## ACKNOWLEDGEMENTS

We would like to acknowledge our debt to Commander J. Ashley Roach and Commander Dennis McCoy who shepherded these volumes for the Naval War College with their usual applomb and impressive Navy efficiency. We are also indebted to Ms. Lisa Montgomery who did much of the initial editing necessary to move from selected Review articles to a two-volume collection of readings. Lisa's good spirit and charm under fire deserve a commendation traditionally awarded only to those in uniform. Above all, we would like to thank the Naval War College, whose interest in international law has made these readings possible, and the authors, whose thought and dedication is what it's all about.

# INTRODUCTION TO VOLUME II

## (The Use of Force, Human Rights and General International Legal Issues)

by

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As my Brother Moore rightly suggests in his Introduction to Volume I, "some of the best writing on international law has appeared in the *Naval War College Review.*" I need add only that "some of the best" of this "best writing" has been on the not unrelated subjects of the use of force and international human rights, the two areas upon which most of the contributions to this volume focus. Writing an Introduction to such a remarkable collection of articles presents an editor with two principal alternatives. Either he surveys the various contributions in "once-over-lightly" fashion—stressing their originality, taking issue with an occasional fine point, and attempting throughout to whet the reader's appetite for the intellectual fare to follow—or he ignores them entirely and produces an independent piece of scholarship on some topic supposedly of compelling interest. Actually, I intend to borrow a bit from both approaches, taking the views of the various contributors on two specific points—forcible self-help to protect nationals abroad and the impact of international human rights norms upon the U.S. foreign policy process—and weaving them with some of my own views into what hopefully will be an interesting, if not necessarily an *avant garde,* pattern.

### Forcible Self-Help to Protect Nationals Abroad

Under the UN Charter, as Admiral Miller points out, member states foreswore the unilateral use of force in international relations save in

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the case of self-defense. "There should be little doubt," he concludes from his examination of the relevant Charter provisions, "that unilateral, forcible self-help as an acceptable sanction in international law has been prohibited."[1] While it seems clear that it was the intention of the framers to achieve just this result, they also intended, as a *quid pro quo* to states for this surrender of a portion of their sovereignty, that the UN would take collective measures in the future to enforce compliance with the Charter's obligations. Such measures, as everyone knows, rarely have been taken. Indeed, it can be said without much overstatement that the Charter provisions in this regard have atrophied. Ambassador Rosenne, in a generally pessimistic assessment of the present state of the collective security concept, goes so far as to conclude that "the original scheme has failed, and its replacement has not yet begun to take clear shape."[2] The latter half of this compound sentence offers little comfort or guidance to the government planner, much less to the naval officer faced with an on-the-spot decision.

To take as an example a situation which has occurred time and again in the past and undoubtedly will occur with some frequency in the future, what action can a state take to protect its nationals living in a foreign state when their lives are endangered by a complete breakdown of law and order in that state? Under customary international law, it was blackletter law that a state, invoking its right of forcible self-help, could send its navy and land its marines to protect the lives of its citizens in such a situation. Indeed, as Commander Woods points out in his scholarly article on the U.S. Navy Regulations covering this issue, from 1893 onward they specifically "tasked naval officers with the responsibility of exercising their independent judgment in the application of force to protect the lives and property of U.S. citizens on foreign soil against actual or impending arbitrary violence."[3] While the specific provisions discussed by Woods have been deleted from the 1973 edition of the regulations—to be replaced by a somewhat opaque admonition that "[t]he use of force in time of peace . . . is illegal except as an act of self-defense"[4]—his and several other articles contained in this volume contain useful analyses and helpful guidelines for decisionmakers in this area.

If recent history is any guide, the problem of protecting nationals abroad will be one of particular concern to the U.S. for some time. The articles in this volume focus upon the three "classic" cases where the U.S. has used forcible self-help and defended the legality of its actions under international law in general and the UN Charter in specific—the

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[1] Miller, "Collective Intervention and the Law of the Charter," page 77 of this volume at page 81.

[2] Rosenne, "International Law and the Use of Force," page 1 of this volume at page 7.

[3] Woods, "U.S. Navy Regulations, International Law, and the Organization of American States," at page 16 of this volume.

[4] For the full text of the applicable articles, see page xiv *infra*.

landing in Lebanon in 1958, the Congo rescue operation in 1964, and the Dominican Republic action in 1965. Since their original publication, moreover, other situations have arisen where forcible self-help either was used or contemplated—the *Mayaguez* incident and the evacuation of U.S. nationals from Iran being the most prominent examples. Varying the fact pattern somewhat, the rash of aerial hijackings—in which passengers are held hostage to the achievement of political, pecuniary or personal goals—has raised the same legal issues in a new and different context. Indeed, an examination of the Israeli raid on Entebbe in 1976 shows how the norms discussed in several articles in this volume have been used by the international legal community in appraising this use of forcible self-help.

This Introduction is not the place to discuss the Entebbe raid in detail. Interested readers will find it considered at some length in my forthcoming monograph in the "Blue Book" Series—*Forcible Self-Help to Protect Nationals Abroad.* Suffice it to say that, given the well-known facts of Entebbe situation, nearly all commentators have approved the Israeli rescue operation and considered it a valid exercise of the right of forcible self-help which they consider still exists under contemporary international law.[5] In the Security Council debate that followed Entebbe, the U.S. once again reaffirmed its recognition of a state's right to take forcible steps to protect its nationals abroad.

> Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the Charter of the United Nations. However, there is a well established right to use limited force for the protection of one's own nationals from the imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.[6]

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[5] Green, "Rescue at Entebbe—Legal Aspects," 6 *ISRAEL Y.B. HUMAN RIGHTS* 312 (1976); Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action," 12 *J. INT'L L. & EC.* 57 (1977); Krift, "Self-Defense and Self-Help: The Israeli Raid on Entebbe," 4 *BROOKLYN J. INT'L. L. 43* (1977); Salter, "Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression?" 11 *INT'L LAW. 331* (1977); and Note, "Use of Force for the Protection of Nationals Abroad: The Entebbe Incident," 9 *CASE W. RES. J. INT'L. 117* (1977). *Compare* Sheehan, "The Entebbe Raid: The Principle of Self-Help in International Law As Justification for State Use of Armed Force," 1 *FLETCHER FORUM 135* (1977) (recommends new concept of "rectification"), *with* Paust, "Entebbe and Self-Help: The Israeli Response to Terrorism," 2 *FLETCHER FORUM 86* (1978) (urges retention of traditional concept of self-help.

[6] 31 U.N. SCOR (1941st mtg.) 31, U.N. Doc. S/p.v. 1941 (1976).

Note that this right, while stoutly defended, is described only as one "flowing from the right of self-defense. . . ." Can and should it not be defined with more precision?

The answer obviously is in the affirmative. A quick glance at several of the articles in this volume provides some definitional help, more, it must be added, than most of the legal literature on Entebbe.[7] Parenthetically, it is worth noting that this literature nowhere cites or otherwise makes use of these articles which had appeared some years before in the *Naval War College Review.* Such research oversights, understandable in view of the fact that not all nonmilitary authors have ready access to the *Review,* hopefully will occur with diminishing frequency now that the present two volumes are in print. Thus the articles discussed immediately below should have considerable impact upon the protection of nationals debates in coming years.

Take, for instance, the previously-mentioned article by Admiral Miller. As we have seen, contrary to the stereotype of military lawyers held by many civilians, Miller ends his textual analysis of the impact of the UN Charter upon the customary norms governing the protection of nationals abroad with a conclusion which not all government decision-makers, military or otherwise, will welcome: namely, that the Charter prohibits forcible self-help.[8] The counterweight to this prohibition, he proceeds to relate, is the substitute of collective action by the UN. Yet Miller, unlike some international lawyers who focus their eyes on the text of the Charter almost exclusively,[9] is not unaware of the principle that the subsequent conduct of parties to a treaty is relevant to its interpretation. "Whether or not the charter has constructed collective machinery adequate to [its] purpose," he rightly observes,

> is quite another question and, it would seem, a most crucial one. For if the promised substitute for unilateral action is not forthcoming, states could hardly be expected to refrain from developing other procedures and perhaps from even falling back to their prior practice of unilateral forcible self-help. . . . It is abundantly clear from current international practice that this process has long since begun.[10]

One example he cites is the Dominican Republic. While not taking a position himself on whether the U.S.'s actions were legal or not—once again demonstrating his independence from the official line taken by the U.S. Government at the time—he does note that many com-

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[7] *See* note 5 *supra.* An exception is Paust's short comment.

[8] *See* text at note 1 *supra.*

[9] *See, e.g.,* Brownlie, "Thoughts on Kind-Hearted Gunmen," in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139* (R. Lillich ed. 1973). *Compare* Brownlie, "Humanitarian Intervention," in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (J.N. Moore ed. 1974), *with* Lillich, "Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives," in *LAW AND CIVIL WAR IN THE MODERN WORLD 229* (J.N. Moore ed. 1974).

[10] Miller, *supra* note 1, at 80.

mentators have called the initial landing of marines to protect and evacuate U.S. nationals "a legitimate exercise of unilateral self-defense or unilateral forcible self-help for humanitarian purposes."[11] Since his article concerns the legitimacy of collective action by regional organizations, he does not venture to define these two concepts or clarify the criteria for their invocation.

This task is attempted with some success by Commander Woods. While never explicitly distinguishing between the two concepts, he repeatedly makes clear his belief that unilateral forceful action to protect nationals abroad can be justified under contemporary international law only if such action is deemed "to be encompassed within the concept of self-defense."[12] Using these criteria formulated by Judge Waldock–"(1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereignty to protect them and (3) measures of protection strictly confined to the object of protecting them against injury"[13]–he concludes that "the original limited intervention in the disorders of the Dominican Republic on 28 April 1965 to protect U.S. citizens from imminent danger in a situation of anarchy did not violate standards of customary international law."[14] Woods claims support for this conclusion from Article 0614 of the U.S. Navy Regulations of 1948, then in force, which under the rubric of the "right of self-preservation" specifically authorized (and, indeed, mandated) the use of force to protect "the lives and property of [U.S.] citizens against arbitrary violence, actual or impending. . . ."

In the best tradition of the Navy JAG, however, Commander Woods does not accept the authoritativeness of the above article unquestionably, always a prudent approach and an especially wise one in this case in view of the fact that the article had remained unchanged since the late Nineteenth Century.[15] Reviewing it against contemporary international law, he finds it no longer completely compatible and hence urges the Navy

> to update article 0614 to conform to modern standards of customary international law. It is suggested that this can be accomplished by the simple expediency of deleting any reference

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[11] *Id.* at 96.

[12] Woods, *supra* note 3, at 30.

[13] Waldock, "The Regulation of the Use of Force by Individual States in International Law," 81 *RECUEIL DES COURS* (Hague Academy of International Law) 455, 467 (1952-II).

[14] Woods, *supra* note 3, at 26.

[15] *See* text at note 3 *supra*. "Your present [pre-1973] Navy Regulations I was able to trace . . . back to 1893. They are almost *in haec verba* now with what they were in 1893. Since then we have had the Hague Convention, the League of Nations, the Kellog-Briand Pact, and the United Nations Charter. I gently [suggest] that it might be a good idea to reassess these sections of the Navy Regulations to see whether they [are] in conformity with international law . . . ." Lillich, "Forcible Self-Help Under International Law," page 129 of this volume at page 133.

> to "property" and substituting the words "self-defense" for the outmoded language "self-preservation" wherever the latter appears. Additionally, bearing in mind the serious international consequences that an application of force could entail, it is suggested that specific operation orders be written with a view toward giving commanding officers definitive guidance in the enforcement of this right, emphasizing the concept of evacuation over all other means of protection.[16]

His call here fell on receptive ears, for the 1973 edition of the regulations not only shifts the juridical rationale for the use of force from self-preservation to self-defense, but also eliminates any reference to protecting the "property" of U.S. nationals. The new regulations provide as follows:

> 0914. Violations of International Law and Treaties.
>
> On occasions when injury to the United States or to citizens thereof is committed or threatened in violation of the principles of international law or in violation of rights existing under a treaty or other international agreement, the senior officer present shall consult with the diplomatic or consular representatives of the United States, if possible, and he shall take such action as is demanded by the gravity of the situation. In time of peace, action involving the use of force may be taken only in consonance with the provisions of the succeeding article of these regulations. The responsibility for any application of force rests wholly upon the senior officer present. He shall report immediately all the facts to the Secretary of the Navy.
>
> 0915. Use of Force Against Another State.
>
> 1. The use of force in time of peace by United States naval personnel against another nation or against anyone within the territories thereof is illegal except as an act of self-defense. The right of self-defense may arise in order to counter either the use of force or an immediate threat of the use of force.
>
> 2. The conditions calling for the application of the right of self-defense cannot be precisely defined beforehand, but must be left to the sound judgment of responsible naval personnel who are to perform their duties in this respect with all possible care and forebearance. The right of self-defense must be exercised only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required.
>
> 3. Force must never be used with a view to inflicting punishment for acts already committed.

Like its predecessor, however, Article 0915(2) does not spell out satisfactorily the criteria to be used in determining when force may be used to protect U.S. nationals. Instead, on the ground that "[t]he conditions calling for the application of the right of self-defense cannot be precisely defined beforehand," it leaves the decision "to the sound judgment of responsible naval personnel who are to perform their

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[16] Woods, *supra* note 3, at 30.

duties in this respect with all possible care and forebearance." From whence, then, is the naval commander (or operations order writer or other decisionmaker) to get the "definitive guidance" Woods states—and everyone must agree—he needs?

Considerable help is provided by Captain McHugh in his article "Forcible Self-Help in International Law."[17] As his title indicates, unlike Miller, who straddles the question, and Woods, who opts for the self-defense theory, McHugh adopts the forcible self-help rationale to justify the protection of U.S. nationals abroad. In this respect he joins company not only with me,[18] but with Professor Myres S. McDougal, one of the leading U.S. international lawyers of this century and the distinguished co-author of the leading treatise on the use of force in international law.[19] In an article in the *Naval War College Review*, reprinted in Volume I, McDougal graphically demonstrates how his own thinking on forcible self-help has shifted in light of post-Charter state practice. The importance of his views warrants the following quotation of unaccustomed length:

> It has been argued . . . that only two kinds of uses of force, transnational force, are now authorized. One is the self-defense that is authorized under article 51, the other is the collective police action of the organization which is authorized in chapter VII of the Charter. I'm ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that article 2(4) and article 51 must be interpreted differently. . . .
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> [T]he first important fact is that the machinery for collective police action projected by the Charter has never been implemented. We don't have the police forces for the United Nations, the collective machinery that was expected to replace self-help. In other words, there has been a failure in certain of the major provisions for implementing the Charter.
>
> If, in the light of this failure, we consider how we can implement the principal purposes of minimizing coercion, of insuring that states do not profit by coercion and violence, I submit to you that it is simply to honor lawlessness to hold that the members of one state can, with impunity, attack the nationals—individuals, ships, aircraft or other assets—of other states without any fear of response. In the absence of collective machinery to protect against attack and deprivation, I would suggest that the principle of major purpose requires an interpretation which would honor self-help against prior unlawfulness. The principle of subsequent conduct certainly confirms this. . . .

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[17] McHugh, "Forcible Self-Help in International Law," at page 139 of this volume.

[18] *See* note 15 *supra*.

[19] McDougal & Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961).

> Hence, if I had the opportunity to rewrite the book with Mr. Feliciano in which we mildly questioned the lawfulness of self-help less than self-defense, I think I would come out with a different conclusion, as many people have.[20]

While McHugh does not cite this extract in his own article, his analysis obviously was influenced by McDougal, whose treatise he relies upon heavily.

McHugh's primary contribution, however, is his refinement of various criteria, which Professor Richard A. Falk first advanced 10 years ago, by which the legality of a state's claim of forcible self-help may be judged.[21] Under these criteria, the use of force by states may be acceptable provided:

> —That acts of provocation by the target state have raised an imminent and significant threat to the continued existence of a nation's political independence and/or territorial integrity.
>
> —That, if possible, a diligent effort has been made to obtain satisfaction by pacific means.
>
> —That recourse to international organizations is had as practicable.
>
> —That a state accepts the burden of persuasion and makes a prompt explanation of its conduct before the relevant organ of community review, showing a disposition to accord respect to its will.
>
> —That the acting state's purpose cannot be achieved by acting within its own territory.
>
> —That the use of force is proportional to the provocation and directed against military and paramilitary targets and clearly indicates the contours of the unacceptable provocation.
>
> —That the user of force continues to seek a pacific settlement of the underlying dispute on reasonable terms.[22]

Applying these criteria to the Dominican Republic action, McHugh thinks the initial landings to protect and evacuate U.S. nationals pass international muster. "It is submitted," he suggests, "that intervention for this purpose in the future would be hard to fault."[23] The conclusions reached by the commentators on Entebbe bear him out.[24]

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[20] McDougal, "Authority to Use Force on the High Seas," 20 *NAVAL WAR COLLEGE REV.* 19, 28-29 (Dec. 1967), at page 551 of Volume I of these reprints.

[21] Falk, "The Beirut Raid and the International Law of Retaliation," 63 *AM. J. INT'L L.* 415, 441-42 (1969). Other criteria, specifically formulated for the protection of nationals context, may be found in Nanda, "The United States' Action in the 1965 Dominican Crisis: Impact on World Order—Part I," 43 *DENVER L.J.* 439, 475 (1966); Lillich, "Forcible Self-Help to Protect Human Rights," 53 *IOWA L. REV.* 325, 347-51 (1967); and Moore, "The Control of Foreign Intervention in Internal Conflict," 9 *VA. J. INT'L L.* 205, 264 (1969).

[22] McHugh, *supra* note 17, at 154.

[23] *Id.* at 152.

[24] *See* note 5 *supra.*

The several articles discussed above constitute, in my opinion, a most valuable contribution to a topic of great complexity and continuing importance. They have been instrumental, as has been seen, in bringing the Navy Regulations into line with contemporary international law. Moreover, they raise issues of policy and suggest criteria for decision that will prove highly useful in coming years to policy planners and naval officers alike. Their republication herein will assure them of the wide audience they deserve.

## International Human Rights Norms and the U.S. Foreign Policy Process

Turning to the articles in this volume which touch upon international human rights, one is struck both by their number and the wide range of issues they cover. Perhaps that is because under the Carter Administration our consciences have been raised about the issue of human rights, not only at home but also abroad. Yet the concern for human rights, somewhat paradoxically in the view of some civilians, always has been prominent among members of the naval profession. Forcible self-help to protect nationals abroad, after all, is no more than the rudimentary procedure by which states seek to protect the substantive human rights—the most basic of which is the right to life itself—of individuals. Human rights factors are influential if not necessarily controlling in a host of other international law fields as well. Professor Louis Sohn, at the outset of his article on "International Law and Basic Human Rights," correctly states that:

> [t]his is an area of international law in which, over the years, we developed perhaps more law than in other areas. If you look at the jurisprudence of international tribunals, you discover that more cases deal with problems of human rights than with rights and duties of states themselves.[25]

In addition to the traditional international law governing the Responsibility of States for Injuries to Aliens, upon which Sohn focuses, the other major body of law concerned with human rights in pre-Charter days was the Law of War. Few if any international lawyers would dissent from Professor Tucker's assertion that "the traditional law of war [was] one of the most worthwhile achievements of the 18th and 19th centuries. . . ."[26] Beginning just over a century ago and culminating in the four Geneva Conventions of 1949 (soon to be supplemented by the two Geneva Protocols of 1977), a vast body of substantive and procedural law came into being, the purpose of which was to regulate and humanize the conduct of armed conflict. This body of law, ably canvassed by Professor Gerald Draper,[27] arose from the

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[25] Sohn, "International Law and Basic Human Rights," at page 587 of this volume.

[26] Tucker, "The Law of War," at page 233 of this volume.

[27] Draper, "Rules Governing the Conduct of Hostilities—The Laws of War and Their Enforcement," at page 247 of this volume.

concern to protect, insofar as it is possible in wartime, the human rights of individuals, whether combatants or civilians. As Judge Baxter explains,

> [t]he reason for the application of law in this area is to be found in a fundamental human response to warfare and human misery. We realize that even though millions may be suffering, this offers no justification to add one more person to that group if injury to him can be avoided. To find the basis for this, you must go back to the respect for human dignity and for the worth of the individual, which is the foundation of civilization itself.[28]

The Law of War covers a vast range of subjects, most of which receive treatment in this volume. The articles by Baldwin, Grabb and Hearn together comprise a comprehensive study of the Status of Forces Agreements, a major purpose of which is to guarantee U.S. military personnel garrisoned abroad procedural due process should they be tried in foreign courts. Several articles, including one by the President of the Naval War College, Admiral Stockdale, raise legal and other issues concerning the treatment of prisoners of war in Vietnam; of especial interest is Commander Naughton's psychological portrait of the U.S. POW, which describes the stresses to which they were subjected and the creative responses by which they resisted enemy pressure.[29] Other articles treat specific types of weapons and warfare (DeSaussure on air warfare, Levie on mine warfare, and Miller on naval warfare). Professor Levie, in a short but meaty article entitled "Combat Restraints,"[30] examines the four specific areas of military necessity, reprisals, protection of civilian noncombatants and protection of POWs. "The problem in this area," he concludes, "is not lack of law, it is lack of compliance with the law."[31]

Enforcing the law in this area is a problem, as it is in other areas of international law where human rights concerns are manifest. "If the international law of war is to accomplish anything," writes Baxter, "if real restraints are to be placed upon violence in warfare, the wrongdoer must be held criminally accountable for violations of the law."[32] The difficulty with following this prescription is that no international court, as Professor Briggs' review of the Nuremberg Tribunal established after World War II reminds us, exists to try alleged war criminals, and that (*pace* Colonel Poydasheff) the use of courts-martial to try the My Lai defendants clearly demonstrates, at least in my opinion, that the process by which an offender is tried by his or her own military establishment has not yet been made to "work." In view of the well-known facts about My Lai, which led to only six prosecutions and

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[28] Baxter, "The Law of War," page 209 of this volume at page 212.

[29] Naughton, "Motivational Factors of American Prisoners of War Held by the Democratic Republic of Vietnam," at page 379 of this volume.

[30] Levie, "Combat Restraints," at page 201 of this volume.

[31] *Id.* at 207.

[32] Baxter, *supra* note 28, at 213.

but one conviction, that of Lieutenant Calley, who is now free on parole, it simply "boggles the mind" to be told that "the My Lai cases, posing the problem they did, were properly and correctly resolved by the U.S. Army."[33]

Enforcing the Law of War by prosecuting alleged wrongdoers presents some legal as well as administrative problems. In the forefront are the interrelated issues of command responsibility and superior orders. (In the My Lai cases, it will be recalled, Captain Medina argued that he was not responsible for the crimes Calley and his men committed since he [Medina] had no actual knowledge of their acts; Calley, conversely, claimed that he merely was carrying out Medina's orders and hence was not responsible himself.)

Insofar as command responsibility is concerned, military commanders obviously are responsible for war crimes when the acts in question were committed by their men pursuant to their orders. Moreover—and here I quote, *inter alia,* from Paragraph 501 of The U.S. Army Field Manual 27-10, *The Law of Land Warfare*—a commander

> is also responsible if he has actual knowlege, or *should have knowledge,* through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violations thereof. (Emphasis added.)

The italicized phrase, which reflects the rule of broad if not absolute command responsibility applied in the *Yamashita Case,*[34] is a key factor in the enforcement of the law of war since it in effect requires affirmative action by the commander, action which if taken will reduce the likelihood of the law's violation. The surprising failure to charge the court members correctly in the case of Captain Medina, who was found not guilty after a charge repeatedly emphasizing that his *actual* knowledge of the acts of Calley and his men at My Lai was necessary for conviction, constitutes a retreat from the standards of *Yamashita* and Field Manual 27-10.

Joining this unfortunate retreat is Colonel Hart, whose enterprising search into the unpublished records of the Board of Review in *Yamashita* reveals that the five army officers sitting on it clearly thought that the evidence submitted to the Military Commission which tried the General connected him with actual knowledge of the activities for which he eventually paid with his life. Since, as Hart points out, "[t]he Military Commission failed to address the question of knowledge explicitly,"[35] what he calls "the so-called Yamashita principle"[36]

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[33] Poydasheff, "Military Justice: A Reinforcer of Discipline," page 426 of this volume at page 432.

[34] In re Yamashita, 327 U.S. 1 (1946).

[35] Hart, "Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised," page 397 of this volume at page 404.

[36] *Id.* at 412.

emerged. In fact, he argues, it "does not exist legally."[37] This interesting attempt to rewrite legal history seems plausible at first glance, but it runs counter to what has emerged as the accepted—and desirable—rule of command responsibility. Moreover, it clearly conflicts with the above-quoted paragraph of Field Manual 27-10, which the author nowhere cites.

With respect to the defense of superior orders, Paragraph 509(a) of the Field Manual restates the accepted rule, namely, that they do *not*

> constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.

The defense did not save Lieutenant Calley in his court-martial, as Colonel Poydasheff explains, because the presumed order of Captain Medina could not have been considered valid, and because "Calley should have known that killing unarmed, unresisting men, women, and children was illegal."[38] In my opinion, Poydasheff, in his attempt at "a reconciliation of law and military ethics," goes too far in favor of the latter when he parses *Calley* to read that "the servicemember is bound only to refuse patently illegal orders or those that he *personally* knows are illegal."[39] This gloss of Paragraph 509(a), which the author does not cite [although he does quote in full the explanatory and seemingly more exculpatory Paragraph 509(b)], reflects a more lenient attitude toward the alleged wrongdoer than is desirable if a serious effort to enforce the law of war by means of individual responsibility is to be maintained.

Whether this approach is workable in any event is an issue raised by Draper.

> On balance I am inclined to think, after a long and somewhat painful experience in war crimes forums, that the moral, social, and disciplinary effects of thorough instructions in the law of war in general, and in the Geneva Conventions of 1949 in particular, . . . may in the long run prove more persuasive of law observance and dissuasive of its breach than the execution or long imprisonment of war criminals.
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> . . . Instruction in the law of war and the humanitarian code of conduct enjoined thereby, render the recipient aware that there are permanent legal norms, based upon the moral, humane, and rational order, which transcend municipal laws and superior orders at variance with or denying that order. Governments which fail to give that instruction in the law of war now required by the law of war render their armed forces and civil population and the entire community of civilized men and women, a gross disservice which posterity will not fail to condemn. Governments have been given full and adequate warning. Let them disregard it at their peril.[40]

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[37] *Id.*

[38] Poydasheff, *supra* note 33, at 434.

[39] *Id.* at 435 (emphasis added).

[40] Draper, *supra* note 27, at 261-62.

These prophetic words, written at the beginning of the Vietnam War, unfortunately were not heeded initially and one result was My Lai. Subsequent improvements in educating servicemen in the law of war have been far more successful, and if continued and improved should supplement if not supplant traditional methods of enforcement.

In an entirely different area, where human rights concerns once again directly impact upon the duties and responsibilities of the naval officer, Colonel Mann[41] and Professor Goldie[42] both recount the unsuccessful attempt by a Lithuanian seaman on a Soviet ship to obtain political asylum aboard the U.S. Coast Guard cutter *Vigilant* in November 1970. Although the seaman was able to make it aboard the cutter, a Soviet boarding party subsequently was permitted to remove him by force. Clearly this summary denial of asylum violated the U.S.'s obligations under the Protocol Relating to the Status of Refugees,[43] and the officers concerned paid the price in reprimands, retirements and shore duty. Although there was no Coast Guard regulation in force concerning the granting of asylum,[44] the various persons concerned in making the unfortunate decision would have received woefully misleading guidance from Article 0621 of the Navy Regulations of 1948, then in force, which opened with a flatly wrong sentence stating that "[t]he right of asylum for political or other refugees has no foundation in international law." Clearly, the above Protocol being the supreme law of the land under the U.S. Constitution, Article 0621 was void, invalid and in need of revision. Goldie's suggested revisions were adopted almost lock, stock and barrel in Article 0940 of the 1973 edition of the regulations,[45] demonstrating once again the action-oriented thrust of many of the articles in this volume.[46]

Bringing order to one's own house is a major human rights concern, and by so doing the U.S. strengthens its hand when it comes to asserting human rights claims against other countries. Ambassador Hauser, in an insightful article on "International Law and Basic Human Rights,"[47] makes a strong plea for the U.S. to ratify the various human rights treaties which it signed, some of which have been pending in the Senate for over three decades. She is not particularly optimistic on this

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[41] Mann, "Asylum Denied: The Vigilant Incident," at page 598 of this volume.

[42] Goldie, "Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970," at page 626 of this volume.

[43] Protocol Relating to the Status of Refugees, *signed* Jan. 31, 1967, *entered into force* Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. The protocol incorporates by reference the substantive provisions of the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, *entered into force* Apr. 22, 1954, 189 U.N.T.S., which the U.S. had not ratified.

[44] Mann, *supra* note 41, at 618.

[45] Goldie, *supra* note 42, at 38-39.

[46] *See* text at notes 15-17 *supra*.

[47] Hauser, "International Law and Basic Human Rights," at page 579 of this volume.

score, pointing out that "while a good number of our Senators find it quite correct to comment publicly on the treatment, let us say, of Jews by the Soviets, Ibos by the Nigerians, or Anguillans by the British, they cannot accept the idea that the rest of the world would see fit to comment on the way in which our Government treats its own citizens."[48] The attitude she describes not only is logically inconsistent, but it is shortsighted as well. The U.S. has little to lose and much to gain by supporting human rights claims both here and abroad. Baxter, writing about respect for the law of war, makes a similar point. "I think you will agree with me," he states,

> that one of the great objectives of the United States and of the West in the long-range struggle in which we are engaged is the establishment for the entire world of the rule of law. If we ourselves do not adhere to that standard and demand compliance with the rule of law by those who may be arrayed against us, we will have abandoned one of the vital objectives we are bent upon attaining.[49]

The full impact of international human rights norms on the U.S. foreign policy process is just beginning to be felt.[50] It is appropriate that President Carter, a former naval officer, has been the single most important person in bringing this situation to pass. The articles mentioned in this volume contain a host of useful data and ideas about the role that international law, and especially international human rights law, can play in the shaping of a defense and foreign policy that will protect the national security needs of the U.S. while simultaneously contributing to the development of a just and stable international legal order.

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March, 1979

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[48] *Id.* at 583-84.

[49] Baxter, *supra* note 28, at 218-19.

[50] *See* Vogelgesang, "What Price Principle? U.S. Policy on Human Rights," 56 *FOR. AFF.* 819 (1978). *See generally* Schlesinger, "Human Rights and the American Tradition," 57 *FOR. AFF.* 503 (1979). For a survey and evaluation of how the U.S. can best put its human rights policy into practice, see Lillich, "The United States Policy of Humanitarian Intervention and Intercession," in *HUMAN RIGHTS AND AMERICAN FOREIGN POLICY* 278 (D. Kommers & G. Loescher eds. 1979).