith's conviction and dismissal from the service cautioned against the excesses of war:

[T]he very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their hearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.³³

In the ensuing years, the military commander's role in combat situations was incorporated into several international conventions. Hague Convention No. IV of 1907,³⁴ respecting the laws and customs of war on land, required in article 1 of the Annex thereto, as a precondition for a militia or volunteer corps to be accorded the rights of a lawful belligerent that it must be "commanded by a person responsible for his subordinates." Article 43 of the Annex added that the commander of an occupying force in enemy territory "shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Similarly, article 19 of Hague Convention No. X of 1907,³⁵ relating to the adaptation to maritime warfare of the Geneva Convention, provided that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." Although the use of the concept "command responsibility" in these contexts was descriptive more of authority than of personal liability, the Conventions, which are recognized as part of customary international law, created obligations for military commanders which had to be enforced in some fashion, otherwise the words ceased to have any substantive application.³⁶

³²Parks, *supra* note 22, at 8.

³³Court-Martial of General Jacob H. Smith, reprinted in 1 L. Friedman (ed.), *The Law of War: A Documentary History* 799-813 (1972).

³⁴36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

³⁵36 Stat. 2371, 2389.

³⁶U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1982*, at 280, col. 2 (1982) [hereinafter *Treaties in Force*]; U.S. Dep't of Air Force, Pamphlet No. 110-20, *Selected International Agreements*, at 3-1 (1981); Field Manual, *supra* note 19, para. 6; U.S. Dep't of Army, Pamphlet 27-1, *Treaties Governing Land Warfare*, at i (1956).

2. *The Versailles Treaty and the Interwar Period*

At the conclusion of World War I, an International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties met in **Versailles**.³⁷ The Report of the Commission presented to the Preliminary Peace conference in March 1919 listed in Part II thirty-two types of violations of the laws and customs of war by Germany and her **allies**.³⁸ Part III stated: "All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, including Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."³⁹

To implement this finding, the Commission recommended that a tribunal composed of members of Allied national courts be established to entertain charges *inter alia*:

Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or *with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war* (it being understood that no such abstention should constitute a defense for the actual perpetrators)⁴⁰

Discounting the questionable "internationality" of the von Hagenbach trial by the Holy Roman Empire, this recommendation for an international war crimes tribunal, together with the abstention theory of responsibility, represented a revolutionary advance in international jurisprudence designed to promote enforcement of the laws of war and protect the humanitarian values at stake. No longer were war crimes considered offenses solely against national laws triable only in national **courts**; nor was a military commander's criminal liability for the acts of his subordinates limited exclusively to crimes he ordered committed.

The Japanese and Americans filed dissenting opinions to the Commission's Report. For the Japanese, the doctrine of abstention was unacceptable **as** they opposed prosecuting

³⁷Committee on the Responsibility of the Authors of the War and on Enforcement of Penalties—Report Presented to the Preliminary Peace Conference, Versailles, March 29, 1919, reprinted in 14 Am. J. Int'l L. 95 (1920).

³⁸*Id.* at 114-15.

³⁹*Id.* at 117.

⁴⁰*Id.* at 121 (emphasis added).

highly placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war. . . .

. . . .

. . . [They felt] some hesitation. . . in admitting criminal liability where the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing, acts in violation of the laws and customs of war.⁴¹

In a strongly worded reservation, the American representatives commented on the same issue:

It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence [sic]. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission. To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in codunction, and a standard of liability which does not include them all is to be rejected.⁴²

In addition to opposing the extent of liability expounded in the Report, the Americans also dissented from the proposed procedure for trial by international tribunal, under the laws of humanity, for which a precedent was deemed lacking. The Americans were only willing to agree to the formation of international commissions with the stipulation that they apply the laws of one specific nation.⁴³

⁴¹*Id.* at 152.

⁴²*Id.* at 143.

⁴³*Id.* at 145-47

Notwithstanding these dissents, the Treaty of Versailles contained an article providing for the trial by international tribunal of Kaiser William II of Hohenzollern and for the trial by international military tribunal of those persons accused of violating the law of war.⁴⁴ After Germany signed the Versailles Treaty, the Allies presented the German government with a list of 896 alleged war criminals, including Marshals von Hindenburg and Ludendorff, for trial in accordance with the Peace Treaty.⁴⁵

When the time came to hand over the alleged war criminals for trial, the German Cabinet demurred, noting that any effort to hold the agreed-upon trials would be met by **insurrection**.⁴⁶ Further, the Allies were advised that the German Army would resume the war if the Allied demand were pressed. The Cabinet suggested **as** an alternative that the Supreme Court of the Reich at Leipzig could conduct the trials and apply international, rather than national law, in hearing the cases. The Allies assented and submitted forty-five of the original 896 names for trial before the Leipzig Court. The Germans eventually agreed to try twelve persons, six of whom were acquitted. "Of those convicted only one was convicted on the basis of command responsibility. Major Benno Crusius was found guilty of ordering the execution of wounded French prisoners of war and sentenced to two years **confinement**."⁴⁷

Certain aspects of one other case, the *Llandovery Castle* case, warrant examination. Briefly, the *Llandovery Castle* was a properly marked hospital ship which was sunk at night by a German U-boat while transporting wounded and sick Canadians to their **homeland**.⁴⁸ The U-boat commander, to cover up his crime, attempted to sink the lifeboats and, in fact, two were destroyed.

After the war, the U-boat commander could not be located. Two of his subordinates, however, were tried by the Leipzig Court for their assistance to the commanding officer in fixing the positions of the lifeboats and maneuvering the submarine. The court in convicting both officers rejected the defense of superior orders advanced by the officers and cited in support of its decision article 47 of the German Military Penal Code which provided:

⁴⁴Treaty of Versailles, articles CCXXVII, CCXXVIII, *reprinted in* 1 L. Friedman (ed.), *The Law of War: A Documentary History* 417, 431-32 (1972).

⁴⁵Parks, *supra* note 22, at 12-13.

⁴⁶Campbell, *supra* note 6, at 112-13.

⁴⁷Parks, *supra* note 22, at 13.

⁴⁸Judgment of the German Supreme Court in the Case of Lieutenants Dithmar and Boldt, *reprinted in* 1 L. Friedman (ed.), *The Law of War: A Documentary History* 868-82 (1972).

[I]f the execution of **an** order in the ordinary course of duty involves such a violation of the law **as** is punishable, the superior officer issuing the order is alone responsible. . . . However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. . . .⁴⁹

This case was to play a prominent role, after World War II, in the trials at Nuremberg.

The aborted attempt at an international war crimes tribunal during the interwar period had been frustrated by the German state's interest in preserving its bases of power. The exclusive interests of the nation-state had managed to prevail over the inclusive interests of the Allies.

During the interwar period, one other treaty was concluded that addressed the subject of command responsibility. The Geneva Red Cross Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field made it the "duty of the commander-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles [of the Convention], as well **as** for unforeseen cases. . . ."⁵⁰ These words were subsequently tested by "fire" on the battlefields of World War II.

3. *World War II*

(a) *St. James Declaration and the United Nations War Crimes Commission.*

With the onset of the Second World War, reports of atrocities committed by the Japanese and the Germans prompted the revival of the "spirit" of the Commission on Responsibility. Only this time, the Allies would not be denied "justice." The first formal step in this direction was initiated when representatives of the exiled governments of nine German occupied states issued the St. James Declaration on January 13, 1942, which promised "the punishment, through the channel of organized justice, of those guilty of or responsible for [war crimes], whether they have ordered them or participated in

⁴⁹*Id.* at 881.

⁵⁰Geneva Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 1929, art. 26, 47 Stat. 2074, 2092, T.S. No. 847.

them. . . ."⁵¹ With Versailles thus resurrected, the nine exiled governments were joined in July 1943 by Australia, Canada, China, India, New Zealand, South Africa, the United Kingdom, and the United States in forming the United Nations War Crimes Commission which was responsible for compiling and collating war crimes information.⁵² The inclusive interests of the world community and the principle of humanity were once again on the ascendancy.

(b) Moscow Declaration and London Agreement.

As a prelude to setting up the judicial machinery to come, the Soviet Union, the United States, and the United Kingdom jointly issued the Declaration of German Atrocities in Occupied Europe, on November 1, 1943, which declared, *inter alia*, that those German officers responsible for war crimes would either be "sent back to the countries in which their abominable deeds were done. . . ." or, when offenses had "no particular geographic location. . . , be punished by a joint decision of the Governments of the Allies."⁵³ In the summer of 1945, the four major powers met and in August concluded the London Agreement containing the Charter of the International Military Tribunal.⁵⁴

The Charter borrowed from the concepts of the Committee on Responsibility following World War I and provided for an international military tribunal to try the major war criminals of the European Axis countries whose offenses had no particular geographic location. The war crimes for which they were triable were

violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. . . .⁵⁵

⁵¹Inter-Allied Information Committee, Punishment for War Crimes—The Inter-Allied Declaration signed at St. James's Palace, London, Jan. 13, 1942, reprinted in Campbell, *supra* note 5, at 117.

⁵²Campbell, *supra* note 5, at 117-18; Parks, *supra* note 22, at 15.

⁵³Campbell, *supra* note 5, at 118.

⁵⁴Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics respecting the prosecution and punishment of major war criminals of the European Axis, 59 Stat. 1544, 1646, E.A.S.No. 472, 82 U.N.T.S. 280, 282.

⁵⁵*Id.* at 59 Stat. 1547, 82 U.N.T.S. 283.

Responsibility extended to "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiring to commit any of the foregoing crimes [who] are responsible for all acts performed by any persons in execution of such plan."⁵⁶

Lesser officials, as envisioned in the Moscow Declaration, were to be tried by military tribunals of individual states under comparable rules and procedures to those found in the Charter. The rules promulgated by the Allied nations demonstrated a belief that a commander must be held responsible for the unlawful actions of his subordinates if he personally ordered the illegal acts charged or, with knowledge that such actions were taking place, failed in his duty as a commander to prevent such offenses, either intentionally (Netherlands, France, and Luxembourg) or through neglect (United States, China, Great Britain, and Canada).⁵⁷ The intent and neglect tests reflected a divergence of views as to whether the military commander should be held criminally liable only for the acts of his subordinates which he intended or whether he should also be held liable for those crimes which he negligently permitted to occur. The negligence test served the value interest of enhanced enforcement of the laws of war, while the intent test protected the value interests of the individual military commander by not imposing penal sanctions for crimes which he neither committed nor intended.

The trials of lesser officials in Germany were subject to Allied Control Council Law No. 10, entitled "Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,"⁵⁸ which was modeled after the Charter and consented to by the four Allied Zone Commanders. Article II(2) therein stated:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a [war] crime. . . , if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein. . . .⁵⁹

The Council Law further provided, in terms reminiscent of the *Llandovery Castle* case, that "[t]he fact that any person acted pursuant

⁵⁶*Id.*

⁵⁷Parks, *supra* note 22, at 20. For a detailed discussion of the individual state's rules, *see id.* at 17-19.

⁵⁸Control Council Law No. 10, Berlin, Dec. 20, 1945, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Against Humanity, *reprinted in* 1L. Friedman (ed.), *The Law of War: A Documentary History* 908-12 (1972).

⁵⁹*Id.* at 909.

to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."⁶⁰ The stage was set for the postwar trials.

4. *Post-World War II Trials.*

(a) *Yamashita.*

Although the legal framework for the European war crimes trials was set before the conclusion of the war, the first trial after the end of hostilities which involved the issue of command responsibility did not arise in Europe. Instead, it occurred in the Far East in the trial of General Tomoyuki Yamashita by an American military tribunal sitting in Manila. The trial and subsequent legal reviews spawned a plethora of legal writings over a wide variety of issues including the fairness of the proceedings. This inquiry, however, must necessarily be limited to two "command-responsibility" issues which the case addressed: first, whether military exigencies precluded Yamashita from exercising the requisite degree of command and control over his subordinates necessary to prevent the commission of war crimes and, second, whether Yamashita should be held personally liable for the crimes of subordinates found subject to his control, based on a theory of absolute liability without regard to any lack of knowledge of the crimes on his part, or some lesser standard, such as knowledge of the crimes plus intentional failure to intervene.

(1) *The Facts and the Trial.*

General Yamashita had assumed supreme command of the Japanese Army Group and the military police in the Philippines on October 9, 1944.⁶¹ Other army forces on the islands at that time were under the control of Count Terauchi.⁶² Naval forces operating in the Philippines, meanwhile, fell under a completely separate command requiring any joint Army-Navy operation to have Count Terauchi's supervision.⁶³ Ten days after General Yamashita assumed command in Manila, the Americans invaded Leyte in the Central Philippines. The following month, Count Terauchi transferred his headquarters to Saigon, further complicating Army-Navy operations for General Yamashita since those operations still had to be channeled through the Count.⁶⁴

⁶⁰*Id.*

⁶¹P. Piccigallo, *The Japanese on Trial—Allied War Crimes Operations in the East, 1945-61*, at 49 (1979) [hereinafter cited as Piccigallo].

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

In December 1944, the advancing American forces compelled General E'mashita to retreat into the mountains of northern Luzon. At the same time, Yamashita dispersed his forces throughout the islands to meet the American advance. Gradually, between December 1944 and February 1946, tactical command over all Japanese fighting forces in the Philippines, including naval forces, passed to General Yamashita.⁶⁵

In the face of the advancing American forces, the Japanese troops embarked on a systematic campaign of brutality, terrorism, and murder against the Filipino population. In Manila alone, during the period of 6 to 20 February 1945, over 8,000 unarmed civilians non-combatants were killed and over 7,000 were mistreated, maimed, or wounded.⁶⁶

The Americans continued to advance and, on September 3, 1945, General Yamashita surrendered. One month later, he was handed the indictment which charged that he

between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war.⁶⁷

The prosecution later submitted 123 specifications alleging the particulars of specific atrocities committed by members of the armed forces of Japan under General Yamashita's command. The trial commenced on October 29, 1945 and, after 4055 pages of testimony by 286 witnesses and 423 exhibits, concluded on December 7, 1945.⁶⁸

The evidence heard at trial revealed a striking pattern to the executions. Shortly before the arrival of American forces in each area,

⁶⁵*Id.*

⁶⁶Parks, *supra* note 22, at 25 n.78.

⁶⁷U.N. War Crimes Commission, 4 Law Reports of Trials of War Criminals 3-4 (1948) [hereinafter cited as 4 Law Reports].

⁶⁸The Yamashita Case 1945-46, Decision of the United States Military Commission at Manila, *reprinted in* 2 L. Friedman (ed.), *The Law of War: A Documentary History* 1596 (1972) [hereinafter cited as Military Commission].

civilians were rounded up in a central place where they were bayoneted, beheaded, or otherwise killed with minimum expenditure of ammunition and the bodies disposed of by throwing them in the rivers, burning them in houses, or burying them in mass graves.⁶⁹ In many instances, there was evidence of prearranged planning of the sites of the executions. Almost uniformly, the atrocities were committed under the supervision of officers or noncommissioned officers and, in several instances, there was direct proof of statements by Japanese participants that they were acting pursuant to orders of higher authorities; in a few cases, Yamashita himself was mentioned as the source of the order.⁷⁰ There was also extensive evidence concerning the torture, starvation, and murder of prisoners of war and civilian internees. In fact, the mistreatment of prisoners of war at Fort McKinley in Manila in late 1944 occurred while Yamashita was present at his own headquarters a few hundred yards distant.⁷¹ Significantly, General Yamashita admitted never having visited any of the prisoner-of-war camps.⁷²

Aside from the general plan for execution of Filipinos, evidence of General Yamashita's personal involvement surfaced in three separate incidents. In one instance, General Yamashita's own judge advocate testified that he requested permission from the General for the military police to punish Filipino guerillas without trial.⁷³ To this request, Yamashita reportedly nodded his assent. The punishment imposed for many was beheading.

The other two instances involved reported attempts by General Ricarte, a member of the Japanese puppet regime in the Philippines, to convince General Yamashita to rescind his supposed order that Japanese forces wipe out pro-American Filipinos.⁷⁴ General Ricarte, though, did not testify. In one case, his personal secretary testified based upon a conversation with General Ricarte in which the latter recounted an unsuccessful conversation with Yamashita in November 1944 concerning rescinding the order.⁷⁵ In the second case, an-

⁶⁹C. Whitney, *The Case of General Yamashita: A Memorandum 80 (1949)* [hereinafter cited as Whitney].

⁷⁰Parks, *supra* note 22, at 26-27.

⁷¹*United States of America v. Tomoyuki Yamashita, a Military Commission appointed by paragraph 29, Special Order 120, HQ, U.S. Army Forces, Western Pacific, dated Oct. 1, 1946, at 3637, 3673* [hereinafter cited as *Record of Trial*]. See also Whitney, *supra* note 69, at 91.

⁷²4 *Law Reports, supra* note 67, at 27.

⁷³*Id.* at 19-20.

⁷⁴*Id.* at 19.

⁷⁵*Id.*

other witness testified that he overheard a conversation, which his twelve-year-old grandson translated, between Ricarte and Yamashita in December 1944, where the former again attempted to obtain a rescission of the order to kill Filipinos.⁷⁶ The twelve-year-old grandson, however, when called to testify, disclaimed ever having interpreted the conversation.⁷⁷ Given the hearsay nature of this testimony concerning personal knowledge by Yamashita of the atrocities, its veracity and reliability has been considered suspect by many legal commentators.

With respect to the command-and-control issue, the evidence indicated that Yamashita never came into physical contact with many of his units. They merely passed under his tactical command as the battle proceeded.⁷⁸ Former aides and subordinates of Yamashita testified that he was too busy with the details of combat, supply, and reorganization of Japanese forces to know what was going on outside his own headquarters.⁷⁹

The bulk of the atrocities in Manila occurred at the hands of naval land troops stationed there.⁸⁰ Yamashita claimed that he had only tactical, not disciplinary, command over those troops. He further contended that his communications had been disrupted by the American forces and that the naval troops in Manila had completely ignored his order to withdraw from the city.⁸¹ General Muto, the chief of staff to General Yamashita, testified that any officer having command of troops of another branch under him did have the authority and duty to restrain those men from committing wrongful acts.⁸² There was also evidence to the effect that Yamashita had been able to communicate with Japanese forces in Manila through June 1945, long after the surge of atrocities in February.⁸³

General Yamashita's final words to the court, after describing his manifold command-and-control problems, were:

I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the above circumstances, my plans and my strength were not sufficient to the situation and if these things happened, they

⁷⁶*Id.*

⁷⁷Record of Trial, *supra* note 71, at 2014, 2021.

⁷⁸4 Law Reports, *supra* note 67, at 21-27.

⁷⁹*Id.* at 23-29.

⁸⁰*Id.* at 21-24. See also Piccigallo, *supra* note 61, at 53.

⁸¹Piccigallo, *supra* note 61, at 53.

⁸²4 Law Reports, *supra* note 67, at 32.

⁸³Whitney, *supra* note 69, at 81.

were absolutely unavoidable. . . . I absolutely did not order atrocities nor did I receive orders to do this from superior authority, nor did I permit such a thing. . . .⁸⁴

In short, the defense contended that the effectiveness of the American military operation precluded Yamashita from effectively controlling his troops⁸⁵ and, further, that none of the evidence proved that Yamashita had ordered, condoned, sanctioned, or even knew of the atrocities.⁸⁶ The prosecution countered with the assertion that Yamashita possessed the requisite authority and control⁸⁷ and, in fact, ordered or permitted the atrocities to occur in spite of his duty to intervene and prevent such crimes.⁸⁸

(2) *The Judgment of the Commission and the Ensuing Legal Review.*

On December 7, 1945, the American military commission composed of five general officers, each of whom, although not a lawyer, had broad experience in military justice matters, delivered a decision convicting Yamashita and sentencing him to death by hanging. In a remarkable turn of events for a military tribunal, though, the commission issued a written opinion which, although explicit in its findings on the command-and-control issue, failed to articulate clearly whether Yamashita's conviction was based on an absolute- or limited-liability theory of command responsibility and, if limited, whether knowledge of the crimes by Yamashita figured as an essential element in the Commission's findings.⁸⁹

With respect to the issue of command and control, the Commission recognized "the difficulties faced by the accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organisation [sic], equipment, supply with special reference to food and gasolene [sic], train communication, discipline and morale of his troops."⁹⁰ The Commission found, though, that those difficulties were not sufficient to alter the fact that the Japanese forces committing the crimes were under Yamashita's command and effective control.⁹¹

⁸⁴Record of Trial, *supra* note 71, at 3664-66.

⁸⁵4 Law Reports, *supra* note 67, at 24, 27.

⁸⁶Piccigallo, *supra* note 61, at 63.

⁸⁷*Id.*

⁸⁸4 Law Reports, *supra* note 67, at 84.

⁸⁹Military Commission, *supra* note 68, at 1696.

⁹⁰*Id.* at 1697.

⁹¹*Id.* at 1698.

With reference to the legal standard against which Yamashita's action or inaction was measured by the Commission, portions of the decision suggested a broad theory of liability:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, [sic] and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.⁹²

The Commission further stated: "[D]uring the period in question you [Yamashita] failed to provide effective control of your troops as was required by the circumstances."⁹³ These quoted passages were seized upon by A. Frank Reel, one of Yamashita's counsel, who wrote a widely publicized book on the Yamashita trial, and Telford Taylor, who is best remembered as Justice Robert H. Jackson's successor as Chief of Counsel at Nuremberg, as a demonstration of the Yamashita case's espousal of an absolute-liability theory of command responsibility.⁹⁴

A careful reading of the Commission's opinion, however, suggests a more limited theory of liability. Consider the part of the judgment which exhibits disbelief at Yamashita's protestation of innocence:

The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been *wilfully permitted* by *the accused*, or *secretly ordered* by *the accused*. Captured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan.⁹⁵

⁹²*Id.* at 1597.

⁹³*Id.* at 1598.

⁹⁴A. Reel, *The Case of General Yamashita* (1949); T. Taylor, *supra* note 4.

⁹⁵Military Commission, *supra* note 68, at 1596 (emphasis added).

In another portion of the decision, the Commission appeared to have regarded defendant's professed lack of knowledge as simply incredulous:

As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders, further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. *Taken at full face value*, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.⁹⁶

These remarks were not necessary to convict Yamashita under the absolute-liability theory. Rather, the Commission was endeavoring to factor into its deliberations the element of knowledge or a duty to know combined with a failure to inquire **as** a component of Yamashita's criminal liability.

Following the Commission's decision, Yamashita's case was reviewed twice by military judge advocates and in each case they found ample support for rejecting Yamashita's plea of ignorance. First, the staff judge advocate for the Commission's convening authority concluded that Yamashita had:

issued a general order to wipe out the Philippines if possible and to destroy Manila; that subsequently he said he would not revoke the order.

. . .

. . . From all the facts and circumstances of record, it is impossible to escape the conclusion that *accused knew or had the means to know of the widespread commission of atrocities by members and units of his command; his failure to inform himself through official means available to him of what was common knowledge throughout*

⁹⁶*Id.* at 1597 (emphasis added).

*his command and throughout the civilian population can only be considered as a criminal dereliction of duty on his part.*⁹⁷

The next review was conducted by the theatre staff judge advocates prior to the submission of Yamashita's case to MacArthur for his approval or disapproval of the findings and sentence of the Commission. That review restated the evidence tending to show a genocidal plan and actual knowledge by General Yamashita. It was the judge advocates' conclusion that

[t]he only real question in the case concerns accused's responsibility for the atrocities shown to have been committed by members of his command. Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility. In the first place the atrocities were so numerous, involved so many people, and were so widespread that accused's professed ignorance is incredible. Then, too, their manner of commission reveals a striking similarity of pattern throughout. . . in several instances there was direct proof of statements by the Japanese participants that they were acting pursuant to orders of higher authorities, in a few cases Yamashita himself being mentioned as the source of the order. . . . All this leads to the inevitable conclusion that the atrocities were not the sporadic acts of soldiers out of control but were carried out pursuant to a deliberate plan of mass extermination which must have emanated from higher authority or at least had its approval. . . . From the widespread character of the atrocities. . . the orderliness of their execution and the proof that they were done pursuant to orders, *the conclusion is inevitable that the accused knew about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators.*⁹⁸

Yamashita's professed ignorance, then, was unconvincing to the reviewing authorities.

⁹⁷Review of the Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, U.S. Armed Forces, Western Pacific, 9 Dec. 1945, *reprinted in Parks, supra* note 22, at 32 (emphasis added).

⁹⁸Review of the Theater Staff Judge Advocate of the Record of Trial by Military Commission of Tomoyuki Yamashita, General, HQ U.S. Armed Forces, Pacific, 26 Dec. 1945, *reprinted in Whitney, supra* note 69, at 80 (emphasis added).

Significantly, that same plea of lack of knowledge was raised by General A. Muto, Yamashita's chief of staff, in his war crimes trial on the same charges and substantially the same evidence as in Yamashita's case. The trial, though, was conducted before the International Tribunal for the Far East sitting in Tokyo which was constituted with lawyer-judges from eleven nations. In addressing the knowledge issue, the Tribunal stated: "We reject his defense that he knew nothing of these [atrocities]. It is wholly incredible."⁹⁹

The completion of the military legal review process in Yamashita's case did not end the matter, for Yamashita's counsel had petitioned the Supreme Court of the United States for review of the case. The Supreme Court heard arguments on January 7, 1946, and rendered a 6-to-2 decision on February 4, 1946.¹⁰⁰ The Court's opinion stated: "[W]e are not concerned with the guilt or innocence of the petitioner. We consider here only the lawful power of the commission to try the petitioner for the offense charged."¹⁰¹

In assessing the legal sufficiency of the charges as a violation of the law of war, the majority felt compelled to address the issue of command responsibility:

[I]t is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to *control* the operations of the members of his *command* by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to *control* the troops under his *command* for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

Tokyo War Crimes Trial, reprinted in 2 L. Friedman (ed.), *The Law of War: A Documentary History* 1029, 1144 (1972).

¹⁰⁰*In re Yamashita*, 327 U.S. 1 (1946).

¹⁰¹*Id.* at 8.

prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the *control* of the operations of war by *commanders* who are to some extent responsible for their subordinates.¹⁰²

The majority of the Court, then, found that a military commander had "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. . . ."¹⁰³ Cited in support of this statement by the majority were the command-responsibility provisions of the Hague Conventions and Geneva Red Cross Convention of 1929.

The majority, while refusing to weigh the evidence on which petitioner was convicted, concluded that the charge adequately alleged a violation of the law of war:

There is no contention that the present charge, thus read, is without the support of evidence, or that the Commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances. . . . It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the Commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.¹⁰⁴

The majority had managed to affirm the conviction of Yamashita in an elliptical fashion that had both relied on an abstention-type

¹⁰²*Id.* at 14-15 (emphasis added).

¹⁰³*Id.* at 16.

¹⁰⁴*Id.* at 17. 18.

theory of command responsibility and avoided the element of knowledge, while, at the same time, leaving knowledge as a variable for consideration by the Commission.

The dissenting opinions of Justices Rutledge and Murphy bitterly challenged the fairness of the trial as well as the judicial principles asserted. Justice Murphy took the majority opinion to task for failing to address the knowledge issue:

[Yamashita] was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.¹⁰⁵

Justice Rutledge added; “[T]he Court’s opinion nowhere expressly declares that knowledge was essential to guilt or necessary to be set forth in the charge.”¹⁰⁶ Justices Murphy and Rutledge shared the view that knowledge was an essential element to Yamashita’s conviction under the law of war for the atrocities of his troops and found the evidence of such knowledge lacking.¹⁰⁷ Justice Murphy warned that the majority’s open-ended theory of liability meant that “[n]o one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision.”¹⁰⁸

The majority of the Court, though, found the arguments of Justices Murphy and Rutledge unconvincing and, after the Supreme Court’s decision, General MacArthur was left free to confirm the Military Commission’s findings and sentence.¹⁰⁹ On 23 February 1946, General Yamashita was hanged.¹¹⁰

¹⁰⁵*Id.* at 28 (Murphy, J., dissenting).

¹⁰⁶*Id.* at 53 (Rutledge, J., dissenting).

¹⁰⁷*Id.* at 28, 34, 47, 53-55.

¹⁰⁸*Id.* at 28.

¹⁰⁹Order of General Douglas MacArthur confirming death sentence of General Tomoyuki Yamashita, 6 Feb. 1946, reprinted in 2 L. Friedman (ed.), *The Law of War: A Documentary Study 1598-99* (1972).

¹¹⁰Parks, *supra* note 22, at 36-37.

(3) *Value Analysis.*

The Yamashita case is muddled, to a degree, by a confusing aggregation of facts and legal pronouncements which have prompted claims by some jurists that Yamashita was held responsible, not because he ordered, or knowingly permitted, the war crimes to be committed, but rather because he was in a position of command and was per se liable for his troop's atrocities. Such a liability standard would presumably have the effect of maximizing enforcement of the law of war, thereby promoting the principle of humanity. At the same time, however, the standard would sacrifice the value interests of mankind, in general, and the individual military commander, in particular, in the basic tenet of not punishing an individual criminally, absent proof of personal wrongdoing or dereliction. It would also have the untoward effect of forcing the commander, in order to safeguard his own well-being, to retain, rather than delegate, power at the expense of military preparedness and the principle of military necessity.

The liability standard adopted in the Yamashita case does not reflect such a disproportionate priority for humanitarian values over military needs. Instead, a careful reading of the Commission's decision and the ensuing military-legal reviews indicates that Yamashita's claim of lack of knowledge proved unconvincing. The factfinders concluded that Yamashita either knowingly ordered the war crimes committed or knowingly permitted them to occur while failing to exercise his duty to intervene. The Supreme Court essentially left the factual disputes concerning knowledge in the case to the factfinders and held that, as a minimum, a military commander has a duty to take such measures as are within his power and appropriate in the circumstances to protect prisoners of war and the civilian population and that a military commander who fails to take such measures is criminally liable for the war crimes committed by his troops.

The trial of Yamashita represented a significant step forward in promoting the inclusive interests of states in ensuring the enforcement of the laws of war. Yet, at the same time, the principle of military necessity was not ignored in articulating a limited-liability theory of command responsibility.

(b) *Nuremberg.*

During 1945-1946 the International Military Tribunal, a panel of judges from France, the United Kingdom, the Soviet Union, and the United States, tried twenty-four major war criminals including Goer-

ing, Hess, Keitel, and Peer.¹¹¹ The remainder of the war crimes trials in Germany were subsequently conducted before national tribunals under Allied Control Council Order No. 10. In the American zone, under what was termed the Nuremberg Subsequent Proceedings, there were twelve major trials involving one hundred and eighty-four defendants.¹¹² The cases were tried in groups depending upon the nature of the crimes and the classification of defendants, *i.e.*, Gestapo, judges, or High Command. Two cases against military leaders are relevant to the study of command responsibility and are analyzed in the discussion that follows: Case No. 7, *United States v. Wilhelm List, et al.* (the "Hostage Case")¹¹³ and Case No. 12, *United States v. Wilhelm Von Leeb, et al.* (the "High Command Case").¹¹⁴

(1) *High Command Case.*

(A) *Overview.*

The German High Command Trial commenced on 30 December 1947 and ended on 28 October 1948.¹¹⁵ The fourteen defendants before the Tribunal were among the highest ranking German officers brought to the bar following World War II; the principal defendant, Field Marshal Wilhelm von Leeb, was junior only to von Rundstedt, the most senior of all the German Field Marshals.¹¹⁶ The remaining thirteen defendants were likewise general officers. All of the general officers were indicted together on four counts, of which counts two and three involved war crimes and crimes against humanity and raised the issue of the responsibility of these officers for illegal orders and subordinates' crimes.

The illegal orders referred to include the Commissar Order and the Barbarossa Jurisdiction Order. The Commissar Order was a directive of limited distribution issued by Hitler's headquarters ordering the summary execution of captured political commissars attached to the Soviet Army.¹¹⁷ The Barbarossa Jurisdiction Order, meanwhile, was directed at civilians.¹¹⁸ It ordered collective measures, removed legal safeguards granted by the Hague Conventions, directed the sum-

¹¹¹The Nuremberg Judgment, Nuremberg, 1945-46, reprinted in 2 L. Friedman (ed.), *The Law of War: A Documentary Study* 922 (1972).

¹¹²Douglass, *High Command Case: A Study in Staff and Command Responsibility*, 6 *Int'l Law.* 686, 688 (1972).

¹¹³8 *Law Reports*, *supra* note 67, at 34-92.

¹¹⁴12 *Law Reports*, *supra* note 67, at 1-127.

¹¹⁵*Id.* at 1.

¹¹⁶Campbell, *supra* note 5, at 139.

¹¹⁷12 *Law Reports*, *supra* note 67, at 23-26.

¹¹⁸*Id.* at 29-31.

mary execution of inhabitants suspected of activities against the German armed forces, and ordered that no punishment be meted out to soldiers who committed offenses against civilians.¹¹⁹

The prosecution under the direction and supervision of Telford Taylor urged that under international law, including the *Yamashita* case, a military commander is per se responsible for crimes committed within the area of his command, "regardless of superior orders, regulations or law limiting his authority and regardless of the fact that the crimes committed. . . [were] due to the action of the State or superior military authorities which he did not initiate or in which he did not participate. . . ."¹²⁰ The Tribunal rejected this strict theory of liability along with the notion that *Yamashita* supported such a theory and then proceeded to distinguish the facts in the *Yamashita* case as inapplicable

to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the State, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charges were mainly committed at the instance of higher military and Reich authorities.¹²¹

The Tribunal recognized that an occupational military commander's control in his assigned area was not absolute; yet, at the same time, the Tribunal expressed the view that the military commander of the occupied territory had certain responsibilities which could not be set aside by reason of activities of his own state within his area:

He is the instrument by which the occupancy exists. It is his army which holds the area in subjection. It is his might which keeps an occupied territory from re-occupancy by the armies of the nation to which it inherently belongs. It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the State which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment.¹²²

¹¹⁹*Id.*

¹²⁰*Id.* at 76.

¹²¹*Id.*

¹²²*Id.* at 76-77.

Military necessity played a prominent role in the Tribunal's articulation of the standard of command responsibility:

The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.¹²³

Later, the Tribunal stated explicitly that, absent direct responsibility as in the case of the commander issuing illegal orders, a commander to be criminally liable "must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and. . . the offences [sic] committed must be patently illegal."¹²⁴

In addition to articulating a standard concerning the criminal responsibility of a military commander, the Tribunal also addressed the issue of the criminal responsibility of a staff officer, since four of the officers in the High Command Trial had served as staff officers in the German High Command or as chief of staff at the corps or higher headquarters level on the Russian Front. The Tribunal opined:

In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring

¹²³*Id.* at 76.

¹²⁴*Id.* at 77.

therein. He has no command authority over subordinate units. All he can do in such cases is call these matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitely upon his commander.¹²⁵

This standard of liability afforded the staff officer greater protection than his military commander in recognition of the staff officer's non-existent command authority over subordinate units, a reflection of military organizational needs. In the discussion that follows, the cases of six individuals in the High Command Case have been singled out for review and analysis to ascertain the effects of the Tribunal's theory of command responsibility on specific factual scenarios.

(B) VonLeeb.

The Tribunal, in assessing the charges against Wilhelm von Leeb during the period when he was Commander-in-Chief Army Group North, addressed the command structure:

Executive power at the beginning of the Russian campaign was conferred directly upon the army commanders and the commanders of the army group rear areas. It was provided, however, that the commander in chief of an army group might issue orders to his subordinates in the field of executive power. In other words, his authority in this field was more in the nature of a right to intervene than a direct responsibility.

. . .

. . . As stated, his function was operational. Many administrative duties had been left to his subordinate armies and his army group rear area. He and his staff alike would have the right to assume that the commanders entrusted with such administrative functions would see to their proper execution. Under such conditions it must be accepted that certain details of activities within the sphere of his subordinates would not be brought to his attention.¹²⁶

The Tribunal was, in essence, differentiating between the command responsibility of a tactical or operational commander and an occupa-

¹²⁵*Id.* at 81.

¹²⁶1 Trials of War Criminals Before the Nuremberg Tribunal Under Control Council Law No. 10, Nuremberg, Oct. 1946-Nov. 1949, at 554-55 (1951) [hereinafter cited as Nuremberg Trials].

tional or area commander, a recognition of the differing functions of military commanders dictated by military necessity.

Although the Tribunal proceeded to find that criminal orders were executed by units subordinate to the defendant and criminal acts were carried out by agencies of his command, criminal responsibility did not *ipso facto* attach. Rather, the Tribunal found that von Leeb “must be shown both to have had knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence.”¹²⁷ The Tribunal then broke the charges down into the following general headings for discussion *seriatim*: (1) the Commissar Order; (2) crimes against prisoners of war; (3) the Barbarossa Jurisdiction Order; (4) crimes against civilians; (5) pillage of public and private property; and (6) criminal conduct pertaining to the seige of Leningrad.

With respect to the Commissar Order, the evidence disclosed that von Leeb was present at a meeting conducted by Hitler when the proposed extermination of commissars was put forward as a policy matter.¹²⁸ Von Leeb received the announcement with a good deal of consternation, later protesting to Field Marshall von Brauchitsch that it was a violation of the rules of war.¹²⁹ The latter gave von Leeb assurances that he would attempt to prevent its issuance; nevertheless, the order was issued, in this case from Berlin to von Leeb’s Army commanders with von Leeb’s headquarters limited to performing the administrative function of forwarding the order to the Army commanders.¹³⁰ In addition to his protests to his superiors, von Leeb personally communicated his opposition to the order directly to his subordinate commanders, admonishing them to adhere to von Brauchitsch’s Maintenance-of-Discipline Order which required strict sanctions for soldiers committing war crimes.¹³¹ The Tribunal concluded:

[W]e cannot find von Leeb guilty in this particular. He did not disseminate the [Commissar] order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If his subordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his.¹³²

¹²⁷*Id.* at 555.

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.* at 555-57.

¹³¹*Id.* at 555-56.

¹³²*Id.* at 557-58.

Von Leeb was similarly acquitted on the charge of crimes against prisoners of war (POWs). The evidence demonstrated that the responsibility for POWs rested not with von Leeb, but rather with the quartermaster general and his Rear Area Army commanders who reported directly to the German High Command. At the same time, the record failed to show that von Leeb was criminally connected with, knew of, or participated in the illegal execution of Red Army soldiers in his area.¹³³

The Barbarossa Jurisdiction Order was an entirely different matter. It was a criminal order, in part because it included ambiguous guidance with respect to the authority conferred upon junior officers to shoot civilians who were merely suspected of certain acts.¹³⁴ This order came directly to von Leeb's headquarters through the normal chain of command where it was readdressed and forwarded to subordinate units without the benefit of clarification or qualification to prevent or hinder its illegal application. Von Leeb, having set this instrument in motion, was found by the Tribunal to have assumed "a measure of responsibility for its illegal application."¹³⁵

As regards the charge of crimes against civilians, the Nazi Security Police operated within the area of von Leeb's Army Group North, carrying out a program of mass murder and recruitment of slave labor. There was, however, no evidence that von Leeb knew of the liquidation or recruitment activities within his area or acquiesced in such activities, with one exception.¹³⁶ In that case, von Leeb learned of a pogrom at Kovno, ostensibly the work of a local self-defense organization, but apparently inspired by the Nazi Security Police, and took immediate action to prevent any recurrence.¹³⁷

The Tribunal, in reviewing the final two charges of pillage of public and private property and criminal conduct pertaining to the siege of Leningrad, found no criminality because the action taken was justified by existing legal norms and the legitimate military necessities of the situation.¹³⁸ In sum, von Leeb was found guilty only for his role in connection with the transmittal and application of the Barbarossa Jurisdiction Order. The acquittal of von Leeb on the other charges was due, in large part, to von Leeb's lack of knowledge

¹³³*Id.* at 558-60.

¹³⁴*Id.* at 560.

¹³⁵*Id.* at 560-61.

¹³⁶*Id.* at 562.

¹³⁷*Id.*

¹³⁸*Id.* at 562-63.

or duty to prevent the war crimes as a result of his tactical-operational responsibilities, as compared to the occupational-executive responsibilities of his Rear Area Army commanders.

(C) *Von Kuechler.*

Field Marshal Georg Karl Friedrich-Wilhelm von Kuechler took part in the Russian Campaign in 1941 as an Army commander until he succeeded to command of Army Group North after von Leeb's retirement. He was convicted on five counts: the Commissar Order; neglect of prisoners of war and their use in prohibited labor; illegal execution of Red Army soldiers and murder and ill-treatment of prisoners of war; deportation and enslavement of the civilian population; and murder, ill-treatment, and persecution of the civilian population and enforcement of the Barbarossa Jurisdiction Order.¹³⁹ The evidence indicated his knowledge of and acquiescence in, or, in some cases, direct order of the offenses of which he was convicted.

One count, the illegal execution of POWs, is particularly noteworthy for the role of criminal negligence in von Kuechler's conviction. Those POW executions were carried out pursuant to the orders of the German High Command. The prosecution failed to demonstrate that von Kuechler transmitted the order.¹⁴⁰ The Tribunal discovered, however, that von Kuechler was aware that the illegal executions were taking place because his headquarters received regular reports on the executions. The Tribunal concluded that defendant not only tolerated, but approved of, the execution of the orders.¹⁴¹ The Tribunal further concluded that the accused was aware of the extensive neglect and ill-treatment of POWs in his area and found him "guilty of criminal neglect of prisoners of war in his jurisdiction."¹⁴² In effect, the Tribunal found that von Kuechler had a duty to intervene and that he had failed to do so at the expense of human lives while lacking the requisite military-needs justification.

(D) *Von Salmuth.*

General Hans von Salmuth held command on the Eastern Front at both the army and corps level and was found guilty on several counts, one of which is noteworthy for the facts and legal analysis. Von Salmuth was charged with murder and ill-treatment of prisoners of war:

¹³⁹*Id.* at 565-90.

¹⁴⁰*Id.* at 568.

¹⁴¹*Id.*

¹⁴²*Id.* at 569.

Concerning the treatment of prisoners of war in the areas under the defendant, numerous reports from these areas show what must be considered as an excessive number of deaths by shooting and otherwise among the prisoners of war. They imply a degree of negligence on the part of the defendant. . . . These reports show that prisoners of war were handed over to the SD, a police organization, and that thereafter the army exercised no supervision over them and apparently had no control or record as to what became of them.

Whether or not they were liquidated, as many of them undoubtedly were, is not the question. The illegality consists in handing them over to an organization which certainly by this time the defendant knew was criminal in nature.

The defendant undertakes to state that he had no supervision over these prisoner of war camps. From the evidence we are of the opinion that the defendant was responsible for prisoners of war within his area and also had control over them and that he must accept criminal responsibility for the illegal transfer of these prisoners to the SD.¹⁴³

The violent purposes of the Nazi police organization obviously figured very prominently in the Tribunal's guilty finding for von Salmuth.

(E) Von Roques.

The crimes for which Lieutenant General Karl von Roques was charged and convicted were committed while the defendant was Commander of the Rear Area of Army Group South and of the Rear Area of Army Group A. Von Roques' testimony demonstrated that, in the area of his command, he exercised executive power as the representative of the occupying forces. The Tribunal in analyzing the duties of a military occupational commander expressed

the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issues which indicate a repudiation of

¹⁴³*Id.* at 617

such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality.¹⁴⁴

Based on this theory of liability, the Tribunal found von Roques guilty of implementing the Commissar Order in his rear area, even though he denied issuing the order, because he knew commissars were being shot by units subordinate to his command and by agencies in his area and did nothing about it. The decision demonstrated the impact of an occupational commander's broad area responsibilities on his liability for war atrocities in the area. In essence, the area commander, as opposed to a tactical commander, had "geographic" responsibilities and a broader duty to intervene to prevent war crimes because of those geographic responsibilities.

(F) *Reinecke.*

Lieutenant General Hermann Reinecke was indicted and charged largely as a result of his activities as the Chief of the General Armed Forces office from 1939 until the end of the war with oversight responsibility for the Office of Chief of Prisoner of War Affairs.¹⁴⁵ During that period, Reinecke issued numerous directives concerning prisoners of war "by order" of his superior, Field Marshall Keitel, the Commander-in-Chief of the German High Command.¹⁴⁶ The fact that the defendant as a staff officer possessed only derivative administrative authority, as opposed to direct command authority, over the personnel of POW camps proved nondispositive as the Tribunal found:

The evidence establishes overwhelmingly the over-all control and supervision of the defendant Reinecke as to prisoners of war under the supreme authority of the [German High Command] and his power over prisoner of war camps and prisoner of war affairs. The evidence shows that he exercised that authority by issuing orders; that he had the right of inspection both in himself and his subordinate; that such inspection was a duty entrusted to him and carried out by him; that he had the sources of knowledge and the duty was placed upon him to know and supervise what took place in these camps, and that he did know and supervise what took place therein and directed certain operations in such camps.¹⁴⁷

¹⁴⁴*Id.* at 632.

¹⁴⁵*Id.* at 649-51.

¹⁴⁶*Id.* at 651.

¹⁴⁷*Id.* at 653-54.

Having established Reinecke's role in supervising the POW camps, the Tribunal went on to find that "the defendant was an active participant in the program of segregation and illegal liquidation of prisoners of war under his jurisdiction"¹⁴⁸ and was therefore criminally liable.

(G) *Woehler*.

General Otto Woehler was charged with offenses committed both as a commander and a staff officer.¹⁴⁹ One of the charges pertained to the defendant while serving as Chief of Staff of the Eleventh Army where he knew the Commissar Order was being enforced.¹⁵⁰ The evidence failed to show that the defendant participated in the transmittal of the Commissar Order to subordinate units. Absent such participation, the Tribunal concluded that criminal responsibility for the Commissar Order at the command level lay exclusively with the Eleventh Army Commander and not his Chief of Staff on the theory that

{c}riminal acts or neglect of a commander in chief are not in themselves to be so charged against a chief of staff. He has no command authority over subordinate units nor is he a bearer of executive power. The chief of staff must be personally connected by evidence with such criminal offenses of his commander in chief before he can be held criminally responsible.¹⁵¹

Implicit in this liability standard was the recognition that military necessity dictates that the military commander, not the staff officer, must wield the ultimate decisionmaking power with the resultant criminal accountability. This relieves the staff officer of liability for his commander's decisions, unless the staff officer actively participates in the formulation or implementation of criminal acts. A stricter standard of criminal liability for staff officers would probably have the effect of compelling some staff officers in future conflicts to contravene the perceived illegal orders of their commanders in order to save themselves from possible prosecution, thereby sacrificing the value interest of effective command and control for the military commander.

¹⁴⁸*Id.* at 657.

¹⁴⁹*Id.* at 683-90.

¹⁵⁰*Id.* at 684.

¹⁵¹*Id.*

(2) Hostage Case.

The second of the Nuremberg Subsequent Proceedings which involved issues of command responsibility was the Hostage Case, in which the principal defendant, Field Marshal Wilhelm List, and eleven other general officers were brought to trial on charges that they were responsible for offenses committed by troops under their command during the German occupation of Albania, Greece, Norway, and Yugoslavia.¹⁵² All but two of the defendants, who were tried, were found guilty of war crimes on a theory of command responsibility.¹⁵³

In addressing the command responsibility issue, the Tribunal found itself confronted repeatedly with contentions that illegal orders and follow-up reports directed to the defendants never came to their attention.¹⁵⁴ In this connection, the Tribunal observed that the German Army was well-equipped, well-trained, and well-disciplined.¹⁵⁵ Further, it possessed an extensive communication network and systems for transmitting reports to military commanders.¹⁵⁶ under those circumstances, the Tribunal stated:

An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied in his absence resulting from orders, directions, or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters

¹⁵²8 *Law Reports*, *supra* note 67, at 34-36.

¹⁵³*Id.* at 34.

¹⁵⁴Nuremberg Trials, *supra* note 126, at 1259.

¹⁵⁵*Id.*

¹⁵⁶*Id.*

for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.¹⁵⁷

Having resolved generally the extent to which information received at a military commander's headquarters is imputed to the commander, the Tribunal addressed a second defense contention, that a military commander cannot be held criminally liable for the acts of nonsubordinate units:

The matter of subordination of units as a basis for fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordination are [sic]relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.¹⁵⁸

The Tribunal's resolution of this issue was identical, in substance, to that found in the High Command Case. A tactical commander is criminally liable, under the theory of command responsibility, for subordinated units, while an occupational commander is criminally liable for units in his area even though they are not operationally subordinate to him.

For the Tribunal, the guilt or innocence of military commanders required "proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty would be pronounced."¹⁵⁹ The Tribunal followed these remarks with an analysis of the charges and evidence against List.

Field Marshal Wilhelm List, the fifth ranking field marshal in the German Army, was the Commander-in-Chief of the Twelfth Army at the time of the invasion of Yugoslavia and Greece and later assumed responsibility as the chief executive authority for the whole of the Balkans.¹⁶⁰ As commander of the occupying forces, he was charged with the maintenance of internal order and the security of his area

¹⁵⁷*Id.* at 1260.

¹⁵⁸*Id.*

¹⁵⁹*Id.* at 1261.

¹⁶⁰*Id.* at 1262-63.

against attack. His duties in this respect were made increasingly difficult as time went on due to a particularly active resistance movement.

During the summer of **1941**, attacks against German troops singly and as units, as well as the disruption of communication and transportation systems, by partisan guerillas increased dramatically.¹⁶¹ In response to a deteriorating situation, List, on **5 September 1941**, issued a generally worded order to his subordinates directing “[r]uthless and immediate measures against the insurgents, against their accomplices and their families.” As examples, he cited the destruction of villages involved, the deportation and incarceration of relatives of partisans and guerillas, and the seizure of hostages.¹⁶² The insurgent problem soon drew the attention of Berlin.

On **16 September 1941**, Hitler personally ordered List to suppress the insurgent movement. This resulted in the commissioning of General Franz Boehme with the handling of military affairs in Serbia and in the transfer of the entire executive power in Serbia to him. This delegation was, in fact, effected on the recommendation and at the request of List to whom Boehme remained subordinate.¹⁶³

In late September **1941**, List readdressed and forwarded without amplification or clarification to his subordinates, a directive from the German High Command which called for the reprisal killing of **50 to 100** communists for the life of each German soldier lost in partisan guerilla attacks.¹⁶⁴ In the performance of his tasks, Boehme transmitted “routine” progress reports to his superior, List, concerning these reprisal killings.

List contended that he was unaware of Boehme’s reports as he was absent from headquarters at the time of their receipt. In addition, he attributed the killings to units which were not tactically subordinate to him. The Tribunal was not persuaded:

A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area in his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within the territory. He may require

¹⁶¹*Id.* at 1263.

¹⁶²*Id.* at 1263-64.

¹⁶³*Id.* at 1264.

¹⁶⁴*Id.* at 1264-65.

adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made to their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

The reports made to . . . List . . . charge him with notice of the unlawful killing of thousands of innocent people. . . . Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.¹⁶⁵

List's conviction rested on the broad executive authority and co-extensive legal responsibility of an occupational commander for his area of responsibility where that commander had failed to keep informed of events in his area by reading reports forwarded to him which set forth the nature and extent of war crimes occurring in his area of responsibility.

The convictions of List's codefendants reflected the same basic legal rationale. Two of List's codefendants, however, were acquitted. Both of those officers were charged with war crimes com-

¹⁶⁵*Id.* at 1271-72.

mitted while they were serving as chiefs of staff to a military commander.¹⁶⁶ An examination of one of those cases is instructive.

Lieutenant General Hermann Foertsch served as Chief of Staff to Field Marshal List and other commanding generals in the Balkans.¹⁶⁷ The evidence demonstrated that Foertsch had distributed his superior's orders, which he knew to be illegal, and further that Foertsch had read the reports of Boehme concerning the reprisal killings.¹⁶⁸ No overt act by Foertsch, though, from which a criminal intent could be inferred was ever shown.¹⁶⁹

The Tribunal concluded that Foertsch had "knowledge of the doing of acts which we have. . . held to be unlawful under international law," but found in terms reminiscent of the Woehler case in the High Command Trial that it

is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organizations over which the armed forces, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation.¹⁷⁰

In sum, the limited nature of Foertsch's authority and duties required that his criminal liability be restricted to crimes of commission, rather than omission.

(3) *Value Analysis.*

The trials of Field Marshals List and von Leeb and their twenty-four codefendants dealt with a variety of factual scenarios and established specific and detailed standards concerning the issue of command responsibility. Among the military factors which figured

¹⁶⁶*Id.* at 1281-87.

¹⁶⁷*Id.* at 1281-82.

¹⁶⁸*Id.* at 1282-86.

¹⁶⁹*Id.* at 1286.

¹⁷⁰*Id.*

prominently in the Tribunals' limited-liability theory of command responsibility were the differences between tactical and occupational commanders and between commanders and staff officers in their powers and duties, the necessity for a commander to delegate functions and rely on his subordinates to perform those functions, and the critical role of reports in keeping the commander apprised of events within his command or area of responsibility. In essence, the principle of military necessity played a prominent role. The principle of humanity was also evident in the Tribunal's decisionmaking as the Tribunal articulated legal standards designed to enforce the laws of war through command accountability, while at the same time protecting the commander from punishment in the absence of any personal dereliction.

The final balance struck by the Tribunals between the fundamental value interests of humanity and necessity for commanders was to include "knowledge" or its equivalent, such as "acquiescence" or "criminal negligence," as an element of the crime and then restrict the criminal liability of each defendant to war crimes for which he had the authority and duty, but failed, to prevent. For staff officers, the balance shifted more heavily toward a requirement for active participation by the officer in a criminal order or its execution, thereby recognizing the staff officer's limited authority in modern military organizations.

One final comment is warranted. Although the prosecution at the Nuremberg Subsequent Proceedings advocated the concept of absolute liability as an international standard of military command responsibility purporting to rely on the *Yamashita* case, the Nuremberg Tribunals categorically rejected this argument. The Tribunals did not, however, reject the precedential value of the *Yamashita* case. Rather, they adopted an interpretation of that case which called for only limited liability for military commanders. The greater clarity of the Nuremberg decisions, when juxtaposed with the *Yamashita* case, is considered noteworthy and is due in large part to the fact that the Nuremberg Subsequent Proceedings were conducted under international auspices by learned civilian judges in a more judicial atmosphere than that which prevailed in the *Yamashita* trial, immediately at the close of hostilities in the Philippines, before an American Military Commission of lay jurors.

(c) *Tokyo Trials.*

On 19 January 1946, General MacArthur, the Supreme Commander for the Allied Powers, by Special Proclamation established the International Military Tribunal for the Far East for "the trial of

those persons charged individually or as members of organizations or in both capacities with offences [sic] which include crimes against peace.¹⁷¹ The constitution, jurisdiction, and functions of the Tribunal were by the Proclamation declared to be those set forth in the Charter of the Tribunal approved by the Supreme Commander on the same day.

Subsequently, the International Military Tribunal for the Far East with judges from eleven Allied countries tried twenty-eight former leaders of Japan in the International Japanese War Crimes Trials, commonly known as the Tokyo Trials.¹⁷² The indictment entered against the defendants, ten of whom were military leaders, included fifty-five counts, the last two of which accused certain of the defendants with having ordered, authorized, and permitted conduct in violation of the laws and customs of war and having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war.¹⁷³ Trial commenced on 3 June 1946, and ended in the decision of the Tribunal on 12 November 1948, after 48,412 pages of transcript and 4,336 exhibits.¹⁷⁴ Of the twenty-eight defendants, two had died, one was declared unfit to stand trial, and the remaining twenty-five were convicted.

In the first portion of the Tribunal's judgment, the general standard of responsibility under international law for the care of prisoners of war and civilian internees was discussed. The Tribunal declared that, under customary law formally embodied in Hague Convention No. IV of 1907 and the Geneva Red Cross Convention of 1929, a government in possession of POWs and civilian internees was responsible for their maintenance and prevention of their mistreatment.¹⁷⁵ This responsibility, in turn, devolved upon persons in the government including military commanders with civilian or military prisoners under their control. The Tribunal continued:

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

¹⁷¹The Tokyo War Crimes Trial, *reprinted in* 2 L. Friedman (ed.), *The Law of War: A Documentary Study* 1029, 1031 (1972).

¹⁷²*Id.* at 1029.

¹⁷³*Id.* at 1031-33.

¹⁷⁴*Id.* at 1033-34.

¹⁷⁵*Id.* at 1037-38.

(1) They fail to establish such a system

(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. Any Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.¹⁷⁶

Thus, for defendant General H. Kimura, Commander-in-Chief of the Burma Area Army, the fact that he had issued orders to soldiers to conduct themselves properly and refrain from ill-treatment of prisoners was held legally insufficient by the Tribunal since the defendant's duty extended to satisfying himself that his order was being carried out; this he had failed to do.¹⁷⁷

For those commanders who provided a proper system for treatment of prisoners and saw to its continuous efficient functioning, responsibility for war crimes committed against those prisoners was limited to instances where:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to

¹⁷⁶*Id.* at 1038-39.

¹⁷⁷*Id.* at 1039-40.

any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and wide-spread as to time and place are matters to be considered in imputing knowledge.¹⁷⁸

In fact, the notoriety and widespread nature of the “Rape of Nanking,” in which upwards of 100,000 people were killed, was relied upon by the Tribunal to impute knowledge of those war crimes to the Japanese general commanding at Nanking, General I. Matsui, and to find him responsible for the atrocities.¹⁷⁹

The Tribunal’s final normative standard concerning the military commander’s responsibility for acts of subordinates read:

If crimes are committed against prisoners under their control, of the likely occurrence of which they *had, or should have had knowledge* in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he *knew or should have known*, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.¹⁸⁰

After articulating the “knew-or-should-have-known” standard, the Tribunal turned its attention to the chief contention of the defendants, that military exigencies precluded the defendants, just as Yamashita had argued, from maintaining the command and control necessary to safeguard against murder and ill-treatment of prisoners. The Tribunal considered this contention separately as to each defendant and found that the systematic nature of the acts of murder, rape, ill-treatment, and other atrocities throughout the war in occupied territories falling under each of the defendants’ commands tended to militate against this argument.¹⁸¹

In sum, the Tribunals in the Tokyo Trials reasoned that: (1) the government’s responsibility under international law to prevent war crimes against prisoners devolves upon its human instruments; (2) those persons in position to provide a system for the care of prisoners have a duty to establish such a system and see to its implementation;

¹⁷⁸*Id.* at 1039.

¹⁷⁹*Id.* at 1141.

¹⁸⁰*Id.* at 1039 (emphasis added).

¹⁸¹Parks, *supra* note 22, at 67.

and (3) fulfillment of those duties does not excuse the military commander who knows or should know of the commission of war crimes and fails to intervene. This standard, although somewhat different in phraseology from the decisions of the Nuremberg Subsequent Proceedings, share the same normative, value-laden concepts specifically, command and control, war crimes and the risk of future war crimes, the duty to intervene, and knowledge or its equivalent, such as acquiescence or criminal neglect.

(d) Toyoda Trial.

Admiral S. Toyoda, former Commander-in-Chief of the Japanese Combined Fleet, the Combined Naval Forces, and the Naval Escort Command from May 1944 to May 1945 and Chief of the Naval General Staff from 30 May 1945 to 2 September 1945, was tried by a seven-member Allied Military Tribunal, which included as President an Australian brigadier and as members six American officers.¹⁸² Trial commenced on 29 October 1948 on charges, many of which were the same or similar to those for which Yamashita was tried, and concluded on 6 September 1949 with Admiral Toyoda's acquittal.¹⁸³

The Military Tribunal's decision reaffirmed the findings in the Yamashita trial that Yamashita had actual command and control of the Japanese naval troops that committed the "Rape of Manila" and further that Yamashita must have known of the war crimes.¹⁸⁴ In Admiral Toyoda's case, the essential elements of command responsibility were outlined as the commission by subordinates of war crimes which the commander ordered or:

In the absence of proof beyond a reasonable doubt of the issuance of orders then the essential elements of command responsibility are:

- (1) As before, that atrocities were actually committed;
- (2) Notice of the commission thereof. This notice may be either:
 - a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or
 - b. Constructive. That is, the commission of such a

¹⁸²*Id.* at 69-70.

¹⁸³*Id.*

¹⁸⁴*Id.* at 71-72.

great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.

3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.

4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.

5. Failure to punish offenders.

In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.¹⁸⁵

The Military Tribunal's standard of command responsibility matched fairly closely the test applied at the Tokyo Trials with one notable exception. A "reasonable man" standard had been introduced as a purportedly objective test with respect to a military commander's constructive notice, and therefore knowledge, of war atrocities.

(e) *Other Trials.*

The general principles that emerged from the major war crimes trials with respect to the command responsibility issue were **also** evident in the trials of other lesser military commanders following World War II.¹⁸⁶ Two of those lesser war crimes trials warrant special mention.

¹⁸⁵19 United States v. Soemu Toyoda 5005-06 (Official Transcript of Record of Trial).

¹⁸⁶For a more detailed discussion of the trials of the lesser war criminals, see Parks, *supra* note 22, at 73-76 and sources cited therein.

In the *Essen Lynching* case, Captain E. Heyer gave instructions to a prisoner escort that a party of three Allied POWs was to be taken to a Luftwaffe unit for interrogation.¹⁸⁷ Heyer admitted that he ordered the escort not to interfere in any way if a civilian crowd should molest the prisoners.¹⁸⁸ It was also confirmed that Heyer made remarks to the effect that “the airmen would or should be shot.”¹⁸⁹ When the POWs were subsequently marched through Essen, the escort stood by while the mob murdered the prisoners.¹⁹⁰ Heyer was found guilty of incitement, even though the actual killers were civilians, and sentenced to be hanged.¹⁹¹ This represented one more legal wrinkle in the basic theme of a military commander’s duty to intervene and the resulting legal liability when he fails to do so.

The second case warranting special mention is the trial by a British military tribunal sitting in Germany of Major K. Rauer, the German commander of an aerodrome. The charges against Major Rauer were predicated on three separate instances in which his subordinates killed captured Allied airmen. After each killing, Rauer’s subordinates reported that the prisoners had been shot while trying to escape.¹⁹² Although Rauer had expressed hostile opinions towards captured enemy airmen, there was never any suggestion in the evidence that Rauer ordered the killings.

The military tribunal proceeded to acquit Rauer of the first charge, but convicted him of the two charges stemming from the later killings, apparently based on the consideration that, “it was less *reasonable* for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.¹⁹³ Under this “reasonable-man” standard, then, a commander’s knowledge of a single POW’s death is sufficient to establish constructive notice of the risk of commission of future war crimes by subordinates, thereby invoking the duty to intervene.

For many, the “case” law that emerged from Nuremberg, Tokyo, and elsewhere represented the high water mark of the international criminal standard of command responsibility. The customary interna-

¹⁸⁷1 *Law Reports*, *supra* note 67, at 88.

¹⁸⁸*Id.* at 90.

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.* at 88-91.

¹⁹²4 *Law Reports*, *supra* note 67, 113-14.

¹⁹³*Id.* at 114, 117 (emphasis added).

tional law pertaining to armed conflicts, however, does not stand still. Instead, it tends to ebb and flow with the shifting currents of state practice and the relative weight accorded the principles of military necessity and humanity.

5. *Vietnam-My Lai.*

The next time the command-responsibility issue was raised occurred in the Vietnam conflict. During that conflagration, in the subhamlet of My Lai (4) in Son My Village, Quang Nai Province, Republic of South Vietnam, on 16 March 1968, American troops, acting as a unit and under orders, engaged in widespread and indiscriminate killing of unarmed, unresisting Vietnamese civilians consisting almost exclusively of old men, women, and children.¹⁹⁴

First Lieutenant William Calley, a platoon leader at My Lai, was subsequently charged and convicted by an American military court-martial of participating in the actual murders.¹⁹⁵ Because of Calley's direct involvement in the killings, the concept of command responsibility never played a pivotal role in his case.¹⁹⁶ Allegations surfaced, however, that Calley's superior, Captain Medina, the American company commander at My Lai, might be criminally liable under the concept of command responsibility.¹⁹⁷ Later, the general commanding the division responsible for the area of My Lai, Major General Samuel Koster, became the subject of charges, not for the killings themselves, but for his failure to call for a full investigation when he received allegations relating to My Lai.¹⁹⁸ Subsequently, one of the soldiers present at My Lai filed charges against General William Westmoreland, the commanding general of the army forces in Vietnam, for his alleged culpability in the war crimes.¹⁹⁹ Although many officers were made the subject of charges arising out of the incident

¹⁹⁴For a detailed exposition of the facts, see, e.g., S. Hersch, *A Report on the Massacre and its Aftermath* (1972); W. Peers, *The My Lai Inquiry* (1979) [hereinafter cited as Peers book]; 1 Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (1970) [hereinafter cited as Peers Report].

¹⁹⁵United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973). See also Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

¹⁹⁶Howard, *Command Responsibility for War Crimes*, 21 J. Pub. L. 7 (1972) [hereinafter cited as Howard].

¹⁹⁷See Howard, *supra* note 196. See also Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 Rut.-Cam. L.J. 59 (1977) [hereinafter cited as Clark].

¹⁹⁸For a recent discussion of Koster's case, see Koster v. United States, 685 F.2d 407 (Ct. Cl. 1982).

¹⁹⁹N.Y. Times, Jan. 9, 1971, at 3, cols. 1-5.

at My Lai, an examination of the cases of Captain Medina, Major General Koster, and General Westmoreland, in that order, is considered sufficient to an analysis of the juridical value under customary international law of the criminal responsibility, if any, assessed on military commanders in the wake of My Lai.

(a) *Medina.*

Captain Ernest Medina was charged originally in February and March 1970 with five criminal offenses including four arising out of his own activities and one arising out of the activities of his company.²⁰⁰ In the latter instance, Medina was charged as a common law principal with the crime of premeditated murder of Vietnamese nationals.²⁰¹ The charge was one of violation of municipal law. He was not charged under article 18 of the Uniform Code of Military Justice (UCMJ), which empowers an appropriate military authority to convene military commissions to adjudicate war crimes which are not violations of municipal law.²⁰²

Captain Medina was brought to trial in June 1971. The prosecution presented evidence which established the illegality of the deaths but failed to link Medina to the issuance of illegal orders prior to or during the assault on My Lai. Accordingly, the judge found lacking the requisite intent in conjunction with the premeditated murder charge and reduced the charge to involuntary manslaughter.²⁰³

On the manslaughter charge, Medina was able to demonstrate that he ordered a cease-fire, proof positive under the circumstances that he was aware that his troops had gotten out of control and that he did not intend for it to continue. The key issue became one of whether Medina had knowledge of the killings well in advance of his cease-fire order and failed to act promptly to stop the atrocities.²⁰⁴ The evidence on that issue was conflicting.

In addressing the issue of command responsibility, the trial judge instructed the jury:

In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in

²⁰⁰Howard, *supra* note 196, at 7-8.

²⁰¹*Id.*

²⁰²10 U.S.C. § 818 (1976); Howard, *supra* note 196, at 19.

²⁰³Clark, *supra* note 197, at 59; Howard, *supra* note 196, at 7-8.

²⁰⁴Campbell, *supra* note 5, at 190; Howard, *supra* note 196, at 8.

the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has *actual knowledge* that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require *actual knowledge* plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.²⁰⁵

Concerning the elements of the offense, which the prosecution must prove beyond a reasonable doubt before the members could find Medina guilty of involuntary manslaughter, the court was instructed:

- (1) That an unknown number of unidentified Vietnamese persons, not less than 100, are dead;
- (2) That their deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command *after having gained knowledge* that his subordinates were killing noncombatants, in or at the village of My Lai (4), Quang Ngai Province, Republic of Vietnam, on or about 16 March 1968;
- (3) That this omission constituted *culpable negligence*; and
- (4) That the killing of the unknown number of unidentified Vietnamese persons, not less than 100, by subordinates of the accused and under his command, was unlawful.

²⁰⁵Howard, *supra* note 196, at 8-10 (emphasis added).

You are again advised that the killing of a human being is unlawful when done without legal justification.²⁰⁶

The trial judge defined culpable negligence, in phraseology reminiscent of the High Command Case, as “a higher degree of culpable omission [than simple negligence], one that is accompanied by a gross, reckless, deliberate, or wanton disregard for the foreseeable consequences of that omission. . . .”²⁰⁷ On 22 September 1975, the jury returned a verdict of not guilty on all charges for Medina.

Although the judge’s instructions followed generally the language found in the then-applicable Army field manual on command responsibility, one notable difference was apparent. The judge’s instruction used the phrase “actual knowledge” as the mental element of the crime, while the Army field manual stated that the military commander is responsible, if “he has actual knowledge, or *should have knowledge, through reports received by him or through other means*”²⁰⁸ of subordinates’ war crimes. Telford Taylor expressed the view that the absence of the phrase “should have known” from the judge’s jury instructions was squarely contrary to the law of war as set forth in the Army field manual.²⁰⁹

The trial judge in the Medina case, Colonel Howard, in fact, wrote a law-review article several years after the trial in which he defended his jury instructions.²¹⁰ The article clearly recognized the “should-have-known” test as a part of customary international law, but narrowly limited its application to situations where the commander, “should have known of the atrocities had he exercised due care and diligence as a commander, *i.e.*, had he established normal operating procedures usually utilized by such commanders.”²¹¹ This test is clearly inapplicable to Medina’s case since there was never any question raised as to the adequacy of Medina’s reporting procedures. More importantly, Medina proved that he had actual knowledge of the killings when he ordered the cease-fire.

The trial judge, therefore, outlined a very broad definition of the term “actual knowledge,” inclusive both of “direct evidence” situa-

²⁰⁶*Id.* at 10-11, 12 (emphasis added).

²⁰⁷*Id.* at 8, 12.

²⁰⁸Field Manual, *supra* note 19, par. 501 (emphasis added).

²⁰⁹Taylor, *The Course of Military Justice*, N.Y. Times, Feb. 2, 1972, at 39. *See also Vietnam and the Nuremberg Principles: A Colloquy on War Crimes*, 5 Rut.-Cam. L.J. 1, 9-11 (1973).

²¹⁰Howard, *supra* note 196.

²¹¹*Id.* at 16.

tions where the commander was present at the scene and observed the atrocities and of “circumstantial evidence” situations where a report of the atrocities was submitted to the commander and the commander normally read all reports submitted to him by subordinates.²¹² Under that expansive definition, the correct mental element to Medina’s involuntary manslaughter charge was actual knowledge. The judge reenforced his expansive definition of actual knowledge when he included the High Command case criteria on criminal negligence in his jury instructions.²¹³ The trial of Medina, then, is not at variance with its historical antecedents as suggested by Telford Taylor, although the use of the term “actual knowledge” in the jury instructions without the benefit of the judge’s elucidating remarks can be misleading.

(b) *Koster.*

In the case of Major General Koster, the commanding general of the 23d Infantry (Americal) Division to which Captain Medina’s company was attached, there was never any indication that Koster ordered or permitted the killings to occur.²¹⁴ After the crimes had occurred, however, Koster came to learn of at least four irregularities that should have spurred him to call for a full investigation. Three of those irregularities came to his attention on the day of the killings or shortly thereafter. First, there were unusual casualty figures for the day in that 128 of the enemy were reported killed in action, yet there were only two U.S. soldiers killed and eleven wounded, and three weapons captured. Second, there was a report of 20 civilian deaths from U.S. artillery fire, an unusually large number. Third, Koster received a report that a helicopter pilot had observed what he considered to be indiscriminate firing by troops from Captain Medina’s company.²¹⁵ The fourth matter came to Koster’s attention a month later when he learned that there was a Viet Cong propaganda leaflet being circulated which charged American troops with massacring some 500 civilians in and around Son My Village in mid-March.²¹⁶

After receiving the report of the helicopter pilot’s allegations, Koster directed the initiation of an investigation by Captain

²¹²*Id.*

²¹³Compare Howard, *supra* note 196, at 12, 20 (judge’s jury instructions on culpable negligence) with *supra* text accompanying note 123 (High Command case criteria on criminal negligence).

²¹⁴Peers Report, *supra* note 194, at 12-1, 12-2, 12-3, 12-9, 12-10, 12-11, 12-12.

²¹⁵*Koster v. United States*, 686 F.2d 407, 409 (Ct. Cl. 1982).

²¹⁶Peers Report, *supra* note 194, at 12-11.

Medina's brigade commander, Colonel Henderson. That inquiry, in effect, constituted a self-investigation by the commander of the unit involved, an individual whose professional career concerns might interfere with his objectivity.

Within a few days, Koster received and accepted a verbal report, later reduced to writing, that the allegations of untoward conduct by American troops was unfounded.²¹⁷ When the Viet Cong leaflet later surfaced, Koster directed the reopening of the investigation by the brigade commander. In response, a brief, undocumented report was submitted which concluded that the allegations in the leaflet were without substance. Koster rejected this report as inadequate because it lacked substantiation such as witness statements. The next version of the report was more detailed and included witness statements, although there was no statement or testimony from the helicopter pilot. Koster accepted this version of the report without subjecting it to an effective review by his staff.²¹⁸

Koster was subsequently charged under the UCMJ as a consequence of a Military Board of Inquiry, commonly referred to as the Peers Inquiry, with failure to report known civilian casualties to higher headquarters as required by regulation and failure to insure that a proper and thorough initial investigation was conducted into the events at My Lai.²¹⁹ Those charges were referred to an Article 32 investigation, the military's equivalent of a grand jury investigation, but were never recommended for, or referred to, court-martial for trial. Instead, Koster was issued a punitive letter of censure for his failure to investigate adequately the allegations.²²⁰

Koster's case was later reviewed by the Secretary of the Army who found that Koster, "although free of personal culpability with respect to the murders themselves, [was] personally responsible for the inadequacy of subsequent investigations, despite whatever other failures may have been ascribed to his subordinates."²²¹ The Secretary continued:

A commander is not, of course, personally responsible for all criminal acts of his subordinates. In reviewing General Koster's case, I have also excluded as a basis for adminis-

²¹⁷*Id.* at 10-36.

²¹⁸*Id.* at 10-36 to 10-66.

²¹⁹*Koster*, 685 F.2d at 409.

²²⁰Peers Book, *supra* note 194, at 221.

²²¹Secretary of the Army Letter to Secretary of Defense of Mar. 23, 1971, *quoted in Koster*, 685 F.2d at 410.

trative action the isolated acts or omissions of subordinates. But a *commander clearly must be held responsible for those matters which he knows to be of serious import, and with respect to which he assumes personal charge.* Any other conclusion would render essentially meaningless and unenforceable the concepts of great command responsibility accompanying senior positions of authority.

There is no single area of administration of the Army in which strict concepts of command liability need more to be enforced than with respect to vigorous investigations of alleged misconduct. . . . General Koster may not have deliberately allowed an inadequate investigation to occur, but he let it happen, and he had ample resources to prevent it from happening.²²²

The Secretary's comments, although cast principally in the administrative language of command authority rather than judicial terminology, clearly espoused a duty on the part of a military commander to investigate adequately reports of possible war crimes, a necessary component for the effective enforcement of the law of war.

Having found General Koster culpable, the Secretary proceeded to impose the following administrative sanctions on Koster: the latter's appointment as a temporary major general was vacated, reverting him to his permanent grade of brigadier general; a letter of censure was placed in Koster's military personnel file; and the Distinguished Service Medal awarded to Koster for his Vietnam service covering the My Lai period was withdrawn.²²³ The Secretary's action was subsequently sustained in a decision by the United States Court of Claims, which cited the Secretary of the Army's comments on Koster's command responsibility and concluded: "[W]e cannot say differently."²²⁴

The decision in Koster's case is considered significant in two respects. First, it amply demonstrates that a military commander cannot be punished for the isolated war crimes of his subordinates which he did not order or permit and could not foresee. Second, it reaffirms the principle that the military commander who learns of the possible commission of war crimes by his subordinates and fails to make adequate inquiry with a view towards penal or disciplinary

²²²*Id.* at 414 (emphasis added).

²²³*Id.* at 409-10.

²²⁴*Id.* at 414.

action against the violators, where appropriate, will be held liable for breach of his duties. Because these two standards are substantively the same as those articulated in the post-World War II trials, the Koster case may be considered a reaffirmation of customary international legal norms concerning command responsibility.

(c) *Westmoreland*.

General William C. Westmoreland, the Commander, Military Assistance Command, Vietnam, and the Commanding General, U.S. Army, Vietnam, at the time of My Lai, was formally charged by Sergeant E. Torres, one of the My Lai defendants, for his "role" in the My Lai crimes.²²⁵ Those charges were later dismissed by the Secretary of the Army on the grounds that Westmoreland had taken *reasonable precautions*, all that one could expect a military commander to take, to prevent such atrocities.²²⁶ There was never any indication that General Westmoreland knew of the events at My Lai until a year after the massacre, at which time General Westmoreland initiated the Peers Inquiry.²²⁷

The Secretary's action in Westmoreland's case and, more generally, the issue of Westmoreland's guilt or innocence under customary international law became the subject of extensive legal commentary. For example, A. Frank Reel, Yamashita's defense counsel, rejected the "reasonable precautions" argument of the Army and insisted that Westmoreland would be convicted as a military commander under the *Yamashita* precedent.²²⁸ Telford Taylor echoed Reel's arguments by claiming that: "[I]f you were to apply to [General Westmoreland and other American generals], the same standards that were applied to General Yamashita, there would be a strong possibility that they would come to the same end as he did."²²⁹ Taylor adopted this position while conceding, first, that Westmoreland's command directives, issued in an effort to prevent war crimes by insuring that known or suspected war crimes were properly reported, investigated, and processed to action, were virtually impeccable, second, that the massacre was out of the ordinary and there was no evidence of other incidents of comparable magnitude, third that no evidence had surfaced to implicate Westmoreland

²²⁵N. Y. Times, Jan. 9, 1971, at 3, cols. 1-5.

²²⁶Reel, *Letter to the Editor*, N. Y. Times, Jan. 19, 1971, at 36, cols. 4-6.

²²⁷Peers Rook, *supra* note 194, at 1-11; Solf, *supra* note 4, at 58; Peers Report, *supra* note 194, at 1-7.

²²⁸Reel, *Letter to the Editor*, N. Y. Times, Jan. 19, 1971, at 36, cols. 4-6.

²²⁹N. Y. Times, Jan. 9, 1971, at 3, cols. 1-5.

in the atrocities or ensuing coverup, and fourth, that many American servicemen were tried, convicted, and punished for crimes in Vietnam which constituted violations of the law of war.²³⁰

Taylor and Reel supported their “guilty” finding for Westmoreland by interpreting the *Yamashita* case, including Supreme Court Justice Murphy’s dissent, as pronouncing an absolute liability theory of command responsibility. As demonstrated in an earlier section of this article, however, the Reel-Taylor position is not supported by a careful reading of the American Military Commission’s decision and the ensuing legal and factual reviews which recognized a limited theory of command responsibility with actual or constructive knowledge of the crimes, whether proven by direct or circumstantial evidence, as a critical element. Since Westmoreland lacked that element of knowledge, he could not be held criminally liable for the massacre.

Taylor and others, however, looked beyond the events at My Lai in convicting Westmoreland for his approval of “criminal” policies such as the excessive use of American aerial and artillery firepower resulting in unnecessary deaths of civilians, unlawful relocations of South Vietnamese civilians by their government, wanton destruction of property, and torture and murder of POWs in the custody of the South Vietnamese government.²³¹ The opposing view adopted by advocates for the U.S. government’s position was that the United States was not responsible for the actions of the South Vietnamese government and the military tactics at issue were proportional and lawful.

Resolution of these claims required resolution of a number of related issues, such as the international legality of the American presence in Vietnam and the independence of the Saigon regime, both of which are difficult political-legal questions. For example, in assessing Taylor’s charge of unlawful relocations of civilians by South Vietnam, which he attributes to the United States as an occupying power, the reasonableness of the U.S. claims concerning the legality of their presence in South Vietnam and the independence of the Saigon regime strengthens the U.S. government’s argument that the civilian relocations in South Vietnam were lawful. In support of his contention, it should be noted that, under the law of war, the citizens of a cobelligerent do not enjoy the same protections from their allies that the citizens of an occupied nation can expect from

²³⁰T. Taylor, *supra* note 4, at 55, 139, 168. See also MACV Dir. 27-5, 2 Nov. 1967, reprinted in 62 Am. J. Int’l L. 765 (1968).

²³¹N. Y. Times Book Rev., Mar. 28, 1971, at 1-3, 30-34.

the occupier.²³² A country's power to relocate its own inhabitants in order to prosecute a war is virtually unlimited under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.²³³

As the foregoing demonstrates, a determination of the validity of Taylor's charges concerning illegal war policies adopted in Vietnam turns on the critical issue of whether those policies were unlawful, not whether Westmoreland was responsible. Accordingly, a detailed examination of Taylor's charges is not considered instructive to an analysis of the juridical concept of command responsibility.²³⁴ Rather, the precedential value of the Westmoreland "case" lies in the Secretary's decision to dismiss the charges, a recognition that a military commander's liability for his subordinates' crimes, where reasonable precautions have been taken, is limited, not absolute, and knowledge or its equivalent, plus personal dereliction, are critical components to that commander's criminal liability.

(d) *Value Analysis.*

The decisions that followed in the wake of My Lai for Captain Medina, Major General Koster, and General Westmoreland basically affirmed the existing balance in customary international law between the principles of military necessity and humanity. For example, the military commander is still allowed, as Westmoreland did, to prescribe legitimate policy, delegate functions, and rely on his subordinates to implement them without criminal liability attaching solely from the acts of his subordinates, provided that the commander has seen to his duty to insure that the system is functioning properly. Where the military commander breaches a duty, as Koster did by failing to make adequate inquiries into reports of possible war crimes, the humanitarian-value interest in effective enforcement of the law of war and the military necessity for strict adherence by military commanders to their duties combine to render the commander legally accountable for breach of his duty. Finally, the military commander who acts to prevent future war crimes, as Medina did with his cease-fire order, is criminally liable only if he did not act promptly enough when he learned of subordinates' crimes.

²³²Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraisal*, 62 U.S. Naval War C. Int'l L. Stud. 397 (1980) [hereinafter cited as Hart]; Paust, *supra* note 4, at 175-85.

²³³Convention Relative to the Protection of Civilian Persons in Time of War, dated at Geneva Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Civilians Convention]; Hart, *supra* note 232, at 409.

²³⁴For a detailed discussion of the war-crimes-policy issue, see Hart, *supra* note 232; Paust, *supra* note 4; Solf, *supra* note 4; T. Taylor, *supra* note 4.

6. *Summary—Customary International Law*

The early development of command responsibility began in municipal tribunals under domestic laws. Only with the twentieth century has there been a real effort to develop international legal norms pertaining to a military commander's criminal liability for the war atrocities of his subordinates or other persons subject to his control.

A general description of the military commander's role in hostilities first surfaced in the Fourth and Tenth Hague Conventions of 1907. By the end of World War I, however, the concept was becoming increasingly criminal in its normative content in the international community, as the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended an international war crimes tribunal to the Paris Peace Conference. Although the Committee's recommendations were ultimately frustrated by German nationalism, the Allied Powers learned from the experience and took great care during the Second World War to avoid repetition of their mistakes after the previous war. The result was thousands of war crimes trials at Nuremberg, Tokyo, and elsewhere with the issue of command responsibility frequently in evidence. Those cases with specific legal standards and a multiplicity of factual scenarios still stand as the most detailed articulation of the juridical concept of command responsibility under customary international law. Subsequent developments arising out of the events at My Lai in Vietnam only served to reaffirm the basic tenets developed following World War II.

The customary international legal norms that have evolved reflect a balance of the principles of military necessity and humanity. With respect to the first principle, a modern army requires delegation of authority and control and a large degree of decentralization to function effectively. Under those conditions, a military commander cannot keep completely informed of the details of military operations of subordinates. Rather, he has a right to assume that details entrusted to responsible subordinates will be legally executed. Customary international law recognizes this by not imposing absolute liability on the military commander for subordinates' war crimes.

At the same time, the military commander is not permitted, solely through his delegation of authority and control, to escape criminal liability for war crimes committed by subordinates. Instead, customary international law, with a view towards insuring effective enforcement of the law of war, imposes criminal liability on the

military commander for war crimes which he ordered and, more significantly, for war crimes which occurred because of his crimes of omission such as:

failure to control troops, disregard of troop conduct, acquiescence in troop activity, dereliction of duty, general complicity (incitement, approval, aiding and abetting, accessory responsibility, conspiracy), failure to educate troops or suppress crime, failure to prosecute troops who violate the law, failure to enforce the law generally, failure to maintain troop discipline, failure to investigate incidents, failure to report incidents to higher authorities. . . .²³⁵

Although the list of crimes of commission or omission that have developed under the doctrine of command responsibility is lengthy, four basic elements to that doctrine have emerged that warrant mention: status (command and control), mental standard (knowledge), mental object (war crimes), and a duty to intervene.²³⁶ The first element, status, refers to the military commander's hierarchical relationship to his subordinates, in effect, his command and control. Thus, the criminal liability of a tactical military-commander, such as Field Marshal von Leeb, with effective authority only over operational units subordinate to him, is drawn to correspond with his unit command and control. Staff officers, meanwhile, with no operational authority over criminal subordinates have even narrower limits to their criminal liability for crimes of their military commander's subordinates. On the other hand, the criminal liability of a military occupational commander, such as Field Marshal List, with broad executive authority for his area of occupation is no longer limited to units subordinate to him, but extends to other persons subject to his area-wide authority.

The second element to the command-responsibility doctrine is the mental standard. The military commander must actually know of the subordinates' crime or possess the means to obtain such knowledge and fail to utilize such means. Actual knowledge may be shown by direct evidence or presumed through circumstantial evidence such as that the commander has executive authority over a territory and war crimes which are frequent and widespread occur within the territory, where reports of crimes are made to the military

²³⁵Paust, *supra* note 4, at 176.

²³⁶Note, *Command Responsibility for War Crimes*, 82 Yale L.J. 1274, 1276-77 (1973) [hereinafter cited as *Command Responsibility Note*].

commander's headquarters, the presumption is that such reports are for the benefit of the commander. These presumptions may be rebutted, for example, by a showing that the commander was absent from his command at the time of the offense or its reports, or by illness; but this rebuttal is temporary in nature, extending only to the period of the absence or illness. Any inaction upon resumption of command raises a presumption of acquiescence; knowledge will again be presumed.²³⁷

Absent actual knowledge, there must be conduct to support a finding that the commander encouraged the criminal misconduct of his subordinates through his failure to discover and intervene, where he had a duty to prevent such action. For this to occur, there must be either such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences or an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander under the facts and circumstances of the particular case must have known of the offenses charged and acquiesced therein.²³⁸

Closely intertwined with the mental standard to the juridical concept of command responsibility is the third element, the subordinate's mental object. This component may take one of three forms. First, the commander discovers that a *specific crime*, particularized by place, time, perpetrator, and type, is happening or is planned by subordinates. Second, the commander learns that a subordinate group or unit is engaged in a *criminal policy* or organized routine, *e.g.*, killing captured political commissars. Finally, the commander, as in the case of Major Rauer, the aerodrome commander, becomes aware that subordinates' crimes are likely to occur in the future. Here the mental object is the *risk of future war*

Assuming the requisite elements of status, mental standard, and mental object have been satisfied, the final component to the juridical concept of command responsibility is the military commander's duty to intervene for the purpose of repressing or eliminating the war atrocities. Although there have been suggestions in the Toyoda Trial and the *Koster* case that the duty to intervene should be drawn according to a "reasonable man" standard, the predominate position in customary international law, as evident in the *Yamashita* case and the Nuremberg Subsequent Proceedings, has been to impose a

²³⁷Parks, *supra* note 22, at 103.

²³⁸*Id.* at 103-04.

²³⁹Command Responsibility Note, *supra* note 236, at 1280.

duty on the commander simply to take such measures as are within his power and appropriate to the circumstances without express reference to the "reasonable man" test. Having established both the conceptual framework and the substantive content to the juridical concept of command responsibility in customary international law, this article turns next to an examination of conventional international legal norms articulated since the Second World War which address the issue, directly or implicitly, of a military commander's responsibility for subordinates' crimes.

B. CONVENTIONAL INTERNATIONAL LAW

1. Genocide Convention of 1948.

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 was drafted as a consequence of the atrocities of the Second World War and entered into force on 12 January 1951.²⁴⁰ Four months later, the International Court of Justice, noting the universal condemnation of genocide, declared that the basic principles of the Genocide Convention were obligatory on all nations.²⁴¹

According to that Convention, the crime of genocide means the commission, in peace or in war, of certain acts with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.²⁴² The acts include, *inter alia*, killing members of the group or causing serious bodily or mental harm to members of the group.²⁴³ Additional acts which are punishable include a direct and public incitement to commit genocide, attempts to commit genocide, conspiracy to commit genocide, and complicity in genocide.²⁴⁴ Persons committing any of the prohibited acts, according to the Convention, "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."²⁴⁵ Public officials clearly include military commanders.²⁴⁶

²⁴⁰Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force on Jan. 12, 1951) [hereinafter cited as Genocide Convention].

²⁴¹Reservations to Genocide Convention, 1951 I.C.J. 23 (Advisory Opinion).

²⁴²Genocide Convention, *supra* note 240, arts. I, II.

²⁴³*Id.* art. II.

²⁴⁴*Id.* art. III.

²⁴⁵*Id.* art. IV.

²⁴⁶N. Robinson, *The Genocide Convention, A Commentary* 72-73 (1960); 2 P. Drost, *The Crime of State—Penal Protections for Fundamental Freedom of Persons and People: Genocide—United Nations Legislation on International Criminal Law* 26, 94, 98 (1959) [hereinafter cited as Drost].

Although the Genocide Convention contains no express reference to command responsibility, the concept of individual responsibility incorporated therein for complicity in, conspiracy to commit, or incitement of the war crime of genocide affords considerable overlap between the Genocide Convention and the concept of command responsibility. Thus, for example, a military commander with intent to destroy a religious group who directly and openly incites his troops to kill the group members is guilty, both of genocide under the Genocide Convention and the “offense” of command responsibility under customary international law.

Given the Convention’s reliance on a concept of *individual* responsibility with a specific *mens rea* for the narrowly defined crime of genocide, it does not contribute significantly to the concept of command responsibility. Rather, it codifies the international criminality of the most heinous crimes committed in World War II. It is significant to note, however, for purposes of this article, that the three state parties to the Lebanese armed conflict, Lebanon, Syria, and Israel, are all parties to the Genocide Convention.

2. Geneva Conventions of 1949.

The end of World War II saw the International Committee of the Red Cross (ICRC) turn to the task of revising and extending the law of Geneva in light of the experience gained during that conflict.²⁴⁷ With the war crimes trials in progress at Nuremberg and elsewhere, one of the more burning issues considered by the ICRC was fixing penal responsibility and establishing penal sanctions for war criminals, including military commanders.

Despite public acceptance of the inclusive interest in punishment of war criminals, the *ad hoc* nature of the Charter of the International Military Tribunal at Nuremberg and its counterparts in the Far East left some with lingering doubts concerning the propriety of such action.²⁴⁸ To eliminate such objections in future conflicts, the Geneva Conventions of 1949, to which Lebanon, Syria, and Israel are state parties, incorporated provisions regarding penal sanctions for war criminals in international armed conflicts. Prior to examining those sanctions, it is necessary to delineate the duties and responsibilities contained in the 1949 Conventions which are directly or indirectly applicable to military commanders.

²⁴⁷ ICRC, *Commentary on the Geneva Conventions of 1949*, at 15 (J. Pictet ed. 1952) [hereinafter cited as Pictet].

²⁴⁸ *Id.* at 353.

Under Article 1 common to the four Geneva Conventions of 1949, the nation-state signatories to the Convention “undertake to respect and to *ensure respect* for the present Convention[s] *in all circumstances*.”²⁴⁹ The obligation to ensure respect for the Conventions encompasses the state’s issuing orders necessary for its representatives, including military commanders, to fulfill its obligations.²⁵⁰

In an article common to the first two Geneva Conventions of 1949, military commanders are also assigned specific responsibilities concerning the amelioration of the condition of the wounded and sick on the battlefield and wounded, sick, and shipwrecked at sea. The common article provides for the execution of the two Conventions with the statement: “Each Party to the conflict, *acting through its commanders-in-chief*, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.”²⁵¹

Similar language was contained in the Tenth Hague Convention of 1907, as discussed earlier, except that the 1907 Convention placed sole responsibility on the commanders-in-chief.²⁵² Under the terms of the Geneva Conventions, while the commanders-in-chief are the intermediaries, it is the parties to the conflict that have the primary responsibility.²⁵³ Notwithstanding this fact, it is clear that some of the responsibility continues to rest with the commanders-in-chief.

The use of the term “commander-in-chief” today denotes a very high-level commander who is likely to be far from the scene of actual hostilities and unable to control fast breaking events in the battle-

²⁴⁹Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, dated at Geneva Aug. 12, 1949, art. 1, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as Wounded and Sick Convention]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, dated at Geneva Aug. 12, 1949, art. 1, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as Wounded, Sick and Shipwrecked Convention]; Convention Relative to the Treatment of Prisoners of War, dated at Geneva Aug. 12, 1949, art. 1, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as POW Convention]; Civilians Convention, art. 1 (emphasis added).

²⁵⁰1 Pictet, *supra* note 247, at 25-26.

²⁵¹Wounded and Sick Convention, art. 45; Wounded, Sick and Shipwrecked Convention, art. 46 (emphasis added).

²⁵²See *supra* text accompanying note 35. See also 2 Pictet, *supra* note 247, at 261.

²⁵³2 Pictet, *supra* note 247, at 251.

front.²⁵⁴ The commanders-in-chief contemplated by the Geneva Conventions, however, are those who are responsible for taking “*action on the spot*” during the fighting, to ensure respect and protection for the wounded, sick, and shipwrecked. . . ,” including seeing to it that the enemy’s sick bays are protected during the **fighting**.²⁵⁵ Clearly, the military commander contemplated is the senior officer commanding at or near the battlefield, not a military commander far removed from the scene of the actual fighting.

The commanders-in-chief article is not found in the Third and Fourth Geneva Conventions of 1949 concerning, respectively, treatment of prisoners of war, hereinafter the POW Convention, and protection of civilians in time of war, hereinafter the Civilians Convention. Those Conventions contain dissemination articles, however, which call for “military authorities,” who, in time of war, assume responsibilities in respect of prisoners of war or protected civilians, to possess a text of the appropriate Convention and be specifically instructed as to its provisions.²⁵⁶ The reference to military authorities necessarily includes military commanders. It is interesting to note that Article 4 of the POW Convention carries forward the requirement of the Fourth Hague Convention of 1907 that POW entitlement for militia forces be reserved to those who are, “commanded by a person responsible for his subordinates.”

Turning next to the penal sanctions provided in the Geneva Conventions, which were drafted in reaction to the atrocities of World War 11, several articles common to the four Conventions require the passage of national penal legislation necessary to provide effective sanctions for “persons committing, or *ordering to be committed*, any of the grave breaches. . . .”²⁵⁷ Those breaches are defined, by way of example in the Civilians Convention, as the following acts, if committed against persons or property protected by that Convention

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or

²⁵⁴For example, in the U.S. Navy: “The Commander of a principal organization of the Operating Forces of the Navy, as determined by the Chief of Naval Operations. . . shall have the title ‘Commander in Chief.’” Navy Regs., art. 0601 (1973). There are currently only three Navy Commanders in Chief: Commander in Chief, U.S. Pacific Fleet, Commander in Chief, U.S. Atlantic Fleet, and Commander in Chief, U.S. Naval Forces, Europe.

²⁵⁵2 Pictet, *supra* note 247, at 251-52 (emphasis added).

²⁵⁶POW Convention, art. 127(2); Civilians Convention, art. 144(2).

²⁵⁷Wounded and Sick Convention, art. 49(1); Wounded, Sick and Shipwrecked Convention, art. 50(1); POW Convention, art. 129(1); Civilians Convention, art. 146(1) (emphasis added).

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 prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.²⁵⁸

Willful killing, according to Pictet's commentary, "covers faults of omission provided the omission was intended to cause death."²⁵⁹

In addition to a state's duties with respect to grave breaches, the states are also obligated to take measures necessary for the suppression of acts contrary to the Conventions that do not constitute grave breaches.²⁶⁰ Clearly, under these common "penal" articles, the military commander is to be held accountable for grave breaches which he ordered committed. There is no mention, however, of the responsibility of those military commanders who fail simply to prevent, or put an end to, a breach of the Conventions,²⁶¹ due in part to the lingering doubts in 1949 as to the precedential value of the Yamashita and other "command responsibility" trials.

The duty to intervene or the crime of omission is only indirectly recognized in the Geneva Conventions through provisions, such as Article 13 of the POW Convention, which states: "Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention."²⁶² The Geneva Conventions do, however, recognize the existence of normative principles not as readily identifiable as those set forth in the Convention, but of binding validity, in the famous "de Martens clause" common to the four Conventions and borrowed from the law of the Hague. That clause declares that state parties to an armed conflict remain bound to fulfill the obligations created, "by virtue of the principles of the law of nations, as they result from the usages established among civilized people, from the

²⁵⁸Wounded and Sick Convention, art. 50; Wounded, Sick and Shipwrecked Convention, art. 51; POW Convention, art. 130; Civilians Convention, art. 147.

²⁵⁹2 Pictet, *supra* note 247, at 267.

²⁶⁰Wounded and Sick Convention, art. 49(3); Wounded, Sick and Shipwrecked Convention, art. 50(3); POW Convention, art. 129(3); Civilians Convention, art. 146(3).

²⁶¹2 Pictet, *supra* note 247, at 264; 3 Pictet, *supra* note 247, at 622.

²⁶²POW Convention, art. 13.

laws of humanity and the dictates of the public conscience."²⁶³ The de Martens clause represents an explicit recognition of customary international law and the basic principle of humanity and an implicit recognition of the principle of military necessity, as dictated by the public conscience of nation-states.

To summarize, the Geneva Conventions, with respect to the juridical concept of command responsibility, add little of substance to the international legal norms which developed in the war crimes trials following the Second World War. Instead, they restate provisions concerning a military commander's responsibilities found in the earlier Hague Conventions and identify the most abominable war crimes committed in World War II as grave breaches for which a military commander can be held criminally liable if he *ordered* the crime to be committed. Beyond these rather narrow strictures, the further codification in conventional international law of the concept of command responsibility had to await the negotiation of Protocol I Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts.²⁶⁴

3. Protocol I of 1977.

In 1974, a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened by the Swiss government as depositary of the 1949 Geneva Conventions. This Conference, which completed its work on 10 June 1977, produced two Protocols to the Four Geneva Conventions.²⁶⁵ The First Protocol entered into force on 7 December 1978²⁶⁶ and is applicable to international armed conflicts, including "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,"²⁶⁷ where state parties or national liberation movements, which

²⁶³Wounded and Sick Convention, art. 63(4); Wounded, Sick and Shipwrecked Convention, art. 62(4); POW Convention, art. 142(4); Civilians Convention, art. 158(4).

²⁶⁴Protocol I Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 Int'l Legal Materials 1391 (1977) (entered into force Dec. 7, 1978) [hereinafter cited as Protocol I].

²⁶⁵Protocol I; Protocol II Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 Int'l Legal Materials 1442 (1977) [hereinafter cited as Protocol II].

²⁶⁶M. Bothe, K. Partsch, & W. Solf, *New Rules for Victims of Armed Conflicts—Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 726 (1982) [hereinafter cited as Bothe, Partsch, & Solf].

²⁶⁷Protocol I, art. 1(4).

recognize the Geneva Conventions and Protocol I, are participants. Part V of Protocol I pertains to execution of the Geneva Conventions of 1949 and the Protocol and contains numerous provisions relating to the duties and responsibilities of the military commander.

(a) Dissemination Requirements.

Article 83, paragraph 2, in terms reminiscent of the article common to the Civilians and POW Conventions on instruction of cognizant military commanders on the text of those Conventions, provides: "Any military. . . authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof."²⁶⁸ The military *commander* is clearly a military authority who "assumes responsibilities" in respect to application of the Conventions and Protocol I. Consequently, he has a duty to be fully acquainted with their provisions. Being "acquainted," though, connotes familiarity, whereas the commander's burden of responsibility, under the provisions of Protocol I discussed hereinafter, is so extensive and detailed that more than familiarity is required.

Once the commander has attained the requisite knowledge of the conventional legal norms, he is under an obligation to import a measure of such knowledge to his subordinates. Article 87, paragraph 2, mandates: "In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol."²⁶⁹

Placing this responsibility on the military commander insures that the officer who may ultimately be called to account for the actions of his subordinates plays an active role in their training in the law of armed conflict. Given this active role for the commander in dissemination of knowledge of the law of Geneva and the complexity of the Conventions and Protocol I, it is essential that the military commander should have recourse to trained experts in the law of war.

(b) Law-of-War Adviser.

Article 82 of Protocol I recognizes the need for trained law-of-war advisers by providing:

The High Contracting Parties at all times, and the Parties

²⁶⁸*Id.* art. 83(2).

²⁶⁹*Id.* art. 87(2).

to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.²⁷⁰

Although the institution of legal advisers in the military services has enjoyed widespread usage of the municipal law of the United States and other countries, the establishment of such an institution **as** an instrument of the law of war represents a new development. There is no obligation in Article 82, however, as evident in the phrases “when necessary” and “at appropriate levels,” that these legal advisers be employed at all times or on all levels where military commanders **exist**.²⁷¹ Further, the article does not expressly assign or delegate personal responsibility to the legal **adviser**.²⁷²

The military commander, consistent with the practice evident in the High Command and Hostage Cases, is not relieved of his duties and responsibilities by the detail of a *stuff* legal officer to advise him. At the same time, the military commander benefits from the mandate of Article **82** that legal advisers be furnished to him, when necessary. Although not expressly stated in the terms of this Article, the military commander clearly incurs an implied obligation thereby to utilize those resources, when necessary.

(c) Duties of Commanders With Respect to Breaches.

Article **87**, paragraphs 1 and 3, imposes affirmative duties on the military commander with respect to breaches of the law of Geneva:

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

. . .

3. The High Contracting Parties and Parties to the con-

²⁷⁰*Id.* art. 82. For a detailed discussion of this provision, see Park, *The Law of War Advisor*, 31 JAG J. 1 (1980).

²⁷¹Bothe, Partsch, & Solf, *supra* note 266, at 499-501.

²⁷²*Id.* at 501.

flict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.²⁷³

The original draft of this Article, as introduced by the United States, was addressed directly to commanders, but was later revised consistent with other provisions on execution of the Conventions and Protocols so that the addresses of the Article were the High Contracting Parties and the Parties to the conflict.²⁷⁴ Thus, while these provisions are intended to operate on the military commander, they do not do so directly. Rather, the obligation is placed upon the Parties to the conflict to “require” the commander to take certain actions. If a High Contracting Party fails to make appropriate modifications to its municipal law to impose liability on a commander for his failure to observe the requirements of Article 87, the commander may still be criminally liable under customary international law.

A fundamental question concerning Article 87 involves the definition of the term “commander.” The United States, in submitting the draft article to the Diplomatic Conference, expressed the view that the term “commander” refers “to all persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command.”²⁷⁵

Other delegates suggested that the functions attributed to the commander under Article 87 indicated that only commanders of a certain level, at least company commanders, were covered.²⁷⁶ This suggestion is only accurate, though, with regard to the commander’s responsibility under paragraph 2 of that article for setting up programs of military instruction in order to insure that subordinates are aware of their obligations under the law of Geneva. Paragraph 2 recognizes that this function need not be attributed to military commanders with only a few men under their command by assigning the task to commanders “commensurate with their level of responsibility. . . .”

²⁷³Protocol I, art. 87(1), (3).

²⁷⁴H. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions 313-21 (1981)* [hereinafter cited as Levie]; Solf & Cummings, *A Survey of Penal Sanctions Under Protocol 2 to the Geneva Conventions of 1949*, 9 *Case W. Res. J. Int’l L.* 205, 245 (1977) [hereinafter cited as Solf & Cummings].

²⁷⁵Levie, *supra* note 274, at 314.

²⁷⁶*Id.* at 315.

In the case of paragraphs 1 and 3 of Article 87, however, the term “commander” is not so restricted. Rather, the commander is defined in terms of his hierarchical relationship to members of the armed forces under his command or other persons under his control. Even a squad leader commands troops, albeit few in number, and can and should be obliged under paragraphs 1 and 3 of Article 87 to prevent and, where necessary, to suppress violations of the law of Geneva.²⁷⁷ Moreover, if the squad leader does not possess the formal authority to initiate disciplinary action against a violator, he must report it to competent superiors.²⁷⁸ From an analysis, then, of the functions assigned to the commander in paragraphs 1 and 3 of Article 87, it does not emerge that only commanders of a certain level are covered by those provisions.

The employment of the command-and-control terminology in Article 87 in effect codifies existing customary international law concerning the status element of command responsibility. Thus, a military occupational commander assumes responsibility under Article 87, much like the defendants in the High Command and Hostage Cases, not only for his subordinates’ crimes, but also for the crimes of other persons subject to his control within his assigned area of responsibility.

The other elements to the “command responsibility” concept in customary international law, specifically, mental object, duty to intervene, and mental standard are also evident, either explicitly or implicitly, in paragraphs 1 and 3 of Article 87, although paragraph 3 is more detailed in its articulation of those elements. With respect to the mental-object element, it is defined in Article 87(1) and (3) in terms of *existing* breaches or the *risk* of breaches of the Conventions or Protocol I, by subordinates or other persons subject to the commander’s control. Thus, in paragraph 3, there is reference to breaches which have been committed or are going to be committed. Paragraph 1, meanwhile, refers to the *suppression* and *prevention of* breaches, a circuitous reference to subordinates’ war crimes past and prospective in nature.

As regards the duty-to-intervene element, paragraph 3 prescribes a broad duty for the military commander “to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol and, where appropriate, to initiate disciplinary or penal action against violators thereof.” Paragraph 1, meanwhile, prescribes

²⁷⁷Bothe, Partsch, & Solf, *supra* note 266, at 628.

²⁷⁸*Id.*

a commander's duty, "to prevent and, where necessary, to suppress and report to competent authorities breaches," of the law of Geneva.

The real difficulty in Article 87(1) and (3) of the absence of a comprehensive mental standard pertaining to the commander's knowledge of subordinates' war crimes. Paragraph 1 assumes, without so stating, that the commander knows of the subordinates' war crimes or the likelihood of their occurrence in the future. Paragraph 3, meanwhile, refers simply to the commander who is *aware* of subordinates' crimes. The use of the term "aware" in this context is defined nowhere in the Protocol or its *travaux préparatoires*,²⁷⁹ nor for that matter is the term lifted directly from the decisions of any of the post-World War II cases on command responsibility, although it reflects the general tenor of their "mental-standards" tests. In reality, a specific and detailed mental standard for the "crime" of command responsibility under Protocol I is addressed elsewhere in that Protocol, specifically, in Article 86, the subject of discussion in the next section of this article.

(d) Failure to Act.

Article 86, entitled "Failure to Act," emphasizes in paragraph 1 that there is a duty on the part of High Contracting Parties and Parties to the conflict to repress grave breaches and to suppress other breaches which result from a failure to act when under a duty to do so. Paragraph 2, meanwhile, states:

The fact that a breach of the Conventions or of this Protocol was submitted by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.²⁸⁰

This language was included in the original draft Protocol proposed by the ICRC because of an awareness that the legislation of several states did not address a commander's failure to act when there may have been an implied duty to do so under the Geneva Conventions of

²⁷⁹*Id.* at 525.

²⁸⁰Protocol I, art. 86(2).

1949.²⁸¹ Several delegates were of the view, citing the case of Captain Heyer in the *Essen Lynching* case, that a commander's failure to act constituted a criminal omission which could not go unpunished.²⁸² During the plenary debates, it was pointed out that the principles upon which Article 86(2) was based were not new and that they had played an important role in the war crimes trials following World War II.²⁸³

Although the language of paragraph 2 does not establish a new proposition of law, it signifies an enormous expansion of conventional norms on command responsibility over the existing provisions of the Geneva Conventions of 1949, which recognize the commander's responsibility only for committing grave breaches or *ordering* grave breaches to be committed. This expansion occurs in part because paragraph 2 is addressed directly to the commander, not to the High Contracting Parties or Parties to the conflict, and because it extends to all breaches, not just grave breaches. More importantly, the paragraph provides a conventional law basis for finding the military commander liable for his crimes of omission, which should thwart criticism of the sort levied against the Yamashita trial and Nuremberg proceedings as "victor's justice," for these new written rules will be in existence before the beginning of the conflict to which Protocol I applies.

The four component elements to the concept of command responsibility are incorporated in Article 86(2). Three of those elements: status, mental object, and the duty to intervene require only brief comment and are therefore discussed first, prior to turning to a substantive analysis of the mental standard stated in paragraph 2 of Article 86.

Concerning status, Article 86(2) provides that the commission of breaches of the law of Geneva by a subordinate does not *absolve* his superior of criminal liability and that the superior must take measures within his *power* to prevent or repress breaches. Although this paragraph contains no express reference to the command-and-control phraseology found in Article 87, the concepts of superior-subordinate relationships and the exercise of power expressly set forth in Article 86(2) are necessarily predicated upon the existence of command or control by the superior over the subordinate, a de facto recognition of the Article 87 standards.

²⁸¹Self & Cummings, *supra* note 274, at 242-43.

²⁸²*Id.* at 243.

²⁸³*Id.*

The mental-object element incorporated in Article 86(2), is identical to that found in Article 87(3). Specifically, the commander must discover that the subordinate “was committing or was going to commit” a breach, grave or otherwise, of the Conventions or Protocol I.

In the same fashion, the duty-to-intervene element prescribed by paragraph 2 of Article 86 provides a standard closely analogous to Article 87 by stating that the commander must, “take all feasible measures within [his] power to prevent or repress the breach.” This phraseology is also strikingly similar to that found in the Supreme Court’s stated conclusion in *In re Yamashita* that a commander, “has an affirmative duty to take such measures as are within his power and appropriate in the circumstances” to protect POWs and civilians.²⁸⁴

The key component of Article 86(2), though, is the mental element. The test in paragraph 2 is that the commander, “knew, or had information which should have enabled [him] to conclude in the circumstances at the time” that the subordinate was committing or was going to commit breaches of the law of Geneva.²⁸⁵ Knowledge here may be actual as shown through direct or circumstantial evidence in the post-World War II war crimes trials, or constructive based on the “had information” requirement.²⁸⁶ The more difficult component to decipher is the latter requirement.

In analyzing substantively the “had information test,” legal commentators have expressed differing views as to its meaning, although agreeing generally on one point, that the test is similar to that found in the *Yamashita* case.²⁸⁷ Several textwriters have stated:

First it is required that the superior had certain information. This is an objective requirement. But who will be able to prove it in a controversial case? The second requirement is of a subjective character. From this information available to the superior he should have drawn the conclusion that his subordinate was committing or even was going to commit a breach. Here there is also a strange

²⁸⁴*In re Yamashita*, 327 U.S. 1, 16 (1946).

²⁸⁵Protocol I, art. 86(2).

²⁸⁶Bothe, Partsch, & Solf, *supra* note 266, at 525.

²⁸⁷*Id.* at 525; Bassiouni, *Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 Rut.-Cam. L. J. 185, 204 (1976-77); Karlshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: The Diplomatic Conference, Geneva, 1974-1977*, 9 Netherlands Y.B. Int'l L. 107, 170 (1978).

divergence between the English and the French text. The English text embraces the objective and the subjective elements. The French text, on the contrary, contains only the objective elements by saying “des informations leur permettant de conclure” instead of translating verbally “qui auraient du jeu permettre”. The representative of France insisted on this version and it is strange that the attempt to introduce such a divergence into the texts in the two languages was not opposed, though the problem was seen. According to the rule that in the case of a divergence between two official texts one should apply the text which covers both, the French text should prevail.²⁸⁸

The “~~had-information-which-should-have-enabled-him-to-conclude~~” test, then, is objective in its normative content, not unlike the criminal negligence test implicit in the *Yamashita* case and explicit in the High Command case.²⁸⁹ Thus, the military commander cannot successfully plead ignorance under Article 86(2) where, for example, he received reliable reports of suspected war crimes but chose to belittle their importance.

4. Summary.

When the world community turned to the task following World War II of negotiating conventional international norms to preclude the recurrence of the atrocities of that War, the Genocide Convention and the four Geneva Conventions that emerged, given the need for consensus among nation-states and the lingering doubts concerning “victor’s justice” in the war crimes trials, focused upon only the most heinous of war atrocities, genocide and grave breaches, and upon only the most obvious grounds for command responsibility, the commander’s culpability where he orders the commission of grave breaches or directly and publicly incites the commission of genocide. The Conventions were notably silent concerning the military commander’s responsibility for the crime of “omission” where, for example, the commander fails to control his troops gone berserk in occupied territory.

The Genocide Convention and the four Geneva Conventions, in omitting express provision for international criminal sanctions to be imposed on military commanders for their crimes of “omission”, had failed to utilize to the fullest extent possible the “office” of military

²⁸⁸Bothe, Partsch, & Solf, *supra* note 266, at 525.

²⁸⁹See *supra* text accompanying notes 97, 102, 104, 123, 140-42.

commander as an effective tool for enforcement of the law of war and protection of the underlying humanitarian value interests. Although customary international law has filled this gap to a large degree, the subsequent negotiation of Protocol I afforded an excellent opportunity to establish comprehensive conventional norms on command responsibility.

The result was the development of fairly extensive provisions in Protocol I, many of which codified existing customary international legal norms. Those command responsibility articles in Protocol I prescribe the military commander's duty to disseminate knowledge of the law of war, to seek the advice of law-of-war legal specialists, and to prevent or repress subordinates' crimes, including initiating investigations and taking appropriate disciplinary measures. Those articles also establish the military commander's personal criminal liability for the crime of "omission." As a consequence of these provisions, the law of Geneva can no longer be faulted for its failure to utilize fully the concept of command responsibility to promote the inclusive community interest in effective enforcement of the law of war. At the same time, Protocol I, as evidenced by the "knew-or-had-information" standard in Article 86(2), does not incorporate an absolute liability theory of command responsibility in recognition of the commander's legitimate requirement to delegate functions in a modern military organization.

IV. A CASE STUDY OF THE MILITARY COMMAND RESPONSIBILITY FOR THE POGROM AT SABRA AND SHATILA

Having established the general nature and substantive content of the concept of command responsibility, the remainder of this article is devoted to a case study of the criminal responsibility, if any, under international law of three Israeli Defense Force (IDF) commanders for the massacre in the Palestinian refugee camps in West Beirut. Those officers, as previously mentioned, are Lieutenant General Eitan, IDF Chief of Staff, Major General Drori, General Officer Commanding Northern Command, and Brigadier General Yaron, IDF Division Commander in West Beirut. While this study is limited in its scope to an examination of the cases of those three officers, it does not follow that criminal liability may not also lie with other IDF officers, but rather that time and space preclude further examination.

Before turning to a recitation of the events leading up to and inclusive of the pogrom at Shatila and Sabra, with particular attention

to the roles of the three IDF general officers, it is important to identify certain issues which are not the object of study here. First, the article makes no attempt to assess the criminal or other responsibilities of the United States for the atrocities in the Palestinian refugee camps in West Beirut. Second, there is no attempt to examine the criminal responsibility, if any, of the civilian leadership of the State of Israel. Third, the culpability of the leadership of Lebanon is not under review. Finally, the study is not designed to assess the criminal liability of the IDF general officers under Israeli municipal law.

A, FACT SITUATION

1. Lebanon Prim to the Civil War.

Lebanon has for many centuries been occupied by both Muslims and Christian Maronites, the latter being one of the Eastern rites of the Roman Catholic Church.²⁹⁰ In 1943, when Lebanon became independent, political power was divided among the various religious groups according to a 6-to-5 ration of Christians to Muslims in the population.²⁹¹ Under the National Covenant, an unwritten agreement reached at that time, the country's President is always a Maronite, the Prime Minister Sunni Muslim, and the Speaker of Parliament a Shi'ite Muslim.²⁹² Under the Covenant, the country was able to function in relative quietude for over thirty years as the Maronites overwhelmingly dominated the political system through their power in the military and their economic influence.²⁹³

The birth of the State of Israel in 1948 and subsequent developments in the Middle East, however, led to successive waves of Palestinian refugees entering Lebanon. By 1982, the United Nations Relief and Works Agency estimated a refugee population of 270,000.²⁹⁴ The Christian Maronites put the figure at 500,000.²⁹⁵ Since the Lebanese Maronites themselves only numbered 500,000,²⁹⁶ the influx of Muslims was perceived by the Maronites as tilting the

²⁹⁰A *Pledge for Unity*, Time, Oct. 4, 1982, at 24, col. 1 [hereinafter cited as *Pledge for Unity*].

²⁹¹*Id.*

²⁹²*Id.* cols. 1-2.

²⁹³*Id.*

²⁹⁴Final Report, *supra* note 17, at 6.

²⁹⁵*Id.*

²⁹⁶*Pledge for Unity*, *supra* note 290, at 24, col. 1.

delicate demographic balance heavily in favor of the Muslims and thereby threatening the stability of the country and its Christian population.²⁹⁷

Equally significant were the aspirations of certain individuals in leadership positions in Israel concerning annexation of southern Lebanon. Moshe Sharratt, a Prime Minister of Israel during the mid-1950s, reported that then-Army Chief of Staff Moshe Dayan in May 1954, in a meeting of senior officials of the Defense and Foreign Affairs Ministries, expressed the view that

the only thing that's necessary is to find an officer, even just a Major. We should either win his heart or buy him with money, to make him agree to declare himself the savior of the Maronite population. Then the Israeli army will enter Lebanon, will occupy the necessary territory, and will create a Christian regime which will ally itself with Israel. The territory from the Litani southward will be totally annexed to Israel and everything will be all right²⁹⁸

2. *Lebanon's Civil War.*

In 1975, civil war broke out in Lebanon between the Christian organizations on the one hand and the Palestinian Liberation Organization (PLO), Lebanese leftist organizations, and Muslim and Druze organizations on the other.²⁹⁹ The Maronites insisted that the presence of the Palestinians provoked the incident that sparked the civil war, an attack on Pierre Gemayel, the leader of the Maronite's Phalange Party, by Muslim gunmen that left one of the Phalangist leader's bodyguards dead.³⁰⁰ In the course of the civil war, Syrian armed forces entered Lebanon and took part in the war for a period of time on the side of the Christian forces and thereafter on the side of the PLO and Lebanese leftist organizations.³⁰¹

In 1975, several large massacres involving the civilian population occurred. In January, the Christian city of Damur was captured and many of the Christian residents who had not fled were slaughtered by the conquering Muslim forces.³⁰² That massacre resulted in the

²⁹⁷Final Report, *supra* note 17, at 8.

²⁹⁸L. Rokach, *Israel's Sacred Terrorism* 28 (1980).

²⁹⁹Final Report, *supra* note 17, at 6.

³⁰⁰Pledge for Unity, *supra* note 290, at 24, col. 3.

³⁰¹Final Report, *supra* note 17, at 6.

³⁰²*Id.*

creation of a fanatical Christian militia group, the Damur batallion, from the city's survivors, and a retaliatory raid by Christian militia forces against the Tel Zaatar Palestinian refugee camp in West Beirut where thousands of refugees were slain.³⁰³

As the war progressed, Pierre Gemayel's son, Bashir Gemayel, who had become the Phalangist military commander in 1976, eventually usurped the leadership of the Phalange Party founded by his father.³⁰⁴ The Phalange Party also emerged as the strongest political and military entity in the Christian armed forces. Part of their strength derived from their close ties to the State of Israel that had formed as Israel furnished arms, training and instruction to the Christian forces of Gemayel.³⁰⁵ The Israelis even provided the Phalangist uniforms, complete with an emblem embroidered over the shirt pocket bearing an inscription and a drawing of a cedar tree.³⁰⁶ The Moslems, meanwhile, feared Bashir Gemayel for the savageness with which he had directed the Christian militias against them during the civil war.³⁰⁷

As the ties binding Israel to the Christian Phalangist forces grew, the Israeli Institute for Intelligence and Special Assignments (MOSSAD) maintained close contacts with the Phalangist leadership.³⁰⁸ Although MOSSAD was assigned primary responsibility for such contacts, both it and the IDF Intelligence Branch shared responsibility for developing evaluations on the Phalangists and bringing, "these evaluations to the attention of all interested parties."³⁰⁹ Those evaluations diverged markedly as MOSSAD argued for strengthening relations with the Phalangists while Military Intelligence emphasized the dangers in the links to the Phalangists, primarily because of the organization's lack of reliability and its military weakness.³¹⁰

In southern Lebanon, meanwhile, Moshe Dayan's dream bore fruit as Lebanese Major Haddad, with support from the Israelis, founded the Army of Free Lebanon. Major Haddad's forces wore a distinctive emblem on the epaulet with the words "Army of Free Lebanon" in Arabic and the drawing of a cedar.³¹¹

³⁰³*Id.*

³⁰⁴Washington Post, Sept. 15, 1982, at A21, col. 2.

³⁰⁵Final Report, *supra* note 17, at 7.

³⁰⁶*Id.*

³⁰⁷Washington Post, Sept. 15, 1982, at A21, col. 2.

³⁰⁸Final Report, *supra* note 17, at 8.

³⁰⁹*Id.*

³¹⁰*Id.*

³¹¹*Id.* at 7.

3. *Israel Intervenes.*

On 6 June 1982, Israel invaded Lebanon and advanced northward, until, on 14 June, it had gained control of the Beirut suburbs and linked up with Christian forces who controlled East Beirut.³¹² By 25 June, Beirut was completely encircled³¹³ and the IDF had commenced contingency planning aimed at the employment of Phalangist troops to capture PLO-controlled West Beirut.³¹⁴ The effort failed, however, because the Phalangists were not equal to the task.³¹⁵

The ensuing eight weeks witnessed the slow and painful negotiation of an agreement, reached on 19 August 1982, for the evacuation of PLO and Syrian forces from West Beirut.³¹⁶ Four days later, Bashir Gemayel was elected President of Lebanon with his term of office to begin on 23 September 1982.³¹⁷

On 21 through 26 August, a multinational force of American, Italian, and French troops arrived in Beirut to serve as a buffer during the departure of the PLO.³¹⁸ The exodus of the PLO and the Syrian Armed Forces then ensued and was completed by 1 September.³¹⁹ The Israelis, however, claimed that the PLO had violated the evacuation agreement, which called for the removal of all PLO forces and the surrender of PLO arms to the Lebanese Army, by leaving 2,000 PLO fighters behind and turning PLO arms caches over to the Lebanese leftist militia, the Mourabitoun.³²⁰ Meanwhile, with the evacuation of the PLO complete, the United States, along with the French and Italians, withdrew their forces by 12 September 1982.³²¹

During the period of the Israeli invasion of Lebanon and the subsequent departure of the PLO, the role of the Christian militia forces was extremely limited. Major Haddad's forces had advanced northward until they reached the Awali River where they stopped pursuant to IDF orders.³²² The Phalangists, meanwhile, were told by the Israeli Chief of Staff Rafael Eitan to refrain from all fighting. The IDF was concerned that the Phalangists would disrupt the Israeli

³¹²*Id.* at 9.

³¹³*Id.*

³¹⁴Washington Post, Sept. 20, 1982, at A22, col. 4.

³¹⁵*Id.*

³¹⁶Final Report, *supra* note 17, at 9.

³¹⁷*Id.*

³¹⁸Mission Impossible, *supra* note 12, at 20, col. 1.

³¹⁹Final Report, *supra* note 17, at 9.

³²⁰*Id.* at 10; New Lebanon Crisis, *supra* note 9, at 25, col. 3.

³²¹Final Report, *supra* note 17, at 10.

³²²*Id.* at 8.

plan of action.³²³ The Phalangists did, however, when directed by the IDF, participate successfully in the capture of a technical college in Beirut.³²⁴

The August election of Gemayel to the Presidency was interpreted by the MOSSAD as demonstrating the Phalangists' ascendancy to a stage of political and organizational maturity that obviated the need for the repetition of past incidents of indiscriminate slaughter. This opinion was

based both on personal impressions of the character of the Phalangist leadership, as well as on the recognition that the interest of the Phalangist elite to eventually rule an independent Lebanese nation, half or more of whose population is Muslim and would be interested in maintaining relations with the Arab world, requires moderation of actions against Palestinians and restraint as to modes of operation. At the same time, there were various facts that were not compatible with this outlook.³²⁵

First, Bashir Gemayel was on record as calling for the razing of the refugee camps in West Beirut and flattening them into tennis courts.³²⁶ Second, there were extensive reports of Phalangist liquidations of Palestinians and Druze women and children.³²⁷

Nevertheless, political pressure had begun to build for the increased use of the Phalange militia, as Israeli domestic public opinion questioned the efficacy of Israelis' fighting and dying on behalf of the Christian militia while the latter stood aside.³²⁸ In addition, the IDF found that the Phalangists were experienced at identifying so-called terrorists in urban areas.

The Lebanese Army, meanwhile, figured only insignificantly in the unfolding events in Beirut. Under the evacuation agreement, they were charged with protecting West Beirut³²⁹ but the leftist militias distrusted the Army, considering it a tool of the Phalangists.³³⁰ Moreover, the Army was armed with obsolete American and French equipment and had compiled "a dismal battle record and a reputa-

³²³*Id.* at 10.

³²⁴*Id.*

³²⁵*Id.* at 11.

³²⁶*Crisis of Conscience, supra* note 8, at 16, col. 3.

³²⁷*Final Report, supra* note 17, at 11.

³²⁸*Id.*

³²⁹*Washington Post*, Sept. 27, 1982, at A1, col. 2.

³³⁰*Washington Post*, Aug. 30, 1982, at A1, col. 3.

tion of being kicked around by every other military group in the country."³³¹ In fact, when the Lebanese Army attempted to move into the refugee camps in West Beirut in early September to seize weapons, it quickly withdrew in the face of small arms fire.³³²

4. *The Death of Bashir Gemayel and the IDF's Entry into West Beirut.*

On the afternoon of 14 September 1982, a bomb blew up an office of the Phalangist Party in East Beirut, killing Bashir Gemayel who was attending a meeting there.³³³ No one claimed responsibility, but Gemayel's followers blamed the Moslems.³³⁴ One Moslem academic summed up the tense atmosphere in Beirut at that time with the glum words: "This plunges one half of the country into sheer despair and the other half into pure terror."³³⁵

During the night following Gemayel's assassination, the decision was made in conversations between the Israeli Prime Minister, his Minister of Defense, and the Israeli Chief of Staff that the IDF would enter West Beirut.³³⁶ In one of the consultations between the Defense Minister and the Chief of Staff, there was mention of including the Phalangists in the entry of West Beirut.³³⁷ In the early morning hours of 15 September, the IDF's entry into West Beirut began. The IDF's objective, according to a statement later issued by the Israeli Cabinet, was to take positions in West Beirut, "to forestall the danger of violence, bloodshed and chaos, as some 2,000 terrorists, equipped with modern and heavy weapons, have remained in Beirut in flagrant violation of the evacuation agreement."³³⁸ The Defense Minister is reported to have admitted subsequently that the occupation was merely a smoke screen to hide the real purpose which was rooting-out the guerillas.³³⁹

On the night between 14 and 15 September, the Israeli Chief of Staff flew to Beirut and met with Major General Amir Drori and Brigadier General Amos Yaron.³⁴⁰ The Chief of Staff subsequently

³³¹*An Army for Every Ideological Bent*, U.S. News & World Report, Oct. 4, 1982, at 23, col. 2.

³³²Washington Post, Sept. 22, 1982, at A1, col. 2.

³³³Washington Post, Sept. 15, 1982, at A1, col. 4.

³³⁴*Id.* at A21, col. 5.

³³⁵*Back to Square One*, U.S. News & World Report, Sept. 27, 1982, at 23, col. 2.

³³⁶Final Report, *supra* note 17, at 13.

³³⁷*Id.*

³³⁸*Id.* at 27.

³³⁹Washington Post, Sept. 27, 1982, at A18, col. 3.

³⁴⁰Final Report, *supra* note 17, at 14.

met with the Phalangist commanders and ordered them

to effect a general mobilization of all their forces, impose a general curfew on all the areas under their control, and be ready to take part in the fighting. The response of the Phalangist commanders who took part in that meeting was that they needed **24** hours to organize. . . . At that meeting, the Phalangist commanders were told by the Chief of Staff that the I.D.F. would not enter the refugee camps [of Shatila and Sabra] in West Beirut but that the fighting this entails would be undertaken by the **Phalangists**.³⁴¹

Later, on the morning of the 15th, the Israeli Defense Minister met with Lieutenant General Eitan, Major General Drori, Brigadier General Yaron, and others at the IDF forward command post, a five-story building located 200 miles southwest of the Shatila camp, to discuss the entry of the Phalangists into the refugee camps.³⁴² There then ensued a meeting of the Defense Minister with the Phalangists where it was established that the Phalangists would enter West Beirut after the IDF and maintain contact with Major General Drori.³⁴³

Major General Drori, however, was not at ease with the plan to send the Phalangists into the camps and made an effort before meeting with the Phalangists to persuade the commander of the Lebanese Army that his forces should enter the camps.³⁴⁴ This request met with a negative reply by the Lebanese Army.³⁴⁵ Major General Drori then met on the evening of the 16th with the Phalangists and told them that their entry into the camps would be from the direction of **Shatila**.³⁴⁶ The end of the day saw the IDF, at a cost of three Israeli dead and over 100 Israeli wounded, in general control of West Beirut.³⁴⁷

The next morning, Thursday, 16 September, the IDF issued orders that "[t]he refugee camps are not to be entered. Searching and mopping up the camps will be done by the Phalangists/Lebanese Army. . . ." ³⁴⁸ That same day, a document issued by the personal

³⁴¹*Id.*

³⁴²*Id.* at 15.

³⁴³*Id.* at 16.

³⁴⁴*Id.* at 17.

³⁴⁵*Id.*

³⁴⁶*Id.*

³⁴⁷*Id.* at 15, 18.

³⁴⁸*Id.* at 13.

aide to the Israeli Defense Minister announced the following instructions concerning the entry into West Beirut: "[O]nly one element, and that is the I.D.F., shall command the forces in the area. For the operation in the camps the Phalangists should be sent it."³⁴⁹ At 1000 hours in Tel Aviv, Lieutenant General Eitan met with the Defense Minister to discuss the refugee camps.³⁵⁰ An hour later in Beirut, the Phalangist Chief of Staff, Fady Frem, and Intelligence Chief Elias Hobeika arrived at Yaron's division headquarters for a coordinating session with Major General Drori and Brigadier General Yaron.³⁵¹ It was agreed at that time that the Phalangists would coordinate their entry into the camps with Brigadier General Yaron at the forward command post that afternoon.³⁵²

The Phalangists commanders are reported to have stated at that time, in Arabic, that they intended to carry out a cutting or chopping action inside the camps.³⁵³ The Phalangist unit scheduled to enter the camps was the intelligence unit headed by Hobeika who, having taken part in the Tel Zaatar massacre and in attacks on the rivals of Bashir Gemayel, had a reputation for ruthlessness.³⁵⁴ Brigadier General Yaron cautioned the Phalangists during the meeting not to harm the civilian population of the camps.³⁵⁵ Later that day, the Phalangist forces assembled at the Beirut International Airport.³⁵⁶

5. *The Phalangists in Sabra and Shatila.*

At approximately 1800 on 16 September, the Phalangist forces entered the Shatila camp from the west and the south.³⁵⁷ The force numbered approximately 500 and consisted of members of the militia's special commando unit and intelligence security units and contingent from the Damur battalion.³⁵⁸ There were numerous reports that day of sightings at the airport and in the refugee camps of military personnel speaking in southern accents and wearing the distinctive uniforms of Major Haddad's Army of Free Lebanon, which was supposed to be south of the Awali River.³⁵⁹ Significantly,

³⁴⁹*Id.* at 19.

³⁵⁰*Id.* at 18.

³⁵¹*Id.*

³⁵²*Id.* at 18-19.

³⁵³Crisis of Conscience, *supra* note 8, at 17, col. 3.

³⁵⁴*Id.*

³⁵⁵Final Report, *supra* note 17, at 19.

³⁵⁶Crisis of Conscience, *supra* note 8, at 17, col. 3.

³⁵⁷Final Report, *supra* note 17, at 21.

³⁵⁸Washington Post, Sept. 30, 1982, at A30, col. 2.

³⁵⁹Final Report, *supra* note 17, at 49-50; *The Making of a Massacre*, Newsweek, Oct. 4, 1982, at 25, col. 1 [hereinafter cited as *Making of a Massacre*]; Washington Post, Sept. 30, 1982, at A1, col. 3.

Major Haddad arrived at Beirut Airport on the morning of 17 September to pay a condolence call on the Gemayel family.

The Private International Commission concluded from the numerous and independent reports of personnel *thought to be* Haddad's men in the camps that "Haddad's militiamen did play a significant part in the **massacres**."³⁶⁰ On the other hand, the subsequently published report of the Israeli Board of Inquiry found, based upon a more detailed exposition of the facts and the history of friction between the Phalangists and Haddad's forces, that "no force under the **command** of Major Haddad took part in the Phalangists operation in the camp or took part in the **massacre**."³⁶¹ The Israeli Board acknowledged the possibility that one or more of Haddad's personnel **might** have infiltrated the camps and committed illegal acts. However, since the Israelis controlled access to the camps, intended to use the Phalangists for the mopping-up exercise, and exercised extensive controls over the operations of the Phalangist militia and Major Haddad's forces, the only plausible conclusion is that the militia forces that entered the refugee camps were exclusively, or almost exclusively, Phalangist and that no organized unit of the Army of Free Lebanon could have participated in the massacre.

When the militia entered the camps on Thursday, 16 September, they met light resistance resulting in two dead and some wounded personnel.³⁶² The IDF, meanwhile, provided illumination throughout the night to assist the Phalangist operation.³⁶³ The anticipated 2,000 PLO fighters failed to materialize. Several weeks later, though, the Lebanese Army, in combining the then-deserted camps, discovered an elaborate network of tunnels used to shelter Palestinian guerillas and store huge quantities of military supplies.³⁶⁴

Within the camps, the Phalangists quickly rounded up large numbers of unarmed men, women and children whom they proceeded to **slaughter**.³⁶⁵ Reports began to trickle out of up to 300 civilians and terrorists **killed**.³⁶⁶ These reports were brought to the attention of Brigadier General Yaron but were greeted with some skepticism as to their **reliability**.³⁶⁷ As a consequence, Brigadier

³⁶⁰International Commission Report, *supra* note 10, at 177.

³⁶¹Final Report, *supra* note 17, at 49-50 (emphasis added).

³⁶²*Id.* at 21, 23; Crisis of Conscience, *supra* note 8, at 18, col. 1.

³⁶³Making of a Massacre, *supra* note 359, at 26, col. 1.

³⁶⁴Washington Post, Oct. 7, 1982, at A38, col. 1.

³⁶⁵Final Report, *supra* note 17, at 21-23.

³⁶⁶Crisis of Conscience, *supra* note 8, at 18, col. 1.

³⁶⁷Final Report, *supra* note 17, at 22-24.

General Yaron did not convey the substance of these reports to Major General Drori that night.³⁶⁸ A report was forwarded, however, by intelligence officers to the office of the Director of Military Intelligence later that evening which stated: "Preliminary information conveyed by the commander of the local Phalangist force in the Shatila refugee camps states that so far his men have liquidated about 300 people. This number includes terrorists and civilians."³⁶⁹ The cable did not reach the Director of Military Intelligence until early the next morning. Though the Director requested clarification, he took no further action,³⁷⁰ such as informing his superior, the Chief of Staff.³⁷¹

On Friday morning, 17 September, additional reports reached Yaron of unnecessary Phalangist violence against civilians in the refugee camps.³⁷² When this information was shared with Drori later that morning,³⁷³ the latter ordered the halt of Phalangist operations, "meaning that the Phalangists should stop where they were in the camps and advance no further."³⁷⁴ That something was amiss in the refugee camps was communicated by Drori to the Chief of Staff that morning.³⁷⁵

At the same time, Major General Drori, "held a meeting with the commander of the Lebanese Army in which he again tried to persuade the commander, and through him the Prime Minister of Lebanon. . . , that the Lebanese Army enter the camp. . . ."³⁷⁶ Throughout the morning, IDF members observed acts of killing and violence against people from the refugee camps, but this information did not reach Brigadier General Yaron or Major General Drori,³⁷⁷

At 1530 that afternoon, the Chief of Staff arrived in Beirut to meet with the Phalangists; beforehand, he was briefed by Major General Drori about the reasons for halting the Phalangists actions.³⁷⁸ During the meeting with the Phalangists, the Chief of Staff received a

³⁶⁸*Id.* at 267.

³⁶⁹*Id.* at 25.

³⁷⁰*Id.* at 30, 31.

³⁷¹E. Luttaak & D. Horowitz, *The Israeli Army 96-98 (1975)* [hereinafter cited as D. Horowitz].

³⁷²Final Report, *supra* note 17, at 29-30.

³⁷³*Id.* at 30.

³⁷⁴*Id.*

³⁷⁵*Id.*

³⁷⁶*Id.* at 33.

³⁷⁷*Id.* at 33-34.

³⁷⁸*Id.* at 35.

report concerning their operation, including an assertion that there had been almost no civilian casualties.³⁷⁹ The Chief of Staff accepted the report with expressions of appreciation for a job well done and made no attempt to question the Phalangists about civilian casualties.³⁸⁰ The Chief of Staff concluded by stating that the Phalangists could continue mopping up action in the camps until Saturday morning at 0500, “at which time they must stop their action due to American pressure.”³⁸¹

The Phalangists were permitted to remain in the camps and even brought in fresh troops and bulldozers on Friday evening to assist in the ongoing massacre.³⁸² The following morning, the Phalangists did not leave at 0500 and Brigadier General Yaron, upon learning this at 0630, gave an order to the Phalangist commander on the scene that they must vacate the camps without delay.³⁸³ That order was eventually obeyed, and the last of the Phalangist militia force had departed the camps by approximately 0800.³⁸⁴

After the Phalangists left, Red Cross personnel, journalists, and other observers entered the camps only to find the bloody remains of a pogrom.³⁸⁵ The picture that emerged from the camps was one of extensive Phalangist rapes, kidnappings, and murders of civilians, including Palestinian doctors and nurses at the Gaza Hospital located inside the camp and at Akka Hospital located immediately adjacent to Shatila.³⁸⁶ Many of the dead had been buried in a mass grave dug by the Phalangists using bulldozers.³⁸⁷ The final death toll ranged from estimates of 800, according to the Israeli Board of Inquiry, to 2,400, according to the International Committee of the Red Cross.³⁸⁸

³⁷⁹*Id.*

³⁸⁰*Id.*

³⁸¹*Id.*

³⁸²Washington Post, Nov. 8, 1982, at A17, cols. 4-6; Making of a Massacre, *supra* note 359, at 27, cols. 1-3.

³⁸³Final Report, *supra* note 17, at 40.

³⁸⁴*Id.*

³⁸⁵*Id.* at 42.

³⁸⁶Making of a Massacre, *supra* note 359, at 27, cols. 1-3; God—Oh, My God, *supra* note 6, at 23, col. 1.

³⁸⁷God—Oh, My God, *supra* note 6, at 23, cols. 1-2.

³⁸⁸Final Report, *supra* note 17, at 42-43; Washington Post, Oct. 26, 1982, at A1, col. 6.

B. JURIDICAL ANALYSIS OF THE MILITARY COMMAND RESPONSIBILITY FOR THE MASSACRE AT SHATILA AND SABRA

1. War Crimes.

Before assessing the criminal responsibility of individual IDF military commanders for the killings in the refugee camps, it is necessary to ascertain whether the deaths of the Palestinian refugees constituted crimes under the law of armed conflict. To accomplish that task requires a determination as to whether the law of war was applicable to the events that transpired in the refugee camps and, in the event the law of war was applicable, a determination as to whether the killings were unlawful.

At the outset, in 1975, the conflict in Lebanon constituted a civil war to which the law of armed conflict has only limited applicability, principally that found in Article 3 common to the four Geneva Conventions of 1949.³⁸⁹ Under Article 3, each party to a non-international armed conflict, even though not a state party, is bound to insure that persons taking no active part in the hostilities, such as the unarmed women, children, and men in the Palestinian refugee camps, are treated humanely. To this end, Article 3 prohibits, "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. . . ."³⁹⁰ In a non-international context, the killings in the refugee camps constituted breaches of Article 3 common to the four Geneva Conventions.

The presence of Syrian troops in Lebanon, however, and, more significantly, the invasion of Lebanon by Israel in the summer of 1982 raises the question as to whether the conflict was thereby escalated to the status of an international armed conflict for Israel, obviating the applicability of Article 3. The conditions for applicability of the four Geneva Conventions to international armed conflicts are contained in Article 2 common to those Conventions, which reads, in pertinent part:

³⁸⁹Protocol II, art. 1; Wounded and Sick Convention, art. 3; Wounded, Sick and Shipwrecked Convention, art. 3; POW Convention, art. 3; Civilians Convention, art. 3. For a discussion of this issue, see Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 31 *Am. U.L. Rev.* 911, 921-23 (1982).

³⁹⁰Wounded and Sick Convention, art. 3(1)(a); Wounded, Sick and Shipwrecked Convention, art. 3(1)(a); POW Convention, art. 3(1)(a); Civilians Convention, art. 3(1)(a).

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to **all** cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. . . .³⁹¹

Concerning the applicability of this article to the Israeli invasion of Lebanon in **1982**, Israel has denied the existence of a state of war or armed conflict between itself and Lebanon, contending that it was not making war but merely engaging in a police action directed at the PLO and designed to save the Lebanese people and their government from the usurpation of power by the PLO.³⁹² This argument blends claims of the right of self-defense and humanitarian intervention.³⁹³ Israel has also contended that its presence in Lebanon did not constitute an occupation of Lebanon within the meaning of Article 2 because it had no intention of setting up an administration in the zones where it was temporarily present. Instead, it restricted itself to the setting up of "special units for civilian assistance," which would intervene only where local government authority was lacking.³⁹⁴

The Israeli claims are not dispositive of the issue of Article 2's applicability. Article 2(1) was specifically designed to apply, even if one party denies the existence of a state of war, whenever any differences arise between two states leading to the intervention of members of the armed forces.³⁹⁵ Clearly, the properly constituted government of Lebanon was on record **as** opposing the Israeli invasion of Lebanon. This was evident in the remonstrations of the President of Lebanon on the official government radio **station**,³⁹⁶ the official protests of the Lebanese Permanent Representative to the Security Council of the United Nations, and Lebanon's votes in the

³⁹¹Wounded and Sick Convention, art. 2; Wounded, Sick and Shipwrecked Convention, art. 2; POW Convention, art. 2; Civilians Convention, art. 2.

³⁹²International Commission Report, *supra* note 10, at 114.

³⁹³*Id.* at 2, 4, 114, 167.

³⁹⁴*Id.* at 114.

³⁹⁵4 Pictet, *supra* note 247, at 20.

³⁹⁶Statement of President Sarkis of Lebanon, Voice of Lebanon, July 24, 1982.

General Assembly.³⁹⁷ That the Lebanese armed forces were not strong enough to repulse the Israeli attack or that Major Haddad and the Phalangists may have welcomed the Israeli incursion does not alter the fact that the properly constituted government of Lebanon opposed the Israeli invasion, and the ensuing armed hostilities clearly fell within the intended application of Article 2(1) common to the Geneva Conventions.

Setting aside any discussion of Article 2(1), Israel's continued military presence in Lebanon in September 1982 also satisfied the applicability provisions of Article 2(2), as it constituted a partial occupation of the territory of Lebanon. Occupation in this case was evident in the security measures imposed by the Israeli forces such as roadblocks, searches, curfews, mass arrests of civilians, and issuance of identity passes for the Lebanese.³⁹⁸ The IDF had also undertaken numerous governmental functions such as removing and burying bodies, clearing debris and mines, widening roads, and requisitioning civilians to perform some of these tasks.³⁹⁹

The IDF, then, by virtue of its strength and organization, was exercising, in September 1982, ultimate executive authority in the territories of which it had gained control as demonstrated, in the cases of the Palestinian refugee camps, by the IDF's ability to control the Christian militia force's entry into and exit from the camps. Under the circumstances, Israel could not exercise some of the powers of an occupying force and disregard the concomitant legal responsibilities; nor could Israel discharge its responsibilities under the Civilians Convention when it occupied West Beirut by entrusting the Palestinian refugees to the forces of a central government incapable of intervention and quite possibly disinclined to protect the refugees from violence.

In sum, the facts point toward the applicability of Article 2 to the hostilities in Lebanon and Beirut because of the IDF's invasion of and initiation of hostilities on Lebanese soil and its functioning role as an occupying power. This conclusion is reinforced by the intent underlying Article 6 of the Civilians Convention which pertains to the beginning and end of application of that Convention. That Article states that the Civilians Convention applies "from the outset of any conflict or occupation," and ceases to apply "on the general close of military operations," or, in the case of occupation, "one

³⁹⁷International Commission Report, *supra* note 10, at 115.

³⁹⁸*Id.* at 115-16.

³⁹⁹*Id.* at 116

year after the general close of military operations. . . .'⁴⁰⁰ Pictet's *Commentary* states that, "the Convention should be applied as soon as troops are in foreign territory and in contact with the civilian population there. . . . Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets."⁴⁰¹

The Civilian Convention, then, is clearly intended to apply to the IDF presence in Lebanon, but that Convention is not *unlimited* in the class of persons it protects. Paragraph 1 of Article 4 provides: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not **nationals**."⁴⁰²

The negative form of this "protected person" definition has been carefully crafted so that the coverage of the Article extends to persons without **nationality**.⁴⁰³ The intent here is to protect anyone who is, "not a national of a Party to the conflict or Occupying Power in whose hands he is."⁴⁰⁴ Significantly, were the Palestinian refugees to be treated as nationals of Israel based upon their emigration from that area, they would be excluded from the scope of the Civilians Convention while "in the hands of" Israel. Neither the State of Israel, however, nor the Palestinians have claimed that the refugees in the camps were Israeli nationals.

The expression "in the hands of" in Article 4(1) is used in an extremely general sense:

It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or "hands" of the Occupying Power. It is possible that this power will never actually be exercised over the protected person; very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person **is** in territory which is under the control of the Power in question.⁴⁰⁵

⁴⁰⁰Civilians Convention, art. 6.

⁴⁰¹4 Pictet, *supra* note 247, at 69-60.

⁴⁰²Civilians Convention, art. 4(1).

⁴⁰³4 Pictet, *supra* note 247, at 47.

⁴⁰⁴*Id.* at 46.

⁴⁰⁵*Id.*

Given the broad scope of coverage of the phrase “in the hands of,” the Palestinian refugees may be said to have fallen into the hands of Israel when the IDF occupied West Beirut. That the IDF sent the Phalangists into the camps, rather than Israeli forces, does not alter that conclusion, as Article 29 of the Civilians Convention provides: “The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.”⁴⁰⁶

The term “agent” in Article 29 is intended to embrace “any person who is in the service of a Contracting Party, no matter, in what way or in what capacity,” including, *inter alia*, members of armed forces and paramilitary police organizations.⁴⁰⁷ The nationality of the agents does not affect the issue:

[Occupying authorities] are responsible for acts committed by their locally recruited agents of the nationality of the occupied country. The position is just the same whether the agent has disregarded the Convention’s provisions on the order, or with the approval, of his superiors or has, on the contrary, exceeded his powers but made use of his *official standing* to carry out the unlawful act.⁴⁰⁸

In light of the extensive operational controls exercised by the IDF over the Phalangist militia and the use by the Phalangists in the camps of their standing as a militia force outfitted by and allied with the State of Israel, an agency relationship can be said to have existed for purposes of Article 29 between the Phalangists and the IDF during the former’s authorized stay in the camps.

That statement aside, the occupying power is also responsible for the unlawful acts of local authorities if the unlawful acts were committed at the instigation of the occupying power.⁴⁰⁹ In light of the history of bad blood between the Palestinians and the Christian militia, Israel’s invitation to the militia to enter the camps arguably constituted such instigation. The extant agency relationship between the Phalangists and the IDF confirms that the refugees in Shatila and Sabra were “in the hands” of Israel within the meaning of Article 4(1) of the Civilians Convention following the IDF occupation of West Beirut.

⁴⁰⁶Civilians Convention, art. 29.

⁴⁰⁷4 Pictet, *supra* note 247, at 211

⁴⁰⁸*Id.* at 212 (emphasis added).

⁴⁰⁹*Id.*

Paragraph 2 of Article 4, however, excludes certain additional classes of nationals, otherwise within the ambit of Article 4(1), from protected persons status under the Civilians Convention:

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.⁴¹⁰

Under this provision, whether one classified the Palestinians inhabiting the refugee camps as stateless persons or nationals of and emigres from one of the Arab states in the Middle East, they did not fall within the scope of this exclusion since all of the Arab states in the Middle East were state parties to the Civilians Convention⁴¹¹ and the Palestinian refugees in Lebanon were not nationals of Egypt, the only Arab state with diplomatic relations with Israel.⁴¹²

Although the refugees in the Palestinian refugee camps were protected persons for purposes of the Civilians Convention, those individuals in the camps definitely suspected of or engaged in activities hostile to the security of the State of Israel were not entitled under Article 5 of the Civilians Convention to claim such rights and privileges as would be prejudicial to the security of such State.⁴¹³ In fact, the Israelis contended at the time of their invasion of West Beirut that the refugee camps were centers of military resistance for 2,000 PLO fighters.⁴¹⁴ This was simply not borne out by the facts, however, as the Christian militiamen met no significant resistance and suffered virtually no casualties in their sweeps through the camps. Even if Article 5 were applicable to the Palestinian refugees because they were suspected of engaging in hostile activities, derogations are only permissible under that Article on a case-by-case basis. Moreover, in each case, the person must be "treated with humanity," a condition totally lacking in the pogrom at Shatila and Sabra.

⁴¹⁰Civilians Convention, art. 4(2).

⁴¹¹Treaties in Force, *supra* note 36, at 276-77.

⁴¹²*Documents and Statements on Middle East Peace, 1979-82: Report Prepared for the Subcommittee on Europe and the Middle East of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess., 161-62, 194 (1982) [hereinafter cited as Middle East Documents].

⁴¹³Civilians Convention, art. 5.

⁴¹⁴International Commission Report, *supra* note 10, at 167.

The protected person status for the Palestinian refugees in Shatila and Sabra, according to Articles 146 and 147 of the Civilians Convention, required that Israel provide effective sanctions for persons committing or ordering to be committed⁴¹⁵ "wilful killing, torture or inhumane treatment. . . [and] wilfully causing great suffering or serious injury to body or health. . . ." ⁴¹⁶ The killings in the refugee camps constituted grave breaches of the Civilians Convention if they were willful.⁴¹⁷ In defense of those persons who committed or ordered the commission of killings, it could be argued that the killings were not willful, but rather incidental to an attack on a legitimate military objective by a belligerent armed force. This argument is predicated on the assertions that the Lebanese armed forces did encounter small arms fire in early September when it tried to comb the refugee camps for weapons, that the IDF also encountered fire from the camps upon their entry into West Beirut, that an elaborate network of tunnels in the camps for hiding guerillas and storing supplies confirms the camps' military utility to the PLO, and that the Israelis contended that 2,000 PLO fighters were still hiding in the camps.

The entire camp, though, was not considered a military objective nor was the population constituted primarily of combatants. This was evident when the Israeli Chief of Staff, in order to prevent injuries to civilians, declined requests by the Phalangists, both before and after their entry into camps, for support in the form of artillery fire and tanks.⁴¹⁸

The real proof, however, that the killings were not incidental to legitimate military operations lies in the total absence of any real resistance to the Phalangist sweep of the camps as demonstrated by their extremely light casualties. There is only one conclusion possible; that the slaughter of the Palestinian refugees was without legal justification, a willful killing in grave breach of the Civilians Convention. Although Protocol I has not been ratified or acceded to by Israel,⁴¹⁹ it is interesting to note that the Protocol, arguably the harbingers of emergent customary international legal norms on the protection of civilian populations in combat areas, is more explicit than the Civilians Convention in its prohibitions against attacks on civilian populations, such as the refugees in Shatila and Sabra.⁴²⁰

⁴¹⁵Civilians Convention, art. 146.

⁴¹⁶*Id.* art 147.

⁴¹⁷*Id.*

⁴¹⁸Final Report, *supra* note 17, at 52.

⁴¹⁹Bothe, Partsch, & Solf, *supra* note 266, at 725.

⁴²⁰Protocol I, arts. 1, 48-51.

Aside from the specific guarantees of Articles 146 and 147 of the Civilians Convention, the famous de Martens clause also binds Israel to follow the laws of humanity and the dictates of the public conscience as they result from the usages established among civilized people.⁴²¹ These binding rules of civilized people, otherwise known as customary international law, prohibit, as evident in the Charter of the International Military Tribunal at Nuremberg, the intentional, wholesale slaughter of captured noncombatants such as the Palestinian refugees in Sabra and Shatila on 16 through 18 September 1982, by belligerent combatants, in this case the Christian militia forces, without the requisite justification of military necessity.⁴²²

Apart from the Civilians Convention, the killings in the camps may also fall within the ambit of the Genocide Convention. The evidence discloses that all of the Palestinians in the camps, including small children and Palestinian doctors and nurses treating the wounded and sick, were singled out by the Christian militiamen for execution. The wholesale slaughter evinces an intent to destroy the Palestinians as a group. The first critical issue is whether the Palestinians represent a distinct national, ethnical, or religious group within the meaning of the Genocide Convention.⁴²³ Certainly, the Palestinians would assert such a status based on their historical claim to Palestine, now Israel.⁴²⁴ The opposing argument would assert that the Palestinians are only a political group, a category expressly omitted from the coverage of the Genocide Convention.⁴²⁵

Since the killings in the camps clearly constituted war crimes under the Civilians Convention and customary international law, it is unnecessary at this juncture to resolve the contentious genocidal war crimes question in this study. Suffice it to say that, if the Palestinians are a protected group, the Genocide Convention is applicable to the pogrom at Sabra and Shatila for any individual who possessed the requisite intent to destroy the Palestinians and committed pro-

⁴²¹Civilians Convention, art. 158(4).

⁴²²See Hague Convention No. IV Respecting the Laws and Customs of War on Land with Annex of 1907, art. 46, 36 Stat. 2227, T.S. No. 639, 1 Bevens 631; U.S. Dep't of Army, Pamphlet No. 27-161-2, International Law 48-51, 165-66 (1962) [hereinafter cited as Army Pamphlet]; Field Manual, *supra* note 19, par. 25.

⁴²³Genocide Convention, art. II.

⁴²⁴Middle East Documents, *supra* note 412, at 164-44, 194; Palestinian National Covenant, *reprinted in* 1 J. Moore (ed.), *The Arab-Israeli Conflict* 536-63 (1974).

⁴²⁵Anabtawi, *The Palestinians as a Political Entity*; Hidon, *Arab-Israeli Movement-Its Significance in the Middle East*, *reprinted in* 1 J. Moore (ed.), *The Arab-Israeli Conflict* 489-617 (1974). For a discussion of the Genocide Convention's non-applicability to political groups, see Drost, *supra* note 246.

hibited acts including, *inter alia*, murder of the Palestinian refugees, conspiracy to commit the murders, or complicity in the

In conclusion, the international law of armed conflict was clearly applicable to the hostilities in Lebanon following the Israeli intervention in June 1982 and inclusive of the ensuing Israeli occupation of West Beirut in September 1982. Given the absence of the requisite element of military necessity to justify the killing of noncombatants in Shatila and Sabra, the wholesale slaughter of the refugees, whether classified as grave breaches, crimes against humanity under customary international law, or a combination of the foregoing, constituted war crimes under the law of armed conflict.

2. IDF Military Commanders.

Having established, under international law, the criminal nature of the killings in Shatila and Sabra, this next section analyzes the extent and nature of the command responsibility of Lieutenant General Eitan, Major General Drori and Brigadier General Yaron for those crimes, according to the four components of command responsibility: status, mental element, mental object, and duty to intervene.

(a) Eitan.

(1) Status.

Lieutenant General Eitan has served as Chief of Staff for the multi-service Israeli Armed Forces since April 1978.⁴²⁷ By law, "the highest level of command in the armed forces is the Chief of Staff,"⁴²⁸ although the Chief of Staff remains "subject to the Cabinet and subordinate to the Minister of Defense."⁴²⁹

The Israeli Area commanders, including the General Officer Commanding Northern Command, Major General Drori, and his subordinates come under the Chief of Staff's command and control.⁴³⁰ The Chief of Staff's far-reaching powers and responsibilities even extended to the area of military justice as evident in three highly pub-

⁴²⁶Genocide Convention, arts. I-IV.

⁴²⁷W. Frankel, *Israel Observed: An Anatomy of a State* 274 (1982) [hereinafter cited as Frankel]; D. Horowitz, *supra* note 371, at 94-98 (1975).

⁴²⁸G. Yaacobi, *The Government of Israel* 243-44 (1981).

⁴²⁹*Id.*

⁴³⁰Horowitz, *supra* note 371, at 95.

licized cases where Eitan commuted the courts-martial sentences of three service members, including two officers, convicted of killing four Arabs during a military operation.⁴³¹

The killings in the refugee camps, though, were not committed by the IDF but rather by Christian militia forces. Nevertheless, both the Phalangist militia and Major Haddad's Army of Free Lebanon received their weapons, training, instruction and uniforms from the Israelis.⁴³² Moreover, during the Israeli advance north into Lebanon, both groups obeyed operational orders from Eitan.⁴³³

As regards Sabra and Shatila, the evidence shows that the initial decision to use the Phalangists in the refugee camps was made jointly by the Defense Minister and the Chief of Staff. Following that decision, orders were issued that the IDF alone should command the forces in West Beirut and that the Phalangists would handle the "mopping-up" operation in the refugee camps. Concurrently, Eitan met with the Phalangist military commanders and ordered them to effect a general mobilization and prepare to take part in the fighting.⁴³⁴

Subsequent events demonstrated that the Phalangists both entered and exited the refugee camps pursuant to orders approved by Eitan. After the event, Eitan met with the Phalangist military commanders and told them that they must admit to having perpetrated the acts and explain the matter. "Their reaction was that if the Chief of Staff says they must do so, they would."⁴³⁵ The Chief of Staff declined, however, to press the issue when the meeting disclosed the possibility that the Phalangist military commanders may not have known of, or ordered, the killings in the camp.⁴³⁶

From the facts, it is clear that Eitan, in deploying IDF forces to West Beirut ostensibly for the purpose of avoiding the outbreak of violence there, assumed physical and legal control of the area. Had Eitan ordered the Phalangists not to enter the camps or to leave earlier, such order would no doubt have been obeyed by the Phalangists.⁴³⁷ Moreover, judging from the willingness of the Phalangist military commanders to do whatever Eitan told them to do after the killings, Eitan probably possessed the power necessary to insure the punishment of the perpetrators.

⁴³¹Frankel, *supra* note 427, at 274.

⁴³²See *supra* text accompanying notes 305-06, 311.

⁴³³See *supra* text accompanying notes 322-24.

⁴³⁴Final Report, *supra* note 17, at 19.

⁴³⁵*Id.* at 51.

⁴³⁶*Id.*

⁴³⁷*Id.* at 75-76.

In sum, as a consequence of his frequent meetings with the Phalange commanders and his ability to conduct onsite inspections, Eitan exercised more control over the Phalangist militia than Yamashita did over the naval forces that were principally responsible for the "Rape of Manila."⁴³⁸ Eitan's operational control over the Phalangist forces and his occupational control over West Beirut, exercisable through his area commander, vested him with a status equivalent to that possessed by the military occupational commanders who were convicted at the Nuremberg Subsequent Proceedings for subordinates' crimes.⁴³⁹ The subsequent reaffirmation of those command-and-control principles in the codification of command responsibility in Protocol I only serves to confirm that Eitan, as Chief of Staff of the IDF, possessed the requisite control over the Phalangists, both before and during the camp operation, to satisfy the status element of command responsibility.

(2) *Mental Element and Mental Object.*

As regards Eitan's state of mind, he has stated: "The IDF had no knowledge until Saturday morning of what was going on." "The Phalangists were fighting within Shatila. . . . We didn't really know what was going on. It was at night. It was assumed it was ordinary fighting. . . ." ⁴⁴⁰ There is no evidence to suggest that Eitan expressly ordered the murder of the noncombatants in the refugee camps, an order which would have constituted a grave breach under the Civilians Convention. Eitan did, however, participate in the decision to order the Phalangist militia into the camps.

At a Cabinet meeting on the evening of 16 September, the Chief of Staff said that the consequence of Bashir Gemayel's assassination would be either a collapse of the Phalangists or an eruption of revenge:

[I]t will be an eruption the likes of which has never been seen; I can already see in their eyes what they are waiting for.

Yesterday afternoon a group of Phalangist officers came, they were stunned, still stunned, and they still cannot conceive to themselves how their hope was destroyed in one blow, a hope for which they built and sacrificed so

⁴³⁸See *supra* text accompanying notes 78-88.

⁴³⁹See *supra* text accompanying notes 126-70.

⁴⁴⁰International Commission Report, *supra* note 10, at 168.

much; and now they have just one thing left to do, and that is revenge; and it will be terrible.

. . . .

There is no such thing there. Among the Arabs revenge means that if someone kills someone from the tribe, then the whole tribe is guilty. A hundred years will go by, and there will still be someone killing someone else from the tribe from which someone had killed a hundred years earlier. . . .

I told Draper this today, and he said there is a Lebanese army, and so on. I told him that it was enough that during Bashir's funeral, Amin Jemayel, the brother, said "revenge;" that is already enough. This is a war that no one will be able to stop. It might not happen tomorrow, but it will happen.

It is enough that he uttered the word "revenge" and the whole establishment is already sharpening knives. . . .⁴⁴¹

When queried by the Israeli Board of Inquiry concerning these remarks and the risk of Phalange-committed war crimes in the camps, Eitan responded:

[I]t had never occurred to him that the Phalangists would perpetrate acts of revenge and bloodshed in the camps. He justified this lack of foresight by citing the experience of the past, whereby massacres were perpetrated by the Christians only before the "Peace for Galilee" War and only in response to the perpetration of a massacre by the Muslims against the Christian population, and by citing the disciplined conduct of the Phalangists while carrying out certain operations after the I.D.F.'s entry into Lebanon. The Chief of Staff also noted the development of the Phalangists from a militia into an organized and orderly military force, **as well as** the interest of the Phalangist leadership, and first and foremost of Bashir Jemayel, in behaving moderately toward the Muslim population so that the president-elect could be accepted by all the communities in Lebanon. Finally, the Chief of Staff also

⁴⁴¹Final Report, *supra* note 17, at 26.

noted, in justifying his position, that none of the experts in the I.D.F. or in the Mossad had expressed any reservations about the planned operations in the camps.⁴²²

The Chief of Staff's exculpatory statement is flawed. Past experience in no way justified a conclusion by him that no danger was posed by the entry of the Phalangists into the camps. The Chief of Staff was fully cognizant, as demonstrated in his remarks to the Cabinet, of the longstanding blood feud between the Phalangist and the Palestinians and the "Peace for Galilee" War had not altered that fact. Moreover, the operations, in which the Phalange militia had participated during the war, took place under conditions that were radically different from those which arose after the murder of Gemayel.⁴⁴³ Significantly, in none of those operations was an area populated exclusively by Palestinian refugees turned over to a Phalange operation.⁴⁴⁴ As regards the battle ethics of the Phalange, they did not improve during the war, as is evident in the reports of Phalangist massacres of women carried out by the intelligence unit of Elias Hobeika, the Phalange commander in the refugee camp operation.⁴⁴⁵ The traumatic death of Gemayel only served to inflame the Phalangists. Eitan apparently chose to ignore the effect of this event in arousing a feeling of hatred and vengeance among the Phalangists against the Palestinians.

The absence of a warning from Eitan's staff officers, such as the IDF Director of Military Intelligence, cannot serve as an explanation for his ignoring the danger of a massacre. The Chief of Staff had already forseen, in his Cabinet speech, the real danger in the near future of Phalange atrocities. Moreover, under international law, Eitan cannot absolve himself of his responsibility simply because his staff officers are remiss, since ultimate power and accountability rests with the commander, not his staff officers.

Eitan, then, was fully aware at the time of the Phalangist entry into the camps of the general risk of Phalange atrocities. Under customary international law, there is ample precedent for the proposition that Eitan's state of knowledge of Phalange criminal proclivities was sufficient to satisfy the mental element and mental object components of the command responsibility concept.

⁴⁴²*Id.* at 74.

⁴⁴³*Id.* at 75.

⁴⁴⁴*Id.*

⁴⁴⁵*Id.* at 12.

For example, General von Salmuth, one of the defendants in the High Command case, was found guilty because, in turning POWs over to the SD, he knew of the criminal nature of the organization and, therefore, the likelihood of future war crimes.⁴⁴⁶ Similarly, in the Tokyo trials, the Tribunal stated that a military commander who knew or should have known *in advance* of the likelihood of war crimes being committed by persons subject to his control but failed to take adequate steps to prevent the occurrence of such crimes would be criminally liable for such crimes.⁴⁴⁷ Knowledge of the risk of future war crimes also figured prominently in Article 86(2) of Protocol I which is derived from the *Yamashita* and High Command cases and imposes criminal liability on the commander if he knew or had information which should have enabled him to conclude, in the circumstances at the time, that the subordinate was going to commit breaches of the law of Geneva.⁴⁴⁸ The conclusion reached, then, is that Eitan possessed the requisite knowledge of future Phalange war crimes to be held criminally liable for introducing the Phalange into the camps.⁴⁴⁹

Not only was Eitan aware of the **risk** of future Phalange war crimes, but he also received reports after the Christian militia entered the camps of Phalange abuses that deviated from usual combat operations. The initial report was received on Friday morning, 17 September, when Major General Drori telephoned Eitan, stating briefly that the Phalangists had gone too far and he had therefore ordered a halt to the operations of the Phalangists. The Chief of Staff asked no questions at that time but was later informed by Drori in greater detail of three specific incidents, two involving Phalangist beatings of residents of the camps and one concerning the Phalangists' opening fire on houses without first calling on the residents to exit **peacefully**.⁴⁵⁰ The beatings constituted violations of the duty to treat noncombatants humanely, while the Phalangists firing appeared to be **indiscriminate**.⁴⁵¹

Later, when Eitan subsequently met with the Phalange, he chose not to raise any questions about the aberrant operations for fear of offending their honor. Instead, he readily accepted the Phalangist

⁴⁴⁶See *supra* text accompanying notes 145-61, 167-70.

⁴⁴⁷See *supra* text accompanying note 143.

⁴⁴⁸See *supra* text accompanying note 180.

⁴⁴⁹See *supra* text accompanying notes 286-89.

⁴⁵⁰Final Report, *supra* note 17, at 74-77; International Commission Report, *supra* note 10, at 179-80.

⁴⁵¹Civilians Convention, *supra* note 233, arts. 27, 32; Army Pamphlet, *supra* note 422, at 166; Field Manual, *supra* note 19, pars. 266, 271.

report of no civilian casualties and agreed to their request to stay in the camps until Saturday morning. Following the meeting, in a conversation with the Israeli Defense Minister, Eitan acknowledged that the Phalangists had “overdone it” in the camps, an implicit admission of his knowledge of Phalange-committed breaches of the law of war. Even absent such admission, Eitan’s actions, in ignoring Drori’s reports constituted personal neglect amounting to a wanton, immoral disregard of the actions of persons under his control, as defined in the High Command case⁴⁵² and reaffirmed in the Hostage⁴⁵³ case and in the *Medina* case.⁴⁵⁴ Within twenty-four hours of the Phalangist entry into the camps, Eitan knew or had information which should have enabled him to conclude, like Major Rauer forty years earlier, that the Phalange were committing breaches of the law of war, thereby satisfying the mental element and mental object components required under the doctrine of command responsibility.⁴⁵⁵

(3) Duty to *Intervene*.

Eitan’s duty to intervene first arose when he participated in the initial decision to send the Phalangists into the camps. Had the Chief of Staff expressed opposition or reservations at that time based on the Phalangists’ lack of battle ethics, that fact would have borne serious weight in the consideration of the decision.⁴⁵⁶ Moreover, had there been a difference of opinion between Eitan and the Minister of Defense, he could readily have brought the matter before the Prime Minister for his decision.⁴⁵⁷ The Israeli Board of Inquiry concluded from the Chief of Staff’s testimony that “his opposition to sending the Phalangists into the camps would have meant that they would not have been sent in, and other means. . . would have been adopted for taking control of the camps.”⁴⁵⁸

The Chief of Staff, however, chose to support the Phalange entry into the camps in order to avoid Israeli casualties, while ignoring the risk of Phalange war crimes, hopeful no doubt that Phalange excesses would not be on a large scale.⁴⁵⁹ In so doing, the Chief of Staff allowed perceived military requirements to predominate over his duty to prevent the commission of future war crimes.

⁴⁵²See *supra* text accompanying note 123.

⁴⁵³See *supra* text accompanying notes 157, 165.

⁴⁵⁴See *supra* text accompanying note 207.

⁴⁵⁵See *supra* text accompanying notes 285-88.

⁴⁵⁶Final Report, *supm* note 17, at 75.

⁴⁵⁷*Id.*

⁴⁵⁸*Id.*

⁴⁵⁹*Id.* at 76.

The Chief of Staff, however, argued that appropriate safeguards were established to prevent the commission of war crimes by the Phalangists. Those safeguards included the posting of IDF lookouts near the refugee camps on the roof of the IDF forward command post and on another roof nearby, IDF monitoring of radio communications between the Phalangist forces in the camps and their commander, and the stationing of a Phalangist liaison officer on the roof of the forward command post and a MOSSAD liaison officer in the Phalangist headquarters.⁴⁶⁰

The lookout positions, though, proved worthless in terms of obtaining information on the Phalangist operations in the camps because it was impossible to see what was happening in the camp alleyways from the roof of the command post.⁴⁶¹ The radio monitoring and the liaison officers proved almost as useless, yielding, at best, only ambiguous information on two fortuitous occasions, as the Phalangists avoided broadcasting news of their ongoing massacre.

Those two fortuitous occasions involved, first, a monitored radio communication in which Hobeika directed a Phalange commander in the camps to “Do the Will of God” with fifty Palestinian captives, a conversation which was interpreted, on the one hand, by an Israeli lieutenant as ordering the murder of women and children and, on the other, by Brigadier General Yaron as only killing terrorists, and, second, the report by a Phalangist liaison officer of 300, later reduced to 120, dead terrorists and civilians in the camps without specifying how many of the casualties were civilians or the circumstances surrounding their deaths.⁴⁶² Eitan’s safeguards proved largely ineffective, a foreseeable consequence since the Phalangists were not likely to proclaim openly their plans for revenge.

Significantly, Eitan did not attach an IDF liaison officer to the Phalangist forces that entered the camps because of fear for the life of any such liaison officer, although that safeguard constituted the only secure means of monitoring the Phalangist operation in the camps. Eitan also failed to direct that special briefings be given to the IDF units in the area on reports of possible war crimes. Accordingly, many incidents of suspected Phalangist war crimes, which were observed by the IDF forces stationed around the camps, went unreported.⁴⁶³

⁴⁶⁰*Id.*

⁴⁶¹*Id.* at 14, 76.

⁴⁶²*Id.* at 21-22, 76.

⁴⁶³*Id.* at 21-35.

Those few accounts of Phalangist beatings and indiscriminate fire which did filter through to Major General Drori resulted in his report to Eitan on the irregularities. Although the latter listened to Drori's report, he asked no questions, directed no investigation, and refrained from bringing the matter up during the meeting with the Phalangist military commanders. Instead, at that meeting, Eitan approved the continued Phalangist operation, complete with Israeli bulldozers, in the camps, effectively countermanding Drori's previous order to halt.⁴⁶⁴ Later, when the Phalangists had exited the camps, Eitan met with the Phalange leaders but did not direct them to apprehend, accuse, or otherwise punish the perpetrators of the pogrom, although the Phalangist leaders were apparently prepared to do as the Chief of Staff directed.⁴⁶⁵

Under customary international law, reenforced by Articles 86(2) and 87(1) of Protocol I, Eitan's duty to intervene included taking such measures as were within his power and appropriate to the circumstances, such as objecting to the proposed Phalangist operation, instituting adequate safeguards to monitor their operations, insuring the reporting and full investigation by the IDF of suspected war crimes, ordering a halt to the Phalange operation and their immediate withdrawal from the camp, cutting off assistance and reenforcement to the Phalange, admonishing the Phalange commanders about the aberrant actions, and insuring that the murderers were punished. Eitan's failure to intervene in each instance constituted a breach of his duty as a commander.

(4) *Summary.*

Because Lieutenant General Eitan possessed the requisite command and control over the Phalangist militia and West Beirut and an awareness, beforehand, of the risk of Phalange war crimes and, later, of Phalange-committed war crimes, his failure to intervene to prevent or repress those crimes rendered him criminally liable under the customary international law concept of "command responsibility." Eitan is not guilty, however, of genocide under the Genocide Convention since there is no evidence to date that he acted in concert with the Phalangist with the intent of destroying the Palestinian refugees in the camps as a group, assuming for these purposes that the Palestinians are a national, ethnic, or religious group protected by that Convention. Rather, Eitan's intent was limited to the defeat of the PLO fighters.

⁴⁶⁴*Id.* at 78-79.

⁴⁶⁵*Id.* at 51.

Eitan's guilt or innocence under the Civilians Convention for the grave breach of "ordering to be committed willful killings, torture, or inhumane treatment of protected civilian persons" is more difficult to assess. Certainly, grave breaches were committed by the Phalangist militia and Eitan did participate in the order to send the Phalangists into Shatila and Sabra and later ordered the Phalange to stay in the camps until Saturday morning. Eitan's express orders, though, called for the Phalangists to attack the PLO guerillas rather than unarmed and unresisting civilians.

Later, Eitan congratulated the Phalangists on a job well done while knowing that they had engaged in beatings and indiscriminate fire. Although he did not expressly order the commission of grave breaches, an expansive interpretation of "willful killing," according to Pictet, includes "faults of omission where there was an intention to cause death by it."⁴⁶⁶ One can argue from the evidence, then, that Eitan ordered the Phalangists to remain in the camps while accepting the fact that some noncombatant deaths and beatings would result therefrom. In effect, he exhibited an intent to cause unlawful killings and inhumane treatment in grave breach of the Civilians Convention.

A finding of guilty for Eitan serves to reenforce the continuing efficacy of the senior military commander's role in insuring enforcement of the law of war. At the same time, it should be recognized that a military commander such as Eitan or Governor Hamilton during the American Revolution, in order to avoid casualties among his own troops, may employ organized militia, such as the Phalangists or the Indian frontier tribes, for legitimate combat operations without automatically violating international law. The military commander is not permitted, however, as Eitan and Governor Hamilton did, simply to unleash the Phalangists or Indians given their criminal proclivities. Rather, the commander must employ those forces only under tightly controlled circumstances which avoid the risk of war crimes being committed. Any other conclusion would create a loophole in the enforcement mechanisms for the law of war, contrary to the basic dictates of humanity.

(b) *Drori.*

(1) *Status.*

As the general officer commanding the Northern Command, Major General Drori was a permanent member of the Israeli General Staff.

⁴⁶⁶2 Pictet, *supra* note 247. at 267.

Within his area command, he exercised operational control over all troops deployed in his area, as well as certain administrative and executive functions.⁴⁶⁷

With respect to the Phalangist operation in Shatila and Sabra, the Phalangists were instructed by the Israeli Defense Minister that they should maintain contact with Major General Drori regarding the modes of operation.⁴⁶⁸ Drori later instructed the Phalangists on the direction and time at which they should enter the camps and that they should coordinate their actions with his subordinate division commander, Brigadier General Yaron.⁴⁶⁹

The best evidence of Drori's control over the Phalangists consists of his order for them to halt their operations, an order which Eitan initially let stand. The fact that this order was never implemented, because Eitan later approved the Phalangists remaining in the camp through Saturday, does not alter the conclusion that Drori exercised extensive command and control over the Phalangists and West Beirut, comparable to that enjoyed by the military occupational commanders found guilty at Nuremberg and Tokyo.

(2) *Mental Element and Mental Object.*

Drori testified before the Israeli Board of Inquiry that he feared that mass killings of civilians would result from the decision to send Phalangist units into the Palestinian refugee camps in West Beirut.⁴⁷⁰ Those fears had prompted him to meet with the senior commander of the Lebanese Army in an effort to persuade him that his forces should enter the camps.⁴⁷¹ Drori knew, then, the risk that the Phalangists would commit war crimes in the refugee camps. His expectations, unfortunately, proved only too accurate as the morning following the Phalangists' entry into the camps, he received the reports of Phalangist beatings and indiscriminate employment of firepower. He later paid a second visit to the commander of the Lebanese Army in which he tried again to impress on the commander the need for the Army to enter these camps in place of the Phalangists.⁴⁷² Drori warned the Lebanese Army commander at that time: "You know what the Lebanese are capable of doing to each

⁴⁶⁷Horowitz, *supra* note 371, at 95; D. Peretz, *The Government and Politics of Israel* 178-79 (1979).

⁴⁶⁸Final Report, *supra* note 17, at 16.

⁴⁶⁹*Id.* at 17, 18.

⁴⁷⁰Washington Post, Nov. 1, 1982, at A1, col. 6.

⁴⁷¹Final Report, *supra* note 17, at 17.

⁴⁷²*Id.* at 90.

other.⁴⁷³ Drori knew, then, on Friday morning that the Phalangists had committed breaches of the law of war and further that the danger existed that they would continue to do so.

(3) *Duty to Intervene.*

When Drori received his orders to coordinate with the Phalangist militia commanders concerning their entry into Shatila and Sabra, the essential issue posed was, in light of Drori's opinion of the danger of Phalange war crimes, what were his duties under the juridical concept of command responsibility. He endeavored, on his own initiative, to persuade the Lebanese Army to carry out the camp operation. Later, during one of his coordinating sessions with the Phalangist military commanders, he warned them that they "should behave like human beings, that they should not hurt nonfighters, women, children, old people."⁴⁷⁴ Like General von Salmuth in the High Command case, however, Major General Drori was turning protected persons over to an organization bent on destruction.⁴⁷⁵

Drori's remaining options, aside from those which he had already exercised, were to protest to his superiors as General von Leeb did in the High Command case, to secure permission for an IDF liaison officer to accompany the Phalange into the camps, to publicize to his troops the importance of reporting war crimes, a generally recognized duty in international law implicitly contained in the dissemination and grave breach articles of the Civilians Convention and Protocol I or to resign his command or commission, as General von Leeb contemplated in the High Command case. The record fails to disclose that he did any of the foregoing.

Later, when Drori learned of the Phalangist abuse in the camps, he acted promptly to halt the Phalangist operation, as Medina had done at My Lai, and reported the matter to his superior. In accompanying the Chief of Staff to a meeting with the Phalangists several hours later, however, he adopted a passive role and did not press for a withdrawal of the Phalangists from the camp or other action to preclude future Phalange war crimes.

The explanation given by Drori for this passivity was that his sense of imminent danger had diminished because there were no additional reports of abuses and the Lebanese Army commander who met with Drori that Friday morning did not raise the issue of

⁴⁷³*Id.* at 90.

⁴⁷⁴Washington Post, Nov. 1, 1982, at A16, col. 3.

⁴⁷⁵See *supra* text accompanying note 143.

Phalange atrocities in the camps.⁴⁷⁶ The lack of additional reports hardly mattered, though, where only a few hours were involved, and Drori made no effort while he was at the forward command post to investigate the matter further, an omission for which General Koster was faulted, by talking to the Phalangist liaison officer there or the IDF officers stationed on the roof.⁴⁷⁷ Drori's meeting with the Lebanese Army commander is equally nonexculpatory because Drori did not ask whether the commander had any reports on events in the camp but rather "drew his conclusion which reduced his alertness solely from the fact that this commander did not volunteer any information."⁴⁷⁸

Drori was also remiss in not raising the issue of Phalange abuses with the Chief of Staff after the meeting with the Phalangists, particularly since the Phalangist request for an IDF bulldozer should have increased suspicions that actions which are difficult to describe as combat operations were being carried out in the camps.⁴⁷⁹ Apparently that suspicion arose since the order was given to provide the Phalangists with only one bulldozer and to remove the IDF markings from it.⁴⁸⁰

Certainly, Drori endeavored both before and during the Phalangist operation in the camp to prevent the commission of war crimes. Yet, he did not take all the measures which were within his power and appropriate to the circumstances, as contemplated by customary international law, and he was therefore derelict in his duty to intervene.

(4) Summary.

Major General Drori, like Eitan, did not possess, according to the evidence of record, the requisite intent to destroy the Palestinians, which is necessary to be found guilty under the Genocide Convention. Unlike Eitan, though, Drori did not order the Phalangists to remain in the camps, and he did expend great efforts prior to and during the Phalangist refugee camp operation to prevent Phalange war crimes. Therefore, it is doubtful that one can justify a finding that he ordered willful killings, torture, or inhumane treatment of protected persons within the meaning of the grave breach article of the Civilians Convention.

⁴⁷⁶Final Report, *supra* note 17, at 91.

⁴⁷⁷*Id.*

⁴⁷⁸*Id.*

⁴⁷⁹*Id.* at 92.

⁴⁸⁰*Id.*

Instead, Drori's criminal liability attaches under customary international law because he failed to do all that he could under the circumstances to prevent or repress breaches of the international law of armed conflict. His personal neglect, particularly his passivity in connection with the Chief of Staff's approval of the Phalange operation in the camps through Saturday, amounted to a wanton and immoral disregard of the Phalangist actions equivalent to acquiescence in their crimes. The standard of responsibility expressed here is indeed high, although no higher than that expressed in customary international law precedents such as the *Yamashita* case, Nuremberg Subsequent Proceedings, and Tokyo Trials.

This conclusion represents a proper balance of humanitarian and military values best illustrated by looking at the alternative. Specifically, a finding of not guilty in Drori's case would mean that a military commander could absolve himself of responsibility simply by reporting war crimes of persons subject to his control to his superior and thereafter ignoring the matter, while his superior disregards the war crimes report. Such a result serves no legitimate military purpose since it involves dereliction of duty and equally significantly, is counterproductive to the value interest of enforcement of the law of war.

(c) *Yaron.*

(1) *Status.*

Brigadier General Yaron, the field commander for the IDF division occupying West Beirut, located his headquarters at the forward command post outside the refugee camps.⁴⁸¹ At noon on 16 September, Yaron accompanied his superior, Major General Drori, to a meeting with the Phalange military commanders at which the Phalangists were ordered by Drori to coordinate their actions with Yaron.⁴⁸² During the ensuing Phalange operation in Shatila and Sabra, Elias Hobeika, the Phalangist commander, was stationed on the roof of the IDF forward command post serving in the role of liaison officer.⁴⁸³

Yaron did not, however, enjoy the same measure of command over the Phalangists that his superior, Drori, did. This was illustrated on Friday morning, 17 September, when Yaron reached the conclusion that something was awry in the refugee camps but did not order a

⁴⁸¹*Id.* at 14.

⁴⁸²*Id.* at 18.

⁴⁸³*Id.* at 18-19.

halt to the Phalangist operation. Rather, he suggested to Drori the issuance of such an order.⁴⁸⁴ Drori's order to halt was then conveyed to the Phalangist commanders.

Similarly, when the Phalangist commanders requested permission to send new troops in on Friday morning, Yaron permitted their troops to assemble at the airport, pending approval by the Chief of Staff of their entry into the camps.⁴⁸⁵ The ensuing meeting by Eitan with the Phalangist military commanders on Friday afternoon, at which the Phalangists were authorized to use an IDF bulldozer and to operate in the camps through Saturday morning, was interpreted by Yaron, who was present at the meeting, as granting permission for the Phalangist resupply and troop rotation.⁴⁸⁶

The next morning, though, Yaron learned that the Phalangists had not exited the camps at 0500. Yaron thereupon gave the Phalangist commander on the scene an order that they must vacate the camps without delay. This order was obeyed, thus confirming that Yaron exercised a considerable measure of authority over the Phalangists; otherwise, he would have had to refer the matter to Drori.

Although many of the orders to the Phalangist militia forces were not originated by Yaron, he clearly exercised, as the senior IDF on-scene commander, extensive control over the actual entry to and exit of the Phalangists from the camp. This was due, no doubt, to the presence of Yaron's division in West Beirut and the stationing of the Phalange military commander for the camp operation at Yaron's command post.

In sum, Yaron's command and control over the Phalangists compared favorably in many ways with that exercised by Yamashita with his poor communications and his tactical command over the rampaging Japanese naval troops in Manila. That Yaron's superiors issued the initial orders to the Phalange does not alter that conclusion since the Phalange were placed under his control, a control which he effectively exercised. Since the *Yamashita* decision was reaffirmed on the command-and-control issue at the Tokyo Trials and elsewhere following World War 11, it must be concluded that Yaron enjoyed sufficient control over the Phalangists to satisfy the status component of the command responsibility concept.

⁴⁸⁴*Id.* at 29-30.

⁴⁸⁵*Id.* at 33.

⁴⁸⁶*Id.* at 36; Washington Post, Nov. 8, 1982, at A1, col. 6, at A17, cols. 4, 6.

(2) Mental Element and Mental Object.

When Yaron was first informed in a meeting of senior IDF officers of the decision to send the IDF into West Beirut, he reportedly stood up and spoke forcefully against the move to the Israeli Defense Minister, arguing without success that many civilians and soldiers would be killed and pleading for a seige *instead*.⁴⁸⁷ Like Eitan and Drori, he was aware of the proclivities of the Phalangists to commit atrocities against the **Palestinians**.⁴⁸⁸ In fact, he had had arguments with the Phalangists over this issue in the **past**.⁴⁸⁹

After the decision to use the Phalangists for purging the refugee camps of the PLO had been made, Yaron participated in a meeting with Elias Hobeika and his superior, Fady Frem, where the latter said pointedly in Arabic that there would be a chopping or slicing operation in the **camps**.⁴⁹⁰ Yaron warned them during that meeting not to harm the civilian population, ample proof when combined with Yaron's knowledge of Phalangist military operations that he was aware, prior to the Phalangist entry into the camps, of the risk of Phalange war crimes being committed.

During the evening following the Phalange entry into the camps, Yaron received several reports of Phalange killing of noncombatants. The first report came from the IDF lieutenant who overheard Hobeika directing a Phalange commander in the camp to "do God's will" with fifty captured women and children. The second report came from the division intelligence officer concerning the fate of forty-five people in Phalange **hands**.⁴⁹¹ The third report, meanwhile, was delivered by Hobeika concerning the death of some 300, later reduced to **120**, terrorists and civilians in the camps.

Yaron chose to ignore the warning signals raised by these reports and did not communicate these reports to his superiors for several reasons. First, he considered the casualty figures exaggerated, a frequent occurrence in **combat**.⁴⁹² Second, he interpreted the casualties **as** deaths of **terrorists**.⁴⁹³ Third, he thought that the first two reports with roughly equivalent numbers of casualties referred to the same **incident**.⁴⁹⁴ Yaron was, in essence, relying on the various

⁴⁸⁷N. Y. Times, Feb. 10, 1983, at A12, col. 3.

⁴⁸⁸Final Report, *supra* note 17, at 19.

⁴⁸⁹*Id.* at 19.

⁴⁹⁰International Commission Report, *supra* note 10, at 165-66.

⁴⁹¹Final Report, *supra* note 17, at 22-24, 93.

⁴⁹²*Id.* at 22-23.

⁴⁹³*Id.* at 22.

⁴⁹⁴*Id.*

precautionary measures which had been taken, including lookouts, radio monitoring, and liaison officers, to deter Phalangist misconduct.⁴⁹⁵ In so doing, he ignored the facts, including the inflammatory effect of Gemayel's assassination. It is significant to note that he admitted afterwards that he had been insensitive to the dangers of a massacre in the camps presumably because of a desire to save IDF soldiers that would otherwise be lost in clearing the camps.⁴⁹⁶

Yaron was not totally insensitive to the dangers, however, as on the morning of 17 September, he received additional reports of aberrant conduct by the Phalangists. He concluded: "Something smelled fishy to me,"⁴⁹⁷ and phoned Major General Drori with the consequence that Drori ordered the Phalangists to halt their operations. From Yaron's conduct and admissions, it is evident that he recognized on Friday, 17 September, that abuses of the law of war were being committed by the Phalangists against the Palestinian refugees.

Yaron, in sum, possessed knowledge both beforehand of the risk of Phalange war crimes and, later on, of Phalange-committed war crimes that was more detailed and complete than that possessed by Eitan and Drori⁴⁹⁸ He, therefore, possessed the requisite mental element and mental object required under customary international law for the "crime" of command responsibility. He did not, however, possess the requisite intent to destroy the Palestinians *as* a group which is required for genocide under the Genocide Convention, nor did he intend for the Phalange to cause the death, torture, or inhumane treatment of noncombatants.

(3) *Duty to Intervene.*

Although Yaron had opposed the IDF's entry into West Beirut, he voiced no opposition to the decision to send the Phalangists into the refugee camps because the IDF had been fighting in Lebanon for four months already, and he considered the camps a place where the Phalangists could take part in the fighting, because "the fighting serves their purposes *as* well. . . ."⁴⁹⁹ For Yaron, insensitive *as* he was to the risk of Phalange war crimes, the predominant concern was saving the lives of IDF soldiers. Thus, he did not advocate sending an IDF liaison officer into the camps.

⁴⁹⁵*Id.* at 13.

⁴⁹⁶*Id.* at 47, 95-96.

⁴⁹⁷*Id.* at 29.

⁴⁹⁸See *supra* text accompanying notes 440-55, 471-73.

⁴⁹⁹Final Report, *supra* note 17, at 94.

When the reports surfaced on the evening of 16 September of the killings, Yaron was skeptical of the reports' veracity and did nothing other than reiterate to Hobeika the warning not to harm women and children. He later claimed that pressing combat problems, which were more important than the matter of the Phalangists in the camps, kept him busy, a defense specifically rejected in the *Yamashita* case and Tokyo Trials. Despite Yaron's claim, he found the time to hold a staff meeting that evening where the intelligence officer reported on one incident of possible Phalange killing of non-combatants. Yaron played down the importance of the matter and cut off clarification of the issue at the meeting.⁵⁰⁰ He did not issue orders to pass on the reports.

The next day, Yaron did take the initiative in reporting the other Phalangist abuses to Drori, but he made no reference to the previous nights reports of Phalange killings. Moreover, he only secured an order from Drori for the Phalangists not to advance. This order might have been considered an adequate precaution by Drori, who had yet to hear reports about instances of killings; Yaron should have known, however, that halting the advance did not insure an end to the Phalange killings.⁵⁰¹

Yaron was similarly remiss during the Chief of Staff's visit to Beirut when he assumed a passive role, akin to Drori's, and failed to pursue measures designed to forestall Phalangist atrocities. Following Eitan's meeting with the Phalangists, Yaron, evincing a total disregard for the reports of Phalange abuses, even authorized the re-supply and rotation of Phalange forces in the camps, although the Chief of Staff had not expressly approved or ordered that to occur. Throughout the Phalangist refugee camp operation, then, Yaron was derelict in his duty to intervene as he failed to take all the measures within his power and appropriate to the circumstances to investigate, report, prevent, or repress Phalangist war crimes.

(4) Summary.

The requisite mens rea is lacking to convict Yaron of genocide under the Genocide Convention. Similarly, he is not guilty of a grave breach under the Civilians Convention since he did not order the Phalangists to commit willful killings or torture of Palestinian non-combatants. Instead, Yaron repeatedly ordered the Phalangists to treat noncombatants humanely. His personal neglect, however,

⁵⁰⁰*Id.* at 93-94.

⁵⁰¹*Id.* at 95.

before and during the Phalangist presence in the camps to the risk of, and commission of, Phalange war crimes amounted to a wanton and immoral disregard equivalent to acquiescence in the crimes. This result reaffirms the finding in Drori's and Eitan's cases that a military commander, while afforded the opportunity under the principle of military necessity to avoid casualties to troops of his own armed forces by ordering friendly militia forces of another nation to handle the fighting, may not disclaim responsibility for the militia's atrocities where the risk of the militia's commission of war crimes is substantial and the military commander fails to prevent or repress the crimes.

V. CONCLUSIONS AND RECOMMENDATIONS

The screams of the victims at Dubno, My Lai, and Sabra and Shatila should never be forgotten. In assessing the blame for such atrocities and, more importantly, in deterring the commission of future atrocities, command responsibility must play a key role.

The first portion of this article was devoted to an analysis of the juridical concept of command responsibility. Born in a municipal law context, it gradually evolved into a customary international law norm during the twentieth century, playing a major role in the international war crimes tribunals following World War II. For the military commander, criminal liability extended not only to those war crimes which he ordered committed but also, according to the Yamashita-Nuremberg standard, to those war crimes perpetrated by subordinates or other persons subject to his control where the commander was personally derelict in his duty. Having been reaffirmed in the My Lai proceedings, the concept is now firmly entrenched in customary international law.

The ascendancy of this concept into the firmament of customary international law has been belatedly shadowed by the increasing recognition of the same concept in conventional international law. This was evident first in the brief, noncriminal references to the military commander's role in a military organization in the Fourth and Tenth Hague Conventions of 1907 and the Geneva Red Cross Convention of 1929. Later, the four Geneva Conventions of 1949 and the Genocide Convention of 1948 assigned criminal liability for the relatively narrowly defined crimes of genocide and grave breaches to those commanders who possessed the requisite intent and committed proscribed acts such as ordering grave breaches or in-

citing genocidal killing. The Yamashita-Nuremberg standard of command responsibility for crimes of absence or omission proved too controversial at the time and had to wait until 1977 when its increasing acceptance in the world community led to its codification in Protocol I to the Geneva Conventions of 1949, thereby aligning the conventional international legal norms with their customary international law antecedents.

The juridical components of this command responsibility concept include status, mental element, mental object, and the duty to intervene. Status refers to the military commander's command and control over members of his own armed force or other persons subject to his control. The mental element for the military commander, variously represented by the "knew-or-should-have-known" standard in the Tokyo Trials and *Yamashita* case, the "personal-neglect-amounting-to-a-wanton-immoral-disregard-equivalent-to-acquiescence" standard pronounced at Nuremberg, or the "knew-or-had-information-which-have-enabled-him-to-conclude-in-the-circumstances-at-the-time" standard articulated in Article 86(2) of Protocol I, is broadly defined to insure legal accountability, attaches where the military commander is personally derelict. The third element, mental object, pertains to the commander's knowledge of subordinates' war crimes or criminal policies or the risk of subordinates committing war crimes in the future. The final element, the commander's duty to intervene, requires that the commander take those measures which are within his power and appropriate to the circumstances to prevent or repress subordinates' war crimes.

These broadly defined elements to the concept of command responsibility have evolved in order to utilize effectively the commander's role and power in the modern military organization to insure effective enforcement of the law of war. Defining the elements more narrowly would prove extremely destructive to the humanitarian value interests at stake. For example, limiting the military occupational commander's liability to only those Army personnel under his command would excuse him from criminal acts committed by naval personnel in his area of responsibility and authority simply because they are not in his direct chain of command. Similarly, restricting the commander's criminal liability to only those subordinate crimes of which he had actual knowledge would permit many military commanders to escape liability for widespread and commonly known atrocities which they ordered or in which they silently acquiesced because proof of the commander's actual knowledge was rendered impossible by the death of witnesses and destruction of records in combat. Finally, defining the mental object element to in-

clude the risk of future war crimes insures that the commander acts not only to punish subordinates' crimes already committed but also to prevent future war crimes.

Although the criminal liability of a military commander has been broadly defined in international law to protect the underlying humanitarian values, the law recognizes the necessity for a military commander to decentralize and delegate authority and control in order to administer effectively a modern military organization. Accordingly, his liability for subordinates' war crimes is not absolute. Rather, it is limited to instances where there is personal dereliction on his part, the point at which the principles of humanity and military necessity are properly balanced.

The second portion of this study consisted of an examination of the responsibility of Rafael Eitan, the Israeli Chief of Staff, Amir Drori, the area commander for Lebanon, and Amos Yaron, the division commander in West Beirut, for the massacre in Shatila and Sabra. Although none of those Israeli officers expressly ordered the commission of war crimes, the facts and law applicable to each officer's case demonstrate their criminal liability as military commanders for the Phalangist atrocities. This finding is consistent generally with the conclusions of the Israeli Board of Inquiry and the Private International Commission, although the former was never specific in articulating the sources for its jurisprudence, whether national or international, statutory, conventional or customary, and the latter dealt primarily with the responsibility of the State of Israel. Significantly, the finding by the Israeli Board of Inquiry of indirect responsibility for the massacre in the cases of Eitan, Drori, and Yaron, like the administrative decision of the Secretary of the Army in Koster's case, may be treated as customary international law practice.

A contrary finding of not guilty for the IDF military commanders would have represented a retreat from the existing boundaries of command responsibility to one limited by very restrictive definitions of command and control, and knowledge. Such a result is needlessly destructive of the humanitarian values one is attempting to preserve in the Lebanese armed conflict.

In concluding this article, it is appropriate to make several recommendations based upon the foregoing study and conclusions. First, the concept of command responsibility contained in Protocol I should be adopted by all nations and parties to an armed conflict as binding international law, whether through ratification or accession to the Protocol or through recognition of the applicable norms in the

Protocol as a codification of customary international law. Second, adviser positions should be established for all armed forces to insure that the military commander is able to avail himself of the necessary expertise to insure compliance with the law of war. Finally, to avoid the misfeasance of past commanders, including Eitan, Drori, and Yaron, any military commander, Israeli or otherwise, assigned command and control over armed combatant group similar to the Phalangists which has engaged in widespread war crimes in the past should refrain from employing that group in combat situations until they have demonstrated clearly and unequivocally their commitment to the fundamental humanitarian protections of the law of war.

NUCLEAR WEAPONS: THE CRISIS OF CONSCIENCE

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*This article examines the impact of nuclear weapons on international law, religion, and Army doctrine and personnel policies. **This** article concludes that principles of international law can be applied to the use of counterforce nuclear weapons and **is** reflected in Army doctrine. Principles of international law can only be applied to countervalue nuclear weapons through the policy of mutual deterrence and a balance of power. The American Roman Catholic Bishops have launched a moral crusade against nuclear weapons. They demand that individuals make moral choices regarding the use of nuclear weapons. Individuals **will** have to make their choices without adequate moral and religious guidance. The Bishops' call for legislative recognition of selective conscientious objection has given moral legitimacy to nuclear pacifism. While selective conscientious objection has been rejected by Congress and the Supreme Court, the Army must prepare to deal with nuclear pacifism.*

In the Paradise of Children dwelt a boy named Epimetheus. Because he lived alone, the gods on Mount Olympus sent him a companion. Her name was Pandora.

In the house of Epimetheus, Pandora spied a large carved chest that was locked. She immediately wanted to know what was in it. The boy told her that the god, Mercury, had brought it and left it with strict instructions never to open the chest, not even to unlock it. Pandora grew more curious.

The Paradise in which they dwelt was perfect. There was no sickness or trouble. Yet each time Pandora spied the chest, the more her curiosity grew.

One day when Pandora was alone she decided to unlock the chest and lift the lid for one quick look. **As** she began to raise the lid very

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slowly, it flew open. There was a great clap of thunder and the room grew instantly dark. A sudden swarm of batlike creatures rushed out of the chest and past her into Paradise. And so it was that anger, sorrow, sickness, despair, and all other evil things came into the world. Then the room grew light again. Pandora gazed into the chest and saw one last, tiny creature of great beauty struggling to fly out. When it gained strength, it, too, flew into Paradise. That last creature was Hope.

A Greek Legend

I. INTRODUCTION

A. *HIROSHIMA AND NAGASAKI: THE TURNING POINT*

Single events have often triggered dramatic changes in the course of civilization. The discovery of fire brought warmth, light, and a greater chance of survival to primitive humanity. Gutenberg's printing press made books available to the average citizen and fostered widespread literacy. The Wright Brothers's short flight paved the way for intercontinental travel and space exploration. In August 1945, the United States decimated Hiroshima and Nagasaki with nuclear weapons. Never before had a single bomb been able to obliterate an entire city and most of its population. While these weapons of mass destruction have never again been used to vanquish the enemy, Hiroshima and Nagasaki represent civilization's entry into a new era. The specter of universal holocaust has emerged from Pandora's box. The potential devastation and carnage of war was transformed from limited to unlimited. If ever unleashed, the present nuclear stockpiles of the United States and the Soviet Union have the potential of destroying civilization. Human beings need no longer work in munitions factories, be enmeshed in the advance of armies, or participate actively in warfare to become targets. Nuclear weapons and the resultant radioactive fall-out make people, those born and unborn, those far from the battle, and those uninvolved in the conflict, vulnerable to nuclear devastation and death.

B. *PUBLIC RESPONSE*

A few Americans participated in the short-lived "Ban the Bomb" movement of the early 1950s. Anti-nuclear movements have gained a stronger foothold in Western Europe and the United States in the 1980s. Mass demonstrations have been conducted in Great Britain

and the Federal Republic of Germany to protest the presence of U.S. nuclear weapons and the deployment of Cruise and Pershing II missiles. Americans have joined in peaceful demonstrations and civil disobedience to protest nuclear missile storage sites, reactors, and the proposed MX missile system. Numerous politicians, church groups, and scientific organizations have joined citizens in the call for nuclear freeze and eventual disarmament. Movies like *On The Beach*, *The Day After*, and *Testament* have focused public attention on the terrifying aftermath of a nuclear holocaust. Such movies have increased both the awareness of the threat and the fear of its occurrence. No sane individual, with even minimal moral scruples, desires to witness universal destruction. At the same time, other concerned politicians, church groups, and citizens believe that the United States must maintain our nuclear arsenal in order to prevent war and provide national security for ourselves and our allies. So the debate rages. Can we live with nuclear weapons? Can we survive without them? Can we limit their use? Is nuclear holocaust avoidable or inevitable?

C. COPING WITH THE CHALLENGE

Nearly 40 years have passed since Hiroshima and Nagasaki ushered in the age of nuclear weapons. Nations have thus far avoided the use of those weapons since that fateful day. The presence of nuclear weapons has presented new and unique challenges to international lawyers, military strategists, the clergy, and individuals. Have these challenges been met, avoided, or denied? If all human institutions and organizations were to be examined, volumes would result. Therefore, the scope of this article will be limited. First, the impact of nuclear weapons on international law will be examined. The second subject will be an analysis of Army doctrine on the limited use of nuclear weapons. Third will be an examination of how the Roman Catholic Church, particularly the American Bishops, have met the challenge. Last will be an examination of how this challenge impacts on individual conscience and Army personnel policies.

11. NUCLEAR WEAPONS

A. BASIC DEFINITIONS

Before nuclear weapons use and policy can be analyzed within the framework of international law, basic concepts and terms must be defined:

Tactical employment of nuclear weapons is the use of nuclear

weapons by the battlefield commander in support of maneuver forces in his command, usually at corps level or below.¹

The Army's tactical nuclear doctrine specifies the manner in which corps and divisions will conduct nuclear operations subject to political and military constraints. Such constraints may include target types, restrictions on delivery systems and yield, time, number of weapons to be used, geographical or political boundaries, and collateral damage preclusion guidance.²

The corps nuclear weapons package is a discrete grouping of nuclear weapons to be used in a specific area during a short time period to support a corps tactical mission.³

Counterforce nuclear weapons are typically small in yield, but highly accurate. The purpose of counterforce strategy is to aim directly at the enemy's military forces as opposed to destruction of the adversary's society in a massive way.⁴

Countervalue weapons and strategies primarily emphasize destruction of industrial bases and population centers. This kind of targeting strategy is best served by using larger yield weapons or multiple warheads.⁵

Target evaluation is an examination of targets to determine the priority for attack and military importance.⁶

Deterrence is the attempt to keep an adversary from taking a particular course of action by insuring that the risks will appear to him to be out of proportion to any gains he may achieve.⁷

Because these terms and concepts will be used throughout this article, it is critical that a precise conceptual basis be established immediately to provide a common basis for examination and evaluation of the issues.

¹U.S. Dep't of Army, Field Manual No. 6-20, Fire Support in Combined Arms Operations, at 6-2 (30 Sept. 1977) [hereinafter cited as FM 6-20].

²*Id.* at 6-3.

³*Id.* at 6-3.

⁴A. Jordan & W. Taylor, American National Security: Policy and Process 221 (1981).

⁵*Id.* at 221-22.

⁶U.S. Dep't of Army, Reg. No. 310-25, Military Publications-Dictionary of United States Army Terms, at 257 (15 Oct. 1983).

⁷H. Kissinger, Nuclear Weapons and Foreign Policy 96 (1957).

B. THE DESTRUCTIVE POTENTIAL OF NUCLEAR WEAPONS

The means and methods of waging war have changed over time as a result of technological discoveries and advances. Prior to World War I, enemies fought each other on land and sea. Land battles were confined to limited areas because armies could not travel far or quickly. They walked to battles or traveled by horseback. Land battles were frequently waged on vast farmlands. Civilians and their homes were rarely the objects of direct attack. During World War I, millions of soldiers fought in trenches and hedgerows far from cities and the civilian population. The use of airplanes was new and limited. Aerial bombardment of civilian population centers only became a common method of waging war during World War II. Technological advances had produced airplanes capable of flying great distances with heavy loads of men, cargo, and bombs. As a result, the war could be easily extended to cities where munitions were produced, rail centers were located, and enemy strategies were planned. Aerial bombardments were at times launched for the purpose of destroying the morale and resolve of the civilian population. Hitler's indiscriminate air raids on London are a prime example. The bombing raids on London, Coventry, Dresden, and Cologne evoke memories of massive destruction of heavily populated areas. The carnage of war engulfed the civilian population on a level not previously experienced.

The vulnerability of the civilian population was magnified further in August 1945, when the first nuclear weapons were dropped on Hiroshima and Nagasaki. Since that time, nuclear weapons have been developed to such a degree that mankind has available the means to destroy civilization.

If countervalue nuclear weapons and strategy were to be employed in a future war, the devastation of human life, property, and the environment that would result would make the carnage of World War II seem insignificant in comparison.

The effects of conventional bombing in World War II were cumulative: "[W]hereas today *one 10 megaton weapon represents five times the explosive power of all the bombs dropped on Germany during four years of war and one hundred times those dropped on Japan.*"⁸ In World War II, the population adjusted to the frequency and timing of bombardments. They could seek safety in shelters and

⁸*Id.* at 70.

increase their chance for survival. A thermonuclear weapon would produce all the direct casualties with a single strike. Combined, all the raids in Germany killed 330 thousand people. A single 10 megaton weapon exploded over Chicago or New York City will kill several times that number.⁹

The conventional bombings of World War II affected only limited parts of a city. Thermonuclear attack would paralyze an entire city with heat and blast. The surrounding countryside would be subjected to the residue of a thermonuclear blast, radioactive fall-out.¹⁰

Differences in explosive power account for different radiological effects. The fireball of a 20 kiloton weapon has a diameter of 1½ miles. The fireball of a 10 megaton thermonuclear weapon has a diameter of 6 miles. Unless exploded at very high altitudes (above 16 thousand feet), it will, therefore come in contact with the ground below. As it does so, the blast of the explosion dislodges millions of tons of the surface. The rising fireball sucks up this debris and converts it into radioactive material which is then swept up into the stratosphere and deposited downwind. As a result, there takes place over a period of days a continual "fall-out" of radioactive material over an elliptically shaped area. The nature and distribution of the fall-out depends on meteorological conditions and the constitution of the surface above which the bomb explodes.¹¹

The effect of fall-out is dependent upon the amount of radiation to which a person or areas is subjected. In general, there are two types of damage. Direct damage leads to illness, death, reduced life expectancy, and genetic defects. Direct damage is caused by the penetration of gamma rays into the skin, which alters the molecular structure of the cells. Alpha and beta rays cause burns and lesions; they cannot do internal damage unless a person ingests contaminated food or water; this constitutes indirect damage. Gamma rays also damage blood cells. Thus, a greater susceptibility to infection is produced. Radiation may produce leukemia and cataracts months after an individual has been exposed to radiation.¹²

As soon as the radiation drops to a level safely tolerable to people, decontamination measures must be taken immediately. Otherwise,

⁹*Id.* at 70-71.

¹⁰*Id.* at 71-73.

¹¹*Id.* at 74-75.

¹²*Id.* at 74-76.

the area may be rendered unproductive for months or even years and the cumulative effects of lingering radiation could make it uninhabitable.¹³

The fall-out will contaminate the water supply and crops. Most livestock will either be killed or contaminated by ingesting radioactive fodder and water. The available food supply will be even more drastically reduced.¹⁴ "In addition to its drastic impact on the social structure and the material well-being of warring nations, an all-out war with modern weapons would produce genetic effects and consequences from long-term fall-out, which might affect all humanity."¹⁵

The cities of London, Coventry, Dresden, and Cologne, though terribly devastated, have been rebuilt. The survivors of the bombing raids did not have to fear the effects of fall-out. Food and water were not contaminated. Genetic defects were not produced in the offspring of the survivors. Cities were rebuilt from rubble; they were not abandoned because there was no means to decontaminate the area. Decontamination was not necessary. The homeless and dispossessed could seek shelter with friends and relatives. Survivors knew that the farms would continue to produce food that could be safely consumed. Widespread countervalue warfare could produce destruction and desparation that would render the cessation of hostilities meaningless and survival a living hell. Societies and individuals may not have the materials and resources necessary for the reconstruction of all that was destroyed. Simple survival may be beyond the reach of many people. Those who survive the nuclear bombs may well envy those who perished instantly. The only law that may survive in a contaminated world is that which promotes personal survival regardless of the cost to others.

C. TREATIES AND INTERNATIONAL AGREEMENTS

For hundreds of years, rules have been devised by nations to control the means of waging war. Some of these rules comprise customary international law principles. Nations often reduce these rules to writing and form a treaty to formally bind themselves and make clear exactly what the rules mean and are supposed to do. Regardless of the form the rules take, their purpose is to regulate warfare so

¹³*Id.* at 77.

¹⁴*Id.* at 78.

¹⁵*Id.* at 79-80.

that it can be made more humane. During the course of a conflict, new weapons may be developed and used that are not covered specifically by treaty. During the conduct of a war, it may not be possible for the parties to reach an agreement regarding the use of the new weapon. Therefore, rules may be developed after the conflict has ceased.

Nuclear weapons were used for the first time in August 1945 when Hiroshima and Nagasaki were bombed. No treaties, prior to 1945, had been concluded regarding the use of nuclear weapons. Clearly, nations could not have regulated a weapon that was non-existent.

Nearly forty years have passed since the destruction of Hiroshima and Nagasaki. Have nations developed any rules or entered into any treaties that regulate the use of nuclear weapons? Do any principles of customary international law regulate the use of nuclear weapons?

The United States has made continuous efforts for 25 years to negotiate limitations on nuclear weapons. In 1959, the United States negotiated The Antarctic Treaty with the Soviet Union. The articles of this Treaty prohibit the use of Antarctica for the establishment of military bases and fortifications, military maneuvers, the testing of weapons, and disposal of radioactive waste material. The United States became bound by this Treaty on June 23, 1961.¹⁶

The United States entered into the Limited Nuclear Test Ban Treaty, a treaty of unlimited duration, on August 5, 1963. The parties to this agreement, including the Soviet Union, proclaimed as their principal aim the expeditious achievement of a total disarmament agreement to be supervised under strict international control in accordance with the objectives of the United Nations. The parties expressed a desire to end the arms race and eliminate the production and testing of weapons, including nuclear arms.¹⁷ Each party to this treaty agreed to prohibit and prevent the testing of nuclear weapons, at any place under its control or jurisdiction in the atmosphere, in outer space, underwater, on the high seas, or in any other environment, if the explosion would cause radioactive material to be present outside the testing state's territorial limits.¹⁸

¹⁶Antarctic Treaty, December 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

¹⁷Treaty Banning Nuclear Weapon Tests In The Atmosphere, In Outer Space, and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43 (date of entry into force with respect to the United States: October 10, 1963).

¹⁸*Id.* at art. 1.

The United States agreed, in Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, to abstain from arming Latin American nations with nuclear weapons. The Soviet Union is not a party to this agreement.¹⁹

In 1971, the United States and Soviet Union agreed not to emplant or emplace on the seabed or ocean floors beyond the limit of a seabed zone, any nuclear weapons, structures, launching installations, or any other facilities designed for storing, testing, or using nuclear weapons.²⁰

The United States and the Soviet Union entered into Strategic Arms Limitation Treaty (SALT I) on May 26, 1972. This agreement expired in October 1977.²¹ Although not legally binding, both parties indicated they would abide by the terms of SALT I pending the outcome of the SALT II negotiations. SALT I provided for a halt in the construction of additional fixed land-based intercontinental ballistic missile (ICBM) launchers. The parties agreed not to convert land-based launchers for light ICBMs into heavy land-based ICBM launchers.²² Also limited were the number of submarine-launched ballistic missile launchers (SLBM) and number of operational submarines capable of launching SLBMs.²³

The United States and the Soviet Union, in October 1972, agreed to limit anti-ballistic missile systems (ABM), launchers, interceptor missiles at launch sites, and radar.²⁴

President Jimmy Carter signed the SALT II Treaty with the Soviet Union on June 18, 1979. This treaty, which limits strategic offensive

¹⁹Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, February 14, 1967, 22 U.S.T. 754, T.I.A.S. 7137, 634 U.N.T.S. 364 (date of entry into force with respect to the United States: May 12, 1971).

²⁰Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, February 11, 1971, 23 U.S.T. 701, T.I.A.S. 7337 (date of entry into force with respect to the United States: May 18, 1972).

²¹Interim Agreement Between the Union of Soviet Socialist Republics and the United States of America on Certain Measures with Respect to the Limitation of Strategic Offensive Arms with Protocol (SALT I), with Agreed Interpretations, Common Understandings and Unilateral Statements, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. 7504 (date of entry into force with respect to the United States: October 3, 1972).

²²*Id.* at art. 11.

²³*Id.* at art. III.

²⁴Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitations of Antibalistic Missile Systems with Agreed Interpretations, Common Understanding and Unilateral Statements, May 26, 1979, 23 U.S.T. 3435, T.I.A.S. 7503 (date of entry into force with respect to the United States: October 3, 1972).

arms, was never given the advice and consent of the United States Senate.²⁵

With regard to these treaties, Secretary of Defense Caspar Weinberger observed:

A melancholy chapter in the troubled history of the last decade or two is that on arms control. Early in the 1960's, after many years of fruitless negotiations, the United States seemed to have reason for high hopes. The Limited Nuclear Test Ban Treaty of 1963 seemed to offer the imminent prospect of a much broader U.S.—Soviet understanding on nuclear arms that would slow down and eventually halt the nuclear competition and make the deterrent forces of both sides more stable and secure. Today, we have come to recognize the full extent of our disappointment. Despite the agreements we negotiated, the Soviet Union steadily increased its investment in nuclear strategic forces even though we reduced ours.²⁶

The United States, despite its disappointment, engaged in the Strategic Arms Reduction Talks (START), nuclear weapons negotiations with the Soviet Union, in Geneva, Switzerland. Shortly after the United States deployed its Pershing II missiles in NATO in 1983, the Soviets broke off the negotiations. One can speculate about the reason for the Soviet action. It may have been due to the deployment of the Pershing II missiles, the failing health of the Soviet leader, Yuri Andropov, a Soviet desire to influence the American Presidential election of 1984, or a combination of these and other reasons.

None of the treaties that have been negotiated have addressed the use of nuclear weapons in time of armed conflict. Therefore, if the use of nuclear weapons during conflict is regulated at all, the source of the regulations must be found elsewhere.

²⁵Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms with Agreed Statements and Common Understanding (SALT 11), June 18, 1979, U.S. Department of State Publication 8984, Selected Documents No. 12A, at 3-50.

²⁶Report of Secretary of Defense Caspar W. Weinberger to the Congress on the FY 1983 Budget, FY 84 Authorization Request and FY 1983-87 Defense Programs, February 8, 1982, 1-19 [hereinafter cited as Weinberger Report].

D. INTERNATIONAL RESTRAINTS ON WAR

While the United States is not a party to any international agreement that specifically outlaws the use of nuclear weapons, it does not follow that it or any other nation is free to use nuclear weapons without restraint. It is the view of the United States:

The use of explosive "atomic weapons," whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.²⁷

The import of this view is that, absent a particular international convention or customary law, nuclear weapons are legal weapons like conventional bombs, hand grenades, and bayonettes. Their **use**, on the other hand, is subject to recognized principles of international law. What international law principles limit the use of nuclear weapons? Are there other principles of international law that should be extended to regulate the use of nuclear weapons?

After World War II, the nations of the world agreed to form an international forum that was primarily designed to promote peace and avoid the type of conflict that had twice shattered the world in the twentieth century. Thus, the United Nations was born. In Article I of the United Nations Charter,²⁸ the nations formally proclaimed as one of their purposes:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression **or** other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²⁹

²⁷U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 35 (July 1956) [hereinafter cited as FM 27-10].

²⁸The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153; 1963 amendments, 16 U.S.T. 1134, T.I.A.S. 5857, 557 U.N.T.S. 143; 1965 amendment, 19 U.S.T. 5450, T.I.A.S. 6529; 1971 amendment, 24 U.S.T. 2225, T.I.A.S. 7739 (date of entry into force with respect to the United States: October 24, 1945; amendments to Articles 23, 27, 61 of the Charter came into force on August 31, 1965; an amendment to Article 109 of the Charter entered into force on June 12, 1968).

²⁹*Id.* at art. 1.

The United States, a party to this international Charter, has committed itself to a course of conduct that is intended to prevent war, promote peace, and support efforts to peacefully settle disputes.

Article 51 of the Charter recognizes the right of a nation or several nations to act in self-defense against an armed attack. An act of self-defense is to be reported immediately to the United Nations Security Council. That Council may take whatever measures are necessary to maintain international peace and security.³⁰

However, a party is not entitled to attack another nation when an international dispute arises. Article 33 provides that the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a peaceful solution through negotiation, conciliation, arbitration, judicial settlement, or other means of their own choice. When it deems necessary, the Security Council shall call upon the parties to settle their dispute by peaceful means.³¹

If nations resolve their disputes peacefully, questions regarding the use of nuclear weapons will not arise. When a nation attacks another nation, the right to self-defense is triggered.³² A nation that attacks another nation without attempting to resolve the dispute peacefully is in violation of the United Nations Charter.³³ Such an attack would be illegal, regardless of the type of weapons used. If a peaceful settlement cannot be achieved and conflict results or if a nation responds to unjust aggression in self-defense, nuclear weapons may be used during the conflict. What rules of international law would regulate the use of nuclear weapons?

Three basic principles of customary international law govern the use of all weapons, to include nuclear weapons.

The first principle is military necessity. A nation is not free to wield its power without restraint during conflict. A nation is to use only that force or violence which is truly necessary to achieve the military objective. Principles of humanity and chivalry are not to be wholly abandoned.³⁴

The second principle is proportionality. Attacks are to be planned and conducted so that the loss of life and damage to property caused

³⁰*Id.* at art. 51.

³¹*Id.* at art. 33.

³²*Id.* at art. 51.

³³*Id.* at art. 33.

³⁴FM 27-10, para. 3.a.

will not be excessive in relation to the military advantage to be gained.³⁵

The third principle is avoidance of unnecessary suffering. Weapons are not to be used to inflict unnecessary suffering. An example of this is using a substance on a bullet that would cause a wound to become needlessly inflamed. The use of explosive materials is not prohibited.³⁶

While nuclear weapons are not per se illegal under international law,³⁷ their use must be evaluated through the application of these three principles of customary international law.

1. Countervalue Weapons and Strategy

Countervalue nuclear weapons and strategy defy traditional application of the principles of military necessity, proportionality, and avoidance of unnecessary suffering. Countervalue nuclear weapons have enough destructive power to decimate entire cities and civilization. They can be launched from great distances, from Kansas to Moscow or Moscow to Washington, D.C. One of the strategic benefits of such weapons is that they can destroy military targets that cannot be attacked successfully with conventional weapons. Pinpoint targeting is not critical for a successful countervalue nuclear attack as it is for conventional attacks. However, if nuclear weapons were used to attack scattered military targets in a city with a large civilian population, would the resultant death and destruction be disproportionate to the military objective to be obtained? Could military necessity justify the death of thousands of civilians when a few scattered military targets are the object of the attack? Would the effects of fall-out and radiation cause disproportionately prolonged and unnecessary suffering among the survivors and succeeding generations?

One court has addressed these very issues in *The Shirnoda Case*.³⁸

Japanese nationals who survived the attacks on Hiroshima and Nagasaki brought suit for damages against Japan. They claimed compensation for the wounds they suffered and for the deaths of relatives caused by the nuclear weapons. *The Shimoda Case* was decided in Tokyo in December 1963.³⁹ The Tokyo District Court determined

³⁵*Id.* at para. 41.

³⁶*Id.* at para. 34.

³⁷*Id.* at para. 35.

³⁸*Ryuichi Shimoda v. The State*, 8 Japanese Annual of Int'l Law 1964-65 (District Court of Tokyo 1963).

³⁹*Id.* at 212.

that the point at issue was whether the act of bombing of Hiroshima and Nagasaki by the United States was illegal in view of positive international law in force at that time.⁴⁰ The court stated:

Any weapon the use of which is contrary to the customs of civilized countries and to the principles of international law should *ipso facto* be deemed to be prohibited even if there is no express provision in the law; the new weapon may be used as a legal means of hostilities only if it is not contrary to the principles of international law.⁴¹

Hiroshima had a civilian population of 330,000 and Nagasaki 270,000. Each city was defended by anti-aircraft guns and had military installations.⁴²

The court held that there was no military necessity for the indiscriminate bombardments. Only bombardment of military objectives was permissible.⁴³ The court stated that “the distinction between a military objective and a non-military objective cannot be said to have completely disappeared.”⁴⁴

The court also found that the bombings violated the fundamental principle of the law of war that prohibits the causing of unnecessary suffering.⁴⁵ The court drew its conclusion from the following facts and observations:

It is doubtful whether the atomic bomb with its tremendous destructive power was appropriate from the viewpoint of military effect and was really necessary at the time. It is indeed a fact to be regretted that the atomic bombing of the cities of Hiroshima and Nagasaki took away the lives of tens of thousands of citizens, and that among those who have survived are those whose lives are still imperilled owing to its effects even now after eighteen years.⁴⁶

The *Shimoda* court has applied customary international law in a traditional and logical manner. While reason may compel individuals to accept the *Shimoda* court's conclusions and the logical meaning of

⁴⁰*Id.* at 239.

⁴¹*Id.* at 236.

⁴²*Id.* at 239.

⁴³*Id.* at 236.

⁴⁴*Id.* at 239.

⁴⁵*Id.* at 240.

⁴⁶*Id.* at 241.

military necessity, proportionality, and avoidance of unnecessary suffering **as** applied to countervalue nuclear weapons, the realities of the political arena cannot be overlooked. The United States and the Soviet Union have enough nuclear weapons to create a universal holocaust. They have been unable to conclude long-lasting treaties that limit the number of nuclear weapons. In a climate of mutual distrust, the arms race continues. It is within this context that the defense policy of the United States is formulated.

The Secretary of Defense is responsible for reporting annually to Congress the basic defense policies and goals of the administration. This report is tendered during the preparation period of the annual budget. The basic goal of Secretary Weinberger is to eliminate major weaknesses in our defense and construct a defense that can reduce our present vulnerability and give us a margin of safety necessary to preserve **peace**.⁴⁷ The basic defense posture is that

[t]he United States remains committed to a defensive use of military strength; our objective is to deter aggression or to respond to it should deterrence fail, not to initiate warfare or “preemptive” attacks. In tactics it is often said, the offensive is best, but the defense policy of the United States must remain strictly defensive. This stance has been fundamental to U.S. national security since World War II, indeed before then. From this premise it flows that our military forces must be prepared to react after the enemy has seized the first initiative and react so strongly that our counter attacks will inflict unacceptably high cost on the enemy—a requirement that puts a heavy burden on our readiness and intelligence capability. A defensive strategy must be responsive to the particular threats presented by our potential enemies; in other words, we must adapt our forces and our tactics to the magnitude and character of the threats **as** they evolve over time.⁴⁸

Total reliance on nuclear weapons is not contemplated. Nuclear strength is not regarded **as** a substitute for conventional **strength**.⁴⁹ It is the goal of United States policy to maintain a strategic nuclear force posture such that the Soviet Union will have no incentive to attack the United States or its allies with nuclear weapons. The heart of this goal **is** to create and maintain a nuclear deterrent force that

⁴⁷Weinberger Report, *supra* note 26, at 1-3.

⁴⁸*Id.* at 1-11.

⁴⁹*Id.* at 1-17.

will give the United States an adequate margin of survivability even if the Soviets should first strike and permit the United States to retaliate in such a manner that it would achieve its objectives.⁵⁰ Above all, it is America's purpose to prevent nuclear attack in all contexts and from all possible causes.⁵¹ The nuclear forces of the United States will serve at least four basic purposes: to deter nuclear attack on the United States or its allies; to help deter major conventional attack against U.S. forces and its allies; to impose termination of a major war on terms favorable to the U.S. and its allies and to deter escalation in the level of hostilities, even if nuclear weapons have been used; and to preclude possible Soviet nuclear blackmail against the U.S. or its allies.⁵²

At the same time, the United States is committed to seeking balanced and verifiable arms control agreements that will substantially reduce nuclear arsenals and make a significant contribution to American society and to world peace.⁵³

Implicit in the policy of deterrence is a balance of power and equal threat. If the Soviet Union has the means to destroy the United States with nuclear weapons, then the United States must have the means to destroy the Soviet Union. Each must maintain nuclear parity in order to avoid forced surrender through nuclear blackmail. Should the Soviet Union contemplate the surprise nuclear attack of American cities, it must recognize that a return strike by the United States would render victory meaningless; such an attack would therefore be prevented. Neither the President nor Secretary Weinberger has denounced first use of countervalue weapons or strategy against the Soviet Union. To formulate such a policy would permit the Soviet Union a strategic advantage that could completely undermine United States national security. In order to deter nuclear attack, the United States must be willing to use countervalue weapons.

A paradox appears. The strategy of mutual deterrence is a reverse application of customary international law. It can be concluded that military necessity compels nations to maintain a balance of countervalue nuclear weapons so that one nation cannot blackmail another into total surrender or decimate its adversary with impunity. The principles of proportionality and avoidance of unnecessary suffering

⁵⁰*Id.* at 1-17.

⁵¹*Id.* at 1-17.

⁵²*Id.* at 1-18.

⁵³*Id.* at 1-21-22.

prompt nations to build and maintain nuclear arsenals equal in destructive power *so* that the use of these weapons would be equally devastating and *so* costly that they will never be used. The application of these principles within the context of deterrence is a preventative application of customary international law. However, if the concept of deterrence fails, the application of these three principles will most likely vanish in the blast of exploding countervalue nuclear weapons.

What if deterrence should fail? One of the purposes of United States nuclear forces is to impose termination of a major war on terms favorable to the United States and its allies and to deter escalation in the level of hostilities. The United States could determine, for example, that the best way to achieve this objective would be through targeting and attacking the Soviet Union's military control center in Moscow. The goal could be to create internal chaos in the Soviet Union, disorganize its military forces, and promote peaceful negotiation. But would this strategy comport with United States policy and international law?

It is United States policy to attack only military objectives which include:

[C]ombatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage—are permissible objects of **attack**.⁵⁴

This policy is in accord with customary international law. The United States also recognizes that “[c]ustomary international law prohibits the launching of attacks (including bombardment) against the civilian population **as** such or individual civilians **as such**.”⁵⁵

The United States' military commanders must attempt to control incidental damage during an attack:

Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified **as** military objectives or defended places within the meaning of the previous paragraph but also that these objectives may be attacked without proh-

⁵⁴FM 27-10, para. 40c.

⁵⁵*Id.* at para. 40a.

able losses in lives and damage disproportionate to the military advantage anticipated.⁵⁶

The distinction between targeting military objectives and civilians disappears in connection with the use of countervalue nuclear weapons. The Kremlin would be a proper military objective, but St. Basil's Church would not be. In terms of results, it would make no difference if the Kremlin were targeted or St. Basil's Church. Most of the civilian population would die as a direct result of the blast and many more would die later from fall-out and radiation exposure. A commander who ordered the launch could not reduce this incidental damage. Under the *Shimoda* rationale, such an attack could not be justified under international law principles.

On the other hand, long-term political objectives might be used to justify such an attack. If Moscow were attacked by countervalue nuclear weapons and five million civilians died, it could be argued that international law would be vindicated by a quicker resolution of the conflict and the protection of even more civilians. The military necessity of destroying Moscow's military objectives would be ultimately proportional and avoid unnecessary suffering.

The problem with the *Shimoda* view is that nations could cloak military objectives with immunity from attack because they are located in cities. If such objectives were located in the heart of the Soviet Union, it would be extremely difficult to reach them even with precision, conventional bombs.

The second view is also flawed; it does not take into account the risk of nuclear escalation and potential universal holocaust. How many cities would have to be destroyed and how many civilians killed with countervalue nuclear weapons before military necessity could no longer justify the death and destruction?

Neither view can comport with customary international law or political reality. Countervalue nuclear weapons are too terrible to fit within the framework of international law, a law that was developed to make conflict as humane as possible. The application of customary international law makes sense only within the context of mutual deterrence.

On a different level, the attitude of nations appears to be schizophrenic when dealing with conventional warfare. Nations have attempted to regulate warfare and provide increased protection to the

⁵⁶*Id.* at para. 41.

civilian population. This evolutionary process made its first advance in 1907 with the adoption of the Hague Convention No. IV.⁵⁷ The parties agreed that the means of injuring the enemy is limited.⁵⁸ It is particularly forbidden to use arms, projectiles, or material to inflict unnecessary suffering⁵⁹ and to destroy enemy property unless demanded by the necessity of war.⁶⁰ The attack or bombardment of undefended cities and towns is prohibited.⁶¹ However, the Convention did not define "undefended." Attackers are to take all necessary measures to spare, **as** far as possible, religious, historic, artistic, scientific, and charitable buildings and hospitals.⁶²

World War II vividly demonstrated the inadequacy of these protections. A new Geneva Convention⁶³ was negotiated in 1949 to remedy the problems that had emerged in World War II. Greater and more specific protections were accorded to civilians. The parties agreed:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria.

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:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment.⁶⁴

⁵⁷Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2227, T.S. 639, Bevans 631 (date of entry into force with respect to the United States: January 26, 1910).

⁵⁸Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, Annex to the Convention, art. 22, 36 Stat. 2227, T.S. 539, Bevans 631.

⁵⁹*Id.* at art. 23.c.

⁶⁰*Id.* at art. 23.g.

⁶¹*Id.* at art. 25.

⁶²*Id.* at art. 27.

⁶³Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 - Feb. 12, 1950, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 (date of entry into force with respect to the United States: February 2, 1956).

⁶⁴*Id.* at art. 3(1).

During conflict, parties are encouraged to negotiate neutral areas to which civilians, the sick, wounded, and infirm can go to avoid the effects of war.⁶⁵

This Convention did not specifically address the issue of aerial bombardment of cities. The indiscriminate bombing of cities during World War II produced enormous casualties among the civilian population.

A Diplomatic Conference convened in Geneva, Switzerland in 1974 to draft protocols to already existing conventions on the conduct of warfare. In 1977, Protocol I, relating to the protection of victims of international armed conflicts, was adopted.⁶⁶ There was a tacit understanding among the states that the new rules of warfare established by the Protocol would not regulate the use of nuclear weapons.⁶⁷ While the United States Senate has yet to give its advice and consent to the proposed Protocol I, the United States made the following reservation at the time of signature:

with regard to Protocol I

It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.⁶⁸

Protocol I is important to consider with regard to countervalue nuclear strategy because it clearly demonstrates the confused attitude of nations with respect to the conduct of war. Protocol I is the newest attempt by nations to make conflict more humane and to further extend protection to civilians. Article 35 of Protocol I provides that, in any armed conflict, the right of the Parties to the conflict to choose means or methods of warfare is limited. It is prohibited to employ means and methods of warfare of a nature that causes superfluous injury or unnecessary suffering. It is also prohibited to use means or methods of warfare that are intended to or may be expected to cause widespread, long term damage to the environment.⁶⁹

Article 51 provides protection to the civilian population and individual civilians from the dangers arising from military operations.

⁶⁵*Id.* at art. 15.

⁶⁶Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts with Annexes, December 12, 1977, Vol. XVI International Legal Materials 1391 (1977), UN Document A/32/144 of August 16, 1977.

⁶⁷J. Goldblat, Arms Control Agreements 84-86 (1983).

⁶⁸Protocol I, Declarations.

⁶⁹*Id.* at art. 35.

The civilian population and individual civilians are not to be made objects of attack or threats of violence intended to spread terror among the population.⁷⁰ Indiscriminate attacks on civilians are prohibited. Indiscriminate attacks are defined as:

- a. those which are not directed at a specific military objective;
- b. those which employ a method or means of combat which cannot be directed at a specific military objective; or
- c. those which employ a method or means of combat the effect of which cannot be limited as required by this protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁷¹

Article 51 further defines indiscriminate and prohibited attacks as:

- a. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and
- b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁷²

Additionally, attacks against the civilian population or civilians by way of reprisal are prohibited.⁷³ Article 85 declares that a grave breach of the Protocol will be committed when the civilian population or individual citizens are made the direct object of attack or when an indiscriminate attack affecting the civilian population is launched with the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects in relation to the military advantage anticipated.⁷⁴

⁷⁰*Id.* at art. 51(2).

⁷¹*Id.* at art. 51(4).

⁷²*Id.* at art. 51(5).

⁷³*Id.* at art. 51(6).

⁷⁴*Id.* at art. 85(3).

Protocol I exemplifies a rational attempt by nations to remove the threat of indiscriminate bombing of cities and civilians from future conventional wars. Nations have agreed in principle to reject tactics that were practiced in World War II. The very carnage nations desire to minimize and avoid in conventional warfare they threaten to perpetrate on a wider scale with countervalue nuclear weapons. The era following World War II taught that nations can be rebuilt from the ashes of devastation. That possibility may not be present if the nuclear arsenals of the United States and Soviet Union were unleashed. If logic were the only factor to be considered in the question of regulating the means of waging war and selecting targets, countervalue nuclear weapons would be the first weapons to be regulated because they can cause universal holocaust. Principles of customary international law can be applied to countervalue nuclear weapons prospectively to insure that they are never used. Mutual deterrence is the only alternative. Conventional weapons, as destructive as they may be, do not threaten universal holocaust. As a consequence, nations can agree to regulate them because less is at stake. Nations can agree to limit that which has limited destructive potential. International law is incapable of regulating the unlimited. The contradictory policy of regulating conventional methods of war, but exempting countervalue nuclear weapons from all regulation is demanded by political reality. What appears to be an illogical and insane method of international relations is the only logical and sane method available in the face of the threat of the destructive potential of countervalue nuclear weapons.

Principles of international law are rendered impotent and irrelevant by the threat of the use countervalue weapons and strategy. Nations have difficulty in negotiating arms limitations. To limit use of those weapons would require trust. Unlike numbers or types of weapons, trust cannot be monitored, counted, or verified. Even if nations agree not to produce countervalue weapons and destroy the ones they have in their arsenals, knowledge is still present. One nation could never be sure that its adversary is not secretly building such weapons so that it can insure victory.

The ultimate threat to civilization cannot be disarmed by law; only a transformation of individuals and civilization can do that. Until nations can achieve mutual trust, we may be relegated to Dr. Kissinger's observation and conclusion:

The new technology thus increases our dangers at the precise moment when our commitments have never been greater. For the first time in our history we are vulnerable to a direct hostile attack. No remaining margin of indus-

trial and technological superiority can remove the consciousness of our increasing vulnerability from the minds of our policy makers who have to make the decision of peace or war. But perhaps our dangers offer us at the same time a way out of our dilemmas. As long **as** the consequences of all-out thermonuclear war appear **as** stark to the other side **as** to us, they may avert disaster, not through a reconciliation of interests but through mutual terror. Perhaps our identification of deterrence with retaliatory power, however faulty its historical analogies, provides the basis for achieving a durable peace, after all?⁷⁶

2. *Counterforce Nuclear Weapons and Tactical Nuclear Doctrine*

While countervalue nuclear weapons eviscerate customary international law, perhaps counterforce nuclear weapons can be used in accord with those principles. Counterforce nuclear weapons, unlike countervalue nuclear weapons, are smaller in yield and less destructive. They are more accurate but can cover a much more limited distance. Do military plans for use of counterforce (tactical) nuclear weapons comport with customary international law?

Whether nuclear weapons are to be utilized and how they would be used are strategic decisions made, not by commanders in the field, but by high level political and military **authorities**.⁷⁶

Release, or the authority to use nuclear weapons, will be granted by the National Command Authority (NCA). National Command authorities are the President and The Secretary of Defense. To dampen the escalatory effects of using nuclear weapons, release normally will be approved for *preplanned packages* of weapons to be fired within a *specified timeframe* and within *specified geographical areas*. Approval to employ nuclear weapons is granted after consideration of the predicted military effect, the strategic impact, and the overall political objectives.⁷⁷

The corps nuclear package is planned prior to hostilities and refined during hostilities **as** the battle progresses and new intelligence data is gathered. Aimpoints are planned outside civilian population

⁷⁶Kissinger, *supra* note 7, at 84-86.

⁷⁶FM 6-20, at 6-20, 6-2, 6-3.

⁷⁷*Id.* at 6-5.

centers in areas that the enemy must use to accomplish the mission. All weapons, or the smallest number necessary to accomplish the mission, are fired in the shortest possible time to convey to the enemy that nuclear weapons are being used in a limited manner.⁷⁸

Nuclear packages are planned and refined using a combination of two nuclear target analysis techniques. Preclusion-oriented analysis seeks to avoid excessive damage to population and facilities while employing yields that will give the greatest effect on the probable enemy locations within the remaining areas. Target-oriented analysis requires a known target, location, size, and composition. Using this technique, weapon yields can be selected to achieve specific target coverage within use constraints.⁷⁹

Military victory and objectives no longer are the sole considerations taken into account when the decision is made to use nuclear weapons. Political considerations may bar use of nuclear weapons, even if use would benefit the military objective. The types of nuclear weapons to be used and their yield will not be unlimited. Selection of aimpoints, weapons, and yield will be determined by taking into account military objective, avoiding unnecessary destruction of property, and minimizing danger to civilians and allies.

The Army's Nuclear Planning Guidance incorporates fundamental principles of customary international law. The objective in using nuclear weapons is to decisively alter the tactical situation. The use of nuclear weapons may be compelled offensively, to destroy enemy forces or regain lost territory; defensively, where the mission cannot be accomplished without them; or in response to enemy first use.⁸⁰ This Army plan implies engagement in a limited war in which counterforce nuclear weapons may be useful, **as** opposed to all-out war which implies the use of countervalue strategy and weapons. Limited use of counterforce nuclear weapons **is** designed to limit damage, confine and shorten conflict, and reduce the **risk of** nuclear holocaust:

A limited war is fought for a specified political objectives which, by their very existence, tend to establish a relationship between the force employed and the goal to be attained. It reflects an attempt to affect the opponent's will, not to **crush** it, make the conditions to be imposed

⁷⁸*Id.* at 6-3.

⁷⁹*Id.* at 6-3.

⁸⁰*Id.* at 6-3.

seem more attractive than continued resistance, to strive for specific goals and not for complete **annihilation**.⁸¹

. . . .

The purpose of limited war is to inflict losses or to pose risks for the enemy out of proportion to the objectives under dispute. . . . An attempt to reduce the enemy to impotence would remove the psychological balance which makes it profitable for both sides to keep the war limited. Faced with the ultimate threat of complete defeat, the losing side may seek to deprive its opponent of the margin to impose its will by unleashing a thermonuclear holocaust.⁸²

The weapons system for a limited war must be flexible and discriminating. In a limited war, the problem is to apply graduated amounts of destruction for limited objectives and also to permit the necessary breathing space for political **contacts**.⁸³

Armies are becoming increasingly mobile and self-sufficient. The focus of most of the conflict would shift from cities to the opposing forces if limited use is made of nuclear weapons. Interdiction of communication centers in cities and transportation lines may lose much of its former significance. With conventional technology a decisive victory on the battlefield could be achieved only by using quantities of arms too large to stockpile. Munitions and weapons constantly have to be supplied out of current production. Under conditions of nuclear plenty, weapons can be more decisively used against opposing forces than against production centers.⁸⁴

Much argument against limited nuclear war proceeds from the premise that there will be indiscriminate use of high-yield weapons against a stabilized front and behind enemy lines. Such a situation is unlikely. Small mobile detachments will operate in opposing territory. There will be greater rewards for weapons with relative discrimination and greater accuracy. Use of such low-yield weapons will minimize danger of fall-out and avoid destroying friendly forces **as well as** the civilian population. Use of such weapons may keep enemy troops dispersed and less effective. The enemy would find it more difficult to hold areas and more dangerous to remain in groups.

⁸¹Kissinger, *supra* note 7, at 140.

⁸²*Id.* at 146.

⁸³*Id.* at 156-57.

⁸⁴*Id.* at 183.

It would be more effective to utilize low-yield, accurate nuclear weapons to destroy enemy mobile units whose success or failure would ultimately decide the control of territory.⁸⁵

The limited use of counterforce nuclear weapons on the battlefield could further the objects of international law. Opposing troops, not cities and their attendant civilian population, would be the focus of the weapons. Counterforce nuclear weapons could create a shorter conflict and limit the areas in which damage is done. Opposing forces would gain no strategic advantage by using high-yield weapons, for such weapons would produce radiation and fall-out that would endanger their own soldiers and allies. The object of using low-yield nuclear weapons would be to scatter opposing forces and to keep them scattered and disorganized so that they could not gain or maintain control over territory. The span of the conflict could be shortened. In such an event, there is little or no need to destroy munitions factories, roads, communication centers, railroads, and other military targets within the enemy's borders. Thus, the danger to civilian lives and property is reduced. A short, limited counterforce nuclear war may be less costly to both sides than a prolonged conventional war that is carried to the cities of the parties. If United States forces do not enter enemy airspace, it is unlikely that the enemy will conclude that the U.S. intends to use nuclear weapons against enemy cities. Limited nuclear war, in which counterforce weapons are used, should obviate any need to destroy military targets in the enemy's territory.

If, for example, the Soviet Union were to invade the Federal Republic of Germany, NATO Forces could utilize low-yield, accurate nuclear weapons to halt the Soviet advance, break large units into small groups, loosen their hold on territory, and drive them back beyond the border. Swift, decisive action could cause the Soviets to come to the negotiating table and reach a political solution to the conflict. A portion of the Federal Republic of Germany would sustain damage as a result of the conflict. However, a prolonged conventional war could well cause more destruction of property and many more civilian casualties. A limited nuclear war, in which low-yield nuclear weapons are used, could keep the conflict away from cities, reduce total destruction, and minimize the loss of civilian lives.

The United States Army's plan for the use of counterforce nuclear weapons of low-yield comports with principles of customary interna-

⁸⁵*Id.* at 187.

tional law. Only targets with military significance are focal points for attack. Aimpoints will be chosen and weapons and yield selected that will accomplish the mission, minimize damage to allies and civilians, and reduce the risk of unnecessary suffering. However, the more indiscriminate and inaccurate the weapon and the more powerful its yield, the more likely that the use of the weapon will violate customary international law. First use of low-yield nuclear weapons would not be unlawful if necessary for defense and would assist the defended in stopping the enemy's progress and scattering its forces.

It is necessary for diplomats to convey to potential opponents what is meant by limited nuclear war, or at least what limitations are acceptable. Unless nations establish these concepts of limitation in advance, miscalculation and misinterpretation of the opponent's intentions may cause an all-out war even if both sides intend to limit it.⁸⁶

The use of nuclear weapons does not have to be an-all-or nothing proposition. Nor does the use of some types of nuclear weapons constitute a breach of customary international law:

A power which is prepared to unleash all-out holocaust in order to escape defeat in a limited nuclear war would hardly be more restrained by an initial distinction between conventional and nuclear weapons. The argument that neither side will accept defeat amounts to a denial of the possibility of limited war, nuclear or other, an argument which is valid only if nations in fact prefer suicide to a limited withdrawal.⁸⁷

The use of counterforce nuclear weapons, as planned by the United States Army, comports with the principles of military necessity, proportionality, and avoidance of unnecessary suffering.

How and when to use nuclear weapons are not questions confined to the spheres of international law, United States policy, and Army doctrine. Nuclear weapons could not be launched without human action. One person orders the launching of a missile, another complies with the order. Concepts of customary international law may be irrelevant to individuals when the order to launch is given. However, they may think deeply about the morality of using nuclear weapons. The potential of destroying many innocent civilians and

⁸⁶*Id.* at 185.

⁸⁷*Id.* at 186.

property may present dilemmas of significant proportions, when the order to launch nuclear weapons is issued, that were merely abstract during time of peace. What are these moral questions? How do they impact on the military?

111. THE AMERICAN ROMAN CATHOLIC BISHOPS AND NUCLEAR WAR

American domestic public opinion influences the waging of war. During World War II, the citizens of the United States stood four-square behind their armed forces and government. Rationing of food, clothing, and gasoline was accepted by civilians so that the soldiers would have what they needed to defeat the enemy. Women went to work in factories so supplies to Europe and the Pacific would be plentiful. This patriotic moral support helped to win the war. Twenty years later, when the Vietnam War was raging, public support waned and later turned into a demand to bring the soldiers home. The lack of popular support and the disillusionment of the citizenry were major factors in the government's decision to end the conflict without achieving victory.

Various political, social, and religious groups influence the beliefs and values of individual citizens and groups. In turn, those beliefs and values formed during times of peace can determine how individuals will act during time of war.

Examination of all groups that have addressed the subject of nuclear weapons would require volumes. The examination here will be confined to one particular group, the American Roman Catholic Bishops. Roman Catholics comprise a large segment of the American population. Of the 226,505,000 people in the United States, approximately 50,450,000 are Roman Catholics, or about twenty percent of the population.⁸⁸ Moral doctrine and guidance from their church's leaders shape their consciences, lives, and decisions. The actions and beliefs of such a large segment of society can greatly influence the actions, decisions, and policy of the government.

In **May 1983**, the Bishops issued a comprehensive pastoral letter on nuclear weapons entitled "The Challenge of Peace: God's Promise and Our Response."⁸⁹ All Roman Catholic Bishops in the United States had gathered to discuss the threat and terror posed by nuclear

⁸⁸Statistical Abstract 1982-83, at 55 (103d ed. 1983).

⁸⁹U.S. Bishops' Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response* (May 19, 1983) [hereinafter cited as *Bishops' Letter*].

weapons and the arms race. This pastoral letter was issued by the Bishops because

[a]s bishops and pastors ministering in one of the major nuclear nations, we have encountered this terror in the minds and hearts of our people—indeed, we share it. We write this letter because we agree that the world is at a moment of crisis, the effects of which are evident in people's lives. It is not our intent to play on fears, however, but to speak words of hope and encouragement in time of fear.⁹⁰

The Bishops desired to encourage people of faith to seek a world free of the nuclear threat, which is neither tolerable nor necessary.⁹¹ They challenged Catholics in the United States to join with others in shaping the choices and policies necessary to save humanity.⁹²

The letter is comprised of several parts. The first part is dedicated to an examination of the Roman Catholic Church's teaching on war and peace. The second part is a discussion of public policy, strategy, and issues regarding nuclear weapons. Finally, the Bishops discussed pastoral approaches for promoting peace in the modern world.

This letter provides one framework in which it is possible to compare the Bishops' approach to that of international law, United States policy, and Army plans and doctrine. Also, in speaking to Catholics, the Bishops are requiring choices from their people who are not only members of a particular religious organization, but who are also citizens of the United States. This letter, along with its demands, could have a great impact on individuals now serving in the Army and those who may serve in the future.

A. REVIEW OF THE ROMAN CATHOLIC CHURCH'S TEACHING ON WAR

Because it is nearly 2000 years old, the Roman Catholic Church has built up a rich deposit of teaching that has been born of earthly events, change, challenge, and trauma. The teaching of the Church is always rooted in the Gospel of Jesus. The subject of war stands as

⁹⁰*Id.* at 1.

⁹¹*Id.* at 2.

⁹²*Id.* at 2.

one topic among many. Major and minor theologians have devoted much time writing about war and the Christian's relationship to it.

In order to understand the American Bishop's letter, it is necessary to examine the teaching of the Church upon which the first part of their letter is based.

1. *St. Augustine of Hippo*

The earliest major theologian to address the subject of war was St. Augustine of Hippo.⁹³ Augustine felt the shockwaves caused by the sack of Rome by the Visigoths under Alaric in 410.⁹⁴ In the last years of his life, he had witnessed the advance of barbarian hordes across North Africa and, when he died in **430**, his own city of Hippo was under siege by the Vandals.⁹⁵ The teachings of Augustine on war have been a touchstone for the Church throughout the years, even to the present time.

Augustine wrote that, when an individual kills during the course of a war that has been declared by lawful authority and in accordance with God's laws, he does not commit murder.⁹⁶ He further stated that it is beneficial for good men to wage war against an evil nation in order to replace the evil with goodness, justice, and peace.⁹⁷ He cautioned men to remember that the fullness of peace and life are to be found only in eternal union with God. If men forget to follow God after they have conquered evil nations, only misery and endless war will befall them.⁹⁸

Augustine observed that all wars are waged for the attainment of peace and glory. Those men who interrupt peace to wage war on other nations do so, not because they hate peace, but because they only wish to spread the brand of peace which suits them best.⁹⁹ The peace of unjust men is never peace regardless of how it is defined.¹⁰⁰

Augustine formulated the requirements of just war in these principles: war must be declared by lawful authority; war must be waged for a reason flowing from God's law; war is to be waged against evil

⁹³St. Augustine of Hippo, *The City of God* (M. Dods translation 1950) [hereinafter cited as St. Augustine].

⁹⁴H. Deans, *The Political and Social Ideals of St. Augustine* **154** (1963).

⁹⁵*Id.* at 154.

⁹⁶St. Augustine, *supra* note 93, Bk. I, Ch. 21, at 27.

⁹⁷*Id.* at Bk. IV, Ch. 14, at 123.

⁹⁸*Id.* at Bk. XV, Ch. 4, at 482.

⁹⁹*Id.* at Bk. XIX, Ch. 12, at 687.

¹⁰⁰*Id.* at 689.

and unjust men; and the goal of war must be to prevent such men from ruling the just who follow God's law and desire to abide in peace and justice.

2. *St. Thomas Aquinas.*

St. Thomas Aquinas, the great Dominican theologian and philosopher of the Middle Ages, was the next major contributor to the Church's thoughts on war.¹⁰¹ He wrote that three things are necessary in order for a war to be just:

First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And **as** the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, Kingdom, or province subject to them. And just **as** it is lawful for them to have recourse to the sword in defending the common weal against internal disturbances, when they punish evil-doers, . . . so too, it is their business to have recourse to the sword of war in defending the common weal against external **enemies**.¹⁰²

. . . .

Secondly, a just cause is required, namely that those who are attacked deserve it because of some fault. A just war avenges wrongs, when a nation refuses to make amends for the wrongs inflicted by its people or to restore that which has been unjustly **seized**.¹⁰³

. . . .

Thirdly, it is necessary that the belligerents have the right intention, namely the advancement of good and avoidance **of** evil. Wars are not to be fought for aggrandisement or cruelty, but rather with the object of securing peace, punishing evil doers, and uplifting the good.¹⁰⁴

¹⁰¹St. Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province translation 1916)[hereinafter cited **as** Aquinas].

¹⁰²*Id.* at Pt. II, Ques. 3 XL, at 501.

¹⁰³*Id.* at 501-02.

¹⁰⁴*Id.* at 502.

Aquinas parallels Augustine in his thoughts. In order for a war to be just it must be declared by lawful authority; declared for a just cause; be waged with a just and proper intention; and be waged with just means. Aquinas better explained that the war is to be fought for the protection of the common good of the nation's citizens, not for the gain of a few individuals. In his second requirement, Aquinas seemed to imply that peaceful means for the redressing of the wrong should be exhausted before resort is made to armed conflict.

St. Thomas distinguished between acts of treachery and lawful combat tactics.¹⁰⁵ He stated that certain rules of warfare develop and that one side should not pretend to follow those rules and act in a manner contrary to fool the enemy and gain advantage. Such concepts are embodied in international law today with respect to improper use of flags of truce,¹⁰⁶ treachery or perfidy,¹⁰⁷ and improper use of the Red Cross emblem.¹⁰⁸ Thus, the means of waging war must be just.

The ideas of Augustine and Aquinas form the core of Roman Catholic teaching on war. This moral teaching has remained untouched and secure, until the advent of nuclear weapons.

3. *The Modern Popes and Second Vatican Council*

While the teachings of St. Augustine and St. Thomas Aquinas have continued to guide the Roman Catholic Church's teaching on war, the advent of nuclear weapons have presented a new challenge to the Church. This challenge has been specifically addressed by the popes of the nuclear age and Vatican Council II. Throughout the history of the Church, traditional teaching has been applied to moral issues that have arisen in new ways. The pope is the primary teacher of faith and morality in the Church. It is his duty to teach the faithful how to live and cope with specific moral problems that are part of their daily lives. He also acts as a spiritual mediator among nations when he pleads with government leaders to conform their internal and external policies with principles of peace and justice. When the bishops, together with the pope, gather as a council, they exercise as a unity the roles of teacher and mediator. Pope Pius XII, Pope John XXIII, Pope Paul VI, Pope John Paul I, and Vatican Council II have addressed the moral issues of nuclear holocaust and the arms race,

¹⁰⁵*Id.* at 507-08.

¹⁰⁶FM 27-10, para. 53.

¹⁰⁷*Id.* at para. 50.

¹⁰⁸*Id.* at para. 55.

issues that were non-existent before Hiroshima and Nagasaki. It is necessary to understand what they have taught because the American Bishops are bound to follow the teachings of these popes and Vatican Council II.

Pope Pius the XII was the first pope of the nuclear age. He recognized that a nation has the legitimate right to self-defense. He promised to work tirelessly to bring about international agreements that would proscribe and banish atomic, biological, and chemical warfare.¹⁰⁹ He asked the following question:

[H]ow long will men continue to withdraw themselves from the saving light of the Resurrection and persist in expecting security from the deathdealing explosions of new tools forever? How long will they oppose their designs of hatred and death to the precepts of love and to the promise of life offered by the Divine Saviour? When will the rulers of nations understand that peace does not exist in the exasperating and costly relationship of mutual terror? Rather does peace lie in that greatest of Christian virtues—universal charity. And especially is it found in the virtue of justice—a justice voluntarily observed rather than extorted by force, and in confidence which is truly inspired rather than a mere pretence.¹¹⁰

Nine years later, a new pope, John XXIII issued his encyclical *Pacem in Terris*¹¹¹ He echoed Augustine when he wrote that civil authorities derive their right to command from God; if they act contrary to the will of God, their commands do not bind citizens of conscience. God must be obeyed rather than man.¹¹² Thus, it follows that citizens may resist going to war if the authorities do not wage the war for reasons that accord with God's law.

He wrote on the relationship of nations:

Our predecessors have constantly maintained, and we join them in reasserting, that political communities are reciprocally subjects of rights and duties. This means that their relationships also must be harmonized in truth, in justice, in an active solidarity and in freedom. The same

¹⁰⁹Pope Pius XII, *Easter 1954 and the Threat of ABC Warfare*, The Pope Speaks Second Quarter 134 (1954).

¹¹⁰*Id.* at 134.

¹¹¹Pope John XXIII, *Pacem in Terris*, The Gospel of Peace and Justice 201 (J. Gremillion ed. 1976) [hereinafter cited as Pope John XIII].

¹¹²*Id.* at para. 51, at 212.

moral law which governs relations between individual human beings serves also to regulate the relations of political communities with one another.¹¹³

Nations have the right to exist and develop. They have a right to share in the means and resources necessary to progress. Nations also have the corresponding duty of respecting the rights of others and avoiding any act of violation.¹¹⁴ When disagreements arise between nations, they must be settled by negotiation and equitable reconciliation, not by force, deceit, or trickery.¹¹⁵ This moral call for negotiation and peaceful settlement of disputes reflects the principles set forth in the Charter of the United Nations.¹¹⁶ This demand for peaceful resolution may find its roots in the testament of Thomas Aquinas.¹¹⁷

Pope John next turned to the question of the arms race and disarmament. He noted with deep sorrow the vast outlay of intellectual and economic resources that are spent on the enormous stocks of armaments.¹¹⁸ He observed that the reasons given by nations for this stockpiling are deterrence and maintaining the balance of power.¹¹⁹ He observed that people fear nuclear war with good cause, for the arms of war are ready at hand:¹²⁰

Justice, right reason and humanity, therefore, urgently demand that the arms race should cease; that the stockpiles which exist in various countries should be reduced equally and simultaneously by the parties concerned; that nuclear weapons should be banned; and that a general agreement should eventually be reached about progressive disarmament and an effective method of control.

All must realize that there is no hope of putting an end to the building up of armaments, nor of reducing the present stocks, nor still less of abolishing them altogether, unless the process is complete and thorough and unless it proceeds from inner-conviction; unless, that is, everyone sincerely co-operates to banish the fear and anxious ex-

¹¹³*Id.* at para. 80, at 218-19.

¹¹⁴*Id.* at para. 91, at 221.

¹¹⁵*Id.* at para. 93, at 221.

¹¹⁶The Charter of the United Nations, art. 33.

¹¹⁷Aquinas, *supra* note 101, at Pt. II, Ques. XL, at 501-02.

¹¹⁸Pope John XXIII, *supra* note 111, at para. 109, at 224.

¹¹⁹*Id.* at para. 110, at 224.

¹²⁰*Id.* at para. 111, at 224.

pectation of war with which men are oppressed. If this is to come about, the fundamental principle on which our present peace depends must be replaced by another, which declares that the true and solid peace of nations can consist, not in equality of arms, but in mutual trust alone.¹²¹

. . . .

We believe that this can be brought to pass, and we consider that it is something which reason requires, that is eminently desirable in itself and that it will prove to be the source of many **benefits**.¹²²

John XXIII ended this section of his encyclical with a plea to all governments to work together in trust and sincerity and negotiate agreements that will rid the world of **terror**.¹²³

On his trip to the United States, Pope Paul VI echoed the thoughts of Pius XII and John XXIII to the United Nations General Assembly.¹²⁴ He said: "You are expecting us to utter this sentence, and we are well aware of its gravity and solemnity: *not some* people *against* others, never again, never **more!**"¹²⁵ The first step to peace is that of **disarmament**.¹²⁶ The very weapons that men possess ferment bad feelings and cause nightmares, distrust, and dark **designs**.¹²⁷ He reminded the United Nations that it was founded to promote peace, not war. He challenged the nations to remember the past so that the future may be different:

It suffices to remember that the blood of millions of men, that numberless and unheard of suffering, useless slaughter and frightful ruin, are the sanction of the past which unites you with an oath which must change the future history of the world: No more war, war never again! Peace, it is peace which must guide the doctrines of peoples and **all mankind**.¹²⁸

¹²¹*Id.* at para. 112, at 226.

¹²²*Id.* at para. 113, at 226.

¹²³*Id.* at para. 118, at 226.

¹²⁴Pope Paul VI, *Address of His Holiness Paul VI to the General Assembly of the United Nations October 4, 1965, The Gospel of Peace and Justice* (J. Gremillion ed. 1976).

¹²⁵*Id.* at para. 19, at 383.

¹²⁶*Id.* at para. 22, at 384.

¹²⁷*Id.* at para. 23, at 384.

¹²⁸*Id.* at para. 19, at 383.

Pope John Paul II has spoken about the dangers of war, the need for disarmament, and the responsibilities of nations and individuals in establishing peace. When speaking to the United Nations General Assembly in October 1979, he urged nations to search for the roots of hatred, destructiveness and contempt—the roots that produce the temptation to war, not so much in the hearts of the nations **as** in the inner determination of the systems that decide the history of whole societies. He insisted that one of the facets of peace is the recognition of the inalienable rights of man: life, liberty, security of person, food, clothing, shelter, health care, rest, leisure, freedom of expression, education, culture, thought, conscience, and **religion**.¹²⁹

John Paul II traveled to Hiroshima, where he observed that war is the work of man. He made this pilgrimage out of the conviction that to remember the vast suffering of the past is to commit oneself to the future.¹³⁰ In viewing the past and future he said:

I bow my head **as** I recall the memory of thousands of men, women and children who lost their lives in that one terrible moment, or who for long years carried in their bodies and minds those seeds of death which inexorably pursued their process of destruction. The final balance of the human suffering that began here **has** not been fully drawn up nor has the total human cost been tallied, especially when one sees what nuclear war has done—and could still do—to our ideas, our attitudes and our civilization.¹³¹

He repeated John XXIII's call for peaceful resolution of differences and conflicts. He called upon governments to make decisions in economic and social fields in accordance with the demands of peace, not narrow self-interest. He, **as** others before him, challenged the nation's leaders to work untiringly for nuclear **disarmament**.¹³²

In 1982, John Paul II sent a special message to the United Nations Assembly's special session on disarmament. He made absolutely clear the Church's stand on nuclear **weapons**.¹³³ He wrote:

The Catholic Church's teaching is thus clear and

¹²⁹Pope John Paul II, On *Pilgrimage—The U.N. Address 2 October 1979* to the U.N. General Assembly, Origins, October 11, 1979, at 26.

¹³⁰Pope John Paul II, *War Is Death—The Pope at Hiroshima*, Origins, March 12, 1981, at 619.

¹³¹*Id.* at 619-20.

¹³²*Id.* at 620.

¹³³Pope John Paul II, *The Necessary Strategy for Peace*, Origins, June 24, 1982, at 84 [hereinafter cited as *Strategy for Peace*].

coherent. It deplores the arms race, it demands at least progressive, mutual, verifiable arms reduction **as well as** greater precautions against possible errors in the use of nuclear weapons. At the same time, the Church claims respect for the independence, the liberty, and the rightful security of every nation.

Under present conditions, discussion based on equilibrium—certainly not **as** an end in itself but as a stage on the way to progressive disarmament—can still be judged to be morally acceptable. However, to ensure peace it is indispensable not to be content with a minimum which **is** always fraught with a real danger of explosion.¹³⁴

Again, he urged nations to engage in honest negotiations. He added a new note: "Disarmament negotiations could not be complete if they ignored the fact that 80 percent of armaments expenditures are for conventional weapons."¹³⁵

Pope John Paul II diagnosed the cause of production and possession of armaments **as** the result of an ethical crisis growing into society in all directions, political, social, and economic. Peace results from the respect for ethical principles. Any efforts made to negotiate arms limitations and total disarmament will fail if not paralleled by ethical **recovery**.¹³⁶

John Paul II has made clear to Christians what their role is in establishing peace. He stated that the object of dialogue for peace cannot be reduced to a condemnation of the arms race. The individual has a large role in this **dialogue**.¹³⁷

Finally, I must address myself to every man and woman and also to you, the young: **You** have many opportunities to break down the barriers of selfishness, lack of understanding and aggression by your way of carrying on a dialogue every day in your family, your village, your neighborhood, in the associations in your city, your region, without forgetting the non-governmental organizations. Dialogue for peace is the task of everyone.

Now, I exhort you especially, the Christians, to take your part in this dialogue in accordance with the responsi-

¹³⁴*Id.* at 84-86.

¹³⁵*Id.* at 85.

¹³⁶*Id.* at 86.

¹³⁷Pope John Paul II, *Peace for Our Time*, 28 *The Pope Speaks* 139 (1983).

bilities that are yours, to pursue then with that quality of openness, frankness and justice which is called for by the charity of Christ, to take them up again ceaselessly, with the tenacity and hope which faith enables you to have. You also know the need for conversions and prayer because the main obstacle to the establishment of justice and peace is to be found *in man's heart, in sin*, as it was in the heart of Cain when he refused dialogue with his brother, Abel. Jesus has taught us how to listen, to share, to act toward other people as one would wish for oneself, to settle differences while on travels together, to pardon. Above all, by His death and resurrection, He came to deliver us from the sin which sets up one against the other, to give us His peace, to breakdown the wall which separates the peoples.¹³⁸

In all of his talks, John Paul II has given the most comprehensive plan for peace among the popes of the nuclear age. It is his belief that, if people and nations do not reform their ethical lives, peace is not possible. His challenge is not solely aimed at governments which will reflect the ethics of their people. Governments alone cannot make peace, even if there is total disarmament, unless justice, charity, and human rights are given to and respected by all people.

The most important document on war, for the nuclear age Church, issued from Vatican Council II.¹³⁹ The Church, which consisted of the universal bishops and the pope, spoke as one for and to the Church and to the world. The Council began by recognizing that peace is not merely the absence of war.¹⁴⁰ Because men are sinful, the threat of war will always hang over them until the return of Christ. But to the extent that men overcome sin by living as Christ taught, they will overcome violence as well.¹⁴¹

The Council stated that international agreements, particularly those with respect to the conduct of war, must be observed and improved upon by all nations so that the frightfulness of war will be restrained.¹⁴² Nations are called upon to make humane laws for the case of those persons who for reason of conscience refuse to bear

¹³⁸*Id.* at 140-41.

¹³⁹*Gaudiam et Spes: Pastoral Constitution on the Church in the Modern World, The Second Vatican Council, December 7, 1966, The Gospel of Peace and Justice (J. Gremillion ed. 1976) [hereinafter cited as *Gaudiam et Spes*].*

¹⁴⁰*Id.* at para. 78, at 314.

¹⁴¹*Id.* at para. 78, at 316.

¹⁴²*Id.* at para. 79, at 316.

arms, provided they accept some other form of **service** to the human community.¹⁴³

Governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been **exhausted**.¹⁴⁴

But it is one thing to undertake military action for the just defense of the people, and something else **again** to seek the subjugation of other nations. Nor does the possession of war potential make every military or political use of it lawful. Neither does the mere fact that war **has** unhappily begun mean that all is fair between the warring **parties**.¹⁴⁵

The need to exhaust peaceful solutions to conflicts, the right to defend one's people, and the limits placed on means and methods of making war **as** enunciated by the Council give added moral **weight** and authority to the United Nations Charter, The Geneva **and Hague** Conventions, and Protocol I.

The Council stated that men cannot follow and **will** not be morally excused from following orders issued by any authority that are **criminal** and in contravention of universal natural law. **An** example **of** such criminal action is **genocide**.¹⁴⁶

The Council had this to say to soldiers:

Those who are pledge to the service of their country **as** members of its armed forces should regard themselves **as** agents of security and freedom on behalf of their people. As long **as** they fulfill this role properly, they are making a genuine contribution to the establishment of peace.¹⁴⁷

Unfortunately, the Council did not provide any guidelines regarding the soldier's proper role, particularly in time of war. However, one may conclude that a soldier, acting in proper defense of his nation and who observes international law in the conduct of war and obeys legitimate orders, is acting properly. This must be deduced from what the Council stated regarding the conduct of nations and superiors.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.* at *par.* 70, at 316.

¹⁴⁷*Id.*

The Council then addressed the potential of total war:

The horror and perversity of war are immensely magnified by the multiplication of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defense. Indeed, if the kind of instruments which can now be found in the armories of great nations were to be employed to their fullest, an almost total and altogether reciprocal slaughter of each side by the other would follow, not to mention the widespread devastation which would take place in the world and the deadly after-effects which would be spawned by the use of such **weapons**.

All these considerations compel us to undertake an evaluation of war with an entirely new attitude.

With these truths in mind, this most holy synod makes its own the condemnation of total war already pronounced by recent Popes, and issues the following declaration:

Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation.¹⁴⁸

The Council paralleled in this declaration Articles 51 and 85 of Protocol I. Logically piecing together portions of this document leads to the conclusion that, to the Council fathers, it would be a horrendous crime for a superior to order an individual to engage in indiscriminate bombing of cities by any means and it would be equally wrong for the individual to follow the order. Blind obedience cannot excuse those who issue or follow such orders. Roman Catholics, universally, are bound by the moral declaration and teaching of this "Constitution on the Church." The Council, unlike nations, draws no distinction between conventional and nuclear weapons. Indiscriminate destruction by means of conventional weapons is equally as criminal as destruction by nuclear weapons. They naturally apply customary international law principles to nuclear weapons. The entire context of the Council's condemnation of total war appears to give a wider meaning to the term indiscriminate destruction. The Council clearly

¹⁴⁸*Id.* at para. 80, at 316-17.

stated that it was compelled to evaluate war with an entirely *new* attitude. If indiscriminate destruction is evaluated within this context, it can be concluded that the Council condemned the targeting of military objectives in cities if the destruction of those targets would produce enormous casualties among the civilian population. Use of countervalue nuclear attacks would thus be morally forbidden. If this is the conclusion the Council intended, the individual Roman Catholic may find himself caught between the demands of Church and state. For a Roman Catholic of good conscience, the only choice available is to follow the Church's teaching and take whatever consequences may follow from disobedience of state authority.

The Council concluded by stating that peace is born of mutual trust. Nations must not attempt to impose peace on other nations through fear of weapons. All must work to end the arms race and begin to disarm, not unilaterally, but by proceeding on an equal basis according to agreement, supported by authentic and workable safeguards.¹⁴⁹

B. THE AMERICAN ROMAN CATHOLIC BISHOPS PASTORAL LETTER

The American Roman Catholic Bishops' letter is important for several reasons. While they reiterated the teaching of the popes and Vatican Council II, they also made moral judgments about the use of nuclear weapons and counseled Catholics to seriously consider **their** judgments when making moral **decisions**.¹⁵⁰ The letter **has** been made available to Catholics throughout the United **States**. Bishops and priests have conducted meetings at local churches to foster **and** spread loyalty to their principles among the laity. Catholics are **being** influenced by this letter and, **as** a consequence, their actions in war could well be changed by the counsel of the Bishops. **This** could present a challenge to the Army and the other military **services** on a scale larger than that experienced during the Vietnam War. **Individuals** fled to Canada and went to jail because they viewed Vietnam **as** an unjust war. The military may have to meet the challenge of what **appears** to be a new tradition of nuclear pacifism.

It must be noted that the Bishops are not the only clergymen to oppose nuclear weapons. As a group, they have formulated the most

¹⁴⁹*Id.* at para. 82, at 318.

¹⁵⁰U.S. Bishops Pastoral Letter. *supra* at I, p. 3.

comprehensive letter on this subject. They have also received the most publicity. Other religious groups, for example the Episcopal Diocese of Southern Virginia,¹⁵¹ have embraced the Bishops' views. The impact of the anti-nuclear movement on individuals is not confined to Roman Catholics.

What do the Bishops say about the use of nuclear weapons? What do they recommend that governments do about the arms race and the threat of nuclear holocaust? Do they give specific moral guidance to individuals with respect to military service and the use of nuclear weapons? Do the principles and policies conflict with customary international law and Army policy? It is within the context of these questions that the pastoral letter will be examined.

1. *The Bishops on the Morality of the Use of Nuclear Weapons*

In Part I of the Letter, entitled Peace in The Modern World: Religious Perspectives and Principles, the Bishops set forth the basic teaching of the Church on **war**.¹⁵² The principles discussed find their basis in Augustine, Thomas Aquinas, the popes of the nuclear age, Vatican Council II, and modern theological refinements of the Just War doctrine.¹⁵³ The Bishops noted that nations have often perverted the notions of just **war** and just cause. Careful analysis of such claims must be employed. However, blatant aggression from without and subversion from within are readily identifiable **as** just cause.¹⁵⁴ The Bishops stated that governments threatened by armed, unjust aggression must defend their **peoples**.¹⁵⁵ However, "[j]ust response to aggression must be discriminate; it must be directed against unjust aggressors, not against innocent people caught up in a war not of their own **making**."¹⁵⁶ A nation's response to aggression must not exceed the nature of the aggression. To destroy civilization by waging total war would be a disproportionate response to aggression on the part of any **nation**.¹⁵⁷

With this background in mind, the Bishops next focused on the subject of nuclear weapons in particular. It is at this point in the letter, Part II, entitled War and Peace in the Modern World: Problems and Principles, that the Bishops began to apply moral teachings to specific **cases**.¹⁵⁸ Early in the letter the Bishops stated:

¹⁵¹The Catholic Virginian, March 26, 1984, at 1.

¹⁵²Bishops' Letter, *supra* note 89, at I, at 3.

¹⁵³*Id.* at 8-12.

¹⁵⁴*Id.* at I.C.3. at 10.

¹⁵⁵*Id.* at I.C.1, at 9.

¹⁵⁶*Id.* at I.C.3, at 11.

¹⁵⁷*Id.* at I.C.3, at 11.

¹⁵⁸*Id.* at II, at 13.

When making applications of these principles we realize—that prudential judgments are involved based on specific circumstances which can change or which can be interpreted differently by people of good will (e.g., the treatment of “no first use”). However, the moral judgments that we make in specific cases, while not binding in conscience, are to be given serious attention by Catholics as they determine whether their moral judgments are consistent with the Gospel.¹⁵⁹

In considering the effect of an all-out nuclear war, the Bishops made two conclusions. First, nuclear war must be prevented. Second, they rejected nuclear war and called upon all people to refuse to legitimize the idea of nuclear war.¹⁶⁰

The first idea they addressed was that of deterrence, which they found to be a political paradox that strains moral conception:

Today military preparations are undertaken on a vast scale, but the declared purpose is not to use the weapons produced. Threats are made which would be suicidal to implement. . . . The presumption of the nation-state system that sovereignty implies an ability to protect a nation’s territory and population is precisely the presumption denied by the nuclear capacities of both superpowers. In a sense each is at the mercy of the other’s perception of what strategy is “rational,” what kind of damage is “unacceptable,” how “convincing” one side’s threat is to the other.¹⁶¹

The Bishops highlighted from their moral perspective the paradoxical mentality that nations exhibit in their application of the principles of international law to conventional warfare and to the isolation of countervalue nuclear weapons from those same principles of law. The Bishops rejected the concept of nuclear war as a strategy for defense and called upon the public to resist that defense strategy. The public was exhorted to influence the actions of their respective governments in setting limits on nuclear policy.¹⁶² At the same time, the Bishops concurred with Pope John Paul II in stating that deterrence based on balance of forces as a step on the way

¹⁵⁹*Id.* at I, at 3.

¹⁶⁰*Id.* at II.A, at 13.

¹⁶¹*Id.* at II.A, at 14.

¹⁶²*Id.* at II.B, at 14.

toward progressive disarmament may still be judged to be morally acceptable.¹⁶³ The dilemma of deterrence is exhibited by the danger of nuclear war with its human and moral costs, the extreme distrust among nations, and the duty to prevent nuclear war while protecting and preserving justice, freedom, independence, and personal and national dignity.¹⁶⁴ In order to resolve these paradoxes, the Bishops recommended the following as steps toward nuclear and conventional disarmament:¹⁶⁵ support for immediate, bilateral, verifiable agreements to halt the testing, production and deployment of new nuclear weapons systems; support for negotiated bilateral deep cuts in the arsenals of both superpowers, particularly those weapons systems which have destabilizing characteristics; support for early and successful conclusion of negotiations of a comprehensive test ban treaty; removal by all parties of short-range nuclear weapons which multiply dangers disproportionate to their deterrent value; removal by all parties of nuclear weapons from areas where they are likely to be overrun in the early stages of war, thus forcing rapid and uncontrollable decisions on their use; and strengthening of command and control over nuclear weapons to prevent inadvertent and unauthorized use.¹⁶⁶ The Bishops rejected the idea of nuclear war and nuclear superiority. Nuclear deterrence must be used as a step toward progressive disarmament.¹⁶⁷

The Bishops addressed three particular uses of nuclear weapons and their moral implications.

The first is counterpopulation warfare. The Bishops reiterated the teaching of Vatican Council II in condemning the indiscriminate use of any type of weapon that produces mass slaughter in the destruction of population centers.¹⁶⁸ The Bishops go one step further and stated their belief that

[r]etaliatory action, whether nuclear or conventional, which would indiscriminately take wholly innocent lives, lives of people who are in no way responsible for reckless actions of their government, must also be condemned. This condemnation, in our judgment, applies even to retaliatory use of weapons striking enemy cities after our

¹⁶³*Id.* at II.D.2, at 17; *Strategy for Peace*, *supra* note 133, at 84-85.

¹⁶⁴Bishops' Letter, *supra* note 89, at II.D.2, at 17.

¹⁶⁵*Id.* at III.A.3, at 21.

¹⁶⁶*Id.* at II.D.2, at 18-19.

¹⁶⁷*Id.* at II.D.2, at 18.

¹⁶⁸*Id.* at II.C.1, at 14-15.

own have already been struck. No Christian can rightfully carry out orders or policies deliberately aimed at killing non-combatants.¹⁶⁹

The Bishops parallel here the prohibition in Protocol I, against attacking the civilian population or civilians by way of reprisal. Although Protocol I has yet to be given the advice and consent of the U.S. Senate, this same rule of reprisal is applicable through previously adopted international agreements and customary international law.¹⁷⁰ The United States does not target civilians.

The Bishops further made clear what Vatican Council II seemed to imply:

A narrow adherence exclusively to the principle of non-combatant immunity as a criterion for policy is an inadequate moral posture for it ignores some evil and unacceptable consequences. Hence, we cannot be satisfied that the assertion of an intention not to strike civilians directly or even the most honest effort to implement the intention by itself constitutes a “moral policy” for the use of nuclear weapons.

The location of industrial or militarily significant economic targets within heavily populated areas or in those areas affected by radioactive fallout could well involve such massive civilian casualties that in our judgment such a strike would be deemed morally disproportionate, even though not intentionally indiscriminate.¹⁷¹

The Bishops articulated their view that nations cannot morally justify a nuclear attack on military objectives in cities. Targeting military objectives is in essence a moral charade. Whether or not the intended target is legal, the results will be the same. The consequent civilian casualties cannot be morally justified.

Second, with respect to the initiation of nuclear war the Bishops opined:

We do not perceive any situation in which the deliberate initiation of nuclear warfare on however restricted a scale can be morally justified. Non-nuclear attacks by another state must be resisted by other than nuclear means. There-

¹⁶⁹*Id.* at II.C.1, at 15.

¹⁷⁰FM 27-10, para. 497.

¹⁷¹Bishops' Letter, *supra* note 89, at II.D.2, at 18.

fore, a serious moral obligation exists to develop non-nuclear defensive strategies as rapidly as possible.

We find the moral responsibility of beginning nuclear war not justified by rational political objectives.¹⁷²

The Bishops based this conclusion on evidence given to them that field commanders would not be able to exercise strict control over nuclear weapons that the number of weapons used would increase rapidly, that targets would expand beyond the military, that the level of civilian casualties would rise enormously, and, finally, that mass escalation could follow leading to unlimited nuclear war.¹⁷³

World War II clearly demonstrated how devastating a long-term conventional war is to civilians and military personnel. First and limited use of nuclear weapons may bring about a quick resolution of hostilities. Infinitely greater civilian and military casualties and destruction may be avoided. The possibility exists that first and limited use could comply with customary international law. The Bishops recognize that a debate is under way on this issue, but find the danger of escalation so great as to make unjustifiable the initiation of nuclear war in any form.¹⁷⁴

The third point addressed by the Bishops was that of limited nuclear war. They realized that this issue is real, not theoretical. They posed a series of questions which go to the heart of the actual meaning of the word "limited."¹⁷⁵ Would leaders have sufficient information to monitor and keep limited the nuclear exchange? Would commanders be able to maintain discriminate targeting? Could computer error be avoided? Would not casualties run in the millions? How limited would be the long-term effects of radiation, famine, social disorganization, and economic disruption?¹⁷⁶ They concluded that, unless these questions can be properly answered, they will continue to remain skeptical about the true meaning of "limited."¹⁷⁷ The Bishops stated within this context that a nuclear response to either a conventional or nuclear attack that goes beyond legitimate defense is not justified.¹⁷⁸

¹⁷²*Id.* at II.C.2, at 15.

¹⁷³*Id.* at II.C.2, at 15.

¹⁷⁴*Id.* at II.C.2, at 15.

¹⁷⁵*Id.* at II.C.3, at 15.

¹⁷⁶*Id.* at II.C.3, at 15-16.

¹⁷⁷*Id.* at II.C.3, at 16.

¹⁷⁸*Id.* at II.C.3, at 16.

The Bishops, while asking numerous questions, condemned counterforce strategy and nuclear weapons under certain circumstances:

We are told that some weapons are designed for purely “counterforce” use against military forces and targets. The moral issue, however, is not resolved by the design of weapons or the planned intention for their use; there are also consequences which must be assessed. It would be perverted political policy or moral casuistry which tried to justify using a weapon which “indirectly” or “unintentionally” killed a million innocent people because they happened to live near a “military significant target”¹⁷⁹

While it appears that the Bishops claimed “to remain skeptical”¹⁸⁰ about limited nuclear war, they in fact seemed to reject any possibility that counterforce nuclear strategy can be conducted morally and in accordance with the principles of military necessity, proportionality, and avoidance of unnecessary suffering. They glossed over the fact that aimpoints are planned outside civilian population centers; the number and yield of weapons used will be kept at the level necessary to accomplish the mission; and preclusion-oriented analysis is used to avoid excessive damage to population, environment, and facilities.

On these three points, the Bishops took stands and asked penetrating questions that are consistent with the international law principles of military necessity, proportionality, avoidance of unnecessary suffering, the prohibition on indiscriminate attacks, and retaliation. They highlighted that the use of nuclear weapons could violate all notions of morality and international law.

In summary, the Bishops have asserted that governments must defend their people from threats of armed aggression. Nuclear war must be prevented and rejected. Nuclear deterrence based on a balance of forces may be judged to be morally acceptable **as long as** it remains a step on the way toward progressive disarmament. Nuclear weapons cannot be used offensively, defensively, or in retaliation to destroy cities or produce **mass** slaughter of civilians. The deliberate initiation of nuclear warfare on however restricted a scale cannot be morally justified. A nuclear response to either a conventional or nuclear attack that goes beyond legitimate defense is not justified.

¹⁷⁹*Id.* at II.D.2, at 19.

¹⁸⁰*Id.* at II.C.3, at 16.

Finally, while they reserve judgment on the limited use of counter-force nuclear weapons, they will remain skeptical about such use until many questions are answered.

The Bishops did not completely ignore political reality when they condemned nuclear war and called for negotiation and disarmament:

The fact of a Soviet threat, as well as the existence of a Soviet imperial drive for hegemony, at least in regions of major strategic interest, cannot be denied. The history of the Cold War has produced varying interpretations of which side caused the conflict, but whatever the details of history illustrate, the plain fact is that the memories of Soviet policies in Eastern Europe and recent events in Afghanistan and Poland have left their mark in the American political debate. Many people are forcibly kept under communist domination despite their very manifest wishes to be free. Soviet power is very great. Whether the Soviet Union's pursuit of military might is motivated primarily by defensive or aggressive aims might be debated, but the effect is nevertheless to leave profoundly insecure those who must live in the shadow of that might.

Americans need have no illusions about the Soviet system of repression and the lack of respect in that system for human rights or about Soviet covert operations and pro-revolutionary activities.

It is one thing to recognize that the people of the world do not want war. It is quite another thing to attribute the same good motives to regimes or political systems that have consistently demonstrated precisely the opposite in their behavior. There are political philosophies with understandings of mortality so radically different from ours that even negotiations proceed from different premises, although identical terminology may be used by both sides. This is no reason for not negotiating. It is a very good reason for not negotiating blindly or naively.¹⁸¹

The United States actively pursues negotiation with the Soviet Union. In the absence of mutual and verifiable nuclear disarmament, it has practiced nuclear deterrence. In order for nuclear deterrence

¹⁸¹Bishops' Letter, *supra* note 89, at III.B.2, at 23-24.

to work, it must be mutual. If the United States were to reject its present policy and embrace the Bishops' views, deterrence would become unilateral. The United States would no longer be able to forestall or keep in check the Soviet threat. The Soviet Union and other nations with nuclear capability would have the power to blackmail the United States and its allies with nuclear weapons. The preventative threat of mutual destruction would vanish. The conventional power of the United States would be overshadowed by the nuclear power of the Soviet Union. In rejecting the means necessary to avert such aggression on moral grounds, the United States would be powerless to fulfill its moral obligation to defend its people from unjust aggression. This position is politically untenable.

The Bishops have made absolutely clear to nations that they condemn nuclear war and demand that nations engage in bilateral, verifiable nuclear disarmament.

The Bishops spoke not only to nations and political leaders, but also to individuals. What do the Bishops ask of people? What moral challenge is the individual soldier asked to face? Did the Bishops give the necessary moral guidance for people to make the choices they request?

These questions have great implications for the military. Roman Catholics comprise thirty percent of the Army, Navy, Air Force, and Marine Corps.¹⁸² Forty percent of the students at the service academies are Roman Catholic.¹⁸³ **The** Bishops have issued their moral challenge to these individuals **as** members of their faith.

Individual soldiers who are Roman Catholic are confronted with a serious choice. If they are going to follow the Bishops' teaching, they will be compelled in conscience to disobey an order to fire a countervalue nuclear weapon. An individual may have no crisis of conscience during times of peace. If, however, he is serving in a position in which he could be ordered to launch a countervalue nuclear weapon, how would he respond if the order were issued? Until the time arrives, the answer to that question will not be known. By the same token, no Roman Catholic can morally issue an order to launch countervalue nuclear weapons. The same choices, tensions, and questions apply to those issuing orders.

¹⁸²Interview with Monsignor Markham, Military Ordinariate, 1011 1st Avenue, New York, New York.

¹⁸³*Id.*

The Bishops failed to enlighten individual soldiers on how to discern before attack whether the use of counterforce nuclear weapons will comport with the moral principle of proportionality and whether the consequences of the attack will be morally acceptable. The Bishops have created moral questions for individuals about limited, counterforce nuclear war without giving them any clear, practical guidance on how to act morally or make moral judgments within this context.

At the beginning of their letter, the Bishops stated that Catholic teaching on war and peace has two purposes: to help Catholics form their consciences and to contribute to the public policy debate about the morality of war.¹⁸⁴ In fulfilling the demands of their pastoral ministry, they are required to speak to Catholics in a specific way and to the political community regarding public policy.¹⁸⁵ With regard to the latter, the Bishops have addressed public policy in a comprehensive, lucid manner. The Bishops have failed to give Catholics clear, specific guidance regarding numerous questions. For example: If it is immoral to use nuclear weapons against cities, can a Roman Catholic serve in a position, in the peacetime Army, Navy, or Air Force, that calls for training in and the readiness to use such countervalue nuclear weapons? If the United States becomes engaged in a conflict and uses nuclear weapons first, would it be immoral for a Roman Catholic to continue to participate in its nation's defense in any capacity? Are there any circumstances in which a Roman Catholic can work directly or indirectly with nuclear weapons? Would it be immoral for a Roman Catholic to launch a nuclear weapon whose target and destination are unknown to him? Would it be immoral for a military attorney, who is a Roman Catholic, to give a commander legal advice regarding the use of counterforce nuclear weapons? Would a military chaplain be bound to promulgate the Bishops' teaching or would he be permitted to remain silent, particularly if he ministers to a nuclear-capable unit?

In addressing the men and women who work in defense industries, the makers of nuclear weapons, the Bishops stated:

We do not presume or pretend that clear answers exist to many of the personal, professional and financial choices facing you in your varying responsibilities. In this letter we have ruled out certain uses of nuclear weapons,

¹⁸⁴Bishops' Letter, *supra* note 89, at I., p. 3.

¹⁸⁵*Id.* at I., at 4.

while also expressing conditional moral acceptance for deterrence.¹⁸⁶

As long as deterrence is a morally acceptable step along the way toward mutual disarmament, it is plausible that individuals may morally manufacture nuclear weapons. If arms negotiations are not being conducted and are not contemplated, does deterrence then become morally unacceptable? If deterrence becomes unacceptable, what are the moral ramifications for individuals, civilians as well as military personnel? The Bishops do not even allude to these questions or pose answers.

To men and women in the military service the Bishops stated:

It is surely not our intention in writing this letter to create problems for Catholics in the armed forces. Every profession, however, has its specific moral questions and it is clear that the teaching on war and peace developed in this letter poses a special challenge and opportunity to those in the military profession.¹⁸⁷

The Bishops have raised specific moral problems that strike at the very heart of the military profession. Can individuals prepare to do in peace that which would be immoral to do in war? How can individuals serve in the military morally, obediently, and loyally, particularly if there is a limited, counterforce nuclear war? It is in this realm that the Bishops have hedged, opening a Pandora's Box for Catholic soldiers without giving them the wherewithal to answer these pressing moral questions. This lapse is a fundamental flaw in the letter. It is the primary responsibility of the Bishops to give concrete moral guidance to their followers, not to give political advice to government leaders. The Bishops have failed to give to their people what is needed, have failed to fulfill their primary responsibility and goal. They have talked at great length about God's challenge, but have failed to address realistically, clearly, and honestly the individual's response.

2. The Bishops and Selective Conscientious Objection

The overall moral position the Bishops have implicitly advocated is nuclear pacifism. How does this impact on the individual who elects to embrace that moral position? How does nuclear pacifism relate to United States law and Army personnel regulations?

¹⁸⁶*Id.* at IV.C, at 29.

¹⁸⁷*Id.* at IV.C., at 28.

The Bishops stated that they accept “the right in principle of a government to require military service of its citizens provided the government shows it is necessary.”¹⁸⁸ “At the same time, no state may demand blind obedience.”¹⁸⁹ The Bishops reiterated their support for general conscientious objection and for selective conscientious objection to participation in a specific war “either because of the ends being pursued or the means being used.”¹⁹⁰ They called for legislative recognition and protection of both classes of objectors.¹⁹¹

The Bishops advanced beyond Vatican Council II in respect to selective conscientious objection. The Council had called for general recognition and protection of persons who for reason of conscience refuse to bear arms, provided that they accept some other form of service to the human community.¹⁹²

The United States has made provision for conscientious objectors from its birth as a nation. In 1775, the Continental Congress announced its resolve to respect the beliefs of people who from religious principles could not bear arms in any war.¹⁹³ This exemption from military service was made during the Civil War, World War I, and World War II.¹⁹⁴ The refusal to participate in war in any form has remained the basis of this exemption ever since.¹⁹⁵

The United States Congress has determined that it is more essential to respect a man’s religious beliefs and opposition to war in any form that to force him to serve in the armed forces.¹⁹⁶ It is also true that exemption from military service based on conscientious objection is dependent upon the will of Congress and not upon the beliefs of the individual.¹⁹⁷ At no time has Congress recognized selective conscientious objection.

United States law at this time does not require any person to be subject to combatant training and service in the armed forces if the person, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.¹⁹⁸ Army regulations fur-

¹⁸⁸U.S. Bishops Pastoral Letter, *supra* note 89, at III.A.6, at 22.

¹⁸⁹*Id.* at III.A.6, at 22.

¹⁹⁰*Id.* at III.A.6, at 22.

¹⁹¹*Id.* at III.A.6, at 22.

¹⁹²*Gaudium et Spes*, *supra* note 139, at para. 79, at 316.

¹⁹³*United States v. Gillette*, 401 U.S. 437, 443 n.8 (1971).

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 443 n.5. (citing Dep’t of Defense, Directive No. 1300.6 (May 10, 1968)).

¹⁹⁷*United States v. Macintosh*, 283 U.S. 605, 623 (1931).

¹⁹⁸50 U.S.C. App. § 456(j) (1982).

ther implement this statute by providing that no person in the Army will be granted conscientious objector status based solely upon policy, pragmatism, expediency, or objection to a particular war.¹⁹⁹ In the case of *Gillette v. United States*,²⁰⁰ one of the petitioners was a Roman Catholic who objected to being drafted because he felt for moral reasons that the Vietnam war was unjust.²⁰¹ The Court upheld the Selective Service Act of 1967 and the law's provision that requires objection to war in all forms.²⁰² The Court stated:

Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." When the Government exacts so much, the importance of fair, evenhanded, and uniform decision making is obviously intensified. The Government argues that the interest in fairness would be jeopardized by expansion of § 6(j) to include conscientious objection to a particular war. Their contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decision making in administrative practice.

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war."

Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events.²⁰³

At the time of induction, those who are opposed to war in all forms can make their scruples known. If it is discovered that their beliefs are sincere, they will not be compelled to serve. However, if the Bishops's proposal for selective conscientious objection to both unjust wars and unjust means of warfare were implemented, numerous difficulties would arise. A conflict may begin as purely conventional. Mr. Smith is drafted and sent to Germany. After his arrival, counterforce nuclear weapons are used. The just war in which he was will-

¹⁹⁹U.S. Dep't of Army, Reg. No. 600-43, Personnel-General-Conscientious Objection, para. 1-7a (1 Aug. 1983).

²⁰⁰*Id.* 401 U.S. 437 (1971).

²⁰¹*Id.* at 440.

²⁰²*Id.* at 443.

²⁰³*Id.* at 455-56.

ing to serve and which had theretofore utilized only just means has been markedly changed. He can no longer serve because he believes unjust means, nuclear weapons, are being used. What does the Army do with Mr. Smith now? What can be done if there are a thousand Mr. Smith's in the theater of war?

Who will be responsible for determining whether a war is just or not? Who will determine whether or not the means of waging war are just? Would the Bishops contend that nuclear weapons are the only unjust means? Would the use of napalm be unjust? If the United States were in a conflict with Mexico, would that be an unjust war for Mexican-Americans? The potential basis for selective conscientious objection are inexhaustible. The Selective Service System would collapse under the multitude of claims of selective conscientious objection. The system could not operate in a fair and objective manner. The Bishops have not ventured to suggest how Congress should draft a practical law enacting selective conscientious objection.

Congress has seen fit to grant an exemption from military service to those who normally believe it is wrong to engage in any war. This is an exemption, not a right, that could be repealed should circumstances necessitate such an action. Unlike selective conscientious objection, it is not based on exterior circumstances that can change from day to day. Conscientious objection is based on a solid, interior conviction that war is wrong. It is an unchanging belief. That is the moral conviction Congress has chosen to protect and respect.

Selective conscientious objection based on a claim of the use of unjust means would undermine the mission of the armed forces, particularly during combat. A soldier could presumably always find a reason to object. If given a dangerous assignment, he might.

For all the reasons stated in *Gillette*, selective conscientious objection must be rejected. Selective conscientious objection based on unjust means presents a more serious threat because it is so dependent on ever changing circumstances. Objection based on unjust means of waging war injects uncertainty into the armed forces. The excellent soldier of today may become an objector and a liability tomorrow because he disapproves of the use of a particular weapon.

Selective conscientious objection is not an alternative because it depends on the particular whims and idiosyncracies of each individual.

The Bishops have stated that a nation has the moral obligation to defend its people from unjust aggression. Individual soldiers are the

very instruments of that defense. If the United States is to fulfill that moral obligation, it must have soldiers who are disciplined, predictable, and dependable to carry out the mission. Selective conscientious objection would undermine cohesion, discipline, and reliability.

Nuclear pacifism, while not recognized by Congress or the courts, is a movement that is gaining momentum. Does nuclear pacifism present problems to the armed forces? What challenges lie ahead for the Army due to this moral position?

3. *The Army and Selective Conscientious Objection*

Army regulations provide that, in order to receive an appointment **as** a Commissioned or Warrant Officer in the Regular Army, the individual must be willing to give unrestricted service to the United States. With the exception of a few categories of officers, a person cannot be a conscientious objector and must be willing to bear arms.²⁰⁴

A newly commissioned officer will be designated in an initial specialty at the time of appointment. Appointment to a particular branch and specialty is made according to the needs of the Army. The individual's desires are taken into account, but are not **controlling**.²⁰⁵

The enlisted ranks are filled by individuals who voluntarily enlist or are drafted when the Selective Service System is operational. Persons who profess conscientious objection or religious scruples at the time of application, which preclude unrestricted assignment, and who desire to enlist **as** noncombatants are disqualified from enlisting but may request a waiver from the Commanding General, United States Army Recruiting **Command**.²⁰⁶ An individual's desires will be considered **as much as** possible in determining a Primary Military Occupational Specialty. However, the needs of the Army will come first.²⁰⁷

²⁰⁴U.S. Dep't of Army, Reg. No. **601-100**, Personnel Procurement-Appointment of Commissioned and Warrant Officers in the Regular Army, para. **1-16** (16 Aug. **1981**) [hereinafter cited **as** AR **601-1001**].

²⁰⁵U.S. Dep't of Army, Reg. No. **611-101**, Personnel Selection and Classification-Commissioned Officer Specialty Classification System, para. **1-14** (1 Jan. **1982**) [hereinafter cited **as** AR 611-101].

²⁰⁶U.S. Dep't of Army, Reg. No. **601-210**, Personnel Procurement-Regular Army and Army Reserve Enlistment Program, Table **4-1** (1 Sept. **1982**).

²⁰⁷U.S. Dep't of Army, Reg. No. **600-200**, Personnel-General-Enlisted Personnel Management System, para. **2-11** (C1, **28** Oct. **1981**) [hereinafter cited **as** AR **600-200J**].

By regulation, the Army provides a means of assessing the reliability of individuals being considered for and assigned to nuclear duty positions.²⁰⁸ This program applies during peacetime and hostilities.²⁰⁹ The U.S. Army Nuclear Surety Program, of which the Personnel Reliability Program is a part, was established to provide policies and procedures and responsibilities for the safety, *security*, and reliability of nuclear weapons in the custody of the Army.²¹⁰ Commanders are required to remove from the nuclear surety program an individual whose reliability is *suspect*.²¹¹ In the absence of disqualifying evidence, selection for training and assignment to nuclear duty will be based on a positive attitude toward duties involving nuclear weapons and the objectives of the Personnel Reliability Program.²¹² The person who has been tentatively selected for nuclear duties will be interviewed by the immediate commander or designated representative. The commander must determine whether the individual has a positive attitude toward nuclear-related duties.²¹³ The individual is under an obligation to report promptly any factors or conditions that may adversely affect his performance or that of a fellow worker.²¹⁴ Disqualification from the Personnel Reliability Program will neither be considered an adverse personnel action nor an adverse reflection upon the individual²¹⁵

Nuclear pacifism, a form of selective conscientious objection, does not comport with Army personnel policies. Individuals who desire to serve in the Regular Army must be willing to give unrestricted service.²¹⁶ Nuclear pacifism and unrestricted service are mutually exclusive and incompatible. If, at the time of enlistment or appointment, an individual gives no thought to nuclear weapons, moral scruples or objections should be expressed during the required Personnel Reliability Program suitably *interview*.²¹⁷ An individual may involuntarily find himself assigned to a specialty and **Branch**²¹⁸ or Military Occupational Specialty²¹⁹ that requires him to perform duty

²⁰⁸U.S. Dep't of Army, Reg. No. 50-5, Nuclear and Chemical Weapons and Material-Nuclear Surety, para. 3-1 (1 June 1983) [hereinafter cited as AR 50-5].

²⁰⁹*Id.* at para. 3-3.

²¹⁰*Id.* at para. 1-1.

²¹¹*Id.* at para. 3-3.

²¹²*Id.* at para. 3-11.

²¹³*Id.* at para. 3-13.

²¹⁴*Id.* at para. 3-16.

²¹⁵*Id.* at para. 3-20.

²¹⁶AR 601-100, para. 1-15.

²¹⁷AR 50-5, para. 3-13.

²¹⁸AR 611-101, para. 1-14.

²¹⁹AR 600-200, para. 2-11.

related to nuclear weapons. If an individual is opposed to performing nuclear-related duties, it is incumbent upon him to be honest and direct about his moral scruples during the suitability interview.²²⁰ If an individual, already in the Personnel Reliability Program, develops a nuclear pacifist position, then his moral principles should dictate that he report, **as** required by **regulation**,²²¹ that he no longer can serve in such a position. If an individual discloses these moral scruples during the suitability interview or should the scruples develop after admission to the Personnel Reliability Program, his disqualification will not be considered an adverse personnel action or reflect adversely upon **him**.²²² The Army provides individuals with the opportunity to make their moral scruples known without fear of punishment or retribution. It is the individual's responsibility to be forthright. If an individual is later discovered to have been dishonest during the suitability interview or while in the Personnel Reliability Program, then punitive or adverse administrative action would be appropriate. Nuclear pacifists in nuclear-related duty positions undermine security and the mission.

Nuclear pacifism appears to be a growing phenomenon. It is not a movement restricted to Roman Catholics or other religious groups. Many of these individuals may be willing to serve in positions that are of a conventional nature. When applying for enlistment or appointment, an individual is not asked if he is opposed to the use of any or all nuclear weapons. Individuals in the Volunteer Army may be filling nuclear-related duty positions for the sake of job and material security; they may have no intention **of** launching a nuclear weapon if ever ordered to do *so*. If conscription is ever again used to fill the ranks of the military, individuals may fill nuclear positions deliberately to insure that nuclear weapons are not launched. Some individuals will not think about the consequences of firing nuclear weapons until they are ordered to launch them. It may be then that they realize they are in fact nuclear pacifists. In order to safeguard its mission, it may be necessary for the Army to develop questions to be asked of **all** persons applying for enlistment or a commission respecting moral or religious scruples about nuclear weapons.

Law and Army regulations do not recognize any form of selective conscientious objection. Assignment of personnel to duty positions ultimately must serve the needs of the Army, not the individual.

²²⁰AR 50-5, para. 3-13.

²²¹*Id.* at para. 3-16.

²²²*Id.* at para. 3-20.

However, if nuclear pacifism becomes widespread, the Army may be required to reassess its personnel policies so that it can at least use nuclear pacifists in conventional warfare roles during time of war.

The Bishops' advocacy of selective conscientious objection is impractical and begs many serious questions. Who is to determine if a war is just or unjust in nature? Who is to determine if the means of waging the war are just or unjust? If all Christians in the Western World opt for total pacifism, who will protect our nation and allies from "aggression, oppression, and **injustice**"?²²³ If the Bishops do not begin to answer these questions, and more, give clear moral guidance to their people, and thereby give legislators and the military a clear idea of how to carry out their duties and attempt to accommodate those with religious or moral scruples, then the answers may not be forthcoming.

IV. CONCLUSION

The challenge presented by nuclear weapons has not been met, although it can be observed that forty years have passed since Hiroshima and Nagasaki and nuclear weapons have not been used again. At least the nations of the world have avoided nuclear holocaust thus far.

Principles of customary international law, military necessity, proportionality, and avoidance of unnecessary suffering apply in different manners to countervalue nuclear weapons and counterforce nuclear weapons.

With respect to countervalue nuclear weapons, the policy of mutual deterrence is an inverse application of these principles. These rules of customary law keep nations in a stalemate. They make sense only in the context that mutual destruction is not worth unleashing the destructive forces of countervalue weapons. These rules of customary international law have always been applied during war to reduce destruction and carnage, to make conflict as humane as possible. For the first time these rules are being applied during an era of peace, or at least during the absence of conflict between superpowers. If the nuclear arsenals of the United States and Soviet Union are unleashed, customary international law will be powerless to control countervalue warfare. Such rules of law only

²²³Bishops' Letter, *supra* note 89, at I.C.3, at 9.

matter to nations and governments that will survive war. Nuclear holocaust eviscerates law and morality. The only international legal value in countervalue nuclear weapons lies in their application through the practice of a balance of power and deterrence. Until nations can learn to trust each other and dismantle the countervalue nuclear stockpiles, the only safe alternative is to apply customary international law through the practice of mutual deterrence.

Counterforce nuclear weapons could be utilized in accord with principles of military necessity, proportionality, and avoidance of unnecessary suffering. Army planning has incorporated these principles in its tactical nuclear doctrine. Such weapons may further the aims of international law. A conflict could be more limited in scope, area, and duration. A nation may quickly decide that it is better to negotiate than to risk a long-term war or nuclear holocaust. Nations must establish means of communicating prospectively so that, if conflict ensues and counterforce nuclear weapons are used, the adversary will not mistakenly instigate countervalue nuclear war.

The American Roman Catholic Bishops' pastoral letter is an important omen to observe and study because it influences many people and voices opinions shared by many outside their Church. In their application of theological and moral doctrine to countervalue nuclear warfare, the Bishops parallel the traditional application of customary international law principles. However, they do not see how those same principles function through the policy of mutual deterrence. They are willing to accept deterrence only as a step toward mutual disarmament. Even if the nuclear stockpiles are reduced to nothing, how long can lack of trust and the knowledge of how to construct such weapons be kept in Pandora's Box? With respect to counterforce nuclear weapons, the Bishops doubt that their use could be controlled. They doubt that they could be used proportionally and without causing disproportionate loss of civilian life and damage to the environment. Plans have been drawn up for their use, plans devised according to principles of customary international law. Being limited in capacity, imperfect human beings can only make plans that fall short of absolute certainty. If the Bishops are awaiting certainty before they decide to absolutely condemn or absolve limited, counterforce nuclear weapons, they will have to wait forever. All that people can hope for is that nations will adopt Protocol I and apply its rules not only to conventional warfare, but to limited, counterforce nuclear warfare as well

People are terrified of nuclear holocaust and nuclear weapons. They are looking for guidance on what to do as individuals in peace and war. The Roman Catholic Church has been an institution that

has given people concrete moral directives for centuries. The American Roman Catholic Bishops wrote their letter to give guidance to their people. They failed. They hedged and hid behind words like "we do not presume."²²⁴ They stated: "It is surely not our intention in writing this letter to create problems for Catholics in the armed forces."²²⁵ Nearly twenty years ago, Vatican II taught that Christians cannot engage in countervalue warfare of any kind. The Bishops only echoed that teaching. The Bishops set out to give moral guidance to individuals but created instead only more confusion. While individuals of conscience would rejoice over disarmament and the removal of the nuclear threat, they realize that, if it is ever to occur, it will take many years. While living with the threat, many many wonder what will happen to their immortal souls if they must order nuclear missiles to be launched or must carry out the order. They look to their religious leaders for answers so they can make the choice responsibly. These people may fear death in no matter what guise it comes, but going to meet their God, having violated his law, is the ultimate fear. The Bishops are charged, within their Church and faith, with guiding the immortal souls of individuals. The Bishops gave a lucid commentary on theology as applied to politics and military strategy. They devised a marvelous schema for demolishing all means of warfare, conventional and nuclear. In the final analysis, they failed because they left their people stranded in uncertainty.

The Bishops came very near to openly advocating nuclear pacifism; it is implied in ail that they write. However, short of an open declaration of that position, they advocated legislation exempting selective conscientious objectors from wars that they deem to be unjust and wars in which unjust means are employed. American law does not recognize selective conscientious objection. It is a solution that is unworkable. It has been rejected by the Supreme Court and Congress. Personnel who have moral scruples about nuclear weapons are not assigned to nuclear related duties for reasons of security. Army personnel who screen individuals before admitting them to the Personnel Reliability Program and who monitor individuals in the program cannot read minds. It is, therefore, incumbent upon individuals to express their moral reservations.

The Army's personnel regulations and Personnel Reliability Program are sound, when isolated from the question of nuclear

²²⁴*Id.* at IV.C, at 29.

²²⁵*Id.* at IV.C, at 28.

pacifism. The Army has promulgated the Personnel Reliability Program in order to insure the security and reliability of its nuclear mission. The screening procedure is not a recognition of nuclear pacifism; individuals are dropped from the program for drug and alcohol abuse as well. It is a program aimed simply and solely at maintaining security and reliability. Those excluded or dropped from the program are not released from military service. They are re-assigned to other military duties, duties that could demand from them active service during armed conflict.

However, the Army must prepare to deal with soldiers who emerge as nuclear pacifists during time of armed conflict. This concern should not be focused solely on Roman Catholics because the anti-nuclear movement transcends religious groups and particular faiths.

Nuclear pacifism will not threaten the military mission and national security if the conflict is of a conventional nature. If nuclear weapons of any type are used, soldiers who are nuclear pacifists could create numerous problems. Some may be willing to serve in positions totally divorced from nuclear weapons. Others may lay down their weapons and refuse to serve in any capacity. The latter group will believe that if they participate in any way they will be indirectly supporting the use of nuclear weapons. Indirect support is as morally culpable to them as direct support. Some soldiers may refuse to launch counterforce and countervalue nuclear weapons. Others may refuse to deliver supplies to nuclear-capable units. Some will refuse to serve at all. In the midst of conflict, such dissent could spell disaster for the military.

The destructive potential of nuclear weapons evokes a wide range of human emotions. The thought of killing thousands of civilians at the touch of a button gives many people pause. Before the advent of nuclear weapons, individuals did not have to deal with such thoughts. Conventional warfare, as devastating as it can be, permits survival. Because nuclear weapons could produce universal holocaust, individuals view future war from a different perspective. The Army and the other services must be prepared to deal with the emotion, doubts, and moral questions that surround the use of nuclear weapons. Ignoring these questions will not make them disappear.

Nuclear pacifists are not exempt from military service; they are not opposed to all wars. Therefore, they do not come under the legislative exemption granted to conscientious objectors by Congress. These individuals will not give unrestricted service because of their moral convictions. The only personnel in the Army who are ques-

tioned about their attitudes regarding nuclear weapons are those who are going to be assigned to nuclear-related duties. The attitudes of all other personnel are not questioned or probed. If nuclear pacifists refuse to perform duties, the moral dissidents will appear in all branches and military occupational specialties.

Moral dissent may be stronger among nuclear pacifists. If they believe that they are going to perish in nuclear holocaust, they will be more resolute in defending their moral beliefs. If they believe they are going to die, they will want to die knowing they can face their God without having betrayed their beliefs.

The military cannot wait to confront nuclear pacifism and its variations until they surface during armed conflict. The military must act prospectively. All those who want to voluntarily join the military and those who may be drafted should be questioned about their attitudes regarding the use of nuclear weapons. Would they be willing to serve if countervalue weapons were used? Would they be willing to serve if counterforce weapons were used? Would they refuse to serve in any capacity if nuclear weapons were used? It must also be recognized that some soldiers will not know the answers to such questions. They may be searching for clear moral guidance so that they can resolve their moral dilemma.

The anti-nuclear movement is growing. The American Roman Catholic Bishops exemplify one fraction of that cause. The military cannot afford to ignore it.

International law will be of no help if countervalue nuclear weapons are unleashed. However, the same principles of international law can be used to regulate counterforce nuclear strategy. The Army's strategic planning for the use of counterforce weapons measures well against international law. The policymakers of the United States who seek mutual deterrence have applied international law principles well, although in a novel manner. They have kept nuclear holocaust at bay for nearly forty years. Law and policy with regard to conscientious objection is fair, sensible, and practical. The greatest failure to be noted is in the field of morality. The problems have been raised, but real guidance has not been forthcoming. If war should come, it is the individual soldier of conscience who will suffer the most. He will want to be moral, do his duty, and do that which is right. He will not know what his ultimate duty is or what is morally right. His loyalties, emotions, and thoughts will be torn asunder. The American Roman Catholic Bishops have told the individual soldier that his nation must defend its people against unjust aggression. At the same time, he knows that the Bishops say

nuclear weapons should not be used against civilians, nor should they be used under other circumstances. What exact circumstances? He **has** not been told. So, he is torn between one moral duty, to defend his nation, and the moral duty to defend it only with just means. Had the Bishops fulfilled their moral obligation to give clear moral guidance, even if that meant openly embracing nuclear pacifism, the individual soldier would at least have had a clearly defined choice.

This crisis of conscience may not occur until a war has begun and nuclear weapons are used. The soldier will then face, not an abstract crisis, but one that is real and demands some choice. He will have to decide in a virtual vacuum because his spiritual mentors would not presume to give guidance. This uncertainty could threaten national security.

The ultimate challenge of nuclear weapons, to live in peace or die, has not been met. The challenge may have only been postponed. If nations are to survive, their leaders must continue to negotiate, but they all must learn to do so in honesty and trust. They must renounce foisting their brand of peace on other nations. They must ultimately learn to define the words peace, justice, and human rights in the same way. The more time that passes without such agreements, the more likely it is that nations and their peoples will come to accept this ultimate threat as the status quo and become complacent and falsely secure in the notion that it hasn't happened yet so it never will.

Since 1945, nuclear weapons have not been used. There is still time for nations to disarm so that they will never be used again. Let it not be forgotten, that amidst all the horrors that escaped from Pandora's **Box**, the last spirit to emerge was Hope.

AERIAL INTRUSIONS BY CIVIL AND MILITARY AIRCRAFT IN TIME OF PEACE

by Major John T. Phelps II*

This article examines the nature of military and civil aerial intrusions into the airspace of other states. It explores the acceptable responses under international law that an overflown state may make in response to an aerial violation of its territorial sovereignty. This article concludes that force may be used against military intruders but a requirement to warn and an opportunity to turn away or land exists under certain circumstances. Force may not be used against civil aerial intruders unless in self-defense as defined in the United Nations Charter.

“We state, in the Soviet territory the borders of the Soviet Union are sacred”

Soviet Foreign Minister Andrei Gromyko in justifying the
destruction of Korean Airliner Flight 007 and its 269
passengers and crew.¹

I. INTRODUCTION

A. THE KOREAN AIRLINES 007 INCIDENT

The issue of the sovereignty of a nation's airspace was put to the test on August 31, 1983 at 1400 hours Greenwich Mean Time (GMT), when a Korean Air Lines Boeing 747, Flight 007, departed from John F. Kennedy International Airport for a flight to Seoul, Republic of Korea. It made one scheduled stop at Anchorage, Alaska for refueling and a crew change. It carried 269 passengers and crew for the final flight to Seoul.² The passengers represented 14 different na-

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¹Secretary of State George Shultz quoting Andrei Gromyko in a statement made in Madrid, Spain on September 7, 1983. Dep't St. Bull., Oct. 1983, at 1, 3.

²*Id.* at 1.

tions and included Congressman Lawrence P. McDonald, a Member of the U.S. House of Representatives.³

Shortly after its departure from Anchorage, Korean Airlines Flight-007 began deviating to the right, north, of its assigned flight path. This gradual deviation caused it to penetrate the airspace above the territorial waters of the Soviet Union as well as portions of Soviet territory on the Kamchatka Peninsula and Sakhalin Island.⁴ Upon contacting air traffic control on Tokyo, Japan, the pilot of KAL-007 gave his position as east of Hokkaido, Japan; in fact, he was off course by more than 100 miles.⁵ This transmission occurred at 1709 hours (GMT), well after Soviet radar had begun tracking KAL-007, and approximately 78 minutes before Soviet fighters attacked the **airliner**.⁶

Soviet radar units began tracking the airliner at approximately 1600 hours (GMT). On two separate occasions, Soviet fighters were dispatched to intercept the intruder. At 1812 hours (GMT), a Soviet pilot reported that he had visual contact with the aircraft. At 1826 hours (GMT), the Soviet pilot reported that he had fired an air-to-air missile and that the target was destroyed. Twelve minutes later, the Korean airliner disappeared from the radar screen.⁷

The last transmission from KAL-007 advised Tokyo Air Traffic control that they were undergoing rapid decompression. There **was** no indication that the pilot knew that the reason for the decompression was that the aircraft had been hit by an air-to-air missile.⁸

KAL-007 crashed and sank in the Sea of Japan somewhere southwest of Sakhalin Island. There were no **survivors**.⁹ Search and rescue efforts by the Soviet Union, Japan, Republic of Korea, and the United States resulted in the recovery of fragmentary pieces of the airliner, several items of personal property belonging to passengers, and portions of the bodies of three adults and one **child**.¹⁰

³*Id.* at 6.

⁴Report of ICAO Fact-Finding Invest. 1 (Dec. 1983). See also Dep't St. Bull., Oct. 1983, at 1, 3.

⁵Dep't St. Bull., Oct. 1983, at 1, 7.

⁶*Id.* at 3.

⁷*Id.* at 4. See also Report of ICAO Fact-Finding Invest. 1, App. C, at C-8 (Dec. 1983).

⁸Report of ICAO Fact-Finding Invest. 1, App. C, at C-10 (Dec. 1983).

⁹*Id.* at 1.

¹⁰Kessings Contemporary ARchives 32613 (Nov. 1983).

B. INTERNATIONAL REACTION TO THE KAL-007 INCIDENT

World reaction to the destruction of a civilian airliner by Soviet military aircraft was swift and highly critical. In outlining the American response to the attack, President Ronald Reagan called it a "crime against humanity" and an "atrocious."¹¹ On September 2, the Australian Minister of Foreign Affairs, Bill Hayden, stated:

There is no circumstance in which any nation can be justified in shooting down an unarmed civilian aircraft serving no military purpose. The fact that an aircraft may have strayed into Soviet airspace and the fact that the Soviet Union refuses to recognize the existence of the Republic of Korea provide no justification for an attack on the aircraft.¹²

A spokesman for the French government said that the attack on the airliner "placed in question the principles which govern international relations and respect for human life," while the Italian government referred to it as "a mad gesture of war."¹³ Similar protests and statements were issued by governments throughout the world, including the Vatican and the People's Republic of China.¹⁴

In a letter to the President of the United Nations Security Council Charles M. Lichenstein, the Acting Permanent Representative of the United States stated:

The United States Government considers this action of Soviet military authorities against a civil air transport vehicle a flagrant and serious attack on the safety of international civil aviation.

This action by the Soviet Union violates the fundamental legal norms and standards of international civil aviation. These norms and standards do not permit such use of armed force against foreign civil aircraft. There exists no justification in international law for the destruction of an identifiable civil aircraft, an aircraft which was tracked on radar for two-and-one-half hours, and which was in visual contact of Soviet military pilots prior to being deliberately shot down.

¹¹Dep't St. Bull., Oct. 1983, at 1, 6-7.

¹²Korean Overseas Infor. Serv., *Massacre in the Sky* 39-40 (1983).

¹³Keesings Contemporary Archives 32514 (Nov. 1983).

¹⁴*Id.* See also Korean Overseas Infor. Serv., *Massacre in the Sky* 23-32 (1983).

It is the considered position of the Government of the United States of America that this unprovoked resort to the use of force by the Soviet military authorities in contravention of International Civil Aviation Organization standards and the basic norms of international law must be deplored and condemned by the international community and by world public opinion.¹⁵

C. THE SOVIET RESPONSE

The initial Soviet response on September 1, 1983 was that an unidentified aircraft had twice violated Soviet airspace and had ignored attempts by Soviet interceptors to guide it to a Soviet airfield for a landing. The report further said that the aircraft was operating without navigation lights. There was no mention of the airliner being attacked and destroyed by Soviet aircraft. The next day, the Soviets announced that their aircraft had fired tracer shells to warn the aircraft but that the aircraft had ignored the warning and continued its flight.¹⁶ It was not until September 6 that the Soviets announced that, after attempts to communicate with the intruder on the international emergency frequency, 121.5 megacycles (MHz), and after tracer shells had been fired across the path of the intruder, did the pilot fulfill "the order of the command post to stop the flight."¹⁷

The Soviet News Agency TASS asserted that the attack on the airliner was "fully in keeping with the law on the state border of the USSR" and that the Soviet Union would "continue to act in keeping with [Soviet] legislation" as the Soviet Union had a right to protect its borders and its airspace.¹⁸

In a preliminary report of the Soviet Accident Investigation Commission, the Soviets concluded that the deviation by KAL-007 was a "preplanned intelligence gathering and provocative mission" by the United States and Korea.¹⁹ The Soviet report alleged that KAL-007 had been in contact with a United States Air Force RC-135 reconnaissance aircraft and that the two aircraft flew together for some

¹⁵Dep't St. Bull., Oct. 1983, at 1, 3.

¹⁶*Id.* at 8.

¹⁷Keesings Contemporary Archives 32514 (Nov. 1983).

¹⁸*Id.*

¹⁹Report of ICAO Fact-Finding Invest. 1, App. F, at F-10 (Dec.1983).

time.²⁰ The report noted that the aircraft was flying over strategic areas of the Soviet Union.²¹

Concerning the interception, the Soviet report stated:

The second interception took place in the vicinity of Sakhalin Island. The intruder aeroplane was still flying with its navigation and strobe lights switched off and the cabin lights extinguished. Interception procedures were initiated at **22.16** Moscow time on **31 August 1983 (06.16** local time on **1 September 1983)** when the intruder aeroplane crossed the State frontier. During the interception the intercepting aircraft flashed its light repeatedly and rocked its wings to attract the attention of the intruder aircraft's crew. At the same time the interceptor endeavoured to establish radiocommunication on the emergency frequency of **121.5 MHz**.

The intruder aeroplane did not respond to the actions of the interceptor.

On the order of the ground control unit the interceptor, in addition to the procedures already described, fired four warning bursts of tracer shells from its guns at **22.20** Moscow time on **31 August 1983 (06.20** Sakhalin time on **1 September 1983)**. Altogether **120** shells were fired. The intruder aircraft did not react to this action either.

Having concluded that the unknown intruder aeroplane was an intelligence aircraft, the Area Air Defence Command decided to terminate its flight. On instructions from the ground control unit the pilot of the **SU-15** interceptor launched two rockets at the intruder aeroplane at **22.24** Moscow time on **31 August 1983 (06.24** Sakhalin time on **1 September 1983)** over the territory of the USSR and turned back to its base aerodome.²²

²⁰*Id.* at 3. The United States admitted that an RC-1353 reconnaissance aircraft had been operating off the Kamachatka Peninsula for the purpose of monitoring Soviet compliance with the SALT treaties. The Soviet claim that it was an a joint mission with KAL-007 was denied. The United States pointed out that the two aircraft were no closer than 75 nautical miles and that, at the time of actual interception of KAL-007, the RC-135 had been at its base in Alaska for over one hour. The United States argued that no military pilot using proper intercept procedures could mistake a Boeing 747 airliner with an RC-135 military reconnaissance aircraft. Dep't St Bull., Oct. 1983, at 1, 19.

²¹Report of ICAO Fact-Finding Invest. 1, App. F at **F-6** (Dec. 1983).

²²*Id.* at F-6.

In justifying the interception and attack, the report stated:

The intruder aeroplane's penetration of USSR airspace resulted in the violation of Soviet law, the 1944 Chicago Convention and the Standards of ICAO [International Civil Aviation Organization]. The actions of the crew of the intruder aeroplane, which conflicted with the provisions of national and international legal rules governing the conduct of international flights by civil aircraft, in conjunction with other circumstances, led to the conclusion that this violation of the State frontier of the USSR was pre-planned.²³

The Soviet report concluded:

The actions of the Soviet anti-aircraft defence interceptors were conducted in strict conformity with current Soviet legislation and the provisions set out in AIP [Airman's Information Publication] USSR. The intruder aeroplane ignored the actions of the intercepting fighters and altered its heading, altitude and flight speed, which proves that the crew was in full control of the flight. In view of the complete refusal of the intruder aeroplane to obey the instructions given by the Air Defense aircraft, the intruder aeroplane's flight was terminated on orders from the ground.²⁴

The Soviet explanation was contradicted by intercepted tape recordings of transmissions between the interceptors and their ground control unit. These tapes were played before the United Nations Security Council on September 6, 1983 by the U.S. Ambassador, Jeane Kirkpatrick. The tapes revealed that, contrary to the Soviet reports, the interceptor pilot reported on three separate occasions that the airliner's navigation lights were on. At no time did the pilot report firing any tracer rounds as a warning; the only reported firing was the launch of two missiles. The Soviets alleged that the interceptor pilots tried to communicate with the airliner by visual signal and radio. Yet, at no time did the tapes indicate that the interceptor pilots reported to the ground control unit any attempt to communicate with the airliner by radio or aerial maneuver. Ambassador Kirkpatrick suggested that Soviet military aircraft are technically incapable of communicating on the international emergency

²³*Id.* at F-7.

²⁴*Id.* at F-15.

frequency. The tapes showed that the interceptor which attacked KAL-007 had had the airliner in sight twenty minutes before firing the missiles. At no time did the pilot on his own initiative or at the request of the ground control unit attempt to visually identify the aircraft as civilian or military, nor was there an attempt to examine the aircraft's markings. The only recorded attempt at identification was the use of electronic interrogation by the IFF (identify friends or foes) system. However, only military aircraft carry this system and a civilian airliner would not respond to electronic interrogation of this type.²⁵

D. INTERNATIONAL ACTION AGAINST THE SOVIET UNION

The Soviet explanation was rejected by the majority of nations. Many nations, in accordance with international practice, imposed sanctions against the Soviet Union. The United States reacted by suspending negotiations in a number of cultural, economic, and scientific areas.²⁶ The ban on the Soviet airline, Aeroflot, was reaffirmed and several Aeroflot offices in the United States were closed.²⁷ Canada, Japan, Switzerland, most NATO countries, and a number of other nations imposed a ban on Aeroflot landings for periods ranging from **14** to **60 days**.²⁸

In the private sector, the International Federation of Air Line Pilot's Associations, representing some 57,000 affiliated members from **67** countries, passed a recommendation that its members not fly to the Soviet Union for a period of 60 days. Numerous national airline pilot associations followed suit with Finnish, British, Dutch, West German, Irish, French, and Spanish pilots refusing to fly to the Soviet Union.²⁹

On September **12, 1983**, nine members of the United Nations Security Council approved a draft resolution that provided in part:

Gravely disturbed that a civil air liner of the Korean Airlines on an international flight was shot down by

²⁵Dep't St. Bull., Oct. 1983, at 1, 8-9. For a complete transcript of the tapes, see Report of ICAO Fact-Finding Invest. 1, App. D, at D-1 - D-4 (Dec. 1983).

²⁶Keesings Contemporary Archives 32513 (Nov. 1983) See also Dep't St. Bull., Oct. 1983, at 1, 6-8.

²⁷*Id.*

²⁸Keesings Contemporary Archives 32516 (Nov. 1983).

²⁹*Id.*

Soviet military aircraft, with the loss of all 269 people on board,

Expressing its sincere condolences to the families of the victims of the incident, and *urging* all parties concerned, as a humanitarian gesture, to assist them in dealing with the consequences of this tragedy,

Reaffirming the rules of international law that prohibit acts of violence which pose a threat to the safety of international civil aviation,

Recognizing the importance of the principle of territorial integrity as well as the necessity that only internationally agreed procedures should be used in response to intrusions into the airspace of a State,

Stressing the need for a full and adequate explanation of the facts of the incident based upon impartial investigation,

Recognizing the right under international law to appropriate compensation,

1. *Deeply deploras* the destruction of the Korean air liner and the tragic loss of civilian life therein;

2. *Declares* that such use of armed force against international civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity;

3. *Urges* all States to comply with the aims and objectives of the Chicago Convention on International Civil Aviation;³⁰ . . .

The draft was approved by the United States, the United Kingdom, France, Jordan, Malta, the Netherlands, Pakistan, Togo, and Zaire. It was opposed by Poland and the Soviet Union which, for the 116th time, used its veto in the Security Council.³¹

³⁰Dep't St. Bull., Oct. 1983 at 1, 14-15.

³¹Keesings Contemporary Archives 3215-16 (Nov. 1983). Four countries: China, Guyana, Nicaragua, and Zimbabwe abstained in the vote. The Soviet permanent representative claimed that the resolution was merely an attempt by the United States to distract world attention from the persons responsible for the tragedy and that KAL-007 was used "as a shield for unsavory and inhuman operations." *Id.*

Another international organization to consider the KAL-007 incident was the International Civil Aviation Organization (ICAO), headquartered in Montreal Canada. The ICAO was created by Article 43 of the Convention on International Civil Aviation of 1944,³² also known as the "Chicago Convention," for the purpose of aiding in the planning and development of international civil aviation.³³ The ICAO, working through its two sub-groups, the Air Navigation Commission³⁴ and the Air Transport Committee,³⁵ has created a framework for the functioning and control of international aviation among member nations. An affiliate organization of the United Nations,³⁶ the ICAO is the only major international organization devoted to the development of international aviation.

The ICAO considered the KAL-007 incident at the request of Canada and the Republic of Korea. The ICAO Council met in Extraordinary Session on September 15 and 16, 1983 to consider the incident.³⁷ On September 17, the Council adopted a resolution which provided in part:

HAVING CONSIDERED the fact that a Korean Air Lines civil aircraft was destroyed on September 1, 1983, by Soviet military aircraft,

EXPRESSING its deepest sympathy with the families bereaved in this tragic incident.

URGING the Soviet Union to assist the bereaved families to visit the site of the incident and to return the bodies of the victims and their belongings promptly.

DEEPLY DEPLORING the destruction of an aircraft in commercial international service resulting in the loss of 269 innocent lives.

RECOGNIZING that such use of armed force against international civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and invokes generally recognized legal consequences.

³²Chicago Convention on International Civil Aviation, 61 Stat. 1180 (1944); T.I.A.S. 1591: 15 U.N.T.S.295.

³³*Id.* at Art. 44.

³⁴*Id.* at Arts. 56-57.

³⁵*Id.* at Art. 54.

³⁶9 M. Whiteman, *Digest of International Law* 393 (1968).

³⁷ICAO Bull., Nov. 1983, at 10.

REAFFIRMING the principle that States, when intercepting civil aircraft, should not use weapons against them.

CONCERNED that the Soviet Union has not so far acknowledged the paramount importance of the safety and lives of passengers and crew when dealing with civil aircraft intercepted in or near its territorial airspace.

EMPHASIZING that this action constitutes a grave threat to the safety of international civil aviation which makes clear the urgency of undertaking an immediate and full investigation of the said action and the need for further improvement of procedures relating to the interception of civil aircraft, with a view to ensuring that such tragic incident does not recur.

(1) DIRECTS the Secretary General to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft and to provide an interim report to the Council within 30 days of the adoption of this Resolution and a complete report during the 110th Session of the Council³⁸

The International Civil Aviation Fact Finding Investigation sanctioned by the resolution was completed in December 1983. In considering the reasons why the airliner may have been off course, the report dismissed **as** too unlikely to warrant further investigation the possibilities of unlawful interference, crew incapacitation, and extensive avionics/navigation systems failure or malfunction. They also dismissed **as** implausible the theory raised by some that the airliner had been deliberately flying off course to save fuel³⁹ Based upon Soviet reports and observations by Japanese civil and defense force **radar**,⁴⁰ the report found no records of any such previous deviations. The report also discounted Soviet allegations that the airliner was on **an** intelligence-gathering mission. The Soviets had alleged that KAL-007 had delayed its departure time to coordinate with American intelligence aircraft and satellites. The report found that the departure was timed instead to coordinate with a navigational satellite's orbital position.⁴¹ The investigation concluded that

³⁸*Id.* at 10-11.

³⁹Report of ICAO Fact-Finding Invest. 1, at 2 (Dec. 1983).

⁴⁰*Id.* at 33.

⁴¹*Id.* at 36.

the most likely explanation for the course deviation of KAL-007 was crew error through the improper use and programming of navigational equipment. The report noted that this type of error assumed “a considerable degree of lack of alertness and attentiveness on the part of the entire flight crew but not to such a degree that is unknown in international civil aviation.”⁴²

The ICAO also investigated the evidence concerning the identification, signalling, and communication procedures used by the Soviets during the interception and found that interceptions of KAL-007 had been attempted by USSR military interceptor aircraft, over Kamchatka Peninsula and in the vicinity of Sakhalin Island. Moreover, the USSR authorities had assumed that KAL-007 was an “intelligence” aircraft; therefore, they did not make exhaustive efforts to identify the aircraft through in-flight visual observations. KAL-007’s climb from FL 330 to FL 350 during the time of the last interception, a few minutes before its flight was terminated, was thus interpreted as being an evasive action, further supporting the presumption that it was an “intelligence” aircraft. As the ICAO was not provided any radar recordings, recorded communications or transcripts associated with the first intercept attempt or for the ground-to-interceptor portion of the second attempt, it was not possible to fully assess the comprehensiveness or otherwise of the application of intercept procedures, signalling and communications. Finally, in the absence of any indication that the flight crew of KAL-007 was aware of the two interception attempts, the report concluded that they were not.⁴³

Based upon the ICAO Fact-Finding Investigation, the ICAO’s 33 member governing council voted 20 to 2, with 9 abstentions, to condemn the Soviet Unions’ destruction of KAL-007 as violative of accepted international practice. The resolution also condemned the Soviet’s failure to cooperate in the search and rescue efforts of other involved nations and with the ICAO investigation of the incident. Following the vote, the Soviet delegate withdrew a counter-resolution accusing the United States and Japan of withholding information on the incident.⁴⁴

⁴²*Id.* at 3.

⁴³*Id.*

⁴⁴N.Y. Times, Mar. 7, 1984, at A4, col. 2.

II. INTERNATIONAL STANDARDS REGARDING SOVEREIGNTY OVER AIRSPACE

A. DEVELOPMENT OF THE CONCEPT OF SOVEREIGNTY

The destruction of KAL-007 and its 269 passengers and crew is rooted in the widely accepted principle of international law that every state has complete and exclusive sovereignty over the airspace above its territory and territorial waters. Although this principle has long been accepted by all nations and while essential to the problem of aerial intrusions, it is not the primary issue.

The real issue involves not a question of sovereignty in the strict sense but the nature of the response to aerial intruders by the overflown state. By its terms, complete and exclusive sovereignty implies an absolute right to take whatever action the offended state deems appropriate. However, this has not been the case both according to custom and agreement. Responses became dependent upon whether the aircraft were civilian or military, whether the aircraft were in distress, the apparent hostile or peaceful intentions of the aircraft, the existence of a state of war or peace, and the existing political climate.

Historically, responses to unauthorized aerial intrusions have included indifference, forcing the intruder to leave the airspace or to land, control of the intruder's movements until it exited the overflown state's airspace, and hostile action against the intruder. In addition to such immediate remedies, resort to the local courts of the offended sovereign, international judicial and administrative actions, and diplomatic measures have also been utilized.

The issue of aerial sovereignty was given little attention until the early part of the twentieth century. When the brothers Montgolfier first sent aloft a silk balloon filled with hot air and carrying a rooster, a sheep, and a duck in 1783,⁴⁵ those witnessing the event did not envision the problems that aerial flight would create. Aerial flight was more of a curiosity than a serious mode of transportation, communication, or power.

The threat to security posed by aerial flight was first demonstrated in the military context. Balloons were used for artillery spotting in

⁴⁵D. Johnson, *Rights in Airspace* 7 (1965).

the French Revolution and, in 1849, the Austrians used bomb laden balloons during the siege of Venice. During the American Civil War, balloons were used to gather intelligence and for artillery spotting.⁴⁶ The military impact of a form of transportation that could easily cross defended borders was becoming increasingly apparent. By the turn of the century, the issue of sovereignty over airspace was the most discussed question in international aviation law. This question became critically important when the Wright brothers ushered in the age of powered flight.

Prior to World War I, there were four main theories regarding aerial sovereignty. The complete sovereignty theory provided for absolute sovereignty over the airspace above a state. The free air theory envisioned the air as being the same as the high seas and open to all for use. The territorial air or navigable airspace theory provided that a state had rights in the subjacent airspace up to a certain height and that above that height, the air was free to every state. The innocent passage theory provided for complete sovereignty, subject to the right of innocent passage for civil aircraft of all nations.⁴⁷

At the 1906 meeting of the Institute of International Law, a proposal on aerial sovereignty was accepted by the Institute that was based in part on the free air and complete sovereignty theories. It provided for complete freedom of the air, subject to a right of self-defense for the overflowed state. This same approach was again approved by the Institute in 1911, when it also added that civil aircraft should bear markings identifying their civil nature and national origin.⁴⁸

During this period, there was a strong desire on the part of many to make travel through the air free to all nations. It was recognized that the benefits to commerce and communication would be greatly enhanced by complete freedom. At the same time, it was recognized that the airways presented a great opportunity for military purposes.⁴⁹

As powered flight became more prevalent, many nations began to reconsider the free-air theory. Aerial intrusions, while not serious, were occurring with greater frequency. Incidents of violence were

⁴⁶*Id.*

⁴⁷I P. Keenan, A. Lester & P. Martin, Shawcross and Beaumont on Air Law 189(3d ed. 1966) [hereinafter cited as Shawcross & Beaumont].

⁴⁸Whiteman, *supra* at note 36, at 309.

⁴⁹Johnson, *supra*, at note 14.

rare, although it was reported that Russian border guards fired on a German balloon as it approached their borders.⁵⁰ Incidents involving aerial intrusions were often processed in local courts as a violation of national law. Occasionally, the aircraft would be impounded and customs duties collected.⁵¹

An increase in the number of aerial intrusions along the border between France and Germany, as well as increased tensions between the two countries, caused them to enter into an agreement in 1913 regarding aerial intrusions. It provided that military aircraft could only overfly the territory of the other country if they had first obtained special permission. The only exception was if the aircraft were in distress. Civil aircraft were generally permitted to overfly the territory of the other party in non-prohibited areas.⁵²

B. TREATMENT OF BELLIGERENTS IN WORLD WAR I

World War I brought civil aviation to a halt in Europe; the skies belonged to military aircraft. Aerial flight became a question of air power, with each nation vying for control of the skies. Among the belligerent powers, the concept of sovereignty was lost to military aims. Instead, sovereignty evolved along with the rights of neutrals and belligerents in time of war.

Unlike maritime practice, there was no right of belligerent entry into neutral airspace. The consequences to people and property below an aerial conflict in neutral skies was deemed to be too great.⁵³ Allowing a belligerent to enter neutral airspace and conduct intelligence operations or combat operations against their opponent might also affect the neutrality of the neutral state in the eyes of other belligerents. Neutral states took the position that they had complete sovereignty over their airspace and that entry by a belligerent aircraft would not only be a violation of their neutrality, but of their sovereignty as well. The neutral states held that they had the right to prevent entry, by force if necessary, and the right to intern the aircraft and its crew for the duration of the war. This position was actively pursued and there were numerous incidents during

⁵⁰Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 Am J. Int'l Law 559, 561 (1953).

⁵¹*Id.*

⁵²*Id.* at 561.

⁵³J. Spaight, *Air Power and War Rights* 421 (3d ed. 1947).

which aircraft were fired upon and shot down by **neutrals**.⁵⁴ An exception did develop for aircraft in distress, but they were still liable for internment.⁵⁵ Hostile resistance to aerial intruders was normally preceded by a warning, but the Dutch noted that a warning was not required.⁵⁶

C. THE PARIS CONVENTION OF 1919

Although the concept of sovereignty over airspace was closely tied to the right of neutrals in time of war, the practice in World War I established that a neutral nation had complete sovereignty over its airspace and could take action, including hostile action, to counter violations of its territorial airspace. In addition, the sudden increase in air power brought about by World War I demonstrated the need for a closer examination of the role of international civil and military aviation. The skies were no longer free. Nations began to realize the tremendous economic and military advantages in airpower. With the increasing importance of aviation came the need for regulation and definition. To this end, the Convention for the Regulation of Air Navigation of 1919,⁵⁷ the Paris Convention, met.

Article 1 of the **Paris** Convention provided:

The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the **air** space above its territory.

For the purpose of the present Convention the territory of a State shall **be** understood **as** including the national territory, both that of the Mother Country and of the colonies, and the territorial waters adjacent thereto⁵⁸

Article 1 purported to recognize the customary law of the **time**.⁵⁹ While this is partially true, it is important to note that the customary **law** in regard to sovereignty did not **arise** from pre-World War I practice regarding civil aviation, but came about as the result of the treatment of belligerent aircraft by neutrals during the war. Thus,

⁵⁴*Id.* at 504.

⁵⁵Lissitzyn, *supra* note 50, at 562.

⁵⁶Spaight, *supra* note 53, at 422.

⁵⁷Paris Convention for the Regulation of Air Navigation (1919), 11 L.N.T.S. 173 [hereinafter cited as **Paris** Convention of 1919].

⁵⁸*Id.* at Art. 1.

⁵⁹Shawcross & Beaumont, *supra* note 47, at 190.

attempts to regulate civil aircraft in time of peace arose out of the customary law established during wartime and reflected world concern for protection from hostile intrusions.

The impact of the war and the concern for security was reflected in the remainder of the Convention. Military aircraft were forbidden to enter foreign airspace without express authorization. If authorization was granted, they were accorded the same rights as warships. If they entered unintentionally or due to distress, they were not accorded these rights.⁶⁰ Civil aircraft, except those engaged in scheduled service, were afforded the right of innocent passage in time of peace.⁶¹ This right was limited by Article 3, which provided that, for military purposes or in the interest of public safety, a state could prohibit aircraft from overflying certain designated areas, provided that no discrimination was shown in favor of their own aircraft.⁶² According to Article 4, an intruding aircraft that found itself above a prohibited area should promptly give a distress signal and land at the nearest airfield of the overflowed state.⁶³ Annex H on customs allowed the overflowed state to supervise the aircraft and impose penalties for violations of national law.⁶⁴

The Paris Convention was the first serious attempt at international regulation of aviation. It provided the framework for the growth of civil aviation between the two world wars. It further defined the rights of sovereignty over airspace as applied to overflights by civil and military aircraft.

For all of its accomplishments, the Paris Convention had its drawbacks. Only 38 states became parties to the Convention.⁶⁵ Germany was excluded as she was from most of the world affairs in 1919. The United States signed the Paris Convention, but did not ratify it. The Soviet Union did not sign the Paris Convention and continued to adhere to its position that no aircraft was allowed to enter its airspace under any circumstances.⁶⁶

⁶⁰Paris Convention of 1919, Art. 32.

⁶¹*Id.* at Arts. 2, 15.

⁶²Paris Convention of 1919.

⁶³*Id.*

⁶⁴Lissitzyn, *supra* note 50, at 565.

⁶⁵These states included Great Britain and the Dominions, nineteen European states, eight Latin American states, Iran, Iraq, Japan, and Siam. Johnson, *supra* note 45, at 35-36.

⁶⁶W. Wagner, *International Air Transportation as Affected by State Sovereignty* 53 (1970).

The primary failure of the Paris Convention, in the context of aerial intrusions, was its lack of discussion regarding the limits of response to an aerial intrusion by the overflowed state. Civil aviation was in the embryonic stage of development prior to World War I and, as a result, a body of customary law concerning civil aviation had not yet developed. The only customary law regarding aerial intrusions was the practice that had evolved concerning the treatment of belligerent aircraft entering neutral airspace. The established customary law allowed for neutrals to prevent the entry of belligerent intruders by force if necessary and, furthermore, force could be used without warning. This was hardly a standard compatible with the concept of civil aviation. The only provision directly dealing with aerial intrusion was Article 4. Although Article 4 called for a civil intruder upon discovery of itself over a prohibited area to land immediately, it did not specify what steps the overflowed state was entitled to take in such circumstances. The Paris Convention provided a prohibition, but failed to define the means of enforcement or recourse for the overflowed state.

D. POST-WORLD WAR I AND WORLD WAR II PRACTICE

Between the wars, there were no major incidents involving aerial intrusions by civil or military aircraft of major importance.⁶⁷ Consequently, very little developed in terms of customary law regarding sovereignty and aerial intrusions. A great many states passed national laws affirming the right to complete and exclusive sovereignty over their airspace⁶⁸ and a number of states provided for monetary fines and imprisonment for offending pilots.⁶⁹ The imposition of penalties was often based upon whether or not the overflight was intentional or unintentional.⁷⁰ This practice seemed to recognize that aerial navigation was not perfect and that pilot error, mechanical failure, weather, and other circumstances could result in the unintentional violation of aerial borders. It was reasoned that aerial intrusions resulting from these factors should not be made the subject of penalties.

⁶⁷For a discussion of several incidents involving aerial intrusions between the wars, see Lissitzyn, *supra* note 50, at 566-67.

⁶⁸Wagner, *supra* note 66, at 53.

⁶⁹Lissitzyn, *supra* note 50, at 566.

⁷⁰*Id.*

As in World War I, the development of civil aviation in World War II assumed a lesser priority as a consequence of the emphasis on military air power. Most nations capable of commercial air traffic were active belligerents. The primary use of aviation was in support of the war effort.⁷¹ Civil aviation, such as it existed in Europe, was used primarily to further war aims.⁷² As in World War I, belligerent aircraft were prohibited from entering neutral airspace and were subject to being fired upon if they refused to leave or to land. There was no firm requirement that belligerent aircraft should be warned before being fired upon, although some neutrals required warning shots to be fired prior to hostile action being commenced.⁷³

E. THE CHICAGO CONVENTION OF 1944

With the end of World War II in sight, the Allied and neutral nations met to determine the nature of civil aviation following the termination of hostilities. The result was the Convention on International Civil Aviation of 1944,⁷⁴ the Chicago Convention. Like the Paris Convention, the Chicago Convention reaffirmed the principle that every state has "complete and exclusive sovereignty over the airspace above its territory."⁷⁵ Territory was defined as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."⁷⁶ The Convention was made applicable only to civil aircraft, but it also prohibited the overflight by state aircraft of another nation's territory without permission.⁷⁷ The Convention provided for a general right of transit and stops for non-traffic purposes for non-scheduled air traffic.⁷⁸ For scheduled airlines to operate over the territory of another state, special permission was required.⁷⁹ For reasons of military necessity or public safety, contracting states were allowed to restrict or prohibit flights by aircraft over certain designated areas of their territory. Aircraft entering a restricted or prohibited area could be required by the overflown state to land as soon as practicable at a designated airfield within its territory.⁸⁰ Aircraft engaged in inter-

⁷¹See generally E. Emme, *The Impact of Air Power* (1959).

⁷²Spaight, *supra* note 53, at 395.

⁷³Lissitzyn, *supra* note 50, at 567. See also Spaight, *supra* note 53, at 420-60 for a discussion of belligerent and neutral rights as practiced during World War II.

⁷⁴Chicago Convention of 1944.

⁷⁵*Id.* at Art. 1.

⁷⁶*Id.* at Art. 2.

⁷⁷*Id.* at Art. 3.

⁷⁸*Id.* at Art. 5.

⁷⁹*Id.* at Art. 6.

⁸⁰*Id.* at Art. 9.

national air traffic were also required to bear nationality and registration markings for identification purposes.⁸¹

The Chicago Convention did not grant any rights to intruding military aircraft **as** did the Paris Convention, which had accorded them the same rights **as** foreign warships. Like the Paris Convention, it failed to discuss how aerial intruders were to be treated by the overflown state. While Article 9 of the Chicago Convention permitted the overflown state to require the intruder to land, it did not specify how that is to be accomplished. More importantly, the issue of force was not **discussed**.⁸² In addition, Article 9 dealt with flights over restricted or prohibited areas; it did not address the situation involving aerial intrusions into non-restricted and non-prohibited areas. This suggests that intruders into non-restricted and non-prohibited areas could not be required to land, but were merely under a duty to return to their original flight plan or exit the territorial airspace of the overflown state by the most expeditious means.

It is difficult to understand why the Chicago Convention did not address these issues. The importance attached to the issue of sovereignty, coupled with the rapid expansion of civil aviation following World War I, should have suggested the problems associated with aerial intrusions. The science of navigation had been by no means perfected. Human and mechanical error, **as** well **as** poor weather conditions, often resulted in aircraft being innocently and unknowingly hundreds of miles off course. The only precedent regarding aerial intrusions was the treatment of intrusions by belligerent aircraft into neutral airspace **as** established by customary practice in World War I. These practices would hardly form an appropriate standard for dealing with civil intruders or even for military intruders in time of peace.

Another failure of the Chicago Convention was the lack of participation by the Soviet Union. The Soviet delegation headed by Andrei Gromyko was recalled just days before the opening of the Convention. The Soviets gave **as** the reason for their non-participation the fact that the conference was to be attended by delegates from Spain, Portugal, and Switzerland, countries which did not maintain diplomatic relations with the Soviet Union.⁸³ Efforts by the United

⁸¹*Id.* at Art. 20.

⁸²*But see* Lissitzyn, *supra* note 50, at 568 n. 47 (citing Chauveau, *Droit Aerin* 49 (1951), where it is suggested that Article 9 implies that an aerial intruder can be shot down in cases of resistance of attempted escape).

⁸³Wagner, *supra* note 66, at 91.

States to procure Soviet participation failed. The United States, which favored complete freedom of the air, hoped to have the Soviets participate in the conference because the Soviets still maintained their position that no other nation's aircraft could enter Soviet airspace without specific authorization.⁸⁴

Two theories have been advanced to explain Soviet reluctance to participate in an attempt to regulate international civil aviation. The Soviets may have wished to develop their national air lines before entering into an agreement that would perhaps interfere with the development of their own commercial aviation industry. There may be some merit to this argument as the war with Germany had completely devastated the Soviet Union. All Soviet efforts, particularly in the area of aviation, had been directed toward supporting the war effort.⁸⁵ It was impossible for the Soviet Union to develop their civil aviation industry under these conditions.

The second and the most likely theory is that the Soviets did not wish to be bound by any international regulation of air navigation. They had refused to sign the Paris Convention and had instead enacted laws forbidding the entry of non-Soviet aircraft. The spectre of international aviation regulation impacting on their airspace did not appeal to the Soviets.⁸⁶ Likewise, the prospect of an international body charged with the regulation of international civil aviation, as proposed by Great Britain, Canada, and India, was an anathema to the Soviets,⁸⁷ who seemed determined to carve out their own rules for the regulation of Soviet territorial airspace.

Perhaps the most critical drawback of the Chicago Convention lay in its timing. The Chicago Convention convened at a time when World War II was still raging. Naturally, only the allied and neutral nations were in attendance. The outcome in Europe, while favoring the Allies, was still not firmly decided. Japan was slowly being forced to retreat toward her home islands, but most military experts predicted that final victory would not be achieved for some time and at great cost. The fact that the Chicago Convention met at a time when most of the world was still at war could perhaps account for its failure to deal with the issue of aerial intrusions in time of peace. During the war, attacks on strictly civil aircraft had not been fre-

⁸⁴*Id.* at 92.

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* See also VanZandt, *The Chicago Civil Aviation Conference*, 20 Foreign Policy Rep. 290, 292 (1945).

quent and did not involve the issue of sovereignty.⁸⁸ It was perhaps inconceivable to the delegates that hostile actions would take place against civil aviation in peacetime. Experience had not indicated that possibility. The delegates in all likelihood never considered the possibility of an occurrence like the KAL-007 disaster.

111. AERIAL INTRUSIONS AND PRACTICE FOLLOWING WORLD WAR II

The years following the end of World War II saw a dramatic rise in the number of aerial intrusions by civil and military aircraft. Responses to these intrusions ranged from no action to attacks by military aircraft on the intruder. As with many other aspects of world affairs, aerial intrusions were affected by the tensions between the Soviet Union and the free world following World War II. The absence of Soviet participation in the Chicago Convention began to impact on international aviation.

A. YUGOSLAVIAN ATTACKS ON AMERICAN MILITARY AIRCRAFT

Little more than a year after the end of World War II, the problem of aerial intrusions became a major issue. On two separate occasions, fighters from Yugoslavia attacked unarmed U.S. Army C-47 transport aircraft. The first incident occurred on August 9, 1946, when Yugoslav fighters forced a C-47 to crash in Yugoslavia following an aerial attack. A Turkish officer was wounded in the **attack**.⁸⁹ The second incident occurred on August 19, when an unarmed C-47 was shot down; all five of its crew were **killed**.⁹⁰

There was never any question that both aircraft had entered Yugoslav airspace. The United States maintained that the intrusion was due to bad **weather**.⁹¹ The Yugoslav government asserted that the intrusions were for hostile **reasons**.⁹² The parties also disagreed as to the nature of the attack. The American position was that at no time did the Yugoslav interceptors direct either C-47 to land, but, instead, that the Yugoslav planes had attacked without warning. The

⁸⁸Spaight, *supra* note 53, at 394-418.

⁸⁹15 Dep't St. Bull. 415-19 (1946).

⁹⁰*Id.* at 501-05.

⁹¹*Id.*

⁹²*Id.* at 418.

Yugoslav response was silent **as** to the first incident, but alleged that they had invited the second C-47 to land and had been **ignored**.⁹³

The United States claimed that the Yugoslav action in firing on an unarmed military transport was “an offense against the law and the principals of humanity” and that an aircraft in distress due to weather conditions should be accorded the right of innocent **passage**.⁹⁴ The United States further demanded compensation for the loss and the release of crew members being detained by Yugoslavia.⁹⁵

Although the Yugoslav government maintained its position that the American pilots had refused to **land**,⁹⁶ it did modify its position in regard to its future response to aerial intrusions. In a letter to the U.S. Ambassador, Marshal Tito informed the American government that they would no longer fire on transport aircraft, even if their intrusion into Yugoslav airspace was intentional. If an aerial intrusion occurred, the intruder would be invited to land and, if he refused, steps would be taken through appropriate diplomatic channels. Hostile action would not be taken against the **intruder**.⁹⁷

The Yugoslav response established two principles in **regard** to military intruders. First, military aircraft in time **of peace would not** be fired upon without first being accorded the opportunity to **land**. Second, unarmed military transport aircraft would not be fired **upon** in time of peace under any circumstances. Intrusions by unarmed military transport aircraft would be handled through diplomatic channels without resort to the use of force if the aircraft refused to land. By analogy, it can be speculated that Yugoslavia would not fire upon a civil intruder and, at most, it would invite a civil intruder to land; a refusal to land would be treated **as** a diplomatic incident.

B. SOVIET ATTACK ON A FRENCH AIRLINER

The first serious incident involving a civil aircraft occurred on April 29, 1952, when an Air France airliner on a flight from Frankfurt to Berlin along the Berlin Corridor was attacked by two Soviet

⁹³*Id.* at 501-05.

⁹⁴*Id.* at 416-18.

⁹⁵*Id.*

⁹⁶In regard to the first incident, the American pilot noted that the Yugoslav fighters had wobbled their wings. He took this as a signal to gain his attention. The Yugoslav said it was meant as a signal to land. *Id.* at 502, 505.

⁹⁷*Id.* at 505.

fighters. The French stated that the two MIG-15s had buzzed the airliner before making four separate attacks with cannon and machine gun fire. The attack resulted in injuries to several passengers and one crew member. French reports stated that the attack occurred inside the Berlin Corridor. The Soviets asserted that the airliner had violated East German airspace and had refused to obey orders to land after warning shots had been fired across its nose.⁹⁸

In their response to the Soviet attack, the Allied High Commissioners in Germany stated: "Quite apart from these questions of fact, to fire in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible and contrary to all standards of civilized behavior."⁹⁹

The Soviets did not seem to draw any distinction between the civil or military nature of the aircraft. The prime consideration appeared to be that an aircraft had allegedly violated Soviet-controlled airspace. In a latter incident involving a Soviet attack on a Swedish military aircraft, the Soviets noted that

if a foreign aircraft violates the State frontier and if a foreign aircraft penetrates into the territory of another Power, it is the duty of the airmen of the State concerned to force such aircraft to land on a local airfield and, in case of resistance, to open fire on it.¹⁰⁰

In reply to the Soviet statement, the Swedish government said:

In fact, there are fundamental differences. While the orders of the Swedish Air Force are to turn off foreign aircraft by means of a warning, the Soviet Air Force has, according to its orders, to try to force the foreign aircraft to land. While the instructions of the Swedish Air Force mean that the foreign aircraft is not fired upon if it changes its course and flies away, the Soviet instructions seem to imply that the foreign aircraft is fired upon if it flies away instead of **landing**.¹⁰¹

Throughout the 1950s, numerous incidents occurred involving confirmed and alleged penetrations of Soviet territorial or Soviet-

⁹⁸Keesings Contemporary Archives 12190 (1952).

⁹⁹Lissitzyn, *supra* note 50, at 574.

¹⁰⁰*Id.* at 575.

¹⁰¹*Id.* at 576.

controlled airspace. In the majority of incidents, there was a factual dispute between the parties **as** to whether a violation of territorial airspace had taken place, whether warning shots had been fired, whether the intruder had opened fire first, and whether the intruder had failed to obey instructions to **land**.¹⁰² Based upon these incidents, the Soviet position became clear; they would not tolerate violations of their sovereign airspace regardless of whether the area was militarily sensitive or of the character of the aircraft. Hostile action would be taken against any civil or military intruder that refused to obey instructions to land.

C. CHINESE ATTACK ON A BRITISH AIRLINER

The 1950s saw two more serious incidents involving intrusions by civil airliners. On July 23, **1954**, a British Cathay Pacific airliner flying from Bangkok to Hong Kong was shot down by Chinese fighters. The airliner ditched in the sea. Two passengers were killed in the attack; several others drowned. The airliner's pilot said that they had been attacked without warning and that the fighters were aiming at the fuel **tanks**.¹⁰³

The Chinese reported that they did not know that they had shot down **an** airliner. They claimed that, **as** a result of recent armed incidents with Nationalist Chinese forces, they mistook the airliner for a National Chinese military aircraft. They believed the aircraft to be on a mission to raid their military base at Port **Yulin**.¹⁰⁴ In a note to the British government, they stated that "the occurrence of this unfortunate incident was entirely accidental." In addition to their apology, the Chinese agreed to pay compensation for all **losses**.¹⁰⁵

By implication, the Chinese position appeared to be that, if they had been aware of the aircraft's civil nature, they would not have attacked. They did not adhere to the Soviet position that they were free to take whatever action they deemed appropriate against an intruder. Their statements suggested that, had it been an unarmed military aircraft and not on "a mission of aggression," they may have taken the Yugoslav approach or at least fired warning shots before attacking.

¹⁰²For a discussion of other incidents involving aerial intrusions by military aircraft into Soviet airspace, *see* Lissitzyn, *supra* note 50, at 574-80.

¹⁰³Keesings Contemporary Archives 13733 (1964).

¹⁰⁴*Id.*

¹⁰⁵*Id.*

D. BULGARIAN ATTACK ON AN ISRAELI AIRLINER

One of the most widely discussed incidents involving an aerial intrusion by a civil aircraft occurred on July 27, **1955**, when an Israeli El Al airliner was shot down by Bulgarian interceptors killing all **51** passengers and **7** crew members. The airliner was enroute from London to Israel via Paris, Vienna, and **Istanbul**.¹⁰⁶ The initial announcement by the Bulgarian government stated that the airliner had entered Bulgarian airspace and was fired upon by anti-aircraft fire from the ground. The report said that they opened fire because they were unable to identify the **aircraft**.¹⁰⁷

Israel and a number of other governments protested to Bulgaria, demanding a full explanation and compensation for the loss of life. On July 30, **1956**, an Israeli investigation team was allowed to examine the wreckage. The findings revealed that the airliner had been shot down not by anti-aircraft fire **as** claimed by Bulgaria but by fighter aircraft. In addition, they reported that Bulgarian authorities had been extremely uncooperative and had tampered with the wreckage in order to remove incriminatory evidence.¹⁰⁸

On August 3, the Bulgarian government issued a statement admitting that the airliner had been shot down by fighter aircraft and that they would be willing to pay compensation. The statement further claimed that the airliner had penetrated Bulgarian airspace to a point **25** miles in depth and had ignored signals to land prior to its being shot down.¹⁰⁹

Bulgaria later changed its position and disclaimed **all** responsibility in the incident. They proposed instead to make *ex gratia* payments in Bulgarian currency to the families of the **victims**.¹¹⁰ In response to this change, the United States, Israel, and Great Britain filed applications before the International Court of Justice against Bulgaria. While Bulgaria refused to submit to the jurisdiction of the Court and the cases were later dismissed, the Memorials submitted by each government provide the most comprehensive statements to date regarding aerial intrusions.

¹⁰⁶Keesings Contemporary Archives 14369 (1966).

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰[1959 Aerial Incident of 27 July 1966, Israel v. Bulgaria; U.S.v. Bulgaria; U.K. v. Bulgaria] I.C.J. Pleadings 168.

The United States, which had nine citizens killed in the attack, concluded that, regardless of the airliner's reasons for entering Bulgarian airspace, the action by Bulgaria was completely unwarranted and in violation of all accepted international practices.¹¹¹ The position of the United States is stated in its Memorial as follows:

1. A safe alternative means that the airplane should either have been told from the ground, by voice radio, or by CW transmission, on an international radio frequency used by airplanes in flight, or it should have been told by the fighters intercepting it, that it was off course. It should then have been either escorted back to Yugoslavia or given a route to fly safely to Yugoslavia, or even to Greece. If there were Bulgarian terrain security questions already raised, 4X-AKC [the designation for the Israeli airliner] should have been given comprehensible communications to lead it to a designated airport with safety for the crew, the passengers and the aircraft. There were enough of such airports in and around Sofia. The latter, however, seems a senseless alternative, for 4X-AKC was obviously on the regular corridor from Belgrade to Sofia and therefore, that corridor being open to foreign travel, had no security character. Nor, since Bulgaria had then other air traffic could any such direct route from Sofia to the Greek border have had security character. It was when 4X-AKC was on or near that Belgrade corridor that the fighters were sent up. The 4X-AKC flight southward thereafter was over obviously unsecure terrain being for the most part within eye sight of the Yugoslav frontier observers covering the Struma River Valley, and the rest of the Yugoslav-Bulgarian frontier.

True, the Bulgarian Government note says: "Even after having been warned, it did not obey but continued to fly towards the south in the direction of the Bulgarian-Greek frontier." But evidence of the giving of a warning or the giving of an alternative is lacking, and it is believed that testimony will show that there was no firing across the nose, or other firing not endangering the aircraft, that the first firing was at the tail of the airplane, starting a fire; then into the passengers' quarters.

¹¹¹*Id.* at 198.

Indeed, any firing would have been unnecessary since the pilots of the fighter planes, **as** the evidence shows, had an opportunity to identify the 4X-AKC from its appearance and markings, and to report them to the Bulgarian ground authorities. The latter, in accordance with the present international practice of civilized governments, then would take the matter up in appropriate diplomatic channels with the Israel Government. Diplomatic inquiry then would result in a disclosure whether the overflight was accidental, or rendered necessary by supervening circumstances, in which case it would be condonable.

2. In any case, should there have been a security necessity, which the Bulgarian Government **has** not claimed and cannot claim in this case, to bring the Constellation aircraft down to the ground, only reasonable methods for doing so could be used. An airfield of proper facilities must have been shown to the pilot of the 4X-AKC and the fighters must have led him there. Evidence to this effect is completely lacking.¹¹²

The Israeli Memorial advanced an argument similar to the American position. The Memorial noted that, although Bulgaria was not a party to the Chicago Convention, the rules established by the Convention reflected accepted international practice with which Bulgaria must comply.¹¹³ It noted that Israel, by virtue of Article 6 of the Chicago Convention, was not entitled to operate its airlines over Bulgarian airspace without permission.¹¹⁴ They argued that a distinction must be made between operating a scheduled airline service over another sovereign's territory and innocently overflying the territory. The latter type of infringement was not uncommon and was, at times, **unavoidable**.¹¹⁵ The Israeli Memorial argued that, even if sovereign airspace had been violated, Bulgaria was still subject to the limitations of international law in defending its sovereignty. One of these limitations was on the use of force. In arguing that Bulgaria had exceeded the acceptable limits on the use of force, the Israelis noted:

The basis of this contention is the rule that when measures of force are employed to protect territorial sov-

¹¹²*Id.* at 210-11

¹¹³*Id.* at 83.

¹¹⁴*Id.* at 86.

¹¹⁵*Id.* at 87.

ereignty, whether on land, on sea or in the air, their employment is subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat (if any). In all systems of law, including international law, this is the test for measuring the degree of violence which may justifiably be used to protect rights recognized by the law, and particularly the degree of violence used when performing acts by their very nature dangerous.¹¹⁶

Furthermore, the Israelis maintained that “the careless opening of fire on this aircraft was by its very nature so dangerous an act that a basic principle of international law was infringed.”¹¹⁷ The Israeli Memorial set forth that there were only two options open to the offended state in time of peace:

When a State party to the Chicago Convention in time of peace encounters instances of an infringement of its airspace, such as the intrusion of international scheduled air services contrary to Article 6, or intrusion of any aircraft into a duly established prohibited area contrary to Article 9 of the Convention, it normally reacts in one or both of two ways. In the first place, if this is physically possible, it indicates to the aircraft in the appropriate manner, and without causing an undue degree of physical danger to the aircraft and its occupants, that it is performing some unauthorized act. In taking this action that State may also, always exercising due care, require the intruder either to bring the intrusion to an end (i.e. to return to its authorized position, within or without the airspace of the State in question), or to submit itself to examination after landing, at a place, in the territory of the State in question, duly, properly and effectively indicated to it in the appropriate manner. In the second place, and subsequently, it may deal with the infringement of its sovereignty by making the appropriate *demarche* through the diplomatic channel.¹¹⁸

The Israeli Memorial qualified this statement this statement to the extent that “in normal times there can be no legal justification for

¹¹⁶*Id.* at 84.

¹¹⁷*Id.* at 85.

¹¹⁸*Id.* at 86-87.

haste and inadequate measures after interception of, and for the opening of fire on, a foreign civil aircraft, clearly marked as such.¹¹⁹

In its Memorial, Great Britain categorically rejected the use of force against a civil airliner under any circumstances. Citing both the Paris and the Chicago Conventions, the British Memorial noted:

No justification for the use of force against civil aircraft on a scheduled flight which enters, without authorization, the airspace of another State, can be derived from the Convention for the Regulation of Aerial Navigation signed at Paris on October **13, 1919**, or the Convention on International Civil Aviation, signed at Chicago on December **7, 1944**. Both Conventions provide that Contracting States may establish areas in which, for military reasons or in the interests of public safety, the entry of aircraft of the other Contracting States may be prohibited (Article **3** of the Paris Convention and Article **9** of the Chicago Convention). Under Article **4** of the Paris Convention, an aircraft finding itself above a prohibited area established under Article **3** of that Convention must, as soon as it is aware of the fact, give the signal of distress provided for in paragraph **17** of Annex (**D**) to the Paris Convention, and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State whose territory it has entered. Under paragraph (c) of Article 9 of the Chicago Convention, each Contracting State, under such Regulations as it may prescribe, may require any aircraft entering one of the restricted or prohibited areas for the establishment of which paragraph (a) of Article 9 provides "to effect a landing as soon as practicable thereafter at some designated airport within its territory." The Government of the United Kingdom submits that, since the Conventions on Aerial Navigation do not sanction the use of force against aircraft flying above prohibited or restricted areas, no contracting State can be in any stronger position against civil aircraft on scheduled flights which overfly other areas of their territory without permission.¹²⁰

¹¹⁹*Id.* at 89.

¹²⁰*Id.* at 363-64.

The British argued that the only time armed force could be used against foreign aircraft or ships was in "the legitimate exercise of the right to self defense."¹²¹ However, in regard to civil aircraft they stated:

The Government of the United Kingdom submits that the shooting down of 4X-AKC on July 27, 1955, by members of the Bulgarian armed forces was wrongful and contrary to international law. In general, the use of armed force against foreign ships or aircraft is not justified in international law unless it is used in the legitimate exercise of the right of self-defence. This basic principle is reflected in the Charter of the United Nations, under paragraph 4 of Article 2 of which all members of the United Nations have undertaken to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Government of the United Kingdom submits that there can be no justification in international law for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters without previous authorization the airspace above the territory of that State.¹²²

For the British, the only possible remedy for a violation of territorial airspace by a civil aircraft was for the overflowed state to first request redress from the owners of the aircraft and, if unsuccessful, pursue the matter through appropriate diplomatic channels. In reaching this conclusion, the British relied upon the position assumed by the Yugoslav government after the downing on August 19, 1946 of an unarmed American military transport.¹²³

In arriving at their conclusions regarding the international standards applicable to aerial intrusions, the three governments acknowledged that very little law existed in the area of aerial intrusions. The United States Memorial noted: "It may be said that there is no existing treaty or international code in terms prohibits a government from ordering the killing of innocent passengers in an in-

¹²¹*Id.* at 368.

¹²²*Id.*

¹²³*Id.* at 363.

nocent civil transport aircraft that has strayed without prior authorization into the territorial airspace of the killing government."¹²⁴

In support of their positions, all three nations relied upon the International Court of Justice's ruling in the *Corfu Channel Case*.¹²⁵ In *Corfu Channel*, the government of Albania had mined that portion of the Corfu Channel that lay within its territorial waters. The mining occurred in time of peace and was done without warning any other governments of the action. On October 22, 1946, two British destroyers were heavily damaged when they struck several mines.¹²⁶ The court held that Albania was under a duty to warn vessels of the presence of the mine field located within its territorial waters. This obligation arose not out of written agreements, but out of "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than war; the principle of maritime communication; and every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States."¹²⁷

Based upon *Corfu Channel*, it was argued that states are under an obligation to not use hostile force against the rights of other states, particularly in peacetime, and, if they are going to use hostile force, they must first give warning. The three parties maintained that Bulgaria had violated the first principle and failed to heed the second.

All three Memorials relied on the maritime principle that, in time of distress or out of necessity, a ship may enter the territorial waters of another state. Noting that an aircraft off its course is similar to a ship off its course at sea, the United States argued that such an aircraft should be aided just as a ship is aided. Further, the duty not to harm "straying mariners and ship passengers" should be extended to aircraft.¹²⁸ The British noted that this right had not been extended to aircraft but, by analogy, there is a right of entry for an aircraft in distress just as there is for a ship in distress. The British Memorial argued that Article 22 of the Paris Convention and Article 25 of the Chicago Convention both recognized a duty on the part of the contracting states to aid an aircraft in distress and implicit within that duty was the obligation to treat a civil airliner off course and over the territory of another state as an aircraft in distress.¹²⁹

¹²⁴*Id.* at 212.

¹²⁵[1949 *Corfu Channel*] I.C.J. 1.

¹²⁶*Id.* at 12-13.

¹²⁷*Id.* at 22.

¹²⁸1959 I.C.J. Pleadings, at 212.

¹²⁹*Id.* at 359.

In regard to the right to use force against an intruder, the United States and British Memorials relied upon an International Arbitration Award case, *Garcia v. United States*.¹³⁰ In *Garcia*, a U.S. Army officer on border patrol discovered a group of Mexicans attempting to cross the Rio Grande River on a raft in an effort to enter United States territory. In violation of existing military regulations, the officer fired a warning shot, intending to make them stop. His bullet struck and killed a young girl on the raft.¹³¹ The Commission held that the officer's action was a violation of international law:

In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.¹³²

The rationale of the *Garcia* case as applied to aerial intrusions is that the mere violation of territorial sovereignty does not justify the use of extreme force. Force should be used only if the interests sought to be protected can justify the threat to human life. Prior to force being applied, other alternatives should be considered. Finally, if force is used, it must be used in such a way so as to not create unnecessary danger, except if it is being employed with the intention of killing.

¹³⁰*Garcia Case (Mexico v. United States)*, 4 R. Int'l Arb. Awards 119 (1928).

¹³¹*Id.* at 119-20.

¹³²*Id.* at 121-22.

The validity of the legal arguments put forth by the United States, Britain, and Israel, **as** with so many other cases involving aerial intrusions ~~were~~ never put to the test. Bulgaria declined to submit to the court's jurisdiction and the cases were ultimately dismissed.

E. SOVIET ATTACKS ON AMERICAN MILITARY AIRCRAFT

In 1960, there were two aerial intrusions of significance. Both involved military aircraft. The first incident occurred on May 1, 1960, when the Soviet Union shot down an American U-2 reconnaissance aircraft flying over the Soviet Union on **an** intelligence mission.¹³⁴ The U-2 was shot down without warning deep within Soviet territory at an altitude of 60,000-68,000 feet. The United States did not protest the attack or the conviction and imprisonment of the pilot, Francis Gary **Powers**.¹³⁵ The lack of American protest indicated that the United States accepted the proposition that intentional intrusions by military aircraft could be countered with the use of force. Further, the overflowed state was not required to give a warning or request the intruder to land before resorting to the use of force when the intrusion is intentional and for hostile or intelligence purposes.

The second incident occurred on July 1, 1960, when a United States Air Force RB-47 was shot down by Soviet aircraft. **As** with most of the incidents involving military aircraft, the Soviet Union alleged that the aircraft intruded into Soviet airspace, was ordered to land, and opened fire first before Soviet fighters shot it down. The United States refuted the Soviet claim, stating that the RB-47 was outside Soviet territorial airspace at the time of the **attack**.¹³⁶

Little of value can be drawn from the incident due to the factual dispute. The RB-47 incident is important, however, in light of the pronouncements made by Soviet representatives which clearly defined the Soviet position on the treatment of aerial intruders. During the United Nations Security Council debate on the RB-47 attack, a

¹³³A number of claims were brought against the Soviet Union in the International Court of Justice for Soviet attacks on aerial intruders. These cases were dismissed when the Soviet Union refused to accept jurisdiction. For a brief discussion of some of these cases, see Whiteman, *supra* note 48, at 340-41.

¹³⁴Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 66 Am. J. Int'l Law 135, 135 (1962).

¹³⁵*Id.*

¹³⁶*Id.* at 139-40.

Soviet representative sated: "The Soviet Government is known to have given the order to its armed forces to shoot down American military aircraft, and any other aircraft, forthwith in the event their violation of the airspace of the Soviet Union. . . ." ¹³⁷ From this, it is clear that the Soviet Union will meet all aerial intruders with force.

F. ISRAELI ATTACK ON A LIBYAN AIRLINER

The next major incident involving an aerial intrusion occurred on February 21, 1973, when Israeli fighters shot down a Libyan airliner over the Israeli-occupied Sinai Peninsula about 12 miles from the Suez Canal. Following the attack, the airliner crash landed and burned, killing 106 people. ¹³⁸

The Israelis argued that the Libyan aircraft had entered Israeli airspace in the occupied Sinai and flew over a number of sensitive military installations and a key **airfield**. ¹³⁹ The aircraft was more than 100 miles off of its **course**. ¹⁴⁰ The Israeli fighters had approached the airliner and instructed it to land. One of the fighter pilots stated that he had three times indicated by hand signals to the airline pilot that he should land. The airline pilot responded with a gesture indicating that he was flying on and would not land. Following this exchange, the fighters again signalled by dipping their wings, but were ignored. At this point, the Israeli fighters attacked. ¹⁴¹

According to the Libyan co-pilot, they were aware of what the Israeli fighters wanted them to land but, because of the poor relations between Israel and Libya, they decided not to **comply**. ¹⁴² Contrary to the co-pilot's statement, the Libyans maintained that the Israelis attacked without warning. The inflight recorded indicated that the pilot believed he was in Egypt and that the interceptors were **Egyptian**. ¹⁴³ They attributed the aircraft being off course to instrument failure. ¹⁴⁴

¹³⁷*Id.* at 138.

¹³⁸Facts of File 136 (1973).

¹³⁹*Id.* at 136, 160.

¹⁴⁰*Id.* at 160.

¹⁴¹*Id.* at 137.

¹⁴²*Id.*

¹⁴³*Id.* at 160.

¹⁴⁴*Id.* at 137.

The Israeli government justified its action based upon security considerations and the airliner's refusal to follow orders to land. According to Major General Mordochai Hod, Chief of Staff of the Israeli Air Force, "the more the pilot objected and tried to get away, the more suspicious he became."¹⁴⁵ He further stated that the Israelis feared that the airliner may have been on a spy mission over Israel's secret air base at Bir Gafga.¹⁴⁶ The Israelis maintained that their attack was designed to cripple the aircraft so as to force it to land; they did not intend to destroy it. The Israeli government later announced that it would compensate the victims out of humanitarian concerns, but not based upon any implications of guilt.¹⁴⁷

The Israeli government's justification for its action was in keeping with the position it had advanced concerning the Bulgarian aerial incident in 1955; the Israeli argument for downing the Libyan jet was based upon the security exception. The situation in the Sinai was anything but normal. Relations between Egypt, Libya, and Israel were tense and the threat of war was ever-present. With hostile neighbors on all of her borders, Israel was deeply concerned about its security. The actions of the Libyan jet were viewed as hostile and a threat to the security of Israeli military forces in the Sinai.¹⁴⁸ Based upon past actions of the Libyan government, it would not have been inconceivable that a civilian airliner would be used for intelligence-gathering or other hostile activity.

In spite of Israel's arguments and the tense situation in the occupied Sinai, world reaction to the Israeli attack was one of condemnation. Many nations, including the Soviet Union, condemned Israel.¹⁴⁹ The United States, which had advanced the security exception in its arguments during the Bulgarian incident, did not support Israel's justification for the attack.¹⁵⁰ When the International Civil Aviation Organization considered the Israeli action,¹⁵¹ the United States joined in the resolution condemning Israel.¹⁵² Even though the American delegation had attempted to change the text of the reso-

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.* at 160.

¹⁴⁸*Id.* at 137.

¹⁴⁹*Id.*

¹⁵⁰*Id.* As this stance was inconsistent with its own policy concerning aerial intrusions, the Soviet position on the Libyan airliner must be viewed as motivated more by politics than by their own views on the treatment of aerial intrusions.

¹⁵¹*Id.*

¹⁵²28 IACO Bull. 13 (July 1973). See also 68 Dep't St. Bull. 369 (1973) for the initial resolution calling for an investigation into the Libyan incident.

lution from "condemnation" of the Israeli action to "deploring" the Israeli action, the United States clearly rejected Israel's claim for a security exception.¹⁵³ It was apparent that, if a security exception existed, the standard would be extremely high.

G. SOVIET ATTACK ON A KOREAN AIRLINER—1978

Deadly military force was again applied to a civil airliner on April 20, 1978, when a Korean Air Lines Boeing 707 was forced to land by Soviet fighters after intruding into Soviet airspace. The Korean airliner was flying from Paris to Seoul, by a polar route, with a refueling stop in Anchorage, Alaska.¹⁵⁴

According to Soviet reports, the airliner entered Soviet airspace northeast of Murmansk.¹⁵⁵ It then flew over the Kola Peninsula, a sensitive Soviet military area. The port of Murmansk and the submarine base at Slveromorsk were in the overflowed area.¹⁵⁶ After the airliner refused to follow the Soviet fighters, the fighters opened fire to force it down. Two passengers were killed and eleven wounded before the airliner made a forced landing on a frozen lake.¹⁵⁷

The official Soviet investigation concluded that the airliner had failed "to abide by the international rules of flight" and had refused to follow the interceptors to an airfield for the purpose of landing. The pilot and navigator pleaded guilty to violating Soviet airspace and the international rules of flying. They said that they had understood the orders of the Soviet interceptors, but had declined to obey them. Criminal charges were not brought against them after they appealed to the Presidium of the Supreme Soviet.¹⁵⁸

Passengers on board the airliner disputed the Soviet claims. According to their statements, the fighters followed the airliner for only about fifteen minutes before opening fire. They observed no signalling by Soviet aircraft, nor did they observe any warning shots being fired.¹⁵⁹

¹⁵³68 Dep't St. Bull 370 (1973).

¹⁵⁴Facts on File 302 (1978).

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷Keatings Contemporary Archives 29060 (1978).

¹⁵⁸*Id.*

¹⁵⁹Facts of File, *supra* note 154.

The Republic of Korea, which did not have diplomatic relations with the Soviet Union, did not protest the Soviet action. In fact, they expressed their gratitude for the release of the passengers and requested the release of the pilot and navigator. The only explanation offered by South Korea was the navigator's assertion that there was a defect in the directional gyro which had caused the plane to fly off course.¹⁶⁰

Contrary to the admissions made by the crew while they were in Soviet custody, the Korean pilot gave a different version of the facts when interviewed following the **KAL-007** incident. In an interview with the *New York Times*, he stated that he saw the Soviet fighter only once before it fired and that it was off to his right and behind him. He believed this to be strange, as international guidelines called for an interceptor to fly to the left and front of an intruder to enable the intruder pilot, who sits on the left, to see them. He further related that, when his co-pilot told him that he saw a fighter with Soviet markings, he slowed his airspeed and began blinking his landing lights to indicate to the interceptor that he was willing to follow his directions. He also tried to establish radio contact, but was unsuccessful. It was at this point that the Soviet fighter fired a missile that blew away nearly fifteen feet of one of the wings.¹⁶¹ The remarkable difference between his statement at the time of the incident and his statement some five years later can perhaps be explained by the fact that his first statement was made while he was in the custody of Soviet officials facing criminal charges for a violation of Soviet airspace.

IV. STATUS OF INTERNATIONAL LAW REGARDING AERIAL INTRUSIONS

A. CUSTOMARY LAW BASED UPON INCIDENTS OF AERIAL INTRUSIONS

Based upon the foregoing aerial incidents and the responses to these incidents, it is apparent that civil and military aircraft are treated differently by custom and by necessity. In the case of military aircraft, there is a much lower threshold in terms of the use of force. The unprotested U-2 incident in 1960 supports the propo-

¹⁶⁰*Id.*

¹⁶¹Dep't St. Bull., Oct., 1983, at 1, 15.

sition that force may be applied without warning against a military aircraft that has intruded into the territory of another state on a definite and deliberate military mission.

The use of force becomes questionable, but is still an option, when it appears that a military aircraft is in distress or that the intrusion is unintentional. In such instances, the appropriate response would be either to order the aircraft to leave the territorial airspace or order it to land at a designated airfield within the overflowed state. It is only when the aircraft refuses to obey instructions or takes some form of hostile action that the use of force is permissible. Customary practice and, by analogy, the treatment of belligerent intruders by neutrals in time of war supports this approach. However, based upon the *Garcia* case,¹⁶² it may be argued that the amount of force used must be in proportion to the threatened danger.

An exception to this practice exists for military transport aircraft. This exception, as established by the aerial incidents involving Yugoslav fighters and unarmed American military transport aircraft, does not permit the use of force against unarmed military transports which do not manifest any hostile intent. If a military transport ignores signals to land and attempts to escape, the remedy would be to make the necessary protests through diplomatic channels and not to shoot down the intruder.

The reason for a difference in treatment between civil and military aircraft as well as the lesser threshold for the use of force is obvious. Every state has the right and the obligation to protect itself and its people from hostile action, to include intelligence gathering activity. Given today's technology, a single aircraft can carry highly sophisticated intelligence and weapons systems that are capable of doing great damage to the security of another state.

In the case of civil aerial intruders, the use of force is almost universally condemned except under the most extreme circumstances. In those instances where force has been used against civil aircraft, it has always been justified by the overflowed state as a last resort following attempts to compel the intruder to leave the territorial airspace or to land. Whether true or not, the Soviet Union has claimed this justification each time it has attacked a civil airliner. The only instance where the failure to leave or land following a warning by the interceptors was not claimed was the attack by the People's Republic of China on the British Cathay Pacific airliner. The Chinese

¹⁶²*Garcia*, 4 R. Int'l Arb. Awards 119 (1928)

claimed instead that they believed the intruder was a Nationalist Chinese warplane on a mission of aggression.¹⁶³ If this were true, it would have justified their action. From these incidents, it may be concluded that, with civil aerial intruders, there is no *per se* right to use force based upon the mere violation of territorial airspace, regardless of whether the intrusion was intentional or unintentional.

Although overflown states have sought to justify attacks on civil airliners on the basis of a failure to follow instructions from interceptors or because of an attempt to escape, this rationale has never been accepted by the world community as justifying the use of force. Bulgaria, Yugoslavia, Israel, and Soviet Union have all used this justification, but, in each case, it has been rejected by the majority of nations as unacceptable.

In their Memorial concerning the Bulgarian incident, the British categorically rejected the use of force against civil aircraft under any circumstances. They reasoned that, as Article 9 of the Chicago Convention did not provide for the use of force against aircraft that flew over restricted areas, it must be taken to mean that the use of force is forbidden.¹⁶⁴ This is a strong analogy but in fact, neither the Chicago Convention or its predecessor, the Paris Convention, specifically prohibit the use of force against civil aircraft.

In their Memorials in the Bulgarian incident, the United States and Israel claimed that, in certain circumstances, the use of force might be justified if there was an overriding security interest at stake. Based upon international practice and opinion, the security interest involved must be more than the mere flight of an intruder over prohibited or restricted areas. In Israel's attack on the Libyan airliner, the Israelis claimed that the airliner overflew a secret air base and other sensitive areas. In addition, Libya, while not at war with Israel, was openly supporting hostile activity against Israel and had continually called for the destruction of Israel. Even under these circumstances, the ICAO, as well as world opinion, rejected Israel's claim and condemned her action. The United States, which put forward the security exception, has never exercised it as an option notwithstanding that civil aircraft of the Soviet Union have on numerous occasions overflown sensitive military facilities in the United States.¹⁶⁵ Based upon established precedent, the security interest at

¹⁶³Keesings Contemporary Archives 13733 (1954).

¹⁶⁴1959 I.C.J. Pleadings, at 363-64.

¹⁶⁵Dep't St. Bull., Oct. 1983, at 1, 4, 6.

stake must be of extreme importance before hostile force can be used. It is even questionable whether it would be accepted at all as a justification for the use of force against a civil intruder.

Even if there ~~was~~ **was** a case in which a security interest was so overwhelming **as** to justify the use of force, the rationale of the *Corfu Channel*¹⁶⁶ and *Garcia*¹⁶⁷ cases would require that a warning be given prior to the use of force and that the loss of life **as** a result of any force be weighed against the security interest involved. The requirement of proportionality must be satisfied before the use of force against a civil intruder can be justified. In peacetime, this would be an extremely difficult requirement to meet. It is doubtful that the damage to a nation's security interest arising out of the overflight of a sensitive area would outweigh the loss of life associated with an attack on a civil airliner.

B. APPLICATION OF THE CHICAGO CONVENTION

Although **as** previously stated, the Chicago Convention does not specifically rule out the use of force against civil aircraft. Annex 2 to the Chicago Convention¹⁶⁸ makes a strong case against the use of force against civil aerial intruders. The rules regarding interception of civil aircraft provide:

2.1 Interception of civil aircraft should be avoided and should be undertaken only **as** a last resort. If undertaken, the interception should be limited to determining the identity of the aircraft and providing any navigational guidance necessary for the safe conduct of the flight.

2.2 To eliminate or reduce the need for interception of civil aircraft, all possible efforts should be made by intercept control units to secure identification of any aircraft which may be a civil aircraft, and to issue any necessary instructions or advice to such aircraft, through the appropriate air traffic services units. To this end, it is essential that means of rapid and reliable communications between intercept control units and air traffic services units be

¹⁶⁶1949 I.C.J.I.

¹⁶⁷4 R. Int'l Arb. Awards 119 (1928).

¹⁶⁸Rules of the Air, Annex 2 to the Convention of International Civil Aviation 13 (July 1983).

established and that agreements be formulated concerning exchanges of information between such units on the movements of civil aircraft, in accordance with the provisions of Annex 11.¹⁶⁹

• • • •

7.1 Intercepting aircraft should refrain from the use of weapons in **all cases** of interception of civil **aircraft**.¹⁷⁰

Although the prohibitive language in **regard** to the use of force is qualified by the word “should,” thereby allowing for **an** argument that the use of force is still an option, the general theme of Annex 2 is that interception should only be utilized in rare instances and with the safety of the civil intruder **as** the prime **consideration**.¹⁷¹

Based upon customary international law **as** established by the previously discussed incidents, the analogies that can be drawn from the *Corfu Channel* and *Garcia cases*, the Chicago Convention, and Annex 2 to the Chicago Convention, the use of force against civil aircraft is not justified. The only exception that has been recognized is if there is a vital security interest at stake. Considering the reaction to the Israeli downing of a Libyan jet, the threshold for a valid security interest is extremely high. Thus far, no nation that has shot down a civil airliner has successfully used the security exception **as** a justification.

C. *LEGAL STATUS OF THE SOVIET ATTACK ON KAL-007*

The weight of international legal authority does not support the Soviet attack on KAL-007. KAL-007 did violate Soviet territorial **air**-space in violation of Soviet law and Article 6 of the Chicago **Con**-vention.¹⁷² It committed no other violations. This mere violation of Soviet territorial airspace alone could not justify the use of force **against** KAL-007.

As part of their justification for the attack on KAL-007, the Soviets attempted to invoke the security interest exception by claiming that KAL-007 had overflown sensitive military areas of the Soviet

¹⁶⁹*Id.* at 43.

¹⁷⁰*Id.* at 46.

¹⁷¹*See also id.* at 44 (requiring a civil airliner to land should only be done in exceptional cases).

¹⁷²Chicago Convention 1944. Art. 6.

Union.¹⁷³ This justification must fail. The Soviets offered no credible evidence that the airliner was engaging in aerial spying or carrying out any type of hostile mission. Their claim that the airliner delayed its departure in order to coordinate with a United States spy satellite was rejected by the ICAO Fact Finding Investigation.¹⁷⁴ Their allegation that the airliner was flying a joint mission with one of the American RC-135 reconnaissance aircraft, which routinely operate in the area, is also unsupported by the evidence.¹⁷⁵ At the time of the incident, the Soviet Union was at peace and there was no hostile action taking place in the area. The security interest exception, as demonstrated by the Libyan airliner incident, envisions more than the mere overflight of a military sensitive area. The Soviet security interest pales when compared to the Israeli security interest invoked in the destruction of the Libyan airliner.

The Soviet explanation of the facts surrounding the destruction of KAL-007 is also weak. Given the inconsistencies between Soviet statements and the evidence provided by the radio interceptions, their claims that they attempted to make contact with KAL-007 are probably no more than fabrications. Their explanation and justification for the attack was a carbon copy of almost every other incident in which their interceptors have attacked an aerial intruder.

D. THE SOVIET EXCEPTION

Based upon the KAL-007 incident and other attacks on aerial intruders by the Soviet Union, it is submitted that, apart from the accepted international practice regarding civil and military intruders, there is the separate and distinct Soviet practice. Beginning with the Paris Convention, the Soviets have opposed any attempt by international agreement to regulate aerial navigation. The current Law on the State Frontier states that: "The whole territory of the USSR except the airways, State border entry gates, terminal areas, aerodrome takeoff and landing zones listing in AIP [Airman's Information Publication], USSR, shall be considered prohibited for foreign aircraft, if it is not specified otherwise."¹⁷⁶ In her speech before the United Nations Security Council, U.S. Ambassador Jeane Kirkpatrick noted that a Soviet newscast stated that the Soviet Union

¹⁷³Soviet Embassy, Information Dep't, Press Release (Sept. 20, 1983).

¹⁷⁴Report of ICAO Fact-Finding Invest. *supra* note 4, at 36.

¹⁷⁵Dep't St. Bull., Oct. 1983, at 1, 6.

¹⁷⁶Report of ICAO Fact-Finding Invest. 1, App. F, at F-10 (Dec. 1983).

“like any self-respecting state, [they] are doing no more than looking after [their] sovereignty which [they] shall permit no one to violate.”¹⁷⁷

The Soviet view on the sovereignty of their airspace is in accord with the majority of nations; however, their treatment of aerial intruders is not. The accepted international practice is to treat an aerial intrusion by a civil aircraft **as** a diplomatic incident, unless there is found to be a legitimate security interest involved which would justify the use of hostile force. By their actions, the Soviets have demonstrated that they do not adhere to this standard in their treatment of aerial intruders. In light of past Soviet actions, the KAL-007 incident should not have come as a surprise. Since **1919**, the Soviets have put the world on notice that their airspace is inviolate. The Soviet Union’s record on aerial intrusions make clear that they will not tolerate violations of their aerial sovereignty. Aerial intruders, civil or military, who either deliberately or unintentionally intrude into Soviet airspace will be intercepted and ordered to land. If they ignore the interception, either intentionally or unintentionally, they will be shot down regardless of the potential loss of life involved. The Soviet position was best explained by Dimitri Simes of the Carnegie Endowment for International Peace. Mr. Simes stated: “Their image of the Korean plane is different from ours; for us, it is a tragedy of **269** innocent people. Their emphasis is not on what they did to the plane but, on what the plane did to their airspace.”¹⁷⁸

V. AMENDMENT OF THE CHICAGO CONVENTION

The problem of civil aerial intrusions **was** addressed on April **24, 1984**, when the International Civil Aviation Organization held an Extraordinary Session of the Assembly to consider an amendment to the Chicago Convention dealing specifically with civil aerial intrusions. Prior to adjournment on May **10, 1984**, the ICAO Assembly unanimously approved an amendment to the Chicago Convention which provided for a specific prohibition on the use of weapons against civil aircraft. This was the first major amendment to the Chicago Convention since it was signed in **1964**. It will become effec-

¹⁷⁷Dep’t St. Bull., Oct. 1983, at 1, 19.

¹⁷⁸Wiley, Cullen, & Shabad. *The Stonewall*, Newsweek, Sept. 19, 1983, at 102.

tive once two-thirds, 102, of ICAO's 152 contracting states approve the amendment.¹⁷⁹ The amendment will become a new Article 3 bis and provides:

(b) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent resi-

¹⁷⁹ICAO News Release (P10 6/84).

dence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.¹⁸⁰

The need for the amendment of the Chicago Convention was best expressed by Dr. Assad Kotaite, the President of the 25th Session (Extraordinary) of the Assembly, in his opening remarks to the Assembly:

There may be some who believe that the prohibitions of use of force against civil aircraft is already a firm part of general international law and there is no need to codify that provision in the body of the Convention.

. . . . However, the international community believes that only written law can remove the uncertainties of the other prime source, customary law; it fills existing gaps in the law and gives precision to abstract general principles, the practical applications of which have not been previously settled.

. . . A written rule is far superior to general principles recognized as customary law because frequently the very existence of a customary law or its exact scope and content may remain subject to challenge.¹⁸¹

The opening statements by many of the assembly delegates underscored the opinion expressed by Dr. Kotaite that an amendment to the Convention was necessary in order to end the doubt over the treatment of aerial intruders. A number of the delegates expressed the belief that the prohibition against the use of force when intercepting civil aerial intruders was a firmly established principle in international law.¹⁸² For example, France argued that the use of force is normally prohibited by general international law.¹⁸³ Great Britain adopted a position similar to that advanced in the British Memorial concerning the Bulgarian incident. The British delegates admitted that, under current international law, force could only be used in those exceptional circumstances involving self-defense.¹⁸⁴ The op-

""Protocol Relating to an Amendment to the Convention on International Civil Aviation ICAO Doc. 9436 (10 May 1984).

¹⁸⁰38 ICAO Bull., June 1984, at 13.

¹⁸²*Id.* at 14-28. Those nations that held this position included Australia, Austria, Canada, Japan, Netherlands, New Zealand, Pakistan, Republic of Korea, Switzerland, and the United States.

¹⁸³*Id.* at 18.

¹⁸⁴*Id.* at 25.

posite end of the spectrum regarding the current state of international law on aerial intrusion was expressed by the representative of the German Democratic Republic who appeared in an observer status:

Anyone who willfully crosses the border of another state on land or in the air is, ipso factor, committing an illegal act. An essential and unshakable element of state sovereignty recognized by Article 1 of the Chicago Convention is the right of a State to terminate an illegal intrusion into its airspace and take appropriate measures in this regard.¹⁸⁵

The Soviet Union and its allies took the position at the outset of the Assembly that the Chicago Convention did not require amendment.¹⁸⁶ They maintained that the existing body of international law, including the Chicago Convention and the UN Charter, contained adequate safeguards for the safety of civil aviation. The thrust of the Soviet concern was expressed by the Soviet Deputy Minister of Civil Aviation, M.A. Timofeyev, in his opening remarks to the assembly:

The problems of protecting of sovereignty from incursions by foreign aircraft and preventing the illegal use of civil aviation are of serious concern to all countries. Incessant violations of this sort create the atmosphere of mistrust and tension in interstate relations and cause a real danger to flight safety and human life. The current Assembly Session should set itself the goal of finding additional means to raise the level of international flight safety and prevent the violation of state sovereignty by civil aircraft as well as to prevent the illegal use of civil aircraft.¹⁸⁷

It was based upon this philosophy that, prior to the convening of the Assembly, the Soviet Union advanced its proposal for dealing with civil aerial intrusion. The Soviets proposed that the preamble and Article 4 of the Chicago Convention be expanded.¹⁸⁸ Article 4 provides: "Each contracting state agrees not to use civil aviation for any purpose inconsistent with the aims of the convention."¹⁸⁹ This

¹⁸⁵*Id.* at 27.

¹⁸⁶*Id.* at 14-28. Those nations that held this position included Bulgaria, Cuba, Czechoslovakia, Democratic Yemen, Hungary, Poland, Syrian Arab Republic, Soviet Union, and Vietnam.

¹⁸⁷*Id.* at 25.

¹⁸⁸Dep't St. Bull., Oct. 1983, at 1, 17.

¹⁸⁹Chicago Convention 1944, Art. 4.

proposal addresses only intrusions by civil aircraft the purpose of which is to gather intelligence or to conduct other hostile activity. It ignores the fact that most civil aerial intrusions are unintentionally caused by distress, pilot error, or equipment malfunction. Most importantly, it fails to deal with the vital issue of how an aerial intruder is to be treated by the overflowed state. The Soviet proposal was merely another expression of their fanatic concern over the sanctity of their borders. The proposal complements the Soviet position that KAL-007 was on an intelligence gathering mission and not merely off-course.

As finally drafted, Article 3 bis met the major concerns of the nations represented at the Assembly. Paragraph 3 bis (a) clearly prohibits the use of force against civil aerial intruders. In addition to prohibiting the use of weapons against civil aircraft, it provides that the lives of the passengers and the safety of the aircraft must not be endangered. This would prohibit aerial maneuvers by interceptors designed to force an aircraft down which at the same time endangers the safety of the intruder aircraft. The only situation where force could be used against an aerial intruder would be in circumstances involving self-defense as defined by Article 51 of the United Nations Charter.¹⁹⁰ As civil airliners have rarely been used to carry out armed attack as defined in Article 51, this would virtually eliminate the possibility of armed force being used against the civil intruder. Paragraph 3 bis (a) would clearly rule out the use of force in those situations where an intruder merely flies over a highly sensitive area without manifesting any intent to conduct an armed attack. While it may be argued that this proposal will lead to civil aircraft engaging in intentional intrusions for the purpose of conducting intelligence-gathering activity, this is unlikely to occur with such frequency so as to pose a problem. Given the sophistication of today's intelligence-gathering satellites, the same sort of result may be achieved at less risk to human life and political reputation.

Paragraph 3 bis (b) of the proposed amendment will give the overflowed sovereign the right to require landing upon a violation of its aerial sovereignty. Present terms of the Chicago Convention allow for the overflowed state to require a landing only when the intruder overflies a restricted or prohibited area.¹⁹¹ As most states have designated only a small portion of their airspace as restricted or prohibited, except for the Soviet Union which has restricted or pro-

¹⁹⁰U.N. Charter, Art. 51.

¹⁹¹Chicago Convention 1944, Art. 9.

hibited nearly all of its airspace, this portion of the proposal will greatly expand the amount of control a state may exercise against an intruder under the terms of the Chicago Convention. In practice, it will probably change very little as most states respond to all forms of aerial intrusion regardless of whether or not a restricted area is overflowed.

Paragraph 3 bis (c) of the proposed amendment would add further force to paragraph 3 bis (b) by making it a requirement of the intruder's national law to comply with the demand of an interceptor of the overflowed state. The additional force of an intruder's national law requiring him to land if intercepted would remove any discretion or doubt on the part of the pilot to do otherwise. This in turn would reduce the possibility of force being used so long as proper interception procedures were utilized.

The final paragraph, 3 bis (d), addresses the concern set forth by the Soviet Union. It requires member states to take steps to prohibit aircraft operated under their registry or by an operator who has his principal place of business or permanent residence in that state from engaging in any activity that is inconsistent with the purposes of the Chicago Convention. This portion of the proposed amendment emphasizes the principle that civil aircraft should be operated for peaceful purposes and not for military purposes or intelligence-gathering purposes. The proposal goes to the heart of the Soviet position that KAL-007 was on an intelligence gathering mission for the United States. Ironically, it has been the Soviet Union and not the Western Nations that has used civil aviation for such purposes in the past.¹⁹² Their use of civil aviation in this fashion may in some respects contribute to their suspicions concerning KAL-007 and their obsession with aerial security.

In conjunction with the proposed amendment, the ICAO Air Navigation Commission has recommended a number of amendments to the Annexes to the Chicago Convention relevant to the interception of aerial intruders. The proposals include the routine exchange of flight plan information between adjacent air traffic control authorities and the maintenance of communication between adjacent air traffic control authorities to better facilitate reporting of positions in sensitive areas and to aid in the identification of civil aircraft in order to dispense with the need for an interception. The Commission further recommended that all intercept control units,

¹⁹²ICAO News Release (P10 24183).

interceptor aircraft, and civil aircraft be equipped to communicate on the aeronautical emergency frequency of **121.5 MHz**.¹⁹³

It is expected that Article 3 bis **will** be adopted by the contracting states to the Chicago Convention. It is less certain whether the amendment will prevent another KAL-007 incident. Article 3 bis clearly settles the issue concerning the use of force; there can be no doubt that force can be used in only the most extreme circumstances. Incidents such **as** KAL-007 will become **as** they should, **diplomatic** incidents with diplomatic and economic consequences. This is the most positive step that **has** been taken since the advent of flight concerning the treatment of aerial intruders. For the first time, there is clearly written standard to which the nations of the world will be asked to adopt **as** their standard of practice. As was said by the Italian delegate to the Convention, Dr. A. Sciolla-Lagrange: "Words fly away but what is written remains **forever**."¹⁹⁴ Article 3 bis may provide the fulfillment of President Franklin D. Roosevelt's words on the eve of the 1944 Chicago Convention:

We **are** engaged in a great attempt to build enduring institutions of peace. These peace settlements cannot be endangered by petty considerations or weakened by groundless fears. Rather, with full recognition of the sovereignty **and** judicial equality of all nations, let us work together so that the **air** may be used by humanity, to serve humanity.¹⁹⁵

¹⁹³*Id.*

¹⁹⁴ICAO Bill, *supra* note 177, at 21.

¹⁹⁵Wagner, *supra* note 66, at 93.

1. TITLE OF PUBLICATION Military Law Review, DA Pam 27-100 series		4. PUBLICATION NO				2. DATE OF FILING	
		4	8	2	1	3	0
3. FREQUENCY OF ISSUE Quarterly		A. NO. OF ISSUES PUBLISHED ANNUALLY Four				B. ANNUAL SUBSCRIPTION PRICE \$ 14.00 domestic	
The Judge Advocate General's School, US Army, Charlottesville, VA 22903-1781							
6. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS (Not printers) Headquarters, Department of the Army, Washington, D.C. 20310							
8. FULL NAMES AND COMPLETE MAILING ADDRESS OF PUBLISHER, EDITOR AND MANAGING EDITOR (This item MUST NOT be blank)							
PUBLISHER (Name and Complete Mailing Address) COL Robert E. Murray, Commandant, The Judge Advocate General's School, US Army, Charlottesville, VA 22903-1781							
EDITOR (Name and Complete Mailing Address) CPT Stephen J. Kaczynski, The Judge Advocate General's School, US Army, Charlottesville, VA 22903-1781							
MANAGING EDITOR (Name and Complete Mailing Address) CPT Stephen J. Kaczynski, The Judge Advocate General's School, US Army, Charlottesville, VA 22903-1781							
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FULL NAME				COMPLETE MAILING ADDRESS			
Headquarters, Department of the Army				Washington, D.C. 20310			
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10. EXTENT AND NATURE OF CIRCULATION		AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS		ACTUAL NO. COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE			
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B. PAID CIRCULATION 1. SALES THROUGH DEALERS AND CARRIERS, STREET VENDORS AND COUNTER SALES		0		0			
2. MAIL SUBSCRIPTION		470		473			
C. TOTAL PAID CIRCULATION (Sum of 1B1 and 1B2)		470		473			
D. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES		6380		6370			
E. TOTAL DISTRIBUTION (Sum of C and D)		6850		6843			
F. COPIES NOT DISTRIBUTED 1. OFFICE USE, LEFT OVER, UNACCOUNTED, SPOILED AFTER PRINTING		350		350			
2. RETURNS FROM NEWS AGENTS		0		0			
G. TOTAL (Sum of E, F1 and 2 - should equal net press run shown in A)		7200		7193			
11. I certify that the statements made by me above are correct and complete		SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER <i>Stephen J. Kaczynski, CPT, JAGC</i>					

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