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Hazing And Initiation Rites as International War Crimes

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SCSL

ISSUE: HAZING AND INITIATION RITES AS INTERNATIONAL WAR CRIMES

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I. Introduction and Summary of Conclusions[*]

A. Issues

This memorandum addresses international law on the issue whether a member of a private army may be held culpable for his conduct in subjecting other members of his own army to violent initiation rites and hazing that result in wounding, maiming, or death. The first part of this memorandum identifies the relevant provisions of the Statute of the Special Court of Sierra Leone giving the court its jurisdictional base, and then explains how the Martens Clause of Additional Protocol I of the Geneva Conventions may be properly invoked and applied to the present issue. The second part of this memorandum addresses and analyzes various treaties and conventions on torture in hopes of drawing a parallel between initiation rights, on the one hand, and hazing and torture on the other. The third part of this memorandum discusses current trends in international law on the issue of military hazing.

B. Summary of Conclusions

(1) The Martens Clause, as Articulated in Additional Protocol I of the Geneva Conventions, Authorizes this Court to Look to Humanitarian Law and Customary International Law as Means of Addressing and Defining New War Crime Violations.

Articles 2 and 3 of the Statute for the Special Court of Sierra Leone limit this court's jurisdiction to crimes committed against civilian populations and against prisoners of war. Since the issue presented here for consideration deals with what we may call "friendly soldiers," Articles 2 and 3 are inapplicable to the issue presented. However, Additional Protocol I of the Geneva Conventions contains a version of the Martens

[*] ISSUE: In the course of initiating members who consent to join a private army, some members are killed, wounded and maimed. Can the prosecution lead such evidence in support of the crimes charged in the indictment? Under international criminal law can a member of a private army be culpable for killing a member of his own army? The deceased member is neither a civilian nor and enemy combatant.

Clause, originally formulated in the Preamble to the 1899 Hague Convention, that authorizes this court to look to humanitarian law and the principles of customary international law for direction in addressing and defining new war crimes.

(2) Humanitarian Law, Namely Treaties and Conventions on Torture, Support the Proposition that Military Initiation Rites and Hazing May Properly Be Categorized as War Crimes.

Torture conventions and treaties, specifically the Universal Declaration of Human Rights of 1970, the International Covenant on Civil and Political Rights of 1966, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1953 Convention for the Protection and Fundamental Freedoms, and the 1969 American Convention on Human Rights, do not discriminate against individuals on the basis of status. Whereas Articles 2 and 3 of the Statute of the Special Court of Sierra Leone apply only to atrocities committed against civilians and prisoners of war, the plain language of the aforementioned treaties and conventions makes it clear that any person, regardless of status, may claim their protection. Instances of initiation rites and hazing, however, may still have to be evaluated on a case by case basis to determine whether the act in question rises to the level of torture. Assuming that a parallel may be drawn between hazing and torture, there is humanitarian law that suggests that we may properly categorize hazing as a war crime, and therefore within the jurisdiction of this court via the Martens Clause of Additional Protocol I.

(3) State Practice Supports the Proposition that Hazing Prohibitions Constitute Customary International Law.

Although the task of establishing policies and laws against hazing as principles of customary international law is beyond the scope of this memorandum, an analysis of some countries' anti-hazing policies or laws is helpful in demonstrating a global trend

toward banning violent military initiation and hazing. Analysis of the policies and laws in the United States, Canada, the Philippines, Taiwan, Kazakhstan, Latvia and Russia present a broad global picture of the already established and the still evolving practice of states with regard to military hazing rituals and initiation rites. The policies and laws of the aforementioned countries indicate a global trend towards prosecuting and punishing individuals that participate in acts of hazing in the military. By applying the precepts of the Martens Clause, this court may then prosecute instances of hazing as war crimes.

II. Factual Background

Since 1991, Sierra Leone and its people have been the victims of a vicious civil war. At last report, nearly 100,000 people have been killed, and millions have been forced to flee from their homes.[1] Over the last decade, the Revolutionary United Front (RUF) has been the most violent aggressor in this conflict. Primarily motivated by power and greed, the RUF has attempted to gain control over Sierra Leone's diamond trade.[2] These attempts have nearly always ended in long cycles of brutality. By 1994, the RUF had gained control of large portions of diamond-rich areas of the country.[3] This, however, was not done through political means, but rather through the use of violence to gain access to and power over political structures in the country.[4] Such tactics have come to be known generally as the "campaign of terror" and they include murdering adult men,

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[1] Youth Ambassadors for Peace, *Sierra Leone: In Depth*, http://www.freethechildren.org/peace/childrenandwar/slindepth.html [hereinafter *Sierra Leone in Depth*] (last viewed Apr. 14, 2004). [Reproduced in accompanying notebook at Tab 29.]

[2] *Id.*

[3] *Id.*

[4] *Id.*

raping women and girls, abducting young men, and generally creating a fearful environment for the civilians of Sierra Leone.[5]

The RUF's cycle of brutality, however, affects not only Sierra Leone's civilian population, but also the RUF's own members.[6] The information available in regards to incidents and practices of hazing within the RUF is restricted to those practices as applicable to child soldiers. However, for the purpose of this introduction and the rest of the memorandum we may assume that these practices apply equally to the RUF's adult recruits. Youth Ambassadors for Peace, a subsection of the Free the Children movement, reports that the most common hazing practices in the RUF are food deprivation, forced amputation of fingers, noses, ears, and limbs, and execution.[7] On July 23, 2001, the UN Security Council approved the creation of the Special Court for Sierra Leone in order to prosecute people accused of crimes against humanity and war crimes applicable in this conflict.[8]

III. The Martens Clause and the Laws of Armed Conflict

A. General Background

The Statute of the Special Court of Sierra Leone[9] grants the court jurisdiction to prosecute persons for "Crimes Against Humanity" as defined under Article 2 and for

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[5] *Id*.

[6] Youth Ambassadors for Peace, *Child Soldiers: In Depth*, http://www.freethechildren.org/peace/childrenandwar/soldiersindepth.html [hereinafter *Child Soldiers in Depth*] (last viewed Apr. 14, 2004). [Reproduced in accompanying notebook at Tab 31.]

[7] *Id*.

[8] *Sierra Leone in Depth*, *supra* note 1, at 6. [Reproduce in accompanying notebook at Tab 29.]

[9] Statute of the Special Court for Sierra Leone, U.N. Doc. S/2000/915 (2000), *available at* http://www.sierra-leone.org/specialcourtstatute.html. [Reproduced in accompanying notebook at Tab 9.]

"Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II as detailed in Article 3. Unfortunately, neither of these articles is applicable to atrocities committed by members of a private army against fellow members in that army. As defined by Article 2, "Crimes against Humanity" applies only to attacks against civilian populations[10], and the 1949 Geneva Conventions, which give Article 3 its jurisdictional authority, apply solely to prisoners of war and to civilians in time of war[11]. However, the Martens Clause of the 1949 Geneva Conventions may provide the court with the requisite jurisdiction over hazing and related crimes.

As originally formulated in the Preamble to the 1899 Hague Convention[12] with respect to the laws and customs of war on land, the Martens Clause read:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[13]

The clause's original intent is revealed in the Preamble to the Hague Convention: Cases not provided for in the Convention "should [not] for want of a written provision be left to

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[10] *Id.* at Art. 2.

[11] *Id.* at Art. 3.

[12] "The clause was based upon and took its name form a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899. Martens introduced the declaration after delegates at the Hague Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force… Although the clause was originally formulated to resolve this particular dispute, it has subsequently reappeared in various but similar versions in later treaties regulating armed conflicts." Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, INT'L REV. RED CROSS, 1, *available at* www.icrc.org/web/eng/siteeng0.nsf/iwpList133/32AEA038821EA35EC1256B66005A747C (last viewed Feb. 16, 2004). [Reproduced in accompanying notebook at Tab 24.]

[13] *See generally* Helmut Strebel, *Martens Clause*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 252 (Rudolph Bernhardt ed., 1982). [Reproduced in accompanying notebook at Tab 21.]

the arbitrary judgment of the military commanders."[14] In the case of *In re Krupp and others*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948), the U.S. Military Tribunal saw fit to expound upon the Martens Clause, stating:

> The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.[15]

In 1949, the drafters of the Geneva Conventions included a Martens Clause in their denunciation clauses[16] in order to achieve a somewhat different goal: to ensure that if any parties should denounce the Conventions, they would still remain bound by customary international law, the laws of humanity, and the dictates of public conscience. The provision therefore guaranteed that international customary law would still apply to states no longer bound by the Geneva Conventions as treaty law.[17]

Since the creation of the Additional Protocols to the Geneva Conventions in 1977, a modernized version of the Martens Clause has emerged. Notably, although the Martens Clause first appeared in the preamble to the 1973 draft of Additional Protocol I, the 1977 Diplomatic Conference, underlining the continued importance of the Clause, moved it to the substantive text and provisions of the Protocol.[18] Protocol I, Article 1(2) provides: "In

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[14] Theodor Meron, *The Hague Peace Conferences: The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 1 (2000). [Reproduced in accompanying notebook at Tab 22.]

[15] Meron, *supra* note 14, at 2, citing *In re Krupp and others*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948). [Reproduced in accompanying notebook at Tab 22.]

[16] *See generally* Common Articles 62, 63, 142, and 158.

[17] Meron, *supra* note 14, at 2. [Reproduced in accompanying notebook at Tab 22.]

cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."[19] This "modernized" version of the clause therefore acts as a principle of interpretation that rules out "an a contrario interpretation since, where there [is] no formal obligation, there [will] always [be] some duty stemming from international law."[20]

B. Employing the Martens Clause

i. International Precedent

The Martens Clause calls for the consideration of principles of international law, principles of humanity, and dictates of public conscience when analyzing cases falling outside of the purview of the Geneva Conventions. This consideration has been utilized by many international courts and organizations. In the merits phase of Military and Paramilitary Activities in and against Nicaragua, for example, the International Court of Justice stated that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law" and that the rules detailed in Common Article 3 "constitute a *minimum* yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of

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[18] Ticehurst, *supra* note 12, at 1. [Reproduced in accompanying notebook at Tab 24.]

[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1(2), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977). [Reproduced in accompanying notebook at Tab 6.]

[20] Meron, *supra* note 14, at 2, citing 8 DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL LAW APPLICABLE IN ARMED CONFLICTS, OFFICIAL RECORDS, Doc. CDDH/I/SR.3, ¶ 11 (1978). [Reproduced in accompanying notebook at Tab 22.]

humanity'."[21] This same statement was invoked by UN Secretary General in the report on the Statute of the International Criminal Tribunal for the Former Yugoslavia:

> In this context [of crimes against humanity], it is to be noted that the International Court of Justice has recognized that the prohibitions contained in Common Article 3 of the 1949 Geneva Conventions are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character.[22]

In the *Furundzija* case, the International Criminal Tribunal for the Former Yugoslavia embraced the Martens Clause and the UN Secretary General's aforementioned declaration, turning to the Martens Clause in order to support the proposition that the prohibition of torture is a part of customary international law.[23]

Perhaps the most striking example of the relevance and continued importance of the Martens Clause is the International Court of Justice's Advisory Opinion on the legality of the threat or use of nuclear weapons issued on July 8, 1996, wherein the court determined that the Martens Clause was a customary rule, and therefore of normative status.[24] The Opinion itself "merely referred to the Martens Clause by stating that 'it proved to be an effective means of addressing the rapid evolution of military technology'," but "[s]tate submissions and some of the dissenting opinions provide[] very

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[21] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ. REP, 113-114, ¶ 218 (June 27) (Emphasis added). [Reproduced in accompanying notebook at Tab 17.]

[22]Meron, *supra* note 14, at 82, citing *Report of the Secretary General pursuant to paragraph 2 of the Security Council Resolution 808*, ¶ 48 n.9, UN Doc. S/25704 (1993). [Reproduced in accompanying notebook at Tab 22.]

[23] *Prosecutor v. Furundzija*, Judgment, No. IT-95-17/1-T, ¶ 137 (Dec. 10, 1998). [Reproduced in accompanying notebook at Tab 18.]

[24] Legality of the threat or use of nuclear weapons, 1996 I.C.J. 95 (Jul. 8). [hereinafter Weapons]. [Reproduced in accompanying notebook at Tab 37.]

interesting insight into its meaning."[25] The Russian Federation, for example, contended in its submission that the Martens Clause was redundant, and therefore irrelevant, because a complete code of the laws of war had been established by the 1949 Geneva Conventions and the Additional Protocols.[26] In its written submission, the United Kingdom argued that the absence of a relevant treaty provision does not implicitly mean that nuclear weapons are lawful. The United Kingdom went on to argue that the Martens Clause *alone* could not establish the illegality of nuclear weapons. Rather, it contended that it was necessary to point to some rule of customary international law in order for a prohibition to exist.[27] In his dissent to the ICJ's opinion, Judge Koroma objected to the United Kingdom's suggested approach, stating, "the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism."[28] Echoing this sentiment, Judge Shahabuddeen in his dissent stated that "[i]t is difficult to see what norm of State conduct [the Martens Clause] lays down if all it does is to remind States of norms of conduct which exist totally *dehors* the Clause."[29] One legal scholar has commented, "Judge Shahabuddeen is clearly of the opinion that the Martens Clause is not simply a reminder of the existence of other norms of international law not contained in a specific treaty- it

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[25] Ticehurst, *supra* note 12, at 1. [Reproduced in accompanying notebook at Tab 24.]

[26] Ticehurst., *supra* note 12, at 1, citing Russian Federation, written submission on the Advisory Opinion of the ICJ, Legality of the threat or use of nuclear weapons, requested by the General Assembly, at 13. [Reproduced in accompanying notebook at Tab 24.]

[27] Ticehurst, *supra* note 12, at 1-2, citing United Kingdom, written submission on the Advisory Opinion of the ICJ, Legality of the threat or use of nuclear weapons, requested by the General Assembly, at 21. [Reproduced in accompanying notebook at Tab 24.]

[28] Weapons, *supra* note 13 (dissenting opinion of Judge Koroma, at 14). [Reproduced in accompanying notebook at Tab 37.]

[29] Weapons, *supra* note 13 (dissenting opinion of Judge Shahabuddeen, at 21). [Reproduced in accompanying notebook at Tab 37.]

has a normative status in its own right and therefore works independently of other norms."[30]

The Martens Clause is potentially useful to the Special Court because, through its reference to "principle of international law", "principles of humanity", and "the dictates of public conscience", it allows the Court to invoke customary norms of international law, international humanitarian law, and public sentiments in order to define war crime prohibitions. In the ICJ's Advisory Opinion on the legality of the threat or use of nuclear weapons, for example, Judge Shahabuddeen noted in his the dissent the importance of numerous United Nations General Assembly resolutions condemning the use of nuclear weapons.[31] Although none of these resolutions was ever adopted unanimously, and therefore was unlikely to establish a rule of customary international law, Judge Shahabuddeen concluded that the "dictates of public conscience", as demonstrated in the United Nations General Assembly resolutions, could still be interpreted to oppose the use of nuclear weapons in all circumstances.[32]

Judge Shahabuddeen's position on the relevance of the Martens Clause was strongly supported by various states' submissions to the ICJ. In its submission, Australia stated that "[t]he question is not whether the threat or use of nuclear weapons is consistent with any of these instruments, but whether the threat or use of nuclear weapons is *per se* consistent with general principles of humanity."[33] Japan similarly argued,

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[30] Ticehurst, *supra* note 12, at 2. [Reproduced in accompanying notebook at Tab 24.]

[31] Notably, Judge Shahabuddeen referred to U.N.G.A. resolution 38/75 (15 December, 1983).

[32] Weapons, *supra* note 13 (dissenting opinion of Judge Shahabuddeen, at 16). [Reproduced in accompanying notebook at Tab 37.]

"because of their immense power to cause destruction, death and injury to human beings, the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation."[34]

ii. Application of the Martens Clause

The problem with the application of the Martens Clause to any international legal issue is that there is no one accepted interpretation of the meaning and proper invocation of the clause. It is therefore subject to various legal interpretations, both narrow and expansive. At its narrowest and most restrictive, the Martens Clause acts as a mere reminder that customary international law applies even after the adoption of a treaty or provision.[35] A less restrictive interpretation is that the inherent inability of international treaties on the law of armed conflict to provide a complete and codified list of specific prohibitions puts the Martens Clause in a position to provide that something that is not explicitly prohibited by a treaty is not necessarily ipso facto permitted.[36] The broadest interpretation is that the Martens Clause provides that conduct in armed conflict is subject to not only treaty norms and provisions, but also to the principles of international law referred to in the text of the Clause.

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[33] Ticehurst, *supra* note 12, at 3, citing Legality of the threat of nuclear weapons, 1996 I.C.J. 95 (Jul. 8): Australia, oral argument before the ICJ, at 21. [Reproduced in accompanying notebook at Tab 24.]

[34] Ticehurst, *supra* note 12, at 3, citing 42. Legality of the threat of nuclear weapons, 1996 I.C.J. 95 (Jul. 8): Japan, oral statement before the ICJ, at 57. [Reproduced in accompanying notebook at Tab 24.]

[35] Ticehurst, *supra* note 12, at 1, citing Christopher Greenwood, *Historical Development and Legal Basis*, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, 28, at 129 (Oxford University Press 1995). [Reproduced in accompanying notebook at Tab 24.]

[36] Meron, *supra* note 14, at 81, citing Yves Sandoz, et al., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 39, at 55 (ICRC/Martinus Nijhoff, Geneva 1987). [Reproduced in accompanying notebook at Tab 22.]

Rupert Ticehurst takes the position that the present debate over the meaning and relevance of the Martens Clause may ultimately be reduced to the conflict and debate between legal positivism ("positive law") and natural law.

> Through a positivist interpretation of international law, States that do not consent to being bound by treaty norms or to the development of customary rules remain outside the regime governed by those norms: subjugation to a positive norm is dependent of the will of the State. . . If that will is absent, the State is not bound by that norm and so is not responsible to the international community for non-observance of it.[37]

In stark contrast, Ticehurst continues, "natural law is universal, binding all people and all States. It is therefore a non-consensual law based upon the notion of the prevalence of right and justice."[38] As is evidenced by the aforementioned states' submissions to the ICJ, great pressure has been placed on international courts to look beyond the positive norms of international law and to consider and rely on norms of "natural law". "The Martens Clause supports this position as it indicates that the laws of armed conflict do not simply provide a positive legal code, they also provide a moral code."[39] This "moral code" as well as its roots in natural law are desirable for the international community. As opposed to national legal systems, the international legal community does not have a central law-making body. Instead, international legal systems are decentralized because their development is largely dependent on widespread consensus of States to norms of positive law, created either through the treaty process or through the slow development of customary rules of international law. It is because of this inevitable decentralization of the international legal community that positive law has proven itself ineffective in

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[37] Ticehurst, *supra* note 12, at 3. [Reproduced in accompanying notebook at Tab 24.]

[38] Ticehurst, *supra* note 12, at 3. [Reproduced in accompanying notebook at Tab 24.]

[39] Ticehurst, *supra* note 12, at 4. [Reproduced in accompanying notebook at Tab 24.]

addressing new developments and issues in the area of war crimes. New developments in military technology, for example, as well as current problems within the military, are forced onto the "back burner", so to speak, until some positive norm emerges within the international community. The Martens Clause, as Judge Shahabuddeen points out, as a customary rule with normative status[40] provides us with effective means of foregoing the belabored process of waiting for a positive norm to develop, and instead to rely on "principles of international law derived from established custom", "principles of humanity", and "dictates of public conscience" when defining war crime violations and prohibitions.

For the purpose of this memorandum, I suggest that the Special Court employ a somewhat liberal interpretation of the Martens Clause. This approach requires an analysis and application of humanitarian laws, as well as an overview of various national anti-hazing laws and policies in order to establish hazing as a war crime.

IV. International Humanitarian Law

A. Making the Case: Hazing as Torture

Conventions and treaties on torture, as part of customary international law, are especially useful in making out a legal case against violent military initiations and hazing. Unlike the jurisdictional bases found in Articles 2 and 3 of the Statute for the Special Court of Sierra Leone, these conventions and treaties do not apply solely to civilians or prisoners of war. Rather, they are all-inclusive in the sense that they do not discriminate on the basis of the status of the victim. However, making the case that hazing is torture is

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[40] *Prosecutor v. Furundzija*, Judgment, No. IT-95-17/1-T, ¶ 137 (Dec. 10, 1998). [Reproduced in accompanying notebook at Tab 18.]

far from clear cut. Military commanders and human rights activists have been unable to draw any meaningful distinction between abuse and acceptable military practices.[41] Many soldiers, for instance, recognize the brutality of hazing rituals but still believe them to be important initiation rites that serve to create a strong bond within a military unit.[42] Raymond J. Toney, a former military officer and Executive Director of the National Interreligious Service Board for Conscientious Objectors (NISBCO) provides a unique insight into this issue. Toney reports:

> Characteristically, basic military training is a harsh environment in which military officials intentionally subject recruits to high levels of stress and physical exertion. Stress-inducing techniques include sleep deprivation, prolonged physical exercises, and routine verbal abuse. Basic training is also a "weeding out" process whereby superiors single out recruits posing disciplinary problems for especially harsh treatment as a method of assessing their ability to adapt to the military environment. Recruit-on-recruit abuse also occurs during the basic training phase, frequently under the condoning glare of superiors. Recruits who appear weak and defenseless may face violent assaults. . . In addition, conscientious objectors often face severe physical assaults.[43]

Initiation practices and hazing range from being required to perform services for tenured recruits to being subjected to severe beatings, even to the point of death. Reported hazing incidents also include deprivation of food and sleep for excessive periods, open-handed blows to the ears and head, requirements to masturbate in front of other recruits, exercises that exceed normal physical endurance, forced eating of lighted cigarettes, being urinated on, public insult, mockery and humiliation, and burning of

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[41] *See generally* Raymond J. Toney & Shazia N. Anwar, *International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls,* 14 AM. U. INT'L L. REV. 519 (1998). [Reproduced in accompanying notebook at Tab 25.]

[42] Toney, *supra* note 41, at 522. [Reproduced in accompanying notebook at Tab 25.]

[43] Toney, *supra* note 41, at 524. [Reproduced in accompanying notebook at Tab 25.]

genitalia with cigarettes.[44] Despite such reported brutality, however, Toney warns against drawing a hard-line parallel between hazing and torture: "One must distinguish carefully between military rigor and abuse."[45] The "hazing-torture parallel", then, has to be drawn on a case-by-case basis, taking into consideration the context and the nature of the act. The Youth Ambassadors for Peace, a subsection of the Free the Children movement, has reported that the most common incidents of hazing in the RUF involve food deprivation, amputation of fingers, noses, ears, and limbs, and execution.[46] Considering the violent and gruesome nature of these acts, it seems that they clearly fall into the category of military abuse, rather than military rigor. An examination of the interpretation and application of various torture prohibitions, then, proves exceptionally useful is providing support for the proposition that acts of hazing properly fall into the category of torture.

i. <u>The United Nations</u>

The Universal Declaration of Human Rights of 1970 states that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[47] Additionally, the General Assembly of the United Nations has declared that the dictates of the Declaration constitute customary international law.[48] The International Covenant on Civil and Political Rights of 1966, Article VII, articulates that "[n]o one shall be

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[44] Toney, *supra* note 41, at 524, citing abuses from the United States, Eastern Europe, the Russian Federation, and South America. [Reproduced in accompanying notebook at Tab 25.]

[45] Toney, *supra* note 41, at 529. [Reproduced in accompanying notebook at Tab 25.]

[46] *Child Soldiers in Depth*, *supra* note 6, at 3. [Reproduced in accompanying notebook at Tab 31.]

[47] G.A. Res. 217, U.N. GAOR, 3rd Sess., Supp. No. 9, at 42. U.N. Doc. A/810, at 73 (1948). [Reproduced in accompanying notebook at Tab 33.]

[48] G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 67, U.N. Doc. A/8028 (1971). [Reproduced in accompanying notebook at Tab 35.]

subjected to torture or to cruel, inhuman or degrading treatment or punishment…"[49] The 1984 Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[50]

ii. The European Human Rights System

Article 3 of the 1953 Convention for the Protection and Fundamental Freedoms, which governs all members of the European Union, states, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."[51] In the "Greek case"[52], the European Commission applied a flexible working definition and analysis to torture as it is laid out in Article 3. The Commission stated:

> The notion of inhuman treatment covers *at least* such treatment as deliberately causes severe suffering, mental or physical, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be

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[49] G.A. Res. 2825, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966). [Reproduced in accompanying notebook at Tab 34.]

[50] G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). [Reproduced in accompanying notebook at Tab 36.]

[51] Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222. [Reproduced in accompanying notebook at Tab 2.]

[52] Toney, *supra* note 41, at 531, citing Greek Case, 12 Y.B. Eur. Conv. H.R. 1 (1969). [Reproduced in accompanying notebook at Tab 25.]

> degrading if it grossly humiliates him before others or drives him to act against his will.[53]

In *Ireland v. United Kingdom*[54], the European Court stated that certain necessary inquiries must be made in cases of alleged torture or cruel, inhuman, or degrading treatment or punishment in order to determine if the act in question rises to the level of torture. The Court stated that such inquiry depends on the circumstances and context of the case, including the duration of the alleged abuse, its mental and/or physical effects, and in some cases the sex, age, and state of health of the victim.[55]

iii. The Inter-American Human Rights System

Article 5 of the American Convention on Human Rights of 1969, entitled "Right to Humane Treatment," states that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."[56] Moreover, Article 5 states that every person has the right to the respect of their physical, mental, and moral integrity and that punishment shall not extend to anyone other than criminals.[57] In 1986, the Organization of American States adopted the Inter-American Convention to Prevent and Punish Torture. Article 2 of the Inter-American Convention on Torture also gives a flexible definition to the term. According to Article 2, torture is defined as "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for

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[53] Toney, *supra* note 41, at 531, citing Greek Case, 12. Y.B. Eur. Conv. H.R. 1 (1969), at 186. [Reproduced in accompanying notebook at Tab 25.]

[54] Ireland v. United Kingdom, 2 Eur. Ct. H.R. (Ser. A) (1978). [Reproduced in accompanying notebook at Tab 16.]

[55] *Id*. at 25.

[56] American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1. [Reproduced in accompanying notebook at Tab 1.]

[57] *Id*. art. V, 2-3.

purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventative measure, as a penalty, *or for any other purpose*."[58] The Convention also states:

> Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.[59]

In the case of *Egocheaga v. Peru*[60], the Inter-American Commission articulated the Convention as a three-tier analysis for torture claims.[61] To determine whether a claim rises to the level of torture, the following three elements must be proved:

1. that the act was intentional and inflicted physical or mental pain and suffering upon a person;

2. that the act was committed with a purpose; and

3. that the act was committed by a public official or by a private person acting at the instigation of the former.[62]

iv. <u>Synthesis of Understanding</u>

As this analysis has demonstrated, current understandings on torture and cruel, inhuman, or degrading treatment are imprecise and require a case by case analysis in

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[58] Inter-American Convention to Prevent and Punish Torture, Article 2, Dec. 9, 1985, O.A.S. Treaty Series No. 67. (Emphasis added). [Reproduced in accompanying notebook at Tab 5.]

[59] *Id*. art. 2.

[60] Egocheaga v. Peru, Case 10.970, Inter-Am. C.H.R. 157 (1996). [Reproduced in accompanying notebook at Tab 15.]

[61] *Id*. at 185.

[62] *Id*.

order to determine whether a specific act rises to the level of torture. However, by considering the similarities between all of the aforementioned treaties and conventions, we may synthesize them into and create a roadmap of the necessary elements of torture. For an act to rise to the level of torture, each of the following elements apparently need to be present:

1. the intent to cause severe mental and/or physical pain;

2. A purpose, including, *but not limited to,* obtaining information during a criminal investigation, punishing an individual for an act committed by himself or a third party, or intimidating an individual; and

3. The act must be conducted by a state official, or an individual acting under color of state authority.

Lacking these elements, an act may still rise to the level of inhuman and/or cruel treatment. Note that the European Court in the case of *Ireland v. United Kingdom*[63] emphasized the following elements in making a claim of inhuman and/or cruel treatment:

1. the nature and severity of physical or mental suffering;

2. the manner and method of infliction;

3. the age, sex, health, and maturity of the victim of the treatment; and

4. Whether the treatment forced the victim to act against his or her will.[64]

B. <u>The Martens Clause and Conventions and Treaties on Torture</u>

Although my legal research indicates that military hazing and initiation rites have never been categorized so as to fall under the protection of the torture conventions and

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[63] Ireland v. United Kingdom, 2 Eur. Ct. H.R. (Ser. A) (1978). [Reproduced in accompanying notebook at Tab 16.]

[64] *Id*. at 25.

treaties, the fact that the conventions and treaties do not discriminate on the basis of status indicates that all people, regardless of status, may claim protection against such treatment. The context of military service, one scholar comments,

> cannot be considered a mitigating factor in cases where the severity of physical or psychological abuse results in significant short-term or permanent disability. Treatment that results in psychological or neurological damage, soft tissue injury, broken bones, or death is not acceptable under any circumstances.

If a specific incident of military hazing meets the elements noted in the previous section, then it seems that the act in question then falls into the category of torture. As such, the victim, *regardless of status*, is protected under the appropriate convention or treaty. The hazing incidents that are occurring in Sierra Leone, namely severe food deprivation, forced amputations, and executions, clearly meet the aforementioned requirements; that is, the acts are clearly committed with the intent to cause physical or mental pain, the acts are committed with some definable purpose, and committed by an individual acting under color of authority. Although the Statute of the Special Court of Sierra Leone does not explicitly grant this Court jurisdiction to try people for torture violations committed against members of their own army, the Martens Clause allows this court to look towards the "principles of humanity" in determining whether such a prohibition does exist. Employing the Martens Clause accordingly, we may confidently say that such a prohibition does exist.

IV. Trends in International Law and Hazing

Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."[65]

For a general principle to rise to the status of customary international law, therefore, it must meet the following elements:

1. Widespread repetition by States of similar international acts over time. (State practice)

2. Acts must occur out of sense of obligation. (opinion juris)

3. Acts must be taken by a significant number of States and not be rejected by a significant number of States.

Unfortunately, the task of establishing policies and laws against hazing as principles of customary international law is beyond the scope of this memorandum. However, an analysis of some countries' anti-hazing policies or laws is helpful in demonstrating a global trend toward banning violent military initiation and hazing.

A. North America

i. United States

Military academies in the United States all have anti-hazing policies. In fact, as early as the cadet stage, or initiation stage, there are statutes in place to regulate military conduct. Incidents of hazing occurring in the U.S. Military Academy is subject to 10 U.S.C.S § 4352, which calls for the Superintendent of the Academy to define hazing, to issue regulations to prevent such practices, and to issue regulations to punish any occurrences with dismissal, suspension, or other adequate punishment.[66] 10 U.S.C.S § 9352 employs the same language as § 4352, and applies to the U.S. Air Force

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[65] International and Foreign Legal Research, *Researching Customary International Law and Generally Recognized Principles* (Spring 2004), *available at* http://www.law.berkeley.edu/library/classes/iflr/customary.html. [Reproduced in accompanying notebook at Tab 27.]

[66] 10 U.S.C.S. § 4352 (2003). [Reproduced in accompanying notebook at Tab 12.]

Academy.[67] The U.S. Naval Academy is subject to 10 U.S.C.S § 6964 and, unlike § 4352 and § 9352, defines hazing. U.S.C.S § 6964 defines hazing as follows: "The term 'hazing' means any unauthorized assumption of authority by a midshipman whereby another midshipman suffers or is exposed to any cruelty, indignity, humiliation, hardship, or oppression, or the derivation or abridgement of any right."[68] The statute also states that any midshipman guilty of hazing is potentially subject to suspension, dismissal, court-martial direct, or even imprisonment.[69]

Interestingly enough, there is a discrepancy between the U.S. academy codes and the codes that govern enlisted military. Unlike the laws governing academies, there are no statutes explicitly prohibiting hazing in the U.S. military itself. In practice, however, the Uniform Code of Military Justice (UCMJ), Article 93, applies to much of the behavior thought of as hazing.[70] Article 93 states: "Any person subject to this chapter . . . who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."[71] Article 93, therefore, applies to the conduct of a senior officer who orders those subject to him to perform some act, whether the act is dangerous or humiliating.[72] Additionally, conduct commonly thought of as hazing is often prosecuted by charging the perpetrator with the actual act

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[67] 10 U.S.C.S. § 9352 (2003). [Reproduced in accompanying notebook at Tab 14.]

[68] 10 U.S.C.S. § 6964 (2003). [Reproduced in accompanying notebook at Tab 13.]

[69] *Id*.

[70] Amie Pelletier, *Regulation and Rites: The Effect and Enforecement of Current Anti-Hazing Statutes*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT (2002), at 396. [Reproduced in accompanying notebook at Tab 23.]

[71] 10 U.S.C.S. § 893 (2003). [Reproduced in accompanying notebook at Tab 10.]

[72] Pelletier, *supra* note 70, at 396. [Reproduced in accompanying notebook at Tab 23.]

committed.[73] For example, UCMJ Article 128 states: "Any person subject to this chapter…who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct."[74] In the case of *United States v. Davis*,[75] the appeals court for the armed forces reversed the decision in a Marine Corps Court of Criminal Appeals decision in a hazing case involving assault with a dangerous weapon and attempted assault and battery.[76] Although none of the perpetrators was charged with hazing *per se*, the court drew a clear analogy to hazing by summarizing the transpired event as follows: "[A]ppellant's court-martial arose after he and numerous others participated in a form of hazing known as a 'blanket party' or 'fumble.'[77] The alleged purpose… is to censure Marines who do not live up to the expectations of their organization."[78]

ii. <u>Canada</u>

In the case of *R. v. Paquette*,[79] the appellant had been charged with "permitt[ing] teenaged cadets of both sexes to engage in degrading [sexual] activities while playing a

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[73] Pelletier, *supra* note 70, at 400. Pelletier also notes that the specific act committed often carries a more severe penalty than does a general hazing charge. [Reproduced in accompanying notebook at Tab 23.]

[74] 10 U.S.C.S. § 928 (2003). [Reproduced in accompanying notebook at Tab 11.]

[75] United States v. Davis, 47 M.J. 484 (1998). [Reproduced in accompanying notebook at Tab 20.]

[76] *Id*. at 484. Specifically, "appellant was convicted of conspiracy to commit assault and battery, violation of a general order, assault with a dangerous weapon, and communication of a threat in violation of Articles 81, 92, 128, and 134, [UCMJ], 10 U.S.C. §§ 881, 892, 928 and 943 respectively."

[77] See Pelletier, *supra* note 70, at 398. The "blanket party" or "fumble" involved approximately nine intoxicated marines grabbing, kicking, and hitting the victim. Davis was also charged with pointing an unloaded gun at the victim's face stating: "I ought to cap you now." [Reproduced in accompanying notebook at Tab 23.]

[78]Pelletier, *supra* note 70, at 485. [Reproduced in accompanying notebook at Tab 70.]

game of 'Truth or Dare.'"[80] The activities in question included sexually suggestive humping, as well as licking. Captain Luc Paquette "pled guilty to four counts of conduct to prejudice good order and discipline under s. 129 of [the] National Defence Act and two counts of sexual exploitation under s. 130 of [the] National Defence Act and s. 153(1) (b) of [the] Criminal Code."[81] Paquette was sentenced to five months imprisonment. In rejecting Captain Paquette's request that the sentence be reduced to thirty days, the Court Martial Appeal Court held:

> A sentence of 30 days would not reflect the public interest in ensuring that sexually degrading activities, or 'hazing', which may have been part of the military culture in the past, are no longer acceptable. Protection of the public through a sentence that incorporated the elements of general deterrence and denunciation was of paramount importance in this case.[82]

B. <u>The Philippines</u>

In 1995, the Senate and House of Representatives of the Philippines in Congress passed Republic Act No. 8049, entitled "An Act Regulating Hazing and Other Forms of Initiation Rites in Fraternities, Sororities, and Other Organizations and Providing Penalties Therefor."[83] The Philippines government defined hazing as:

> [A]n initiation rite or practice as a prerequisite for admission into membership in a fraternity, sorority or organization by placing the recruit, neophyte or applicant in some embarrassing or humiliating situations such as forcing him to do menial,

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[79] R. v. Paquette, 1998 CarswellNat. 278, Docket CMAC-418 (1998). [Reproduced in accompanying notebook at Tab 19.]

[80] *Id*.

[81] *Id*. Notably, although the charged offenses involved teenaged cadets between the ages of fourteen and seventeen, Captain Paquette was charged not only under the applicable Criminal Code provisions for such offenses, but also under applicable military law relating to mistreatment of those under his control and order.

[82] *Id*.

[83] Republic Act, No. 9049 (Phil.), *available at* www.upsilon.com/a/haze.shtml. [Reproduced in accompanying notebook at Tab 8.]

> silly, foolish and other similar tasks or activities or otherwise subjecting him to physical or psychological suffering or injury.[84]

The Act further states that "[t]he term organization shall include any club or the Armed Forces of the Philippines, Philippine National Police, Philippine Military Academy, or officer and cadet corp of the Citizen's Military Training and Citizen's Army Training."[85] In doing so, Republic Act No. 8049 effectively creates a blanket anti-hazing policy that extends to the Philippines armed forces and all branches thereof.

Section 4 of Republic Act No. 8049 states:

> If the person subjected to hazing or other forms of initiation rights suffers any physical injury or dies as a result thereof, the officers and members of the fraternity, sorority or organization who actually participated in the infliction of physical harm shall be liable as principals. . .[86]

The penalties set out by Section 4 range from life imprisonment if death, rape, sodomy or mutilation results from the incident, to four years to six years if the hazing victim suffered physical injuries that did not require medical attendance, nor prevented him from habitual activity or work.[87]

C. <u>Taiwan</u>

The United States' 2003 annual human rights report on Taiwan found that "Taiwan's overall human rights record improved last year…"[88] One factor in this determination was that "[c]orporal punishment is forbidden under military law and the

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[84] *Id*. at Section 1.

[85] *Id*.

[86] *Id*. at Section 4.

[87] *Id*.

[88] Taipei Times, *US report: Taiwan's human rights record improved*. www.taipeitimes.com/News/taiwan/archives/2004/02/27/2003100289 (February 27, 2004). [Reproduced in accompanying notebook at Tab 28.]

Ministry of National Defense implemented several programs in recent years to address the problem. . .”[89] More specifically, as reprinted in the Taipei Times,

> In 2002, a law was passed establishing committees for the protection and promotion of servicemen’s rights and interests. [However], in November, opposition legislators raised incidents of military hazing… Premier Yu Shyi-kun has pledged to look into these cases and more actively ensure the protection of human rights in the military.[90]

D. <u>Republic of Kazakhstan</u>

Despite the enactment of reforms designed to eliminate military conscription in favor of the creation of a professional volunteer army, “[d]raft evasion and desertion are [currently] widespread due to poor conditions and human rights violations within the armed forces. Conscripts are allegedly subjected to brutal treatment to the extent that in 1998 the army launched a campaign to punish violators in a new anti-hazing policy.”[91] The U.S. State Department, in its 1999 report on human rights in Kazakhstan, similarly reported:

> Army personnel continued to subject conscripts to brutal hazing, including beatings and verbal abuse. No statistics were available on the extent of the problem. The Army launched a campaign to punish violators of a new anti-hazing policy in 1998, and the Government has taken action occasionally against officials charged with abuses, often levying administrative sanctions such as fines for those found guilty. A military court in [the] Zhambul region sentenced a sergeant to death by firing squad in December. The court ruled the man was guilty of killing two persons and of desertion to avoid responsibility for beating a soldier under him.[92]

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[89] Taipei Times, *supra* note 88. [Reproduced in accompanying notebook at Tab 28.]

[90] Taipei Times, *supra* note 88. [Reproduced in accompanying notebook at Tab 28.]

[91] U.S. Department of State, *Country Reports on Human Rights Practices: Kazakhstan*, Feb. 5, 2004, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27845.htm. [hereinafter *2003 Kazakhstan*] [Reproduced in accompanying notebook at Tab 39.]

The Army's new anti-hazing policy imposes administrative sanctions, and fines found guilty of hazing.[93] Since the inception of the program in 1998, the government has reported a 50 percent decline in incidents of hazing.[94] In 2002, the government of Kazakhstan also initiated the December 2002 Humanization of Criminal Justice Law, which, in part, strengthened sanctions of the Criminal Code related to hazing.[95] Additionally, "[t]he Army reported that 128 hazing cases were opened during the first 9 months of the year. . .In the first 6 months of the year, 50 service members were convicted of hazing, and the Government reported that in 2002 military courts convicted 275 individuals of hazing or abuse."[96]

E. Latvia

In 2002, the U.S. State Department's annual human rights report on Latvia reported that

> There were no reports of the arbitrary or unlawful deprivation of life committed by the Government or its agents. Fifteen members of the army's Special Operations Unit were convicted in May in connection with the hazing death of a conscript in 2001. The ringleader was sentenced to three years probation, and the other 14 soldiers received suspended sentences. In addition, the army's anti-hazing program was fully established.[97]

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[92] U.S. Department of State, *Kazakhstan Country Report on Human Rights Practices for 1998*, Feb. 26, 1999, at 3, *available at* http://www.state.gov/www/global/human_rights/1998_hrp_report/kazaksta.html. [Reproduced in accompanying notebook at Tab 38.]

[93] *Id.* at 4.

[94] *Id.*

[95] *2003 Kazakhstan*, *supra* note 91, at 3. [Reproduced in accompanying notebook at Tab 39.]

[96] *2003 Kazakhstan*, *supra* note 91, at 3. [Reproduced in accompanying notebook at Tab 39.]

[97] U.S. Department of State, *Country Reports on Human Rights Practices: Latvia*, Feb. 5, 2004, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27847.htm. [Reproduced in accompanying notebook at Tab 40.]

Since the establishment of the army's anti-hazing program, no new instances of hazing violations within Latvia's military have been reported.

F. Russia

In 2004, the U.S. State Department reported serious incidents of hazing in Russia:

> Various abuses against military servicemen, including . . . violent, at times fatal hazing . . . continued during [2003]. On September 3, the chief military prosecutor announced that approximately 2,000 hazing incidents had been reported in the military in the first half of the year. . . He estimated that 1,200 soldiers had died in non-combat situations in the first half of the year, of which at least 16 were the result of hazing.[98]

In order to combat the military's hazing problem, the chief military prosecutor, as part of a national policy to eliminate occurrences of hazing in the Russian military, opened over 300 criminal cases involving hazing incidents in the army during the first part of 2003.[99] Whether or not this new focus on perpetrators of military hazing will have the desired effect will not be clear until the end of the year, when a new report is created.

V. Conclusion

The Martens Clause of Additional Protocol I of the Geneva Conventions enables the Special Court to look towards humanitarian law, customary international law, and public sentiment in order to formulate war crime violations not explicitly set forth in the Conventions themselves. This, in turn, allows us to make the argument that hazing is, in fact, a war crime.

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[98] U.S. Department of State, *Country Reports on Human Rights Practices: Russia*, Feb. 25, 2004, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27861.htm. [hereinafter *2003 Russia*] [Reproduced in accompanying notebook at Tab 41.]

[99] *2003 Russia*, *supra* note 98, at 5.

As we have seen, humanitarian law, in the form of treaties and conventions, provides strict prohibitions against torture. Moreover, unlike the Geneva Conventions, these treaties and conventions against torture do not discriminate based on the status of the victim of the crime. It therefore makes no difference if the person is a civilian, enemy combatant, prisoner of war, or a member of the army committing the act. This seems inherently to make sense in context, for if the hazing acts in question here were performed on or committed against a civilian or an enemy combatant, the question of illegality would be clear-cut and easy to determine.

Although a determination of whether prohibitions against hazing constitute customary international law is beyond the immediate scope of this memorandum, a study of international laws, policies, and trends against hazing suggest that such a prohibition may, in fact, qualify as such.

By employing what we may take from humanitarian law and what we may take from the study of practices of several nations, I believe that the Special Court may successfully utilize the authority of the Martens Clause to properly categorize the act of hazing in the RUF as a war crime.