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CONTENTS

ARTICLES

BOOK REVIEWS

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MILITARY LAW REVIEW

Volume 154 October 1997

PRESS ACCESS TO COMBATANT OPERATIONS IN THE POST-PEACEKEEPING ERA

COLONEL JAMES P. TERRY (RETIRED)*

I. Introduction

In the fifteen years since the United States intervened in Grenada in 1983, the Department of Defense (DOD) has engaged in a careful process to balance the requirement that the Government conduct effective military operations, with the requirement that the public, via a free press, be independently informed about the actions of its Government. This process, initiated largely because of adverse press reaction to tighter restrictions on media coverage resulting from military frustrations with the press in Vietnam, has culminated in a series of negotiations following United States interventions in Grenada, Panama, and in the Persian Gulf. During the last five years, however, this process has been in abeyance, because the advent of multi-national peacekeeping often left United States leaders and forces assigned to these initiatives without independent control over either information or operational decision-making.[1] Somalia and Rwanda are examples of this phenomenon.[2]

As the decade closes, and as the United States and other Western nations revise their view of the utility of United Nations'

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[1] *See* James P. Terry, *A Legal Review of U.S. Military Involvement in Peacekeeping and Peace Enforcement Operations*, 42 NAVAL L. REV. 79 (1995).

[2] It is hard to forget the international array of newsmen, complete with lights and camera equipment, awaiting the arrival of United States Marines by sea at Mogadishu, Somalia, during Operation Restore Hope.

peace operations[3] in favor of coalition initiatives with carefully selected national participants in which operational security is strictly maintained, it may be prudent to review once again the role of the press in combatant theaters of operation. If the current crises in Sierra Leone and the Congo (formerly Zaire), and the continuing unrest in Algeria, Burundi, Uganda and Rwanda are representative of the concerns facing us in the next decade, we will likely once again have to address the limits of media access.

This article establishes the framework for debate, reviews the historical currents underlying our present policy regarding press access, examines several conflicts (Grenada, Panama, Desert Storm, and Haiti) that have shaped that policy, reviews the litigation arising from these operations, and comments on the May 1992 "agreement on war coverage guidelines'' negotiated over a period of eight months between the press and the Department of Defense. Finally, this article explains the shortcomings of the latest policy guidance, as reflected in the 1996 DOD Directives resulting from the post-Desert Storm negotiations, and offers suggestions on areas not addressed, to include numerical limitations on correspondents assigned to specific military operations, and U.S. media access to multinational operations.

11. Framework for Debate

The United States intervention in Grenada in 1983 marked a turning point in the relations between the working press and U.S. military officials. The exclusion of media from Grenada during the first two days of that operation resulted in a ten-year battle between the media and the Government to establish reasonable limits on press access to U.S. military operations. Following the 1983 intervention, immediate demands were leveled by the national media organizations to accommodate the Fourth Estate in combat operations. Two arguments, one historical and one constitutional, were advanced to justify the presence of reporters on the battlefield. These arguments, found within the 1984 Statement of Principles on Press Access to Military Operations,[4] urged that, historically, United States reporters "have always been allowed to cover U.S. troops in

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[3] *See* James P. Terry, ***UN Peacekeeping and Military Reality, 3*** BROWN J. OF **WORLD AFFAIRS 135** (1996). The author makes the case for limiting UN-led peace operations to those in which less than "all necessary means" under Chapter VII of the UN Charter are authorized. That is, he contends that UN peace initiatives should be limited to Chapter **VI** peacekeeping in contrast to peace enforcement operations.

[4] The statement was issued on 10 January 1984. The full text is reported in N.Y. TIMES, Jan. **11,** 1984, at A10, col. **1.**

action."[5] The journalists also argued that the presence of the press in combat serves the citizens' right to know. The thrust of this claim is tied to the democratic values attributed to a free press as a pillar of American strength.6 The Sidle Panel, commissioned by the Secretary of Defense to address the press' concerns related to Grenada, assuaged the press initially, but the pool concept it approved was later found by journalists to be inadequate.[7]

The attempt to find compromise after Grenada, and the press frustrations during the Panama intervention and the Desert Storm operation with the limitations imposed on pool reporters' access to combat operations and military personnel, ultimately led to the 1992 negotiations which resulted in new Department of Defense combat coverage principles. The negotiators from the press finally agreed "that the guidelines offer the kind of coverage the citizens of a democracy are entitled to have."[8] The implementation of the negotiated agreement evolved into a lengthy process concluding with the publication of two DOD Directives in 1996, and the issuance of a statement entitled *Principles of Information* by Secretary Cohen on 1April 1997.9

The agreed-upon principles at the heart of these documents include: (1)open and independent coverage as the principal means of covering U.S. military operations; (2) use of a pool when it provides the only feasible means of access to a military operation, when space is limited, or for a specific event; (3) the credentialing of journalists and the requirement to abide by security ground rules, with non-observance leading to loss of accreditation; (4) access for journalists to all major units, although special operations units may

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5 *See Media Organizations Take a Stand,* EDITOR & PUBLISHER, Jan. 14, 1984, at 18.

6 *See* Henry Catto, Jr., *Dateline Grenada: The Media and the Military Go At It,* WASH. POST, Oct. 30, 1983, at C7.

7 Discussion of the Sidle Report is included in John Jeffries, *Freedom of Expression, in* NATIONAL SECURITY *Law* 995 (Moore, Tipson, & Turner 1990).

8 Louis D. Boccardi, *Agreement on War Coverage Guidelines,* A.P. News Release, May 21, 1992.

9 *See* U.S. DEP'T OF DEFENSE, DIR. 5122.5, ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS (29 Mar. 1996) [hereinafter DOD DIR. 5122.51; U.S. DEP'T OF DEFENSE, DIR. 5400.13, JOINT PUBLIC AFFAIRS OPERATIONS (9 Jan. 1996) [hereinafter DOD DIR. 5400.131; and William S. Cohen, Secretary of Defense, *Principles of Information* (Apr. 1, 1997) (public statement). DOD Directive 5122.5 sets policy by documenting the responsibility of the Assistant Secretary of Defense for Public Affairs to the media, and establishes, in enclosure 3, the tasks to be performed by the various echelons for accommodating reporters during operations. DOD Directive 5400.13 assigns responsibilities for the conduct of joint, combined, and unilateral military operations. The 1997 statement, *Principles of Information,* commits "the Department of Defense to make available timely and accurate information so that the public, Congress and the news media may assess and understand the facts about national security and defense strategy."

have some restrictions; (5) the noninterference with reporting by public affairs officers; (6) the responsibility of the military to provide transport and communication facilities for pool journalists; (7) the application of these principles to the national media pool; and (8) the agreement by both parties to disagree on the issue of security review.[10]

Although agreement on these principles provides an important first step in resolving long-standing differences between the military and the media, it leaves as many unanswered questions as it resolves. An important unresolved issue is the meaning and extent of "open and independent coverage" in the first principle above. While reporters would like to believe it means that reporters can go when they want, where they want and report on what they want, operational security (OPSEC) and the security of the force will likely dictate otherwise. Nevertheless, the new DOD Directive requires that commanders grant reporters the maximum access possible to the battlefield.[11]

Another major issue left unresolved in the latest round of negotiations is the question of security review. The Department of Defense has remained adamant that it must retain authority to impose security review where operationally required, while the press finds no circumstances which would warrant such extreme measures. All find agreement, however, that certain ground rules to ensure the security of the operation and the safety of the force are warranted.[12]

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[10] *See* DOD DIR. 5122.5, *supra* note 9, encl. 3. These principles, entitled *Statement of* DOD *Principles for News Media Coverage of DOD Operations* were first incorporated in the 19 May 1992, version of this Directive.

[11] *See* DOD DIR. 5400.13, *supra* note 9.

[12] *See Pentagon Rules on Media* Access *to the Persian Gulf War: Hearings Before the Senate Committee on Governmental Affairs,* 99th Cong. 328 (Jan. 7, 1991). For Operation Desert Storm, the security ground rules for the media included a restriction on publication of:

> specific numerical information on troop strength, aircraft, weapons systems, on-hand equipment, or supplies. Unit size and number or amount of equipment and supplies may be described in general terms; any information that reveals details of future plans, operations, or strikes, including postponed or canceled operations; information, photography, and imagery that would reveal the specific location of military forces or show the level of security at military installations or encampments; rules of engagement details; information on intelligence collection activities, including targets, methods and results; specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardize operational security or lives; identification of mission aircraft points of origin other than as land or carrier-based; information on the effectiveness or the ineffectiveness of enemy camouflage, cover, deception, targeting, fire, intelligence and security measures, specific identifying information on missing or downed aircraft or ships while search and rescue missions are planned or underway; Special

A third area of continuing debate relates to how the Pentagon will determine when the circumstances are such that a pool can be disbanded and "open and independent coverage" permitted. A final issue relates to the question of press access to multinational operations. Except for Operation Just Cause (Panama) and Operation Uphold Democracy (Haiti), nearly all our large military operations in the last ten years have had multilateral or United Nations' participation. Nevertheless, we have developed no process and no guidelines for accrediting foreign reporters to cover U.S. forces and activities.[13]

Each of the concerns addressed is presented in the context of the development of a body of applicable caselaw affecting DOD decisionmaking.

III. Historical Currents

Until the American Civil War, the United States military had neither cause nor capability to censor reports of the working press. There was neither a corps of American war correspondents nor a means to transmit information in a sufficiently timely manner that its dissemination could affect either actions on the battlefield or public opinion. What news that was transmitted came in the form of long-delayed personal letters from soldiers to their loved ones.[14] With the advent of the telegraph in the early 1800's, however, everything changed.[15]

Although the Mexican-American War of 1846-47 saw the emergence of the modern war correspondent,[16] the Civil War was the first

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Operations forces' methods and equipment; specific operating methods and tactics; information on operational or support vulnerabilities that could be used against U.S. forces, such as details of major battle damage or personnel losses of specific or coalition units until released by CENTCOM.

[13] Except in the case of Operation United Shield in Somalia in March, 1995, the United States military has made no effort to grant access to foreign reporters.

[14] *See* Jack A. Gottschalk, *Consistent with Security: A History of American Military Press Censorship,* 5 COMMUNICATIONS AND THE LAW 35, 35-36 (1983).

[15] *See* Arthur Lubow, *Read Some About It,* NEW REPUBLIC, Mar. 18, 1991, at 23, 25. Lubow describes the significant impact of the first real war correspondent, William Howard Russell of *The Times* of London, during the Crimean War. Russell's vivid descriptions of the horrible battlefield conditions in the Crimea incurred the wrath of the British commander and shocked the British public. The result was the fall of a Cabinet and the end of official British tolerance for battlefield journalism.

[16] *See* JOSEPH J. MATHEWS, REPORTING THE WARS 54-55 (1957). Mathews explains that for the first time during the Mexican-American War, newspapers carried extensive coverage of war news. This was due, in part, to newspaper reporters' widespread access to the war, as there were no legal restrictions on reporting. Matthews also notes there was very little to distinguish a reporter from an ordinary soldier, as writing men fought and a number of fighting men wrote. He observes that aside from the representatives of the New Orleans press, all who served as reporters appear to have attended the conflict primarily as fighters.

major American conflict involving large numbers of reporters. This led to the first concerted Government efforts at censorship. As Matthew Jacobs explains:

> The American Civil War engendered a great deal of censorship on both sides, particularly in the North where the population was divided in its support of the conflict. The North adopted voluntary censorship but did not issue guidelines, resorting largely to postpublication punishment. After the *New York Journal of Commerce* and the *New York World* published a forged letter from Abraham Lincoln about plans to expand the draft, these publications were suspended for two days. Similarly, General Ambrose Burnside shut down the *Chicago Tribune* for three days, until President Lincoln countermanded the order with a telegram warning that censorship would do more harm than good . . . . The South, for its part, kept a close watch on the press but did not punish or prosecute any newspapers. Despite the formal restrictions, Civil War reporting in both the North and the South was plentiful and often critical of the respective governments.[17]

Contrary to the broad coverage described above, President Lincoln placed far greater restrictions on media reporting within the border states. The President permitted his Secretaries of State and War to censor at will these slave states which had not seceded but which held dubious loyalties to the Union.[18] President Lincoln commented at the time: "Must I shoot a simple soldier who deserts, but not touch a hair on a wily agitator who induces him to desert?"[19] Censorship measures included placing all telegraph lines under military supervision, thus limiting the ability of correspondents to send stories without submitting to censorship.[20]

Whatever tensions that had developed between the media and the Government during the Civil War were dissipated during the Indian Wars that occupied our military over the next thirty years. Reporters, although not in great numbers, accompanied General George Crook and General George Custer in their efforts to quell Indian uprisings. Largely because the views of reporters paralleled those of the military in having little sympathy for, or understanding

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17 Matthew J. Jacobs, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 680 (1992).

18 *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 105 (1941).

19 *Id.*

20 *See* MATHEWS, *supra* note 16, at 82.

of, marauding bands of Indian warriors, relations improved and censorship was minimal.[21]

With competition among newspapers growing, provocation by agitating editors became a major impetus for greater censorship in the Spanish-American War. In the era of yellow journalism represented by newspaper barons like William Randolph Hearst, official Government policy for the first time permitted prepublication censorship of incoming dispatches as key telegraph offices were monitored.[22] Grant Squires, for example, was appointed military censor in New York[23] There were other instances of carefully controlled censorship during this conflict, as well. After the battleship ***Maine*** was blown up, severe controls on information were imposed in the area of operations.[24] Similarly, John J. Pershing excluded the press entirely from the successful pacification campaign he was waging on Mindoro Island in the Philippines, and General Shafter banished all Hearst reporters from captured Santiago.[25] American naval censorship was also imposed in **1914** at Vera **Cruz** by U.S. leaders following our intervention there.[26]

The late entry by the United States into World War I brought with it two factors which greatly influenced the tight control of military information during that conflict. The first was a carefully instituted information security program already established by the British and French forces. The second was the choice of General John J. Pershing as commander of the American Expeditionary Force in Europe.[27] As he had been on Mindoro much earlier, Pershing was very comfortable with limited access for the media. Although not going as far as the British and French had initially gone in **1914** in banning all reporters from accompanying their forces, Pershing attempted to ensure operational security through several means. First, he limited accredited correspondents to thirty-one; second, he imposed rigorous pre-publication censorship; and third, he restricted reporters' access to the lines where combatant

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21 *See* OLIVER KNIGHT, FOLLOWING THE INDIAN WARS: THE STORY OF THE NEWSPAPER CORRESPONDENTS AMONG THE INDIAN CAMPAIGNERS 307 (1960). **Knight reported that the press was accommodated because of their small number and because they shared the same negative view of Indians as did U.S. forces.**

22 *See* **Gottschalk,** *supra* **note 14, at 20.**

23 *See* FRANK MOTT, AMERICAN JOURNALISM—A HISTORY: 1690-1960 536-37 (1962).

24 *See* FRANKLIN BALLARD, FAMOUS WAR CORRESPONDENTS 413-14 (1914).

25 *See* **Drew Middleton,** *Barring Reporters from the Battlefield, N.Y.* TIMES MAG., **Feb. 5, 1984, at 36, 37.**

26 *See* **Gottschalk,** *supra* **note 14, at 38. Gottschalk notes that while censorship was imposed at Vera Cruz in 1914, no media restrictions were used during the U.S.** *Army's* **campaign against the Mexican revolutionary Pancho Villa in 1916.**

27 *See* MATHEWS, *supra* **note 16, at 161.**

activities were taking place.[28] Any reporter publishing a story without pre-publication review had his credentials withdrawn immediately.[29] Although these restrictions were relaxed by mid-1918, their impact was nevertheless significant.

During World War II, different security considerations in different theaters of operation resulted in the inconsistent application of information controls. The 1942 Code of Wartime Practices was issued by the new Office of Censorship, but compliance by newsmen with its terms was voluntary.[30] In the Pacific, General MacArthur used heavy censorship to ensure that only his message was published.[31] This was also true for a short period in North Africa, where a tight lid was placed over negotiations between the Free and Vichy French. Conversely, news reporting in Europe was nearly unrestricted, although all publications had to be pre-cleared. Gottschalk reports that the media were given ready access to the battlefields in France and Italy, with 500 newsmen accredited in London on D-Day.[32] Some stories that would be published today were censored. An example was the 400 friendly fire deaths resulting from the loss of twenty transport planes over Bari to American guns.[33] Nevertheless, the press was present at the November 1942 invasion of North Africa, the July 1943 invasion of Sicily, the November 1943 invasion of Tarawa, the January 1944 invasion of Kwajelein Atoll, the October 1944 invasion of the Philippines, and the February 1945 invasion of Iwo Jima.[34]

With MacArthur in command in Korea, reporting the war was not easy. By December of 1950, General MacArthur had imposed full censorship on all journalists, and in January 1951, all accredited U.S. reporters were placed under the jurisdiction of the U.S. military forces within the UN Command.[35] The determination on censorship, surprisingly, was considered the lesser of two evils by the working press. Until this action, reporters had to guess whether their stories would incur the wrath of the command, and possible expulsion by MacArthur.[36] Despite these restrictions, U.S. corre-

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28 *Id.* at 169.

29 *See* M. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS 73 (1968).

30 *See* Gotschalk, *supra* note 14, at 40.

31 *Id.*

32 *Id.*

33 *See* MATHEWS, *supra* note 16, at 215-16.

34 *See* Affidavit of Dale R. Spencer, Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984).

35 *See* PHILLIP KNIGHTLEY, THE FIRST CASUALTY—FROM CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH-MAKER 337 (1975).

36 *Id.* at 349.

spondents were often seen on the front lines and accompanied the UN forces into Inchon.[37]

The Vietnam conflict represented a new era for journalists, and for the military in dealing with the media. As the author can attest, this was a difficult and frustrating period for the U.S. military and press alike.[38] Phillip Knightley accurately places the conflict in perspective when he explains that there was no focus, no simply explained cause, no easily identifiable foe, no threat to U.S. territory, and therefore, no national feeling of patriotism.[39] Contrary to the Cuban missile crisis in 1962, however, when reporters were not allowed to go on ships or planes deployed for purposes of the quarantine of Cuba, or set foot on the Guantanamo Naval Base,[40] journalists could travel relatively freely in South Vietnam.[41]

Unlike World War II and Korea, there was no formal security review or censorship applied to journalists during the Vietnam conflict.[42] The United States mission in Saigon did issue guidelines covering "the release of combat information" in 1965. The guidelines "requested" that reporters not release information concerning specific U.S. casualty figures, troop movements, and order of battle information until it was clear the Viet Cong had the information. At least two reporters had their accreditation revoked for thirty days for failing to follow the guidelines.[43]

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37 *See* STEIN, *supra* note 29, at 149-59.

38 The author served as a Marine Corps infantry platoon commander with 1st Battalion, Third Marines in I Corps in 1968-69, prior to attending law school.

39 *See* KNIGHTLEY, *supra* note 35, at 381.

40 *See Hearings on Government Information Plans and Policies, before a Subcommittee of the House Comm. on Government Operations,* 88th Cong. 1st Sess. 15, 32, 34, 61 (Part 1), 269 (Part 2) (1963). The press did accompany United States Marines during the 1965 intervention in the Dominican Republic. *See* N.Y. TIMES, Oct. 27, 1983, at A23, col. 6.

41 Despite a liberal access policy, the press was not able to go everywhere. In January 1971, for the first six days of the Dewey Canyon II Operation, a news embargo was maintained, no U.S. correspondents were permitted in the operational area and no reports were permitted on the operation. No member of the press was on board the helicopters that raided the Son Tay POW camp or on the ships that rescued the crew of the Mayaguez. The secret bombing in Laos and Cambodia for fourteen months in 1969 and 1970 was not disclosed to the press. Later, reporters could only cover the air war in Thailand by special permission. *See 1984-Civil Liberties and the National Security State: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. (1983).

42 *See* Robert Waters, *The Media us. the Military,* HARTFORD COURANT, Dec. 23, 1985, at 1.

43 *See News Policies in Vietnam: Hearings Before the Senate Comm. on Foreign Relations,* 86th Cong., 2d Sess. 68 (1966) (Statement by Ass't Sec'y of Defense Arthur Sylvester).

While stories were neither censored nor reviewed for security, "[clensorship at the source reached its epogee in the Vietnam War . . . . [Reporters] who did not have the trust of senior officers . . . were given little information."[44] Several reporters fell into this category. Ackerly correctly explains:

> The core of the military-media feud lay in the central contradictions of the policies pursued by Presidents Kennedy, Johnson and Nixon. Each president sought to avoid making Vietnam the prime focus of U.S. policy, but each also feared that no U.S. president could "lose Vietnam" without adverse political repercussions. Thus, the U.S. military was told by the White House to avoid "losing Vietnam"—at the lowest possible cost, militarily and politically. The only problem was that this "lowest cost" kept getting more and more expensive, especially in terms of American lives. And the American press was there to see it. The press covered the government's attempts to simultaneously appease society's "hawks" and "doves."[45]

The concerns of the press during the height of the Vietnam conflict centered on the quality of information provided by the military at daily briefings (the famous "five o'clock follies"), and government secrecy generally, rather than access issues.[46] For the young military officers fighting the war without the total commitment of their government, however, the frustration was directed at a press constantly criticizing the conduct of the war, without acknowledging or understanding the limitations on operations created by policy considerations in Washington. For these officers, the perceived unfair press criticism of the U.S. role was the most significant factor in the erosion of public support for the war.[47] These same officers would hold senior positions during the next encounter in which the interests of the Fourth Estate clashed with those of the military—Grenada.

IV. The Modern Era of Military Press Relations

Operation Urgent Fury,[48] the 1983 United States invasion of the island nation of Grenada in the Carribean, marked a new chap-

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44 Middleton, ***supra*** note ***25,*** at 61.

45 William G. Ackerly, Analysis of the Pentagon's Press Pool Tests 10 (1987) (unpublished M A. thesis, University of Kansas) (on file with the University of Kansas Library).

46 ***See*** Lubow, ***supra*** note 15, at ***25.***

47 ***Id.***

48 ***See Special Report: The Battle for Grenada,*** NEWSWEEK, Nov. 7, 1983, at 66, for a detailed summary of the operation.

ter in press-military relations. When Army and Marine forces entered Grenada in the early morning hours of 25 October 1983,[49] no correspondents were present and none had been advised of the operation in advance. When the American people were advised of the intervention the following day, the statement provided by Secretary of Defense Weinberger concerning the lack of press coverage included the comment that the military commander in the field had made the decision because of the difficulty of guaranteeing the safety of press representatives and the need to maintain secrecy during the initial phases of the intervention.[50]

The press was not allowed access until the third day of the operation, 27 October, when fifteen reporters were escorted ashore by the military for a few hours.[51] The press ban was not fully removed until 30 October, when 168 correspondents were allowed on the island and authorized to remain indefinitely, although without military support services.[52]

The press was outraged. Anthony Lewis demanded to know "[wlhat feared knowledge was President Reagan trying to keep from the American public on Grenada?"[53] The Managing Editors of the Associated Press condemned the government action as "inexcusable."[54] Walter Cronkite argued that "[t]his is our foreign policy and we have a right to know precisely what is happening, and there can be no excuse in denying the people that right."[55] Conversely, George Will opined:

> People can reasonably differ about when journalists should have been allowed into Grenada. But journalists have earned a certain coolness from officials making life and death decisions. Many journalists advocate an "adversary" stance toward their government, denying any duty to weigh the consequences of what they print or broadcast. But incantation of the words "the public's right to know" is no substitute for thinking. Someone must make judgments. Many journalists assert a moral as well

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49 Army forces entered Grenada through a low-level parachute drop while Marines came ashore on the eastern coast and moved south.

50 *See* Jeffries, *supra* note 7, at 993-96.

51 *See U.S. Allows 15 Reporters to Grenada for Day,* N. Y. TIMES, Oct. 28, 1983, at A13, col. 5.

52 *See U.S. Eases Restrictions on Coverage,* N.Y. TIMES, Oct. 31, 1983, at A12, col. 1.

53 *See* Anthony Lewis, *What Was He Hiding,* N.Y. TIMES, Oct. 31, 1983, at A19, col. 5.

54 *See* N.Y. TIMES, Nov. 4, 1983, at A16, col. 1.

55 N.Y. TIMES, Oct. 28, 1983, at A13, col. 5.

> as a constitutional right to the status of—strictly speaking—irresponsibility . . .[56]

The media seethed for months, and then on 10 January 1984, the major news organs issued a joint statement[57] calling for recognition of the "historic principle" that reporters "should be present at U.S. military operations" but acknowledging the media's responsibility to "reaffirm their recognition of the importance of U.S. military mission security and troop safety."[58] In response to the media's criticism, the Chairman of the Joint Chiefs of Staff (JCS), General Vessey, created a panel headed by Major General Winant Sidle, to make recommendations to him on the issue of "How do we conduct military operations in a manner that safeguards the lives of our military and protects the security of the operations while keeping the American public informed through the media?"[59] Although the initial plan for this study called for representatives from the working press and from the military, the major media organizations, while desiring to cooperate, determined that it would be "inappropriate for media members to serve on a government panel."[60] General Sidle thus called upon experienced retired members of the press and journalism professors who were expert in military-media relations. The panel, meeting at Fort McNair in Washington in February, 1984, set into principle the significant lesson from Grenada, as stated by the U.S. Commander, Admiral Joseph Metcalf, that the press ban had been counter-productive because the American public was denied the full appreciation that "in both a military and strategic sense all objectives were realized."[61]

The Sidle Report, structured as a statement of principles and a series of recommendations, emphasized as a basic tenet that "it is essential that the U.S. news media cover **U.S.** military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces."[62] The major recommendations were presented in two sections, with the second section providing an explanation of panel comments on each recommendation. The substance

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56 NEWSWEEK, Nov.7, 1983, at 142.

57 The text of the joint statement was reported in N.Y. RMES, Jan. 11, 1984, I, at 10, col. 1.

58 ***Id.***

59 Question asked and explained in Major General Sidle's introduction to U.S. Dep't of Defense, ***Report by*** CJCS ***Media-Military Relations Panel (Sidle Panel)*** (1984) (available in Pentagon library) [hereinafter ***Sidle Panel Report].***

60 ***Id.***

61 Vice Admiral Joseph Metcalf, ***The Press and Grenada: 1983, in*** DEFENSE AND MEDIA IN TIME OF LIMITED WAR, SMALL WARS AND INSURGENCIES 169-70 (P. Young, ed. 1991).

62 ***See*** Statement of Principle in Section I, ***Sidle Panel Report, supm*** note 59.

of the report declared (1)the need for early public affairs planning, concurrent with operational planning, (2) recognition of the need for a national media pool, but of minimal duration with full coverage restored as soon as feasible, **(3)** a recommendation to develop a pre-established and constantly updated accreditation list of correspondents in case of a military operation for which a pool is required, **(4)** acceptance by the press of basic security ground rules as a basic condition to media access, and ***(5)*** consideration in military public affairs planning for adequate logistics, transportation and equipment support for all media members assigned. A final recommendation concerned measures necessary for improved media-military understanding and cooperation, to include increased education concerning the media's role in service schools, more frequent and regularized meetings between senior military and press representatives to address current problems, and the need to explore the special problems of ensuring military security when real-time or near real-time newsmedia audiovisual coverage is present on the battlefield.[63]

The Department of Defense wasted no time in moving to implement the recommendations in the Sidle Panel Report. After instructing operational commanders to plan for public affairs in all future operational planning, the Department of Defense (DOD) implemented plans for a DOD News Media Pool.[64] The initial plan called for four television reporters, one camera operator and one sound technician, two news agency reporters, and one magazine correspondent. Following protests from the nation's newspapers, a newspaper was added.[65] The plan called for rotating the one newspaper slot among eight leading dailies.

In addition to four planned tests of the national pool orchestrated by DOD,[66] the pool was used for the first time in a real operation in Operations Earnest Will and Preying Mantis as part of our ship escort plan for Kuwaiti vessels in the Persian Gulf in 1987-88. The pool was viewed as a success in those operations because no media was in the area with access to military operations, reporters could not travel to the scene without military assistance, and the

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[63] The ***Sidle Panel Report*** was signed by the following panel members: Winant Sidle, Major General, USA (Ret); Brent Baker, Captain, USN; Keyes Beech; Scott M. Cutlip; John T. Halbert; Billy Hunt; George Kirschenbauer, Colonel, USA; A.J. Langguth; Fred C. Lash, Major, USMC; James Major, Captain, USN; Wendel S. Merick; Robert O'Brien, Colonel, USAF; Ricard S. Salant; and Barry Zorthian.

[64] ***See Pact Reached on Media*** *Pool* ***to Cover Military Operations,*** WASH. POST, Oct. **11,** 1984, at A1, col. **4.**

[65] ***See Pentagon to Add Reporter*** *from* ***Daily Paper to Pool,*** WASH. POST, Oct. 12 1984, at Al, col. **1.**

[66] The four tests were conducted in 1985 and 1986 during military exercises in Honduras; Fort Campbell, Kentucky; off the southern coast of California; and at Twenty Nine Palms, California. ***See*** Ackerley, ***supra*** note 45 at 31-32.

capacity of Navy ships in the area to accommodate the press was extremely limited.[67] A year later, in a pool created to cover Operation Nimrod Dancer in Panama when the United States moved military reinforcements into that country because of the unlawful nullification of the national election results in May, 1989, criticism, rather than praise, was voiced. In Panama, reporters already had access to the area, and the creation of a mandatory national media pool restricted, rather than enhanced access.[68] Again in 1989, criticism was voiced during Operation Just Cause, when a similar pool was established, as U.S Forces entered Panama City in December to restore order, save lives and protect U.S. interests under the Panama Canal Treaty.[69] In Panama, the pool concept was a failure. Pool reporters were not transported into the area of hostilities until the combat was nearly over, and when they did arrive they were given Army briefings rather than access to the front lines.[70] To make matters worse, those reporters already assigned in Panama were restricted to Howard Air Force Base to ensure early access to the pool which the Department of Defense was unable to deliver in time for the fighting.[71]

The media concerns following Operation Just Cause led the Department of Defense's Assistant Secretary for Public Affairs, Pete Williams, to request Fred Hoffman, longtime Associated Press Pentagon correspondent and former Pentagon Deputy Assistant Secretary of Defense for Public Affairs during the Reagan Administration, to head a panel to review the press concerns that had arisen during Operation Just Cause and to make recommendations on how greater press accommodation, consistent with mission security, could be effected.[72] Of the seventeen recommendations

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[67] *See* discussion of Operation Earnest Will in P. COMBELLES-SIEGEL, THE TROUBLED PATH TO THE PENTAGON'S RULES ON MEDIA ACCESS TO THE BATTLEFIELD: GRENADA TO TODAY 13 (U.S. Army War College Strategic Studies Institute, 1996).

[68] *See U.S.* Dep't of the Army, Public Affairs Office, Info. Memorandum, Deployment of the DOD Media Pool on Nimrod Dancer (12 May 1989). In this Information Memorandum, the Army concedes the pool should not have been deployed since more than a hundred reporters were in Panama, already covering these operations.

[69] *See* Fred Hoffman, *Review of the Panama Pool Deployment: December 1989, in* UNDER FIRE: U.S. MILITARY RESTRICTIONS ON THE MEDIA FROM GRENADA TO THE PERSIAN GULF, app. C at 4 (J. Sharkey ed., 1991). *See* also James P. Terry, *Law in Support of Policy in Panama,* NAVAL WAR COLLEGE REV. 110 (Autumn 1990).

[70] *See* James Warren, *In First Battlefield Test, Media Pool Misses Mark,* CHI. TRIB., Jan. 7, 1990, Perspective section, at 1.

[71] *See* Pascale M. Combelles, *Operation Just Cause: A Military-Media Fiasco,* MIL. REV., May-June 1995, at 77-85.

[72] In his report to Assistant Secretary Williams, dated March, 1990, Mr. Hoffman gives an account of the operation, offers his observations about what happened, and makes 17 recommendations he believes would improve future media pool operations. *See* Fred Hoffman, Review of Panama Pool Deployment (March 1990) (Report on file with the Pentagon Library, Washington, D.C. 20310). *See also* Hoffman, *supra* note 69, app. C.

offered by Mr. Hoffman in his report, five were accepted for immediate implementation, six were agreed to in principle but required some refinement, and six were taken under consideration, with the recognition that they would require "further consideration and coordination with the Joint Chiefs of Staff, the Unified Commands, and the media pool members."[73] The five recommendations the Assistant Secretary agreed to act on immediately included the following:

> The ASD(PA) [Assistant Secretary of Defense for Public Affairs] must be prepared to weigh in aggressively with the Secretary of Defense and the JCS Chairman where necessary to overcome any secrecy or other obstacles blocking prompt deployment of a pool to the scene of action. . . .
>
> After a pool has been deployed, the ASD(PA) must be kept informed in a timely fashion of any hitches that may arise. He must be prepared to act immediately, to contact the JCS Chairman, the Joint Staff Director of Operations and other senior officers who can serve to break through any obstacles to the pool. The ASD(PA) shall call on the Defense Secretary for help as needed . . . .
>
> The ASD(PA) should study a proposal by several of the Panama poolers that future pools deploy in two sections. The first section would be very small and would include only reporters and photographers. The second section, coming later, would bring in supporting gear, such as satellite uplink equipment . . . .
>
> The national media pool should never again be herded as a single unwieldy unit. It should be broken up after arriving at the scene of action to cover a wider spectrum of the story and then be reassembled periodically to share the reporting results . . . .
>
> During deployments, there should be regular briefings, for pool newsmen and newswomen by senior operations officers so the poolers will have an up-to-date and complete overview of the progress of an operation they are covering.[74]

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[73] Pete Williams, Assistant Secretary for Public Affairs, Memorandum for Correspondents (March 20, 1990) (on file with the Pentagon Library, Washington, D.C. 20310). In the memorandum, Assistant Secretary Williams stated: "The Department of Defense is committed to the National Media Pool and will make every effort to use the pool in a way that serves the interests of informing the American people about military activities."

[74] Hoffman, *supra* note 72.

This commitment on the part of DOD was followed by the 30 March 1990 dissemination of a new JCS publication[75] which provided new planning requirements for public affairs. Under this guidance to the regional joint operational commanders (CINCs), the CINCs are required to coordinate all public affairs decisions, guidance and activities with DOD Public Affairs and JCS to ensure the pool and the accredited media, if the pool is no longer operational, gain the greatest possible access to information. As the DOD later reported to the Congress after the Gulf War, this JCS publication required the CINCs to issue the appropriate public affairs instructions, after coordination with ASD(PA) and JCS, and implement public affairs policy, to include providing transportation and communication equipment support for the National Media Pool, unless unavoidable military necessity (safety or mission essential considerations) required all available resources.[76]

The new guidance was tested only five months later when Saddam Hussein invaded tiny Kuwait in the Persian Gulf.[77] The immediate United States response, sanctioned by the United Nations, was Operation Desert Shield. During this initial operation, the press accommodations worked well enough and appeared to satisfy the media, as well as the military. This was largely because no American or European reporters were in Saudi Arabia, the deployment area for U.S. and Allied Forces in the early stages of the operation, and the media could not have otherwise gained access. Moreover, the military benefited from the positive stories of U.S. training and deployment.

As the climate shifted from one of watchful waiting to offensive military operations, however, the press chafed under the requirements of pool restrictions imposed for Desert Storm. The DOD and JCS had approved guidelines which specified:

> To the extent that individuals in the news media seek access to the U.S. area of operations, the following rules apply: Prior to or upon commencement of hostilities, media pools will be established to provide initial combat coverage of U.S. forces. U.S. news media personnel present in Saudi Arabia will be given the opportunity to join CENTCOM media pools, provided they agree to pool their products. News media personnel who are not members of

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75 THE JOINT CHIEFS OF STAFF, JOINT PUB. 5-02.2, ANNEX F, PLANNING GUIDANCE—PUBLIC AFFAIRS (30 Mar. 1990).

76 *Id.*

77 *See* James P. Terry, ***Operation Desert Storm: Sharp Contrasts in Compliance with the Rule of Law,*** 41 NAVAL L. REV. 83 (1993) for one view of how and under what authority the United States initially responded to the Iraqi invasion of Kuwait.

> the official CENTCOM media pools will not be permitted into forward areas. Reporters are strongly discouraged from attempting to link up on their own with combat units. U.S. commanders will maintain extremely tight security throughout the operational area and will exclude from the area of operation all unauthorized individuals.[78]

The United States Central Command (CENTCOM) Guidelines also provided for pre-publication review by the CENTCOM public affairs staff of any articles written after the inception of hostilities. The Guidelines stated:

> In the event of hostilities, pool products will be subject to review before release to determine if they contain sensitive information about military plans, capabilities, operations, or vulnerabilities . . . that would jeopardize the outcome of the operation or the safety of U.S. or coalition forces. Material will be examined solely for its conformance to the attached ground rules, not for its potential to express criticism or cause embarrassment.79

Many in the press cried foul and demanded they be given greater access to the battlefield than provided by CENTCOM pools, urging that denial of unfettered access to news was akin to a constitutional violation.[80] Criticisms also included the claim that pre-publication review was a prior restraint, amounting to censorship, for which no extreme circumstances could be shown where national security was believed to be in peril.[81] Other journalists, however, felt the media restrictions were reasonable and necessary to protect the troops. Paul Kamenar, writing in ***Legal Times*** on ***28*** January 1991, reminded his readers that,

> the free speech clause of the First Amendment is not absolute and does not protect the publication, for example, [from charges] of obscenity, so too are we reminded of Chief Justice Charles Evans Hughes oft-quoted observation in ***Near v. Minnesota*** that the First Amendment's guarantee of freedom of speech does not bar the government from preventing the publication of sailing dates of transports or the number and location of troops.[82]

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78 U.S. Central Command, Public Affairs Offce, Guidelines for News Media (Jan. 14, 1991).

79 *Id.* The security ground rules are reproduced at ***supra*** note 12.

80 The right of journalistic access to news, or to places where news is found, is one that the Supreme Court has never even recognized. ***See, e.g.,*** Branzburg v. Hayes, 408 U.S. 665 (1972).

81 ***See, e.g.,*** New York Times Co. v. United States, 403 U.S. 713 (1971)(per curiam).

82 Paul D. Kamenar, ***Media Restrictions Are Necessary to Protect Troops,*** LEGAL TIMES, Jan. 28, 1991, at 19-20. ***See*** Near v. Minnesota ***ex rel.*** Olson, 283 U.S. 697, 716 (1931).

While the public at large was more amused than concerned about press complaints, finding the televised daily command briefings by CENTCOM from Dhahran, Saudi Arabia informative, the Secretary of Defense did take the media concerns seriously. After the Desert Storm cease-fire, DOD asked all pool journalists for comments on military-press arrangements. A letter from seventeen news executives began a process of negotiation. Over the course of eight months, Assistant Secretary Williams engaged in a series of negotiating sessions with representatives of *Time,* the *Washington Post, Knight-Ridder, ABC,* and the *Associated Press.* The Services and CINCs also offered thoughtful and balanced views on the media concerns. Their comments focused upon practicalities, but noted the lack of accountability for the consequences of publication of information that would have immediate adverse effects on U.S. operations.[83]

The negotiations[84] resulted in nine principles which the Defense Department and media representatives could agree upon.[85] The news organizations originally proposed ten principles. The tenth dealing with security review stated: "News material—words and pictures—will not be subject to security review." The Pentagon proposed instead the following principle: "Military operational security may require review of news material for conformance to report-

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[83] Another comment raised frequently by JCS and CINCs Public Affairs Officers was that much of the media criticism was based on false analogies to other conflicts, in which events unfolded at a much more deliberate pace and press presence developed over a considerable length of time.

[84] The media representatives negotiating this Statement of Principles included Stanley Cloud of the New York Times, Michael Getler of the Washington Post, Clark Hoyt of Knight-Ridder Newspapers, George Watson of ABC News, and Jonathon Wolman of The Associated Press. Assistant Secretary Pete Williams represented DOD.

[85] The nine principles, announced on 21 May 1992, by Assistant Secretary Williams, were as follows:

> **1.** Open and independent reporting will be the principal means of coverage of U.S. military operations.
>
> **2.** Pools are not to serve as the standard means of covering U.S. military operations. Pools may sometimes provide the only feasible means of early access to military operations. Pools should be as large as possible and disbanded at the earliest opportunity—within 24 to **36** hours when possible. The arrival of early-access pools will not cancel the principle of independent coverage for journalists already in the area.
>
> **3.** Even under conditions of open coverage, pools may be appropriate for specific events, such as those at extremely remote locations or where space is limited.
>
> 4. Journalists in a combat zone will be credentialed by the US. military and will be required to abide by a clear set of military security ground rules that protect U.S. forces and their operations. Violation of the ground rules can result in suspension of credentials and expulsion from the combat zone of the journalist involved. News organizations will make their best efforts to assign experienced journalists to combat operations and to make them familiar with US. military operations.

ing ground rules."[86] The fundamental disagreement could not be bridged. Nevertheless, Louis D. Boccardi, president and chief executive officer of the *Associated Press*, who had organized the original meeting with Defense Secretary Cheney which led to the negotiations, said of the guidelines: "It is the consensus of our group that the guidelines offer the promise of the kind of coverage the citizens of a democracy are entitled to have, while they also recognize the need for security ground rules in combat zones."[87]

On the whole, the media seemed satisfied.88 There was, of course, a small group represented by *Harper's* editor, John MacArthur, who attacked the principles as a sellout of the First Amendment.[89] However, the mainstream press, led by ***Time*** magazine's Washington bureau chief, defended the principles.[90]

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5. Journalists will be provided access to all major military units. Special operations restrictions may limit access in cases.

6. Military public affairs officers should act as liaisons but should not interfere with the reporting process.

7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft whenever feasible. The military will be responsible for the transportation of pools.

8. Consistent with its capabilities, the military will supply PAOs with facilities to enable timely, secure, compatible transmission of pool material and will make these facilities available whenever possible for filing independent coverage. In cases when government facilities are unavailable, journalists will, as always, file by any other means available. The military will not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

9. These principles will apply as well to the operations of the standing DOD National Media Pool system.

86 U.S. Dep't of Defense, Dir. 5122.5, Encl. 3 (19 May 1992). Attachment on Security Review, provided to author by Commander David Barron, USN, Deputy Public Affairs Officer, JCS, in May, 1993 (on file with the author).

87 Louis D. Boccardi, Remarks found in ASD(PA) News Release No/241-92, May 21. 1992.

88 See the statement of Mr. Seymour Topping, President of the American Society of Newspaper Editors and Director of Editorial Development for the 32 regional newspapers of the New York Times Company, in Robert Pear, *Military Revises Rules to Assure Reporters Access to Battle Areas,* N.Y. TIMES NAT'L, May 22, 1992, at 3, where he described the agreement as follows: "We hold that if the spirit of the agreement is fully respected by both sides, the military will find no need for prior security review." It is important to note that the major criticism during the Gulf War came from Eastern media representatives where the pressure to meet deadlines and placate editors is strongest, with Central and Western reporters not disturbed by the pool system or pre-publication review. Therefore, it was critical that the Eastern media be satisfied with the agreement that was developed.

89 *See, e.g.*, JOHN R. MACARTHUR, SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR (1992).

90 *See* Stanley W. Cloud, *Covering the* Next *War,* N.Y. TIMES, Aug. 4, 1992, at 19, col.3.

The agreed principles reached between DOD and the media representatives were not praised by the CINCs because of their continuing concern with the consequences of publication of information that would have immediate adverse effects on U.S. operations. Nevertheless, there was a recognition that these largely hortatory principles were not terribly inconsistent with the functioning of the National Media Pool or with the way press arrangements actually worked in the Gulf. There was a recognition that in any future conflict, the CINCs' public affairs officers would continue to provide guidelines on reportable information, access, story filing, logistics and other matters tailored to the particular situation.

In Haiti during Operation Uphold Democracy in 1994, the last major operation in which the U.S. military has controlled both operations security and press relations,[91] the media found common ground and accommodation with military leadership in covering this U.S. deployment. In the Haiti operation, Army leaders within the XVIII Airborne Corps and Joint Task Force (JTF) 180 took the lead in educating their unit commanders on what to expect from the press,[92] while thoroughly briefing the press in advance of the deployment of forces.[93]

As General Shelton and Lieutenant Colonel Vane point out, "what made the Haiti operation unique was the concept of merging the media into operational units before the invasion began."[94] General Shelton explains: "It was evident to [public affairs] planners and the JTF commander that what was missing from America's recent military operations were reporters who would participate in and cover the final planning and initial assault by U.S. troops."[95]

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91 Operations in Somalia in 1992-1994 are not addressed here because the information flow, and to some extent, operational security, could not be effectively controlled by U.S. military leaders, and the opportunity to enforce even the smallest modicum of press restraint in favor of operational security did not exist. In addition, reporters in Somalia seldom understood the military operational context of what they were reporting. For example, U.S. Army Rangers clearly won a highly publicized fire fight in Mogadishu in 1993, but that fact was lost among the casualty figures and other images that were broadcast live on television.

92 The XVIII Airborne Corps held two separate sessions on Media Intelligence Preparation of the Battlefield (IPB), on August 3 and September 22, 1994, to educate their senior leaders on the media's training, background capabilities and needs in order to enable them to incorporate them smoothly into military deployments and operations.

93 The assigned media pool members were thoroughly briefed prior to deployment. They received detailed plans from USACOM, from the Joint Task Force (JTF) commander at Fort Bragg, and from representatives of the individual units they would cover.

94 Henry Shelton & Timothy Vane, *Winning the Information War in Haiti,* MIL. REV., Nov.-Dec. 1995, at 3, 5.

95 *Id.* at 3.

The leaders of Joint Task Force 180 in Haiti, careful observers of the U.S. experience in Somalia, were acutely aware of the principle within *Army Field Manual 100-5* that: "Dramatic visual presentations can rapidly influence public—and therefore political—opinion so that the political underpinnings of war and operations other than war may suddenly change with no prior indication to the commander in the field."[96] They were convinced from Somalia that an uneducated press was no ally. For this reason, the Army leadership had committed itself to the nine principles within the 1992 Statement of Principles for News Coverage of DOD Operations in both their planning and execution, with the result that the operation stands as a model of good media relations. The proof lay in the lack of leaks, the stories emphasizing the military's professionalism in a complex operation, and the fact that the media really seemed to understand what they were reporting. The excellent coverage of numerous civil affairs initiatives and of the great assistance provided by our forces in the slow process of nation-building in Haiti marked a military-press relationship unusual in military operations overseas.

V. Resolving Press Restrictions in the Courts

Paralleling the tortuous path just described, the same issues, lack of access and prepublication review, were focused upon in the Federal Courts. In the legal context, just as in the political context, those press restrictions necessary to ensure the security of the operation and the safety of the troops were preserved. Following the conclusion of Operation Urgent Fury in Grenada where all media had been excluded during the first sixty hours of the operation, publisher Larry Flynt of *Hustler* magazine filed suit in Federal District Court in Washington, D.C., seeking both declaratory and injunctive relief against Secretary Weinberger,[97] while alleging the exclusion of *Hustler* reporters from the island during the initial phase of the operation had violated his First Amendment rights.[98]

The Government response was that since the restrictions complained of had been lifted, the suit should be dismissed as moot.[99] Flynt argued that the legal claims fell within an exception to the mootness doctrine, namely, "capable of repetition yet evading review," first articulated by the Supreme Court in 1911 in *Southern*

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96 *See* U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 1, 3 (14 June 1993).

97 Flynt v. Weinberger, 588 F. Supp. 57, 58 (D.D.C. 1984), ***appeal filed,*** **No.** 84-5888 (D.C. Cir. **Aug.** 20, 1984).

98 *Id.*

99 *Id.*

Pacific Terminal Company u. ICC.[100] Judge Oliver Gash, however, found that there was no reasonable expectation that the situation would be repeated, as required by the Supreme Court in *Southern Pacific Terminal*, for application of the exception.[101] Furthermore, Judge Gash stated that even if the challenge represented a live controversy, although he had doubts that Flynt's constitutional rights had been violated, he "would exercise [the court's] equitable discretion and decline to enter an injunction."[102] He found that the relief sought by plaintiff "would limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations and the lives of military personnel and thereby gravely damaging the national interest."[103] The court thus dismissed as moot both the request for injunction, as well as the request for declaratory relief, finding there was no "fixed and definite" government policy at issue.[104]

One week after the start, of Operation Desert Storm, the Department of Defense was again sued over its policies of controlling access, this time through a pool arrangement. In *The Nation Magazine u. U.S. Department of Defense*,[105] five journalists, nine publications, a national radio network and a news agency challenged the Department of Defense press restrictions in the Desert Storm theater of operations. They asked the United States District Court for the Southern District of New York to declare that the "defendants' creation and promotion of a pool of journalists is unconstitutional," to order "the defendants to provide the press access where U.S. forces are deployed or engaged in overt operations," and to enjoin the "defendants from preventing, hindering, obstructing, delaying, or exercising a prior restraint on conduct constituting freedom of the press by plaintiffs and other members of the U.S. press."[106]

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100 219 U.S. 498 (1911). For a discussion of the "capable of repetition yet evading review" doctrine, *see* R. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897 (1983).

101 *Flynt*, 588 F. Supp. at 59.

102 *Id.* at 60.

103 *Id.*

104 *Flynt*, 588 F. Supp. at 60-61. *See also* Halkin v. Helms, 690 F.2d 977, 1006-09 (D.C. Cir. 1982).

105 762 F. Supp. 1558 (S.D.N.Y. 1991). *Agence France-Presse* also filed suit against DOD on 6 February 1991, challenging its exclusion from the Desert Storm media pool because priority was given to entities that "principally serve the American public." It also complained that administration of the pool had been entrusted to Reuters, its principal competitor. *Agence France-Presse* asked for a TRO. The Government defended on a variety of grounds, eventually moving for joinder with *The Nation Magazine*. The claims of *Agence France-Presse* were ultimately dismissed when the lawsuit in *The Nation Magazine* v. *U.S. Department of Defense* was dismissed.

106 *Id.* at 1561-63.

After finding the legal question of press access to the battlefield to be a novel one,[107] the District Court found that a minimal constitutional right of access is at least implicated by the First Amendment:

> [T]here is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation. As such, the government could not wholly exclude the press from a land area where a war is occurring that involves this country. But this conclusion is far from certain. . .[108]

The court then found that the plaintiffs had standing and that the claim for injunctive and declaratory relief did not present a nonjusticiable political question.[109] Judge Sand further found that the press restriction issues as a whole were not moot because they "were capable of repetition, yet evading review," with the proviso that pooling rules were likely to be different and differently applied in subsequent conflicts.[110] With respect to the particular claims of the plaintiffs, the court found the request for injunctive relief to be moot since "the regulations have been lifted and the press is no longer constrained from traveling throughout the Middle East, [and] there is no longer any presently operative practice for this Court to enjoin."[111] With regard to the request for declaratory relief, the court declined to decide the question in the abstract, stating: "prudence dictates we leave the definition of the exact parameters of press access to military operations abroad for a later date when the full record is available, in the unfortunate event that there is another military operation."[112]

Finally, the court also declined the plaintiffs' equal protection challenge to the pools. Judge Sand elicited little disagreement among the plaintiffs "that DOD may place time, place, and manner restrictions on the press upon showing that there is a significant governmental interest."[113] Nevertheless, when he urged plaintiffs, in light thereof, to suggest alternatives to utterly unfettered access, they refused and adhered to an absolute 'no limitation' approach.

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107 *Id.* at 1561.
108 *Id.* at 1572.
109 *Id.* at 1568.
110 *Id.* at 1569.
111 *Id.* at 1570.
112 *Id.* at 1572.
113 *Id.* at 1574.

The court thus dismissed the complaint, declining to decide an unfocused controversy.114

There have been no significant decisions *in the military context* on pre-publication review or prior restraint. Following Desert Storm, challenges on this basis were likely not raised because it was the pool system that posed the greatest restriction on newsgathering, while pre-publication review (prior restraint) at worst simply delayed the stories. Another rationale for the lack of litigation, suggested by Garry Sturgess, is that it would have been imprudent to subject the prior restraint doctrine to a legal test at that time, given the overwhelmingly conservative tenor of the contemporary judiciary.115

While the Government may validly take measures to prevent publication of the number and location of troops in wartime,116 "content based exclusion" of protected speech may be enforced only if the Government shows that the exclusion "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."117 Nevertheless, in the Gulf conflict, acceptance of the Ground Rules constituted an agreement on the part of pool members that the information controlled therein was properly restricted by the justification of a "compelling))Governmental interest.

Furthermore, the willingness of the press representatives in 1992, who negotiated the new principles for press-military relations, to continue to accept reasonable ground rules, albeit narrowly drawn, suggests this will not be an issue in the next conflict, as access will again be traded for reasonable restrictions necessary to maintain the security of the operation.118

VI. Conclusions and Observations for the Future

The Vietnam War, in the view of many who were military participants, was an aberration in military-press relations. There were

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114 *Id.* at **1575.**

115 *See* Garry Sturgess, *Media Powers Oppose War Rules But* ***Shun Suit,*** LEGAL TIMES, Feb. **4,** 1991, at 2.

116 *See* Near v. Minnesota *ex rel.* Olson, 283 *U.S.* **697, 716** (1931).

117 Frisby v. Schultz, **487** U.S. **474, 481** (1988).

118 Operations other than war such as peacekeeping and peace enforcement operations (Haiti, Rwanda, etc.) raise other issues, but seldom require the information security such as required in Desert Storm where the strength and commitment of the opposition was not fully known, and political controversy was high. In these peacekeeping initiatives, it is often important to communicate as fully, and as often, as possible with potentially adverse factions concerning the actions and motives of the peacekeeping force. The opposite is normally true in high intensity conflict situations.

few restrictions on the media related to access to geographical areas, but restrictions at the source, through withheld and inaccurate information, soured the press. This occurred at the same time that efforts of U.S. forces to implement a flawed political agenda were turning the nation against a continued role in Vietnam. Concomitantly, the military distrust of the media for a perceived lack of accountability in Vietnam carried through Grenada, Panama and Desert Storm.

The serious negotiations between the Department of Defense and respected representatives of the media in 1992 brought the process back into balance. Subsequently, the integration of the press into combatant units in Operation Uphold Democracy in Haiti, coupled with the media's clear understanding and enforcement of the security of the operation, has given a new equilibrium to military-press relations. While there are those who claim that short one-sided operations like Uphold Democracy and United Shield in Somalia in March, 1995 (where U.S. forces covered the U.N. withdrawal) do not offer a fair assessment of military-media relations that only a conflict involving a sophisticated enemy or a politically controversial operation can provide, it is telling that the press as a whole, and the military, have accepted and incorporated the new principles in their planning.

In 1996, the Department of Defense further implemented the 1992 principles, with the experience of Somalia, Haiti and Rwanda to draw upon.[119] The new directives provide flexibility for the CINCs to decide whether circumstances warrant the establishment of a pool, but neither accept nor reject the possibility of correspondents carrying sophisticated electromagnetic gear in theater, leaving that decision to the operational commander. This latter flexibility would be required because of the differing nature of possible conflicts, with Desert Storm reflecting one conflict where the potential for an adversary to monitor such signals was clearly present.

Although the new directives incorporate each of the nine principles negotiated with the media, there are those in the press who will argue that providing a numerical limitation on the number of reporters allowed to accompany the force for specific types of operations should also be incorporated in DOD directives, to ensure pools will not be the only available tool to afford access. They would argue that this would serve both media and military interests by affording both the opportunity to better prepare for accommodating the press in specific types of operations, and for the press to ensure it has experienced reporters assigned for such contingencies. With regard

119 *See* DOD DIR. **5122.5** & DOD DIR. 5400.13, ***supra*** note **9.**

to experience, the new directives do not change the current minimal requirement for accreditation — that the correspondent be associated with a news organization. Requiring that only experienced reporters be assigned would enhance reporting and ensure the most accurate picture is provided to the American public.

Finally, the new directives do not adequately address the differences in press coverage standards imposed by the "nine principles" versus those imposed by the UN or other foreign governments in multinational operations. We can expect that the U.S. will not "go it alone" in future major conflicts in Europe, Africa, the Gulf, or elsewhere. The UN standards, and those of some European nations, for example, are far more rigid, yet seldom enforced, while U.S. press standards are more realistic, while capable of enforcement through revocation of accreditation. Nevertheless, for news media to fail to even acknowledge the more restrictive standards in multinational operations, could result in criticism.[120]

Despite the minor deficiencies noted above, the military-media negotiating process, to include the Sidle Panel in 1984, the Hoffman Panel in 1990, and the media negotiations with Assistant Secretary of Defense Pete Williams in 1992, has resulted in an understandable and reasonable accommodation of operational and journalism interests. The Courts have not been a big player in this process, largely because of their recent conservative tenor, public support for the military versus the media, and the prior history of court decisions indicating a lack of eagerness to address First Amendment access or prior restraint in the military context. While we can certainly expect future debate on these issues, as long as our young men and women are sent into battle to defend the American people, including the American media, operational security and the safety of our forces will be carefully balanced with the right to be independently informed about the actions of our Government.

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[120] Other thoughtful criticisms **are** discussed in **COMBELLES-SIEGEL,** *supra* note 67.

GETTING BACK TO THE REAL UNITED NATIONS: GLOBAL PEACE NORMS AND CREEPING INTERVENTIONISM

COMMANDER ROGER D. SCOTT*

The United Nations (UN) has been so abused with altruistic adventurism that few can now recognize its original purpose. The UN Charter, in its proper context, is a strategic watershed that should be reevaluated and applied with greater circumspection. This paper outlines the origins and structure of the Charter regime of peace and the clear direction of national practice. It also distinguishes between three alternatives for national security strategy and planning with respect to that regime:

> (1) defy Charter norms and intervene on the basis of unilateral discretion;
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> (2) attempt to change Charter norms by renegotiating broader authority of states to use force against each other unilaterally; or
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> (3) comply with existing norms for the use of force—learn them, plan to them, and take advantage of legitimate opportunities, including use of the inherent right of individual and collective self-defense more assertively—while pressuring the Security Council to authorize the use of non-defensive force more readily.

Explication of the origin and stature of the UN Charter, and the deeply rooted U.S. policy of compliance, will illustrate that the first two options are fatuous.

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The traditional practice of relying on canonical strategies from the last war has repeatedly led to strategic surprise and defeat. Armed with the lessons of history, military commanders labor to keep pace with change, to know potential enemies, and to outmatch them with innovations of strategy, technology and style. The decades-long arms race of the recent Cold War etched in the minds of many a pattern of one-upmanship, raised to the heavens with the shock of the Soviet inauguration of the Space Age.[1] As in all things, the military struggles to remain at least one step ahead, to develop countermeasures for the latest threat, to control the battlespace and dominate any adversary, to end-run enemy systems, to deliver a knock-out punch in the first round. Value is placed on new ideas, not old idioms. The chief engine of national prosperity is innovation. Change is our creed.

Old strategies for peace can fail just as surely as old strategies for war; the record bears this out. The Treaty of Versailles, the League of Nations, the Washington and London Naval Conferences,[2] the Kellogg-Briand Pact[3]—the instruments of order conceived after World War I failed to counter the resurgence of German militarism and the aggressive expression of Japanese imperialism that led to a second World War. Against this backdrop of failure, the 1990's are governed by a regime of peace approximately fifty years old, consisting of the United Nations,[4] toothless human rights declarations and agreements,[5] and the institutions that evolved from Bretton Woods (e.g., the World Bank and the International Monetary Fund).[6] The

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1 The launch of the first Sputnik satellite is widely recognized as the first salvo in the decades-long "Space Race."

2 The 1921-22 Washington and 1930 London Naval Conferences attempted to maintain "strategic balance" through numerical and tonnage limits on capital ships. JOHN NORTON MOORE ET AL., NATIONAL **SECURITY** LAW 67 (1990). Germany and Italy disregarded the limits by falsifying tonnage or by classifying large ships as heavy cruisers instead of battleships.

3 27 Aug. 1928, 46 Stat. 2343, 94 L.N.T.S. 57. The Kellogg-Briand Pact, or 'Treaty of Paris," is discussed more fully below. The chief principles of the Pact were peaceful resolution of international disputes and renunciation of war as an instrument of foreign policy.

4 The United Nations Charter was signed in 1945.

5 *E.g.,* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/811, at 56 (1948). Lack of international enforcement mechanisms is a continuing weakness of human rights agreements and covenants. The agreements defer to domestic enforcement or are purely admonishments.

6 ***See*** Bretton Woods Agreements Act, 22 U.S.C. § 286 (1997); Articles for the Government of the International Monetary Fund, 60 Stat. 1401, **2** U.N.T.S. 39, T.I.A.S. No. 1501 (1945); Global Agreement on Tariffs and Trade (GATT), Oct. 30, 1957, 4 Bevans 639, 55 U.N.T.S. 187, T.I.A.S. No. 1700. The principal impetus for the global trade and economic agreements sponsored by the United States at the end of World War II was a recognition of the international friction created by Nazi manipulation of exchange rates and discriminatory trade policy, coupled with the need to reconstruct a war-shattered world.

Cold War stymied the post-World War II regime of peace.[7] Now the "good guys" are dusting off that regime and relying on old rules, while new threats seem increasingly not amenable to established solutions. The habit of innovation so permeates modern thinking that people who fancy themselves movers and shakers in the defense business are impatient with any old order that seems to inhibit immediate results—old war, old peace, new world. Have we come to a streetfight with the Marquis of Queensbury's rules?

Proponents of new-age solutions blame the nation-state system ensconced in the UN Charter for the seeming intractability of modern threats.[8] Sovereignty has become the shield of the enemy. The Islamic World is breeding and exporting terrorists to murder busloads of Israelis[9] and barracks full of U.S. servicemen,[10] attacking even the foundations of the World Trade Center in New York.[11] Narcotics produced in the Andean Ridge are poisoning our children. In a period of increasingly nervous grace, we wait for nuclear weapons to explode in the trunks of cars or in small suicide airplanes.[12] We wait for Iran, Pakistan, North Korea, Libya, or some other frustrated state to play the opening hand in a new thermonuclear age. The borders of states around the world are permeated by tides of indigent, untalented migrants who sap local economies and challenge cultural order established among assimilated populations. International crime proliferates from bases safely within the borders

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7 It is a common view that the U.N. Security Council was rendered ineffective during the Cold War by discord among the permanent members. *See, e.g.,* Martti Koskenniemi, *A Symposium on Reenvisioning the Security Council: Article: The Place of Law in Collective Security,* 17 MICH. J. INT'L LAW 455, 457 (1996).

8 *See* Jurat Chopra, *Back to the Drawing Board,* 51 BULL. ATOM. SCI., NO. 2, 29 (1995); *Scathing Report Rips U.N. "Znertia,"* TORONTO STAR, Nov. 8, 1993, at A3; Moira Farrow, *UN Called Obsolete as More Nations split,* VANCOUVER SUN, Oct. 19, 1992, at B7. Robert D. Kaplan may be the leading proponent of the view that the nation-state system is doomed in a chaotic future. *See, e.g.,* ROBERT D. KAPLAN, THE ENDS OF THE EARTH (1996).

9 *See Terror Attacks in Israel: Chronology of Violence,* FIN. TIMES, Mar. 5, 1996, at 4; Nicholas Goldberg, *Another Bloody Sunday/3rd Bomb in a Week Kills 19, as Jerusalem Bus Explodes,* NEWSDAY, Mar. 4, 1996, at A4.

10 *See* Bradley Graham, *Bomb Kills 23 Americans at Saudi Base,* WASH. POST., June 26, 1996, at A1 (discussing a truck bomb at Khobar Towers in Dharan). Consistent with the theme of this article, it should be noted that the United States is cooperating with the Saudi Arabian government in pursuing a *law enforcement* approach to this incident.

11 *See* N.R. Kleinfield, *Explosion at the Twin Towers,* N.Y. TIMES, Feb. 27, 1993, at sec. 1, p. 1, col. 2. Members of the Egyptian-based group responsible for the bombing of the World Trade Center and planning a wider campaign of terrorism in New York have been prosecuted and convicted in federal court.

12 On the proliferation of nuclear materials, see Gavin Cameron, *Nuclear Terrorism: a Real Threat?,* 8 JANE'S INTEL. WEEKLY, no. 9.422 (Sept. 1. 1996).

of rogue states.[13] The world waits nervously for the next Chernobyl, unable to enforce environmental standards inside national boundaries.[14] Our currency is counterfeited,[15] and our intellectual property is stolen.[16] We attempt to deliver humanitarian relief in environments of violence and to champion human rights against authoritarian regimes that act under the aegis of sovereignty. In the process, the United States suffers casualties and is accused of taking sides in the conflict. States negotiate while evil proliferates; and the new activists are calling for forceful transboundary solutions.[17]

As the sole superpower, the United States could marshal1 irresistible forces of unmatchable mass and technological sophistication to extinguish the embers of regional instability, to win decisively the war on drugs, or erase proliferation of weapons of mass destruction wherever found. Aggressively expanding military roles and missions to counter new threats could achieve immediate, demonstrable results — and happily provide a new *raison d'être* for a military bureaucracy now scanning for threats to offset irrelevance. If we lack sufficient conventional enemies to sustain our force, why not turn to nonconventional enemies, like narcotraffickers, migrant smugglers, and rhinoceros poachers, while we attempt to inspire conventional fears of a trading partner like China? Soldiers of fortune, earnest problem-solvers, or budget-preservers, whatever their motivation, there is no shortage of new pugilists who would strike off the shackles of law and whip a trumpeting elephant against an

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[13] *See* Sara Jankiewicz, *Glasnost and the Growth of Global Organized Crime,* 18 Hous. J. INT'L L. 215 (1995); CLAIRE STERLING, THIEVES' WORLD: THE THREAT OF THE NEW GLOBAL NETWORK OF ORGANIZED CRIME (1994); David Crane, *New "Global Crimes" on Horizon for 22st Century,* TORONTO STAR, Feb. 5,1996, at A12.

[14] *See* John F. Beggs, *Combating Biospheric Degradation: International Environmental Impact Assessment and the Transboundary Pollution Dilemma,* 6 FORDHAM ENVTL L.J. 379 (1995); David **A.** Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?,* 49 WASH. & LEE L. REV. 1389, 1391 (1992) ("The international system as currently structured invites the proliferation of holdouts, free riders, laggards, scofflaws, and defectors.").

[15] *See* Nicholas D. Kristof, *Is North Korea Turning to Counterfeiting?,* N.Y. TIMES, Apr. 17, 1996, at A13, col. **4;** Bill McAllister, *Mideast Counterfeiters Making $100 Bills of 'HighestQuality,' GAO Says,* WASH. POST, Feb. 28, 1996, at A21.

[16] *See, e.g.,* J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export, 20 U.* DAYTON L. REV. 809 (1995).

[17] The intrepid Tom Clancy *Clear and Present Danger/Executive Orders* perspective on new-age threats is beginning to find expression disguised in the more somber tones of proposals advanced by senior national security officials. *See, e.g.,* Anthony Lake, *American Military Intervention: A User's Guide, in* HERITAGE FOUNDATION REPORTS No. 1079 (May 2, 1996)(March 1996 speech at George Washington University by Anthony Lake, proposing the use of military force "to defend key economic interests . . . to prevent the spread of weapons of mass destruction . . . international crime, and drug trafficking . . . *to maintain U.S. reliability* [emphasis added] . . . [and] for humanitarian purposes"); John T. Correll, *The Lake Doctrine,* A.F. MAG., May, 1996, at 3. Lake's proposals have not yet been adopted in published official policy.

army of poisonous ants. "The goal," they typically claim, is not to try the new criminals in a court of law, 'but to kill them until the survivors quit."[18] Such prurient warrior-vaunt might titillate frustrated trigger-pullers, but it is just so much wasted ink in a growing corpus of exasperated hawkish pornography. The new era unfolding might call for military strategists to "think outside the box," but no one should hold his breath for napalm strikes in the upper Huallaga Valley, or a global campaign by **JTF** (Joint Task Force) MURDER to root out computer hackers and expatriate Soviet scientists.

The problem some new strategists face is the desire to apply the tools of military force to threats apparently not amenable to resolution by traditional non-forceful means. The UN Charter is the chief obstacle to such innovations. Appreciation of the contours of the UN Charter system, of its origins and importance, and our national commitment to its overarching principles, is not an integral element of U.S. military culture.[19] The regime of peace embodied in the Charter, however, governs the use of force—the chief business of U.S. armed forces. The Charter is not the argot of lawyers, a mere factor for planners to consider, an input to be balanced, or an influence to be analyzed—it is the foundation of current world order, whatever its imperfections. The Charter regime exists on a higher plane of global politics, of past and future, than the familiar field of targets and trajectories. Lest we merely add more paper to a growing heap of hapless vanity literature, the regime of the Charter must be considered in any new strategy that includes international use of force. The Charter system defines for the present the difference between pipedreams and policy.

In recent national security debates, discussion has focused on the UN only as an ***institution,*** recalling its missteps in Somalia and

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18 Ralph Peters, ***After the*** *Revolution,* **25** U.S. ARMY C.Q., PARAMETERS **7** (Summer 1995).

19 Over the course of two years in the International and Operational Law Division of the Office of the Judge Advocate General of the Navy, we turned back copiously staffed and resource-consuming proposals inconsistent with law governing the use of force, including, for example, proposals to conduct unilateral preemptive strikes against WMD facilities in countries which merely possess or develop such capabilities, and counterdrug proposals more consistent with a combat paradigm than the law enforcement paradigm that applies. The urge to penetrate and to preempt many peacetime disorders with military measures is prevalent. Planning against nontraditional threats runs the constant risk of preemption by law, yet a belligerent "use it or lose it" perspective continues to resist or deny the preemptive role of law. As one Marine Corps Major stated when a script-writer for the television series "Navy JAG" asked why aggressive military action could not be taken against new criminal threats, notwithstanding the enthusiasm of his superiors: "The law wears more stars than anyone in this building." Planning inconsistent with law is a waste of diminishing resources.

Bosnia,[20] its mismanagement of money,[21] its bloated staff,[22] and whether U.S. troops should be placed under UN command.[23] This narrow focus on the UN overlooks the fact that the UN Charter, the document itself, wholly apart from the institution of the *UN,* is a treaty that contains well-settled norms for the use of force which evolved before the Charter was ratified.[24] Charter norms have by now attained the power of *jus cogens*[25]—universal principles, like the prohibition of torture, that do not depend on specific expressions of law. The underlying principle of the Charter system is that states should resolve disputes by peaceful means,[26] reserving the use of military force for individual or collective self-defense against an armed attack.[27] For threats to international peace below the

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20 The *law* of the Charter should not be confused with the failures of UN leadership in Somalia and Bosnia. Under the Charter system, the United States possessed all along the authority to assist Bosnia against Serbian aggression, internal and external, and to veto Security Council interference. Similarly, the United States was not required to concur in the authority delegated by the Security Council to the Secretary General in Somalia, nor in the mission-drifting decision to arrest faction leaders. Neither of these decisions with respect to Somalia could have been taken over a veto by the United States. Political failures and mismanagement by Charter instrumentalities should not be attributed to inadequacy of the treaty system itself.

21 *See* Christopher S. Wren, *Mismanagement and Waste Erode U.N.'s Best Intentions,* N.Y. TIMES, June 23, 1995, at A1, col. 5; Barbara Crossette, *U.N. Facing Bankruptcy, Plans to Cut Payroll by 108,* N.Y. TIMES, Feb. 6, 1996, at A3, col. 1; *U.N. at 50,* NEWSDAY, June 27, 1995, at 26 ("pork-barrel sinkholes and international conferences at exotic locales that produce nothing but superheated air").

22 *See Clinton Says U.N. Bloated, Needs Reform,* L.A. TIMES, June 27, 1995, at A1.

23 *See Soldier Convicted for Refusing U.N. Duty,* DALLAS MORNING NEWS, Jan. 25, 1996, at 3A (discussing the case of Specialist Michael New); *Blue Helmet Blues,* ST. LOUIS POST-DISPATCH, Sept. 14, 1996, at 6B (discussing the defeated House bill that would have restricted the assignment of U.S. troops to U.N. command).

24 MOORE ET AL., *supra* note 2, at 74 (quoting the Nuremberg Tribunal) (The Charter was "the expression of international law existing at the time of its creation."); Joint Declaration of the President of the United States and the Prime Minister of Great Britain ["The Atlantic Charter"], Aug. 14, 1941, U.S.-U.K., E.A.S. 236 ("[A]ll of the nations of the world . . . must come to the abandonment of the use of force . . . no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten . . . aggression outside of their frontiers . . . ."). The 1928 Kellogg-Briand Pact's distinction between aggression and defense is widely accepted as a landmark intellectual breakthrough, signifying rejection of the unworkable principle of "Just War" ("justice" is a changing, relative concept) and the dogeat-dog *realpolitik* of 'War as Fact." Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

25 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102, cmt. k (1995) [hereinafter RESTATEMENT]. The Charter principles that have become fundamental norms are the prohibition of international aggression, and restriction of the use of force to self-defense. *Id.* Under these principles, "[a] state [may] . . . no longer use coercion as an instrument of national policy but only to protect against an illegal use of force." MOORE ET AL., *supra* note 2, at 68.

26 U.N. CHARTER arts. 2.3, 33.

27 Restriction of the use of force to situations of legitimate self-defense has long been a basic principle of social order in civilized states. The prohibition of assault and murder to resolve ideological, economic, or lifestyle disputes among competing individuals has been widely accepted as a fundamental principle of domestic law. The

threshold norm for national self-defense, the Charter authorizes the Security Council to call for the use of force *proactively*, to redress incipient threats. The problem many theorists face is the desire to intervene forcefully in the affairs of other nations below the juridical threshold of national self-defense, without resort to the Security Council—a desire to use force prophylactically, to nip problems in the bud, to shape forcefully the behavior of the rest of the world to American values. The Charter system, however, does not provide such a supervisory role for the United States.

An understanding of the history of the Charter is critical to strategic appreciation of its importance. The Nineteenth and early Twentieth Centuries have been characterized as the period of 'War as Fact."[28] The right to conduct war, without regard to justice or distinctions between aggression and defense, was seen as an attribute of sovereignty. The use of force between nations proliferated. The thinking of the time is reflected in such statements as: 'War is not merely a political act but a real political instrument, a continuation of political intercourse, a carrying out of the same by other means."[29] The rise of German militarism during the period of 'War as Fact,'' leading to World War I, was fueled by sentiments such as those expressed by General Friedrich von Bernhardi, who said that war "is a biological necessity,'' the carrying out among mankind of "the natural law . . . of the struggle for existence."[30] For Bernhardi, conquest was Germany's destiny, a necessity compelling Germany "to act on the offensive and strike the first blow."[31] These sentiments were shared by General Helmuth von Moltke, who said, ''[sluccess alone justifies war."[32] The philosophers Fichte, Hegel, Nietsche, and Treitschke, all contributed to the culture of German militarism and aggression,[33] a cultural watershed for the later nascence of Nazism. In the wake of the carnage of World War I, a bloodbath compared to recent lopsided conflicts,[34] an international

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Charter seeks to translate this universal principle of order and restraint to interaction among competing states. Both systems allow the use of force in self-defense, and both prohibit self-interested aggression.

[28] MOORE ETAL., *supra* note 2, at 51-52.

[29] KARL VON CLAUSEWITZ, ON WAR 16 (O. J. Matthijs Jolles trans., 1943) (principle 24).

[30] BARBARA W. TUCHMAN, THE GUNS OF AUGUST 11 (1962).

[31] *Id.*

[32] *Id.* at 26.

[33] *Id.* at 21. *See also* Warren C. Robertson, *Struggle for the Heartland: An Introduction to Geopolitics* (1994), *in* STRATEGY AND FORCE PLANNING 353-54 (Naval War College, Richmond M. Lloyd, et al., eds., 1995) (discussing the state expansionist theories of Friedrich Ratzel and Karl Haushofer—a "biological drive," a "Darwinian struggle," a quest for the natural right to "*Lebensraum*").

[34] Compare, for example, the casualties during World War I to the minimal U.S. casualties experienced in Bosnia or Operation Desert Storm.

norm against aggression emerged and was memorialized in the Kellogg-Briand Pact:

> Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made . . . The High Contracting Parties solemnly declare . . . that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.[35]

By 1939, sixty-three nations had joined the Kellogg-Briand Pact.[36] The destructiveness of post-industrial warfare, with all the resources available to modern states, had become so great that the world sought to ban aggressive war, preserving only the right of self-defense.

The Kellogg-Briand Pact and the Covenant of the League of Nations did not contain enforcement mechanisms, and the martial spirit of Germany asserted itself again, while Japan embarked on a ruthless campaign of conquest throughout the Western Pacific. By the end of World War II, the craving for peace had hardened into a world conviction that international aggression should be criminalized. The Charter of the Nuremberg Tribunal resulted in trials for the first time in history for the offense of "Crimes Against Peace,'' namely, "planning, preparation, initiation or waging of a war of aggression, or *a war* in violation *of* international treaties, agreements *or assurances.*"[37] Meanwhile, the de-Nazification and reconstruction of occupied Germany proceeded from the precepts of Yalta: "It is our inflexible purpose to destroy German militarism . . . . We are determined to . . . remove all . . . militarist influences from public office and from the cultural and economic life of the German people . . . ."[38] The condemnation of aggression was universal.[39]

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35 Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, art. I.

36 MOORE ET AL., *supra* note 2, at 74.

37 Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 (emphasis added). The United Nations General Assembly affirmed the principles of the Nuremberg Charter as principles of international law. *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal,* G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946). *See also, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal*, 2 Y.B. INT'L L. COMMITTEE 374-80 (1950).

38 Report of the Crimea Conference, art. II, in U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS (THE CONFERENCES AT MALTAAND YALTA 1945) 970-71 (1955). *See also* 2 The Conference of Berlin (The Potsdam Conference) 1945, *in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS, at 1576 (1960).

39 Strong anti-aggression sentiment at the end of World War II was stimulated as much by the policies of Japan as by those of Nazi Germany. Illustrative of Japanese

Signed on 26 June 1945 in San Francisco,[40] the U.S. sponsored Charter of the United Nations opens with a conviction written in blood and ashes: 'We the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind . . . ."[41] To achieve the purpose of suppressing armed aggression and other breaches of the peace, the Charter requires that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[42] The prohibition of force excludes "the inherent right of individual or collective self-defence [sic] if an *armed attack* occurs against a Member of the United Nations."[43] The regime of the Charter does not embrace the *unilateral* use of force in the territories of other states to promote values, to reverse proliferation, to root out criminals, or to replace governments whose ideologies differ from our own. Unlike the Kellogg-Briand Pact and the Covenant of the League of Nations, however, the UN Charter provides an enforcement mechanism against *incipient* threats to international peace—action by the Security Council under Chapter VII.

Many who advocate more expansive use of force to shape the world consider the United Nations an alien entity, failing to recognize its close connection to the United States.[44] The United Nations is a creature of the United States. The broad outlines of the Charter system were conceived by President Roosevelt;[45] drafts were prepared by the Department of State;[46] and the final instrument was

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policy in 1941 is the communication of General Tojo, as new Prime Minister, to Emperor Hirohito, explaining that the Americans were trying to:

> force upon Japan the Four Principles: (1) respect of territorial integrity and sovereignty, (2) non-interference in internal affairs, (3) non-discriminatory trade and (4) disapproval of changing the status quo by force . . . . The United States demands that we accept these principles. We cannot do so, because we carried out the Manchurian Incident and the China Incident to get rid of the yoke based on these principles . . . .

R.A.C. PARKER, STRUGGLE FOR SURVIVAL: THE HISTORY OF THE SECOND WORLD WAR 82 (1989).

[40] Introductory Note, CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (Dep't of Pub. Info., United Nations, Oct. 1991).

[41] U.N. CHARTER, Preamble.

[42] *Id.* art. 2.4.

[43] *Id.* art. 51.

[44] *See, e.g.,* Richard L. Armitage, *Bend the U.N. to Our will,* N.Y. TIMES, Feb. 24, 1994, at A23, col. 1 ('We now consider the U.N. a foreign organism . . . . We have adopted an 'us versus them' attitude.").

[45] Edward Epstein, *More Than a Museum Piece–What the U.N. Charter Says,* S.F. CHRON., June 24, 1995, at A7 ("President Franklin D. Roosevelt . . . is recognized as the father of the United Nations.").

[46] RUTH B. RUSSELL. A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, 244-75, 990-1006, 1019-28 (1958).

favorably endorsed by the Secretary of War, the Joint Chiefs of Staff, and the Secretary of the Navy.[47] The United States hosted international conferences on the Charter at Dumbarton Oaks and San Francisco.[48] President Truman delivered the finished Charter in person to the Senate for advice and consent,[49] and the Senate approved it eighty-nine to two.[50] The United States was the first government to formally ratify the Charter on 8 August 1945.[51] The close connection of the United States to the Charter is evident in the fact that Article 110 identifies the government of the United States as the world depository for instruments of ratification.[52]

The Charter is a formal treaty. As such, it is not merely an international "contract" or an influence to be considered by national security strategists. Treaties are a part of the law of the United States.[53] Article VI of the United States Constitution states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."[54] Treaties and federal statutes are equal in authority,[55] a status of sufficient gravity to warrant careful consideration of the Charter regime in current strategy and planning. In fact, the UN Charter is preeminent among international agreements—it trumps all others.[56] Violation of the norms in the Charter could give rise to punitive action. As stated in Naval

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47 *Id.* at 939-40 ("[L]etters were read at the [Senate] hearings from the Secretary of War and of the Navy, both concurring in an opinion of the Joint Chiefs of Staff that 'the military and strategic implications' of the Charter were 'in accord with the military interests of the United States."').

48 *Id.* at 440-447 (Dumbarton Oaks), 625-645 (San Francisco).

49 *Id.* at 935 (President Truman urged prompt ratification.).

50 91 CONG. REC. 8190 (1945).

51 RUSSELL, *supra* note 46, at 947. ***See also*** 13 DEP'T ST. BULL., Oct. 1945, at 679-80.

52 U.N. CHARTER art. 110.2.

53 The Paquete Habana, 175 U.S. 677, 700 (1900).

54 U.S. CONST. art. VI, cl. 2.

55 Whitney v. Robertson, 124 U.S. 190 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature . . . ."). Under the Supremacy Clause, treaties take precedence over inconsistent state law. An act of Congress may overrule an earlier treaty (The Cherokee Tobacco, 78 U.S. (15 Wall.) 616, 620-21 (1870); Head Money Cases, 112 U.S. 580, 598 (1884)), but a treaty may overrule an earlier act of Congress (Cooke v. United States, 288 U.S. 102 (1933)); Valentine v. United States ex *rel.* Neidecker, 229 U.S. 5, 10 (1936); Restatement, *supra* note 25, § 115(2)). The last in time prevails. RESTATEMENT, *supra* note 25, § 115, cmt. a.

56 U.N. CHARTER art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

Warfare Publication (NWP) 9(A):[57] "Since armed force can be used today lawfully only in self-defense (or as an enforcement action by the United Nations . . .), unlawful use of armed force may constitute a crime against peace under international law, a violation of U.S. Navy Regulations,[58] or a violation of the UCMJ."[59]

Dutiful obedience to the raw authority of rules and regulations, however, is not the chief motivation for compliance with treaties. National self-interest motivates the promotion of reciprocal observance of international commitments generally. Self-interest in the stability of expectations is the cornerstone of the doctrine of *pacta sunt servanda.*[60] If treaties were just so many pieces of paper, to be honored when convenient, foreign investments and property, the global flow of money, access to foreign resources and foreign markets for our products, status of forces agreements, the protection of embassies and foreign ministers, freedom of navigation, flight safety, the regulation of transboundary pollution, cultural exchanges—all organized international activity would be jeopardized.[61] International interests would depend on the whim of the moment and the willingness of states to enforce their interests with weapons. If the world seems a violent, disorderly place today, it would be apocalyptic in the return of a " Force as Fact" ***milieu.***

The efficacy of a universal commitment to peaceful relations should not be measured by the number of feeble defectors, but by the greater number of powerful adherents. When discussing defectors, strategists should not be too quick to advocate a convenient solution which ignores global consequences. Resort to martial solutions for every brushfire *du jour* must be measured against the certain collapse of whatever interstate firebreaks hold back the real

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[57] NWP 9(A) (Annot.), § **5.1,** note **2.** NWP 9(A) is a product of the Naval War College and the Office of the Judge Advocate General, U.S. Navy.

[58] ***See,*** *e.g.,* United States Navy Regulations, Commanders in Chief and Other Commanders, **32** C.F.R. § **700.605** (1997) (observance of international law): "At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized."

[59] Unlawful use of armed force could constitute, for example, homicide, assault, or any number of property offenses. The parameters of international law that govern the use of force define the limits of the criminal defense of justification (i.e., as a lawful combatant) that might be available in a particular case. Whether court-martial charges would be referred or not is immaterial; the point is that the skein of laws that stand in the way of a strategy of international aggression is dense and complex, Ralph Peters' blood-lusty avenger might well be prosecuted for murder ***(see*** *supra* note **18).**

[60] RESTATEMENT, ***supra*** note **25,** § **321** ("[A]greements should be observed"–pacta *sunt servanda* "is perhaps the most important principle of international law.").

[61] World order in all of these areas, and others, depends on respect for the authority of treaties.

conflagrations of a future world—a world awash with weapons and yet unforeseen applications of amazing technology. When the gloves come off, they will come off in *all* corners, in arenas around the world. Should the United States trade today's handful of recalcitrant states and networks of petty substate criminals for a nation-to-nation order where force returns as the norm? The capacity of nation-states to mobilize resources for dedication to war far exceeds the capacity of substate threats catalogued by the new alarmists; it is the difference between cockfights and cataclysms.

It is tempting to measure the risks and rewards of a force-based environment by comparing current U.S. military might to the capabilities of other nations. If the United States could always prevail under force-based ground rules, why not bend or change the rules to maximize our advantage? Why dicker with Huck when we can force him to whitewash at gunpoint? This bully perspective overlooks two consequences of a force-based environment:

> **(1)** Force or displays of force would be required with increasing frequency to obtain international objectives, diverting resources from economically productive peacetime activities. The result would be similar to British imperial militarism[62] or exhausted isolationism.
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> **(2)** The United States is not the only country in the world; a force-based world order would lead to explosive arms buildups everywhere and regional conflicts such as those that precipitated two World Wars.

The vitality of any peace regime depends on voluntary observance by states, especially the most prominent and influential states.[63] The offenses of a few cheaters are not sufficient to warrant a global return to the jungle.

The commitment of U.S. foreign relations policy to observance of the use-of-force principles in the Charter weighs heavily against inconsistent strategy or military planning. Visions of a sovereignty-busting United States constabulary are products with no foreseeable market. Since the relaxation of the veto-lock in the Security Council in 1990, the United States has used force against the "territorial

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62 The British fought wars all over the world to maintain their force-based authority over a colonial empire. Similarly, a modern, force-based, authoritarian regime of international relations would lead to increasing numbers of armed enforcements and wars.

63 ***See*** Steven **J.** Metz et al., ***The Future of American Landpower: Strategic Challenges for the 21st Century Army,*** *in* STRATEGIC STUDIES INSTITUTE, U.S. *ARMY* WAR COLLEGE **21** (Mar. 12, 1996). No other state could cause the erosion of international norms as effectively as the United States.

integrity or political independence" of other states in accordance with Security Council Resolutions, including operations in Iraq and Kuwait,[64] Somalia,[65] Bosnia,[66] Rwanda,[67] and Haiti.[68] The small peacekeeping force in Macedonia, Operation Able Sentry, was invited by the government of Macedonia and is provided under a UN Security Council Resolution.[69] The Vigilant Warrior deployment of September 1994 was invited by Kuwait when Iraq began massing troops near the Kuwaiti border. A list of military deployments dur-

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[64] S.C. Res. 661, U.N. SCOR (1990) (imposing inbound and outbound trade and economic sanctions; freezing of Iraqi assets); S.C. Res. 665, U.N. SCOR (1990) (authorizing "such measures commensurate with the circumstances as may be necessary to halt all inward and outward maritime shipping" to enforce sanctions); S.C. Res. 670, U.N. SCOR (1990) (applying S.C. Res 661 to aircraft); S.C. Res. 678, U.N. SCOR (1990) (authorizing "all necessary means" to eject Iraq from Kuwait and to enforce other resolutions, to commence after 15 Jan. 1991); S.C. Res. 687, U.N. SCOR (1991) (cease-fire conditions; continuation of sanctions); S.C. Res. 688, U.N. SCOR (1991) (authorizing Southern Watch and Provide Comfort enforcement to end repression of Iraqi civilian population). *See Status* of *Iraqi Compliance with U.N. Resolutions*, 3 DEP'T ST. DISPATCH, no. 47 (23 Nov. 1992) (reprinting the text of a letter from President Bush to Congress, addressing no-fly zones for Southern Watch and Provide Comfort).

[65] S.C. Res. 733, U.N. SCOR (1992) (imposing an embargo on all weapons and military equipment; authorizing "all necessary measures" to ensure the safety of personnel providing humanitarian assistance); S.C. Res. 751, U.N. SCOR (1992) (authorizing UNOSOM I relief operations); S.C. Res. 794, U.N. SCOR (1992) (authorizing military enforcement action to create a secure environment for UNITAF humanitarian relief operations); S.C. Res. 814, U.N. SCOR (1993) (transition from UNITAF to UNOSOM 11; authorizing the Secretary General to take "all necessary measures" against those responsible for attacks, including arrest and detention of warring faction leaders); S.C. Res. 837, U.N. SCOR (1993) (urging states to contribute tanks and attack helicopters to confront and to deter attacks on U.N. relief operations; reaffirming S.C. Res. 814 with respect to arrest of faction leaders); S.C. Res. 954, U.N. SCOR (1994) (authorizing military action as necessary to secure the withdrawal of UNO SOM II).

[66] S.C. Res. 713, U.N. SCOR (1991) (imposing an embargo on all weapons and military equipment to Yugoslavia); S.C. Res. 757, U.N. SCOR (1992) (imposing additional sanctions, including an outbound embargo on Serbia and Montenegro); S.C. Res. 787, U.N. SCOR (1992) (authorizing "such measures . . . as may be necessary . . . to halt all inward and outward shipping . . .;" authorizing Sharp Guard); S.C. Res. 820, U.N. SCOR (1993) (prohibiting all commercial shipping from entering the territorial sea of Serbia and Montenegro; enforcement under S.C. Res. 787); S.C. Res. 824, U.N. SCOR (1993) (creating "safe areas" in Srebrenica, Zepa, Sarajevo, Tusla, Bihac and Gorazde); S.C. Res. 836, U.N. SCOR (1993) (authorizing "all necessary measures" to support UNPROFOR's mandate to secure the safe areas, by force if necessary); S.C. Res. 781, U.N. SCOR (1992) (banning military flights in Bosnian airspace); S.C. Res. 816, U.N. SCOR (1993) (extending S.C. Res. 781 *to all* flights and authorizing "all necessary measures" to enforce the ban; authorizing Deny Flight); S.C. Res. 1031, U.N. SCOR (1995) (authorizing "all necessary measures" to protect UNPROFOR and the implementation of IFOR).

[67] S.C. Res. 929, U.N. SCOR (1994) (authorizing "all necessary means" to meet humanitarian objectives, including the protection of displaced persons).

[68] S.C. Res. 940, U.N. SCOR (1994) (authorizing "all necessary measures" to remove the military leadership, maintain a secure environment, and enforce the Governor's Island Agreement; authority for Uphold Democracy).

[69] S.C Res. 795, U.N. SCOR (1992).

ing the 1990's released by the Chairman of the Joint Chiefs of Staff contained nothing but operations sanctioned by the UN or invited by host nations.[70] The President cited Security Council Resolution 688 (protection of the Kurds) as authority for the cruise missile attack on Iraqi radar sites as recently as early September 1996.71 Apparently the Charter carries weight in some circles.

Adherence to the Charter's preference for the peaceful resolution of disputes in lieu of unilateral force is also evident in the increasing use of treaties to promote national security objectives, including the Nuclear Non-Proliferation Treaty;[72] the Comprehensive Test Ban Treaty;[73] the Missile Technology Control Regime;[74] the Chemical Weapons Convention;[75] new protocols to the Certain Conventional Weapons Convention;[76] the South Pacific and African Nuclear Weapons Free Zones;[77] the Agreed Framework with

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[70] Associated Press, *U.S. Military Deployments List, AP* ONLINE, Jan. 25, 1995, *available in* LEXIS/NEXIS.

[71] Alison Mitchell, *Raid on Iraq: The Overview,* N.Y. TIMES, Sept. 4, 1996, at A1, col. 6.

[72] Treaty on the Non-Proliferation of Nuclear Weapons [NPT], July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. After a global campaign by the current administration, the NPT was extended indefinitely on 12 May 1995. Barbara Crossette, *Treaty Aimed at Halting Spread of Nuclear Weapons Extended,* N.Y. TIMES, May 12, 1995, at A1; United Nations: Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, 34 I.L.M. 959 (1995).

[73] *See Banning All Nuclear Testing; U.N. Action: World Sentiment Prevails Even if India and U.S. Senate Block Ratification,* BALT. SUN, Sept. *26,* 1996, at 22A; John Aloysius Farrell, *Clinton, at UN, Signs Nuclear Test Ban Pact; Sees Movement Toward Global "Norm,"* BOST. GLOBE, Sept. 25, 1996, at A1; Statement on the Comprehensive Test Ban Treaty, 32 WEEKLY COMP. PRES. DOC. 1146, (June 28,1996).

[74] Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, 26 I.L.M. 599 (1987) (revised Jan. *7,* 1993; Annex revised July 1, 1993) (revisions reproduced at 32 I.L.M. 1298 (1993) and 32 I.L.M. 1300 (1993), respectively). The Missile Technology Control Regime is not a treaty but a voluntary set of guidelines. *See* Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry,* 43 AM. U. L. REV. 755, 820 (1994). China is not a signatory, but the United States continues to seek China's compliance.

[75] The Convention on the Prohibition, Production, Stockpiling, and Use of Chemical Weapons, opened for signature Jan. 13, 1993, U.N. GAOR, 47th Sess., Supp. No. 27, U.N. Doc. A/47/27/Appendix 1 (1992), *reproduced* at 32 I.L.M. 800 (1993).

[76] *See* Theodor Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law,* 90 AJIL 238, 245-46 (1996) (A proposed amendment to Protocol II of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons would tighten restrictions on the use or transfer of landmines, and a new Protocol IV would ban blinding lasers.). After a difficult staffing battle in the Pentagon, the United States will support both of these Protocols. The President has already issued a new policy on landmines. *See infra* note 86.

[77] *See United States, France, and the United Kingdom to Sign Protocols of the South Pacific Nuclear-Free Zone Treaty [Treaty of Raratongal,* 7 DEP'T ST. DISPATCH, no. 15 (Apr. 8, 1996) (White House statement of Mar. 22, 1996); *Fact Sheet: African Nuclear Weapons-Free Zone Treaty, 7* DEP'T ST. DISPATCH, no. 16 (Apr. 15. 1996);

the Democratic Peoples Republic of Korea;[78] and a host of trade and economic agreements and other exchanges, summits, conferences and cooperative efforts.[79] The United States confronts international irritations not with the business-end of bayonets but through bilateral cooperation agreements;[80] rule-of-law training programs;[81] multinational intelligence fusion centers;[82] or diplomatic, trade, and economic sanctions where cooperative solutions would be futile.[83]

France, Britain, U.S. Sign Pacific Anti-Nuclear Pact, WASH. POST, Mar. **26, 1996,** at **A14;** African Nuclear-Weapon-Free Zone Treaty (Pelindaba Text), **35** I.L.M. **698 (1996).** The United States has long been a protocol participant in the Treaty of Tlateloco (Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. **14, 1967, 6** I.L.M. **521 (1967))** and is encouraging treaties to establish nuclear weapon-free zones in the South Pacific and Middle-East. Other treaties prohibit nuclear weapons in Antarctica, in outer space, and on the seabed.

78 Democratic People's Republic of Korea–United States of America: Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, **34** I.L.M. **603 (1995).**

79 The White House, A National Security Strategy of Engagement and Enlargement (Feb. **1996)** (citing "80 separate trade agreements").

80 For example, when it became apparent that suspected narcotraffickers were avoiding detect and monitor missions and interdiction efforts in the Caribbean by transiting through the territorial seas of Caribbean littoral nations, the United States embarked on an ambitious program to negotiate bilateral maritime counterdrug cooperation agreements with affected nations. These agreements provide for cooperative interdiction efforts in foreign territorial seas and airspace. *See* U.S. DEP'T ST., INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT (Mar. **1, 1991)** ("Types of agreements include overflight authority for Coast Guard surveillance aircraft, permission to enter foreign territorial waters to carry out enforcement actions, and shiprider agreements to facilitate coordination between forces.'').

81 *See, e.g., Fact Sheet: U.S.-Russian Economic Relations and Military,* **5** DEP'T ST. DISPATCH, no. **52** (Dec. **26, 1994)** (''Technical assistance and training programs on the rule of law . . . [were] launched in **1992** and [were] significantly expanded by Presidents Clinton and Yeltsin at the **1993** Vancouver Summit."). The Expanded International Military Education and Training Program (EIMET), a statutory joint program managed by the Department of the Navy, exports rule-of-law training all over the world. The Coast Guard has recently implemented a similar international program that emphasizes the rule of law and provides law enforcement training and advice. The Marshall Center in Garmisch, Germany, another statutory program, provides such training for the former Warsaw Pact states.

82 For example, the United States recently established a multinational intelligence fusion center in Thailand devoted to interdiction of heroin trade originating in the Golden Triangle. Joint Interagency Task Force (JIATF) West, formerly JTF FIVE, participates with the Drug Enforcement Agency and other federal agencies in counter-heroin activities centered in Thailand. Prosecution of Khun Sa, the leading Burmese heroin magnate, is a recent success of this multinational effort. Annual "International Narcotics Control Strategy Reports", prepared by the U.S. Department **of** State, contain extensive information on international cooperative efforts. *See also American Security in a Changing World,* **7** DEP'T ST. DISPATCH, no. **32** (Aug. **5, 1996)** ("Over the past four years, our intelligence services have been sharing more information than ever with other nations . . . .").

83 *See, e.g.,* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of **1996,** Pub. L. **No. 104-114, 110** Stat. **785 (1996);** The Iran-Libya Sanctions Act **of 1996,** Pub. L. **No. 104-172, 110** Stat. **1541 (1996);** *Iran-Libya Sanctions Act of 1996,* **7** DEP'T ST. DISPATCH, no. **32** (Aug. **5, 1996)** (remarks by the President at signing ceremony); *U.S. and the U.N. Respond to Cuban Shootdown of Civilian Aircraft,* **7** DEP'T ST. DISPATCH, no. **11** (Mar. **11, 1996);** *Fact Sheet: Implementation of the LIBERTAD Act,* **7** DEP'T ST. DISPATCH, no. 15 (Apr. 8, **1996).**

In obedience to treaties and the norms of force, the United States has denied itself the use of riot control agents[84] and nonlethal weapons.[85] The federal government has limited the use of landmines and lasers,[86] compromised OPSEC for arms control,[87] and terminated assistance to host-nation shootdown of aircraft suspected of narcotrafficking.88 The United States is prosecuting terrorists

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84 *See* Message to the Congress Transmitting the Chemical Weapons Convention, 29 WEEKLY COMP. PRES. DOC. 2452 (Nov. 23, 1993); Message to the Senate on a Review of the Impact of the Chemical Weapons Convention, 30 WEEKLY COMP. PRES. Doc. 1337 (June 23, 1994) (The Conventional Weapons Convention (CWC) prohibits the use of riot control agents (RCA's) "as a method of warfare" and will remove two of the four situations for their use which are currently provided in Executive Order 11,850.). The National Command Authority decided to apply the new RCA restrictions *pending* ratification of the CWC. This led to efforts at the operational level to define pepper spray (oleosorin capsicum) as something other than an RCA, but that definition was reversed by the Chairman of the Joint Chiefs of Staff.

85 *See* Bradley Graham, *Use of Nonlethal Arms Leaves Pentagon Scrambling; Policy Sought Amid Denials that a Kinder, Gentler Marine Force is Deploying to Somalia*, WASH. POST, Feb. 24, 1995, at A8. Although the Marine force commanded by General Anthony Zinni was allowed to deploy with nonlethal weapons to cover the withdrawal of UNOSOM II personnel from Somalia, rules of engagement (ROE) for the use of the nonlethal weapons restricted them to situations where deadly force would otherwise be authorized. The ROE substantially diminished the practical use of nonlethal weapons. The ROE requested by the Marines reflected the intention to use nonlethal force prophylactically, in situations below the traditional threshold of self-defense. Breach of that threshold was not allowed.

86 The United States recently agreed to two protocols to the Convention on Certain Conventional Weapons, Geneva, Oct. 10, 1980, S. Treaty Doc. 103-25, 19 I.L.M. 1523 (1980). One protocol bans the use of blinding lasers, and the other limits the use of "dumb" landmines (i.e., landmines that do not self-destruct or self-inert). *See* Bradley Graham, *Pentagon Shifts, Seeks Laser Weapons Curbs; U.S. Joins Move on Arms Designed to Blind*, WASH. POST, Sept. 20, 1995, at **A3;** William Neikirk, *In Bid for International Pact, U.S. Will Remove Weapons by 1999 Except in Korea: Clinton Urges Immediate Ban on Land Mines*, CHI. TRIB., May 17, 1996, at 3. *See also, supra* note *76*.

87 For example, the Open Skies Treaty, which provides for short-notice overflight of military and other facilities in standardized inspection aircraft bristling with sensors, is one of a growing number of arms control treaties that include intrusive inspection/verification regimes. *Fact Sheet: Open Skies Treaty*, 4 DEP'T ST. DISPATCH, no. 11 (Mar. 15, 1993); *Open Skies Treaty Signed*, DEP'T ST. DISPATCH (Mar. 30, 1992) (statement of White House Press Secretary). START 11, the 'Wyoming MOU" with the former Soviet Union, and the Chemical Weapons Convention (which the United States has not yet ratified) also provide for verification inspections. Efforts to negotiate verification amendments to the Biological Weapons Convention continue. The U.S. On-Site Inspection Agency (OSIA) was established to manage arms control inspections of U.S. and foreign facilities.

88 United States "detect and monitor" assistance to Colombia and Peru against aircraft suspected of narcotrafficking was suspended in May 1994, because aggressive shootdown procedures in those countries were deemed by the U.S. Departments of Justice and State to contravene article *3bis* of the Chicago Convention and U.S. criminal law (18 U.S.C. § 32(b) (safety of civil aviation)). Section 1012 of the Department of Defense Appropriations Act for Fiscal Year 1995, Pub. L. No. 103-335, § 1012, 108 Stat. 2599 (1994), authorized the President to resume assistance if he determined that appropriately revised host-nation intercept procedures had been implemented. President Clinton issued determinations for Colombia and Peru in December 1994, and detailed reporting procedures were issued to ensure withdrawal by the United States if unlawful shootdowns resumed.

and international criminals, not bombing their homelands.[89] America pursues peace where tensions loom, between Israel and its neighbors,[90] the I.R.A. and the U.K.,[91] Turkey and Greece,[92] and the divided Koreas.[93] The weakening of Iraq's sovereignty continues not because the United States claims a monopoly of violence, but because the American people profoundly abhor Saddam Hussein's commitment to national militarism and his defiant and persistent resort to a policy of force.[94] There is no meaningful audience for pro-

[89] *Compare UNSC Resolutions Against Libya,* DEP'T ST. DISPATCH (Apr. 6, 1992) (regarding the bombing of Pan Am flight 103 and UTA flight 772–Libya must "[s]urrender the bombing suspects for trial in the United States or [the] United Kingdom . . .") *to* Operation El Dorado Canyon (1986 bombing of sites in Tripoli and Benghazi). Recent well-known federal trials of terrorists include those of Fawaz Yunis for the hijacking of a Jordanian airliner in 1985 and Sheik Omar Abdel-Rahman and his associates for the bombing of the World Trade Center. The emphasis on enhanced law enforcement to combat terrorism was manifested in the Omnibus Counterterrorism Act of 1995. The only provisions in the Act affecting the military were ones that authorized Department of Defense support to law enforcement with technical matters associated with biological and chemical weapons. *See Prepared Testimony of Jamie Gorelick, Deputy Attorney General, Before the Committee on the Judiciary, U.S. House of Representatives, Concerning Omnibus Counterterrorism Act of 1995,* FED. NEWS SERV., Apr. 6, 1995 (NEXIS:CURNWS). The United States has been progressively internationalizing criminal law enforcement. *See, e.g.,* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT (1993), *reviewed in* Roger S. Clark, *The Internationalization of U.S. Criminal Law Enforcement,* 6 CRIM. LAW FORUM 115 (1995).

[90] *See* Marc Fisher and Donnie Radcliffe, *Feasting on the Fruits of Peace: At the White House, Jordan and Israel Find Common Ground,* WASH. POST, July 26, 1994, at E1; Alison Mitchell, *Arafat and Rabin Sign Pact to Expand Arab Self-Rule,* N.Y. TIMES, Sept. 29, 1995, at A1; Thomas W. Lippman, *Slaying Casts Doubt on Middle East Peace; Clinton Vows Continued Effort to End Conflict in the Region,* WASH. POST, Nov. 5, 1995, at A1; Serge Schmemann, *Spurred by U.S., Two Sides Open New Talks to Save Mideast Peace,* N.Y. TIMES, Oct. 7, 1996, at A1; Tom Hundley, *U.S. to Israel: Keep '93 Pact,* CHI. TRIB., Oct. 7, 1996, at 3.

[91] *See* James F. Clarity, *Both Sides Describe Ulster Talks as "on Track,"* N.Y. TIMES, Jan. 31, 1994, at A7; John Darton, *Britain Says it is Willing to Upgrade Talks with I.R.A.,* N.Y. TIMES, Apr. 25, 1995, at A8. President Clinton's controversial meeting with Jerry Adams of Sinn Fein and his efforts to encourage resolution of disputes between Britain and the I.R.A. are well known.

[92] *See U.S. Defuses Turk, Greek Islet Dispute,* CHI. TRIB., Feb. 1, 1996, at 18; *Clinton Offers to Ease Turkey-Greece Disputes,* N.Y. TIMES, Apr. 10, 1996, at A11, col. 1. Greece and Turkey came close to blows over sovereignty over the Islet of Imia, known as "Kardak" to the Turks. The United States intervened diplomatically.

[93] *See* George Moffett, *North Korea Curtails its Nuclear Program,* CHRISTIAN SCI. MONITOR., Sept. 21, 1995, at 1 ('When the U.S. persuaded North Korea last year to swap its suspected nuclear-weapons program for two modern nuclear-power plants, few arms-control experts and even fewer lawmakers thought the deal would stick. Eleven months later, the 'Agreed Framework' with the hard-line Communist state is being implemented with greater speed and warmer cooperation than even its strongest backers expected."); Democratic People's Republic of Korea–United States of America: Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, 34 I.L.M. 603 (1995); *U.S. Policy Toward the Korean Peninsula,* 7 DEP'T ST. DISPATCH, no. 14 (Apr. 1, 1996) (giving a detailed account of the Agreed Framework and the direction of U.S. policy toward the Koreas).

[94] *See U.S. Policy Toward Iraq,* 6 DEP'T ST. DISPATCH, no. 34 (Aug. 21, 1995) (statement of Madeleine Albright).

posals that the United States adopt as strategy the policy of aggression we have demonized in Iraq. These points all plot on a law-line where force is the exception and peaceful resolution of disputes is the norm.

The UN Charter system calls for the resolution of international disputes by peaceful means.[95] Members are obligated "to refrain in their international relations from the threat or use of force."[96] The Charter does recognize "the inherent right of individual or collective self-defense" against "an armed attack,"[97] but the Security Council "has primary responsibility for the maintenance of international peace and security."[98] The Security Council is empowered to investigate disputes;[99] to determine "the existence of any threat to the peace, breach of the peace, or act of aggression;"[100] and to decide what measures should be taken, including "measures not involving the use of armed force."[101] When non-forceful measures are inadequate, the Security Council may authorize "actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[102] The Security Council's discretion to define what constitutes a threat to the peace is extremely broad; some would say it is plenary.[103] The Security Council may call for the use of force preemptively to pacify an incipient disturbance, notwithstanding the principles of sovereignty or domestic jurisdiction.[104] Members "agree to accept and carry out the decisions of the Security Council."[105] Although the Charter includes provisions for a standing

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95 U.N. CHARTER arts. **2.3** ("All members shall settle their international disputes by peaceful means . . . ."), **33.**

96 *Id.* art. **2.4.**

97 *Id.* art. **51.**

98 *Id.* art. **24.**

99 *Id.* art. **34.**

100 *Id.* art. **39.** Any member of the United Nations may submit such matters for consideration by the Security Council, based on intelligence or other evidence. *Id.* art. **35.**

101 *Id.* art. **41.** Such measures include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.*

102 *Id.* art. **42.**

103 The Charter does not define what constitutes a threat to international peace or a breach of the peace, nor are any guidelines prescribed for such determinations by the Security Council. ***See*** Matthias J. Herdegan, ***The*** *"Constitutionalization" of* ***the*** *UN Security* ***System,*** **27** VAND. J. TRANSNAT'L L. **135 (1994);** MOORE ET AL., *supra* note **2,** at **207.** Whether the decisions of the Security Council are subject to "judicial review" by the International Court of Justice (ICJ) is an open question.

104 U.N. CHARTER, art. **2.7.** The "domesticjurisdiction" reservation in article **2.7** contains an explicit exception for Chapter VII enforcement measures. Examples of non-defensive interference in domestic matters deemed to threaten international peace and security include U.N.-approved operations in Somalia, Rwanda and Haiti.

105 *Id.* art. **25.** ***See*** *also id.* art. 49.

multinational enforcement force,[106] it also includes provisions for enforcement through the individual or collective action of Members.[107] Chapter VII Security Council enforcement actions are executed through the voluntary participation of member states.[108]

The Charter system is not unduly restrictive. The "inherent right of individual or collective self-defence" permits the United States, or a coalition of states, to come to the defense of any nation subjected to attack. Action by the UN Security Council would not be necessary for the United States, or a coalition of states, to repulse an invasion of South Korea, nor was Security Council authority required to eject Iraq from Kuwait. Similarly, the United Kingdom did not need Security Council authority to defend the Falkland Islands,[109] nor did the United States need approval to rescue hostages in Iran.[110] The right of individual *or collective* self-defense covers a broad range of actions, from U.S. assistance to Afghanistan against Soviet intervention to the protection of US.-flagged and neutral shipping during the 1980's "tanker war" in the Persian Gulf. Article 51, however, appears literally to subject the right of self-defense to superseding Security Council action by recognizing the right of self-defense "until the Security Council has taken measures necessary to maintain international peace and security."[111] Whether this provision allows the Security Council to preempt the right of self-defense is the subject of current, heated debate,[112] but the debate is largely irrelevant to the United States—no Chapter VII

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106 *Id*. arts. 43, 47.

107 *Id*. art. 48.

108 The United Nations cannot compel members to provide military forces to enforce Security Council resolutions. *See id*. art. 44 (The UN Security Council invites a member to participate in enforcement actions, "if the Member so desires.").

109 However, UN Security Council Resolution 502 (1982) determined that the Falklands War constituted a "breach of the peace," calling upon the parties to seek a diplomatic resolution and to refrain from the use or threat of force. The only reasonable explanation for the passage of this resolution with the concurrence of the United States during the Reagan Administration and the United Kingdom under the leadership of Margaret Thatcher (permanent members of the Security Council) is that the resolution also recognized that Argentina had invaded the Falklands. Either country could have vetoed more aggressive UN interference with the right of self-defense.

110 *See* MOORE ET AL., *supra* note 2, at 189-90 (discussing the Israeli rescue of hostages in Entebbe). The Security Council and the ICJ joined in condemning the actions of Iran. *See* S.C. Res. 457, U.N. SCOR (1979); S.C. Res. 461, U.N. SCOR (1979). In dictum, however, the ICJ criticized the rescue attempt as escalatory. MOORE ET AL., *supra* note 2, at 190.

111 U.N. CHARTER art. 51.

112 *See, e.g.*, Craig Scott et al., *Article: A Memorial for Bosnia*, 16 MICH. J. INT'L L. 1 (1994); Malvina Halberstram, *A Symposium on Reenuisioning the Security Council: Article: The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229 (1996).

Security Council action can be taken over a U.S. veto.[113] The Security Council is incapable of limiting the right of self-defense of the United States, or any other nation, unless the United States concurs. Without the Security Council, the United States may use force in individual or collective self-defense; *with* the Security Council the United States may use force in individual or collective self-defense. How is the Security Council system an additional restriction on U.S. freedom of action?

The right of self-defense in Article 51 applies to international aggression. The suppression of internal insurrections or disturbances is a matter of domestic jurisdiction. Every state has the right to maintain internal order, including the suppression of armed internal violence. States may invite the assistance of other states to accomplish such a purpose. For example, Peru could invite the United States to assist with suppression of the Sendero Luminoso; Bosnia-Herzegovina could request assistance with defense against the Bosnian Serbs; or El Salvador could invite aid in suppressing the FMLN. The use of force within the territory of another state is not an unlawful intervention if it is invited by the recognized government of the threatened state.[114] However, the UN Charter allows the Security Council to intervene under Chapter VII when such domestic matters threaten international peace and security,[115] but no such intervening measure inconsistent with the interests of the United States can be taken if the United States exercises its veto power.

Far from being an obstacle or liability, the Security Council uniquely possesses legitimate authority to call for the use of force under circumstances below the accepted threshold of individual national authority.[116] The Security Council may authorize the use

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[113] U.N. CHARTER art **27.3** (Security Council decisions under Chapter VII require the vote of nine members, including the "concurring votes of the permanent Members."). Article **27.3** requires Security Council members to refrain from voting on decisions under Chapter VI if they are parties to a dispute; this provision does not apply to Chapter VII. *Id. See* Frederic L. Kirgis, *The United Nations at Fifty: The Security Council's First Fifty Years*, **89** *AM.* **J.** INT'L L. **506,507** (1995).

[114] Lawrence S. Eastwood, Jr., *Notes: Secession: State Practice and International* ***Law*** *After the Dissolution of the Soviet Union and Yugoslavia*, **3** DUKE **J.** COMP. & INT'L L. **299, 339-40 (1993)** ("[R]ecent state practice appears to have moved toward permitting increased third-party assistance during civil wars"). The various military skills applicable to such third-party domestic assistance are referred to collectively as "Foreign Internal Defense" (FID).

[115] U.N. CHARTER art. **2.7.**

[116] *See, e.g.*, Judith G. Gardam, **A** *Symposium on Reenuisioning the Security Council: Article: Legal Constraints on Security Council Military Enforcement Action*, **17** MICH. **J.** INT'L L. **285, 297 (1996)** ("It is clear that the U.N. Charter does not envisage the Security Council as being bound by customary rules developed in the context of the use of force between States. For a start, those rules are irrelevant as the Council does not resort to force in self-defence [sic].").

of force under circumstances that would constitute illegal aggression or intervention if a nation acted unilaterally.[117] In its discretion, the Security Council may authorize the use of force proactively to abate civil wars, domestic abuse of human rights, refugee crises, and other disturbances deemed to threaten international peace and security.[118] Moreover, the United States enjoys a position of tremendous advantage as a permanent member of the Security Council. In the current international environment, the United States could not renegotiate such a peace regime with the privileges of an elite Security Council.[119] Whether the United States has in fact used its position on the Security Council to best advantage is a political question that does not impugn the advantages inherent in the Charter system.[120]

Independent of the Security Council, the Charter system provides for U.S. self-defense and U.S. defense of other states subjected to international aggression. The Charter system also accommodates U.S. assistance to other states to ensure their internal security. But the Charter system provides the Security Council the extraordinary power to use prophylactic force against mere threats to the peace before they ripen into cross-border conflict, *even where such action*

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[117] The right of states to use force is also limited by the principle of self-defense. Unilateral force not used in legitimate self-defense is prohibited as aggression or intervention, by principles that pre-exist and are independent of the UN Charter.

[118] The enforcement mechanisms in the UN Charter system correct the deficiencies of the League of Nations.

[119] *See, e.g.*, Walter Hoffman, *United Nations Security Council Reform and Restructuring*, Center for U.N. Reform Education Monograph No. 14 (1994); BUILDING A MORE DEMOCRATIC UNITED NATIONS (Frank Barnaby, ed. 1991) (proceedings of the First International Conference on a More Democratic United Nations, 1990); Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201,252-69 (1994).

[120] Rather than rejecting the entire UN Charter system as a reaction to our voluntary overextension in localized peacekeeping operations (a matter of political scapegoating), we should vote more selectively for particular UN operations as a permanent member of the Security Council and tailor more carefully our participation in those operations the Security Council approves. *See, e.g.*, Richard L. Armitage, *Bend the U.N. to Our Will*, N.Y. TIMES, Feb. 24, 1994, at A23, col. 1; Jim Hoagland, *The Blame Game*, WASH. POST, Oct. 21, 1993, at A31. For example, did the faction fighting in Somalia *really* threaten *international* peace and security, or was it an internal disorder fundamentally dissimilar to the type of transboundary aggression by nation-states contemplated by the founders of the Charter system? Chapter VII peacekeeping/peace-enforcement to remedy purely internal disturbances is a novelty engrafted onto the Charter through practice (*see, e.g.*, Brian Urquhart, *The United Nations, Collective Security, and International Peacekeeping, in* NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY 59, 62 (Alan K. Henrikson ed., 1986)), and should not be used as a gauge to measure the core importance and potential of the UN.

would conflict with general principles of international law.[121] Accordingly, the special authority of the Security Council offers the United States the opportunity to do legitimately what it could not otherwise do, and the Security Council cannot prevent the United States from doing what it could otherwise do legitimately (in view of the veto authority).

A key principle in the Charter is aggression; it defines two thresholds: (1) aggression is prohibited, and (2) it gives rise to the right of self-defense. Aggression, therefore, is the limit of freedom of national action, and it is the trigger for forceful national responses against other nations. The UN General Assembly has defined 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."[122] Included as examples in the General Assembly's resolution are invasion; the use of any weapon or blockade; an attack by the armed forces of one state against the territory of another state; an attack upon the armed forces of another state; or the sending of armed bands, groups, irregulars, or mercenaries to carry out acts of armed force against another state.[123] Article 5 of the General Assembly resolution adds that no political, economic, military, or other consideration may serve as a justification for aggression.[124] The United States voted for the Resolution on Aggression and has endorsed it as official policy.[125]

Assuming for the sake of argument that a strategy of non-defensive force could ever be implemented in the United States, ignoring Charter norms and expanding the use of force could have several short-term advantages, including the replacement of hostile regimes with puppet governments, quick suppression of distant disorders, destruction of those weapons of mass destruction detectable by intelligence, and forceful protection of persecuted minorities in other countries. The distinction between aggression and defense is so entrenched in international law that periodic violations by the

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121 *See, e.g.*, Judith G. Gardam, *A Symposium on Reenvisioning the Security Council: Article: Legal Constmints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 297 (1996) ("[T]he Security Council, when acting under Chapter VII, can derogate from the existing rules of international law in its actions dealing with threats to the peace in order to restore international peace and security. AS a general proposition this conclusion has never been seriously in doubt . . . .").

122 G.A. Res. 3314 (XXIX), 29 U.N. GAOR, 29th Sess., Supp. No. 31, v.1, at 142, U.N. Doc. A/9631 (1974).

123 *Id.*

124 *Id.*

125 *See, e.g.*, DEP'T ST. BULL., Feb. 1978, at 155-58; U.S. DEP'T OF AIR FORCE, PAM. 110-20, SELECTED INTERNATIONAL AGREEMENTS, at 5-78 through 5-79 (1981).

United States would not immediately erode observance by committed nations like the United Kingdom and France. However, many nations would likely impose diplomatic, trade, and economic sanctions on the United States. Nations like Russia, China, Libya, and Iran would probably imitate aggressive use of force. Victim nations would engage in asymmetric responses, such as terrorism and seizure of United States assets. Consolidating and perpetuating short-term gains from aggression would be difficult and expensive.[126] Unless we resorted to Soviet-style oppression, intransigence and rebellion in occupied nations would be frequent. A policy of force would probably stimulate virulent domestic resistance in the United States[127] and a global arms race in an environment of universal insecurity. Proliferation of weapons of mass destruction would be accelerated. The trust-based regime of international law that now facilitates trade and other economic activities would be eroded. Our military expenses would increase, and general economic well-being in the United States would decline due to the disruption of economically productive activity. As voluntary restraints on the use of force diminished generally, armed conflicts would erupt among other nations over fish,[128] water,[129] oil,[130] minerals,[131] navi-

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126 As Charles William Maynes observed, "conquered peoples are no longer compliant . . . they struggle on for decades to throw off the rule of the conqueror." Charles William Maynes, *The New Pessimism,* 100 FOREIGN POL. 33, 43 (1995).

127 *See, e.g.,* William C. Adams, *Opinion and Foreign Policy,* 61 FOREIGN SERVICE J. 30-33, (May 1984) (discussing public support for the UN, opposition to foreign combat, preference for unoffensive defense, desire to reduce tensions).

128 Depletion of the world's fish stocks is an enduring "common pool" problem that has led to disputes just short of armed conflict on many occasions, such as the practice in the 1960's and 1970's of the CEP nations (Chile, Ecuador, and Peru) and Mexico of seizing foreign tuna vessels and arresting their crews, or the warship showdown over cod fishing in the North Atlantic between Spain and Canada in 1995. *See* Bronwen Maddox, *Fleets Fight in Over-fished Waters,* FIN. TIMES, Aug. 30, 1994, at 4; *Ecuador: Return of the Tuna Fleet,* IX Latin *America* 6, Feb. 7, 1975, at 41; *News in Brief: Ecuador;* VI Latin America 46, Nov. 17, 1972, at 368; *Saber-Rattling by Canada Pays Off in Bitter Dispute Over Fishing,* Hous. CHRON., Apr. 17, 1995, at A11; Tom Carter, *Canada Defends Firing Shot in Fish War; Officials Hope UN Will Step In,* WASH. TIMES, Mar. 30, 1995, at A19.

129 Access to water is currently a source of great friction in the Middle East. *See* W. Wayne Beall, *Water; One of the Oldest Strategic Resources, Remains a Trigger of War,* DEF. & FOREIGN. AFF. STRATEGIC POL'Y, Sept. 30, 1994, at 4.

130 Some nations, like Japan, are so dependent on foreign oil that their economies would be devastated if oil imports were cut off.

131 Most nations depend to some degree on importation of foreign minerals. For example, the United States imports nearly all of its chromium and nickel.

gation rights,[132] trade,[133] use of space,[134] pollution, ethnicity, religion, ideology, and other simmering sources of friction. Given such possible risks to world order, the likelihood of influencing national security strategy or force-planning to embrace a policy of unlawful aggression is so small that the military departments should not waste public funds encouraging or entertaining such notions. The Charter distinction between aggression and defense should be an assumption in any new military strategy or planning.

Complaints that the United Nations compromises our sovereignty are absurd. The Security Council can do nothing over a veto by the United States. Politicians have blamed the UN for missteps the United States formally supported or for matters that have no basis in fact (such as assertions that the UN can enforce environmental treaties in the United States against our will).[135] Under the

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[132] The 1982 United Nations Convention on the Law of the Sea, 21 I.L.M. 1261 (1982), contains a complex regime of rights to accommodate competing uses of the world's oceans and coastal waters. Conflict still exists over the exercise of innocent passage, transit passage, military survey, coastal state rights in the exclusive economic zone, fishing, access to seabed minerals, ocean environmental protection, navigation in ice-covered areas, and other maritime matters. The tension-filled "Black Sea Bumping Incident" involving the USS Yorktown and the USS Caron arose over a dispute concerning the right of innocent passage.

[133] History is full of examples of wars and skirmishes fought over trade, including the many episodes of the "Spice Wars" between Britain, Holland, and Portugal, which lasted into the Nineteenth Century.

[134] At the dawn of the Space Age, before a regime of law was devised through treaties and state practice, the opinion flourished that nations could freely destroy each other's satellites with impunity since there was no law applicable in space that prohibited it. Return to such a view today would be disastrous, given the tremendous investments in satellites.

[135] *See Bashing the U.N. for Votes*, SACRAMENTO BEE, Aug. 26, 1996, at **B4;** John M. Goshko, *U.N. Becomes Lightning Rod for Rightist Fears; Criticism of World Body Resonates in GOP Themes*, WASH. POST, Sept. 23, 1996, at A1; James A. Goldsborough, *The GOP's Phony War Against the U.N.*, SAN DIEGO UNION TRIB., Aug. 26, 1996, at B7. The 1994 Republican 'Contract with America" contained several anti-UN provisions. At least rhetorically, the President has picked up the anti-UN theme as well. *See* Armitage, *supra* note 120. However, when the rubber really met the road, the President chose to stand by the UN embargo on Bosnia and vigorously resisted legislation to supply arms. Chris Black, *Clinton Veto Keeps Embargo on Bosnia*, BOST. **GLOBE,** Aug. 12, 1995, at 1. All of the recent UN-bashing can be traced to disagreement with its policies in Somalia and Bosnia, and particularly to the exercise of authority formally committed to the Secretary General, Boutros-Ghali, in several Security Council resolutions. The Secretary General has no supervisory or operational authority inherent in the Charter. The Charter prescribes no particular style or strategy for Chapter VII operations. Security Council resolutions determined the structure and style of Chapter VII activities in Somalia and Bosnia, and the United States supported all of these Security Council resolutions. Rather than bashing the UN for its inexperience with peace enforcement, the United States should extract lessons learned from Somalia and Bosnia and exercise more enlightened leadership on the Security Council or veto ineffective measures and proceed under the inherent authority of collective self-defense where it applies. Failures in Somalia and Bosnia developed from errors of execution, not defects in the fundamental structure of the Charter itself.

Charter system, the United States has the unhindered right of self-defense. The Security Council offers the additional opportunity to use force *non-defensively* in situations that would violate the sovereignty *of others*—under the aegis of international law. This is an awesome authority. It has never been used against the United States. **A** common complaint is that the UN does not use it more casually against others. That such a power should be used sparingly is not a surprise. **A** United Nations drunk with violent intervention into every local disturbance could never keep the consensus necessary to survive. The Charter framework addresses the prevention of major wars, of nation-conquest and absorption. It was never intended to turn earth into heaven for mankind. Its focus is floodgates, not fistulas.

The Charter system is not a panacea. It is, however, a strategic watershed. Strong norms promote voluntary compliance, particularly when the norms relate to mutual self-preservation. The number of nations that willingly adhere to Charter limits on the use of force far exceeds the number that do not. Iraq's invasion of Kuwait was the last significant example of defection, and the Charter system provided an unmistakably effective response. **A** strategic consensus of order among nations, with its system of cardinal enforcement, should not be compromised for parasites, pickpockets, and pushers. Nations should seek Charter-compliant solutions for substate threats, including enhanced resources and technological wizardry for law enforcement. Meanwhile, the UN should address recalcitrant nations with a two-pronged, Charter-consistent strategy: conversion and deterrence/reversal. Conversion programs should focus on promotion of the rule of law, including the Charter, with more emphasis on the tools and troops for diplomacy activities, training and contact/exchange programs, civil affairs advice and assistance, law enforcement alliances, arms control compliance transparency, intelligence-sharing, cultural exchanges, and similar non-forceful activities. **As** a hedge against defection, great peace-loving nations should retain sufficient power in reserve to deter or to reverse occasional transboundary aggression—as a fallback or a correction, not as a principal focus. Particularly in the current resource-constrained environment, multilateral cooperation and conversion can be much more efficient than coercion.[136]

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136 In addition to the strategic advantage of *majority* voluntary compliance with peaceful norms and the legal-technical advantage of a reduced force threshold for UN enforcement actions (*see* Figure 1), multilateral approaches supplement efforts where problems still exist by encouraging the participation and contribution **of** others. The participation of other nations enables the United States "to influence events without assuming the full costs and risks" and lends "the weight **of** law and world opinion to causes and principles we support." *Advancing American Interests through the United*

World peace may depend on seeing through and beyond the parochial motives of those whose short-term welfare is entwined with the art and the instruments of force. This is a wake-up call for alarmists who see every challenge as a potential for war. There is no question that the chief role of the military will remain to fight and win the nation's wars, but when there are no military wars to fight it is time to stop fighting the peace, and either disengage[137] or participate in promoting it.[138] Observing law that promotes peace is more important than finding something to do with our hardware. If it's time to stack rifles and polish brass, then so be it.

Nations, 6 DEP'T ST. DISPATCH, no. 8 (Feb. 20, 1995) (statement of Madeleine Albright). "[O]f the more than 67,000 UN peacekeepers deployed in 17 missions, less than 2% are American." *Id.*

137 Military disengagement from the civilian business of peace to focus on readiness for war is an option advocated recently by Colonel Charles Dunlap, United States Air Force, in his award-winning 1993 essay, *"The* Origins of the Military Coup of 2012." *See* Thomas E. Ricks, *Colonel Dunlap's Coup: a Fictionalized Essay That has Been Circulating within the Pentagon Offers a Blunt Warning on Several Fronts*, 271 THE ATLANTIC 23 (no. 1, Jan. 1993).

138 On new opportunities for peace promotion, *see U.S. Intervention in the Post Cold-War Era*, 7 DEP'T ST. DISPATCH, no. 30 (July 22, 1996) (remarks of Nancy Soderberg, Deputy Assistant to the President for National Security Affairs, at the U.S. Institute of Peace). There is some evidence that the military may finally be finding the main road of post-Cold War policy. *See* David Wood, *U.S. Military is Unclear on How to Wage Peace*, CLEVELAND PLAIN DEALER, Sept. 22, 1994, at 1A; NATIONAL MILITARY STRATEGY OF THE UNITED STATES ii, 8-9 (Feb. 1995) (Peacetime Engagement). The United States Army seems to have seized the initiative in developing the concept of Military Operations Other Than War.

UNITED NATIONS OPERATIONS: PROBLEMS ENCOUNTERED BY UNITED STATES FORCES WHEN SUBJECT TO A "BLUE PURSE"

MAJOR LOUIS A. CHIARELLA*

I. Introduction

The end of the Cold War[1] has increased the threat to international peace and security.[2] However, it has also increased the ability of the international community to play an active role in response to that threat.[3] As a result of these circumstances, the United States has increased its reliance on multilateral operations as a vehicle for

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1 The Cold War ended in early 1988 when the basic relationship between the Soviet Union and the United States changed from confrontation to cooperation. President Mikhail Gorbachev's desire for economic and political reform of the Soviet Union necessitated a policy of cooperation with the United States and its allies. COIT BLACKER, HOSTAGE TO REVOLUTION 3 (1993). The policy of confrontation, largely in the form of a military rivalry, was "economically dysfunctional and politically counterproductive." *Id.* at 59. The Intermediate Nuclear Forces (INF) agreement in December 1987 and the Soviet decision in early 1988 to withdraw from Afghanistan exemplified the policy of cooperation.

2 "The cold war confronted the international community with a singular threat to security; now, a widely varying array of resentments, ambitions, rivalries and hatreds masked for decades have come to the fore to threaten international harmony and shared purpose." *Work of the Organization from the Forty-Sixth to the Forty-Seventh Session of the General Assembly: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Supp. No. 1, para. 111, U.N. Doc. A/47/1 (1992) [hereinafter 1992 *Secretary-General Report*]. "The upheaval in the former Yugoslavia illustrates how the closing of the cold war opened a Pandora's box of causes and conflicts that had been kept down by the ideological struggle of that era." *Id.* para. 140.

3 International "agreement on a wide range of issues [now] became possible." *Id.* para. 14. International organizations involving both the United States and the Soviet

achieving national security objectives.[4] Multilateral operations occur across the full spectrum of operations, up to and including war. Like unilateral operations, they respond to the type of conflict and threat to national interests. Sometimes United States involvement in a multinational operation occurs pursuant to **a** mutual defense treaty or an ad hoc coalition.5 Increasingly, American multilateral operations occur as United Nations (UN) "peace operations."[6]

United States participation within the context of UN peace operations[7] occurs for both political and military reasons.[8] Peace operations are political as well as military in nature. Their measure of success requires any military action to "complement diplomatic,

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Union were able to dramatically change the scale and scope of their activities beginning in 1988. *Id.* at 16.

4 Multilateral operations are not new to the United States. United States armed forces have participated in multinational endeavors since the Revolutionary **War.** U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, at 5-1 (14 June 1993) [hereinafter FM 100-5]. Since 1990, however, U.S. military operations involving multinational forces have increased 300%. UNITED STATES ARMY POSTURE STATEMENT FISCAL YEAR (FY) 1997, MEETING THE CHALLENGES OF TODAY, TOMORROW, AND THE 21ST CENTURY 3 (1997).

5 Operation Urgent Fury (Grenada) was a multinational operation that occurred pursuant to a mutual defense treaty. ***See*** John Norton Moore, ***The United States Action in Grenada***, 78 ***Am.*** J. INT'L L. 145. Operation Desert Shield/Desert Storm constituted a multinational operation that made use of an ad hoc coalition.

6 ('Peace operations" is an umbrella term that encompasses three activities with predominantly a diplomatic lead (preventive diplomacy, peacemaking, and peace building) and two activities with more substantial military involvement ("peacekeeping" and "peace enforcement"). U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS, at iv, 111 (30 Dec. 1994) [hereinafter FM 100-23]. This article will focus on the latter two types of activities. "Peace operations are not new to the Army. Since 1948, U.S. soldiers have served in many such operations . . . . What is new is the number, pace, scope, and complexity of recent operations." *Id.* at v. The Department of Defense considers peace operations to be one form of "contingency operations," defined as "military operations that ***go*** beyond the routine deployment of stationing of U.S. forces abroad but fall short of large-scale theater warfare." U.S. GEN. ACCOUNTING OFFICE, BRIEFING REPORT TO THE CHAIRMAN, COMMITTEE ON THE BUDGET, HOUSE OF REPRESENTATIVES, PEACE OPERATIONS: ESTIMATED FISCAL YEAR 1995 COSTS TO THE UNITED STATES, B-260431, GAO/NSIAD-95-138BR, 11 (May 1, 1995) [hereinafter PEACE OPERATIONS 1995 COSTS].

7 The United States may participate in non-UN peace operations, such as the Multinational Force and Observers in the Sinai (MFO) and the Guaranteed Observer Group (GOG) between Peru and Equador. INSTITUTE FOR NAT'L STRATEGIC STUDIES, NAT'L DEFENSE UNIV., 1996 STRATEGIC ASSESSMENT 133 (1996) [hereinafter STRATEGIC ASSESSMENT 19961. However, "[tlhe great majority of United States peace operations will be part of a UN peace operation." FM 100-23, ***supra*** note 6, at 23. This article will focus on those peace operations under UN auspices.

8 "UN . . . peace operations will at times offer the best way to prevent, contain or resolve conflicts that could otherwise be more costly and deadly. In such cases, the U.S. benefits from having to bear only a share of the burden. We also benefit by being able to invoke the voice of the community of nations on behalf of a cause we support." BUREAU OF INT'L ORG. AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 10161, THE CLINTON ADMINISTRATION POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS (1994) (discussing classified Presidential Decision Directive (PDD)-25, Reforming Multinational Peace Operations (May **4,** 1994) [hereinafter PDD-25].

economic, informational, and humanitarian efforts in pursuing the overarching political objective."[9] The appropriateness of committing American troops and money to peace operations is the subject of much controversy and debate.[10] The reality for the armed services is that such operations will remain a critical part of United States national security policy.[11]

United Nations peace operations come in many forms. One distinction is between "peace-keeping"[12] and "peace enforcement"[13] missions.[14] Another difference is between those peace operations undertaken by nations pursuant to UN authorization, and those operations under UN direction.[15] The financial aspects of the operation are a key difference between UN-authorized and UN-directed

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9 **FM 100-23,** *supra* note *6,* at vi.

10 *See The United Nations: Management, Finance, and Reform: Hearing Before the Subcomm. On Int'l Operations and Human Rights of the House Comm. On Int'l Relations,* 104th Cong. *11* (1995) (statement of Rep. Joe Scarborough) ("[W]hat my bill [the U.N. Withdrawal Act, H.R. 2535] discusses is getting out of the United Nations proper . . . and start removing ourselves from some of these peacekeeping operations.").

11 "Properly constituted, peace operations can be one useful tool to advance American national interests and pursue our national security objectives." PDD-25, *supra* note 8, at **13.** This belief is not limited to the current administration. Both Republican and Democratic administrations have issued policy statements emphasizing "the importance of peace operations in reducing instability and limiting conflict." Antonia Handler Chayes & George T. Raach, *Beyond Fighting and Winning,* in PEACE OPERATIONS: DEVELOPING *AN* AMERICAN STRATEGY **3, 5** (Antonia Handler Chayes & George T. Raach eds., **1995).**

12 Peacekeeping refers to "military or paramilitary operations that are undertaken with the consent of all major belligerents; designed to monitor and facilitate implementation of an existing truce and support diplomatic efforts to reach long-term political settlement." THE JOINT CHIEFS OF STAFF, JOINT PUB. **3-07.3,** JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACEKEEPING OPERATIONS, I-1 (29 Apr. **1994)** [hereinafter JOINT PUB. 3-07.3]; **FM 100-23,** *supra* note *6,* at **112;** *see infra* note **53.**

13 Peace enforcement refers to "the application of military force, or the threat of its use, normally pursuant to international authorization, to compel compliance with resolutions or sanctions designed to maintain or restore peace and order." FM 100-**23,** *supra* note *6,* at **111;** *see infra* note **54.**

14 The distinction between peacekeeping and peace enforcement missions has become blurred. This is dangerous:

> The logic of peace-keeping flows from political and military premises that are quite distinct from those of [peace] enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.

Supplement to an Agenda for Peace: Position Paper of the Secretary-General, U.N. GAOR, 50th Sess., para. **35,** U.N. Doc. A/50/60 (1995) [hereinafter *Supplement* to *An Agenda for Peace].*

15 The Joint Warfighting Center recognizes two types of UN operations. United Nations-authorized operations are "operations for which the UN sanctions military intervention with the lead role assigned to a nation." JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, Exhibit **2 (28** Feb. **1995)** (currently under revision) [hereinafter JTF COMMANDER'S HANDBOOK]. United

operations.[16] Domestic authority is the primary fiscal issue in UN-authorized operations. The fiscal issues for "blue-helmeted"[17] UN-directed operations are more complex, political, and largely beyond United States control. The fiscal aspects of UN-directed peace operations also can be the source of operational problems for participating United States forces. It is this aspect of UN peace operations that military lawyers and operators often fail to understand.[18]

This article seeks to resolve the aforementioned problem. Part II of this article examines the general purpose of the UN, and its role within the UN-directed peace operations. Part III reviews the UN structure with regard to peace operations and how the organization exercises fiscal control over these missions. Part IV examines the shortcomings of the UN fiscal process for peace operations and the types of operational problems that result for contributing forces. Part V recommends how United States forces can mitigate and alleviate the problems that occur when operating within the confines of a 'blue" UN purse.

11. The Role of the UN

The UN is the embodiment of the will of the international community. It is a by-product of the strengths and weaknesses of the current nation-state system. The proper role of the UN has been questioned since the organization's origin and the prevailing opinion

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Nations directed operations are "operations conducted under UN auspices with a military force under UN control." *Id.*

16 "For success, it is ***essential*** that a policy be developed for "funding" the peace operation. This may be one of [the Joint Task Force Commander's] most complex and time-consuming tasks." *Id.* at 59.

17 In November 1956, UN peacekeeping forces hastily deployed to the Sinai Peninsula to monitor the cease fire agreement in the Suez Canal War:

> With three foreign armies fighting on Egyptian soil, the U.N. troops needed clear identification . . . . Berets of the same light shade of blue as the U.N. flag was the agreed solution—until it was discovered that these would take months to manufacture. So the United States quickly spray-painted thousands of army helmet liners the right shade of blue and shipped them to Suez. The "Blue Helmet". . . was born.

Paul Lewis, ***A Short History of United Nations Peacekeeping,*** in SOLDIERS FOR PEACE **25, 32** (Barbara Benton, ed., 1996).

18 Interview with Captain Catherine M. With, former Operational Law and Administrative Law Judge Advocate for Multinational Force (MNF) Haiti and later the Command Judge Advocate for United States Forces in Haiti, in Charlottesville, Virginia (Mar. 19, 1997) (most judge advocates had limited knowledge of UN fiscal procedures); U.S. ARMY TRAINING AND DOCTRINE COMMAND, CENTER FOR ARMY LESSONS LEARNED (CALL), U.S. ARMY OPERATIONS IN SUPPORT OF UNOSOM II (**4** May 93-31 Mar 94) LESSONS LEARNED REPORT, at 1-1-6 (n.d.) [hereinafter CALL REPORT UNOSOM II] (military planners did not understand the UN fiscal and procurement processes).

of its proper role has changed over time. This section reviews the role of the UN as set forth in its charter and as it has evolved with practice. Understanding the UN's role will provide a foundation for examining the financial aspects of the peace operations it employs.

A. The Role of the UN As Set Forth In Its Charter

The horrors and carnage of World War II made many realize the need for some world body in which nations could effectively resolve disagreements without recourse to war.[19] The UN was to be the method by which the major powers of the world collectively kept the peace and avoided war as a method of conflict resolution. Such utopian beliefs dueled with national self-interest when deciding what powers and authorities to give this international organization.

The UN's Charter[20] is an international agreement[21] that establishes the organization's actual roles and powers. The UN's primary purpose is unequivocal:

> [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[22]

The UN Charter attempts to achieve these objectives by mandating peace among Member States. Article 2(4) prohibits all use of armed

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19 The UN's predecessor, the League of Nations, had some successes and instituted "twentieth-century peacekeeping in both theory and practice." Thomas F. Arnold & Heather R. Ruland, ***The "Prehistory" of Peacekeeping, in*** SOLDIERS FOR PEACE, ***supra*** note 17, at 11. Overall, the League of Nations was an ineffective world body for resolving international disagreements because major world powers failed to participate and because of the organization's lack of enforcement powers. ***Id.*** at 18-23.

20 U.N. CHARTER (June 26, 1945).

21 In domestic terms, the UN Charter is a treaty entered into by the United States (Senate advice and consent to ratification on 28 July 1945; ratified by the President on 8 August 1945; entered into force on 24 October 1945; and proclaimed by the President on 31 October 1945), 59 Stat. 1031, **T.S.** No. 993. The UN Charter is not a "self-executing" treaty. ***See generally*** Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (self-executing treaties are the "law of the land" and operate without the aid of any legislative provision); Robert F. Turner, ***The Constitutional Framework for the Division of National Security Powers Between Congress, the President, and the Courts, in*** NAT'L SECURITY L. 749, 792-96 (John Norton Moore et al. eds., 1990) (discussing whether Congress must appropriate money to implement a properly ratified treaty). The UN, by contrast, requires annual United States congressional appropriations in order to flourish.

22 U.N. CHARTER art. 1, para. 1.

force and the threat of force by one state against another except under limited circumstances.[23] The UN has the authority and power to intervene and maintain or restore peace when this decree proves unsuccessful.[24] The Charter also gives the UN the ability to intervene in those situations that merely threaten international peace and stability.[25] The Charter intends for the UN to play a substantial role in the maintenance of world peace and security. Practice has shown that the limits of the UN's authority are far more political than jurisdictional.

B. The Role of the UN As It Has Evolved in Practice

The UN became a victim of the Cold War soon after its creation. The mutual mistrust between the United States and the Soviet Union as military rivals only exacerbated the conflicting ideologies of the two nations.[26] The UN became a principal political battleground of the Cold War as both superpowers used it as a forum within which to score political points. "[T]he characteristics of a bipolar world divided by rival ideologies made it impossible for the UN to play an effective . . . role"[27] in the furtherance of international peace and stability. The UN's accomplishments during this period

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[23] *Id.* art. 2, para. 4. The Charter does not in any way "impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." *Id.* art. 51. Collective self-defense, also referred to as "enforcement actions" *(see Supplement to an Agenda for Peace, supra* note 14, paras. 77-78) is distinct from peace enforcement operations. Unlike regional action for enforcing peace, collective self-defense does not require prior UN authorization. *Id.*

[24] The UN Charter attempts to balance the collective right of intervention to maintain peace and security with the concerns for national sovereignty. The Charter guarantees the inalienable sovereignty of the state within its own borders, and generally precludes intervention in the internal affairs of all nation states. *Id.* art. 2, para. 7. The domestic jurisdiction limitations set forth in Article 2(7) do not apply, however, in the case of peace enforcement actions taken by the UN. *Id.* arts. 2, 41-42.

[25] *Id. art.* 39. The Charter does not define a threat to international peace, thereby giving the UN great latitude in making this determination. ***See*** Rosalyn Higgins, *Institutional Modes of Conflict Management, in* NAT'L SECURITY L., *supra* note 21, at 193, 206-07; *see also* Robert F. Turner, *Haiti and the Growth of a Democracy Entitlement, in* THE UNITED NATIONS AT FIFTY SOVEREIGNTY, PEACEKEEPING, AND HUMAN RIGHTS 18, 18-19 (the UN has used the "threat to peace" as the means to foster a democracy entitlement at the expense of domestic sovereignty). The authority for United States-led Operation Provide Comfort, a humanitarian intervention mission into northern Iraq, was a UN determination that a "threat to international peace and security" existed. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/ 688 (1991). In this instance, the threat was the risk of a massive exodus of refugees that endangered regional political stability. *Id.*

[26] The "Soviet-American competition [became one] viewed in zero-sum terms; i.e., gains by one side were, ipso facto, a loss for the other." Bard E. O'Neill & Ilana Kass, *The Persian Gulf War: A Political-Military Assessment,* 11 COMPARATIVE STRATEGY 213, 213-14 (1992).

[27] AGOSTINHO ZACARIAS, THE UNITED NATIONS AND INTERNATIONAL PEACEKEEPING 4 (1996).

were largely ones outside the scope of the superpower confrontation.28

The end of the Cold War resulted in the UN's ability to greatly expand its scope and involvement in the maintenance of international peace and security. Both the United States and the Soviet Union saw an active UN as beneficial to their national self-interests. The Soviet Union used the UN as the political means by which to extract itself from Afghanistan.29 The United States greatly encouraged UN efforts that extinguished civil wars in El Salvador, Nicaragua, Mozambique, and Cambodia, and which fostered the political transition to independence in Namibia.[30] Though the UN did not conduct the Persian Gulf War, the fact that it was able to authorize such an operation "signaled substantial changes in the function the UN could fulfill in the processes of peace."[31]

The UN's involvement in efforts to resolve both regional and internal conflicts reached a high point from 1988 to 1993. From 1945 to 1987, the UN established a total of only thirteen peace operations.[32] Between 1988 and 1993, the UN established twenty new operations in addition to continuing five operations from the earlier period.[33] The scope of UN peace operations changed more dramatically than their number. "Second generation peacekeeping,"[34] with an emphasis on implementation of comprehensive political settlements, largely replaced static truce supervision missions.[35] Each new operation also appeared bent on exceeding all previous ones in terms of size, cost, and complexity.36

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28 Most early UN peace operations occurred at locations that were generally apart from the superpower rivalry (e.g., the Middle East, Cyprus). KAREN A. MINGST & MARGARET P. KARNS, THE UNITED NATIONS IN THE POST-COLD WAR ERA 76 (1995). On other occasions the UN used procedural mechanisms to circumvent the Cold War rivalry. United Nations authorization for United States-led action in Korea, for example, relied on use of the General Assembly as well as the Soviet Union's absence from the Security Council. G.A. Res. 376, U.N. GAOR, 5th Sess., Supp. No. 20, at 9, U.N. Doc. A/1775 (1950).

29 Lewis, *supra* note 17, at 35.

30 ZACARIAS, *supra* note 27, at 4.

31 *Id.*

32 *See* Appendix I: Current UN Peace Operations & Appendix 11: Completed UN Peace Operations.

33 *Id.*

34 The origins of the term "second generation peacekeeping" are uncertain. *See* STEVEN R. RATNER, THE NEW UN PEACEKEEPING 17 (1995). That such a term was coined reflected the dramatic qualitative change in UN peace operations. *See* Lewis, *supra* note 17, at 35.

35 *See* RATNER, *supm* note 34, at 11, tbl. 1.1, 18-19, tbl. 1.2 (most UN peace operations from 1988 to the present constitute second-generation peacekeeping). Examples of second-generation peacekeeping include UN missions in Angola, Cambodia, El Salvador, Namibia, and Mozambique. *See Supplement* to *An Agenda for Peace, supm* note 14, para. 20.

36 United Nations efforts in Cambodia from October 1991 to September 1993 exceeded $1.6 billion. Enid C.B. Schoettle, *Financing UN Peacekeeping, in* KEEPING

A corresponding change in philosophy accompanied this increase in UN action. Many believed that the UN was the best means through which to achieve the collective desires of individual nations, and should play an aggressive role in the furtherance of international peace.[37] United Nations Secretary-General Boutros Boutros-Ghali echoed this widely held opinion shortly after assuming office in 1992:

> [I]t is possible to sense a new stirring of hope among the nations of the world, and a recognition that an immense opportunity is here to be seized. Not since the end of the Second World War have the expectations of the world's peoples depended so much upon the capacity of the United Nations for widely supported and effective action.
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> . . .
>
> As I write this report, one great reality stands out: never before in its history has the United Nations been so action-oriented, so actively engaged, and so widely expected to respond to needs both immediate and pervasive. Clearly, it is in our power to bring about a renaissance—to create a new United Nations for a new international era.[38]

A more tempered view of what the UN can and should do has developed during the past three years. Part of this change is the result of the organization's limited capacity to deal with the new challenges to international peace and security.[39] Part of this change resulted from the costly failures in Somalia, Bosnia, and Rwanda.[40] The "United States own uncertainty about its role in the post-Cold

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THE PEACE IN THE POST-COLD WAR ERA: STRENGTHENING MULTILATERAL PEACEKEEPING 17, 28 (John Roper et al., 1993). United Nations operations in Somalia from April 1992 to March 1995 then exceeded $3 billion. GEOFF SIMONS, UN MALAISE: POWER, PROBLEMS, AND REALPOLITIK 133 (1995). United Nations operations in the Former Yugoslavia between March 1992 and December 1995 surpassed $4 billion. MINGST & KARNS, *supra* note 28, at 77. The total cost for UN peacekeeping operations increased from $250 million in 1988 to more than $3.5 billion in 1993. Paul Beaver, *UN Forced to Count Costs of Peacekeeping Expansion*, JANE'S DEFENCE WEEKLY, Feb. 5, 1994, at 16.

37 PHYLLIS BENNIS, CALLING THE SHOTS: HOW WASHINGTON DOMINATES TODAY'S UN 85-87 (1996).

38 1992 *Secretary-General Report*, *supra* note 2, paras. 4-5.

39 "[T]he murderous conflicts within member countries, . . . [t]he collapse of governing institutions, the deaths of thousands of civilians, as well as the migration of millions of refugees across borders" present situations that the UN has little or no ability to solve. William H. Lewis, *United Nations Role Sharing*, STRATEGIC FORUM NO. 83, Sept. 1996, at 3.

40 The UN Operation in Somalia II (UNOSOM II) unsuccessfully attempted to bring law and order to that country. The UN Protection Force (UNPROFOR) in Bosnia was unsuccessful in imposing a peace settlement on warring parties who did not truly desire peace. The UN Assistance Mission for Rwanda (UNAMIR) failed to avert horrific tribal massacres. Lewis, *supra* note 17, at 28.

War world"[41] is a third cause for UN's current disengagement.[42] The international community no longer appears willing to commit military forces and financial resources for major operations that do not have low risks and finite objectives.43 This change in temperament has had profound results. United Nations involvement in some recent international crises has been slow, minimal, or nonexistent.[44] United Nations peace operations also have diminished. In 1993, the UN conducted a total of nineteen peace operations involving almost 80,000 troops,[45] costing more than $3.5 billion.[46] The UN is currently conducting seventeen operations47 with about 25,000 troops[48] at a cost of approximately $1.2 billion.[49]

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41 STRATEGIC ASSESSMENT 1996, *supra* note 7, at 34.

42 As a permanent member of the UN Security Council (*see infra* note 67) and leading source of UN funding (*see infra* notes 180-81 and accompanying text), the United States wields significant power in shaping the decisions of that body. James P. Terry, ***The Criteria for Intervention: An Evaluation of U.S. Military Policy in U.N. Operations,*** 31 TEX. INT'L L.J. 101, 103 n.9 (1996). PDD-25 now sets forth strict criteria for United States involvement in UN peace operations. PDD-25, *supra* note 8, at 13; *see also* Terry, *supra* (reviewing the two-step analysis for supporting and participating in UN peace operations). Given the political and financial importance of the United States, PDD-25 establishes not only the ***de jure*** American involvement criteria but also the ***de facto*** UN involvement criteria.

43 The American public does not wish to see its forces sent on dangerous missions under inexperienced and ineffective UN command. Lewis, *supra* note 17, at 28. The United States Congress shares this apprehension. The Senate's Peace Powers Act (Peace Powers Act of 1995, S. 5, 104th Cong., 1st Sess. (1995)) proposed severely limiting the payment of assessments for UN peace operations, requiring 15 days advance notice to Congress before voting in the UN on peace operations, and precluding foreign command of United States forces. Terry, *supra* note 42, at 104 n.12. The House of Representatives' National Security Revitalization Act (National Security Revitalization Act of 1995, H.R. 7, 104th Cong., 1st Sess. (1995)) proposed limiting the use of Department of Defense funds for UN peace operations and adding "significant restrictions and reporting requirements on placing American forces under U.N. operational control." Terry, *supra* note 42, at 104 n.13. Some have noted that the UN's precarious financial situation is another reason why the organization has tempered its activist aspirations. The UN's financial crises, however, are more symptomatic of the lack of international will among Members States than a separate problem.

44 Examples include the UN delay in organizing and dispatching the UN Angola Verification Mission (UNAVEM) III, the reduction of the UN contingent to the UN Observer Mission in Liberia (UNOMIL), and the hesitancy to respond to the genocide taking place in Rwanda in 1994. LEWIS, *supra* note 39, at 3. The UN's unwillingness to approve the deployment of a preventive force to Burundi in 1995 and a security force to Zairian refugee camps also reflect this change in political disposition. *Id.*

45 John F. Hillen III, ***Redefining "Victory," in*** SOLDIERS FOR PEACE, *supra* note 17, at 147, 149. United Nations peace operations in 1993 also involved over 4500 civilian police and more than 10,000 civilians. UNITED NATIONS, UNITED NATIONS PEACE-KEEPING 8-9 (1993).

46 *See supra* note 36.

47 *See* Appendix I: Current UN Peace Operations.

48 Current UN peace operations involve the participation of 23,861 troops from 71 countries. United Nations Department of Public Information, ***Monthly Summary of Troop Contributors to Peace-keeping Operations*** (last modified 31 Mar. 1997) <http://www.un.org/depts/dpko/troop.html>.

49 1996 UN assessments for peace operations totaled $1,197,060,353. UNITED

The extent of UN action has swung dramatically with the will of the international community. The techniques employed by the UN to maintain international peace and security have also varied over time. The different types of UN peace operations have different fiscal implications. Understanding the kinds of peace operations that exist will provide a basis for understanding UN fiscal control over such operations.

III. General Attributes of UN Peace Operations

No two UN peace operations are alike.[50] Missions vary in terms of their organization, size, and objectives.[51] Each operation must take into account the situation on the ground, the will of the international community, and the "readiness of UN member countries to provide contingents for the mission."[52] A primary characteristic of peace operations is the type of "mandate," or authority, which governs the mission. The mandate is the defining document that determines if the UN mission is one of peacekeeping[53] or peace

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NATIONS SECRETARIAT, STATUS OF CONTRIBUTIONS, **30** SEPTEMBER 1996, U.N. Doc. ST/ADM/SER.B/499 (1996) (English version) [hereinafter STATUS OF UN CONTRIBUTIONS]. Within its regular budget, the UN accounts for two other peace operations with total annual costs of approximately *$35* million. *See infra* note 96; UNITED NATIONS, UNITED NATIONS PEACE-KEEPING INFORMATION NOTES **5,** 7 (1995) [hereinafter UNITED NATIONS].

50 JTF COMMANDER'S HANDBOOK, *supra* note 15, at 1("[t]here is no standard peace operations mission").

51 ZACARIAS, *supra* note 27, at 16.

52 *Id.* at **17.**

53 The United Nations has used peacekeeping missions as a primary means to maintain international peace and security for the past **50** years. The UN reliance on peacekeeping is particularly interesting, as the drafters of the UN Charter did not foresee this innovation. Memorandum, Colonel James P. Terry, Legal Counsel, Office of the Chairman, Joint Chiefs of Staff, subject: Chapter **VI** vs. Chapter VII Actions Under the UN Charter in Haiti 1(5 July 1994)(copy on file with author) [hereinafter Terry Memo]. Three operational variables characterize UN peace operations: consent, impartiality, and force. FM *100-23, supra* note 6, at 12; *see also Supplement to an Agenda for Peace, supra* note 14, para. **33.** Peacekeeping operations occur with the consent of the parties concerned. This assent to the presence of outside peacekeepers is usually part of a desire for a lasting peace by the former belligerents. The military or paramilitary missions associated with peacekeeping are minimal—observation and monitoring of truces and cease-fires, and supervision of truces. FM 100-23, *supra* note 6, at **5.** Peacekeeping personnel include unarmed observers, lightly armed military units, civilian police, and civilians because of the nominal force requirements. Peacekeeping **also** depends on the impartiality of the peacekeepers, and the use of force only in self-defense or defense with a mandate. *Id.* The UN's own definition of peacekeeping employs similar notions. UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING 4-5 (2d ed. 1990); *see also An Agenda For Peace—Preventive Diplomacy, Peacemaking, and Peacekeeping: Report of the Secretary-General,* para. *20,* U.N.GAOR, 47th Sess., U.N. Doc. A/47/277 (1992). ("[p]eace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well") [hereinafter *An Agenda*

enforcement.[54] While this distinction is important for participating military forces,[55] it is largely irrelevant in terms of UN fiscal concerns.[56]

A characteristic of peace operations with much greater fiscal implications is the extent of UN involvement. The UN does not direct all peace operations. In some instances the UN merely provides the international authority for the actions of Member States and regional organizations. This "contracting out" has occurred for peace enforcement operations, like the multinational Implementation Force (IFOR) and Stabilization Force (SFOR) in Bosnia.[57]

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*For **Peace].*** The activities of peacekeeping forces have expanded dramatically during the past decade. Peacekeeping operations now commonly include "the implementation of comprehensive settlements" and the "protection of humanitarian operations." INDEPENDENT ADVISORY GROUP ON U.N. FINANCING, FINANCING AN EFFECTIVE UNITED NATIONS 2 (1993) [hereinafter INDEPENDENT ADVISORY GROUP].

[54] Peace enforcement is the second means that the UN uses to maintain international peace and security. Chapter VII of the UN Charter provides the UN's authority to undertake peace enforcement actions. U.N. Charter arts. 39-51. Like peacekeeping, the purpose of peace enforcement "is to maintain or restore peace and support diplomatic efforts to reach a long-term political settlement." FM 100-23, ***supra*** note 6, at **6.** In peace enforcement, however, the application of military force or threat of force plays a heightened role. The operational variables of consent, force, and impartiality differentiate peace enforcement from peacekeeping. In peace enforcement, "consent is not absolute." *Id.* at 12. Peace enforcement does not require obtaining the consent of the state on whose territory the threat or breach of the peace is occurring. Force is not limited to self-defense in peace enforcement operations. It may be used to compel or coerce. Peace enforcement missions are not neutral or impartial. However, "an even-handed and humanitarian approach to all sides of the conflict can improve the prospects for lasting peace and security, even when combat operations are underway." *Id.* at 13. Peace enforcement operations may include armed combat, armed intervention, and the physical threat of armed intervention. 'The missions assigned to peace enforcement forces include the restoration and maintenance of order and stability, protection of humanitarian assistance, guarantee and denial of movement, enforcement of sanctions, establishment and supervision of protected zones, [and the] forcible separation of belligerent parties . . . ." *Id.* at 7. The Unified Task Force (UNITAF) and UNOSOM II in Somalia, UNPROFOR in Bosnia, and the MNF in Haiti are examples of recent peace enforcement operations. ***See*** Appendices I & II.

[55] ***See supra*** note 14.

[56] The distinction between UN peacekeeping and peace enforcement operations is highly relevant for domestic fiscal implications. ***See infra*** notes 130, 165.

[57] ***See*** S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995); S.C. Res. 1088, U.N. SCOR, 51st Sess., 3723rd mtg., U.N. Doc. S/RES/1088 (1996). The UNITAF in Somalia, Operation Provide Comfort in Northern Iraq, and MNF in Haiti were also UN-authorized peace enforcement operations. ***See*** S.C. Res. 794, U.N. SCOR, 47 Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992); S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991); S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994). There is great likelihood that the UN will authorize rather than direct future peace enforcement missions. "The United Nations does not have the resources, nor are nations willing to assume the risks and costs of [peace enforcement] operations without sufficient control of operational methods." Antonia Handler Chayes & Wendy J. Jordan, ***Coalition Management in Peace Operations, in*** PEACE OPERATIONS: DEVELOPING AN AMERICAN STRATEGY, ***supra*** note 11, at 153, 168.

The UN may also "subcontract" the peace operations that it directs. Member States and regional organizations may provide concurrent assistance to peace operations outside the formal UN framework.[58] A second variant of subcontracting involves a UN-authorized peace operation by Member State coalitions followed by a UN-directed peace operation, such as missions in Somalia and Haiti.[59] The UN has had to increasingly rely on regional organizations for executing peace operations.[60] Still, the UN's own preference is to be the authority and the sole executive agent for peace operations.[61]

United Nations-directed peace operations experience many problems not encountered by UN-authorized operations. In the former, the UN is responsible for planning, troop contributions, command and control arrangements, administration and logistics, public information, intelligence, and legal issues. The problems associated with these responsibilities have increased with the size of recent missions undertaken by the UN.[62] The fiscal aspects of UN-directed peace operations are also different from UN-authorized ones. The UN has no fiscal responsibility when Member States par-

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[58] Subcontracting, or "co-deployment," usually involves a few UN observers and extensive external assistance. Examples include Russia/Confederation of Independent States (CIS) in the UN observer Mission in Georgia (UNOMIG) and the UN Mission of Observers in Tajikistan (UNMOT), the Economic Community of West African States (ECOWAS) in UNOMIL, France in UNAMIR, and the United States (Operation Provide Relief) in UNOSOM I. A different type of subcontracting occurred in UNPROFOR. Here NATO provided operational support to a large UN force. *See Supplement to An agenda for Peace, supra* note 14, para. 86; LEWIS, *supra* note 39, at 4; STRATEGIC ASSESSMENT 1996, *supra* note 7, at 128.

[59] In Somalia, the UN-directed UNOSOM II mission was the successor to the United States-led UNITAF. Jonathan T. Howe, *Somalia: Frustration in a Failed Nation, in* SOLDIERS FOR PEACE, *supra* note 17, at 159, 161. In Haiti, the UN-directed United Nations Mission in Haiti (UNMIH) peacekeeping mission was the successor to the United States-led MNF. ***See*** CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 19-20 (1995) [hereinafter CLAMO LESSONS LEARNED HAITI].

[60] *See* Boutros Boutros-Ghali, Preface to SOLDIERS FOR PEACE, *supra* note 17, at 2, 3; *see also* Edward Marks, *Peace Operations Involving Regional Organizations*, STRATEGIC FORUM, NO. 25, Apr. 1995, at 2 (the UN has implicitly acknowledged that it should restrict itself to executing peacekeeping operations while "contracting out" more ambitious peace enforcement operations).

[61] *See Supplement to an Agenda for Peace, supra* note 14, para. 87 (even those regional organizations that have the capability to conduct peace operations have little experience doing so); *An Agenda for Peace, supra* note 53, paras. 63-65 (regional organizations should play a supporting role to the efforts of the UN, which has primary responsibility for maintaining international peace and security).

[62] The UN has recognized the need for a structured mechanism to analyze the increasingly complex problems of UN-directed peace operations and to determine ways to improve mission effectiveness. In April 1995, the UN established a Lessons Learned Unit for this purpose. Much of the work of the UN Lessons Learned Unit is available on the Internet. *See* <http://www.un.org/depts/dpkofllu2.htm>.

ticipate in authorized operations.[63] By contrast, the UN is the strategic financier, operational comptroller, and tactical contracting officer for UN-directed operations. The fiscal problems at all levels are in large measure the result of how the UN structure exercises monetary control over directed peace operations.

IV. UN Fiscal Control over Peace Operations

The UN structure is convoluted, in large part because it attempts to service the many diverse needs of its Member States. The UN consists of six primary bodies: the Security Council, the General Assembly, the Secretariat, the International Court of Justice, the Economic and Social Council, and the Trusteeship Council.[64] The first three primary bodies have a significant role in UN peace operations, including the fiscal aspects of the missions.[65]

A. *The Security Council's Role in Peace Operations*

The Security Council is the UN body with primary responsibility for maintaining international peace and security.[66] It is the instrument by which the major world powers exercise their preemi-

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[63] For example, the United States incurred some $692 million in furtherance of the UNITAF effort in Somalia between December 1992 and May 1993. U.S. GEN. ACCOUNTING OFFICE, PEACE OPERATIONS—COST OF DOD OPERATIONS IN SOMALIA, B-255935, GAO/NSAID-94-88 (Mar. 4, 1994). The costs incurred by the United States were not subject to UN reimbursement because UNITAF was a UN-authorized peace operation. S.C. Res. 794, U.N. SCOR 47th Sess., U.N. Doc. S/RES/794 (1992).

[64] The UN also has numerous secondary bodies. *See infra* note *88*.

[65] The International Court of Justice (ICJ), the Economic and Social Council (ECOSOC), and the Trusteeship Council have but an indirect role in peace operations. The ICJ, also known as the World Court, is the main judicial organ of the UN. The ICJ consists of 15 judges elected by the General Assembly and the Security Council. 'The ICJ is involved in peacekeeping as an instrument to which recourse may be made for peaceful settlement of disputes between states or between states and other members of international society." ZACARIAS, *supra* note 27, at 26. The ECOSOC consists of 54 member countries elected for three-year terms. U.N. CHARTER art. 61, paras. 1, 2. Its mission is to coordinate the economic, social, cultural, and educational work of the UN and its specialized agencies and institutions. *Id.* art. 62, para. 1. The ECOSOC "plays an indirect role in peacekeeping in so far as peace depends on the welfare of societies." ZACARIAS, *supra* note 27, at 25. The Trusteeship Council is the UN's supervisory body which ensures "that Governments responsible for administering Trust Territories take adequate steps to prepare them for self-government or independence." United Nations Dep't of Pub. Info., *The UN in Brief* (last modified July 1996) <http://www.un.org/Overview/brief.html> [hereinafter UN Public Information]. It supports peacekeeping by providing a mechanism for avoiding territorial disputes. By 1994, all UN Trusteeship Territories had become independent states or have achieved self-government by joining neighboring independent countries. *Id.* The Trusteeship Council now meets only as the occasion requires. *Id.*

[66] "In order to ensure prompt and effective action by the United Nations, its Members confer upon the Security Council primary responsibility for the mainte-

nence in international affairs.[67] Because the UN Charter provides the Security Council with the requisite authority to achieve its stated responsibilities, its decisions are binding. **All** Member States must accept and carry out Security Council decisions.68 The Security Council also has the authority to act without the consent of the affected parties.[69]

Chapters VI and VII of the UN Charter set forth the powers that the Security Council possesses to fulfill its peacekeeping responsibilities.[70] These powers include:

- Calling on the parties to a dispute to settle the dispute by peaceful means;[71]
- Investigating the situation;[72]
- Recommending appropriate procedures or methods of adjustment;[73]
- Recommending terms of settlement as it may consider appropriate;[74]

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nance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." U.N. CHARTER art. 24.

67 The Security Council consists of **15** members of the UN. *Id.* **art. 23,** para. **1.** China, France, the Russian Federation, the United Kingdom, and the United States are permanent members. *Id.* The General Assembly elects the other 10 members of the Security Council for two-year terms. *Id.* paras. **1, 2.** Each member of the Security Council has one vote. *Id.* art. **27,** para. **1.** Decisions of the Security Council require nine affirmative votes. *Id.* paras. 2, 3. Except for procedural matters, a negative vote (a "veto")by a permanent member precludes a Security Council decision. *Id.* para. 3. Abstaining from a decision is not synonymous with vetoing the decision. Abstaining is a form of a "concurring vote" by a permanent member. *Id.* It is not, however, one of the nine affirmative votes necessary to reach a Security Council decision. *Id.* Thus, even when a permanent member abstains from a vote, the Security Council may still be unable to make a decision. ***See generally*** NATIONAL SECURITY LAW, ***supra*** note 21, at **195-203** for additional information on UN Security Council voting procedures.

68 "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. CHARTER art. 25. The Charter also provides that: "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." *Id.* art. **103.**

69 The actions of the Security Council under Chapter VII of the UN Charter, specifically Articles **41** and 42, may be imposed involuntarily. *Id.* arts. **39,** 41-42. By contrast, the actions of the Security Council under Chapter VI of the UN Charter require the consent of the affected parties. *Id.* arts. 33-38.

70 *Id.* art. **24,** para. 2.

71 *Id.* art. 33, para. **2.**

72 *Id.* art. 34.

73 *Id.* art. 36, para. **1.**

74 *Id.* art. 37, para. 2.

- Calling on the parties to comply with provisional measures laid down by the Security Council;[75]
- Deciding on measures not involving the use of armed force (to include complete or partial interruption of economic relations, communications, and the severance of diplomatic relations) and calling on Members to apply such measures;[76]
- Taking action by air, sea, or land forces as may be necessary to maintain or restore international peace and security, including demonstrations, blockage, and other operations.[77]

The Security Council plays a vital role in all UN peace operations. It is the body "responsible for defining the mandate and approving the establishment of [peace] operations."[78] The Security Council considers proposals from Member States or the Secretary General for the establishment of peace operations.[79] The Security Council then establishes the goals and broad parameters for each approved operation. This includes the choice of executive agent for the mission. The Security Council also decides how to pay for each UN-directed operation —n a voluntary basis or an obligatory basis as an expense of the UN.[80] The Security Council remains responsible

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75 *Id.* art. **40.**

76 Id. art. 41.

77 *Id.* art. **42.** Several portions of the UN Charter outline the means by which the Security Council may call on Member States for armed forces or other support. Member States agree to furnish armed forces, assistance, and facilities in accordance with agreements concluded between the Security Council and each member state, subject to the ratification of those states. *Id. art.* **43,** paras. **1, 3.** The UN has never implemented this article. Non-Security Council members may participate in Security Council decisions if their troops or facilities are involved under Article **43.** *Id.* art. **44.** The Security Council can establish a capability to take urgent military action by using air force contingents from Member States under Article **43** agreements. *Id. art.* **45.** The Security Council also may utilize the resources of all Member States, some Member States, or appropriate international organizations, for preventive or enforcement actions. *Id.* art. **48.**

78 ZACARIAS, *supra* note **27,** at **25.** It is, therefore, impossible for the UN to commit American resources to any peacekeeping operation without United States acquiescence or approval. *But see The United Nations: Management, Finance, and Reform: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. On Int'l Relations,* 104th Cong. **44** (**1995**) (statement of Rep. Joe Scarborough) ("our membership in the United Nations effectively puts . . . our assets wherever a majority of the United Nations' members deem it necessary that we go").

79 Three principal factors influence Security Council approval of peace operations: whether the parties consent to the UN mission; whether broad support from the international community exists; and whether Member States are ready to contribute personnel to the UN mission. **UNITED** NATIONS, *supra* note **45,** at **6-7.**

80 Id. at 7. Other items commonly included in the Security Council mandate are:

> the role of the peace operation force, . . . the tasks or functions to be performed, the size and organization of the force or mission, the appointment of the commander [and] any special mediators, . . . the nomination of the office responsible for the supervision of the operation, general arrangements for financial and logistical support, the division of UN and

for the general control and direction of the peace operation after its commencement and render decisions on "all matters which may affect the nature or the continued effective functioning of the operation."[81]

B. The General Assembly's Role in Peace Operations

The General Assembly is the UN's main deliberative body, composed of all 185 Member States.[82] The General Assembly may discuss any matters within the scope of the UN Charter,[83] although it generally focuses on social and economic concerns.[84] The General Assembly also may make recommendations on any matters over which the Security Council is not exercising its authority.[85] This body sets policies and determines programs for the UN Secretariat to execute.[86] The General Assembly has "no power to compel action by any State, but its recommendations carry the weight of world opinion."[87]

The UN General Assembly holds the "power of the purse." It is the body that considers and approves the organization's budget.[88]

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national responsibilities, the time limit of the mandate, the terms or conditions the host nations intends to impose on the presence of the force or mission, and the statements of the rights and immunities of force or mission members.

FM **100-23,** *supra* note **6,** at 66.

The UN mandate is often "imprecise and susceptible to different interpretations" because it is the result of negotiations between the Security Council, potential troop contributors, and the host nation. JOINT PUB. **3-07.3,** *supra* note **12,** at **11-7.**

81 UNITED NATIONS, *supra* note **45,** at **7.**

82 U.N. CHARTER art. 9, para. 1. Each Member State within the General Assembly has one vote. *Id.* art. 18, para. 1. Decisions of the General Assembly on "important questions" require a two-thirds majority of the members present and voting. *Id.* art. 18, paras. **2, 3.** Decisions of the General Assembly on other questions require a simple majority of the members present and voting. *Id.* art. 18, para. **3.**

83 *Id.* art. 10.

84 The General Assembly has occasionally been the body by which the UN attempts to maintain international peace and security when Security Council action was not possible. ***See*** *supra* note **28.**

85 UN CHARTER arts. 10 & 12, para. 1.

86 UN Public Information, *supra* note 65.

87 *Id.*

88 U.N. CHARTER *art.* 17, para. **1.** Many UN programs rely partially or completely on voluntary contributions for their funding. Several UN programs within the regular budget (e.g., United Nations High Commissioner for Refugees, United Nations Environment Program) rely heavily on voluntary contributions of Member States. These agencies come under the authority of the General Assembly because of their partial support from the regular budget. Other UN-affiliated programs rely entirely on voluntary contributions for financing (e.g., United Nations Development Program, United Nations Fund for Population Activities, United Nations Children's Fund). These affiliated programs have executive heads appointed by the Secretary General and governing boards appointed by the UN Economic and Social Council, but they are not under the authority of the General Assembly. Many other independent specialized agencies often associated with the UN system also rely exclusively on voluntary

The General Assembly budget approval occurs only by consensus of all Member States.[89] The fiscal authority of the General Assembly also extends to determining how to assess Member States for the costs incurred by the UN.[90] The General Assembly bases its scale of assessment for the regular UN budget upon the Member States' ability to pay, represented primarily by national income.[91] Pursuant to the UN's financial rules and regulations, "Member States have a legal obligation to pay their [full] assessed contributions"[92] within thirty days of receiving notice of their assessment.93 The UN enforcement mechanism for delinquent contributors is the potential loss of General Assembly voting privileges.94

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contributions (e.g., Universal Postal Union, International Atomic Energy Agency, International Maritime Organizations, World Meteorological Organization, International Telecommunication Union, United Nations Industrial Development Organization, World Health Organization, International Civil Aviation Organization, Food and Agriculture Organization, International Labor Organization, World Food Program, United Nations Educational, Scientific and Cultural Organization). INDEPENDENT ADVISORY GROUP, *supra* note 53, at 22, 28. Most United States contributions to the UN are voluntary and not mandatory in nature. The United States mandatory assessment to the regular UN budget in 1993 was $314 million, while United States voluntary contributions to the UN system for the same year totaled $1.314 billion. JEFFREY LAURENTI, NATIONAL TAXPAYERS, INTERNATIONAL ORGANIZATIONS 46-8 (1995).

89 The General Assembly, for the past few years,

> [has] approved the budget by consensus. Because consensus is required, a majority of countries cannot force a particular spending plan through the General Assembly if even a few Member States strongly object. Consensus budgeting was designed to give an appropriate level of influence in financial matters to the small number of Member States that contribute the largest part of the U.N.'s budget.

INDEPENDENT ADVISORY GROUP, *supra* note 53, at 7

Accordingly, though many policymakers are critical of the UN's spending policies, the UN consensus requirement means the U.S. voted in favor of such spending.

90 "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." U.N. CHARTER art. 18, para. 2.

91 'The regular budget scale of assessments . . . is a complex formula calculated on the basis of national income, converted into U.S. dollars, with various adjustments for external debt, low per capita income, and other factors." U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, UNITED NATIONS: How ASSESSED CONTRIBUTIONS FOR PEACEKEEPING OPERATIONS ARE CALCULATED, B-257610, GAO/NSIAD-94-206 at 2 (Aug. 1, 1994) [hereinafter PEACEKEEPING OPERATIONS CONTRIBUTIONS]. The General Assembly refines the regular budget scale of assessments every three years. Id. at 8. Assessments now range from a contribution upper limit of 25% to a contribution lower limit of .01%. Id. at 10. The United States has been assessed 25% or more of the regular UN budget since 1946. Id. Eighty-eight countries are presently assessed at .01% for the regular UN budget expenses. Id. at 10, 11, tbl.I.l.

92 SUSAN R. MILLS, THE FINANCING OF UNITED NATIONS PEACEKEEPING OPERATIONS 5 (1989).

93 The obligation of Member States to pay assessments within 30 days applies not only to the regular UN budget but also to peace operations assessed on a separate basis. Id.

94 A Member State whose arrears to the UN equal or exceed the prior two years assessed contributions may have no vote in the General Assembly. U.N. CHARTER art.

The General Assembly's authority to approve the budget and determine the apportionment of expenses also applies to peace operations, regardless of how the UN finances the operation.[95] The General Assembly has used five different financing methods for peace operations during the past fifty years. Some UN peace operations rely on the UN regular budget for financing,[96] while others rely on voluntary contributions.[97] Occasionally the parties most directly concerned have provided the financing for the UN peace operation.[98] In some instances the UN has maintained a separate budget for peace operations but has used the regular budget assessment rates.[99] The most common means of financing UN peace operations, however, has been the use of "special assessments."[100]

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19. The UN has enforced this sanction only sparingly, and never against a permanent Security Council member. MILLS, ***supra*** note 92, at 11-12. Currently 43 Member States are two or more years behind in UN-assessed contributions. ***See*** Jessica Mathews, ***Delinquency Diplomacy,*** WASH. POST, Mar. 10, 1997, at A17. Only a few small Member States, however, have had their General Assembly voting privileges suspended. Schoettle, ***supra*** note 36, at 23.

95 In 1962, the General Assembly requested and received an advisory opinion from the ICJ that the expenses of UN peacekeeping missions constituted "expenses of the Organization" within the meaning of the Charter. ***Certain Expenses of the United Nations Case,*** 1962 I.C.J. 151, 159-79, ***reprinted in*** NAT'L SECURITY L., ***supra*** note 21, at 253. Accordingly, the General Assembly has the authority to determine the budget and the apportionment for peacekeeping operations even if such costs are outside the regular UN budget. The UN enforcement mechanism for delinquent contributors, the potential loss of General Assembly voting privileges, also applies to UN peace operations no matter how funded. ***See, id.*** at 255.

96 The UN Truce Supervision Organization (UNTSO) and the UN Military Observer Group in India and Pakistan (UNMOGIP) are current missions that the UN finances using the regular budget. UNITED NATIONS, ***supra*** note 49, at 5-7.

97 From 1964 through 1993, the UN Force in Cyprus (UNFICYP) made exclusive use of voluntary contributions for its financing. Troop-contributing countries waived UN reimbursement for the regular pay, allowances, and normal materiel expenses of their forces. Voluntary contributions by Member States were to permit the UN to reimburse troop-contributing members for operational and logistical expenses. Insufficient voluntary contributions resulted in a $200 million deficit for UNIFCYP by 1993. Of as June 1993, the General Assembly decided that the UNIFCYP costs not covered by voluntary contributions would be financed with special peacekeeping assessments. ***Id.*** at 9-11; ***see infra*** notes 100-03 and accompanying text.

98 This has occurred in two UN peace operations. Egypt and Saudi Arabia financed the costs of the UN Yemen Observation Mission (UNYOM), while Indonesia and the Netherlands shared the costs of the UN Temporary Executive Authority/UN Security Force in West New Guinea (UNTEA/UNSF). MILLS, ***supra*** note 92, at 3-4. The current UN Iraq-Kuwait Observation Mission (UNIKOM) relies primarily on the Government of Kuwait for financing. UNITED NATIONS, ***supra*** note 49, at 22.

99 The UN Emergence Force I (UNEF I) and the UN Operation in the Congo (ONUC) employed separate budgets with the regular budget assessment rates. MILLS, ***supra*** note 92, at 7-10.

100 Thirteen of sixteen current UN peace operations use special assessments as a method of financing. ***See*** Appendix I. With the exception of the United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), all UN-controlled peace operations since 1973 have utilized special assessments as their financing method. ***See*** Appendices I and II.

The UN has made use of special assessments for peace operations since 1973. Under this method, permanent Security Council members pay at a rate of 100% of their regular budget assessment rate, plus "a proportionate share of the reductions allowed for less developed countries" which pay only ten to twenty percent of their regular budget assessment rate. The UN's rationale for this structure is two-fold: "(1) permanent Security Council members should pay more than others to recognize their influence and veto power over peacekeeping missions; and (2) less developed countries should be given some financial relief due to their limited capacity to pay."[101] The United States assessment rate for the regular UN budget is twenty-five percent[102] while its special assessment for UN peace operations is just under thirty-one percent.[103]

Almost all UN-directed peace operations also rely on voluntary contributions from Member States,[104] even when obligatory assessments are the official financing method. Voluntary contributions come in two forms: (1) monetary donations beyond Member States' assessments and (2) "contributions in kind."[105] Contributions in kind refers to donated goods (i.e., medical equipment and supplies, ground transport equipment, engineering equipment) and services (i.e., airlift of troops and equipment to the peace operation location). A number of Member States have made contributions in kind to peace operations throughout the UN's history.[106] The UN does not,

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101 PEACEKEEPING OPERATIONS CONTRIBUTIONS, *supra* note 91, at 2.

102 STATUS OF UN CONTRIBUTIONS, *supra* note 49, at 9.

103 The United States special assessment for UN peace operations is presently 30.9652%. *Id.* at 18.

104 MILLS, *supra* note 92, at 22.

105 The Department of Defense considers contributions in kind as one form of "incremental costs," defined as "costs that would not have been incurred except for the operation." PEACE OPERATIONS 1995 COSTS, *supra* note 6, at 2 & n.2; *see also* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990). Incremental costs also refers to the "special payments, including imminent danger pay, family separation allowance, and foreign duty pay for troops deployed to certain peace operations." PEACE OPERATIONS 1995 COSTS, *supra* note 6, at 2. The Department of Defense's "annual budget provides it with the capability to conduct peace operations but does not fund the operations' incremental costs." *Id.*; see *also* Brian Patrick Casey, Financial Implications of DOD Participation in Peacekeeping Operations (Dec. 1994) (unpublished M.S.M. thesis, Naval Postgraduate School) (on file with Defense Technical Information Center, Fort Belvoir, Virginia, No. AD A293658) (examining the financial impacts and implications of DOD incremental costs for peace operations).

106 "The United States often provides direct and indirect support to UN peace operations in addition to amounts contributed on the basis of peacekeeping budget assessments." PEACEKEEPING OPERATIONS CONTRIBUTIONS, *supra* note 91, at 3. This occurs in the context of both UN-authorized and UN-directed peace operations. For Fiscal Year 1995, United States incremental costs for peace operations exceeded $1.8 billion and constituted 49% of all United States government costs for peace operations. PEACE OPERATIONS 1995 COSTS, *supra* note 6, at 2, 17-18. By comparison, for Fiscal Year 1992, the United States incurred approximately $42 million in unreimbursed incremental costs for UN peace operations. U.S. DEP'T OF DEFENSE, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR STRATEGY, RESOURCES AND REQUIREMENTS, GLOBAL COOPERATIVE INITIATIVE IN THE BOTTOM-UP REVIEW (11 June 1993).

however, factor contributions in kind into the budget for a peace operation nor include them in the costs assessed to Member States.[107] The UN also gives no credit for the donation of contributions in kind, even though in their absence the UN would have had to purchase these goods and services.[108]

The General Assembly establishes the budget for each UN-directed peace operation in a way to gain maximum consensus. The General Assembly's Advisory Committee on Administrative and Budgetary questions (ACABQ) is a body composed of "16 members, including a representative of the United States who serves in a personal capacity."[109] The ACABQ approves the draft budget for each UN peace operation.[110] The ACABQ recommendation then goes forward to the General Assembly's "Fifth Committee,"[111] comprised of all members states. After the Fifth Committee has amended the budget, the General Assembly conducts a formal vote of approval. The UN begins assessing Member States for contributions following General Assembly budget approval.[112]

C. The Secretariat's Role in Peace Operations

The Secretariat is the permanent executive agent of the UN. The Secretariat is responsible for implementing the decisions of the Security Council and the General Assembly. The Secretary General heads the UN Secretariat.[113] The Secretariat staff presently consists of some 10,000 members drawn from approximately 170 countries worldwide.[114] Member States agree to respect the "interna-

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107 MILLS, *supra* note **92,** at **23.**

108 *Id.;* PEACEKEEPING OPERATIONS CONTRIBUTIONS, *supra* note **91,** at **3.**

109 ZACARIAS, *supra* note *27,* at **24.**

110 The ACABQ also monitors the budgets of on-going UN peace operations. *Id.* The ACABQ works in conjunction with the UN Secretariat and the Security Council, but reports to the General Assembly. *Id.*

111 The General Assembly has six functional committees. The "Fifth Committee," the Administrative and Budgetary Committee of the General Assembly, is responsible for all budgetary aspects of the UN. The Fifth Committee reviews the budget to certify that political aims have been taken into account." *Id.*

112 "The U.N. assesses Member States separately for each individual peacekeeping operation. These assessments are generally made for periods of about *six* months, beginning and ending at different times during the year. Once received, the cash is deposited into separate accounts, outside the regular budget." INDEPENDENT ADVISORY GROUP, *supra* note **53,** at **17.**

113 U.N. CHARTER art. **97.** The General Assembly appoints the Secretary-General on the recommendation of the Security Council. *Id.*

114 John M. Goshko, *U.N.'s New Leader Outlines Personnel, Budget Cutbacks,* WASH. POST, Mar. 18, **1997,** at A1 (UN presently has 8500 to **9000** employees, but more than 10,000 authorizations). These figures do not include the staff members of the affiliated and independent UN bodies *(see supra* note *88).* Personnel levels for the entire UN system are approximately 50,000. **STRATEGIC** ASSESSMENT **1996,** *supra* note **7,** at **34.**

tional character"[115] of the Secretary General and his staff so that they can carry out the day-to-day work of the UN.

The Secretariat is responsible to the Security Council "for the establishment, coordination, and administration of [UN-directed peace] operations."[116] Over the course of fifty years, the UN Secretariat has institutionalized some facets of its responsibilities for peace operations. The Department of Peacekeeping Operations (DPKO) is the agency within the Secretariat responsible for the planning and executing of UN peace operations.[117] The DPKO exercises day-to-day operational and fiscal control for peace operations. "In this capacity, [DPKO] acts as the main channel of communications between the United Nations headquarters and the field."[118]

The structure of the DPKO now allows it to accomplish its planning and executing responsibilities for UN peace operations.[119] The Undersecretary General for Peacekeeping heads the DPKO. He receives support from a military advisor, a twenty-four hour situation center, a policy and analysis unit, and an executive office. The Planning Division[120] and the Field Administration and Logistics

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115 U.N. CHARTER art. 100, para. **2.**

116 FM **100-23,** *supra* note *6,* at **62.**

117 The Department of Peacekeeping Operations is but one of three departments of the Secretary General that has a role within peace operations. The Department of Political Affairs (DPA) has responsibility for the political questions involved in peace operations. The Department of Humanitarian Affairs (DHA) has responsibility for coordinating the role of UN civilian agencies within peace operations. Actual execution of all aspects of UN peace operations, however, rests with the DPKO. STRATEGIC ASSESSMENT **1996,** *supra* note 7, at **35-36.**

118 FM 100-23, *supra* note *6,* at **63.** "Under the DPKO, communications with forces in the field and crisis **C3** (command, control, and communication), which were almost nonexistent in 1990, have been dramatically improved." STRATEGIC ASSESSMENT 1996, *supra* note **7,** at **36.**

119 Only since 1994 has the UN built "a competence to manage peacekeeping operations involving [large] military forces." LEWIS, *supra* note **39,** at **1.** Recent improvements now provide the UN with "its first professional apparatus for managing peacekeeping" operations. *Id.* These included: (1) a major increase in the number of tenant staff for the DPKO, including the augmentation by Member States of over 100 military officers **(12** from the United States); **(2)** the creation of the **24-hour** situation center to monitor UN field operations and to provide early warning of crises; **(3)** the establishment of the mission planning staff to provide estimates of troops, materiel, and financial needs; **(4)** the creation of a professional training program for officers assigned to peacekeeping missions; and **(5)** the development of an intelligence sharing system (largely, United States sharing of unclassified material). *Id.* Instead of a small office in the Secretary General's staff, the DPKO has now expanded to about **420** staff members. STRATEGIC ASSESSMENT 1996, *supra* note 7, at **36.** The United States domestic authority to provide military officers to the DPKO is the Foreign Assistance Act. ***See*** *infra* note **130.**

120 The military advisor to the Undersecretary General for Peacekeeping also acts as the head of the Planning Division. FM **100-23,** *supra* note *6,* at **63,** fig. **A-2.**

Division (FALD)[121] provide the DPKO with an ability to plan and support peace operations. An Offce of Operations, subdivided into geographic divisions, keeps track of individual UN-directed peace missions.[122]

It is largely the DPKO that must make the necessary planning arrangements for the peace operations approved by the Security Council. Military advisors within the DPKO consider the military implications of the Security Council mandate and define the characteristics of the force required to fulfill it.[123] The FALD determines all support needs for the UN-directed force. The FALD also calculates estimated mission costs and drafts the budget that goes forward for approval. The DPKO formally solicits troop contributions from Member States after the Security Council has informally determined that sufficient troop contributions will occur before authorizing the peace operation. The Department of Political Affairs negotiates the status of forces agreement[124] with the host nation and obtains diplomatic privileges and immunities for the UN force. The Secretary General selects his Special Representative (SRSG)[125] as well as the military force commander for each UN-directed peace operation.[126]

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121 The previous title for the Field Administration & Logistics Division was the Field Operations Division. *Id.* at 63, fig. A-2, n.2. The FALD is "the UN headquarters element that has the most responsibility for support to a UN-sponsored force." *Id.* at 53. "Its responsibilities include: planning the support structure; selecting key civilians for the operation; coordinating contributions from Member States; prioritizing requirements from the force; negotiating local purchase agreements with host nations; and negotiating for transportation to the theater." *Id.* The FALD and the Planning Division together comprise the Office of Planning & Support. *Id.* at 63, fig. A-2.

122 *Id.* at 63, fig. A-2.

123 ZACARIAS, ***supra*** note 27, at 26. Oftentimes, the Security Council mandate will define the overall size and individual Member State contributions to a peace operation. *See* ***supra*** note 80.

124 As the UN peacekeeping presence is consensual, it is standard procedure for the UN to enter into a SOFA or status of mission agreement (SOMA) with the host country. The SOFA or SOMA seeks to establish an appropriate balance between the international mandate given to the UN force and the sovereignty of the host state. ***See*** JTF COMMANDER'S HANDBOOK, ***supra*** note 15, at **4.** The SOFA or SOMA "details the rights, privileges, immunities, and nature of services to be provided to the force and its personnel [by the host country], as well as [the UN force] responsibilities and obligations." FM 100-23, ***supra*** note 6, at 66. The SOFA or SOMA may cover many different subjects. "A key subject is the exercise **of** civil and criminal jurisdiction. Unless the SOFA or SOMA states otherwise, peace operation forces are subject to local laws, customs, and procedures." *Id.* at ***67.***

125 The SRSG "represents the Secretary-General **of** the United Nations. He is the chief executive officer responsible for execution of all Security Council Resolutions mandated for a particular mission. He answers to New York and has authority over all UN civilian and military personnel in country." U.S. ***ARMY*** TRAINING AND DOCTRINE COMMAND, CENTER FOR ***ARMY*** LESSONS LEARNED (CALL), THE U.S. ***ARMY*** AND UNITED NATIONS PEACEKEEPING: HAITI INITIAL IMPRESSIONS VOL. III, at 10 (July 1995) [hereinafter CALL INITIAL IMPRESSIONS HAITI]. The Force Commander also may be the SRSG, though this arrangement usually occurs only for small UN missions. ***Id.***

126 FM 100-23, ***supra*** note 6, at 64.

The DPKO has exclusive responsibility for the operational execution of each peace operation. This responsibility falls into the three general areas of military troops, budget, and supplies and equipment. All three areas are inseparable and essential to the success of UN peace operations. The contribution of troops and the provision of supplies and equipment depend on the political will of the international community as expressed in monetary terms. The supply plan[127] for the peace operation depends on the size of the military force and its organic capabilities. The ability of UN forces to accomplish the Security Council mandate depends heavily on the supplies and equipment made available.[128] Experience has demonstrated that equipping and sustaining the force is the most important support function for a peace operation.[129]

The DPKO has the responsibility to arrange for the troop contributions for each UN-directed peace operation.[130] The DPKO

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127 *See infm* notes 147-53 and accompanying text.

128 See Lieutenant Colonel Bill Spracher, *Discussion of Critical Considerations for the Military Commander, in* MILITARY IMPLICATIONS OF UNITED NATIONS PEACEKEEPING OPERATIONS 53, 64 (William H. Lewis, ed., 1993) (military forces assigned to the UN Mission for the Referendum in Western Sahara (MINURSO) "spent a large portion of time there working on living and working conditions" because of the lack of logistic support); *see also* JTF COMMANDER'S HANDBOOK, *supm* note 15, at 59 ("[l]logistics in peace operations is just as important as it is in war, and in many ways it is more critical to success").

129 JOINT PUB. 3-07.3, *supra* note 12, at VII-1; With Interview, *supm* note 18 (the United States and UN force commander in Haiti, Major General Joseph Kinzer, saw troop support as a primary mission concern). Other support functions for peace operations include airlift and sealift, communications, personnel, psychological operations, civil affairs, and public affairs. JOINT PUB. 3-07.3, *supm* note 12, at VII-1 to VII-10.

130 The UN authority to seek troop contributions from Member States for peace operations is the UN Charter and the Security Council Resolutions. The United States authority to contribute military personnel to UN peacekeeping operations is the United Nations Participation Act (UNPA). United Nations Participation Act of 1945, Pub. L. No. 79-264, 59 Stat. 619 (amended by legislation and codified at 22 U.S.C. §§ 287 to 287e-1 (1988 & Supp.)) [hereinafter UNPA]. The UNPA limits the number of United States military personnel assigned to UN peacekeeping operations worldwide at any given time to 1000. *Id.* at § 287d-1(a)(1); *see also* Lieutenant Colonel Jas Barlow, Office of the Chairman, Joint Chiefs of Staff, United Nations Division, U.S. Forces Participating in, or Acting in Support of, UN Operations, UNSC Resolutions, or Non-UN Peacekeeping Activities (16 June 1995) (copy on file with author) (United States forces in support of UN peace operations are distinct from US forces participating in peacekeeping operations). The Foreign Assistance Act provides a second source of authority for the U.S. to contribute military personnel to UN peace operations. Foreign Assistance Act of 1961, 75 Stat. 434 (amended by more than 15 subsequent pieces of legislation and codified at 22 U.S.C. §§ 2151-2429 (1988 & Supp.)) [hereinafter FAA]. Section 628 of the Foreign Assistance Act authorizes the President to detail personnel to international organizations "to render any technical, scientific, or professional advice or service to . . . such organization." Id. § 2328. United States forces participating in or supporting UN peace operations under FAA § 628 "do not implicate the 1000 person limit" of the UN Participation Act. Terry Memo, *supra* note 53, at 2.

issues a formal request, known as a *note verbale,* to those Member States who have previously expressed an informal willingness to contribute military personnel.[131] The *note verbale* establishes the international character of the participating military forces. This basic document also controls what contributing members will provide in terms of troops and rudimentary equipment, and the rate of reimbursement.[132] "The UN typically requests national contingents to arrive with personal weapons and ammunition, organic transportation, unit radios, organic maintenance and medical assets, and an agreed-upon stockage level of all supplies for 30 to 90 days."[133] Many national contingents arrive with only uniforms and individual weapons despite the *note verbale* provisions.[134] When this occurs, the UN must seek donated equipment from other Member States,[135]

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131 U.S. DEP'T OF *ARMY,* PAM. 700-31, COMMANDER'S HANDBOOK PEACE OPERATIONS (A LOGISTICS PERSPECTIVE) 2 (1 July 1994) [hereinafter DA PAM 700-31]. The UN also issues "administrative guidelines, to ensure that contributing countries have the basic information about the new [peacekeeping operation]." *Id.* An example of this was the UN Guidelines for Nations Contributing Contingents to UN Operations in Somalia. *Id.*

132 The standard UN reimbursement rates for troop contributions are: pay and allowances of $988 a soldier per month (all ranks); supplementary payment for specialists of $291 a soldier per month (for a maximum of 25% of logistics units and a maximum of ten percent of other units); usage factors for personal clothing, gear, and equipment of $65 a soldier per month, and personal weaponry to include ammunition of $5 a soldier per month. *See* 12 DEP'T OF DEFENSE FINANCIAL MANAGEMENT MANUAL, CONTINGENCY OPERATIONS, 23-14 (5 Aug. 1994); *see also Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations: Report of the Secretary-General,* U.N. GAOR, 46th Sess., at para. 16, U.N. Doc. A/46/185 (1991) [hereinafter *UN Model Agreement for Peace-keeping Operations].* The UN will also provide a mission subsistence allowance when it cannot provide accommodation and mess facilities to military personnel. *Id.*

133 FM 100-23, *supra* note 6, at 55; *accord* JTF COMMANDER'S HANDBOOK, *supra* note 15, at 66 (the UN requires national contingents to be self-sufficient for 60 to 120 days). "This period allows the UN to organize a logistics structure, acquire real estate and facilities, and establish contracts and local Memorandums of Understanding which will provide logistics support for the forces involved in peace operations." *Id.*

134 In UNOSOM II, some troops arrived without uniforms, boots, and personal weapons. DAVID S. ALBERTS & RICHARD E. HAYES, COMMAND ARRANGEMENTS FOR PEACE OPERATIONS 51 (1995). Only five of 29 troop contributors to UNOSOM II proved to be self-sufficient. CALL REPORT UNOSOM 11, *supra* note 18, at II-9-11. Given that troop contributions are completely voluntary, however, the UN must quite often "be content with what nations choose to provide." *Id.* at I-1-2. Substantial differences between national contingents extend beyond the equipment they provide, and include the training and doctrine of their forces for peace operations. *Id.* Quite unfortunately, the UN "has no integrated troop training program, relying instead on Member States to train their forces for peacekeeping duties." William H. Lewis, *"Assertive Multilateralism": Rhetoric us. Reality, in* PEACEKEEPING: THE WAY AHEAD? 13, 22 (William H. Lewis ed., 1993).

135 The "drawdown authorities" of the Foreign Assistance Act allow the United States to donate (or more accurately, to provide on a nonreimbursable basis) supplies and equipment to other countries participating in UN peace operations. Under FAA § 506(a)(1), the United States may furnish military assistance (defense articles and services) to a foreign country or international organization on a nonreimbursable

purchase such equipment from Member States,[136] or procure the equipment commercially.[137]

The FALD is responsible for maintaining the budget for each peace operation. The FALD fulfills this duty by appointing a Chief Administrative Officer (CAO) as the comptroller for each peace operation. The position of CAO is an important and often misunderstood one.[138] It is the CAO who exclusively controls the purse strings for the entire peace operation.[139] The "CAO is [also] the principal advisor to the SRSG on all matters related to the administration."[140] His sta-

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basis due to an unforeseen emergency. 22 U.S.C. § 318 (1997). The military assistance drawdown authority "requires a Presidential determination and report, in advance, to Congress that an unforeseen emergency exists that cannot be met under . . . any other law." Major Fred T. Pribble, former Deputy Legal Advisor, Office of the Chairman, Joint Chiefs of Staff, Outline on Support to Multilateral Operations 11 (11 May 1995) (copy on file with author). The military assistance "provided under this section is limited to an aggregate value of $100 million in any fiscal year." INTERNATIONAL & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 25-14 (1997) [hereinafter OPLAW HANDBOOK]; Pub. L. No. 104-164 (1996) (amending the President's drawdown authority under FAA § 506(a)(1) from $75 million to $100 million annually). Peace operations are an appropriate purpose for use of this drawdown authority. On 19 September 1994, President Clinton authorized an FAA § 506(a)(1) drawdown of up to *$50* million in defense articles, services, and military education and training to foreign countries participating in the UN-authorized peace operation in Haiti. Presidential Determination No. 94-50, 59 Fed. Reg. 49,781 (1994). Additionally, under FAA § 552(c)(2) (22 U.S.C. § 2348a), the "President may authorize the drawdown of 'commodities and services' from the inventories and resources of any U.S. Government agency" for unforeseen emergencies to support peace operations. OPLAW HANDBOOK, ***supra*** at 25-14. This drawdown authority also requires a Presidential determination and report, in advance, to Congress that an unforeseen emergency requires the immediate provision of assistance. *Id.;* FAA § 652, at 22 U.S.C. § 2411 (1997). The peacekeeping drawdown authority assistance "is limited to an aggregate value of $25 million in any fiscal year." OPLAW HANDBOOK, ***supra*** at 25-15. Both drawdown authorities provide neither funds nor procurement authority to purchase new items on behalf of other national forces. ***Id.*** at 25-14. FAA § 551 (22 U.S.C. § 2348), FAA § 451 (22 U.S.C. § 2261), and FAA § 516 (22 U.S.C. § 2321j) provide alternative sources of authority for furnishing nonreimbursable support in furtherance of UN peace operations.

136 For the United States authority to provide supplies and equipment to the UN on a reimbursable basis, ***see infra*** note 165.

137 FM 100-23, ***supra*** note 6, at 55. The lack of organic equipment in turn requires the national contingents concerned to spend time learning "to operate the equipment, which they are often encountering for the first time." ***Supplement*** to ***an Agenda for Peace, supra*** note 14, para. 45.

138 CALL INITIAL IMPRESSIONS HAITI, ***supra*** note 125, at 11, 170 (the importance of the CAO and his control over the military force's supply, maintenance, contracting, and budget were not understood by all United States Army personnel in UNMIH).

139 *Id.* at 11; FM 100-23, ***supra*** note 6, at 54.

140 CALL INITIAL IMPRESSIONS HAITI, ***supra*** note 125, at 170. While the CAO works for the SRSG, he retains a direct link and responsibility to DPKO (the FALD) on administrative and financial matters. *Id.;* FM 100-23, ***supra*** note 6, at 54; Chief Administrative Officer Brief, ***in*** UNITED NATIONS MISSION IN HAITI (UNMIH/MINUHA) TRAINING PROGRAM (INTRODUCTION TO PEACE-KEEPING) at 13 (5-10 Mar. 1995) (copy on file with author). Prior to 1993 the CAO did not report to the SRSG or even

tus is equal to that of the military force commander.[141] The CAO mission extends beyond that of a "bean counter;" it encompasses all aspects of "administration, logistics, and technical support within the established UN budget and delegated authority."[142] The CAO's policies, procedures, and fiscal decisions will influence all aspects of the UN peace operation.[143]

Each UN peace operation budget consists of two main components: military troops and operating expenses. On average, approximately sixty percent of the budget goes towards the reimbursement of Member States for the military forces and basic equipment they supply to a peace operation.[144] The Security Council's mandate and not the CAO's budgetary oversight generally governs the cost of this first cost element.[145] The remaining forty percent of the budget for each UN peace operation goes towards operating expenses, such as the costs of civilian personnel, housing, supplies, transportation, services, food, and construction materials.[146] The CAO's fiscal decisions primarily impact these expenses.

The FALD has responsibility to provide for each peace operation all the supplies and equipment not brought by contributing

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the Under-Secretary-General for Peacekeeping (by way of the FALD). Instead, the CAO reported to the Under-Secretary-General for Administration and Management (by means of the Field Operations Division). This and many other UN bureaucratic arrangements received severe criticism by a senior American official working for the UN. DICK THORNBURGH, UNDER-SECRETARY-GENERAL FOR ADMINISTRATION AND MANAGEMENT, REPORT TO THE SECRETARY-GENERAL OF THE UNITED NATIONS 8-12 (unnumbered UN document, 1 Mar. 1993) (report never became an official UN document and copies intentionally destroyed). In 1993, the Secretary General made the Field Operations Division part of the Department of Peacekeeping Operations. *Work of* the Organization from the Forty-Seventh to the Forty-Eighth Session of the General Assembly: Report *of* the Secretary-General, U.N. GAOR, 48th Sess., Supp. No. 1, para. 104, U.N. Doc. A/48/1 (1993).

141 Both the CAO and the military force commander report directly to the SRSG. CALL INITIAL IMPRESSIONS HAITI, supra note **125,** at 10 (UNMIH Organization illus.) & 11.

142 *Id.* at 170. "[T]he CAO shall be responsible for: (a) all administrative functions and all general and technical services relating to the mission's activities, and for providing the requisite administrative support for carrying out the substantive work of the mission effectively and economically; (b) all administrative and financial certification; (c) the proper implementation of the rules, regulations and instructions issued by the United Nations, with respect to the administration and finance of the mission." Letter from Kofi Annan, Under-Secretary-General for Peace-keeping Operations, the United Nations, to Major General Joseph **W.** Kinzer, Force Commander, UNMIH, subject: General Guidelines for the Force Commander, para. 16 (1 Mar. 1995).

143 CALL INITIAL IMPRESSIONS HAITI, supra note **125,** at 170.

144 MILLS, supra note 92, at 20.

145 "If possible, the UN must approve all . . . [troop] contributions and the extent of reimbursement prior to the actual deployment. Therefore, costs incurred for activities and troop deployments that are not agreed to by the UN will not normally be reimbursed by the UN. The CAO determines the obligatory authority in a particular operation." FM 100-23, supra note **6,** at ***56.***

146 MILLS, supra note 92, at 20.

troops. During the planning process, the FALD determines the general support plan for the operation.[147] One support plan option, employed by many military forces but currently not available to the UN, is the use of an organic supply system.[148] As a result, each UN peace operation generally "starts from scratch" without the most basic equipment on hand. A second support plan option "is to have one nation control all the logistics for an operation."[149] Although this is the most efficient option, it "is not always [politically] acceptable, nor is one nation always capable or willing to perform this role."[150] A third support plan option "is to make logistics a shared responsibility, both in terms of logistics elements deployed and logistics personnel on the force headquarters staff."[151] A fourth support plan

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147 The FALD's development of the support plan usually occurs informally before the issuance of the Security Council mandate authorizing the operation.

148 'The UN maintains few stocks of military supplies." CALL REPORT UNOSOM 11, *supra* note 18, at 19. The UN has authorized the establishment of a reserve stock depot of standard peacekeeping equipment, such as vehicles, radios, tents, and generators at Brindisi, Italy. *See* Gordon Gedge, *UN Procurement, in* THE CHANGING FACE OF PEACEKEEPING 11, 16 (Russ Tychonick & Susan McNish eds., 1993). This idea, while modest, has not yet come to fruition. *See Supplement to an Agenda for Peace, supra* note 14, para. 45.

149 FM 100-23, *supra* note 6, at 53. The UN employed a "lead nation" concept in Somalia (UNOSOM II), where support centered on the United States contingent. DA PAM 700-31, *supra* note 131, at 4; CALL REPORT UNOSOM II, *supra* note 18, at II-i. The lead nation "assume[s] responsibility for providing an agreed upon list of logistics support to the other nations and . . . maintain[s] resupply links to its home base. Other elements of the force would rely on the [lead nation] for the bulk of their administrative and logistic needs." *Id.* The UN would then reimburse the lead nation for those supplies provided to other troop contributors. *Id.* at 11-9-3. When the UN relies on the United States as lead nation, the United States may in turn rely on the Army's Logistics Civil Augmentation Program (LOGCAP) as the best means available to meet multinational logistic support requirements, as it did in UNOSOM II. *Id.* at 13; U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (16 Dec. 1985). The purpose of the LOGCAP program "is to use a civilian contractor to perform selected logistics and engineering services to augment United States forces during military contingency operations." CLAMO LESSONS LEARNED HAITI, *supra* note 59, at n.447. "In August 1992, the Army Corps of Engineers awarded the [LOGCAP] contract to Brown and Root Services Corporation of Houston, Texas, which thus assumed the obligation to provide basic life support—e.g., shelter, sanitation, food, and laundry—to troops deployed in contingency operations." *Id.* at 134. "[T]he UN uses an expanded definition for the term *logistics.* The UN definition includes engineering, communications, and aviation support" in addition to customary items such as supplies, equipment, and ground transportation. FM 100-23, *supra* note 6, at 52.

150 *Id.* at 53. One reason why the United States may be unwilling to perform the role of 'lead nation' support is the misconception among other troop contributors that the United States would provide full support. This results in the United States being asked to render supplies and equipment that are not subject to UN reimbursement. This logistic "mission creep" leads to increased United States incremental costs for UN peace operations. CALL REPORT UNOSOM 11, *supra* note 18, at 11-9-11.

151 FM 100-23, *supra* note 6, at 53. A variant of shared logistic responsibility is the decentralization of "logistics planning and operations if the operation is dispersed over wide areas in different regions." *Id.* For both the lead nation and shared responsibility support options, "[t]he UN may employ a 'Terms of Reference' (TOR)

option is for the UN to arrange for logistic support through the use of local and centralized procurements.[152] A combination of options three and four is the most common approach selected by the DPKO and the Security Council.[153]

After UN headquarters establishes the general support plan, the CAO also "has overall control of support to the operation."[154] A key principle of UN-directed peace operations is that troop-contributing Member States are not responsible for supporting their soldierothe UN is.[155] The "CAO makes local purchases, coordinates for host nation support if any is available, concludes financial arrangements, prioritizes transportation operations, and coordinates directly with [the **FALD** at UN headquarters] on budgetary and logistical matters."[156] "Some **95%** of the [total] logistical support for the military force comes from the CAO."[157]

The CAO relies on two primary staff officers to assist in carrying out his support responsibilities. These are the Chief Logistics Officer (CLO) and the Chief Procurement Officer (CPO). 'The CLO is a military staff officer on the force headquarters staff."[158] The

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document, jointly approved by the UN and the contributing nation(s) delineating responsibilities." DA Pam 700-31, ***supm*** note 131, at 2. The TOR, also referred to as an Agreement for Support, "detail[s] support responsibilities among coalition forces and describe[s] what support [is] a national responsibility." CALL REPORT UNOSOM II, ***supra*** note 18, at II-9-1 & tbl. T.17, app. I, National and UN Logistic Support Responsibilities; ***see also*** Agreement Between the United States of American and the United Nations Organization Concerning the Provision of Assistance on a Reimbursable Basis in Support of the Operations of the United Nations in Haiti (19 Sept. 1994) (copy on file with author).

152 Local procurements usually cover "consumables, construction materials, laundry contracts, accommodation rental agreements, fresh fruit and vegetable contracts, and locally available spare parts and other miscellaneous services." Gedge, ***supm*** note 148, at 16. Centralized procurement at UN headquarters covers capital equipment and high value service contracts such as food, water, and fuel. "UN headquarters procurement has approximately 100 contracting officers who provide procurement services to all UN organizations, not just peace operations. UN headquarters will to the maximum extent possible solicit bids worldwide, for both competitive and political reasons." *Id.*

153 The UN supply system is almost entirely a procurement system for those items (and services) that contributing nations cannot provide themselves. The CALL REPORT UNOSOM 11, ***supm*** note 18, at 19 & II-9-1.

154 FM 100-23, ***supra*** note 6, at 54.

155 ***See UN Model Agreement for Peace-keeping Opemtions, supm*** note 132, at paras. 11-23.

156 The CALL INITIAL IMPRESSIONS HAITI, ***supm*** note 125, at 11. The CAO "does his utmost to keep operations within the UN allotted budget" while executing these responsibilities. Id.

157 Id. Given the importance of the CAO to logistical support, "there has to be a solid, cooperating working relationship between the CAO and the Force Commander." Id.; ***see also*** FM 100-23, ***supra*** note **6,** at 54.

158 FM 100-23, ***supm*** note 6, at 54.

CLO is responsible for the day-to-day logistics operations of the military force.[159] 'The CLO validates all [non-organic] logistics requirements and passes them on to the CAO for funding and procurement."[160] The CPO is the civilian official responsible for the procurement of local supplies and equipment from the host nation and neighboring states.[161] The CPO takes logistics requirements approved by the CAO and generates a statement of requirements (SOR). The CPO solicits bids, evaluates offers and awards contracts in accordance with UN financial regulations.[162] The CPO then verifies delivery of supplies or services. The CPO and CAO possess limited funding authority, which varies with the size of the mission.[163]

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159 The CLO:

> is responsible for establishing and operating the logistics base . . . . He uses a series of UN directives to control operations and ensure all contingents understand the logistics policies and procedures . . . . The CLO also controls the activities of the logistics elements in the logistics base. Typically those elements provided by each contingent are organized into a force logistics support group (FLSG).

Id.

160 *Id.* Military forces within UN peace operations must obtain prior authorization from the CAO before creating obligations that support their own missions. CALL INITIAL IMPRESSIONS HAITI, ***supra*** note **125,** at **11.** In theory, the CAO may also delegate to the CLO the authority to review and approve support requests using the UN scale of issue entitlements and budgetary provisions. UNITED NATIONS, OFFICE OF GENERAL SERVICES, FIELD OPERATIONS DIVISION, FIELD ADMINISTRATION MANUAL, ch. **14,** at 284-85 (Sept. **1992)** [hereinafter UN FIELD ADMINISTRATION MANUAL].

161 There are many reasons for fully utilizing the procurement of local supplies and equipment:

> [C]ontracting locally reduces dependence on the [centralized] logistics system; contracting with local sources frees airlift and sealift for other priority needs; contracting with local contractors reduces the time between identification of needs and the delivery of supplies or performance of services; contracting with local contractors provides alternative sources for supplies and services.

OPLAW HANDBOOK, ***supra*** note **135,** at **11-2.**

162 UNITED NATIONS, OFFICE OF GENERAL SERVICES, UNITED NATIONS FINANCIAL REGULATIONS AND RULES, **110.16-110.24 (1992).** The CPO has very limited individual authority to award contracts. For most UN-directed peace operations, a "Local Committee on Contracts," consisting of the CAO, the Chief Finance Officer, the Chief Transport Officer, the Chief of General Services, and a Legal Advisor must approve local procurements in excess of $5000. UN FIELD ADMINISTRATION MANUAL, ***supra*** note **160,** at **271-75.** The UN also employs a "Tender Committee," which conducts the public opening of sealed bids submitted for local procurements. *Id.* at **276.** United States contingency contracting officers, by contrast, have significant individual authority to award and administer contracts. Contingency contracting officers must only seek legal review for acquisitions in the amount of $100,000 or greater. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. MANUAL NO. **2,** CONTINGENCY CONTRACTING, at 2-2 (Dec. 1993) [hereinafter CONTINGENCY CONTRACTING].

163 For most peace operations the CAO's delegated procurement authority does not exceed **$20,000** per purchase. UN FIELD ADMINISTRATION MANUAL, ***supra*** note **160,** at **272.** Certain exceptions do exist. In UNPROFOR, the CAOs local procurement limit was **$70,000.** *Id.* In the UN Transitional Authority in Cambodia (UNTAC), the local procurement limit was $500,000. *Id.* The authority of United States contingency contracting officers also may be limited by per purchase dollar amounts or the

Procurements over a certain dollar threshold occur at a centralized office in UN headquarters.[164]

Many supplies and equipment acquired for peace operations are not the result of commercial procurements, but originate from the governments of Member States. The UN requests and reimburses the provision of supplies and equipment from Member States by means of letters of assist (LOAs).[165] It is the responsibility of the CAO to authorize and accept supplies and equipment provided by Member States pursuant to LOAs.[166] In fact, "UN reimbursement is

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types of items acquired. OPLAW HANDBOOK, *supra* note 135, at 11-3; ***see*** *also* DIRECTORATE OF CONTRACTING, XVIII AIRBORNE CORPS, UNITED STATES ARMY, CONTINGENCY CONTRACTING—WHAT TO DO IN AN EMERGENCY HANDBOOK 4 (1 June 1995) (Contracting officers must obtain approval prior to making local purchases of supplies that are centrally managed.). It most instances, however, the authority of United States contingency contracting officers is unlimited. ***See*** CONTINGENCY CONTRACTING, *supra* note 162.

164 UN FIELD ADMINISTRATION MANUAL, *supra* note 160, at 272.

165 *Id.* at 279-80. Letters of assist extend to even basic goods and services that contributing troops have the organic ability to provide (if not already covered by a TOR document). CALL INITIAL IMPRESSIONS HAITI, *supra* note 125, at 171; ***see*** *supra* note 151. The United States government, through the Department of Defense, accounts for more than 50% (in dollar value) of all UN LOAs issued. Pribble, *supra* note 135, at 1. The United States authority to provide supplies, equipment, and services to UN peacekeeping operations is section 7 of the UNPA. ***See*** UNPA, *supra* note 130 (22 U.S.C. § 287d-1). "The statute generally requires reimbursement for support provided absent a determination of exceptional circumstances or when it is in the national interest to waive reimbursement." Lieutenant Colonel Robert B. Lloyd, Jr., Deputy Legal Counsel, Office of the Chairman, Joint Chiefs of Staff, Outline on Funding U.S. Military Operations (Feb. 1997) (copy on file with author). The President has delegated authority to provide support to UN peacekeeping missions to the Secretary of State. Exec. Order No. 10,206, 16 Fed. Reg. 529 (1951). The President has delegated the authority to waive UN reimbursement of support for peacekeeping operations to the Secretary of State in consultation with the Secretary of Defense. *Id.* para. 2. The United States authority to provide commodities and services in support of UN peace enforcement operations is section 607 of the Foreign Assistance Act. 22 U.S.C. § 2357 (1997). The United States may furnish section 607 assistance only "on an advance of funds or reimbursable basis." Pribble, *supra* note 135, at 6. The President cannot waive reimbursement from the UN for section 607 support. *Id.* at 6-7. For both UN peacekeeping and peace enforcement operations, the President must notify the Congressional foreign relations committees a minimum of 15 days in advance of the transfer of defense goods or services to another nation or international organization. ***See*** DOD Appropriations Act for Fiscal Year 1997, Pub. L. No, 104-208, § 8092 (1996).

166 The UN headquarters procurement office also issues LOAs to Member States, for the provision of goods and services which exceed the CAO's funding authority. When the UN determines that the required item is available from the Department of Defense, it must send a request for the item to the United States Mission to the United Nations (USUN) by means of an LOA (LOAs issued by the UN CAO to the United States J-4 must also go forward to the USUN). Each UN LOA must contain the appropriate DOD peacekeeping force project code, the source of supply, national stock number, unit of issue, nomenclature, quantity required, and date the materiel is required. The USUN then assigns a Military Standard Requisitioning and Issue Procedures (MILSTRIP) document number to each line item of the LOA. The Department of State must approve all LOAs prior to their transmission to DOD. The

contingent on [both] validation of requirements prior to obligation of funds and verification that supplies and services were rendered."[167] Member States that provide reimbursable goods and services to the UN force seek reimbursement by submitting a bill to the CAO.[168] United Nations headquarters receives the bill from the CAO and makes payment to the contributing Member State.[169]

In theory, the various bodies of the UN have a comprehensive and coherent division of responsibility for peace operations. The Security Council provides the authorization for each peace operation, and the General Assembly the appropriation. The Secretary General subsequently exercises operational and tactical control over the peace operation and its financial aspects. In practice, however, the UN fiscal processes have major structural defects that severely impede the military forces participating in UN-directed missions. This article will next examine the shortcomings of the UN fiscal process and the ensuing operational problems.

V. UN Fiscal Shortcomings and Their Operational Impacts

The UN's fiscal shortcomings are numerous and serious. Some fiscal problems occur at the strategic level and result from the lack of international will of Member States. Other fiscal problems occur at the operational and tactical levels as a result of the bureaucratic procedures employed by the UN. Regardless of the cause of the fis-

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LOAs for major end items (Class VII) require the approval of the Chief, Troop Support Logistics Office, Directorate for Supply and Maintenance (DALO-SMS), Office of the Deputy Chief of Staff for Logistics (ODCSLOG), Headquarters, Department of the Army (HQDA). The Commander, United States Army General Material and Petroleum Activity (USAGMPA), Supply Support and Inventory Branch, has operational responsibility for executing all UN LOAs. The U.S. Army Material Command (AMC) handles billing for items provided by DOD pursuant to LOAs. See U.S. DEP'T OF ARMY, PAM. **700-15,** LOGISTICS SUPPORT OF UNITED NATIONS PEACEKEEPING FORCES 3-4 (**1** May **1986)** [hereinafter LOGISTICS SUPPORT OF UN PEACEKEEPING FORCES]. These LOA procedures apply even when the UN authority, the United States support need, and the United States support capability are all present "on the ground" during a peace operation. UN FIELD ADMINISTRATION MANUAL, *supra* note **160,** at **279.**

[167] FM 100-23, *supra* note 6, at **56.** The LOA procedure places a burden on United States logisticians to track items that the UN has agreed to reimburse. *Id.*

[168] *Id.* at **57,** fig.4-4. Member States seek reimbursement directly from UN headquarters for goods and services provided pursuant to LOAs issued from the centralized UN procurement office. ***See*** LOGISTICS SUPPORT OF UN PEACEKEEPING FORCES, *supra* note 166, at **4.** Member States and the UN also may agree that reimbursable goods and services will result in a credit against assessed peacekeeping contributions. This has frequently occurred with United States costs. DA PAM 700-31, *supra* note 131, at **15.**

[169] *Id.* When the United States is the supplier of goods and services, the UN issues reimbursement to the USUN. The money then goes to the Department of State and then to the Department of Defense. *Id.*

cal problem, it is often the individual soldier contributed to the peace operation who bears the effects.

A. *The UN's Financial Crises*

The UN Charter makes payment of assessed contributions for both the regular budget and peace operations a mandatory obligation of Member States.[170] This particular treaty obligation is a necessity for the UN to plan and execute peace operations with some semblance of professionalism. "Throughout the Organization's history, however, most Member States have not fulfilled that legal obligation, either in terms of the completeness or the timeliness of their payments."[171] "Since 1956, nations have withheld contributions for UN peace operations."[172] The present record shortfall in Member State contributions, however, is a grave fiscal problem for UN peace operations.[173]

1. UN Peacekeeping Assessments—Many Member States have failed to pay their UN peacekeeping assessments in full and on time. Sometimes countries have withheld contributions for particular peace operations "on the basis of positions of principle."[174] Oftentimes Member States have withheld peacekeeping contributions because of their general dissent with the policies of the UN.[175] The financial inability of some Member States to pay even small contributions is another cause for arrearages.[176] The situation has become progressively worse. Total arrearages to UN peace operations were $262 million in 1985[177] and $671 million in 1992.[178] Total arrearages for UN peace operations now approach $2 billion.[179]

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170 *See supra* notes 88-95 and accompanying text.

171 MILLS, *supra* note 92, at 5. The UN Charter does authorize the body to take action against Member States that fail to pay assessed contributions. *See supra* note 94. However, "experience has shown that the threat of the application of [such sanction], or the actual use thereof, has not constituted an adequate incentive to pay to those Member States who do not wish to do so." MILLS, *supra* note 92, at 5-6.

172 ROSALYN HIGGINS, THE NEW UNITED NATIONS: APPEARANCE AND REALITY 17 (1993).

173 "A chasm has developed between the tasks entrusted to this Organization and the financial means provided to it. The truth of the matter is that our vision cannot really extend to the prospect opening before us as long as our financing remains myopic." *An Agenda for Peace*, *supra* note 53, para. 69.

174 MILLS, *supra* note 92, at 11.

175 *See* Mathews, *supra* note 94 (the United States has adopted "delinquency diplomacy" as the means to force reforms on the UN bureaucracy).

176 United Nations Department of Public Information, *The UN Financial Crisis: At a Glance* (last modified Mar. 1997) <http://www.un.org/news/facts/finance.htmls [hereinafter UN Public Information].

177 MILLS, *supra* note 92, at 21.

178 LYNN E. DAWS, PEACEKEEPING AND PEACEMAKING AFTER THE COLD WAR 17 (1993).

179 Arrearages for all UN peace operations as of February 1997 totaled some $1.9 billion. *See* UN Public Information, *supra* note 176; *see also* STATUS OF UN CONTRIBUTIONS, *supra* note 49, at 10-118.

The unilateral actions of the United States have contributed greatly to the total arrearages of UN peacekeeping assessments. The current United States assessment rate is more than thirty percent of the cost of each peace operation.[180] No other country comes close in terms of assessed contributions.[181] Given the United Nations' overdependence on one Member State, the United States failure to pay its contributions greatly affects the world body's overall financial health. United States arrearages to UN peace operations are not new; they have occurred for more than ten years.[182] In the past few years, however, the situation has become exponentially worse. Overt hostility to the UN within the United States Congress has occurred simultaneously with a great expansion in the size and number of UN peace operations.[183] United States arrearages to UN peace operations alone exceed $1 billion.[184]

The high level of unpaid assessments make the financial status of peace operations precarious at best.[185] Approximately forty percent of the budget for each UN peace operation is for operating costs while almost sixty percent reimburses Member States for the troops supplied.[186] Peace operations have "continue[d]

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180 *See supra* note 103.

181 The second-highest special assessment rate for UN peace operations is 15.4865%, paid by Japan. *See* STATUS OF UN CONTRIBUTIONS, *supm* note 49, at 38.

182 During the past ten years the United States has never paid its UN peacekeeping assessment in full. There are many reasons for this action. "[P]ursuant to the Kassebaum-Solomon amendment to the Foreign Relations Authorization Act of 1985, between 1986 and 1989 the U.S. unilaterally withheld 20% of its assessment for the regular budget each year in order to press the UN to adopt major reforms in budgetary and administrative practices." Schoettle, *supm* note 36, at 25. The costly failures experienced by the UN in Somalia and the Former Yugoslavia added to the domestic distaste for paying UN assessments. *See supra* notes 36, 40. The American uncertainty about its post-Cold War role *(see supm* note 41) has resulted in discordant United States political and monetary support for the UN.

183 While the UN has set the present United States special assessment rate at 30.9652% *(see supm* note 103), domestic law precludes the United States from paying this assessed rate. United States payment for peacekeeping operations in fiscal years 1994 and 1995 could not to exceed 30.4%, and beginning in fiscal year 1996, could not exceed 25%. Section 404 of the Foreign Relations Authorization Act for Fiscal Years 1994 and 1995, Pub. L. No. 103-236 (1994) *(see* 22 U.S.C. § 287e note). Congress also expressly prohibited the expenditure of Defense Department funds for any payments to the UN for the assessed costs of peace operations or to pay United States arrearages to the UN. 10 U.S.C § 405 (1997). Quite simply, the United States Congress has not relinquished its Constitutional power of the purse regardless of the language of the UN Charter. *See supm* note 21; U.S. CONST. art. I, § 9, cl. 7. The actions of Congress, while diplomatically divisive, are not illegal.

184 *As* of 30 September 1996, United States arrearages to UN peace operation assessments totaled $1,100,537,188. STATUS OF UN CONTRIBUTIONS, *supm* note 49, at 10-118; *see also* United Nations Department of Public Information, *supra* note 176.

185 MILLS, *supm* note 92, at 18.

186 *See supm* notes 144-46 and accompanying text.

in spite of very high levels of unpaid contributions only through the forbearance of the countries to whom the [UN] owes reimbursement." Quite fortunately, "troop-contributing countries have been willing to wait for the moneys owed to them, which the UN pays as and when enough contributions are received for each operation."[188]

2. *The UN* Regular Budget — The UN's budgetary crisis extends beyond its peace operations. Many Member States, most notably the United States, also have failed to pay assessed contributions to the regular UN budget. Presently arrearages, or "outstanding contributions," to the regular UN budget total nearly $1.1 billion.[189] The contribution shortcomings to the regular UN budget are not as large as those for peacekeeping assessments, but the effects are more severe. Less than half of peace operations budgets go towards day-to-day operating expenses.[190] By contrast, almost all of the regular UN budget goes toward operating expenses such as payroll and the payment of vendors.[191] "[S]hortfalls in payment of [the UN] regular budget assessment result in an immediate cash shortage"[192] for the organization. In September 1995, the Secretary-General declared the UN bankrupt and the organization's continued viability imperiled.[193]

The UN has had to engage in many irregular fiscal practices in order to stave off complete collapse. The UN has used its Working Capital Fund[194] not for its intended purpose but as another source of income. Another means that the UN has employed to meet its regular budget obligations has been to spend money from peace-

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187 MILLS, ***supra*** note 92, at 20-21.

188 *Id.* at 21.

189 United Nations Department of Public Information, ***supra*** note **176; *see also*** STATUS OF UN CONTRIBUTIONS, ***supra*** note 49, at 9 (total arrearages to the UN regular budget were $713,942,539 on 30 September 1996). Of this total, United States arrearages to the UN regular budget were $561.5 million. United Nations Department of Public Information, ***supra*** note 176.

190 ***See supra*** note 146.

191 MILLS, ***supra*** note 92, at 21.

192 ***Id.***

193 STRATEGIC ASSESSMENT 1996, ***supra*** note 7, at ***35; see also*** United Nations Department of Public Information, ***supra*** note 176 (the current financial crisis "threatens not only the UN's ability to fulfill the mandates given it by member countries, but the Organization's very existence").

194 'The Working Capital Fund is a mechanism to enable the Secretary-General to meet operating expenses under the regular budget until [the UN receives] sufficient assessed contributions . . . . The Working Capital Fund is . . . a form of cash reserve to enable the Secretary-General to meet the Organization's day-to-day expenditure obligations." MILLS, ***supra*** note 92, at 12. The current authorized level for the Working Capital Fund is $200 million. Emilio J. Cardenas, *Financing **the United Nations' Activities: A Mutter of Commitment,*** 1995 U. ILL. L. REV. 147, 149 (1995).

keeping accounts.[195] Because of this internal borrowing and the high level of unpaid peacekeeping assessments, the UN has suspended most payments to troop-contributing countries since 1995.[196] The rising level of reimbursements owed to troop-contributing countries has greatly affected the willingness of these and other countries to continue current peace operations and commence new ones. Canada, Great Britain, Denmark, and Austria significantly reduced their commitments to the UN operation in Cyprus[197] because troop reimbursements are ten years and $200 million past due.[198] Nineteen countries who had pledged and ear-marked some 31,000 troops for peace operations elected not to contribute forces to the UN mission to Rwanda.[199] The UN's ability to attract national contingents for current and future peace operations now rests on a tenuous promise of payment for such contributions.

3. Peacekeeping Reserves—A substantial portion of expenses for peace operations occur in the first thirty days of the mission.[200] Until recently, the **UN** had no mechanism to meet such start-up expenses. The Working Capital Fund, which the UN never intended to serve as the cash reserve for peace operations, held only limited and overtaxed resources.[201] In 1992, the Secretary General pro-

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195 INDEPENDENT ADVISORY GROUP, *supm* note 53, at 9. "But this year there will be less cash available, since peacekeeping assessments for 1997 are expected to fall to only $1.2 billion—less than the yearly administrative costs of the UN." United Nations Department of Public Information, ***supra*** note 176.

196 "At the end of January 1997, the UN owed a total of $1.2 billion to 68 countries for troops and equipment." *Id.* The actions of those Member States in arrears penalizes those that paid their contributions in full. Those in good standing are in fact penalized twice, since the UN has had to withhold reimbursements which were legally due to troop-contributing states. Such actions place unfair burdens on many troop contributors.

197 The UN Peacekeeping Force in Cyprus (UNFICYP) has existed since March 1964 ***(see*** Appendix I) and serves as a deterrent to open fighting between Greek and Turkish Cypriots, as the former belligerents seek to reach a lasting peace:

> Cyprus gained independence from Great Britain in 1960 under a constitution that sought to balance the rights and interests of the two ethnic groups in the population, the Greeks being heavily in the majority. After three years of relative peace, violence broke out between the two communities late in 1963. In March 1964 the Security Council recommended UN mediation and authorized the formation of a peacekeeping force,

Microsoft Encarta 96 Encyclopedia, UN Peacekeeping Efforts in Cyprus (Microsoft CD-ROM, 1996).

The UN peacekeeping force reached almost 7000 soldiers later that year, but has numbered some 2100 troops since the late 1980s. *Id.*

198 UNITED NATIONS, *supm* note 96, at 9-11.

199 Lewis, *supm* note 17, at **40.**

200 Expenses such as airlift and support equipment generally make the start-up of a peace operation the most costly phase. INDEPENDENT ADVISORY GROUP, *supm* note 53, at 17.

201 The UN has used its Working Capital Fund to meet the initial expenses of peace operations. This mechanism has proved inadequate, given the substantial start-

posed, and the General Assembly created, a $150 million peacekeeping reserve fund to remedy this problem.[202] This amount soon proved insufficient to enable the UN to respond rapidly to peace operation needs.[203] In 1993, the Independent Advisory Group on UN Financing[204] then recommended that the UN create a $400 million reserve fund for peace operations.[205] The General Assembly authorized an expanded peacekeeping reserve in accordance with this recommendation. A general lack of contributions by Member States, however, has stymied the existence of a genuine peacekeeping reserve fund to meet the initial expenses of UN operations.[206] The lack of adequate start-up costs threatens to delay future UN-directed peace operations.

B. The Budgetary Process for Peace Operations

The UN Security Council authorizes peacekeeping operations when adequate political will exists. Yet "[flew peacekeeping missions can begin in earnest immediately after the Security Council approves them"[207] because of the UN budgetary process.[208] It can take several weeks for the UN Secretariat to prepare a mission budget.[209] Several additional weeks accompany the budgetary approval process. The ACABQ "must sometimes consider extraordinary means of financing, and this can cause [additional] delay."[210] The two subsequent layers of budgetary approval—the Fifth Committee and the General Assembly—both operate by consensus only.[211] This

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up costs of large peace operations and the monetary shortfalls when Member States pay peacekeeping assessments late, or not at all. MILLS, ***supm*** note 92, at 24-5.

202 INDEPENDENT ADVISORY GROUP, *supm* note **53,** at 18.

203 Of the $150 million reserve (or revolving) fund approved by the General Assembly, only about $60 million was immediately available. This fund was quickly overcome by the size of the peace operations that it was to support. *Id.* at 18-19.

204 In 1992, the Ford Foundation sponsored the Independent Advisory Group on U.N. Financing, under the co-chairmanship of Shijuro Ogata and Paul Volcker. *Id.* at v. Mr. Ogata served for more than 30 years in the Bank **of** Japan and was Deputy Governor of the Japan Development Bank from 1986 to 1991. *Id.* at **34.** Mr. Volcker was Chairman of the Board of Governors of the United States Federal Reserve Bank from 1979 to 1987. *Id.*

205 *Id.* at 19. The Independent Advisory Group also recommended that the UN finance the Peacekeeping Reserve Fund by three annual assessments to the regular UN budget. *Id.*

206 The peacekeeping reserve fund relies on regular UN budget contributions as its source of financing. The failure of Member States to make full and timely contributions to the UN regular budget ***(see*** *supm* Part V.A.2) has prevented the UN from setting aside contributions for this reserve fund.

207 INDEPENDENT ADVISORY GROUP, *supm* note **53,** at 17.

208 ***See*** *supm* notes 109-12 and accompanying text.

209 INDEPENDENT ADVISORY GROUP, *supm* note **53,** at 17.

210 ZACARIAS, *supra* note 27, at 28.

211 INDEPENDENT ADVISORY GROUP, *supm* note 53, at 7.

approval process, by seeking maximum consensus, can have severe operational impacts. "Delays in reaching agreement on budgets at the outset of peacekeeping operations in Cambodia and Yugoslavia in 1992 ran real risks of aborting these operations at their outset."[212]

The Secretary General possesses little authority to act without budgetary approval. While the DPKO is preparing the peace operations budget, "the U.N. cannot contract for equipment or services above a [$5 million] annual limit, for each operation, on the Secretary General's 'unforeseen and extraordinary' spending authority."[213] The Secretary General can only obligate funds up to an annual limit of $10 million per mission subsequent to ACABQ approval of the mission budget.[214] It is only after the General Assembly has formally approved the peace operation budget that "the U.N. can begin spending up to the full mission cost."[215] This general lack of authority to obligate in advance of a General Assembly appropriation makes it extremely "difficult to mobilize troops and to move them to operation areas speedily."[216]

United Nations bureaucratic shortcomings do not end with approval of the budget by the General Assembly. The Independent Advisory Group on U.N. Financing found that:

> [elven after the budget is approved the U.N. must still wait for dues payments to come in, and, on average, only 36 percent of peacekeeping dues are paid in the first three months of a mission. Financing delays can cripple new missions. The start-up phase of a peacekeeping operation is usually its most costly, as troops have to be airlifted and equipment needs to be bought. It is usually the most important, dangerous, and unstable phase as well.[217]

Quite simply, the UN budgetary process is ill-suited to the organization's increasingly operational role:[218]

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212 SCHOETTLE, *supra* note 36, at 29.

213 INDEPENDENT ADVISORY GROUP, *supra* note 53, at 17. The Secretary-General's "unforeseen and extraordinary" spending authority changed from $3 million to $5 million per mission subsequent to the Report of the Independent Advisory Group. RATNER, *supra* note 34, at 67.

214 INDEPENDENT ADVISORY GROUP, *supra* note 53, at 17.

215 *Id.*

216 *Id.* United States domestic law precludes the Department of Defense and all other federal agencies from also obligating in advance of an appropriation. U.S. Const. art. I, § 9, cl. 7; 31 U.S.C. § 1341 (1988). The difference, however, is that the United States possesses a standing and appropriated military force that can rapidly undertake operations.

217 INDEPENDENT ADVISORY GROUP, *supm* note 53, at 17.

218 *Id.*

> Each new peacekeeping mission is now started from scratch, and on a shoestring. The Secretary-General must, in effect, solicit contributions each time a mission is deployed or expanded. There is no common, ongoing, training program, or adequate logistical infrastructure to support missions of such complexity and danger. The absence of proper financial arrangements also prevents the U.N. from maintaining sufficient stocks of equipment. Most missions begin with everything from jeeps to tents to communications gear in short supply.[219]

C. *UN* Organizational Shortcomings

The UN's fiscal shortcomings extend beyond the organization's financial crises and a budgetary process that combines slowness with a lack of delegated authority. The UN's financial problems continue at the operational and tactical levels and these organizational shortcomings greatly and visibly affect the military personnel participating in UN-directed peace operations.

*1. **Lack** of* Quality Personnel—The UN Secretariat is no more capable than the personnel that comprise it. Officially, the UN Secretariat chooses and appoints international personnel on professional merit.[220] The actual practices of the UN fail to live up to this standard, "[Mlany unqualified people work at UN [Headquarters]. This is because each country has a quota of positions to fill and is desperately eager to do so—even with those who do not have the experience or expertise."[221] The lack of formal career training within the UN civil service system only exacerbates the lack of quality personnel. United Nations civilian personnel gradually move up the career ladder without learning from other than their own particular job experiences.[222] As one experienced peacekeeper223 discovered, it "was not unusual to meet a Chief Administrative Officer **(CAO)** of a

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219 ***Id.*** at ***17-18.***

220 ZACARIAS, ***supm*** note 27, at 26.

221 Gedge, ***supra*** note 148, at 11-12. Only rarely does the UN civil service system actually remove someone for incompetence. ***See*** SIMONS, ***supm*** note 36, at 139 (the UN hierarchy has always had too little appetite for the disciplining of incompetent or corrupt employees).

222 ***Id.*** at 12. The UN almost always evaluates staff work as excellent "because employees can and do appeal less-than-stellar evaluations." E. Thomas McClanahan, ***United Nations Ought to Reform Instead of Celebrate—"Making Peace" Has Never Been Part of its Proper Role,*** KAN. CITY **STAR,** June **25, 1995** (quoting Joseph **E.** Connor, UN Undersecretary General for Administration and Management).

223 Lieutenant Colonel Gordon Gedge was a soldier in the Canadian Armed Forces for **40** years. He first served as a UN peacekeeper in UNFICYP(Cyprus). Lieutenant Colonel Gedge later served in the UN Disengagement Observer Force (UNDOF) in the Golan Heights as the operation's Chief Logistics Officer. ***Id.*** at 11.

UN mission who entered UN service as a security guard at UN headquarters 30 years previously."[224]

2. Bureaucratic Mentality — A second shortcoming in the UN fiscal process for peace operations is the bureaucratic mentality of its civilian personnel. As one analyst observed, "[tlhe point at which civilian and military personnel really meet within the UN system is at the mission level."[225] The relationship between the two groups "is not an amenable one, but [instead] one based on bureaucratic politics."[226] "It is the bureaucrat against the operator. The bureaucrat, given control over the budget, has effective control over the operation. Yet he has no orientation to the mission."[227]

Many writers have witnessed first-hand the shortcomings of the UN civilian personnel. First, there is a general inability on the part of the UN civilian staff "to appreciate the urgency military forces face in [peace] operations."[228] 'Time is of the essence" is more than a mere adage to military forces, whose own safety as well as mission success are often at stake. Failing to understand mission exigency is but one consequence of the bureaucratic mentality possessed by UN civilians. United Nations staff members also are "reluctant to support any initiative or concept with which they have not had personal experience."[229] United Nations civilian field staff are "experienced and competent in following UN financial and administrative rules."[230] This is an intolerable situation from a military viewpoint, which considers responsive department logistics

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224 *Id.* at 12.

225 Joseph P. Culligan, *United Nations Peacekeeping: Between Civilian and Military Components, in* PEACEMAKING, PEACEKEEPING AND COALITION WARFARE: THE FUTURE ROLE OF THE UNITED NATIONS 57, 65 (1994).

226 *Id.; see also The Western Sahara: The Referendum Process in Danger, S.* REP. No. 102-75, at 109 (1992) (report detailing a number of complaints by military personnel about their treatment by UN bureaucrats).

227 Culligan, *supra* note 225, at 66; *see* also Brigadier General Ian C. Douglas, *Discussion of Critical Considerations for the Military Commander, in* MILITARY IMPLICATIONS OF UNITED NATIONS PEACEKEEPING OPERATIONS, *supra* note 128, at 53, 56 (UN civilians lacked both the operational and logistics viewpoints necessary to support military forces in peace operations).

228 Culligan, *supra* note 225, at 66. Conversely, "military forces have a hard time understanding that UN civilian employees operate with differing work viewpoints and senses of urgency." CALL INITIAL IMPRESSIONS HAITI, *supm* note 125, at 3.

229 Gedge, *supm* note 148, at 12. "UN field staff are not regarded by UN military peacekeepers as progressive, imaginative, professional or dynamic. There are exceptions of course, but these individuals are considered mavericks, and not often given the opportunity to prove their competence and to prove that they can advance by ability alone." *Id.* Additionally, the recent expansion in peace operations has caused the UN to suffer from a lack of experienced CAOs and Chief Procurement Officers (CPOs). United Nations civilian retirees, some of them as old as 80, have now been called back into missions where the UN especially needs people. *Id.* at 13.

230 *Id.* at 12.

planners and operators a necessity.[231] Military peacekeepers should not have to formulate ways by which to overcome bureaucratic inflexibility.232

The lack of a "can do" mentality among UN headquarters staff is largely due to the absence of field experience by such personnel. "Headquarters civil staff virtually never visit the operational area, to ensure conditions faced by the troops are understood."[233] "In military organizations, service alternates between tours of duty in the field and serving in the headquarters. That is the ideal, and that is what should be achieved within the UN, but is not."[234] In one recent case, the former UN headquarters Chief of Procurement with thirty years of service visited a field mission for the first time just before his retirement.[235]

3. ***The UN*** Procurement Process—The quality and mentality of UN civilian personnel only exacerbates the organization's foremost operational fiscal shortcoming: the UN procurement process. Like its administrators, the UN procurement system is insensitive and unresponsive to unprogrammed requests.[236] The procurement of all supplies and services in the UN system occurs in accordance with budgets prepared in advance of requirements. Items forgotten in the UN planning process are not authorized at a latter date, no matter how essential. Reprogramming the budget of UN peace operations also is problematic.[237] Force commanders often want to alter

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231 Culligan, ***supra*** note 225, at 63; CALL INITIAL IMPRESSIONS HAITI, ***supra*** note **125,** at 11.

232 As a Chief Logistics Officer, LTC Gedge found that one way to overcome bureaucratic intransigence "was to write a memorandum to the CAO with my recommendation as CLO and ask him to pass that to New York. That got [the CAO] off the hook." *Gedge,* supra note 148, at 12. 'These are the kinds of games that have to be played within the UN from time to time. I am not saying that the CAO was not willing to help, but he did not want to put his neck on the line for something that he had never seen happen before or that was a concept that he did not understand." *Id.* at 13.

233 Culligan, supra note 225, at 63. In fact, "UN agencies have no custom of headquarters desk officers dealing with their counterparts at mission level. Contact is generally from the Force Commander to the Under Secretary-General level." *Id.* at 64.

234 Gedge, supm note 148, at **12.** There are several reasons for this happening. The UN has no rotation policy or program for its civilian staff. UN "field personnel become fairly specialized in their line of work and they also receive higher allowances for being in the field." *Id.* Additionally, "those in New York like being at the [headquarters] and do not really wish to go out into the field. They have their families and are well-established and accustomed to the metropolitan life." *Id.*

235 *Id.* at 13. The experience of seeing a field mission first-hand "was an eye opener for him." *Id.*

236 CALL INITIAL IMPRESSIONS HAITI, ***supra*** note **125,** at 11.

237 "Reprogramming" is the use of funds for purposes other than those originally contemplated at the time of the appropriation. See U.S. GEN. ACCOUNTING OFFICE, BRIEFING REPORT TO THE CHAIRMAN, COMMITTEE ON THE BUDGET, HOUSE OF REPRESENTATIVES, BUDGET REPROGRAMMING: DEPARTMENT OF DEFENSE PROCESS FOR REPROGRAMMING FUNDS, GAO/NSIAD-86-164BR (July 1986). Reprogramming is an

methods in response to changes in the tactical situation,[238] yet, the **CAO** will inform the force commander that what he wants is not in the budget. 'You cannot spend any money in that area—there is no UN approved money for that particular item."[239] Military commanders are problem solvers. They are unwilling to wait for future UN budgets to reach their mission requirements.

The UN supply system lacks the assurance that it will provide goods and services in a timely manner. The UN procurement system is essentially unable to respond promptly at both the local and centralized levels.[240] "Routine requirements [within the budget] usually take three months to procure locally."[241] The UN can expe-

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essential financial management tool because it provides the executing agent with the flexibility to change the means employed to accomplish the original intent of the appropriation. ***See*** U.S. DEP'T OF DEFENSE, DIR. 7250.5, REPROGRAMMING OF APPROPRIATED FUNDS (9 Jan. 1980).

238 "[P]eace operations are dynamic, [and] success often hinges on understanding operational feedback and rapid and effective response to changes in the nature of the operation . . . . Unanticipated requirements *are* characteristic of peace operations." Christine M. Cervenak, ***Lessons of the Past: Experiences in Peace Operations, in*** PEACE OPERATIONS: DEVELOPING AN AMERICAN STRATEGY, ***supra*** note 11, at 39, 48.

239 Gedge, ***supra*** note 148, at 15. United States commanders always possess the independent authority to spend United States money for those items deemed mission essential, regardless of the UN budgetary levels. ***See infra*** notes 296-98 and accompanying text.

240 Culligan, ***supra*** note 225, at 63; ***see also*** JTF COMMANDER'S HANDBOOK, ***supra*** note 15, at exhibit 8 ("[t]he UN's intentions are good, but often they are woefully late").

241 Gedge, ***supra*** note 148, at 16. United States contracting offcers must generally provide for full and open competition in soliciting offers and awarding contracts, providing all responsible sources an opportunity to compete. 10 U.S.C. § 2304(a)(1) (1997); 41 U.S.C. § 253(a)(1) (1997); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 6.101 (Apr. 1, 1984) [hereinafter FAR]. During peace operations or other contingency operations (defined by 10 U.S.C. § 101 (a)(13)) declared by the Secretary of Defense, however, United States contracting offcers may employ "simplified acquisition procedures" which waive many competition requirements for purchases up to $200,000 per item of supply or service. 10 U.S.C. § 2302(7) (1997) (amended by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994)); U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 213.000 (Apr. 1, 1984) [hereinafter DFARS]. For purchases up to $2500, a contracting offcer may award a contract based on one oral quotation if he finds the price to be fair and reasonable. OPLAW HANDBOOK, ***supra*** note 135, at 11-7. For purchases between $2500 and the simplified acquisition threshold of $200,000, a contracting offcer may award a contract based upon oral quotations from a reasonable number of sources, with three sources being considered reasonable. FAR, ***supra,*** at 13.106(b). United States contracting officers are also subject to relaxed publication standards for contingency contract actions that do not exceed the simplified acquisition threshold. ***See*** OPLAW HANDBOOK, ***supra*** note 135, at 11-8. Approximately 95% of the contracting activity during peace operations can be met using simplified acquisition procedures. ***Id.*** at 11-6. The heightened simplified acquisition threshold demonstrates how contract law can facilitate peace operations. ***See generally*** Major Rafael Lara, Jr., ***A Practical Guide to Contingency Contracting,*** ARMY LAW, Aug. 1995, at 16. In UNMIH, one partial solution to the UN's contract administrative lead time problem was to have the CAO delegate approval authority to the operation's CLO for the pur-

dite local procurements to a matter of days or hours, but only when [an immediate] operational requirement is present."[242] The UN's normal contracting practice, for even the smallest purchases, make local procurements rigid and unresponsive. The CAO's limited funding authority[243] and the austere locations of most peace operations[244] further hinder the effective use of local procurements.

The UN centralized procurement process also is "not organized to support high priority military operational requirements. Routine capital procurement [lead-time] for peacekeeping missions ranges from six months at best to two years in the worst cases."[245] In Haiti,[246] the UN had to rely on the United States as a "bridge con-

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chase of low dollar supply items. Call Initial Impressions Haiti, ***supra*** note 125, at 140. Even here, the CAO required the CLO to provide written justification for actions taken. Id.

242 Gedge, ***supra*** note 148, at 16. The UN has institutionalized certain "accelerated procurement procedures." The most expeditious procedure, "immediate operational requirement, applies only to emergency cases where a few line items such as sandbags, barbed wire and cement are urgently required. UN FIELD ADMINISTRATION MANUAL, ***supra*** note 160, at 282. During UNMIH, the CAO tried to provide a 24-hour turn around on high priority United States requests, but this did not always occur. CALL INITIAL IMPRESSIONS HAITI, ***supra*** note 125, at 171. United States contracting officers also possess the ability to expedite contract actions above the simplified acquisition threshold, by means of exceptions to the regular competition requirements. One exception is the existence of an ***unusual and compelling urgency*** such that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits offers to those who are able to meet the requirements in the limited time available. See 10 U.S.C. § 2304(c)(2) (1997); ***see also*** 41 U.S.C. § 253(c)(2) (1997); FAR, ***supra*** note 241, at 6.302-2. This exception also authorizes an agency to dispense with normal publication periods if the United States would be seriously injured by the delay. Id. Use of the urgent and compelling exception requires a "Justification and Approval," or J&A. FAR, ***supra*** note 241, at 6.303. Approval levels for justifications vary with the dollar amount of the contract action, although contracting officers may approve justifications under $500,000. ***Id.*** at 6.304; ***see also*** OPLAW HANDBOOK, ***supra*** note 135, at 11-5.

243 ***See supra*** note 163.

244 United Nations peace operations have generally occurred in nondeveloped areas of the world. ***See*** Appendices I & II.

245 Gedge, ***supra*** note 148, at 16. United States forces in UNOSOM II observed that the supply ordering time for everyday supplies and equipment averaged about 90 days. CALL REPORT UNOSOM II, ***supra*** note 18, at 11-9-4.

246 In September 1994, the United States-led Multinational Force (MNF) of some 22,000 soldiers went into Haiti to restore peace and democracy in accordance with Security Council resolutions and the Governors Island Agreement. The MNF turned over the operation to the UNMIH in March 1995, in accordance with an understanding which the parties had reached the previous September. The UNMIH consisted of a 6000-member UN military force, some 900 UN civilian police, and various UN civilians. In addition to the United States forces within UNMIH, the United States maintained a 275 to 450 member Support Group in Haiti under United States operational control. Special Representative of the UN Secretary General for Haiti was Mr. Lakdar Brahimi. The UN and United States Force Commander was Major General Joseph Kinzer. The UN Chief Administrative Officer was Mr. Souren Seraydarian. The last United States military forces serving as part of UNMIH departed Haiti on 17 April 1996; UNMIH ended on 1 July 1996, and transitioned to the UN Support Mission in Haiti (UNSMIH). CLAMO LESSONS LEARNED HAITI, ***supra*** note 59, at 7-25.

tract" for the first three months of the UN-directed operation, because of the UN's failure to have support contracts in place.[247] The UN procurement system as a whole is "not well suited for immediate operational requirements when timeliness is essential."[248]

The United States experience in Somalia also illustrates the slow and bureaucratic nature of the UN procurement process. An example of this follows:

> [T]he UN Logistics Support Command (UNSLC) needed copy machines for its headquarters. The UNLSC sent an officer (POC) to the UN Chief of Procurement to obtain the copy machines. The Chief of Procurement had the POC fill out a description for the type of copy machine required. There was no automated supply system-every request required a written description of the item. When the Chief of Procurement approved the request, it was sent to the [CAO] who also had to approve it. Once approved there, the request was sent to the U-6 for approval (because it was a piece of information equipment). When approved by the U-6, the request went back to the Chief of Procurement for [eventual] purchase.[249]

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247 See Memorandum, Souren Seraydarian, Chief Administrative Officer, UNMIH, to Hocine Medili, Director, Field Administration & Logistics Division, Dep't of Peacekeeping Operations, United Nations Headquarters — New York, subject: Transition Support — MNF to UNMIH (13 Feb. 1995) (detailing input into the LOA for transition support from the United States Government) (copy on file with author); Joint Message Form, Current Operations Division, United States Atlantic Command (USACOM), to MNF Command, Haiti, subject MNF — UNMIH Transition Issues (13 Mar. 1995) (support transition delayed because the UN had not yet passed a budget nor awarded a logistics support contract) (copy on file with author); Memorandum, Deputy Assistant Secretary of Defense for Peacekeeping and Peace Enforcement, to Walter B. Slocombe, Under Secretary of Defense for Policy, subject UN Request for Extension of "Bridge" Logistics Support for UNMIH (30 Mar. 1995) (copies on file with author, International and Operational Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia). The United States in turn employed LOGCAP contractor Brown and Root to provide logistical support to the UN force.

248 Gedge, *supm* note 148, at 16. In UNTAC, "[dlesks, computers, telephones, prefabricated offices, and other necessary equipment arrived late, hampering the initiation of [the operation's] important civilian activities . . . ." RATNER, *supra* note 34, at 168.

249 CALL REPORT UNOSOM 11, *supm* note 18, at 11-9-3. The inefficiencies attendant to the UN procurement process, unfortunately, did not end there. The copy machines purchased by the UN ultimately arrived in Somalia some months later. The UN notified the United States POC that the machines were in and ready for pickup at a UN warehouse. At the warehouse, the UN warehouse chief told the United States POC that his unit was not the priority unit; the copy machines were going to the Pakistani contingent because they had a higher priority. The UN determined priority by arrival date in country — the last to arrive had the higher priority. There was no appeal; the chief of the warehouse alone determined supply priority. *Id.* at II-9-4.

The Center For Army Lessons Learned (CALL)[250] has examined the impacts that the untimely UN procurement process had on United States forces participating in UN-directed peace operations. Military forces "cannot afford the long lead times when ordering supplies and equipment,"[251] whether or not the operation is one other than war. "[Ulnits often reach critically low levels in their on-hand stocks"[252] because of the average ninety-day turn around time associated with the UN support system. This in turn causes a general loss of trust and confidence in the theater support system.[253] United States military forces, and presumably other troop contributors as well, must then rely on the home station resupply to overcome the slow and cumbersome UN support system to sustain mission performance.[254]

The slowness of the UN procurement system is not the result of trying to acquire the highest quality supplies and services in support of peace operations and participating troops. Budgetary concerns primarily drive the UN support system.[255] Consequently, UN support standards tend to be inferior to United States ones for space requirements, human consumption rates, safety levels, operational

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250 *See* U.S. DEP'T OF ARMY, REG. 11-33, ARMY LESSONS LEARNED PROGRAM: SYSTEM DEVELOPMENT AND APPLICATION, at 1-5 (10 Oct. 1989) (establishing the Center for Army Lessons Learned, at Fort Leavenworth, Kansas, as the nucleus for the Army Lessons Learned Program).

251 CALL REPORT UNOSOM II, *supra* note 18, at 11-9-4.

252 *Id.*

253 *See id.*

254 *Id.* The UN deserves much, but certainly not all, the blame for the logistic support and fiscal problems that affect military forces participating in blue helmeted peace operations. The United States, and presumably other Member States, employ extensive procedures for providing supplies and equipment to the UN in response to LOAs. Domestic concerns for accountability and reimbursement demand such time consuming actions. ***See supm*** note 166.

255 CALL REPORT UNOSOM 11, *supra* note 18, at II-9-1 & 11-9-4 (the UN generally purchases supplies and equipment from the lowest bidder with inadequate concern for quality). The UN supply system is also susceptible to great political concerns. The UN has a standing requirement to seek competitive, world-wide procurements for all but the smallest purchases. ***See*** *supm* note 163. Even small, local purchases require competitive bidding procedures. ***See supra*** note 162. In an attempt to achieve the lowest costs possible, UN procurement practices occasionally violate United States law. In UNMIH, the UN CAO requested and received from the MNF Chief Contracting Officer (CCO) cost estimates and other price information. United Nations personnel then used this information to gain lower prices from host nation vendors (the UN would take the pricing information to competing vendors and indicate that the offeror must meet or beat the disclosed price to obtain further consideration). CALL INITIAL IMPRESSIONS HAITI, *supm* note 125, at 173. This practice of auctioning violates the Federal Acquisition Regulation. FAR, *supra* note 241, at 15.610(e)(2). Auctioning also violates United States federal law. Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1994). United States forces in Haiti informed the UN CAO that this practice violated United States law and could not continue. CALL INITIAL IMPRESSIONS HAITI, *supra* note 125, at 173.

compatibility, and quality control.[256] In Haiti, the UN's budgetary concerns affected both the quality and the quantity of transportation available to participating forces after transition from MNF (Multi-National Force) to United Nations Mission in Haiti (UNMIH).[257] The UNMIH's transportation priority plan was less costly but also less effective than that employed by the MNF.[258] The UNMIH forces also lacked the number, or density, of ships, aircraft, and vehicles possessed by the MNF.259

The CAO's concern for the budget affected all aspects of the use of air transportation during UNMIH.[260] "[United Nations] aircraft request and authorization procedures [were] cumbersome and time consuming, requiring thorough, advanced planning with detailed

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256 JTF COMMANDER'S HANDBOOK, supra note 15, at 67; Culligan, supm note 225, at 63. In many ways, the actions of the United States Congress tend to foster UN procurement decisions that are "penny wise and pound foolish." A primary concern of the United States Congress with regard to peace operations is cost effectiveness. In 1992, the General Accounting Offce (GAO) reviewed United States participation in UN peacekeeping operations. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES, UNITED NATIONS: U.S. PARTICIPATION IN PEACEKEEPING OPERATIONS, GAO/NSAID-92-247 (Sept. 1992). The GAO based its report recommendations strictly on cost effectiveness grounds. The GAO found that the UN could contract for airlift services for a price lower than that provided by national governments. *Id.* at 6. The GAO did not consider what safety standards the UN used in its air transport contract. *Id.* The GAO also did not consider if commercial airlift could be provided in a timely manner. *Id.* The GAO also looked at relative cost-effectiveness of different support options without considering concerns of mission and safety. Id. at 9-12. Congressional cost scrutiny is much greater in the context of UN-directed peace operations. The United States soldier in need of support is somehow less meaningful when he is a participant in a UN-directed peace operation because congressional scrutiny is different for UN-authorized operations.

257 Transportation was an important part of the mission in Haiti, as the "transportation infrastructure in Haiti [was] one of the worst in the Western Hemisphere and [would] not generally support sustainment and resupply requirements." CALL INITIAL IMPRESSIONS HAITI, *supm* note 125, at 195.

258 Under the MNF, the transportation priority plan was:

> (1) sea (landing craft utility (LCU) ships), (2) air (helicopter), and (3) road. The UN CAO re-prioritized transportation under UNMIH for cost concerns. The UNMIH priority scheme became (1) road, (2) sea, and (3) air, requiring justification. *Id.* at 139, 166. The Center for Army Lessons Learned astutely observed that "cost savings and habit dictated the UN's primary reliance on ground transportation in Haiti."

Id. at 169.

259 *Id.* at 166.

260 The UN purchased and reimbursed flying hours at fixed rates agreed to by national governments in LOAs. A composite aviation unit (CAU) of American CH-47 and Canadian UH-1N aircraft provided airlift support for UNMIH. *Id.* at 136. The DOD billed the UN at a cost of $2100 per CH-47 flying hour while Canada charged the UN $1300 per UH-1N flying hour. *Id.* at 143. In many instances, the CH-47 proved to be the most cost effective choice of aircraft. Class IX (aircraft) repair parts and labor remained a national responsibility of CAU forces. *Id.* at 138.

justification."[261] The UN transportation priority plan expressly discouraged the use of helicopters by UNMIH forces because of cost concerns. The UN fiscal concerns also led to operationally unsuitable contracting decisions. The UNMIH air transportation originally consisted of United States and Canadian helicopters.[262] The UN then contracted to acquire the services of an Argentine Fokker F-27 aircraft.[263] This aircraft was less expensive to operate per hour, had a larger carrying capacity, and was much faster than the helicopters. It was, however, completely ill-suited for operations in Haiti. Only two runways within Haiti were suitable for fixed-wing aircraft.[264]

Fiscal concerns also determined when the UN would authorize transportation in support of UNMIH. The CAO strictly limited who could ride aboard UN aircraft and vehicles in order to contain costs and limit the UN's legal liability. The CAO often disapproved transportation funding for nongovernmental organizations (NGOs) even though the efforts of such groups supported the UN's objectives.[265] The UN also had strict policies governing what missions it would authorize.[266] The UN would only reimburse troop contributors for those expenses supporting the UN mandate, and the CAO interpreted the mandate very conservatively. The CAO essentially used the UN mandate as a shield to fend off the requests of military operators.[267]

One example of the UN's budgetary impact on mission accomplishment involved the Haitian Interim Police and Security Force (IPSF). The MNF employed a United States Class A agent to pay the Haitian IPSF personnel. The MNF determined that it was essential to pay these personnel on time, even though they were located throughout the country Each month the MNF flew a pay officer aboard a helicopter to various sites around the country to accomplish this task. After transition to UNMIH, the CAO determined that this program was beyond the UNMIH mandate and refused to reimburse the United States for these continuing

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261 *Id.* **at 139.**

262 ***Id.* at 136-37.**

263 **The Fokker F-27 is a fixed-wing, twin engine, turbine-propeller aircraft. *Id.* at 143.**

264 *Id.*

265 *Id.* **at 166.**

266 ***Id.* at 136.**

267 ***Id.* at 141. Interestingly, the actions of the CAO work against "mission creep." Because the CAO will not pay for anything that the UN mandate or Terms of Reference do not expressly authorize, any changes to mission requirements are knowing ones that generally occur above the tactical level. 'The** UN **is more than willing [however] to allow a contributing country to lead forward and expend [its** own**] resources to get the mission accomplished."** COMMANDER HANDBOOK PEACE OPERATIONS, *supra* **note 131, at** 2.

flights.[268] The United States had to absorb the IPSF mission into the helicopter pilot training hour program in order to continue it.[269]

The UN in Haiti also refused to fund helicopters and crews that were used exclusively for MEDEVAC purposes. The UN believed that every helicopter in theater was capable of being a MEDEVAC helicopter, and that additional ones were unnecessary.[270] The United States considered genuine MEDEVAC capability as essential to troop safety. In response to the UN's position, the US decided to supplement the UN-controlled aircraft with four National Guard UH-1 helicopters. These aircraft remained under the direct control of the United States force commander and the associated costs came out of the United States purse.[271]

Budgetary concerns also have caused severe quality control problems for the UN procurement process. In Somalia, the "UN logistical system arranged for the purchase and delivery of 1.3 million bottles of drinking water for all Coalition forces in theater."[272] The UN awarded the contract to the lowest bidder without determining all necessary qualitative prerequisites.273 The UN, and consequently the contractor, failed to take operational material and packaging requirements into account when procuring this supply item. As a result, less than twenty-five percent of the water purchased actually made it to supply units.[274] The lack of quality control in the UN procurement process also has resulted in the purchase of indoor electrical cable for outside use, floodlight sets with no light

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268 CALL INITIAL IMPRESSIONS HAITI, *supra* note 125, at 140.

269 Id.

270 Id. at 138.

271 *Id.* at 136, 138.

272 CALL REPORT UNOSOM 11, *supra* note 18, at 11-9-4.

273 Id.

274 Id. The contractor sent the bottled water by ship to Somalia. The contractor used simple cardboard boxes for packaging which were:

> stacked on top of each other and . . . [other] equipment. The boxes became wet and collapsed, causing the entire shipment to break apart. When the ship arrived, only about 50 percent of the bottles were still intact—over 20,000 gallons of water were pumped from the hold of the ship. The remaining 600,000 one-liter bottles had to be off-loaded by hand, individually, into *cargo* nets so they could be moved to the dock. *Once* on the dock, each individual bottle again had to be placed in a container for movement to a supply unit. This process caused another 50 percent loss factor mainly because the plastic from which the bottle was constructed was too flimsy to stand handling and movement. The UN paid for 1.3 million bottles and received about 300,000. This happened for three shipments before the UN realized that it must require prior packaging as part of the procurement process.

Id.

bulbs, and shower units with no pipes or fittings.[275] The quality of UN food rations in Haiti forced United States planners to procure, at United States expense, a supply item that was the UN's responsibility.[276]

The inability of the UN system to procure adequate goods and services in a timely manner is not the only drawback to the UN logistical process. The United States and UN also use very different standards by which to provide logistics. 'The United States Army uses predictive logistics as its standard. The UN [by contrast] only buys what it needs, [when it needs it,] and only when the user can prove that the materiel is truly required."[277] Rarely does the **CAO** approve the purchase of backup or stockage of anticipated required items. The UN "event-driven" system makes for difficult force sustainment. Military forces that attempt "to be proactive and plan for future events or operational stocks that require the expenditure of UN funds [will] become frustrated" [278] with the UN approach to business.

The frustration experienced by United States military forces with the UN support system is compounded by their general lack of understanding, if not outright disbelief, of the UN approach to doing business:

> To request and purchase material or services through the UN requires information and a level of detail that would bewilder those not familiar with the procedures. For example, if a truck becomes non-mission capable (NMC) with an alternator problem, the unit just does not take

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275 *Id.*

276 The UN became responsible for Class I supply with the transition from MNF, Haiti to UNMIH. CALL INITIAL IMPRESSIONS HAITI, ***supm*** note 125, at 178, 183-84. The UN secured both food and water by soliciting world-wide bids for these items. ***Id.*** at 184. The United States informed the UN that American forces would only consume rations that met United States Department of Agriculture (USDA) standards as tested by Army veterinarians. *Id.* Still, the UN procured food rations that came from Iraq and failed to meet United States standards. With Interview, ***supra*** note 18. United States Forces Command (FORSCOM) then contracted with LOGCAP contractor Brown and Root to provide food service for United States forces. CALL INITIAL IMPRESSIONS HAITI, ***supra*** note **125,** at 184. The UN did not reimburse the United States for this expense. Additionally, the UN supply of water for UNMIH was below United States consumption standards. The UN did not recognize United States Army water planning standards for both drinking and nonpotable water (four gallons/soldier/day **of** drinking water in a tropical environment; **16** gallons/soldier/day of nonpotable water for hygiene, waste, etc.). ***Id.*** The UN also did not recognize ice as an entitlement. *Id.* To meet United States standards for water and ice, the United States again relied upon Brown and Root at its own expense. *Id.*

277 ***Id.*** at 169. In logistics terms, the UN is "an event and not a time driven organization." *Id.* at 171.

278 ***Id.*** The UN supply system does not even employ a standardized logistics reporting system. CALL REPORT UNOSOM II, ***supm*** note 18, at II-9-7. There is no way for the commander to effectively direct priorities for support. *Id.*

> the part off the shelf and repair it. The unit must submit a written justification through the joint and UN staffs to the CAO. If the documentation contains all the required information, is error free, and is accepted by the CAO, it takes from four to five days to receive approval. Expenditures for high dollar items [like a new engine], can take longer.[279]

The entire UN fiscal process is unsuitable for peace operations. The "fiscal quicksand"[280] on which the UN now rests precludes orderly planning and execution. 'While the UN supply system may be sufficient for civilian operations that are not time-sensitive and where quality control is not a major factor, the system is unacceptable for U.S. military operations,"[281] such as peacekeeping and peace enforcement. The next section of this article proposes specific ways to avoid or rectify the deficiencies of the UN fiscal process.

VI. Mitigation and Alleviation of UN Fiscal Problems

The present United States solution to the UN's fiscal problems is to circumvent the UN system. United States force commanders often rely on home station support when UN support is inadequate or untimely, regardless of whether UN reimbursement occurs.[282] The lack of responsiveness of the UN procurement system for both personal and unit needs also has made United States reliance on the exchange services even more indispensable.[283] Although these solutions have proved adequate, they are expediencies that fail to address the underlying deficiencies of the UN fiscal system. However, such shortcomings are not insurmountable. There are many things that the United States and the UN can do to alleviate the fiscal problems affecting military forces within "blue helmeted" peace operations.

A. Changes at the Strategic Level

1. UN-Authorized Peace Operations—The UN should make greater use of authorized peace operations, and rely in whole or in

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279 CALL INITIAL IMPRESSIONS HAITI, *supm* note 125, at 171; *see also* CALL REPORT UNOSOM 11, *supra* note 18, at 11-9-6 (United States and other coalition staff needed as much as two to three months to become knowledgeable of the UN logistics system).

280 Mathews, *supm* note 94.

281 CALL REPORT UNOSOM 11, *supra* note 18, at II-9-5.

282 United States force commanders always possess separate, domestic authority to provide for mission-essential support, even in the context of a UN-directed peace operation. See *infra* Part IV.B.9.

283 To prevent animosity between UN personnel from different countries, the Department of Defense has permitted the Army Air Force Exchange Service (AAFES) to provide services to all national contingents. CALL INITIAL IMPRESSIONS HAITI, *supra* note 125, at 169.

part on regional organizations and ad hoc coalitions as executive agents. The "contracting out" and "subcontracting" of UN peace operations removes the logistical onus from an organization that is presently underfinanced and underequipped. The method by which the UN assembles directed peace operations only intensifies the associated logistical problems. The military forces for UN peace operations are often hastily recruited and ill-equipped. United Nations planners are too often concerned with presence first, and sustainment second. The rationale for supporting UN-authorized and subcontracted operations also extends beyond fiscal and logistical reasons. The willingness of nations to contribute, command and control issues, quality of forces, and commonality of training, all favor reliance on regional organizations whenever possible. If the political will exists to provide troop contributions, then the will usually extends to assuming direction for the operation. Efforts to defray the costs incurred in UN-authorized peace operations, by means of voluntary monetary contributions, will provide additional encouragement to the Member States that undertake such missions.

2. The *UN* Debt—Both the UN and UN-directed peace operations must be financially sound. Many problems faced by contributing forces result from lack of adequate resources. United Nations CAOs cannot afford to plan ahead in their logistical support. With adequate finances, the UN could provide support in a manner befitting the soldiers that serve in peace operations. The United States is presently engaging in "delinquency diplomacy," by intentionally withholding all assessed contributions as the means to force reforms on the UN system. Recent and extensive reforms to the **DPKO** have now ended the "programmed amateurism" that once characterized the UN's management of peace operations.[284] At a minimum, United States arrearages to the UN peacekeeping assessments should no longer be held hostage by a policy aimed at forcing reform in the activities supported by the regular UN budget.

3. Delegation *of* Authority to the Secretary-General— The General Assembly must provide more authority to the Secretary General to spend in advance of peace operation appropriations. The UN possesses no standing force or organic support capability with which to immediately respond to new peace operations. The Secretary General's lack of procurement authority, in the absence of an approved budget, exacerbates this situation. The Independent Advisory Group on UN Financing recommended that the Secretary

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284 **Julia Preston, *U.N. Presses Somalia Attacks as New Role is Questioned; Expanding Demands Expose Limitations of Peace-Keeping Forces*, WASH. POST, June 15, 1993, at A1 (quoting U.S. Ambassador to the United Nations Madeleine K. Albright).**

General should have the authority to obligate up to twenty percent of the estimated cost of a peace-keeping mission once approved by the Security Council.[285] Even this does not go far enough. In United States public contracting, it is common to give a contractor authority to undertake work subject to a later price definitization.[286] The Secretary General should have authority to obligate fifty percent of the estimated budget based on the Security Council's decision to undertake a peace operation. This amount would not remove the fiscal authority from the General Assembly, but it would alleviate the problems associated with the UN's cumbersome budget approval process.

B. Changes at the Operational Level

1. Decreased Reliance on the *UN Procurement System*—Changes to the UN method of doing business also are necessary at the operational level. The military force structure for UN-directed peace operations should be 'beefed up" to decrease reliance on the UN civilian logistics structures.[287] Military forces cannot, and should not, rely on UN procurement for support and supply; it is trust misplaced. United Nations logistical operations often fail to provide quality support and rarely adhere to rigid time scheduling.[288] In light of such deficiencies, additional military assets, such as engineers, should be part of the force structure.[289] Although military forces will still need the UN CAO to procure some supplies and services, these forces must have as much organic capability as possible.

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285 INDEPENDENT ADVISORY GROUP, *supm* note 53, at 21.

286 The United States may enter into a letter contract with a contractor that authorizes the immediate commencement of work, with price definitization to occur at a later date. See FAR, *supra* note 241, at 16.603-1. Prior to price definitization, the contractor's cost estimate establishes a price ceiling. Id. The same type of process commonly occurs in the area of changes to orders issued to an existing contract. In the interest of furthering performance while auditing and negotiating the price for the change order, the contracting officer can authorize the contractor's performance first and work out the monetary details later. See DFARS, supm note 241, at 217.74.

287 CALL INITIAL IMPRESSIONS HAITI, *supm* note 125, at 3.

288 *Id.* at 9; see also JTF COMMANDER'S HANDBOOK, supm note 15, at exhibit 8. The UN's failure to conclude supply and support contracts for UNMIH in a timely fashion forced the UN to rely on bridge contracts with the parties already in place. See *supm* note 247. The UN had many months notice of the transition date from MNF, Haiti to TJNMIH and still was not ready. See Information Paper, Commander Martin J. Brown, Joint Logistics Staff Officer, Int'l Logistics Div., The Joint Chiefs of Staff, subject: Logistics and Budget Issues of MNF-UNMIH Transition (14 Nov. 1994) (copy on file with author) (UN's ability to assume logistics support for the UNMIH force by transition day unlikely given normal UN budget approval and contracting process). The impact of the UN's unpreparedness would have been much greater if Brown and Root had not been part of the operational environment that the UN inherited.

289 CALL INITIAL IMPRESSIONS HAITI, *supm* note 125, at 3.

2. Increased Use *of* Lead Nation Support—The UN should favor the lead nation support concept in both peacekeeping and peace enforcement operations. Having one Member State provide all support on a reimbursable basis has proved to be an effective option. A variant of the lead nation support option is for the UN to have its own Logistics Civil Augmentation Program (LOGCAP) contract in place for future peace operations. Both approaches would greatly relieve many current logistical problems by removing many bureaucratic elements from the process. The proposed solutions may not be the cheapest support options available to the UN,[290] but they would best support operations.

3. Military *Officers* as Chief Administrative *Officers*—The UN should use military officers instead of civilians as CAOs. This would enhance the fiscal administration of peace operations in three ways. First, military CAOs would have a better understanding of the problems facing military forces. Second, soldiers generally possess an attitude that supports mission accomplishment. Third, military CAOs would have greater credibility with CLOs. The use of military CAOs would make the DPKO a more professional operational staff organization. The UN should continue, however, to employ civilians for the Chief Procurement Officer and Chief Finance Officer positions.

4. Increased Delegation *to* CAOs—The UN should delegate more authority to CAOs. The funding delegations to CAOs for local purchases are incredibly low and insufficient to support UN peace operations.[291] What the UN saves in world-wide competitive bidding it loses in transportation costs and time. The decision to use the UN centralized procurement office should be based on local unavailability, not a lack of local authority. The United States discovered, somewhat belatedly, that delegation of procurement authority was mission essential:

> Oversight of contracting activities, to include policy formulation, should be entirely within the theater. Oversight of contracting from 7500 miles away, where the . . . policy makers have no feel for the situation on the

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290 UN **reliance upon a LOGCAP-equivalent may not, however, be the most expensive support plan option. See Memorandum,** MAJ **Douglas P. DeMoss, former Command Judge Advocate to the** U.S. **Army Materiel Command Logistics Support Group, Mogadishu, to Staff Judge Advocate/Deputy Chief Counsel,** U.S. **Army Materiel Command, subject: After Action Report, Legal Support to U.S. Army Materiel Command Logistics Support Group-Mogadishu** (AMCLSG), **Operation Restore Hope, at Enclosure 2-B: Information Paper, subject: Logistics Civil Augmentation Program (LOGCAP) Contract (11 Mar. 1993)** ("[a]lthough providing theater support under LOGCAP will still be expensive, the current cost of U.S. operations in the theater is higher'?.

291 *See supra* **note 163.**

> ground, is unworkable. Delegation of control over all contracting done by ordering officers to the lowest level possible is essential to providing timely and flexible support to the units that the ordering officers accompany.[292]

Increased UN delegation to CAOs may require the appointment of more qualified personnel. As one alternative, the UN could delegate purchasing authority to both the CAO and the Special Representative of the Secretary General for the mission.[293] Regardless of the method, the UN needs to make local purchases a greater part of its peace operations support plan.

5. UN Support Standards — The UN should raise its logistic support standards in terms of both quality and quantity. Items of supply such as food, water, medical, and transportation combine to determine overall troop morale. Present UN support standards discourage involvement by countries with well-trained and well-supported soldiers. Changes in UN support standards will result in greater support costs for peace operations. The current practice of cutting corners, however, puts both individual soldiers and mission success at stake.

6. Improved Contracting Practices — The UN should adopt many United States contracting mechanisms for its support of peace operations. The UN makes very little use of acquisition procedures that waive the requirement of full competitive bidding. The UN's use of local committee on contracts, tender committees, and formal sealed bidding procedures for all but the smallest purchases exalt competition at the expense of mission effectiveness. In the same austere environments, United States contracting officers make great use of simplified acquisition procedures.[294] The UN makes little use of contract mechanisms that create an incentive for the contractor to provide quality supplies and services. The United States, by contrast, has made quality and timeliness of service factors in the fee determination of its LOGCAP contract.[295]

7. Increased Delegation *to CLOs*—The UN must increase the delegation of authority from the CAO to the military CLO. This increased delegation to the CLO should be robust (e.g., $5000 per

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292 **DeMoss, *supra* note 290.**

293 **In Cambodia, for example, the UN delegated purchasing authority to the UNTAC SRSG. *See* UN FIELD ADMINISTRATION MANUAL, *supm* note 160, at** 272.

294 ***See supra* note** 241.

295 **See CLAMO LESSONS LEARNED HAITI, *supra* note 59, at 135 ("[I]n Haiti, for instance, the staff judge advocate advising the [MNF] Joint Logistics Support Commander helped ensure that fees designed to focus [LOGCAP] contractor effort toward quality, responsiveness, and cost control really did focus contractor efforts as designed.").**

item of supply), and not only in terms of dollars. The CLO also should possess the authorization to purchase backup or stockage of anticipated required items. The CLO must be able to use predictive logistics practices to provide timely support to military forces. The CLO needs the tools to do the force logistics job right.

8. Domestic Fiscal Authority — Until the aforementioned changes are made, the UN will possess the responsibility, but not the ability, to provide adequate and timely logistic support to the peace operations it directs. Therefore, United States forces must expect to "bring [their] own support in the areas where the UN-provided support is deficient,"[296] even if not eligible for later UN reimbursement. Judge advocates must know that United States commanders always possess the authority commensurate with the responsibility to support United States forces, including when assigned to UN-directed peace operations:

> Fiscal authority is always available for United States support to United States forces, even when they are assigned a UN mission. UN operational requirements, even those involving United States personnel, should be supported under the [bilateral United States-UN agreement]. However, logistics support for US forces which is above and beyond the capacity of UN logistics operations, and determined by the command to be essential to the sustainment of US forces, is authorized under Article II of the US Constitution and [10] U.S.C. 2241.[297]

VII. Conclusion

Present UN fiscal problems at both the strategic and operational levels work to the detriment of contributing United States forces. American commanders have recognized through experience that adequate funding and support is essential for peace operations. Inadequate UN financial support not only affects the morale and welfare of the troops contributed to peace operations but also the likelihood of overall mission success. Consequently, the present UN

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296 JTF COMMANDER'S HANDBOOK, *supra* note 15, at 67. This is especially true of critical areas such as medical support. *Id.*

297 Fragmentary Order 13, Operation Uphold Democracy, Annex E (Personnel) of Appendix 4 (Legal), § 2(g)(2) (26 Feb. 1995) (copy on file with author). For a complete guide on domestic fiscal authority in deployments, *see* Major Fred *K.* Ford, *Searching for Pennies from Heaven: The Art of Fiscal Law During Deployments* (1997) (unpublished LL.M. research paper, The Judge Advocate General's School, Charlottesville, Virginia) (on file with Writing Program Coordinator, The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

fiscal problems affect the political willingness of nations to undertake UN-directed peace operations.

The UN support system is broken, and only extensive reforms will fix it. Many of the necessary reforms are quite feasible, and catastrophic failure should not be the impetus for correction. As this article has shown, many of the identified fiscal problems result from the hostile United States attitudes towards the UN. This is both unfortunate and unwarranted because the UN can undertake little in the face of American opposition. By contrast, United States support and participation can permit the UN to further American national security interests.

Presently, the best way to overcome the fiscal problems of UN peace operations is to avoid the purse strings attendant to UN-directed missions. UN-authorized peace operations are a much more attractive means of preserving peace and international security. However, they are limited by the political will of the world community and its nation states. To be more effective as an organization, the UN must be willing to remedy the fiscal and support problems within UN-directed peace operations and establish a sound strategic fiscal footing for its regular budget. The UN must change its budgetary process for peace operations and increase the delegation of authority to the Secretary General. Lastly, at the operational level the UN should rely upon lead nation support, decrease reliance on procured logistics, increase delegation to field personnel, and make the CAO a military position. The reforms recommended by this article largely depend upon the necessary political realization that peace operations require sound fiscal policies and adequate logistical support systems. The contributing forces from all nations deserve no less.

Appendix I: Current UN Peace Operations

Name	Year Started	Financing Method	Executive Agent	Type of Operation
United Nations Truce Supervision Organization (UNTSO)	1948	RB[1]	UN[2]	PK[3]
United Nations Military Observer Group in India and Pakistan (UNMOGIP)	1949	RB	UN	PK
United Nations Peace-keepingForce in Cyprus (UNFICYP)	1964	VC[4] & SA[5]	UN	PK
United Nations Disengagement Observer Force (UNDOF)	1974	SA	UN	PK
United Nations Interim Force in Lebanon (UNIFIL)	1978	SA	UN	PK
United Nations Iraq-Kuwai Observation Mission (UNIKOM)	1991	PMDC[6] & SA	UN	PK
United Nations Mission for the Referendum in Western Sahara (MINURSO)	1991	SA	UN	PK
United Nations Observer Mission in Georgia (UNOMIG)	1993	SA	Mixed7	PK
United Nations Observer Mission in Liberia (UNOMIL)	1993	SA	Mixed	PK
United Nations Mission of Observers in Tajikstan (UNMOT)	1994	SA	Mixed	PK
United Nations Angola Verification Mission III (UNAVEM III)	1995	SA	UN	PK

1 "RB" refers to regular UN budget as the method for financing.
2 "UN" refers to the United Nations.
3 'TK"refers to a peacekeeping operation.
4 "VC" refers to voluntary contributions by Member States to the UN.
5 "SA"refers to special assessment as the method for financing.
6 "F'MDC"refers to financing by the party(s) most directly concerned.
7 "Mixed"refers to peace operations in which the UN employs subcontracting.

Appendix I: Current UN Peace Operations (Cont'd)

Name	Year Started	Financing Method	Executive Agent	Type of Operation
United Nations Preventive Deployment Force (UNPREDEP)	1995	SA	UN	PK
United Nations Mission in Bosnia and erzegovina (UNMIBH)	1995	SA	UN	PK
United Nations Mission of Observers in Prevlaka (UNMOP)	1996	SA	UN	PK
United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium UNTAES)	1996	SA	UN	PK
United Nations Support Mission in Haiti (UNSMIH)	1996	SA	UN	PK
United Nations Verification Mission in Guatemala (MINUGUA)	1997	SA	UN	PK

Sources: UNITED NATIONS, UNITED NATIONS PEACE-KEEPING (1995).
UNITED NATIONS, STATUS OF CONTRIBUTIONS AS OF 30 SEPTEMBER 1996.

Appendix 11: Completed UN Peace Operations

Name	Duration	Financing Method	Executive Agent	Type of Operation
United Nations Emergency Force I (UNEF I)	Nov 56 - Jun 67	SB/RA[8]	UN[9]	PK[10]
United Nations Observation Group in Lebanon (UNOGIL)	Jun 58 - Dec 58	RB[11]	UN	PK
United Nations Operation in the Congo (ONUC)	Jul 60 - Jun 64	SB/RA	UN	PK/PE[12]
United Nations Temporary Executive Authority/United Nations Security Force West New Guinea (UNTEA/UNSF)	Oct 62 - Apr 63	PMDC[13]	UN	PK
United Nations Yemen Observation Mission (UNYOM)	Jul 63 - Sep 64	PMDC	UN	PK
Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP)	May 65 - Oct 66	RB	UN	PK
United Nations India-Pakistan Observation Mission (UNIPOM)	Sep 65 - Mar 66	RB	UN	PK
United Nations Emergency Force II (UNEF II)	Oct 73 - Jul 79	SA[14]	UN	PK
United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP)	Apr 88 - Mar 90	RB	UN	PK

8 "SB/RA" refers to financing employing a separate budget but regular assessment rates.

9 "UN" refers to the United Nations.

10 "PK" refers to a peacekeeping operation.

11 "RB" refers to regular UN budget as the method for financing.

12 "PK/PE" refers to operations that had both peacekeeping and peace enforcement mandates.

13 "PMDC" refers to financing by the party(s) most directly concerned.

14 "SA" refers to special assessment as the method for financing.

APPENDIX II: COMPLETED UN PEACE OPERATIONS (Cont'd)

Name	Duration	Financing Method	Executive Agent	Type of Operation
United Nations Iran-Iraq Military Observer Group (UNIIMOG)	Aug 88 - Feb 91	SA	UN	PK
United Nations Angola VerificationMission I (UNAVEM I)	Jan 89 - Jun 91	SA	UN	PK
United Nations Transition Assistance Group (UNTAG)	Apr 89 - Mar 90	SA	UN	PK
United Nations Observer Group in Central America (ONUCA)	Nov 89 - Jan 92	SA	UN	PK
United Nations Angola Verification Mission II (UNAVEM II)	Jun 91 - Feb 95	SA	UN	PK
United Nations Observer Mission in El Salvador (ONUSAL)	Jul 91 - Apr 95	SA	UN	PK
United Nations Advance Mission in Cambodia (UNAMIC)	Oct 91 - Mar 92	SA	UN	PK
United Nations Transitional Authority in Cambodia (UNTAC)	Mar 92 - Sep 93	SA	UN	PK
United Nations Protection Force (UNPROFOR)	Mar 92 - Dec 95	SA	Mixed[15]	PK/PE
United Nations Operation in Somalia I (UNOSOM I)	Apr 92 - Mar 93	SA	Mixed	PK
United Nations Operation in Mozambique (ONUMOZ)	Dec 92 - Dec 94	SA	UN	PK
Unified Task Force (UNITAF)	Dec 92 - Mar 93	VC[16]	US[17]	PE[18]

[15] "Mixed" refers to peace operations in which the UN employs subcontracting.

[16] 'Ye' refers to voluntary contributions by Member States.

[17] "US" refers to the United States as lead executive agent.

[18] "PE" refers to peace enforcement operations.

APPENDIX II: COMPLETED UN PEACE OPERATIONS (Cont'd)

Name	Duration	Financing Method	Executive Agent	Type of Operation
United Nations Operation in Somalia II (UNOSOM II)	Mar 93 - Mar 95	SA	UN	PE
United Nations Observer Mission Uganda-Rwanda (UNOMUR)	Jun 93 - Sep 94	SA	UN	PK
United Nations Mission in Haiti (UNMIH)	Sep 93 - Jun 96	SA	UN	PK
United Nations Assistance Mission for Rwanda (UNAMIR)	Oct 93 - Mar 96	SA	Mixed	PK
United Nations Aouzou Strip Observer Group (UNASOG)	May 94 - Jun 94	SA	UN	PK
Multinational Force (MNF), Haiti	Sep 94 - June 95	VC	US	PE
United Nations Confidence Restoration Organization in Croatia (UNCRO)	Mar 95 - Jan 96	SA	UN	PK
Implementation Force (IFOR)	Dec 95 - Dec 96	VC	NATO[19]	PE
Stabilization Force (SFOR)	Dec 96 - Present	VC	NATO	PE

19 "NATO" refers to the North Atlantic Treaty Organization.

Sources: UNITED NATIONS, STATUS OF CONTRIBUTIONS AS OF 30 SEPTEMBER 1996. UNITED NATIONS, UNITED NATIONS PEACE-KEEPING (1995).

EXCLUSIVE FEDERAL LEGISLATIVE JURISDICTION: GET RID OF IT!*

MAJOR STEPHEN E. CASTLEN**
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I. Introduction

Determining what law applies on military installations (state, federal, or some combination thereof) continues to challenge judge

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advocates and installation commanders. Civilian crime, including juvenile crime, child abuse, spouse abuse, environmental crimes and compliance, local police support, personal injury, wrongful death, service of process, and other issues are all significantly affected by the jurisdictional status of the military installation. For example, when juveniles commit crimes on the installation, commanders and judge advocates need answers to the following questions which involve jurisdictional and practical issues. Does the state or federal Government have jurisdiction to prosecute a juvenile? What criminal or civil law applies? What procedures must be followed before federal courts may prosecute? Which sovereign is best suited to handle juvenile matters? When domestic violence occurs on a military installation, similar questions arise. Often, federal authorities need state police assistance. On military installations local police can be reluctant to assist because there is confusion over their authority, obligations, and liability. Why is jurisdiction different on some military installations — and why do some installations have different types of jurisdiction located throughout the installation? What caused all these problems? It all started in **1783,** when American soldiers mutinied against the Continental Congress. The soldiers were angry because they were not paid for their service during the Revolutionary War. In response, the Continental Congress sought to protect federal activities by limiting or completely excluding state authority on federal lands or "enclaves." While well intended in their time, the efforts of our founding fathers have caused many problems today. Is there a solution?

This article reviews the historical basis for establishing federal legislative jurisdiction over land and examines the extensive problems which can occur when federal legislative jurisdiction applies to the exclusion of all state law.[1] **As** a result of these problems, current Army policy favors acquisition of only proprietary interests in land.[2] Excluding state legislative authority now is not authorized without exceptional circumstances.[3] However, many installations still exist where state legislative authority is excluded.

Problems are inevitable on installations with exclusive federal legislative jurisdiction. This is particularly true on Army installations where civilian dependents reside. In addition to problems involving civilian dependents, other weaknesses and problems exist when state legislative authority is excluded from areas where the

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1 Although state law is excluded generally, specific federal laws apply or require conformance with state law on specific subjects. ***See*** discussion that follows.

2 U.S. DEP'T OF *ARMY,* REG. **405-20,** FEDERAL LEGISLATIVE JURISDICTION, para. 5 (1 Aug. **1973)** [hereinafter AR 405-20].

3 Id. para. 6.

military operates. The same Army policy that restricts exclusion of state legislative authority when land is acquired encourages retrocession of unnecessary federal legislative jurisdiction to the states. Judge advocates and commanders implementing this policy can resolve many problems by retroceding unnecessary legislative jurisdiction, especially on installations containing significant numbers of civilians. Foreseeable benefits include simplifying choice of law determinations, ensuring that the latest, and arguably the most rational, law applies to civil cases, and providing for more efficient and effective criminal prosecutions, greater protection for children and spouses in domestic relations areas, and better police protection.

In examining the benefits of retrocession in detail, this article surveys the process of retrocession. The examination reveals that we need to do more to implement existing Army policy regarding retrocession of unnecessary jurisdiction.

II. Legislative Jurisdiction

A. Background

Legislative jurisdiction is the government's power and authority to enact, execute, and enforce legislation.[4] Generally, the federal government has legislative authority that flows from either specific constitutional grants of authority or its interest in specific parcels of land. As examples of the former, the United States Constitution grants Congress specific legislative authority or the power to regulate in certain areas, such as interstate commerce, declaration of war, and government of the land and naval forces.[5] The Constitution's Supremacy Clause[6] and Property Clause[7] ensure that federal interests in these areas are paramount, regardless of the federal government's interest in the lands involved.[8]

The focus of this article is federal legislative jurisdiction based on the federal government's interest in specific parcels of land. The jurisdiction derives from actions by the state and federal govern-

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4 *Id.* para 3.

5 U.S. CONST. art. I, § 8.

6 *Id.* art. VI, cl. 2. The Supremacy Clause prohibits a state's reservation of jurisdiction from being inconsistent with the free and effective use of the land for federal purposes. See Fort Leavenworth R.R. v. Lowe, 114 U.S. 525,539 (1885).

7 U.S. CONST. art. IV, § 3, cl. 2.

8 In an interesting case regarding pro se pleadings prepared by the Fort Riley Legal Assistance Offce, Fort Riley, Kansas, the Kansas Attorney General deferred to the Supremacy Clause in recognizing that attorneys acting under authority of the United States Army Legal Assistance Program (citing 10 U.S.C § 1044) working on an exclusive legislative jurisdiction enclave do not have to be licensed in the State of Kansas. See Kansas Attorney Gen. Op. No. 95-85, 1995 WL 813454 (Aug. 15, 1995).

ment during the acquisition process, or in some cases, subsequent to the federal government's acquisition of the land. It is not always an absolute power, but instead depends on the terms of its grant. Specifically, there are three types of legislative jurisdiction—exclusive, concurrent and partial. The type of federal legislative jurisdiction that exists over a specific parcel depends on the extent of legislative authority the federal government possesses relative to that property.

B. Types of Legislative Jurisdiction

The type of legislative jurisdiction the federal government possesses directly affects federal-state relations in that it determines what law will apply. Specifically, it will tell us whether the state government, the federal government, or both have legislative authority over that land. In situations where the federal government possesses land without any legislative jurisdiction over the land, the federal government obtains only a proprietary interest from the state. The federal government does not acquire any of the state's legislative authority,[9] rather it merely occupies the property and only state civil and criminal laws apply in that area. In all other situations, the federal government has either exclusive, concurrent, or partial legislative authority over property it owns in a state.

1. Exclusive Legislative Jurisdiction — Exclusive legislative jurisdiction applies to those areas where the federal government possesses all legislative authority, with no authority reserved to the state, except the right to serve process resulting from activities or incidents which occurred off the land.

Federal lands within states that are under exclusive federal legislative jurisdiction, regardless of how the jurisdiction was obtained, are called "enclaves." States lose many rights and obligations on enclaves. For example, states are generally prohibited from defining or enforcing any criminal law on the enclave.[10] Enclave status affects the state's authority to tax persons and private property, and to determine the application of state civil laws. Determining what law applies on enclaves is often confusing because it depends, in part, on how and when the federal government received jurisdiction.

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[9] ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. *ARMY*, JA-221, LAW OF MILITARY INSTALLATIONS DESKBOOK (Sept. 1996) [hereinafter JA 221]. *See also* PETER S. TWITTY, THE RESPECTIVE POWERS OF THE FEDERAL AND LOCAL GOVERNMENTS WITHIN LANDS OWNED OR OCCUPIED BY THE UNITED STATES, CHAPTER VII (U.S. Government Printing Office 1944).

[10] Bowen v. Johnston, 306 U.S. 19 (1939); Battle v. United States, 209 U.S. 36 (1908); Collins v. Yosemite Park Co., 304 U.S. 518 (1938). States historically have had no legislative authority over enclaves but recent developments are changing this traditional view.

2. Concurrent Jurisdiction — Concurrent legislative jurisdiction applies to property where the state reserved or obtained the right to exercise all legislative authority concurrent with the federal government.[11] In these areas, both state and federal laws (civil and criminal) apply and both sovereigns may exercise their authority.

3. Partial Legislative Jurisdiction — Partial legislative jurisdiction applies to parcels of land where the state granted the federal government ***some*** legislative authority, but the state reserved to itself the right to exercise other authority in addition to the right to serve civil or criminal process.[12]

C. Methods *of* Obtaining Federal Legislative Jurisdiction

The federal government obtains exclusive, concurrent, or partial legislative jurisdiction through one of the following three methods: **(1)** a state's "consent to purchase"; (2) a state's cession to the federal government; or **(3)** a federal government reservation of jurisdiction.

Under the first method, the federal government purchases land with the state's consent and the state transfers jurisdiction pursuant to Clause 17 of the United States Constitution. Clause 17 grants the federal government the authority to purchase real property from a state with the consent of the state. States grant consent through legislation known as "consent-to-purchase" statutes.[13] A consent-to-purchase statute may relinquish less than full legislative jurisdiction to allow a state, for example, to exercise jurisdiction concurrently with the federal government.[14]

It is also possible for the federal government to receive legislative authority over a specific parcel of land which the United States already owns. In this case the state initially exercises some form of legislative jurisdiction over the land but then cedes jurisdiction to the federal government at some time after purchase of the land. Similar to "consent-to-purchase" legislation, states may promulgate legislation that expressly cedes jurisdiction to the federal government. Such cession may include all, or only a part, of the state's legislative jurisdiction.

In addition to these methods where the state "gives" the federal government legislative jurisdiction, the federal government also has

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[11] U.S. ATTORNEY GEN., REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. II, at 1 (U.S. Government Printing office 1957) [hereinafter THE STUDY].

[12] JA 221, *supm* note 9, para. 2-5b(3).

[13] TWITTY, *supra* note 9.

[14] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

the power to retain federal legislative jurisdiction. Specifically, when the federal government admits a state into the union and grants statehood, the federal government may reserve or retain jurisdiction over particular sections of land.[15] This was the method used to acquire vast amounts of exclusive federal legislative jurisdiction in the western states. For example, the federal government reserved eighty-three percent of the land mass of Nevada when that state was admitted to the Union.[16] Alaska's federal lands include 250 million acres.[17] The federal government owns the following percentages of land in the following western states: Arizona - 45%; California - 45%; Colorado - 36%; Idaho - 64%; Montana - 30%; New Mexico - 35%; Oregon - 52%; Utah - 66%; Washington - **30%;** and, Wyoming - 48%.[18]

It is not unusual for property under federal control, including many military installations, to have been acquired piecemeal over extended periods of time by a variety of methods. Because the type of existing legislative jurisdiction may vary depending on when and how the specific tract was acquired, judge advocates should be concerned with what type of legislative jurisdiction the federal government possesses on each specific parcel throughout the installation.

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15 THE STUDY, ***supra*** note 11, at 45.

16 *Federal Lands in the Fifty States,* NAT'L GEOGRAPHIC, Oct. 1996 (map supplement) [hereinafter Map Supplement].

17 *Id.*

18 W. CLEON SKOUSEN, THE MAKING OF AMERICA 459 (Nat'l Ctr. For Constitutional Studies, 2d ed. 1986). The author in this source argues that the massive retention of exclusive federal legislative jurisdiction by the United States violates constitutional principles. He states that the Northwest Ordinance of 1787 declared that all new states would come into the Union on a basis of complete equality with the original 13 states. It was assumed that as soon as a new territory was granted statehood, that the state, or the people of the state, would acquire title to every land parcel except that portion needed by the federal government for the "erection of forts, magazines, arsenals, dock yards, and other needful buildings." This did not occur. When Ohio became part of the United States in 1803, the federal government retained title to all of the public lands but promised that the land would fall under the jurisdiction of the state as soon as it was sold. The federal government then sold the land to pay the national debt. Hence, the policy for admitting new states was that: (1) the federal government would retain all ungranted public lands, **(2)** the government guaranteed that it would sell the lands as soon as possible, **(3)** the state would acquire jurisdiction over the land as soon as it was purchased. The result was that all states east of the Mississippi and states from the Louisiana Purchase area eventually acquired jurisdiction over most of their land areas. Congress radically departed from this policy, and, Skousen argues, from the Constitution, when Congress admitted western states acquired from land Mexico previously owned and surrendered to the U.S. in the treaty of Guadalupe Hidalgo. The new policy was to keep federal possession and jurisdiction over major portions of land of the new state. This policy resulted in the federal government becoming the owner and manager of over 35% of the American land mass.

III. The Birth of Exclusive Federal Legislative Jurisdiction—Five Days in 1783

The proposition that we should aggressively divest our military installations of unnecessary exclusive legislative jurisdiction rests in part on the conclusion that its present application was not envisioned by our forefathers who created it. So, how was exclusive jurisdiction created and what benefits did it intend to secure?

The establishment of exclusive federal legislative jurisdiction occurred with the adoption of Clause 17 in Article I of the United States Constitution. Clause 17 was motivated by the turmoil that faced the Continental Congress in 1783. While the Continental Congress met in a Philadelphia courthouse, a riotous group of soldiers outside from General George Washington's militia demanded back pay and "a settlement of accounts."[19] On 21 June 1783,

> [tlhe mutinous soldiers presented themselves, drawn up in the street before the state-house, where Congress had assembled. [Pennsylvania's Executive] was called on for the proper interposition. [It was explained to Congress] the difficulty, under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that, without some outrages on persons or property, the militia could not be relied on . . . . The soldiers remained in their position, without offering any violence, individuals only, occasionally, uttering offensive words, and, wantonly pointing their muskets to the windows of the hall of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling-houses adjoining, began to be liberally served out to the soldiers, and might lead to hasty excesses. None were committed, however, and, about three o'clock, the usual hour, Congress adjourned; the soldiers, though in some instances offering a mock obstruction, permitting the members to pass through their ranks. They soon afterwards retired themselves to the barracks.[20]

The Continental Congress asked Pennsylvania authorities to quell the rioting, but the state was unable and unwilling to call out its militia. It was thought that the militia would not respond without some actual "outrages" on persons or property. The harassment ended after four days when Congress abandoned hope that

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[19] THE STUDY, *supra* note 11, at 15.
[20] *Id.* at 15, 16.

Pennsylvania would disperse the soldiers, and Congress moved to Trenton, New Jersey.[21] Although no further harassment of Congress occurred, the memory of those events led the founding fathers to include Clause **17** in Article I, section **8** of the United States Constitution.

Clause **17** states that:

> Congress shall have power . . . . To *exercise exclusive jurisdiction* in all Cases whatsoever, . . . as may, by Cession of particular States, and the Acceptance of Congress, become the seat of Government of the United States, *and to exercise like Authority over all Places purchased* by the Consent of the Legislature of the State in which the Same shall be, for the Erection of forts, Magazines, Arsenals, dock-yards, and other needful Buildings. (emphasis added)

As a result of Pennsylvania's failure to assist, many members of the Continental Congress saw the need for a national government with some power and authority over specific land areas. Those members subsequently found themselves defending Clause **17** during the state ratification conventions for the United States Constitution.

In defending Clause **17** against severe criticism during the North Carolina Constitutional Ratification Convention, James Iredell (later a United States Supreme Court Justice) stated,

> Do we all remember that, in the year **1783,** a band of soldiers went and insulted Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.[22]

Patrick Henry defended Clause **17** as well. During Virginia's Convention, he cited the "disgraceful insult which Congress received some years ago."[23] Virginia's James Madison similarly referred to the "mutinous" soldiers and questioned whether attacks of that nature (or attacks with "more indignity") might occur if the "commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit."[24]

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[21] *Id.* at **16, 17.**
[22] *Id.* at 24.
[23] *Id.*
[24] *Id.* **at 26.**

In their wildest dreams, neither the Founding Fathers nor the mutinous soldiers could have imagined the impact Clause 17 would have on the nation. In essence, Clause 17 granted the federal government the authority to obtain property from the states and maintain areas where the federal government would have exclusive jurisdiction. Relying in part on the expansive interpretation of this clause, both federal lands and federal functions have become overwhelming. The Supreme Court has interpreted "other needful Buildings" quite broadly, to include "whatever structures are found to be necessary in the performance of the functions of the federal government."[25] As a result, Department of Defense (DOD) real estate holdings are huge. By 1988, DOD had acquired approximately thirty-one million acres of land (an area larger than the State of Kentucky) and 316,000 buildings containing approximately 1,896 million square feet of interior space.[26] Throughout its history, the United States military has constantly acquired and disposed of realty based upon a continually changing mission, the availability of resources, and other factors. To dramatize the dynamic nature of DOD land transfers, by 1996 DOD owned only twenty-seven-million acres of land.[27] The DOD activities conducted on federal lands are expansive as well and range from operating soft drink stands to building nuclear weapons.[28] The entire federal domain includes over 700 million acres of land. This is an area about one-third the size of the nation. Management of this huge land reserve is accomplished through various federal agencies.[29] The legislative jurisdiction of the myriad land parcels is determined by how the land was acquired and whether any cessions or retrocessions occurred subsequently.

With such expansive functions and property, the federal government and the Army control and maintain extensive areas of exclusive federal legislative jurisdiction. Also problematic are the

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[25] James v. Dravo Contracting Company, 302 U.S. 134 (1937).

[26] STATISTICAL ABSTRACT OF THE UNITED STATES, 322, 335, 375 (1989). *See also* H. Allen Irish, *Enforcement of State Environmental Crimes on the Federal Enclave,* 133 MIL. L. REV. 249 (1991).

[27] Map Supplement, *supm* note 16.

[28] The Study, *supra* note 11, at 1. Most of the 27 million acres of military land is located in the United States South and West. These lands are also home to 220 threatened or endangered species and contain 100,000 archaeological sites. *See* Map Supplement, *supra* note 16.

[29] The Department of Agriculture oversees the Forest Service that manages over 200 million acres of the country's national forests. The Department of Energy manages approximately 2.4 million acres of land. The largest land manager in the federal government, the Department of the Interior (almost 500 million acres) includes agencies that manage the following land masses respectively: Bureau of Indian Affairs, 55 million acres; Bureau of Land Management, 270 million acres; U.S. Fish and Wildlife, 90 million acres, and National Park Service, 83 million acres. There are various other agencies managing federal lands and some land is managed by more than one agency. *See* Map Supplement, *supra* note 16.

many federal properties consisting of areas where different types of legislative jurisdiction and authority apply.

IV. Exclusive Legislative Jurisdiction: Then and Now

As noted previously, exclusive federal legislative jurisdiction regarding land means that the federal government has authority to legislate and exercise executive and judicial powers within a land area without interference, or assistance, from the state where the land is located.[30] The federal government has all the authority of the state. The state only has the authority (which it reserved) to serve civil or criminal process in the area for activities that occurred outside the area.[31] "In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither is sovereign, with respect to the objects committed to the other."[32]

Early cases held that exclusive federal legislative jurisdiction meant that all authority—judicial, executive, and legislative—was vested in the *federal* government, excluding *state* legislative and judicial power.[33] All state authority ceased at the federal enclave's border and, in theory, the federal area became "a state within a state."[34] For example, in 1926, enclave residents Mr. and Mrs. Lowe were unable to file for divorce. The Maryland court held that the federal enclave ceased being part of the state and that such residents were no longer state inhabitants and, therefore, could no longer exercise any civil or political rights under state laws.[35] As a result, enclave residents were not entitled to receive state education,[36] vote,[37] hold office,[38] or receive any benefits derived from state residency.

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[30] THE STUDY, *supra* note 11, at 10.

[31] *See* U.S. DEP'T OF ARMY, REG. 405-29, FEDERAL LEGISLATIVE JURISDICTION, para. 2 (C1, 21 Feb. 1974) [hereinafter AR 405-29]. The mere fact that the state has reserved the right to serve criminal and civil process on land does not prevent cession of exclusive or concurrent criminal jurisdiction to the federal government. The purpose of reservation is to prevent the land involved from becoming an asylum for fugitives from justice. United States v. Schuster, 220 F. Supp. 61 (E.D. Va. 1963).

[32] McCulloch v. Maryland, 17 U.S. 316, 409 (1819).

[33] Simms v. Simms, 175 U.S. 162 (1889).

[34] Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885).

[35] Lowe v. Lowe, 133A. 729 (Md. 1926). See *also* Chaney v. Chaney, 201 P.2d 782 (N.M. 1949); Dicks v. Dicks, 170 S.E. 245 (Ga. 1933); Pendleton v. Pendleton, 201 P. 62 (Kan. 1921) (military members and their spouses were denied jurisdiction to obtain a divorce because of their residence on a federal enclave).

[36] Newcomb v. Rockport, 66 N.E. 587 (Mass. 1903).

[37] See Sinks v. Reese, 19 Ohio St. 306 (1869) (denying Ohio voting rights and holding that the exclusive area was as foreign to Ohio as would be any sister state).

[38] THE STUDY, *supra* note 11, at 219.

In 1953, the United States Supreme Court drastically altered the "state within a state" fiction. In Howard *v. Commissioners,*[39] the Court allowed the city of Louisville, Kentucky, to annex an area that included a United States Naval facility and authorized the city to impose an earnings tax on the enclave's occupants. Rejecting the notion that the state ceased to exist in the area of exclusive jurisdiction, the Court stated,

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is not interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.[40]

In all likelihood, the Howard decision reflected a definition of exclusive jurisdiction consistent with the Constitutional Convention's definition.41 Furthermore, both the Supreme Court and lower courts have further expanded the rights of enclave residents and clarified the balance between the state and federal sovereigns. For example, in 1970, the Supreme Court held that enclave residents had the right to vote.[42] Lower courts have held that enclave residents also have the right to hold local office,[43] qualify for local welfare payments,[44] and receive court-ordered child and spouse protection.45

Federal legislation has also clarified whether authorities should apply state law on federal enclaves. In the civil law arena, Congress has provided for the application of the state's current wrongful death and personal injury laws,[46] workers compensation

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[39] 344 U.S. 624 (1953).

[40] *Id.* at 626.

[41] *See* Richard Altieri, *Federal Enclaves: The Impact of Exclusive Legislation upon Civil Litigation,* 72 MIL. L. REV. 55, 63 (1976).

[42] Evans v. Cornman, 398 U.S. 419 (1970).

[43] Adams v. Londeree, 83 S.E.2d 127 (W. Va. 1954), *rev'd on other grounds,* State *ex rel.* Booth v. Board of Ballot Comm'rs of Mingo County, 196 S.E.2d 299 (W. Va. 1972).

[44] County of Arapahoe v. Donoho, 356 P.2d 267 (Colo. 1960).

[45] *See In Re* Terry Y, 161 Cal. Rptr. 452 (Cal. Ct. App. 1980) (regarding the local court's removal of battered child from federal enclave, holding that federal child protection policy supported state services for children on the federal installation); Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989) (holding state's authority to enforce spousal protection laws and issue a restraining order enforceable on the military installation when abuse victim was a service member who resided on the federal enclave).

[46] 16 U.S.C. § 457 (1994). Murray v. Joe Gerrick & Co., 291 U.S. 315 (1934); Vasina v. Grumman Corp., 644 F. 2d 112 (2d Cir. 1981); Quadrini v. Sikorsky Aircraft Division, 425 F. Supp. 81 (D. Conn. 1977), *modified in* 505 F. Supp. 1049 (D. Conn. 1981).

laws,[47] unemployment compensation laws,[48] and fish and game laws[49] on the enclave. In passing the Buck Act, Congress allowed state and local sales, income, and use taxes to apply to persons and nonfederal entities on the enclave.[50] Additionally, all motor fuel sales to private persons are subject to state gas taxes.[51] Congress, however, has not passed legislation for enclaves relative to contracts, sales, agency, probate, guardianship, family relations, and torts not involving death or personal injury.[52]

As for criminal statutes, federal law applies on the enclave; and Congress has passed the Federal Assimilative Crimes Act (ACA)[53] within Title 18 United States Code to fill the gaps. The ACA makes state criminal offenses punishable as federal crimes. Moreover, for offenses occurring in either concurrent or exclusive jurisdictions, the ACA allows federal prosecutors to assimilate state criminal statutes (not local ordinances) as federal offenses.[54] The violations are not state violations, but are federal offenses.

Despite lower-court decisions and federal legislation, the law remains unsettled in many areas. Because of this uncertainty, answers to vital questions concerning jurisdiction, rights, and remedies of enclave residents are unknown.

V. Specific Problems in Areas of Exclusive Federal Legislative Jurisdiction

A. What Law Applies?

Due to varying state court decisions and extensive gaps in legislation on federal properties cluttered with overlapping and inconsistent jurisdictions, confusion abounds. Determining applicable law on each specific parcel of land requires a tract-by-tract analysis that accounts for when and how the tract was acquired and what state legislative action took place relative to the acquisition. Only then can a determination be made regarding whether federal, state, or both sovereigns' laws apply to a parcel. In cases where federal law applies, but there is no existing federal law directed to the issue, it is possible that prior state law was adopted as present federal law.

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47 40 U.S.C. $290 (1994).
48 26 U.S.C. § 3305 (1994).
49 16 U.S.C. § 670a (1994); 10 U.S.C. $2671 (1994).
50 4 U.S.C. §§ 105-107 (1994).
51 4 U.S.C. § 104 (1994).
52 JA 221, *supm* note 9, para. 2-12a.
53 18 U.S.C. § 13 (1987).
54 United States v. Best, 573 F.2d 1095 (Cal. Ct. App. 1978); United States v. Holley, 444 F. Supp. 1361 (D. Md. 1977).

To some degree, *Chicago, Rock Island & Pacific Railroad u. McGlinn* fills the legislative void. This case stated that "whenever political jurisdiction and legislative power over any territory are transferred from one . . . sovereign to another, the . . . laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign."[55] This principle requires that laws intended for the protection of private rights continue to apply to the federal area; and those state laws, which are not contrary to federal law,[56] become federal law.[57] Later enacted state laws have no effect on the federal area.[58]

One can easily imagine the problems inherent under such a scheme. Military installations are composed of numerous tracts of land purchased at different times and under different circumstances. Attorneys may find it impossible to locate records, determine exactly what occurred during the acquisition process, and then actually provide proof in court.

Once authorities determine both the date that the federal government acquired each tract of land on the installation, and whether the federal government obtained exclusive legislative jurisdiction for each tract, then authorities must determine what state law existed at the time of each acquisition. Unless an act of Congress expressly adopts subsequently enacted state law, the state law as it existed at the time of acquisition becomes the present federal law. The irony is that older, and potentially obsolete, laws apply instead of new, and generally preferable, developments.59

This situation creates confusion and frustration for litigants. In some cases, as in the Kansas case of *Orlovetz v. Day & Zimmerman*,[60] the plaintiff may be unable to recover damages at all. In *Orlovetz*, the defendant, Day and Zimmerman, Incorporated, was a contractor operating on the Kansas Army Ammunition Plant, a federal enclave, the situs of the plaintiffs claim. When the plaintiff attempted to sue the defendant for breach of implied contract of employment and wrongful termination of a whistleblower, both the district court and the appellate court found that under the applicable Kansas law of **1942** (the time of the federal enclave's acquisition) the state did not recognize either of the plaintiffs causes of action. The plaintiff, a victim of a harm committed on a federal enclave, was

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55 Chicago, Rock Island & Pac. R.R. v. McGlinn, 114 U.S. 542, 546 (1855).
56 Lord v. Local Union No. 2088, 646 F.2d 1057 (5th Cir. 1981), cert. *denied,* 458 U.S. 1106 (1982).
57 Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959).
58 Arlington Hotel v. Fant, 278 U.S. 439 (1929).
59 *See* Murray v. Joe Gerrick Co., 291 U.S. 315 (1934).
60 *848* P.2d 463 (Kan.App. 1993).

without a remedy since the state ceded the property to the federal government in 1942, when protection from such contract violations was nonexistent. Furthermore, since Congress never passed legislation specifically adopting subsequently enacted Kansas law, the plaintiff only could obtain relief under the Kansas law in effect at the time the federal government acquired the property. That old Kansas law became the present federal law.

B. What Criminal Law Applies?

Unfortunately, *McGlinn* does not provide any relief nor does it fill legislative gaps in the criminal law arena. Prosecutors may apply three categories of federal criminal law for offenses committed on military installations: "criminal laws enforceable only in areas of exclusive or concurrent jurisdiction" (Title 18 enumerated offenses and assimilated state offenses under the ACA for crimes committed in areas of concurrent or exclusive jurisdiction);[61] criminal laws enforceable in federally controlled locations (acts made crimes under the Constitution's Property Clause, such as trespass);[62] and "criminal laws enforceable regardless of where the offense is committed."[63]

In any case, the federal government obtains sole criminal jurisdiction over areas where it has *exclusive* legislative jurisdiction.[64] While the federal government has authority, under a variety of constitutional provisions, to enact and enforce criminal provisions, it generally lacks the power to exercise criminal jurisdiction unless, with some exceptions,[65] the crime occurred within an area subject to federal jurisdiction, either concurrent or exclusive.

Likewise, a state's jurisdiction extends only over state property. For example, in *State v. Morris*,[66] a defendant committed an assault on a military reservation upon lands that the United States purchased with the state legislature's consent. The State of New Jersey's jurisdictional authority was ceded to and vested in the United States. The state court, therefore, was without jurisdiction to try the case and the conviction was reversed.

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61 **JA** 221, ***supra*** **note** 9, **para.** 2-19c.

62 *Id.* **para.** 2-15; 18 **U.S.C.A.§** 1382 **(West** 1995).

63 **JA** 221, ***supra*** **note** 9, **para.** 2-19c.

64 **Bowen v. Johnston,** 306 **U S. 19** (1939);**United States v. Unzeuta, 281 U.S.** 138 (1930);**United States v. Watkins,** 22 **F.2d** 437 (N.D. **Cal.** 1927).

65 **Exclusive federal legislative jurisdiction extends beyond the boundaries of the "jurisdictional area" to include areas to make the exercise of the government'sjurisdiction effective.** ***See*** **Cohens v. Virginia, 6 Wheat.** 264, 426-29 (1821) **(concealmentof knowledge of felony which occurred within an area of exclusivejurisdiction).**

66 **68 A.** 1103 (N.J. 1908) **(citing United States v. Cornell,** 2 **Mason 60,** 25 **Fed. Cas.** 646 **(C.C.D.R.I.** 1918) (No. 14,867)); **Fort Leavenworth v. L.O.W.E.,**114 **U.S.** 525 (1885);**Benson v. United States,** 146 U.S. 325 (1892);**Commonwealth v. Clary,** 8 **Mass.** 72 (1811);**Chicago, Rock Island and Pac. R.R. Co. v. McGlinn,** 114 U.S. 542 (1885).

When prosecuting offenses that are committed on federal enclaves, prosecutors must determine, and in many cases, prove what law applies to each tract of land. Of course, in areas of concurrent legislative jurisdiction, both state and federal authorities may prosecute without violating the Fifth Amendment's double jeopardy clause.[67]

C. Who *Prosecutes Juveniles?*

Juvenile prosecutions present unique challenges to any prosecutor. Those problems are compounded on military installations under exclusive legislative jurisdiction. Both state and federal policies indicate a preference for states to handle juvenile offenses; however, if a juvenile commited a crime in an area of ***exclusive*** federal jurisdiction, the state historically had no recourse. The extensive number of juvenile arrests and the increase of juvenile offenses[68] only exacerbate the problem. As a result, contrary to constitutional requirements—especially Clause 17 of the United States Constitution—many states are forced to take action on federal enclaves.

Federal policy indicates a preference for state action in juvenile delinquency cases, along with reservation of federal criminal prosecutions for particularly serious conduct by older juveniles.69 Generally, federal courts abstain from taking action in juvenile matters and, only in rare cases, will intrude into what is traditionally a state matter.[70] On federal enclaves, however, the state lacks jurisdiction to exert its own policy regarding the state's preference for handling juvenile delinquency matters. Exclusive legislative jurisdiction, therefore, thwarts both state and federal policies in this sensitive area.[71]

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67 Herbert v. Louisiana, 272 U.S. 312 (1926).

68 *See* Richard L. Palmatier, *Criminal Offenses by Juveniles on the Federal Installation: A Primer on 18 U.S.C.* § 5032, ARMY LAW., Jan. 1994, at 3. In 1974, with the passage of the Juvenile Justice and Delinquency Prevention Act, the Senate noted that juveniles under 18 were responsible for large percentages of total arrests, including 51% of property crimes, 23% of violent crimes, and 45% of serious crime. *Id.* at 4 (citing S. REP. NO. 1011, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 5283,5284). In addition, at that time, the Senate also noted that since 1960 the number of juvenile arrests for violent crimes had increased 216%. *Id.* (citing S. REP. NO. 1011, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. at 5285).

69 H.R. REP. NO. 98-1030, 93d Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182,3526.

70 United States v. Sechrist, 640 F.2d 81 (7th Cir. 1981). In addition to thwarting government policy, felony prosecutions of juveniles require the attorney general, or a designee, to certify to the local federal district court that: (1) the state lacks, or refuses to exercise, jurisdiction; (2) the state's programs are inadequate for the juvenile's needs; or (3) there is a substantial federal interest, where, for example, the case is particularly serious. 18 U.S.C. § 5032 (1994).

71 For example, Kentucky gave state district courts exclusive jurisdiction, unless otherwise exempted, over juvenile matters. KY. REV. STAT. ANN. § 610.010 (Banks-

Contrary to clear constitutional standards, states are acting on enclaves in juvenile matters. For example, the State of New Jersey extended jurisdiction over juveniles on Fort Dix, a federal enclave. A New Jersey court found that juveniles should receive various state benefits while residing on Fort Dix and that the state should not deny juveniles the benefit of the state's juvenile laws.[72] Similarly, the New Mexico Court of Appeals ruled that their state child welfare laws apply to children located on Holloman Air Force Base, an area of exclusive federal legislative jurisdiction. The court noted that the state failed to reserve jurisdiction over the enclave in question and the federal government did not grant jurisdiction. The court also noted that such lack of jurisdiction thwarted state taxing, licensing, and price regulations on federal enclaves. Nevertheless, the court allowed the exercise of state jurisdiction to protect abused and neglected children. The court found no interference with a federal function and a strong federal policy in favor of protecting children.

Baldwin 1997). Yet, Kentucky also gave jurisdiction over Fort Knox to the federal government. Section 3.030 of the Kentucky Revised Statutes, entitled Jurisdiction Over Military Post (Fort Knox) at West Point Ceded, states as follows: Kentucky cedes to the United States all the rights and jurisdiction which she now possesses over the land and premises in the vicinity of West Point, Kentucky, conveyed or to be conveyed to the United States for the purpose of establishing a permanent camp of instruction and military post, so long as the same shall remain the property of the United States. KY. REV. STAT. ANN. § 3.030 (Banks-Baldwin 1997). According to Kentucky's highest court and its executive branch, enclave residents come under federal and not state jurisdiction. ***See*** Lathey v. Lathey, 305 S.W.2d 920, 922 (Ky. Ct. App. 1957) ("Persons on the Fort Knox Military Reservation are not within the jurisdiction of the Kentucky courts." *Id.);* 74 **Op.** Att'y Gen. 180 (1974) ("Kentucky cannot exercise any jurisdiction over Fort **Knox** and its residents." *Id.*) Kentucky, therefore, could not exercise jurisdiction over juveniles, This situation changed during 1988 when Secretary of the Army John **O.** Marsh relinquished and retroceded jurisdiction to the Commonwealth of Kentucky over:

> Fort Knox Military Reservation as is necessary to allow the District Courts of the Commonwealth to exercise only that power granted by the Kentucky General Assembly pursuant to the Kentucky Juvenile Code, KY. REV. STAT. *A".* ch. 600 et **seq.** To remove dependent, neglected or abused children from homes located on the military reservation for placement of such children as wards of the court only into homes on or off the military reservation designated and supervised by the agency of the Department of the Army responsible for child welfare services at the Fort Knox Military Reservation. . . . Nothing in this retrocession shall be construed to allow the District Courts to place dependent, neglected or abused children under the control and supervision of the Department of the Army's child welfare services agency in any foster homes other than those designated and supervised by that agency.

The retrocession extended to allow local county sheriffs to serve and enforce district court orders, but only those orders related to dependent, abused and neglected children. Letter from John **O.** Marsh, Jr., Secretary of the Army, to Honorable Wallace G. Wilkerson, Governor of Kentucky (Sept. 20, 1988). ***See also*** Notice of Acceptance from Wallace G. Wilkerson, Governor of Kentucky, subject: Retrocession of Legislative Jurisdiction at Fort Knox Military Reservation, Fort Knox, Kentucky, to John **O.** Marsh, Jr., Secretary of the Army (Oct. 27, 1988).

[72] New Jersey in the Interest of D.B.S., 349 A.2d 105 (N.J. Super. Ct. App. Div. 1975).

The court stated that, 'The military courts do not have jurisdiction over such matters. Unless the State acts to protect these children, they are left without any governmental protection. Such a vacuum must be filled. The State is best fitted for such a role as it understands the needs of the children within its borders and knows best how to address those needs."[73] Also noteworthy, installations appear to be cooperating with and inviting state involvement on installations, whether enclaves or not.[74]

D. Assistance From Local Police

Inherent in the concept of exclusive federal jurisdiction is that state police lack authority to enter an enclave to investigate or arrest individuals for crimes committed within that area of federal exclusive jurisdiction.75 Moreover, if the state court considers an enclave to be a "state within a state," then local police subject themselves to personal liability when providing law enforcement on the federal enclave. Although the concept of the state within a state has eroded since *Howard*, state court and police authority to act on the enclave remains unclear. Service of state civil and criminal process in exclusive federal jurisdiction areas presents special problems.76

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[73] New Mexico *ex rel.* Children, Youth and Families Dep't v. Debbie F., 905 P.2d 205,208 (N.M. 1995).

[74] *See* U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM (18 Sept. 1987).

[75] THE STUDY, supm note 11, at 109. State and local police have no authority to enter an exclusive federal area to make investigations or arrests for crimes committed within such areas since federal, not state, offenses are involved. Only federal law enforcement officials, such as representatives of the Federal Bureau of Investigation and United States marshals and their deputies, would be authorized to investigate such offenses and make arrests in connection with them. The policing of federal exclusive jurisdiction areas must be accomplished by federal personnel, and an offer of a municipality to police a portion of a road on such an area could not be accepted by the federal official in charge of the area, as police protection by a municipality to such an area would be inconsistent with federal exclusive jurisdiction. TWITTY, *supm* note 9, § 68.

[76] State consent or cession laws transferring exclusive or partial jurisdiction to the United States almost always reserve the right to serve civil and criminal process on the enclave. Such a reservation is consistent with the federal exercise of exclusive jurisdiction. Where the United States has concurrent jurisdiction or merely a proprietary interest, state authorities can serve process incident to residual State authority and a reservation of the right is unnecessary. Service of state process in exclusive jurisdiction areas is invalid unless the right to do so has been reserved by the state. Where a state has reserved or been granted the right to serve process within an enclave or has a residual right to do so in an area of concurrent or proprietary jurisdiction, its authorities can enter to serve process subject to reasonable controls designed to prevent interference with federal functions.

Judge advocates should review documents to insure that the document being served is "process" which depends on state law. Where process appears to be regular on its face, service must be allowed, leaving the recipient to challenge any defect in court. On the other hand, installations may wish to examine process and disallow service, either where the process is irregular or where the state's reservation does not permit service.

Local state police officers generally lack authority on federal enclaves and may not be entitled to immunity for their actions.[77] Without proper authority, law enforcement officials face personal liability for their actions in the line of duty such as arrests resulting in injuries or damage to property. It is, however, possible for state courts to follow the holding in *Howard* to protect the involved parties, either law enforcement or victims. In *Cobb v. Cobb*,[78] the Massachusetts Supreme Judicial Court followed the *Howard* logic in upholding a lower state court's restraining order against a soldier's civilian husband. The Supreme Judicial Court found that the order was enforceable both on and off a federal enclave, so long as the order did not interfere with any federal function.

Generally, reservation to serve process within an exclusive or partial federal jurisdiction area applies only to process arising from offenses, incidents, or activities taking place within the surrounding state area. Consequently, even where there has been a reservation of the right to serve process, service should be disallowed where the process relates to an incident that occurred on the installation. The reason for this general rule is that the reservation of the right to serve process should not enlarge the jurisdiction that the state would have absent the reservation.

State "long-arm" statutes present another problem. In *Berube v. White Plains Iron Works Inc.*, 211 F. Supp. 457 (D. Me. 1962), an action for damages was filed on the basis of an incident taking place on a military reservation under exclusive jurisdiction. The defendant was a foreign corporation, not licensed to do business in the state, and its only significant commercial activity within the geographical limits of the state was its activity on the military reservation. The court held that service of process pursuant to a statute providing for substituted service on a foreign corporation "which does business in this State" was invalid. *Swanson Painting* Co. *v. Painters Local Union No. 260*, 391 F.2d 523 (9th Cir. 1968) had a different result. A Washington construction company contracted to build home foundations at Malmstrom Air Force Base in Montana. The Montana union subsequently sued for damages based on the Washington company's alleged breach of the labor contract entered into by the two. Suit was brought in federal court in Montana. Subject matter jurisdiction was based on the Labor Management Relations Act of 1947. Personal jurisdiction over the company was based on the Montana long-arm statute that permitted service on out-of-state defendants doing business in the state. The court held that the defendant was doing business within the State for purposes of the statute. The court held that exclusive jurisdiction over Malmstrom did not immunize the persons engaged therein from liability for breach of any duty arising from such activity.

Mail service under long-arm statutes creates an interesting problem. A strict reading of reservations of the right to serve process might disallow mail service from another state and a similar outcome might result where a state that has reserved the right to serve process seeks to serve the process of another state. Such a reading, however, is flawed because by necessity, any state serving process under a long-arm statute will not have reserved the right to serve process on an installation located in another state. The recipient of the long-arm service may attack the jurisdiction and the process, but should not assume that he can ignore mail service based on the exclusive jurisdictional status of the installation he resides on. It is an open question whether a state that failed to reserve the right to serve process, could rely on its long-arm statute to reach the installation, under the "state-within-a-state" view of jurisdiction.

Where the right to serve process has not been reserved, service may be voluntarily accepted or declined by the person served. *See* JA 221, *supra* note 9, para. 2-11.

[77] Barr v. Matteo, 360 U.S. 564, 575 (1959).

[78] 545 N.E.2d 1161, 1162 (Mass. 1989).

With its holding in *Cobb,* the court protected a soldier who was an abused victim residing on the federal enclave. Generally, however, issues of enforcement of state court orders *against* soldiers may rarely arise because those courts, afraid of stepping beyond their jurisdiction, might hesitate to issue such orders.[79]

Due to the legal debate over the application of laws on federal enclaves, local law enforcement, civil courts that issue restraining orders, and civilian child and spouse protection agencies are unsure what actions they may legally take. The following questions are subject to speculation: **(1)** May they remove a child or parent from a home on the enclave?; **(2)** Will they face civil personal liability for taking actions on areas of exclusive federal jurisdiction?; and **(3)** What personal liability will they face as a result of their actions?[80] Due to limited resources, civilian agencies may decide not to risk taking any action on the enclave. Since the risks may appear to outweigh the benefits, civilian authorities may take no action, and the enclave residents suffer the consequences.

E. Domestic Relations

Generally, state courts preside over domestic relations matters. Civil statutes governing the domestic relations of husband and wife, parent and child, belong to the laws of the states and not to the laws of the United States.[81] In domestic violence cases, state courts face extreme jurisdictional uncertainty when dealing with enclave residents which results in a disastrous impact on the enclave victims.[82]

Advocates argue that the necessary relief for enclave residents is a congressional "domestic violence exception" from the "exclusive legislative jurisdiction of federal enclaves so that all enclave domestic violence victims are assured legal recourse."[83] With such an exception, state courts could apply state law on federal enclaves. Civilian law enforcement agencies, child and spouse protection services, and the courts themselves, could provide the necessary protec-

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[79] Michael J. Malinowski, Note, *Federal Enclaves and Local Law: Carving out a Domestic Violence Exception to Exclusive Legislative Jurisdiction,* 100 Yale L.J. **189, 191 (1990).**

[80] JA 221, *supra* note **9,** para. 2-10d. *See also In re* **Terry Y, 161** Cal. Rptr. 452 (Cal Ct. App. **1980);** Board of Chosen Freeholders v. McCorkle, **237** A.2d **640** (N.J. Super Ct. **1968)** (holding that a county court could commit inhabitants of federal enclaves to a state mental hospital and state child welfare programs applied to children on the military installation); Cobb v. Cobb, 545 N.E.2d **1161** (Mass. **1989).**

[81] Hisquierdo v. Hisquierdo, **439** U.S. **572, 581 (1979).**

[82] Malinowski, *supra* note **79,** at **198,** citing military statistics of **"11, 931** substantiated reports of spouse abuse and 5,488 substantiated reports of child abuse (of both a sexual and nonsexual nature) involving both male and female soldier-perpetrators during the (two-year) period July **1, 1985** through June **30, 1987."** *Id.*

[83] *Id.* at **191.**

tion to soldiers and civilians in the domestic relation arena.[84] Without access to state law, no reliable protection exists for victims of domestic violence on enclaves.

While waiting for Congress to carve a domestic violence exception out of exclusive legislative jurisdiction,[85] active court intervention is suggested to protect domestic violence victims. Courts in California and New Jersey may have begun such an activist trend by exercising jurisdiction over enclave residents. Those state courts used the *Howard* jurisdictional theory of noninterference with the federal function—the "no friction" analysis.[86] Whatever the method, the federal government should make state law accessible and give state courts jurisdiction to enforce local domestic relations laws on the enclave.[87] Retrocession will provide increased protection.

F. Environmental Law

Another legal issue that clouds federal enclaves is confusion regarding compliance with numerous environmental rules applicable to the installation.[88] In addition to a complex federal *statutory* scheme, an even more complex federal *regulatory* scheme exists; additionally, each state has legislated and regulated environmental law. Many of these state requirements, especially for hazardous waste, apply on the enclave.

The Resource Conservation and Recovery Act (RCRA) offers an illustration of how environmental law affects the military installation.[89] The RCRA requires installations to comply with all state and local requirements, both substantive and procedural, regarding solid waste abatement or hazardous waste disposal, as would any person subject to such requirements. The United States, its agents, employees, or officers are not immune from any state or federal process or sanction regarding the enforcement of any related injunc-

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[84] *Id.* at 201.

[85] *Id.* at 191.

[86] *See* Cobb v. Cobb, 545 N.E.2d 1161 (Mass. 1989); *In re* Terry *Y.*, 161 Cal. Rptr. 452 (Cal Ct. App. 1980).

[87] Malinowski, *supra* note 79, at 208.

[88] *See, e.g.*, the Comprehensive Environmental Response Compensation & Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994); Resource Conservation & Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994); the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1988); Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1994); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1994); Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1988); Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127 (1994); Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1994).

[89] Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988).

tive relief, although employees are not personally liable for civil penalties if acting in the scope of their official duties.[90] Furthermore, a United States agent, employee, or officer is subject to all criminal sanctions under any federal or state solid or hazardous waste law.[91]

Clearly, Congress intended to subject enclave environmental activities to state criminal law enforcement and used the waiver of sovereign immunity to achieve that purpose. Apparently, however, Congress failed to consider the consequence of exclusive legislative jurisdiction on federal enclaves. Waiving sovereign immunity eliminates only one hurdle necessary for prosecution; the enclave retains its exclusive jurisdictional status. Congress must do more than waive sovereign immunity to allow a state to enforce environmental criminal provisions against a federal official or an interloper.

Courts and litigants use several theories to support state jurisdictional authority on an enclave. One theory that stems from the state's criminal codes is that a state may assert jurisdiction over regulated conduct when the conduct itself, or the results of such conduct, occurred within the state.[92] This theory allows jurisdiction over an activity occurring in sister states. Because the federal government is not a coequal sovereign, however, this theory may not apply.[93] Under another theory, using a ***Howard*** analysis, federal and state interests do not conflict but rather complement each other. Moreover, statutes, such as RCRA, reflect the clear congressional intent to encourage state environmental action on the enclave. Hence, there is no friction and, therefore, courts should avoid the fiction of "the state within the state." Under this theory it may be difficult to argue no friction exists when a federal officer or instrumentality is litigating against a state. A third theory used in gaining state jurisdiction on the enclave is that the congressional action reflected in the myriad statutes indicates a unilateral retrocession of exclusive jurisdiction to the states relative to environmental offense. This argument, however, ignores federal legislative requirements for retrocession concerning filing notice with the state governor or taking action in accordance with state law.[95]

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90 46 U.S.C. § 6961(a) (1988).

91 *Id.*

92 RESTATEMENT OF CONFLICTS OF LAWS § 425 (1934).

93 U.S. CONST. art. VI, cl. 12. *See* Irish, *supra* note 26, at 249.

94 *See* Irish, *supra* note 26, at 249.

95 *See* 10 U.S.C.S. § 2683 (Law Co-op. 1993):
Relinquishment of legislative jurisdiction; minimum drinking age on military installations. (a) Notwithstanding any other provision of law, the Secretary concerned may, whenever he considers it desirable, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State,

Despite such legal theories, environmental crimes committed on enclaves may still go unpunished. For example, *New Jersey v. Ingram*[96] illustrates the present state of the law and the need for retrocession of legislative jurisdiction. In violation of New Jersey's environmental sanctions, Mr. Ingram abandoned several drums containing hazardous waste about one-fourth mile off Route 130 in New Jersey down a dirt road. By happenstance, however, he dumped the chemicals in an area under exclusive federal legislative jurisdiction. Initially at trial, the court accepted the government's assertion that 42 U.S.C. § 6961 waived sovereign immunity, gave the state authority to regulate disposal of hazardous waste within the state, and thereby granted the court jurisdiction. The defendant, however, subsequently moved to dismiss the case for lack of territorial jurisdiction and, as the New Jersey Supreme Court determined, although the statute's terms waived "sovereign immunity for acts by the Federal Government, its agencies and officers but [it] in no way act[ed] as a blanket relinquishment of jurisdiction by the Federal Government over its own land."[97] Since the state lacked jurisdiction because the dump site was an enclave, the criminal charges were dismissed with prejudice.

There are numerous other jurisdictional issues in the environmental arena. This one area shows that retrocession of exclusive legislative jurisdiction would further Congress' goal to encourage state environmental regulation and enforcement on federal enclaves.[98] Prior retrocession by the Corps of Engineers in New Jersey would have ensured the conviction of Mr. Ingram. Retrocession on installations will avoid similar situations and eliminate many other issues in the complex environmental enforcement area.

VI. Retrocession — The Obvious Answer?

The continued existence of problems inherent with exclusive legislative jurisdiction highlight the merits of retrocession. This sec-

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Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction under this section may be accomplished (1) by filing with the Governor (or, if none exists, with the chief executive officer) of the State, Commonwealth, territory, or possession concerned a notice of relinquishment to take effect upon acceptance thereof, or (2) as the laws of the State, Commonwealth, territory, or possession may otherwise provide.

Id. 40 U.S.C. § 255 has similar requirements.

[96] New Jersey v. Ingram, 545 A.2d 268 (N.J. Sup. Ct. 1988).

[97] *Id.* at 685. *See also* California v. Walters, 751 F.2d 977 (9th Cir. 1984) (holding waiver of sovereign immunity does not extend to criminal sanctions).

[98] *See* H.R. REP. No. 95-294, at 199, 200, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1279. The House Committee statement relative to the Clean Air Act indicated that the waiver of immunity reflected the committee's desire to subject federal facilities to all federal, state, and local requirements.

tion focuses on retrocession procedures, Department of the Army [hereinafter DA] policy regarding retrocession, and general impediments to retrocession that persist.

A. *Retrocession Procedures*

Retroceding, or relinquishing jurisdiction over federal areas is not a difficult process. Congress has authorized the Secretaries of the military departments to relinquish all or part of federal legislative jurisdiction to the state.[99] The request for retrocession, however, must originate with the installation commander.[100]

An installation commander must forward his request to the Chief of Engineers (CERE-MM), the district engineer having responsibility for that particular geographical area. The district engineer then prepares an "assembly." The assembly includes: (1) a color coded map of the installation indicating boundaries of the proposed jurisdiction and the jurisdiction of adjoining land; (2) a metes and bounds boundary description; (3) a statement describing the types of jurisdiction over the installation and an explanation of the reasons for the proposed retrocession; (4) copies of state law authorizing state acceptance of the change in jurisdiction; and (5) a draft letter or other instrument necessary to effect change of jurisdiction. As part of the process, the district engineer must consult with the local

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[99] See 10 U.S.C. § 2683 (1994):

> Relinquishment of legislative jurisdiction; (a) Notwithstanding any other provision of law, the Secretary concerned may, whenever he considers it desirable, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction under this section may be accomplished (1) by filing with the Governor (or, if none exists, with the chief executive officer) of the State, Commonwealth, territory, or possession concerned a notice of relinquishment to take effect upon acceptance thereof, or (2) as the laws of the State, Commonwealth, territory, or possession may otherwise provide. (b) The authority granted by subsection (a) is in addition to and not instead of that granted by any other provision of law.

Id. Under 40 U.S.C. § 319 (1994), the Department of the Army is authorized to relinquish jurisdiction over public roads that traverse the installation by filing a notice of relinquishment with the state governor to take effect upon acceptance or by proceeding in accordance with state law.

[100] According to *AR* 405-20, a request for retrocession of legislative jurisdiction to the state will be initiated by "major field commanders, Headquarters, Department of the *Army,* chiefs and executives having command responsibilities." AR 405-20, *supra* note 2. United States Army Corps of Engineers (the proponent) training materials, however, require that the initial request come from the installation commander. UNITED STATES *ARMY* CORPS OF ENGINEERS, REAL PROPERTY MANAGEMENT HANDBOOK, MODULE 13, JURISDICTION (UNDATED). [Hereinafter HANDBOOK].

United States Attorney and include in the assembly any remarks or recommendations of the United States Attorney.[101]

The district engineer forwards the completed assembly through the major commander for approval or recommended denial to the chief of engineers (HQDA (DAEN-REM-U)). The chief of engineers makes a recommendation and forwards the assembly to the Secretary of the Army for the retrocession of unnecessary federal jurisdiction on the installation.[102] Once approved, the enclave residents and employees will obtain the various rights and benefits of state citizens.

B. Department of the Army Retrocession Policy

The military services, including DA, already recognize that exclusive legislative jurisdiction often results in many disadvantages and a loss of benefits for enclave residents. *Army Regulation* ***405-20,*** *Acquisition of Real Property and Interests Therein*,[103] cites the following disadvantages: "the loss of State or local fire, police, and sanitation services, and the denial of rights incident to residence or domicile such as attendance at State or local schools, right to vote, and access to the authority of State or local courts, officials, or laws in matters relating to probate, domestic relations, notarization, and inquest."[104]

Additionally, the Corps of Engineers has published an extensive list of potentially lost rights and benefits for areas of exclusive jurisdiction, including the following: state law enforcement; applicability of state civil and criminal law, along with access to state courts; diversity jurisdiction; road maintenance; fire protection; trash and garbage removal; sewage disposal; voting, holding office; children's education; in-state fees for state college and university attendance; admission to practice law, medicine and other professions; jury service; acting as executor of a will or administrator of an estate; public hospitals; orphanages; asylums; notarization; inquests; divorce; adoption; probate; guardianship; child protection; mental incompetent commitment; lower cost hunting and fishing; and relief benefits for the poor.[105] Some or all of these benefits may be provided on enclaves, depending on local agreements (whether constitutional or not) and the constantly changing law.

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101 **Letter** from **Department of Defense General Counsel William H. Taft IV to** Army, **Navy, and Air Force General Counsels (May 10, 1983) (on file with the Secretary of Defense and General Counsels' offices).**

102 *See AR* **405-20,** ***supra*** **note 2; HANDBOOK,** *supra* **note 100.**

103 *AR* **405-20,** *supra* **note 2.**

104 *Id.* **para. 6.**

105 HANDBOOK, ***supra*** **note** 100.

Well aware of the problems on enclaves and after thorough studies of federal jurisdictional issues, the **DA** has developed a "give it back" policy regarding legislative jurisdiction. Essentially, the **DA** policy is to retrocede unnecessary federal legislative jurisdiction back to the state. Furthermore, the Army has found that retrocession is particularly appropriate for jurisdiction over public roads that traverse or border a military installation.[106]

As for new acquisitions, the **DA** policy is to acquire only a proprietary interest in land and not to receive any degree of legislative jurisdiction except under exceptional circumstances.[107] Moreover, only in exceptional cases will the federal government acquire concurrent legislative jurisdiction, such as when necessary to furnish or augment state or local government-rendered law enforcement.[108]

As reflected by the **DA** policy, relinquishing federal jurisdiction to the state will not abandon federal interests—the United States Constitution's Supremacy Clause still protects the federal government.[109] **As** a result, federal law will always preempt or supersede state law where Congress indicates federal preemption in the statutory language; where Congress indicates the intent to preempt state law in a specific field; or where a conflict arises between state and federal law.[110]

In areas of concurrent or partial legislative jurisdiction or when the federal interest is only proprietary, sufficient legislative and constitutional safeguards generally exist to ensure protection of federal interests.[111] Retrocession from exclusive to concurrent legislative jurisdiction (rather than proprietary) is appropriate in areas where federal police protection or augmented local law enforcement

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106 AR **405-20,** supra note **2,** para. 5.

107 Id.

108 Id. para. 6.

109 U.S. CONST. art. VI, cl. 2.

110 Hillsborough County, Florida v. Automated Medical Laboratories, **471** U.S. **707 (1985).**

111 Federal laws which apply irrespective of legislative jurisdiction ensure protection of federal interests where federal legislative jurisdiction is lacking. See U.S. CONST. art. 6, cl. 2, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding." See also *id.* art. **4,** § 3, cl. 2: **"The** Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This clause is broadly construed to include not only the land itself but also activities on the land. Kleppe v. New Mexico, **426** US. **529** (1976). 50 U.S.C. **§ 797 (1950)** (implemented by DOD Directive 5200.8) makes it a misdemeanor for anyone to violate a commander's order or regulation relative to the protection or security of the installation. **18** U.S.C. § 1382 prohibits anyone from entering, or re-entering after being removed, for any purpose prohibited by law.

is necessary.[112] This may be the case with an installation that owns a large amount of land, has a large population, is in a remote location, or is located within local or state governments that are unable to meet the installation's needs.[113]

Title 40 U.S.C. § 318 also might be a factor in deciding what type of legislative jurisdiction to obtain when initiating retrocession-either concurrent legislative jurisdiction or a lesser degree of jurisdiction. This federal provision authorizes the federal government to appoint uniformed guards, but only applies to areas of exclusive or concurrent jurisdiction. Specifically, this statute authorizes the appointment of uniformed guards as special policemen with powers as sheriffs and constables to enforce laws that protect persons and property, to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce other rules and regulations.[114]

C. *Impediments to Retrocession*

With the benefit of a streamlined retrocession process and a positive Army policy, the most significant impediment to retrocession may be simple ignorance. Without continuity on an installation and an opportunity to focus on legislative jurisdiction, it is very likely that retrocession will never be fully evaluated as an alternative available to resolve federal state relations issues. Community leaders may, for example, focus on the existence or nonexistence of relationships with local officials as a key to obtaining services or assistance, rather than identifying jurisdiction as a problem. Failure to consider retrocession also may stem from deference to the status quo, or fear of negative implications associated with giving up something "on my watch." It is also possible that misperceptions regarding the authority of the state over the installation pervade consideration of retrocession as an alternative. For example, a commander may fear that concurrent jurisdiction will facilitate harassment of the military community by local law enforcement, or even unnecessary detention of juveniles and adults by the state. Whatever the perceived impediment, there is little justification for failing to consider the advantages that retrocession may provide.

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112 *AR* 405-20, *supra* note 2, para. 6.

113 *Id.*

114 40 U.S.C. § 318 also permits the General Services Administration (GSA) to make, and delegate, certain needful rules and regulations. In 1981, the GSA delegated to the Secretary of Defense authority to make rules and regulations governing vehicular and pedestrian traffic on military installations of the DOD as defined in 40 U.S.C. § 612, where the United States has exclusive or concurrent jurisdiction. A violation of those rules or regulations is a misdemeanor. See GSA Directive 5525.4 (Nov. 2, 1981).

VII. Facilitating Retrocession—Agency Level Recommendations

Policy, procedures, and common sense have suggested for many years that retrocession should be affirmatively considered as an across the board alternative to exclusive legislative jurisdiction. Despite this fact, affirmative efforts to retrocede jurisdiction are slow to develop. This section focuses on two agency level initiatives focused on facilitating retrocession.

A. Draft Legislation

A review of the procedural history behind exclusive federal jurisdiction offers a potential remedy to much of the impact of exclusive federal legislation. That remedy would be to formally write the Supreme Court's decision in *Howard*[115] into federal law. Congress already did this in a piecemeal fashion through its efforts to address taxation and other specific issues, but a consolidated focus on subjects where friction is not an issue makes sense. This would provide an obvious opportunity to clarify issues regarding juveniles, family law in general, and myriad other issues. It would also allow for correction of inconsistencies created by differing applications of the McGlinn decision.

B. Revised Department *of* the Army Policy

To ensure that the potential benefits of retrocession are fully considered in all exclusive legislative jurisdiction enclaves, a revision of DA policy may be in order. Specifically, while current policy places responsibility for initiating retrocession in the hands of the installation commander, a more proactive policy would require the installation commander to justify a decision not to retrocede property under exclusive jurisdiction. Guidance implementing this change could provide for exceptions for specific high security facilities, or otherwise clearly delineate factors justifying exclusion.

VII. Conclusion

Attorneys assigned to installations, especially those containing a significant civilian population, should inventory and assemble the types of legislative jurisdiction on their installations.[116] Once instal-

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115 **Howard v. Comm'rs of Sinking Fund of City of Louisville, 344** U.S. **624 (1953).**

116 **The Chief of Engineers (DAEN-REM-U) furnishes copies of the types of legislative jurisdiction to The Judge Advocate General (HQDA (DAJA-LD)), who in turn furnishes copies to installation commanders and district engineers. The Chief of Engineers maintains all documents evidencing federal acceptance or retrocession of legislative jurisdiction relating to installations.** *Also,* **questions concerning the degree**

lation jurisdictional information is assembled, an analysis of the differing degrees of legislative jurisdiction is required. If exclusive legislative jurisdiction exists on any part of the installation, the commander should consider retrocession action. Only exceptional circumstances warrant retention of exclusive legislative jurisdiction. Army policy is to retrocede unnecessary federal legislative jurisdiction to the state concerned and acquire only proprietary interests.[117] Attorneys should focus their efforts on helping commanders to determine the degree of jurisdiction required to accomplish their mission and foster support for retrocession of the excess.

Proactive efforts to retrocede unnecessary exclusive legislative jurisdiction can have far-reaching and positive implications for our military communities. Concurrent legislative jurisdiction, the most obvious alternative, automatically provides assimilation and application of state law on the installation. As a result, criminal prosecutors and courts will *know* better what law applies; states will *know* they can deal with juveniles; law enforcement authorities and child and spouse protection agencies will *know* they are not subjecting themselves to personal liability; and states will *know* that their environmental requirements are enforceable.

Given the dynamic nature of federal-state relationships and our need to support the common interests of our military and civilian communities, analyzing the potential for retrocession is not a question of if, but when. If the benefits of retrocession outweigh the detriments of exclusive jurisdiction, then just get rid of it.

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of legislative jurisdiction existing on particular lands can be forwarded to the Chief of Engineers, HQDA (DAEN-REM-U), Washington, D.C. 20314. AR 405-20, *supra* note 2, para. 9 b., c.

[117] *Id.* para. 5.

INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS*

REVIEWED BY LIEUTENANT COLONEL H. WAYNE ELLIOTT**

Seventeen year old Joelito Filartiga was tortured and killed in Paraguay in 1976. His death occurred while he was in police custody. Americo Norberto Pena-Irala, the Inspector General of the Paraguayan police, was responsible. Young Joelito was the son of Doctor Joel Filartiga, a long-time opponent of General Alfredo Stroessner, then head of the Paraguayan government. Doctor Filartiga commenced a criminal action in the Paraguayan courts against Pena-Irala charging him with murder. The case languished in the courts of Paraguay.

In 1978, Pena left Paraguay and came to the United States on a visitor's visa. When the visa expired, he illegally continued living in New York. Doctor Filartiga's daughter lived in Washington, D.C. at the time and, learning of Pena's presence in New York, she notified the Immigration and Naturalization Service. Pena was arrested and, in April 1979, ordered deported. While Pena was incarcerated in New York, he was served with a civil summons and complaint alleging that he was responsible for Joelito's death and demanding $10,000,000 in compensatory and punitive damages.

Thus began one of the most significant lawsuits in American jurisprudence concerning the relationship between international law and United States law. The case was filed under a 1789 jurisdictional statute, the Alien Tort Claims Act [ATCA].[1] The district court dismissed the case for lack of subject matter jurisdiction, construing the statute narrowly as not applying to cases in which a state mistreats its own citizens.[2] In 1980, the United States Court of Appeals for the Second Circuit reversed the district court and found jurisdiction because "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international

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* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Transnational Publishers, 1996), 377 pages; $95.00 [hereinafter LITIGATION].

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1 28 U.S.C. § 1350 (1988) [hereinafter ATCA].

2 Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980).

law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process within United States borders, the ATCA provides jurisdiction."[3] On remand, the defendant, Pena-Irala, defaulted and judgment was entered for the Filartigas.[4]

Filartiga v. Pena-Irala was hailed as the threshold for a new era in human rights law.[5] Clearly, acts that violate fundamental human rights might lead to criminal trials. With ***Filartiga,*** there was judicial recognition that they might also subject the violator to civil penalties in United States courts. Litigation in such cases would be incredibly complicated, but it was not impossible, and success was not totally improbable.

The 1789 statute had been rarely used or even mentioned. Its origins had long since been relegated to the dustbin of legal history.[6] No useful legislative history is available, and the language of the statute is fraught with ambiguity: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[7] With ***Filartiga,*** new life animated the old statute.

Yet a fundamental problem remained. What sort of tort was a violation of the law of nations? In 1985, the utility of the ATCA as a basis for exercising jurisdiction over lawsuits alleging torts committed abroad was again questioned. In *Tel-Oren v. Libyan Arab Republic*,[8] the United States Court of Appeals for the District of Columbia affirmed the lower court's dismissal of the case for lack of subject matter jurisdiction. The suit alleged that the defendants were responsible for a terrorist attack on **a** bus in Israel in which several innocent persons were killed. The three circuit judges wrote separate opinions, but at least part of the judges' mutual concern was how one would legally define **a** tort "in violation of the law of nations.''

In 1992, Congress solved part of the definition problem by passing the Torture Victim Protection Act [TVPA].[9] The TVPA is

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3 *Id.* **at** 880.

4 577 F. **Supp.** 860 **(E.D.N.Y.** 1984).

5 **"Human rights" is an evolving concept. Most of the conventional law concerning human rights dates from World War 11.** *See generally* **Kenneth C. Randall,** *Federal Questions and the Human Rights Paradigm,* **73 MINN. L. REV.** 349, 388-395 (1988).

6 **"[N]o one seems to know whence it came." IIT v. Vencap, Ltd.,** 519 F.2d 1001, 1015 (2d **Cir.** 1975).

7 **ATCA,** *supra* **note** 1.

8 726 F.2d 774 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1003 (1985).

9 Pub. L. **No.** 102-256, 106 **Stat.** 73 (1992) **(codified with ATCA,** *supra* **note 1).**

more than just a jurisdictional statute. It also sets out the tortious acts which create civil liability under the statute:

> An individual who, under actual or apparent authority, or under color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[10]

Now, with the "rediscovery" of the ATCA and the passage of the TVPA, United States courts are, without doubt, empowered to hear lawsuits alleging certain violations of international human rights law. The mobility of individuals, the interaction of world economies, and the position of the United States as a center of world trade and politics make it increasingly likely that a person accused of human rights violations might be found in the United States. If found and properly served, that person can be made a defendant in a lawsuit in United States federal court.

Plaintiffs have filed cases in United States courts and more can be expected. In the book ***International Human Rights Litigation in U.S. Courts,*** Beth Stephens and Michael Ratner provide a practitioner's guide for how such lawsuits have been and will be conducted. The authors are associated with the Center for Constitutional Rights in New York. Center lawyers developed the concept of using the ATCA to sue for violations of human rights and are at the forefront of this evolving area of the law.

The book is written as a "how to" manual for human rights tort cases. Divided into three sections and twenty chapters, the book takes the reader through the process from beginning to end. Section A is entitled ''Overview of a Case." The background of the ATCA and the TVPA is explained in the first two chapters. Also discussed here are several of the cases which have been brought under the two statutes. The authors then turn to an examination of who can sue for what and who can be sued for what. The ATCA is limited to suits

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10 *Id.* § 2 (a). **Some might fear that by "explicitly providing a cause of action for these two precise torts, Congress may have, by negative inference, excluded other human rights violations from judicial review." Jennifer Correale, *The Torture Victim Protection Act: A vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT'L. L. REV. 197, 215 (1994). This fear would seem to be assuaged by the fact that Congress chose not to change the older statute. Thus, "Jurisdiction under the ATCA, as opposed to the TVPA, would be proper not only where claims other than torture and extrajudicial killing are at issue but where a foreign government is made a defendant." *Id.* at 217.**

filed by aliens. American citizens could not bring a suit under that statute. However, under the newer TVPA, there is no such nationality limitation. A suit brought under the ATCA could allege any violation of the law of nations as the basis for the cause of action. A suit under the newer TVPA is limited to acts of torture or extrajudicial killing. Success is much more likely where the acts alleged are "characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms."[11] Chapter 5 offers some suggestions for finding and proving rules of international law which have such a binding status. In Chapter 6, seven human rights violations which the authors find to meet the ATCA standard are discussed. The seven human rights violations that meet the ATCA standard include torture, summary execution, genocide, war crimes, disappearance,[12] arbitrary detention, and cruel or degrading treatment. These seven are taken from cases filed in United States courts. However, as new norms for human rights are established, new torts will be recognized, and this list will grow.

Who can be sued is discussed in Chapter 8. The TVPA limits the defendant to "individuals." A suit under the ATCA might conceivably be brought not only against individuals but against governments (but a defendant government would likely plead immunity). Of particular interest to the military attorney is the discussion of civil liability based on the doctrine of command responsibility. That the commander can be held criminally liable for the actions of troops under his command which violate the law of war and are committed with his approval or knowledge is well settled.[13] Legal debate today usually centers on whether criminal liability should also be found when the commander "should have known" of the actions of his subordinates. The question of civil liability is an open question.

One completed case considered the command responsibility issue in a civil suit. In *Xuncax v. Gramajo*,[14] a federal district court held the defendant, Guatemalan General Hector Gramajo, civilly liable for the criminal "acts of members of the military forces under his command."[15] The court based its finding on two factual scenarios. First, Gramajo ordered and directed the abuses.

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[11] **Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).**

[12] **A "disappearance" requires, first, a seizure of a person by state officials and, second, a refusal by those officials to acknowledge the seizure or disclose the detainee's fate.** LITIGATION, *supm* **note *, at 74.**

[13] ***See, e.g., In re* Yamashita, 327** U.S. **1 (1946); William H. Parks,** *Command Responsibility for War Crimes*, **62** MIL. **L.** REV. **1 (1973).**

[14] **886 F. Supp 162 (D. Mass. 1995).**

[15] ***Id.* at 171.**

Second, "he was aware of and supported the widespread acts of brutality committed by personnel under his command"[16] and "refused to act to prevent such atrocities."[17] In short, Gramajo could be said to have both first and second-hand civil liability,

In *Xuncax*, the plaintiffs did not rely on the "should have known standard" but alleged the personal involvement of the defendant in the tortious acts. However, the recently filed case against Bosnian Serb leader Radovan Karadzic specifically alleges that the defendant "knew or should have known of the . . . actions of his troops and failed to prevent or punish said actions."[18] Stephens and Ratner suggest that plaintiffs who bring a suit that alleges the defendant's liability under the doctrine of command responsibility "explain the link between the defendant and those who committed the abuses at issue, specifying why the defendant can be held liable for abuses actually committed by other people."[19]

In Section **2,** the authors discuss some of the issues which a suit brought under the TVPA or the ATCA might engender. Clearly, a defendant will attempt to challenge the jurisdiction of the court. It can be expected that one challenge would be that the act alleged occurred outside the United States. Another challenge might be that there is no constitutional basis for the jurisdictional grant by Congress. The authors refute both of these possible jurisdictional challenges. It is a settled principle that international law is a part of the law of the United States,[20] and certainly Congress could grant jurisdiction to federal courts for violations of United States law, regardless of where the violation occurred.

Immunity is a more difficult issue in these tort cases. Recognized governments are generally immune from suit in United States courts. The exceptions to that immunity are codified in the Foreign Sovereign Immunities Act.[21] The extensive immunity granted foreign governments, however, does not extend to individuals, even those who might have committed the acts while serving in an official capacity. A defendant official may well argue that the acts alleged, if they occurred at all, were committed under the law of the foreign state. Nonetheless, where the suit is based on violations of fundamental human rights, it is unlikely a United States court would find such violations to be immunized because "summary exe-

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16 *Id.* at 172.
17 *Id.* at 173.
18 LITIGATION, *supra* note *, at 103.
19 *Id.*
20 **The Pacquete Habana,** 175 U.S. 677 (1900).
21 28 U.S.C §§ 1330, 1602-11 (1988).

cution and other gross violations of human rights can never be within an official's scope of authority. Such acts are illegal in every foreign state and rarely, if ever, will be explicitly authorized by the foreign state."[22]

For the defendant, building a defense around the idea that an act of torture should be excused because it was lawful where it was committed is a very shaky defense. The defense becomes even more unstable considering that a foreign state is not likely to come before a United States court and argue that torture is permitted under its laws and that individuals sued in their private capacity should escape liability for violations of human rights.

Section **3** sets out the "nuts and bolts" of how a lawsuit brought on the ATCA or the TVPA should be pursued. The chapters in Section **3** explain the fundamentals of drafting and serving the complaint, making good use of the discovery process, and proving the case in court. Of course, because this a civil suit, part of the relief sought most assuredly will be monetary damages. This can be somewhat problematical because not all countries permit the imposition of punitive damages and that can raise choice of law issues for the court. Thus far, courts that have considered the issue have agreed with the plaintiffs that punitive damages may be adjudged, and the awards have been substantial.23

As every law student knows, it is easier to get a judgment than to enforce it. This is especially true where the defendant may no longer be in the United States and may have no assets in the United States. However, it is possible to enforce a United States judgment in a foreign country and the authors provide a discussion of how that might be done. Yet, one must be realistic and accept that few, if any, of these monetary judgments will be collected, if ever, in a timely fashion.

Nonetheless, that it may be difficult or impossible to enforce a judgment against a defendant does not mean that the lawsuit should not be brought. To be found responsible for violations of universally recognized human rights carries a stigma which few individuals would relish. Once identified, there is always the chance that the defendant's own country may decide that there is no reason to protect him from the long-arm of the law. Even more important than a monetary award, perhaps, is the satisfaction that the plain-

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[22] LITIGATION, **supm note** *, **at** 128.

[23] **The plaintiffs in Gramajo were awarded** $47.5 **million. The jury awarded the plaintiffs who sued the estate** of **Philippine leader Ferdinand Marcos almost** $2 **billion.** ***Id.*** **at** 241-42.

tiff derives from finally getting his day in court and thereby documenting and publicizing the inhumanity of the defendant.

The authors conclude the book with several appendices. Included are summaries of the cases brought thus far, the TVPA and its legislative history, complaints, likely motions, and excerpts from jury instructions. Few lawyers are familiar with these statutes or are familiar with how litigation based on the statutes might proceed. This book should be the starting point in that familiarization process.

Military attorneys who work with the law of war are familiar with the criminal consequences of violating that part of international law. Provisions concerning the payment of compensation for violations of the law of war are included in both the Hague Regulations of 1907[24] and the Geneva Conventions of 1949.[25] Neither treaty explains how to enforce the law and the past practice has been to subsume such claims in the peace agreements at the end of the conflict. However, through these two statutes and the budding litigation under them, it would be quite possible to sue the individual responsible for violations of the law of war in a United States court. While the TVPA is limited to situations where the defendant was acting under the color of law of a foreign nation, the ATCA has no such limitation. The import of this is that even United States soldiers could be sued by an alien plaintiff for the commission of acts which constitute a "tort only, committed in violation of the law of nations." Clearly, acts which constitute violations of the law of war would also serve as factual predicates for such torts.

People and their assets move from one nation to another with much greater frequency than just a few years ago. It is not unlikely that some human rights abusers will make their way to the United States. In *Abebe-Jiri v. Negewo*,[26] the plaintiff had been tortured in

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[24] *Art.* 3, Hague Conv. No. IV Respecting the Laws and Customs of War, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631 ("A belligerent party which violates the provisions of said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.").

[25] "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [grave breaches]. *Art.* 51, Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31; Art. 52, Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked of the Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85; *Art.* 131, Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[26] 72 F. 3d 844 (11th Cir. 1996).

Ethiopia in 1978 to 1979. She eventually made her way to the United States and found a job working in an Atlanta hotel. Ten years after her torture, she recognized the man responsible. He worked in the same hotel. A lawsuit was filed. The defendant represented himself, lost, and the plaintiff was awarded $1.5 million. As the Disney attraction says, "It's a small world after all." Bringing those who are responsible for violations of human rights before the bar of justice is no longer a Quixotic quest. The precedents exist, and this book provides a map to the federal courthouse.

It was not without a little trepidation that I undertook the review of this book. The fundamentals of international law and the doctrinal development of human rights law is fairly familiar to most lawyers. However, at least for this reviewer, the steps required to convert those fundamental principles into a cause of action in federal court and perhaps gain a money judgment were distant memories from law school. This book brings the process into focus and does so in a "hornbook" approach to the subject. Those who deal with the international law of human rights would do well to keep the book handy. It describes the cutting edge of a new weapon in the arsenal of international law-civil suits in United States courts.

The late Professor Richard B. Lillich wrote the foreword to *International Human Rights Litigation in U.S. Courts*. He described the volume as a "scholarly yet eminently practical book of great interest and use to all human rights lawyers in the U.S."[27] This reviewer agrees and would only add that the title "human rights lawyer" really should apply to us all.

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[27] LITIGATION, supra note *, at xxi.

AND THE BLOOD CRIED OUT*

REVIEWED BY MAJOR JAMES C. MALLON**

The twenty-sixth day of February, 1993, was a cloudy, cold weekday in New York City That afternoon, an explosion ripped a 200 foot hole through four floors of the World Trade Center, killing six people and injuring over 1000.1 The bomb detonated in the underground parking lot at the World Trade Center, and was, at the time, the "single most destructive act of terrorism ever committed on American soil."[2] The blast's shockwave rapidly spread across the country. The nation's best criminal investigators quickly focused on identifying the culprits and bringing them to justice. On 1 March, 1993, an anonymous letter arrived at the *New York Times* claiming responsibility for the bombing. This letter, or more precisely the flap of the envelope, became one of the prosecutors' key pieces of evidence. Remarkably, the Federal Bureau of Investigation's **DNA** analysis helped identify one of the suspects from the dried saliva on the envelope's flap.

The 1980s saw the advent of DNA analysis, and the criminal justice system quickly embraced the newfound technology. Unlike the fingerprint, which took 118 years to be accepted as a means of identification,[3] the acceptance of **DNA** analysis as an investigative tool took exactly ***three years*** from laboratory to courtroom. Along the way, there were spectacular successes, such as the Trade Center bombing investigation; however, there have been setbacks. Where do we stand now, after the O. J. Simpson case? The public was promised a genetic fingerprint, but now the public believes it was duped. Many feel the technique is confusing, misleading, and discernible only by those with advanced degrees. Is DNA analysis still a viable tool for criminal investigators, prosecutors and the defense bar? Can the courts rely on such evidence? In ***And the*** *Blood* ***Cried***

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* HARLAN LEVY, AND THE BLOOD CRIED OUT (Basic Books 1996), 199 pages.

** United States Marine Corps. Written while assigned as a Student, 45th Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

1 Brian Duffy, A. Martinez, Douglas Pasternak, A *Towering Mystery with Suspect in Custody, the Motive for the Bombing Remains Elusive,* U.S. NEWS AND WORLD REPORTS, Mar. 15, 1993, at 27.

2 *Id.* (quoting Gilmore Childers, the Assistant U.S. Attorney prosecuting the case).

3 ANDRE A. MOENSSENS, FINGERPRINTS AND THE LAW 1, 37 (1969). In 1788, J.C.A. Mayer was the first to theorize that no two individuals have the same fingerprints. The first conviction in the United States using fingerprint evidence was in a 1906 New York case.

Out, author Harlan Levy takes us on an exhilarating roller coaster ride through the legal and societal implications of DNA analysis. A thoroughly enjoyable and completely understandable discourse on DNA, litigators will love Levy's blend of technology and trial tactics.

Mr. Levy's personal introduction to the use of deoxyribonucleic acid, or DNA, analysis came in 1987, when he was a new Manhattan Assistant District Attorney. Previously, he had worked for a major New York law firm for several years but became disillusioned by the firm's skewed priorities. ***An*** energetic idealist, he gave up his generous salary and moved to the district attorney's office. As a district attorney, his sole priority was the pursuit of justice. Having left the "win at all costs" world of the private law firm, he saw the opportunity to do what was "right" as a public servant, and DNA quickly caught his attention. Irresistibly intrigued, he set out to learn as much as possible about this revolutionary technique. In DNA, he saw the path to justice—armed with DNA evidence, an attorney would have the ability to irrefutably implicate the guilty and completely exonerate the innocent.

The duty of a prosecutor is to seek justice, not merely to convict,[4] and charges should never be brought where probable cause is lacking. This is a heavy ethical burden on prosecutors, especially in cases where all that exists is questionable circumstantial evidence or shaky eyewitness testimony. Our criminal justice system seeks to balance society's right to protect itself and the defendant's right of due process. We go to great lengths guarding against any erosion of due process—to the point where illegally seized evidence is suppressed and potentially coerced statements are not admitted. As Mr. Levy puts it, "The law is willing to sacrifice justice in individual cases rather than undermine the constitutional safeguards that protect the individual from the power of the state."[5]

In Mr. Levy's opinion, DNA evidence avoids the normal balancing between society's rights and individual due process. DNA evidence goes right to the heart of the matter—the truth. The technique does not typically involve suspicions of coercion or violations of Constitutional safeguards. It is objective evidence. Like a fingerprint or a photograph, it either implicates or exonerates. Clearly, there are circumstances where the presence of DNA evidence may have innocent explanations. Likewise, there are occasions when the lack of DNA evidence is nevertheless consistent with guilt. Generally speaking, however, this scientific technique assists the prosecutor in clearing that first ethical hurdle of determining

4 ABA STANDARDS FOR CRIMINAL JUSTICE, **Standard 3-1.2 (1993).**

5 HARLAN LEVY, AND THE BLOOD CRIED OUT 21 (1996).

whether to go forward. Eventually, like any other objective evidence presented to the finder of fact, it typically results in justice.

For the average person—one without a doctorate in chemistry—DNA analysis is as puzzling as it is overwhelming. Mr. Levy, however, simplifies the process. In four pages, he does what lengthy dissertations have failed to do—explain what DNA analysis really is, plainly and precisely. To make the complex more understandable, he dives into the disturbing world of violent crime, giving us real world examples of the strengths and weaknesses of DNA analysis. On the one hand, Edward Honaker is pardoned by Virginia Governor George Allen after nine years of imprisonment based primarily on DNA tests reflecting the wrong man had been convicted. On the other hand, its technical terms thoroughly confuse jurors, as it did in the O.J. Simpson trial. His vignettes of the virtues and vices are riveting and shocking. At each turn, the reader confronts a different psychopath and follows Mr. Levy through the criminal process as he highlights the role DNA analysis plays in solving crimes and prosecuting criminals.

The book's title has biblical roots. When Cain murdered Abel, an angry God confronted Cain, asking 'What have you done? Hark, your brother's blood cries out to Me from the ground!" As the author states, 'Thousands of years would go by before blood would cry out again and positively identify a murderer."[6] The first time DNA was used to solve a homicide was in 1987. In its debut, this remarkable new technology lived up to its billing—it exonerated seventeen-year-old George Howard of two brutal rapes and murders, and subsequently identified the psychopathic perpetrator. Since then, the technique's proponents have had to overcome numerous obstacles offered by its critics.

Why are there problems with DNA analysis? Why is DNA not a genetic fingerprint? No two people have the same DNA. However, the technique does not examine the whole DNA, only fragments of each DNA strand. It is similar to taking a portion of a fingerprint and asking an expert to identify an individual based on that portion. In this case, it would be impossible for an expert to positively identify an individual. The expert may, nonetheless, be able to give the odds of someone else having those same characteristics.

Mr. Levy is a fervent defender of the use of DNA analysis as an investigative and prosecutorial tool. He does not, however, shy away from the problems associated with the technique. He addresses the issues using real events, making it crystal clear where the "battle

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[6] *Id.* at 17.

lines" are drawn, rebutting critics' attacks or validating weaknesses and offering practical solutions. His approach is methodical and organized and takes the reader on a chronological journey highlighting the issues.

Among other things, he addresses the adequacy—some would say "inadequacy"—of laboratory controls. He also discusses the need for prosecutors to stand by the technique even when the results of the analysis seemingly refute the government's theory. The credibility of the technique had to be established. Prosecutors could not rely on beneficial DNA tests in one instance and deny their accuracy in another case. Additionally, he confronts one of the most difficult issues in DNA analysis—the astronomical statistics used to illustrate the significance of a match. Experts typically testify that the odds of a match are "one in a million." It is this staggering amount, coupled with the *possibility* of a match, that confuses the lay person. The match is *almost* unique, but not quite. Furthermore, the statistics change from race to race. Critics argued that DNA race and ethnicity statistics did not go far enough. However, in June **1993,** the Federal Bureau of Investigation approach of using broad racial classifications was buttressed by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[7] which held that the general acceptance standard no longer applied in federal courts.

Mr. Levy concludes by discussing in detail the DNA evidence presented during the **O. J.** Simpson trial. In Mr. Levy's opinion, there is a misperception about the validity of DNA analysis after the **O. J.** Simpson trial. Simpson's defense focused on alleged tampering by the investigators and sloppy handling of the evidence by the laboratory resulting in contamination. The defense did not, however, attack the validity of the technique. Regardless, many feel that the technique's reputation was hopelessly tarnished. Mr. Levy persuasively argues the contrary. In fact, he seems to opine that the defense's strategy recognized the presumptive objectivity of the technique. The "lesson learned" should be that investigators and laboratory technicians need to exercise extreme care in the handling of DNA evidence. Because it is so powerful an indication of culpability, and because the technique often overwhelms the average juror, prosecutors are frequently held to a higher standard in presenting this evidence.

Many litigators are intimidated by DNA analysis. It is a seemingly incomprehensible technique. They reasonably believe that since they do not understand it, they will never persuade jurors to accept it. The solution is, unfortunately, for both investigators and

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7 509 U.S. **579** (1993).

counsel to simply rely on other less intimidating evidence and forsake the opportunities DNA analysis offers. The advantage of Mr. Levy's book is that it helps the reader understand the science behind the technique. It precisely illustrates the advantages of the technique, as well as the weaknesses cited by critics, and is invaluable to both prosecutors and defense counsel. The key is to simplify the technique so that all the "players," especially jurors, understand DNA analysis. **And *the Blood Cried Out*** is thoroughly enjoyable and provides readers with a firm foundation for applying this invaluable tool.

PACIFIC DEFENSE*

REVIEWED BY CAPTAIN GREGORY E. LANG**

Look at what is in the newspapers:

North Korean Submarine Incursion Into South Korea

Okinawans Demand United States Military Forces Go Home

Chinese Naval Exercises in the Taiwan Straits to Intimidate Taiwan

Are these recent headlines random, isolated acts, or symptoms of a much larger Far East crisis yet to come? Kent Calder would no doubt argue the latter, for this is the question he poses and answers in his timely new book *Pacific **Defense.***

Kent Calder is currently the director of the United States-Japan Relations program at Princeton University's Woodrow Wilson School of Government. His book, ***Pacific Defense,*** illustrates the potential military and economic challenges facing the United States and the countries of the region he refers to as the North-East Asian Arc of Crisis. These countries include the People's Republic of China, Taiwan, North and South Korea, Japan, and Western Russia. After frightening readers with various trends and scenarios of economic strife and military conflict, Kent Calder offers ten "precepts" to cure what he perceives as an impending geopolitical crisis.

The central premise of this book is that the Arc of Crisis poses numerous and substantial threats to the military and economic interests of the United States. These threats stem from the destabilization caused by the fall of the Iron Curtain; the rapid economic growth of most of the countries of this region; dwindling United States economic influence (and possible military influence) in the region; and a looming energy crisis. In summarizing the threat to American interests, Calder states, "As the tortured road to Pearl Harbor showed so clearly, Asia is at its most turbulent and dangerous to the broader world when it is insecure."

In a somewhat ironic twist, Calder asserts that short-term economic gain and political reunification may, in the long run, lead to

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* KENT E. CALDER, PACIFIC DEFENSE (William Morrow and Co., Inc., New York), 253 pages, $25.00 (hardcover).

**Judge Advocate General's Department, United States Air Force. Written while assigned as a Student, 45th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

insecurity and military crisis. He envisions a worst case scenario where the economic influence of the United States in the Pacific continues its downward trend as the economies of the **Arc** of Crisis become more regional in focus. Next, North Korea, due to a worsening economic condition, accepts reunification with South Korea. With the Korean crisis resolved, the United States military presence greatly diminishes as Korea and Japan ask United States forces to leave or greatly scale back. The resultant power vacuum causes the countries of the **Arc** of Crisis to build up their own military forces. Finally, traditional historic rivalries, intensified by the increasing need for ever scarce natural resources, flare up and engulf the region in armed conflict with dire military and economic ramifications to the United States as it struggles to protect its national interests. Is this a far fetched prognostication? Kent Calder thinks not and he provides a great deal of evidence to back up this and other equally troubling scenarios.

I. Economic Growth and the Looming Energy Crisis

The countries of the **Arc** of Crisis are in the midst of unprecedented economic growth. Between 1990 and 1995, the economies of East Asia grew at nearly ten percent per year. The exploding auto manufacturing and air travel markets have led the way followed by energy intensive industries such as steel and petrochemicals. This growth is causing a tremendous increase in the demand for energy.

Historically, it has only been the Japanese who seriously competed for the energy supplies of East Asia. This is quickly changing as South Korea, China, and Taiwan become major economic powers. Unfortunately, these countries, like Japan, will soon become major oil importers. Economists predict that by the year 2010, Asian oil demand will be nearly twice that of 1993. To put it in some perspective, in 1990, Asian-Pacific regional oil demand exceeded that of Western Europe for the first time and is growing at a yearly rate of four percent, nearly double the rate of the rest of the world. The competition for scarce energy resources has obvious military implications, and the struggle for such resources has already begun. In the South China Sea, recent large energy discoveries led to a Chinese "land grab" for subterranean oil resources near the Filipino island of Palawan. Furthermore, China now includes the Natuna field, a large natural gas discovery off Indonesia, in its official maps. No other country recognizes the Natuna field as part of Chinese waters.

II. Military Growth

Now that the Cold War is over, the United States and most of its North Atlantic Treaty Organization partners have slashed military budgets and significantly reduced their armaments. Russia also cut its defense spending by forty-three percent from 1989 to 1994. However, this trend does not hold true for the countries of the Arc of Crisis. These countries are rapidly increasing the size and sophistication of their air and naval forces. For example, the defense budgets of Japan, China, Taiwan and South Korea have increased 87.5, **23,** 29.9, and **35.8** percent, respectively, from 1990 to 1995. Kent Calder notes that this is not just an upgrade of current weapon systems; it is a development of new systems as well. Disturbingly, China and Japan are currently in the midst of a large maritime buildup as both nations appear to be seeking full scale blue water navies.

Kent Calder notes that China, already in possession of numerous destroyers and frigates, has been "training aircraft carrier pilots and working on carrier technology, as well as acquiring both prospective carrier planes and attack submarines necessary for protecting a carrier task force." Within a decade, the Chinese will likely possess several aircraft carriers. Also, China is building new air bases to support its new Su-27 Flanker fighters and tanker aircraft, and China is making plans to produce its version of the Russian MiG-31 strategic interceptor. China has also purchased Tu-22 long range bombers, IL-76 military transports, and S-300 ground based antiballistic missiles. These increasing capabilities will allow China to enforce disputed territorial claims; claims which stretch to the coasts of Malaysia and Indonesia, nearly a thousand miles away. Of course, these new capabilities will also allow China to impose even more military pressure on Taiwan.

In response to these perceived threats, Taiwan is rapidly increasing the size and capabilities of its air and naval forces. In 1992, the Bush administration sold 150 F-16 fighters to Taiwan. Soon thereafter, Taiwan purchased an additional sixty Mirage 2000-5 multi-purpose combat jets from the French. Additionally, Taiwan has orders for twenty-eight frigates from the French and Germans, and Taiwan is building eight United States Perry-class frigates in its own shipyards.

South Korea, already in possession of a large, well-supplied army, also is in the midst of a large naval expansion. When completed, Korea will possess an additional seventeen destroyers, twenty frigates, fifty corvettes, and up to sixty-eight patrol boats, and will

be able to acquire a small aircraft carrier. South Korea also is acquiring **120** new **F-16s** and several Patriot missile systems.

Japan, although not presently engaged in an arms race, has what the author describes as an "enormous latent potential both to expand defense spending and to aid the efforts of others" and believes their future strategic choices may have "fateful regional and global consequences." Japan possesses highly advanced missile and aircraft technology and should it make the conscious decision to develop those capabilities, will be able to do so easily and efficiently.

111. Bringing Stability to the Arc of Crisis

According to Kent Calder, the waning influence of the United States, both economically and militarily, is an added dimension to the increasing instability of the region. As evidence, he cites statistics showing that "between **1986** and **1992** the share **of** East Asian exports flowing to the United States fell a full ten points, from **32** to **24** percent." In addition, East-Asian investments in the United States, particularly Japanese, are drying up because of staggeringly high losses in the United States real estate market and entertainment business. Also, Calder cites evidence of increasing hostility by the Japanese regarding our forces in Okinawa. The author believes this trend is likely to continue, particularly if reunification occurs between North and South Korea.

To cope with the problem of Pacific defense, Calder presents a list of ten "basic precepts." The central vein of these precepts is that the United States must recognize that Japan is more than just a "shadow power" that will remain loyal and peaceful because our economies are so linked. Calder believes this view is both naive and dangerous. One facet of the "old style" of thinking that Calder believes the United States should quickly abandon is the long-time strategy of using security commitments as a bargaining chip to elicit economic concessions from Japan. He feels this greatly undermines United States credibility in Japan.

Calder stresses that the focus of the relationship should be political problems and not just trade issues. For example, he emphasizes that the United States and Japan must address the cost of their defense arrangement which, contrary to popular beliefs, greatly favors the United States. His recommendations include getting the Japanese more involved in global peacekeeping missions and joint United States-Japan projects—projects that would help "convince the average American and Japanese . . . that the transpacific relationship holds something of value for them personally."

Regarding China, Calder asserts that energy aid in the form of cooperative agreements is in urgent need. In exchange, the United States should insist that China accept international standards regarding intellectual property and foreign investment. He would also include China in mutually beneficial endeavors such as "energy, food, fisheries and environmental protection."

Calder notes that South Korea deserves the special efforts and attention of the United States, mainly in the area of economic cooperation. In stressing the importance of the Korean-United States-Japan Triangle (Triangle), Calder suggests involving Korean business or the Korean Government in United States-Japan projects around the world. He thinks such a relationship would be of particular importance if North and South Korea reunify because a strong Triangle would moderate the flow of reconstruction aid to North Korea and would encourage the flow of Japanese capital. Further, by strengthening the Triangle, South Korea would become more pro-Pacific in its orientation and could help neutralize the growing economic and military influence of China.

Finally, as a general remedy, Calder believes the federal government needs to establish an effective mechanism for understanding and responding to the interdependence of economics and security in East Asia. For example, the United States needs to understand "how economic growth or changing energy demand generates patterns of military competition or domestic political instability." He also thinks appointment of a high level United States-Japan facilitator to monitor information flows and introduce long-term Pacific issues to the Executive Branch could greatly assist the White House in making policy.

IV. Summary

Although it is clear from the author's research that the Arc of Crisis is in the midst of an unprecedented and potentially dangerous arms race, Calder has somewhat overstated his case. One could argue that this arms race could actually help stabilize the region. For example, the Chinese would be less likely to attack Taiwan if Taiwan had sufficient forces to repel such an attack. The United States and Soviet arms race in the 1980s is proof that war is not always the result. Further, the trend of a diminishing United States role in the Far East does not necessarily correlate to an increased threat of military conflict. History has shown that the presence of United States forces is no guarantee of peace.

This is not to say Calder's precepts for peace have no value.

Despite describing China as the new and growing antagonist in the region, none of Calder's precepts address one of the most difficult situations facing the **Arc** of Crisis — the continuing China and Taiwan stand-off. Further, his precepts do not provide insight or strategy in dealing with North Korean military aggression. Finally, although discussing the military threat in great detail, Calder's precepts offer no guidance on how United States military strategy or policy should counter the threat; he relies solely on economic cures.

Despite these omissions, Calder's ten precepts, if followed, would certainly help unify the economic and political interests of the Korean-United States–Japan Triangle and would also improve relations with China through increased economic interdependence. Overall, Kent Calder presents a very compelling, thought provoking analysis of the issues the United States must confront today to protect its future interests. His assertions are well supported, and his solutions are realistic and attainable. His precepts for the ills of the **Arc** of Crisis appear to be based on a keen understanding of the region and its people. United States policy-makers would be well advised to study Calder's theories.

ON BRAVE OLD *ARMY* TEAM: THE CHEATING SCANDAL THAT ROCKED THE NATION*

REVIEWED BY LIEUTENANT COLONEL JACK T. TOMARCHIO**

DUTY, HONOR, COUNTRY. These three words embody the very essence of the United States Military Academy. As Douglas MacArthur said in his 1963 valedictory to the Corps of Cadets, 'These three hallowed words reverently dictate what you ought to be, what you can be, what you will be." Upon them is built the foundation of the Academy and its Honor Code. That code which states that "A cadet will not lie, cheat or steal, nor tolerate anyone who does," came under attack in 1951 when West Point experienced the largest cheating scandal ever to occur at the Academy. In that year, eighty-three cadets, many of them members of Army's nationally-ranked football team, were expelled for cheating. James Blackwell, himself a West Point graduate and a military affairs analyst for Cable News Network, in his book *On Brave Old Army Team: The Cheating Scandal That Rocked The Nation*, examines the incident through the eyes of several of the implicated cadets.

In probing the cheating scandal involving Army football players, Blackwell examines the history of Army's football program from its inception in the 1890's through its rise to national prominence in the 1920's and its entry into college football's elite ranks in the 1940's and early 1950's. The key architect of Army's rise to gridiron power is the legendary Earl "Red' Blaik, Army's most successful football coach. Blackwell surveys Blaik's career first as a cadet football star, then later as an assistant coach and, lastly as head coach at the Academy. Indeed, as Blackwell illustrates, the history of Army football is the history of Red Blaik.

Blaik came to the Academy in 1918, after already playing for and graduating from Miami of Ohio. Eligibility rules not being what they are today, it was not unusual for a man to play college football at two schools for a total of eight years. Because of World War I, Blaik's West Point class was accelerated, and he graduated in 1920 after just two years as a cadet. Commissoned as a cavalry officer, he

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* JAMES BLACKWELL, ON BRAVE OLD *ARMY* TEAM: THE CHEATING SCANDAL THAT ROCKED THE NATION (Novato, CA, Presidio Press, 1996), 336 pages, $27.50.

** Judge Advocate General's Corps, United States Army Reserve. Currently assigned as the Command Judge Advocate, 304th Civil Affairs Brigade, Philadelphia, Pennsylvannia.

took an early exit from the Regular Army in 1922 and went into business with his father in Ohio. Blaik was a successful home developer, yet his heart was always in football. Eventually he left the construction business to return to West Point as an assistant coach.

As West Point's football program grew in stature in the 1920's thanks chiefly to its great rivalry with Notre Dame, Blaik honed his craft as a journeyman coach and developed his philosophy that "winning isn't everything, its the only thing." It was this philosophy that he was to impart to his players and to his young assistant coach and protege, Vince Lombardi. Simply put, Blaik believed that football was the most important thing in the world. He felt it was the only endeavor that truly prepared men for combat, and as such should take a preeminent position at West Point. This led to the initiation of special programs for members of the football team such as tutorials, relaxed hazing rules and other more pernicious activities designed to keep players academically eligible to play. His beliefs were at times shared or reviled by various Superintendents whom Blaik served under over the years. In the long run, Blaik's philosophy of doing whatever it takes to win prevailed.

During the 1940's West Point recruited shamelessly, often accepting players who were academically unsuited for the rigorous cadet course load. Yet, winning was the objective, and during these years, "arrangements" were made to ensure that failing players passed their examinations and kept their football eligibility.

To the college football fan of the 1990's, all too familiar with outrageous recruiting violations and cheating scandals that have become almost a fabric of college football in the later Twentieth Century, such things as sharing information on an upcoming pop quiz may sound like much ado about nothing, but West Point is no ordinary college, and its cadets were bound to obey the stringent dictates of the Honor Code.

The Honor Code is more than simply a moral guide to cadets, it is, to all extents, the basic fabric of cadet life. Seemingly simple in its mandate, the Honor Code is actually more complex in operation with various nuances and gradations of compliance which have been developed by the Corps of Cadets over the years. It forbids much more than cheating on exams, and embraces a host of on and off duty relationships between cadets and the cadre.

By the early 1950's, fed by a desire to continue *Army's* winning football tradition, the football program was the epicenter of an organized system of cheating which was rapidly spreading throughout the Corps of Cadets. It was into such a system that the cadets of the class of 1953 marched. Blackwell interviewed scores of men who

formed the nucleus of the football recruits from that class. While most speak behind pseudonyms, several agreed to talk to Blackwell openly and allowed him to freely use their names.

Blackwell follows these men as they get indoctrinated to the ways of the Corps from their first day in Beast Barracks to the end of their sophomore (Yearling) year. During this time, the footballers in the class of 1953 were being indoctrinated into a system whereby they were always assured that they would "get the poop" on upcoming tests and quizzes. In fact, as Blackwell discovers, the cheating ring was highly sophisticated. Using a system of runners, members of the ring could assure that cadets who took an examination on one day would be able to pass the answers to the cadets who would take the same exam the following day. In case the system was discovered and a cadet tried to report it, the cheating ring placed its own members into leadership positions on the cadet Honor Committees in each cadet company. It was the job of the Honor Committee representatives to police and enforce the Honor Code within the Corps of Cadets. With their own co-conspirators serving as Honor Committee representatives, if a cadet reported a suspected violator of the Honor Code to his Honor Committee Representative as he was required to do, the cheating ring members on the Honor Committee could see that the resulting investigation was quashed before any adverse action could be taken against the suspect which might threaten to expose the whole ring. By 1951, the cheating ring was deeply imbedded into the Corps and was even benefitting cadets who were not on athletic teams. While Blackwell never accuses Blaik and his coaching staff of direct knowledge of the cheating ring, he does leave one with the belief that at least their "win at all costs philosophy" tacitly supported the practice.

While Blackwell does not indict Blaik, Lombardi, or anyone else on the coaching staff or in the school administration, he does indict West Point itself for becoming so addicted to a tradition of winning football that the very ideals of the Academy become clouded in the eyes of the administration, the coaches, the players and the Corps of Cadets. Fittingly, it is a cadet who '%lowsthe whistle'' on the cheating ring and starts the dismantling of the football program.

Reading ***On Brave*** *Old* ***Army Team,*** one is left with the feeling that the dismissed cadets are the real losers in the drama. Some were flagrant cheaters, to be sure, but in their defense, they should never have been admitted into the Academy. Some were so deficient in academics that they had to cheat just to achieve the lowest possible passing grades. Like scores of college athletes after them, they were recruited to play football, getting an education was secondary.

That these cadets were also expected to someday lead men in combat seems to have been forgotten.

Then there were others who although they participated in the cheating ring were assured that that was just the way things were done for the football team. More tragic are the stories of other cadets who although they never availed themselves of the cheating ring, knew that it existed and thus committed the offense of toleration, an Honor Code violation, for which the punishment was dismissal. These cadets were torn by their loyalty to their classmates and by their belief in an Honor Code that appeared flawed to the Corps of Cadets and the Athletic Department.

The cadets profiled by Blackwell were not evil men, in fact, many were deeply ashamed of their conduct while others were still years later uncomprehending of what they went through. Many won their commissions later by participating in college Reserve Officer Training Corps programs, and some had distinguished military and civilian careers.

What comes through clearly is that these men were victims of the scandal as much as participants in its execution. Like legions of college athletes after them, these young men were beguiled by a system that placed winning, money, and prestige before education, character, and integrity. The West Point cheating scandal of 1951 was the first great college football scandal. In the end, the Academy did reform itself, but while the perpetrators were dismissed, the architect of the system that caused the cheating to occur, Red Blaik, continued in his tenure at Army. Controversy about his culpability followed him throughout his remaining years at the Academy, and continued even after his death.

On Brave *Old Army Team* is an important book on several levels. Primarily, it is a history of an American institution and how it became tarnished by a scandal of its own making. It is also a story of how one man in a leadership position and whose drive for success at any cost reaped disaster to those around him and to the institution that he served. Finally it is a story of young men caught up in something far grander and ambitious then they had ever experienced, and who were ultimately sacrificed in the name of athletic victory.

Unfortunately, for the judge advocate, Blackwell spends too little time discussing the legal aspects of the cases brought against the cadets. While he does condemn the dismissal proceedings as little more than drum head courts-martial, he never satisfactorily supports this contention. Among the dismissed cadets whom he interviewed, there is clearly a sense that they were offered up as quickly as possible so the Academy and the Army could put this rather

uncomfortable chapter behind them. One asks oneself where the lawyers were during these events. Blackwell never addresses the legal issues to any great depth in the book and military law is almost completely absent from his treatment of the scandal.

For the college football fan, *On Brave Old Army Team* offers a readable, exciting account of the rich history of West Point football. Students of the military will enjoy Blackwell's examination of the Academy program, in particular the famous Fourth Class system. Students of Americana will find this book a valuable source on the subject of big time college football and the surrounding culture. Lastly, those simply curious about a forgotten episode in our social history will enjoy Blackwell's study of a small, but important slice of our national character.

MILITARY CITATION

Sixth Edition
July 1997

Compiled by the editors of the *Military* ***Law Review*** **and** ***The*** *Army* ***Lawyer.***

Quick Citation Reference

Military Justice Cases (Section III)
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1994-present: United States v. Reid, 43 M.J. 906 (Army Ct. Crim. App. 1996).
CAAF cases: United States v. Faircloth, **44** M.J. 172 (1996).
Slip Opinions: United States v. Gargaro, No. 95-0331 (C.A.A.F. Dec. 13,1996).
Unappealed decisions: United States v. Fowler, No. 17258 (25th Inf. Div. May 25, 1982).

Administrative Decisions (Section III(D))
Board of Contract Appeals: Contract Mgmt., Inc., ASBCA No. 44885, 95-2 BCA ¶ 27,886.
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Forms (Section VI(D))
U.S. Dep't of Defense, DD Form 1840, Joint Statement of Loss or Damage (Jan. 1988).

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Letters (Section VI(E))
Letter, Headquarters, Training and Doctrine Command, ATPL-TD-OR, subject: Correspondence Management (20 Sept. 1984).

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Legality of Conditional Guilty Pleas, Op. Crim. L. Div., OTAG, Army, DAJA-CL/1234, para. 3a (9 July 1988).

Publications (Section VIII(A))
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ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, *U.S. ARMY,* JA-260, LEGAL ASSISTANCE GUIDE: THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT 65 (Jan. 1996).

Periodicals (Section VIII(B))
Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes,* 153 MIL. L. REV. 1 (1996).
Lieutenant Colonel Philip L. Kennerly, *Enhancing Recovery—A Claims Primer,* *ARMY* LAW., June 1997, at 3.

Preface to the Sixth Edition

This edition of *Military Citation* retains the same organization and basic approach established by the fifth edition. However, new sections have been added, others deleted, and citation forms have been modified to reflect the updated conventions of *The **Bluebook,** A Uniform System of Citation* (16th ed. 1996). In response to suggestions from military practitioners, *Military Citation* now covers an expanded range of authorities. Here are some of the more noteworthy changes:

Section II has been expanded to clarify the proper use of rank abbreviations and dates in footnotes.

Section III(B) now distinguishes the citation formats for military justice cases reported from 1951-1975, 1975-1994, and 1994 to the present. It also outlines the proper citation form for slip opinions and suggests language to eliminate the confusion caused by the renaming of the United States Courts of Military Review and the United States Court of Military Appeals.

Section III(D) now describes how to cite unpublished Comptroller General cases and decisions available on electronic databases.

Section IV clarifies proper citation style to the Uniform Code of Military Justice.

Section VI expands citation options to Army Regulation Updates, includes additional examples of common regulations and memorandums, and changes the citation format of Messages.

Section VIII adds citation examples of Deskbooks, Handbooks, Published Reports, and Joint Publications.

The compilers of *Military Citation* would like to thank the faculty members of The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, who contributed their expertise towards the publication of this edition. Since the publication of the fifth edition in July 1992, the following individuals have gathered information and provided assistance in planning and revising this edition: **Major** Stuart W. Risch, Captain John B. Jones, Captain John B. Wells, Captain Albert R. Veldhuyzen, Captain Scott B. Murray, and **Mr.** Charles J. Strong.

MILITARY CITATION

The compilers request that any suggestions to improve the next edition of *Military Citation* be sent to the Editor, *Military* ***Law Review,*** The Judge Advocate General's School, **U.S.** Army, 600 Massie Road, Charlottesville, Virginia **22903.**

MILITARY LAW REVIEW

MILITARY CITATION

TABLE OF CONTENTS

I. Introduction

This manual supplements *A Uniform System of Citation* published by The Harvard Law Review Association (16th ed. 1996) [hereinafter *The Bluebook].* Effective military citation essentially adapts the conventions promulgated in *The Bluebook* to military source materials. Authors should use this manual in conjunction with *The Bluebook* in preparing material submitted for publication in the *Military Law Review* and *The Army Lawyer,* and in preparing research papers and written thesis dissertations submitted for all courses offered by The Judge Advocate General's School. If the *Military Citation* and *The Bluebook* do not address a source of authority used in military practice, the author should attempt to maintain uniformity in citation style by adapting the most analogous and useful citation form that *Military Citation* and *The Bluebook* do address. Most importantly, the author should provide the reader with sufficient information to locate the referenced material swiftly.

II. General Conventions and Typefaces

A. Abbreviations—Military Ranks and Titles

1. The Department of the Army regulates standard rank abbreviations. *See* U.S. DEP'T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE, app. C, fig. C-4 (21 Nov. 1988).

2. In text, standard abbreviations may be used after inserting an explanatory parenthetical. Example:

> Staff Sergeant (SSG) Jones testified on the merits. According to SSG Jones, the victim had taunted appellant prior to the assault.

3. Standard rank abbreviations should be used in footnotes, except when introducing the author of an article. Examples:

> Memorandum from CPT David G. Balmer, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), to MAJ Richard M. Whitaker, Professor, Int'l & Operational L. Dep't, The Judge Advocate General's School, U.S. Army, subject: Suggested Improvements for Chapter 10 of

Operational Law Handbook (4 Dec. 1996) (on file with author) [hereinafter Balmer Memo].

Major Michael J. Davidson, *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields*, ARMY *LAW.*, June 1997, at 17.

B. Numerals and Symbols

1. Substantial differences exist between the *U.S. Government Printing Office Style* Manual (1984) [hereinafter *GPO Style* Manual] and *The Bluebook* on the use of numerals and symbols. *Military Citation* follows *The Bluebook* rules. *See* THE BLUEBOOK, rule 6.2.

2. Military Unit Designations

a. Use arabic numbers for organizations of division size or smaller, for support commands, and for specialized commands. Examples:

1st Infantry Division
172d Infantry Brigade
13th Corps Support Command
5th Signal Command

b. Use roman numerals for corps. Examples:

V corps
XVIII Airborne Corps

c. Spell out numbers for armies. Example:

Fifth Army

d. The word "fort" is not abbreviated in installation names or in addresses. *See* GPO STYLE *MANUAL* rule 9.19. Example:

24th Infantry Division (Mechanized) and Fort Stewart

C. Dates. Use the abbreviations of months recited in *The Bluebook*, tbl. 12. In addition, use the same date format (*i.e.*, day-month-year *or* month-day-year) that appears on the cover of the cited material. *See* THE BLUEBOOK, rule 16.3. Many military references will be cited in the day-month-year format using the abbreviations for months outlined in table 12 of *The Bluebook*.

Example: (21 Sept. 1997)

D. Capitalization—Specialized Court-Martial Terminology. Capitalize the words "charge" and "specification" when they refer to numbered or specifically identified charges and specifications. Otherwise, use lower case. Examples:

Specification 3 of Charge II
Specification 1 of the Charge
The Specification of Charge I
Additional Charge I and its specification
the charges and their specifications
the charges are dismissed
the charge sheet
Charge Sheet (DD Form **458)**

E. Typefaces. Typeface conventions in manuscripts prepared for the ***Military Law Review*** and ***The Army Lawyer*** should comply with ***The Bluebook's*** typeface conventions for law reviews. ***See*** THE BLUEBOOK rules 1.2., 2.1, and 2.2.

111. Cases and Administrative Decisions

A. In General. ***Military Citation*** follows the citation style of ***The Bluebook.***

B. Reported cases

1. Cases reported between 1951 and 1975 are located in the fifty-volume set of ***Court-Martial Reports.*** Citations to these cases are as follows:

a. Decisions of the United States Boards of Review

[case name], [vol] C.M.R. [page] (A.B.R. 19__).

[case name], [vol] C.M.R. [page] (A.F.B.R. 19__).

[case name], [voll C.M.R. [page] (N.M.B.R. 19__).

[case name], [voll C.M.R. [page] (C.G.B.R. 19__).

b. Decisions of the United States Court of Military Appeals.

[case name], [voll C.M.R. [page] (C.M.A. 19__).

2. In 1975, cases began to appear in the *Military* ***Justice Reporters,*** published by the West Publishing Company. Citations to these volumes are as follows:

a. Decisions of the United States Courts of Military Review

[case name], [voll M.J. [page] (A.C.M.R. 19__).

[case name], [vol] M.J. [page] (A.F.C.M.R. 19__).

[case name], [voll M.J. [page] (N.M.C.M.R. 19__).

[case name], [vol] M.J. [page] (C.G.C.M.R. 19__).

b. Decisions of the United States Court of Military Appeals

[case name], [voll M.J. [page] (C.M.A. 19__).

3. On 5 October 1994, The National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) renamed the United States Court of Military Appeals the United States Court of Appeals for the Armed Forces. This Act also renamed the United States Court of Military Review for each service as a United States Court of Criminal Appeals. Citations are as follows:

a. United States Courts of Criminal Appeals

[case name], [voll M.J. [pagel (Army Ct. Crim. App. 19__).

[case name], [voll M.J. [page] (A.F. Ct. Crim. App. 19__).

[case name], [voll M.J. [page] (N.M. Ct. Crim. App. 19__).

[case name], [vol] M.J. [page] (C.G. Ct. Crim. App. 19__).

b. Decisions of the United States Court of Appeals for the Armed Forces

[case name], [voll M.J. [page] (19__).

4. Decisions of the United States Court of Appeals for the Armed Forces and United States Courts of Criminal Appeals not available in the ***Military Justice Reporters*** and not found in electronic databases (THE **BLUEBOOK,** rule 10.8.1(a)) should be cited as slip opinions in accordance with ***The Bluebook,*** rule 10.8.1(b). In accordance with ***The Bluebook,*** rule **10.6,** a parenthetical detailing the future appearance of the case in a ***Military Justice Reporter*** may be added to the slip opinion citation. Examples:

United States v. Gargaro, No. **95-0331** (C.A.A.F. Dec. **13, 1996)** (to appear at **45** M.J. __).

Vanderbrush v. United States, No. **9601265** (Army Ct. Crim. App. Nov. **13, 1996)** (to appear in M.J. Reporter).

5. When appropriate, explain the historical fact of the renaming of the courts in a footnote as follows:

On **5** October **1994,** the National Defense Authorization Act for Fiscal Year **1995,** Pub. L. No. **103-337, 108** Stat. **2663** (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Army Court of Criminal Appeals, the United States **Air** Force Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.

6. In text and in citation, use the name of the military court that was in place ***at the time of the decision.*** For example, when referring to the appellate court, the following text would be appropriate:

The holding in ***United States v. Teters*** illustrated the United States Court of Military Appeals contemporary view on multiplicity. In future cases, the United States

Court of Appeals for the Armed Forces will . .

C. Records of Trial. To cite to a court-martial that has not been appealed to a court of criminal appeals, use the identifying number of the case, if assigned, the command that took action on the case, and the date on which sentence finally was adjudged. For example:

> United States v. Fowler, No. **17258** (25th Inf. Div. May **25, 1982).**

D. Administrative Agency Decisions

1. Cite all administrative agency decisions in areas other than contract law in accordance with *The Bluebook. See* THE BLUEBOOK rules **14.3, 14.4, 18.1, 18.2.**

2. Contract law decisions. Contract law citations should reflect the conventions adopted by the editors of the *Public Contract* ***Law*** *Journal.* The citation forms adopted by *The Bluebook* are not commonly used by contract law practitioners.

a. Board of Contract Appeals Decisions. For decisions repcrted in the Commerce Clearing House *Board of Contract Appeals Decisions* (BCA), cite the name of the appellant, the abbreviated name of the board and the docket number, the reporter volume number, the reporter's citation abbreviation (BCA), and the paragraph number using the paragraph symbol. Example:

> Pennyrile Plumbing, Inc., ASBCA No. **44555, 96-1** BCA ¶ **28,044.**

short citation:

> *Pennyrile Plumbing,* **96-1** BCA ¶ **28,044** at **140,029.**

b. Comptroller General Decisions

(1) Decisions reported *only* in the official *Decisions of the Comptroller General of the United States (Comp. Gen. Reports).* Cite the name or title assigned by the General Accounting Office (GAO), the "B" number, the reporter volume number, the reporter's citation abbreviation (Comp. Gen.), the initial page number of the decision, and the date of decision in parentheses.

> McNamara-Lutz Vans and Warehouses, Inc.,

57 Comp. Gen. **415** (Apr. **18, 1978).**

short citation:

McNamara-Lutz, **57** Comp. Gen. at **417.**

(2) Decisions reported *only* in Federal Publication, Inc.'s *Comptroller General Procurement Decisions (CPD)*. Cite the name or title assigned by the GAO, the "B" number, the full date in civilian format, the reporter volume number, the reporter's citation abbreviation (CPD), and the paragraph number using the paragraph symbol. Example:

> Guardian Tech. Int'l, **B-270213,** Feb. **20, 1996, 96-1** CPD ¶ **104.**

short citation:

Guardian, **96-1** CPD ¶ **104** at **4.**

(3) Decisions reported in *both* the official *Comp. Gen. Reports* and the *CPD:*

> Pendolino's Spelunking and Expeditions, Inc., B-**131313,** May **17, 1995, 66** Comp. Gen. **616, 95-1** CPD ¶ 191.

short citation:

Pendolino's Spelunking, **66** Comp. Gen. at **619.**

If the *Comp. Gen. Reports* volume number is **known,** but the page number is not, cite as:

> Pendolino's Spelunking and Expeditions, Inc., B-**131313,** May **17, 1995, 66** Comp. Gen. **___, 95-1** CPD ¶ **191.**

short citation:

Pendolino's Spelunking, **95-1** CPD ¶ **191** at **4.**

(4) Decisions published in the CCH *Government Contracts Reporter*. Cite the name or title assigned by the GAO, the **"B"** number, the date and the "CGEN volume and paragraph number.

Cuneo's Walking Shoes, **B-242679,** July **4, 1996, 11** CGEN ¶ **109,237, 95-2,** CPD ¶ ___.

short citation:

***Cuneo,* 11** CGEN ¶ **109,237** at **119,367.**

(5) Unpublished Comptroller General decisions not available in an electronic database:

Towne Int'l Forwarding, Inc., Comp. Gen., **B-260768** (Dec. **28, 1995).**

short citation:

***Towne,* B-260768** at **3.**

c. Not yet published *or* unpublished decisions available on electronic databases. Provide the case name, the docket number, the database identifier, and within parenthesis the abbreviated name of the board/court if not part of the database identifier along with the full date of the decision. ***See*** THE **BLUEBOOK,** rule 10.8.1(a). Examples:

EEOC — Payment for Training of Management Interns, **B-257977, 1995** WL **683813** (Comp. Gen. **Nov. 15, 1995).**

To Charles R. Hartgraves, **B-235086, 1991** U.S. Comp. Gen. LEXIS **1485** (Apr. **24,1991).**

short citation:

***EEOC,* 1995 WL 683813,** at ***3.**

***Hartgraves,* 1991** U.S. Comp. Gen. LEXIS **1485,** at ***5.**

IV. The Uniform Code of Military Justice

The Uniform Code of Military Justice (UCMJ) comprises sections **801** to **946 of** Title **10,** United States Code. In citations to the UCMJ, **"10** U.S.C. **§ [x]"** may be replaced with "UCMJ art. [x]." *Cf.* **THE BLUEBOOK** rule **12.8.1.** For example:

10 U.S.C. **§ 934 (1994).**

becomes

UCMJ art. 134 (1994).

Note that the year of the current United States Code or its supplement should always be given (THE **BLUEBOOK,** rule 12.3.2). Citations to the UCMJ appearing in an unofficial code should identify the unofficial code by placing the publisher's name in the parenthetical phrase containing the year of the cited version. For example:

UCMJ art. 134 (West Supp. 1996).

UCMJ art. 134 (West 1995).

V. The *Manual for Courts-Martial*

A. ***Manual for Courts-Martial.*** The *Manual for Courts-Martial (Manual)* contains the Rules for Courts-Martial, the Military Rules of Evidence, and other parts divided into paragraphs. Citation formats vary with the particular part cited. Authors must use the full citation format in the initial citation to the *Manual;* subsequent citations to the *Manual* then may appear in a short citation format through the use of "*supra*" and "hereinafter." Rather than using "pt. 2" and "pt. 3" in citations, use "R.C.M." for the Rules for Court-Martial and "MIL. R. EVID." for the Military Rules of Evidence. The *Manual* is a unitary published work which contains the Rules for Courts-Martial and the Military Rules of Evidence. Accordingly, the *Manual for Courts-Martial* is italicized in text, but the two sets of rules contained therein are not. Since 1994, The *Manual* has been published in its entirety on an annual basis.

1. *Manual for Courts-Martial*

a. Full citation to a particular provision:

MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 93c (1996) [hereinafter MCMI.

b. Short citation:

MCM, *supra* note **2,** pt. IV, ¶ 93c.

2. Rules for Courts-Martial

a. Full citation examples:

> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (1996) [hereinafter MCMI.
>
> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1002 discussion (1996) [hereinafter MCMI.

b. Short citation examples:

> MCM, *supra* note *5,* R.C.M. 1001.
>
> MCM, *supra* note *5,* R.C.M. 1002 discussion.

3. Military Rules of Evidence

a. Full citation examples:

> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803(2) (1996) [hereinafter MCMI.
>
> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803 analysis, app. 22, at A22-48 (1996) [hereinafter MCMI.

b. Short citation examples:

> MCM, *supra* note 3, MIL. R. EVID. 803(2).
>
> MCM, *supra* note **3,** MIL. R. EVID. 803 analysis, app. 22, at A22-48.

B. Changes to the *Manual for Courts-Martial*

1. When citing to a specific change to the *Manual* that still is in effect, give the change number and date.

a. Full citation example:

> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(b) (1984) (C2, 15 May 1986) [hereinafter MCMI.

b. Short citation example:

> MCM, *supra* note 5, MIL. R. EVID. 311(b) (C2, 15 May 1986).

2. When citing to a provision in the *Manual* as it existed prior to a change that still is in effect, cite to that provision and to the specific change. For example:

> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(b) (1984), *changed by* MIL. R. EVID. 311(b) (C2, 15 May 1986).

3. When citing to a change to the *Manual* that no longer is in effect, cite the current version parenthetically. For example:

> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (C2, 15 May 1986) (current version is R.C.M. 701 (C3, 1 June 1987)).

C. Older *Manuals.* A citation to an older *Manual* should contain the title, date, and particular provision. If necessary, use "*supra*" and "hereinafter" to create short forms for subsequent citations.

1. Full citation example:

> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(b) (1984) [hereinafter 1984 MANUAL].
>
> MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 161 (1969) [hereinafter 1969 MANUAL].

2. Short citation example:

> 1984 MANUAL, *supra* note 101, MIL. R. EVID. 303.
>
> 1969 MANUAL, *supra* note 45, ¶ 159.

VI. Administrative Material

A. Regulations. Whenever possible, cite federal rules and regu-

lations to the Code of Federal Regulations (CFR). *See* THE **BLUEBOOK,** rule 14.2.

1. Army Regulations. The Army uses two formats for its regulations: (1) the traditional format with changes and interim changes; and (2) the UPDATE format. The initial citation to a regulation should be a full citation; subsequent citations may use the short form.

a. Traditional Regulation Format. Citations to these regulations may include references to the basic regulation, permanent changes, interim changes, and message changes.

(1) Full citations. A proper full citation includes the publication's institutional author, regulation number, title, cited provision, and the abbreviated date. For example:

> U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 2-2 (11 May 1988) [hereinafter AR 15-61.

If citing to a provision that has been changed since the issuance of the basic regulation:

> U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-4 (11 May 1988) (C1, 15 June 1989) [hereinafter AR 15-61.

Cite to interim changes in a similar fashion:

> U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-4 (11 May 1988) (IOI, 15 Apr. 1992) [hereinafter AR 15-61.

To cite message changes, refer to the date-time group on the message:

> U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE

FOR INVESTIGATING OFFICERS AND **BOARDS** OF OFFICERS, para. **2-6 (11** May 1988) **(IC, 0212252** Dec **1989)** [hereinafter AR **15-61.**

(2) Short form citations. Use ***"supra,"*** and "hereinafter" when necessary, to form short citations. ***See*** THE BLUEBOOK, rule **4.2.** Example:

AR **15-6,** ***supra*** note **6,** para. **2-2.**

b. UPDATE Format. Citations to the UPDATE format regulations are generally the same as the traditional format because citations are usually made to specific regulations; however, the UPDATE may have separate sections from the regulations contained within the UPDATE. Another difference from the traditional format is that Army regulations in the UPDATE format have several dates: the date of the regulation; the effective date of the regulation; the date of the reprint; and the date of the most recent change, if it is in the latest reprint. ***The date of the regulation is in the upper left corner of the first page of the regulation.*** The effective date is in the upper right corner of the first page of the regulation. The date on the cover is the date of the reprint. When a change is first published, the effective date of the change is noted in the center of the first page, below the title. The dates of earlier changes are not noted, and the actual changes are incorporated into the text. When citing to a regulation that is in the UPDATE format, ***cite to the date of the regulation in the upper left corner of the first page.*** The date of the most recent change should be cited only if the change is published for the first time in the current reprint and if the change affects the provision cited. Do not cite to the current reprint or to the effective date; use a parenthetical if these dates are important to the proposition cited.

(1) A full citation to a regulation in the UPDATE format would be:

U.S. DEP'T OF ARMY, REG. **27-10,** LEGAL SERVICES: MILITARY JUSTICE, para. **6-11** (8 Aug. **1994)** [hereinafter AR 27-10].

A citation to a provision that has been changed in the most recent reprint would be:

U.S. DEP'T OF ARMY, REG. **27-10,** LEGAL SERVICES: MILITARY JUSTICE, para. **20-1** (8

Aug. **1994)** (C3, **1** Oct. **1986)** [hereinafter AR 27-10].

(2) Citations to the UPDATE itself and not to the regulations therein can be cited as indicated by the following example:

U.S. DEP'T OF ARMY, RESERVE COMPONENTS PERSONNEL UPDATE **23,** Consolidated Glossary **(1** Sept. **1994)** [hereinafter UPDATE **231.**

(3) Short form citations. Short form citations follow the rule on *"supra"* and "hereinafter." *See* THE BLUEBOOK, rule **4.2.** The short form citations for the three above examples would be:

AR **27-10,** *supra* note **2,** para. **6-11.**

AR **27-10,** *supra* note **67,** para. **20-1.**

UPDATE **23,** *infra* note **45,** para. 5-8.

2. Procurement Regulations. A full citation to a procurement regulation contains the regulation's institutional author, the title, the particular provision, and the date. The first citation to the regulation should be a full cite; subsequent citations may use the short citation form.

a. Full citation examples:

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. **10.010** (Apr. **1, 1984)** [hereinafter FAR].

U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. **201.103** (Apr. **1, 1984)** [hereinafter DFARS].

U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. **1.103** (Dec. **1, 1984)** [hereinafter AFARS].

b. Short form citations. Short form citations should use *"supra"* and "hereinafter." *See* THE BLUEBOOK, rule **4.2.** *See also id.* rule **3** and tbl. **16** for a discussion on citing subdivisions. Examples:

To cite to a part: FAR, *supra* note 1, pt. 6.

To cite to a subpart: *Id.* subpt. 6.1.

All other cites: *Id.* at 6.101.

3. Examples of other common regulations. Citations to other regulations generally should contain the institutional author (or smallest subdivision that prepared the regulation), the regulation's number, the regulation's name or title, the provision, and the date. Supplements should indicate the supplemented regulation in a parenthetical. Short citations should use "*supra*" and "hereinafter" to cross reference to the initial full citation.

a. Subordinate command regulations

(1) Full citation:

U.S. *ARMY* EUROPE, REG. 632-10, STANDARDS OF CONDUCT AND FITNESS: REGULATED ACTIVITIES OF MEMBERS OF THE US FORCES, DOD COMPONENTS, AND FAMILY MEMBERS, para. 2a (5 Nov. 1981) [hereinafter USAREUR REG. 632-101.

(2) Short citation:

USAREUR REG. 632-10, *supra* note 13, para. 2a.

b. Subordinate command supplements

(1) Full citation:

25TH INFANTRY DIV., SUPP. TO ARMY REG. 27-10, para. 3-13 (2 July 1984) (supplementing U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (1 July 1984)) [hereinafter 25TH INF. DIV. SUPP. to AR 27-101.

(2) Short citation:

25TH INF. DIV. SUPP. TO AR 27-10, *supra* note 44, para. 3-13.

c. Joint Federal Travel Regulations. A citation to volume 1 would be:

> **1** Joint Fed. Travel Regs. ¶ **1234 (1** Jan. **1987).**

d. Joint Ethics Regulation

> U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, para. 4-102A(1) (Aug. 30, **1993)** [hereinafter JER].

e. Secretary of the Navy Instructions

> U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. **6794.3,** STANDING OPERATING PROCEDURES FOR PROCESSING, TRAINING, AND ASSIGNING UNITED STATES NAVY AND MARINE CORPS PERSONNEL, para. **2-2 (27** May **1988)** [hereinafter SECNAV INSTR. **6794.31.**

f. Secretary of the Air Force Instructions

> U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. **63-701,** ACQUISITION: MANAGING INDUSTRIAL FACILITIES, para. **4-5 (24** June **1994)** [hereinafter SECAF INSTR. 63-701].

g. Joint Chiefs of Staff Instructions

> CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. **3710.01,** DELEGATION OF AUTHORITY FOR APPROVING OPERATIONAL SUPPORT TO DRUG LAW ENFORCEMENT AGENCIES AND COUNTERDRUG-RELATED DEPLOYMENT OF DOD PERSONNEL, A-5 **(28** May **1993)** [hereinafter JCS INSTR. **3710.011.**

h. Air Force Regulations

> U.S. DEP'T OF AIR FORCE, REG. **75-62,** MILITARY PERSONNEL: JOINT ASSIGNMENTS, para. **3-3 (9** Mar. **1995)** [hereinafter AFR **75-621.**

i. National Guard Bureau Regulations

> U.S. DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 11-14, *ARMY* PROGRAMS: *ARNG* LOGISTIC READINESS, para. 2 (25 Apr. 1977) [hereinafter NGBR 11-14].

j. Marine Corps Orders

> U.S. MARINE CORPS, ORDER 1050.16, APPELLATE LEAVE AWAITING PUNITIVE SEPARATION, para. 2(a) (2 Sept. 1996) [hereinafter MCO 1050.161.

> **U.S. MARINE** CORPS, ORDER P5800.8, **MARINE** CORPS MANUAL FOR LEGAL ADMINISTRATION (24 Dec. 1984) [hereinafter MCO P5800.8].

B. Department of Defense Directives

Cite Department of Defense Directives to the issuing office, followed by the directive number, its title, and date. The first citation must be a full citation. Subsequent short form citations should adhere to the rule on ***"supra"*** and "hereinafter."

> U.S. DEP'T OF DEFENSE, DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980) [hereinafter DOD DIR. 5200.271.

> U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (18 Feb. 1997) [hereinafter DOD DIR. 3025.15].

C. Orders

The full citation to an order should contain the issuing headquarters designated in the order, the order's name and number, and the date. The initial citation must be a full citation. A subsequent citation may be shortened only to the extent that it reasonably cannot be confused with other orders cited to in the same text. Create short form citations by using "*supra*" and "hereinafter."

1. Full citations:

> Headquarters, Dep't of Army, Gen. Orders No. **40 (12** Oct. **1960).**
>
> U.S. Dep't of Army, Gen. Orders No. **25 (12** Apr. **1955).**
>
> U.S. Navy Dep't, Gen. Order No. **21 (1** May **1963).**
>
> Headquarters, U.S. Army Europe & Seventh Army, Permanent Orders No. **2-1 (2** Jan. **1976).**
>
> Headquarters, 4th Infantry Div. and Fort Carson, Gen. Court-Martial Order No. **263 (13** Sept. **1958)** [hereinafter Fort Carson C.M.O. No. **2631.**

2. Short citations:

> Gen. Orders No. **40,** *supra* note **1.**
>
> Gen. Orders No. **25,** *supra* note **2,** para. **1.**
>
> Gen. Order No. **21,** *supra* note **3,** para. **7.**
>
> Permanent Orders No. **2-1,** *supra* note **4.**
>
> Fort Carson C.M.O. No. **263,** *supra* note **5.**

D. Forms

Cite government forms to the issuing agency, the form's designation and number, the form title, and its date.

> General Serv. Admin. & Interagency Comm. on Medical Records, Standard Form **522,** Request for Administration of Anesthesia and for Performance of Operations and Other Procedures (Oct. **1976).**
>
> **U.S.** Dep't of Army, DA Form **5112-R,** Checklist for Pretrial Confinement (Mar. **1985).**

U.S. Dep't of Defense, DD Form 1840, Joint Statement of Loss or Damage (Jan. 1988).

E. Memorandums, Letters, and Messages

The citation style for letters, memorandums, messages, and other similar instructions depends mainly on the format of the authority cited. Generally, a full citation should include the term used for the type of material (i.e., Letter, Memorandum, TJAG Memorandum, Message, Department of the Army Message); the issuing office, if not included in the term used for the type of material; the office symbol, if applicable; the word "to" followed by the addressee, if a particular addressee is named; the title or, if no title exists, the word "subject:" followed by the subject; the provision cited; and the date of the material in parentheses. The first citation to a letter, message, memorandum, or similar document must be a full citation. Subsequent short form citations should adhere to the rule on ***"supra"*** and "hereinafter." ***See*** **THE** BLUEBOOK, rule 4.2. See also ***id.*** rule 17.1.3 for letter and memorandum formats appropriate for civilian and military correspondence.

1. Memorandums

Memorandum, Commander, United States Army Training Center and Fort Dix, ATZD-A, to Staff Judge Advocate, subject: Smoking Policy, para. 3a (29 Feb. 1992) [hereinafter Smoking Policy Memorandum].

Smoking Policy Memorandum, ***supra*** note **3,** para. **2.**

Memorandum from CPT David ***G.*** Balmer, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), to MAJ Richard M. Whitaker, Professor, Int'l & Operational L. Dep't, The Judge Advocate General's School, **U.S.** Army, subject: Suggested Improvements for Chapter 10 of Operational Law Handbook (4 Dec. 1996) (on file with author) [hereinafter Balmer Memo].

Balmer Memo, *infra* note 89, para. 3.

2. Command Policy Memorandums

Command Policy Memorandum, Headquarters, III Corps & Fort Hood, subject: Sexual Harassment, para 3a(1) **(1** Apr. **1997).**

3. Letters

Air Force Letter No. **123-4,** Tactical Aircraft Sustainment, para. **5 (8** Oct. **1983).**

Air Force TJAG Letter 60/14, subject: Quarterly Index and Issues of Cases Pending before the United States Court of Military Appeals **(20** July **1960).**

Letter, Headquarters, Training and Doctrine Command, ATPL-TD-OR, subject: Correspondence Management **(20** Sept. **1984).**

4. Policy letters of The Judge Advocate General

Policy Letter **86-2,** Office of The Judge Advocate General, United States Army, subject: Physical Fitness and Appearance **(12** Mar. 1986), ***reprinted in*** ARMY LAW., May **1986,** at **3.**

Letter, Office of The Judge Advocate General, United States Army, DAJA-CL 1984/5405, to Staff Judge Advocates, subject: Victim/Witness Assistance Program **(1** May 1984), ***reprinted in*** ARMY LAW., June **1984,** at 2 [hereinafter OTJAG Letter]; ***accord*** Letter, Headquarters, 5th Infantry Div. and Fort Polk, to Staff Judge Advocate, subject: Victim/Witness Assistance **(30** May **1985)** [hereinafter Fort Polk Letter].

See generally OTJAG Letter, ***supra*** note **45.**

5. Messages are cited by date-time group, with use of the twenty-four hour clock. Thus, Department of the Army Message **1113302** Mar **96** was transmitted at **1330** hours (1:30 p.m.) on **11** March **1996.** Note that "Z" or Zulu time is Greenwich Mean Time. Examples:

Message, 1111302 Mar 96, Headquarters, Dep't of Army, DAJA-LT, subject: Litigation (11 Mar. 1996) [hereinafter DA Message]; **see** *also* Message, 2610062 May 92, Military Personnel Center, Europe, subject: Monthly Summary of Current Projected Availability of Economy Housing (26 May 1992) [hereinafter Economy Housing Message].

Cf. Economy Housing Message, ***supra*** note 6, at 2.

Message, 2016232 Sep 94, Commander, Training and Doctrine Command, ATPL-TD-OR, subject: Correspondence Management (20 Sept. 1994).

VII. Opinions of The Judge Advocates General

A. Army Opinions

1. The Army historically has used several different filing systems to keep records. Accordingly, several methods of citation were used for opinions. The proper full citation for all of these opinions, however, should follow the format for agency opinions generally. ***See*** **THE BLUEBOOK** rule 14.4. Accordingly, a full citation should include the title of the opinion; the type of opinion (*i.e.*, Op. Crim. L. Div., OTJAG, Army); the proponent's office symbol, followed by a solidus ("/") and opinion number if applicable; the provision cited; and the date of the material in parentheses. For example:

Legality of Conditional Guilty Pleas, Op. Crim. L. Div., OTJAG, Army, DAJA-CL/1234, para. 3a (9 July 1988).

Legality of Wastewater Treatment Facility Compliance Agreement, Op. Admin. L. Div., OTJAG, Army, DAJA-AL/4567, para. 4-2 (28 Nov. 1981).

2. Using office symbols in conjunction with the numbering system found on the particular opinion or decision, any opinion rendered by a division of the Office of The Judge Advocate General, the Claims Service, or the United States Army Judiciary can be cited. For example, the Examinations Division of the Judiciary publishes

opinions on summary and special courts-martial that can be cited thus:

> United States v. Smith, Op. Exam. & New Trials Div., U.S. Army Legal Servs. Agency, JALS-ED/SUMCM 6789 (25 Dec. 1991).

3. Selected administrative law and criminal law opinions of The Judge Advocate General have been digested in the *Judge Advocate Legal Service* (until 1977) and in *The Army Lawyer* (1977 to present). If the author has not seen the full opinion and is citing only to the information contained in the digest, the citations would read:

> Personnel Separations, Op. Admin. L. Div., OTJAG, Army, JAGA/4321 (1 Sept. 1967), as *digested in* 67-22 JUDGE ADVOCATE LEGAL SERV. 10.
>
> Disestablishment of NAFIs, Op. Admin. L. Div., OTJAG, Army, DAJA-AL/2345 (28 June 1983), *as digested in* ARMY LAW., May 1984, at 38.

4. Prior to the advent of *The Army Lawyer*, opinions of The Judge Advocate General were published verbatim or digested in various collections and other publications. Digests of opinions of the Judge Advocates General vary in content, some containing only opinions and others containing additional material. When the digest contains only opinions of The Judge Advocate General, cite to both the original and to the digest. In addition, the phrase *"as digested in"* must be inserted when both the original and digest are cited, but the author has read only the digest. Always cite the date of the material digested in the compilation. Add the date (or year when the date is not available) of publication of the volume parenthetically when it does not appear in the title or is different from the date of the opinion:

> Discharge, **Op.** OTJAG, Army (10 Feb. 1910), *as digested in* Dig. Ops. JAG 1912, para. XIII.D.3., at 449.
>
> Smith v. United States, Op. OTJAG, Army, CM 201377 (1934), as *digested in* Dig. Ops. JAG 1912-1940, § 451(4).

Small Purchases, Op. OTJAG, Army, JAGA1962/4743 (26 Oct. 1962), *as* ***digested in*** 12 Dig. Ops. JAG 134 (1963).

Jurisdiction on Military Installations, Op. OTJAG, Army, JAGA/2177 (25 Feb. 1954), **as** ***digested in*** 1954 JAG Chronicle 91.

Reports of Survey, Op. OTJAG, Army, JAGA1962/4743 (26 Oct. 1962), *as* ***digested in*** 12 Dig. Ops. JAG 134 (1963).

B. Navy Opinions

The Navy has used several filing system formats over the years. Most opinions of The Judge Advocate General of the Navy, however, can and should be cited using the Army opinion rules. Use office symbols, if available; if the office symbol is not available, provide the opinion number or other identification. ***An*** example would be:

Jumping from a Vessel, Op. JAG, Navy, No. 279, para. 1-1 (31 Oct. 1955).

Diminished Rations, Op. JAG, Navy, JAG:II:1:WBM:msc, para. 9 (1 Apr. 1950).

C. Air Force Opinions

Several different record keeping formats have been used by the Air Force. Most opinions of The Judge Advocate General of the Air Force, however, can and should be cited using the Army opinion rules. Use office symbols, if available; if the office symbol is not available, provide the opinion number or other identification. ***An*** example would be:

Picketing on Base Areas, Op. JAG, Air Force, No. 118, para. 2 (28 Sept. 1967).

Access to Air Force Exchanges, Op. JAG, Air Force, AF 63-47.3, at 2 (12 Apr. 1955).

Various services have published digests of opinions of the Judge Advocate General of the Air Force. These services variously have been called ***JAGAF Index-Digest; Air Force JAG Bulletin;*** and, until 1977, ***Air Force JAG Reporter.*** Citation examples are:

Fraternization Between Enlisted Members, Op. JAG, Air Force, AF 47-59.3 (13 Sept. 1958), *reprinted in* AIR FORCE JAG BULL., Nov.-Dec. 1958, at 10.

Transportation of Confinees on Air Force Aircraft, Op. JAG, Air Force, No. 17 (14 Aug. 1974), *us cited in* AIR FORCE JAG REP., Apr. 1974, at 2.

Since 1977, information has been communicated by the Air Force TJAG to the field through *The Reporter,* a bimonthly publication. Citations to opinions appearing in *The Reporter* should use the same format as Army TJAG opinions appearing in *The Army Lawyer.* Thus:

Contracting for Base Services, Op. JAG, Air Force, No. 1234, para. 13 (17 Sept. 1992), *reprinted in* THE REPORTER, Nov.-Dec. 1992, at 3.

VIII. Publications and Periodicals

Citations to military publications and periodicals should follow the conventions of *The Bluebook.* For footnotes to pamphlets, field manuals, and other published works, the author and title should appear in small caps in accordance with *The Bluebook,* rule 2.1(b). In text, the title—or the short form for the title adopted in an explanatory parenthetical—should be italicized (*i.e., Benchbook, Legal Guide for Commanders, AR 608-99, Crimes and Defenses Deskbook).* For periodicals, the title in footnotes should also be italicized. Some examples of footnote citations for common sources are as follows:

A. Publications

1. Pamphlets

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, para. 3-29 (30 Sept. 1996) [hereinafter BENCHBOOK].

BENCHBOOK, *supra* note 3, para. 3-21.

U.S. DEP'T OF ARMY, PAM. 27-26, LEGAL

SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 1.12 (1 May 1992) [hereinafter DA PAM 27-26].

DA PAM 27-26, supra note 7, rule 1.8.2.

2. Field Manuals

U.S. DEP'T OF ARMY, FIELD MANUAL 27-1, LEGAL GUIDE FOR COMMANDERS 5-2 (13 Jan. 1992) [hereinafter FM 27-11.

U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 409 (18 July 1956) [hereinafter FM 27-10].

3. Deskbooks, Handbooks, and Published Reports

ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, **U.S.** *ARMY*, JA-260, LEGAL ASSISTANCE GUIDE: THE SOLDIERS' AND **SAILORS'** CIVIL RELIEF ACT 65 (Jan. 1996) [hereinafter JA-260].

CRIMINAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. *ARMY*, JA-310, TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK 2-3 (Mar. 1995) [hereinafter JA-310].

AIR FORCE GEN. CLAIMS DIV., GENERAL CLAIMS HANDBOOK, ch. 6 (Apr. 1997) [hereinafter AIR FORCE CLAIMS HANDBOOK].

U.S. *ARMY* CLAIMS SERVICE, OTJAG, FEDERAL TORT CLAIMS ACT HANDBOOK 193 (Feb. 1994) [hereinafter TORT CLAIMS HANDBOOK].

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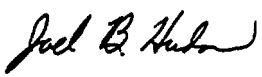
By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:



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