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UNIQUE PROBLEMS IN PROSECUTING CHILD
ABUSE CASES OVERSEAS

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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39TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
April 1991

UNIQUE PROBLEMS IN PROSECUTING CHILD ABUSE CASES OVERSEAS

by CPT Musetta Tia Johnson

ABSTRACT: This thesis examines the unique problems presented in prosecuting child abuse cases in Korea. Research has shown that families overseas tend to have higher levels of stress, hence they tend to be more prone to violence. Child abuse statistics bear this out. This thesis postulates that the reason why the identification, treatment, and prosecution of child abuse is more difficult in Korea, is partially due to cultural attitudes toward childrearing and the law. Finally, this thesis examines the impact of international agreements on the prosecution. This thesis concludes that the prosecutor of child abuse overseas must understand both the cultural and legal milieu of the country and the impact of international agreements.

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"Whereas Mankind Owes to the Child the Best It Has To Give"¹

PART I

In FY 1990, there were 5,953 substantiated cases² of child abuse or neglect reported in the Army.³ During that same period, 6.4% of all Courts-Martials involved some type of child maltreatment.⁴ At present, 8% of all prisoners at the Disciplinary Barracks, Fort Leavenworth, are there as a result of convictions involving child maltreatment.⁵ Obviously, at least with regards to the Army, mankind is still not giving the child its best.

The Child Abuse Prevention and Treatment Act of 1978 (CAPTA)⁶ defines child abuse and neglect as "the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen... by a person ... who is responsible for the child's welfare under circumstances which indicate that a child's health or welfare is harmed or threatened."⁷

For purposes of this paper, child abuse and neglect are used interchangeably with child maltreatment. Unless otherwise specified, the use of these terms is limited to physical abuse or neglect.

I. INTRODUCTION

Since 1962, when Professor Kempe and his colleagues drew attention to what they called the "battered baby syndrome"⁸, the western world in general and the United States in particular became very concerned about issues regarding child abuse and neglect, and have taken steps to identify and alleviate the problem.

Although originally lagging behind its civilian counterpart⁹, the military in the past fifteen years has recognized not only the seriousness of the problem within its community, but also the impact that it has on readiness and mission accomplishment.¹⁰

The incidence of child abuse and neglect has prompted several studies to determine whether abuse is

more widespread in military versus civilian families¹¹, military families stationed in CONUS versus OCONUS¹², and military families living off-post or on-post. These studies have in large part helped shape the formation and implementation of the Family Advocacy Program within the military.

Although much attention has been focused on child abuse occurring in the United States and Europe¹³, very little has been focused on occurrences of child abuse in Korea. For reasons that I will explore later, the identification, investigation and successful prosecution of child abuse cases in Korea presents unique problems.

Two previously prosecuted cases of child abuse which occurred in Korea, will be used to illustrate the potential problems a prosecutor may face in preparing and presenting his case. This paper is intended to be a practical guideline for prosecutors to help them understand that a successful prosecution of child abuse overseas encompasses both the cultural and legal milieu of the country, as well as international and domestic law issues.

II. CHILD ABUSE IN THE MILITARY

A. Historical Background

As mentioned in the Introduction, the military as a whole did not begin focusing on the problems of child abuse until the early 1970's.¹⁴ Most commentators agree that the slowness in recognizing and responding to the problem was due less to callousness on the part of the military and more to the very structure of the military itself.¹⁵ Civilian communities, because of their defined geographic boundaries, could easily assess the occurrences of child abuse. This information was generally centralized within local child welfare organizations. In response to this growing recognition of the problem, by the late 1960's/early 1970's, "reporting laws had been passed in nearly every state, and many were setting up central registers for child maltreatment cases".¹⁶

Several factors distinguished the military community from the civilian community, thus making it more difficult to identify the magnitude of the problem. The military had no geographic boundaries. There were military installations worldwide. The military had no counterpart to the civilian child welfare organization, and therefore no central

repository of information. As a result, installations tended to cope with the problem on an individual basis, if at all.

In a special report, the U.S. Dept. of Health and Human Services pointed out the problems created by this individualized approach. The report, in referring to reasons why the military was slow to respond, stated: "The fact that military bases are scattered throughout the country and indeed the world led to a fragmented perspective on the problem and encouraged those in command to view child abuse cases as isolated incidents on particular bases, rather than manifestations of a military-wide phenomenon."¹⁷

Even on a single installation, information was not centralized in one agency. Without a central agency to provide guidance and focus, the identification, care and treatment of victims of abuse, and the sanctioning of the abusers tended to be inconsistent and sporadic.

This inconsistency was pointed out in an early study conducted at Fort Bliss. In 1967, the William Beaumont Army Medical Center at Fort Bliss, Texas established the Infant and Child Protection Council (ICPC). This innovative committee composed of inter-

disciplinary specialists (pediatricians, Army health nurses, social workers, psychiatrists, the hospital staff judge advocate and representatives from the Army Community Service and local Child Welfare Office of the State of Texas)¹⁸, attempted to provide a nonpunitive response to child abuse and neglect.¹⁹

In 1972, LTC John Miller, Chief of the Social Work Service and coordinator of the ICPC, conducted a study of abused children using data compiled over a 4 1/2 year period beginning in 1967.²⁰ The ICPC was not a child abuse council; however, it did receive referral of cases of child abuse and neglect²¹ from the hospital for evaluation.

In his study, LTC Miller discussed the problems that resulted by not having a centralized agency responsible for child welfare/child protection services:

...while much of the civilian social system, such as fire, police, and health care functions, has been duplicated in the Army, we have never seen it necessary to establish a public of child welfare department. Instead our "relief" operations are fragmented between Red Cross, Army Emergency Relief, Army Community Service, and smaller special activities. Our child welfare programs seem to be concentrated in youth activities Boy Scouts, Little League Sports, Well Baby Clinic, preschool physicals,

immunizations and the Handicapped Program of CHAMPUS. These programs may work well for many, but they offer little for the child who is the victim of maltreatment.²²

It was not until child maltreatment was seen as posing a threat to military effectiveness that the military began to respond.²³ Studies such as LTC Miller's and individual installation programs helped provide the impetus for a military-wide response.

By July 1973, representatives of the three uniform services along with the Office of the Assistant Secretary of Defense for Health and Environment had met to formulate a military-wide program to address the problems of child maltreatment.²⁴ With the passage of the Child Abuse Prevention and Treatment Act of 1974²⁵, the tri-service panel had clear direction and a Congressional mandate for the formulation of child advocacy service regulations. As a result, Army Regulation 600-48²⁶, which established the Army Child Advocacy Program, became effective on February 1, 1976.²⁷

The ACAP provided an administrative mechanism to insure that:

1. There was an awareness of the

special needs of children.

2. There was the necessary interagency staff and command cooperation to meet the special needs of children.
3. There was efficient use of community resources for the prevention and treatment of child abuse.²⁸

With a uniform procedure for reporting, recognizing, preventing and treating child abuse and neglect, the military at last had the "child welfare" system it so badly needed.

One of the guiding principles of the ACAP was that full use should be made of community resources - both military and civilian - in addressing the prevention and treatment of child abuse and neglect. Although working successfully for military families in CONUS, this principle created some unique problems for OCONUS families.

B. Child Advocacy in the Military Overseas

The ACAP is required at all Army facilities where there are 2000 or more dependents.²⁹ Most CONUS

locations could easily meet the requirement to establish an ACAP. However, as was noted in a 1980 study by the National Center on Child Abuse and Neglect (NCCAN), this requirement was not as easily met at overseas installations.

The variety of military communities overseas is extensive; these communities range in size from small clusters of several families around detachments of military personnel to large installations where thousands of military and dependent personnel live. The location may be urban or rural; the language maybe familiar, as in England, but is normally foreign. Professional facilities and programs within the military community may be readily accessible and extensive or quite distant, with the same holding true for host nation support.³⁰

The problems noted by NCCAN were not rapidly abated, for in 1985 the Army commissioned a study on the problems of OCONUS installations and their lack of family oriented resources.³¹

Without the needed resources, the military family overseas has no outlet to deal with internal problems and stresses. As frustrations build within the family, the potential for maltreatment increases. What is it about the military family overseas overseas which makes it such a high-risk entity?

C. Stress and the Military Family

"The military family overseas is a family under stress"³²

Multidisciplinary literature has drawn a "correlation between stress and family violence in general"³³ and stress and child abuse in particular".³⁴ There are several factors which commentators agree relate to child abuse. These include a change in living conditions, social isolation with its associated poor support networks, geographic mobility and major life changes.

"There are a number of studies which deal specifically with child abuse in the military".³⁵ Some discuss the military in general³⁶, and others deal with specific services (i.e. Army³⁷, Navy³⁸, Air Force³⁹).

The lifestyle of the military imposes additional stressors on a family. These include disrupted lifestyle as a result of recurrent moves over an extended time period; lack of choice over timing of relocation; foreign or isolated assignments; isolation from extended family and friends; extended imposed separation either as a result of unaccompanied tours, deployments or field duty; military/family conflicts;

the authoritative management style of the military; high stress/high risk jobs; and finally the youthfulness of the military (i.e. most military families are serving their military service while in their child-rearing years).⁴⁰

The military family overseas must not only cope with living in a foreign environment, but also cope with the results of being Americans in a foreign land; such as experiencing the results of shifts in international relationships between their host country and the U.S.⁴¹ Everyday factors taken for granted in CONUS may be major problems OCONUS - transportation, economic stability, adequate housing, employment opportunities, and health care.⁴² The result of all this is a family that feels trapped. Any dissatisfaction with the military services available cannot be alleviated⁴³, due to the inaccessibility of the host nations resources and services. Mounting frustrations and tensions create the high-risk family.

With the amount of stress that many military families operate under, early commentators hypothesized that the ratio of military child maltreatment would probably far outstrip that of the civilian community.⁴⁴

To test this hypotheses, several studies have been conducted. Depending on the study one relies upon, the military can be found to have more⁴⁵, less⁴⁶ or the same ratio of abuse.⁴⁷

Why the dissimilarity in the rates of abuse?

David Soma, in his analysis of child maltreatment in the U.S. Army⁴⁸ answers this question.

Since the armed services draw their personnel from the civilian population, the question of comparability naturally arises. Are the two populations the same, thereby allowing the use of data already available in the civilian literature? The answer is that, although the populations have some similarities, they are, in the final analysis, significantly different. On the one hand, like their civilian counterparts, military families have increasing numbers of working wives; fathers are increasingly interested in taking an active role in parenting and there are an increasing number of single parent families (ASYMCA, 1984). On the other hand, they are unlike their civilian counterparts as well. There is no unemployment for active duty members; they are younger than the general population and so their children are younger also: there are very few older people; the structure of officer and enlisted groups results in a more firmly delineated social order; they are a more mobile group and they may retire at a younger age than do workers in the civilian sector (citations omitted).⁴⁹

Using data compiled from the Army Central

Registry⁵⁰ between 1983-1985⁵¹, Soma concluded that the Army-wide child maltreatment rate was 7.5 per 1,000 versus the civilian rate of 11.7 per 1,000.⁵² This rate dropped during FY 1987 to 6.4 per 1,000.⁵³

These rates are somewhat misleading, because they encompass both CONUS and OCONUS rates of abuse. DOD-wide, the ratio of child abuse overseas has consistently exceeded that of CONUS locations.⁵⁴

Since nearly one-third of all American soldiers and their families are stationed in Europe⁵⁵, studies concerning the OCONUS rate of abuse have traditionally centered on USAREUR.⁵⁶ Focus has also been directed on Hawaii because of the large number of military stationed there and the disproportionate rate of child abuse.⁵⁷ Very little, if any, attention has been focused on Korea.⁵⁸

The primary factor contributing to the high rate of abuse in USAREUR was the living conditions. "This included crowding, families living in close proximity, lack of privacy, culture shock, separation from spouse for long periods of time and lack of support from extended families".⁵⁹

The authors of one study concluded that a "real excess of environmental stress exists in Europe"⁶⁰, and that "many of these stresses stem from the social and cultural isolation of living in a foreign country".⁶¹

If the additional environmental stress of living in Europe contributes to the higher rates of maltreatment, then how is the military coping with these higher rates of abuse and what if any impact do these findings have on families in Korea?

D. Child Protection Overseas

The military in dealing with the high risk family, and the high risk family itself in trying to cope overseas may find itself in a legal and cultural catch-22. There is generally a lack of civilian child welfare resources.⁶² As early as 1975, the Wichlacz study noted that "the German child welfare agencies (Jugendamt) are heavily burdened by their own social problems to help to account for the current lack of German social agencies involvement with U.S. military child abuse and neglect cases."⁶³

The follow-up studies in 1985⁶⁴ and 1987⁶⁵ confirm that military intervention increased in response to the

problem - German intervention did not.

The irony from a legal standpoint is that under the Status of Forces Agreements, the German, and by analogy, Korean government have jurisdiction over U.S. military dependents. From a jurisdictional standpoint, the only leverage the U.S. government has over dependents is to sanction them administratively (i.e. withdrawal of post privileges, eviction from family quarters, early return of dependents).

The most effective management and treatment therefore would involve the joint intervention of host-nation/U.S. resources. However, experience has shown this is not the case. The high-risk family OCONUS must look to the military for help. Is the military answering the call? The researchers who conducted the Family Research Program thought not.

Unlike CONUS installations where soldiers and families can spread their need for services between civilian and military agencies, OCONUS installations are the 'sole source' for all types of social and medical services. However, with the exception of the FACMT, there is little or no coordination among the agencies in terms of developing unified treatment plans. The effect is two-fold; for the agencies, many of which are understaffed, the patient population exceeds the ability of the staff to treat effectively; and for the patients, prescribed therapies may be at variance with one another, thus retarding

progress in treatment.⁶⁶

The high risk family living in a major community overseas does not feel the impact of limited resources and facilities. Generally, they are in close proximity to the hospital or social services located on the installation. For the family living at a sub-installation or community⁶⁷, or living in the local community, or the non-command sponsored family which does not live on a military community at all⁶⁸, the impact of limited resources can be overwhelming. For these families, the limited military facilities may be totally inaccessible - either because of ineligibility, as a result of non-command sponsorship, or assuming they are eligible to use the facilities, distance and availability may become insurmountable hurdles to actually receiving the services.

The result is predictable. The high risk family becomes overburdened and turns on itself in a violent episode. The ante has just been raised. What was previously a social services problem has just become a criminal problem with which the military must deal.

The USAREUR military family has one advantage over families stationed in Korea. Although still in a foreign country, the USAREUR family has the advantage

of being in a western culture. The cultural similarity can impact greatly on the identification and treatment of child abuse.

E. Cultural Concepts of Child Maltreatment

Present knowledge of child abuse and neglect is based almost entirely on research and clinical experience in Western nations. Evidence for the universality of child abuse and neglect is predicated on a consideration of cultural and historical traditions similar to our own (citations omitted).⁶⁹

The concept of child abuse is relatively new and not well understood in non-western countries.⁷⁰ To gain a cultural perspective of what is/is not considered child maltreatment in Korea, one must understand the cultural milieu of that country.

The Korean traditional culture is based upon Confucian ideals. Confucianism was imported from China and established as the official ideology of the state by the Yi Dynasty in 1392.⁷¹ One of its purposes for establishing Confucianism in Korea was to bring the underlying social structure and mores into line with the political philosophy of the ruling class.⁷² The Yi dynasty felt that the Sinification of Korea through Confucian philosophy would accomplish that.⁷³ Although

the Yi dynasty was overthrown in 1910, the Confucian ideology is still pervasive in modern day Korea.

One of the most important moral tenets of Confucian ideology is the concept of filial piety.⁷⁴ One cannot understand Chinese child-rearing (and in turn Korean child-rearing) without first understanding the historical, cultural, political, and psychological background of filial piety.⁷⁵

Filial piety is essentially a security pact or social contract between parent and child. Parents raise children, and children are expected to provide for parents in their old age. To maintain the 'agreement' or 'contract'... certain child-rearing techniques and punitive actions are necessary for the assertion of parental authority in order to gain children's submission, dependence, and unconditional support.

Two mechanisms to train for filiality are emphasized in child-rearing: (1) the inducement of both physical and emotional closeness so that a lifelong bond is assured; and (2) the maintenance of parental authority and children's obedience through harsh discipline.⁷⁶

Through the use of childhood stories and proverbs, children are taught the concept of filial piety a very early age. They are made to understand its fundamental value in parent-child relations.

Researchers have found four common themes in the

stories depicting filial deeds. They are:

1. From a very young age children are expected to show great devotion to their parent's especially their mother.

2. The parent's welfare comes before the child's welfare or that of a son's wife and children. One should not be happy when one's parents are not happy.⁷⁷

3. At the loss of a parent one is expected to express one's grief openly and dramatically. Those whose mourning behavior exceeds that prescribed by the rites are considered filial. The most filial would rather die than continue to live without the parent's company. This last point is again an extension of the emphasis of attachment even after a parent's death.

4. No matter how unreasonable a parent's demands, or how harsh the treatment inflicted by a parent, a son or a daughter should obey and endure and make sure that the parent's wishes are fulfilled. Children should be considerate and pleasing in order to make their parents as comfortable as possible, even though they may thereby suffer bodily pain or damage. Children's submissiveness to stepmother's maltreatment is praised.⁷⁸

In short, the parent's pleasure is the children's suffering.⁷⁹ In fact, "traditional chinese cultural values uphold the absolute rights of parents to inflict harsh physical punishment upon their children while the children are obliged to endure or even show enjoyment of parental punishment."⁸⁰

One should not conclude that the doctrine of

filial piety advances child maltreatment.⁸¹ On the contrary, pure maltreatment such as beating a child for no apparent reason, or to the extent of physically harming the child is condemned. This type of behavior is "negatively sanctioned and offenders are subject to public criticism and legal prosecution."⁸²

What one must gain from this discussion of filial piety is the difference of opinion between Americans and Koreans on what constitutes child maltreatment. For the Korean, it is not merely the imposition of physical force upon the child, but the reason for the imposition which will determine whether the child was maltreated. Therefore, knowing or seeing signs of physical battering (bruises, scars) would not necessarily raise suspicion within the Korean culture; whereas in the American culture it would.

As will be explored in later, this fundamental difference can greatly impact on the identification and subsequent prosecution of child maltreatment cases.

III. THE CONCEPT OF LAW IN KOREA

Just as the different concepts about child-rearing can impact on the identification and treatment of child abuse and the prosecution of the abusers, different concepts about the law and its role in society can also have an impact.

A. Historical Background

The legal system of Korea is relatively new and almost entirely foreign. The modern legal system was installed after the liberation of the nation in 1945 and was modeled after western legal systems.⁸³ The imposition of a westernized legal system has created some problems. As one scholar noted:

Third-world countries have often confronted significant trouble in importing the modern legal system from the West, and Korea has been no exception. Although the gap between law and reality is surely not peculiar to third-world countries, ... Korean scholars have understood the question as peculiar to Korea. That is, there is the problem of incongruence between westernized, official legal norms and traditional, premodern legal culture.⁸⁴

The "problem" is defined by three interrelated concepts: "the legal consciousness of Koreans; the historical analysis of law and society in the traditional period, especially in the Yi dynasty; and

the reception of foreign law".⁸⁵

One of the best known scholars of Korean law, Hahm Pyong-Choon⁸⁶, clearly sets out the problems of the modern day legal system in discussing the legal consciousness of Koreans.

...the Korean legal system is composed of the superstructure (prescriptive postulates and organizational structures) and the infrastructure (cultural milieu). The main cause of problems in the legal system can be traced to the discord between the advanced superstructure and the backward infrastructure. While the superstructure of the Korean legal system has been modeled after the German system with Japanese modifications the Korean legal culture still remains traditional and premodern. Koreans are adverse to litigation. Thus the Korean legal culture can be characterized as an alegalistic one in which law was a set of punishments based on an appeal to human decency, in which mediation and compromise were preferred to adjudication and in which justice was thoroughly "substantive oriented" and "irrational" in the Weberian sense. Such a perspective is quite opposite to the "formal rationality" of law in occidental capitalism. The westernized, formal superstructure of the Korean legal system still remains fundamentally at odds with the indigenous legal culture, and "the two are based upon two fundamentally different outlooks on life and on hierarchy of values".⁸⁷

So why the clash between occidental laws and oriental culture? The answer lies in the historical analysis of law and society in the traditional period

of Korean history. This analysis must begin with the Yi Dynasty (1392-1910) and Confucianism.

Just as Confucian thought influenced the social structure of Korea, the Chinese influenced the political/legal traditions of Korea as well. During what has been called the "Chinese-adopting" period in Korean history, the purpose of laws were "not for the freedom and right of people like the Magna Carta, but a means of controlling people. Most of the laws were based on government organization, a social status system, criminal policy which was to suppress and rule people for the continued seizure of power".⁸⁸

Hence, the disparity between the two legal systems. The western culture, with its Judeo-Christian tradition, is based upon the "rule of law". Law is supreme. Along with this concept is the idea of individual rights, which the government may not abridge.

Law, as understood in the West, may be roughly defined as a form of convention that rises through use and wont. In a larger sense, it is a product of experience that grows slowly from precedent to precedent. It may also be said to be an embodiment of social intelligence that has been gradually accumulating and growing. As such, it should have an essential place in the state.⁸⁹

In comparing the western concept of law to the traditional Korean system, the same author wrote:

Thus the idea that law is an accumulation of collective experience of the society never has any existence in the Korean political tradition. Law was not even a product of the uses and wonts of the ignorant common man. It was an instrument of chastising the vicious and the depraved. It was an unpleasant necessity prescribed by the failure of reason in politics. Law as a political norm always meant the positive law. It was something that had been legislated by the ruler. It was sharply distinguished from custom. It always signified a norm with physical force as a sanction behind it. It was therefore synonymous with punishment, no more or less.⁹⁰

As a result, "the rule of law" has never been a desirable goal of politics in Korea. In fact, it is a direct antithesis of what the Rule of Law means in the West today. It had also been an antithesis of what a good politics should be in the Korean political tradition.⁹¹

The traditional Korean governed his life not according to laws but by custom. The Confucian concept of "li" most closely resembles the western concept of law. "Li" applied equally to all usages and conventions of the civilized people of China, and included constitutional practices.⁹²

"Li" is an accumulation of political as well as ethical wisdom of the Chinese civilization tried by the Confucian rationality. In a

narrower sense, it means etiquette and manners. It is one of the 'five constant virtues'. In a broader sense, it means an understanding of the Cosmic Reason. It is a moral expression of the Way of the Universe. When both the ruler and the ruled act according to "li", harmony prevails. The virtuous live by it. When a society is ordered by law or by the threat of punitive sanctions, its members evade it with impunity and feel no shame. But when a society is ordered by "li", its members not only behave properly but also know shame. "Li" and law are thus mutually exclusive.⁹³

Therefore, to the traditional Korean, there was a distinct difference between lawfulness and goodness. "To the Korean people, a man who regulates his behavior according to the law has less moral worth than a man who lives by the dictates of the universal code of morality. The former denotes a man who remains within the bound of legality for fear of legal sanctions. The latter signifies a man who strives for goodness because he knows and desires what is good and moral".⁹⁴

As Professor Hahm noted in his study "this disparagement of law in favor of morality and ethics is rooted deeply in the minds of the Korean people."⁹⁵

This disparagement worsened during the Japanese Colonizing Period (1910-1945), which is considered the beginning of the "Western adoption period".⁹⁶

The main policy of Japanese colonial administration for thirty-six years was summarized as the "assimilation policy".⁹⁷ Heteronomous adoption of Western law systems put an end to the "Chinese adopting period".⁹⁸ Modern scholars believe "the period of Japanese colonial rule has exerted a more potent influence on present Korean legal development than the more remote legacy of the Yi dynasty".⁹⁹

The impact of the Japanese colonial period was so far-reaching that it is felt even today. In surveying its effect, a recent article noted:

Especially in the field of public law and criminal law, the legacy from the Japanese rule persists even today, although residual influences from the period of the Yi dynasty may also be discerned, particularly in the area of private law.

The Western legal system imposed on Korea through the Japanese rule was deflected three times from its original form. The perverted, Prussian version of the modern Western legal system was distorted by imperial Japan under pseudoconstitutionalism, and it was once again contorted by the Japanese colonial system in Korea. The essence of this colonial legal system persisted, with some exceptions, even during the period of American military government (1945-48).

To make the matter worse, even after the First Republic of Korea was established in 1948, the colonial legal system under Japanese rule was maintained in considerable parts, including the Criminal Code and the Civil Code, for a fairly long time until the

late 1950's, when new laws were promulgated.

Even today the vestiges of repressive laws under Japanese imperialism remain alive, particularly in the area of politico-social control.

Thus the elements of a repressive colonial legal system have continued through the successive authoritarian regimes since 1948. Not surprisingly, popular attitudes of distrust toward law have gradually deepened.¹⁰⁰

In view of the legal tradition in Korea, what impact has it had on the modern day Korean? Even today, many Koreans still have a "litigation-avoidance attitude", that is attributed to "traditional oriental society with Confucian ideology".¹⁰¹ For a Korean, the law is kept at arms length. Many people still live by the traditional mores and values.¹⁰²

With the rapid industrialization of Korea and subsequent emergence of the middle class, Korean ideas regarding the law are slowly beginning to change. "The Korean's attitude toward the law is changing from an emphasis on law's morality and politicality to its social function and that, due to an extensive skepticism over the present legal validity, Koreans feel they are legally alienated".¹⁰³

Change however is not happening very rapidly. Many

Koreans still cling to the traditional concepts of Confucian thought which places goodness over lawfulness. Although seemingly innocuous, this dichotomy can produce some surprising results.

A survey conducted in the early 1980's to determine the Korean peoples attitudes toward law showed how the Confucian concepts of filial piety and "li" are still prevalent in society.

When asked to pick a better citizen between a law-breaker who is very filial to his old mother and a law-abiding man who is not filial to his old mother, 41.9% chose the former while 33% chose the latter. Many of the respondents could not see a filial son being a law-breaker and vice-versa.¹⁰⁴

Korean attitudes about infanticide have improved. Traditionally, when twins of different sexes were born, the female child was allowed to die of asphyxiation because it was believed to allow her to live would result in the twins having incestuous affections for each other. When questioned as to whether the parents should be punished, 81.2% said that they should, whereas 6.6% said that they should not.¹⁰⁵

What was most surprising of all were the attitudes regarding kidnapping. "Although the Criminal Code provides heavier penalties for kidnapping than for adultery, the sample considered the latter more serious than the former."¹⁰⁶ The questions were premised on the assumption that the kidnapper took the child to make it his own. Opinions regarding this broke-out along socio-economic lines. 40% of the lower-classed people felt it was a lesser offense than adultery, whereas the upper and upper-middle classes felt it more severe.¹⁰⁷

The survey tended to show that "Koreans failed to realize that the traditional criteria for a good man may not be appropriate for a modern world".¹⁰⁸

These concepts are not just imbedded in the Korean culture, but are reflected in codified law.

B. The Law of Korea

Unlike most American state codes, there are no special child protection or child welfare statutes in either the Korean Criminal¹⁰⁹ or Civil Codes.¹¹⁰ Instead, in the criminal code, offenses against children would be prosecuted under the substantive offense.

There are only two provisions in the Criminal Code which specifically name children as victims. Under the substantive offense of homicide, infanticide is a special offense.¹¹¹ It's worth noting that the maximum punishment for homicide is death, with the minimum being five years.¹¹² There is no minimum for infanticide and the maximum is only ten years.¹¹³

Contrast this with the penalty for killing a lineal ascendant. The penalty is death or penal servitude for life.¹¹⁴ As alluded to in Part II, it is plain that the concept of filial piety is alive and well within the criminal code.

Under the substantive offense of abandonment, it is a crime punishable by "penal servitude of not more than three years" if one abandons "another being in need of help by reason of youth".¹¹⁵

There is a special provision regarding abandonment of a baby. The maximum for the offense is only two years¹¹⁶; contrasted to abandonment of a lineal ascendant - which carries a maximum of ten years.¹¹⁷

For every substantive offense listed in the

criminal code, commission of that offense against a lineal ascendant is an aggravating factor. This does not hold true for offenses against lineal descendants. Except for the two offenses discussed above, the code makes no distinction regarding commission of the offense against a lineal descendant; and, where a distinction is made, it is not an aggravating factor.

Children are not a protected resource in Korea.

Children fare only marginally better under the Civil Code.¹¹⁸ The Code clearly sets out that an effect of parental authority is the right to take disciplinary action against one's child.¹¹⁹ However, "if a father or mother abuses parental authority or is guilty of gross misconduct"¹²⁰, their parental rights may be severed by the court.¹²¹ "Abuse of parental authority" and "gross misconduct" are not defined by the statute. However, the surrounding provisions discuss the care a parent must exercise regarding representation of the child in juristic matters and property management.¹²² As a result of this surrounding language, a logical interpretation of the termination provision is that it refers to mismanagement of the child's fiscal affairs, and not to physical maltreatment of the child.

The Civil Code provisions regarding parents and children are a further indication that the concept of filial piety still pervades the Korean culture.

C. Summary

In the discussion of Part 1, the following ideas were developed:

1) child abuse rates tend to be higher overseas because of the additional stresses the family is under and the reduced accessibility to family resources to help alleviate the stress. The situation creates a high risk family which may be more prone to violence.

2) the cultural concept regarding child rearing, i.e. the concept of filial piety which advocates the maintenance of parental authority and children's obedience through harsh discipline; and to a lesser extent the societal values which places more value on boys than girls, affects the society's concept of what constitutes maltreatment. This in turn affects the identification, investigation and prosecution of child abuse and its offenders.

3) finally, the significance of the Korean

attitude toward law. The distinction between goodness and lawfulness, and the disparagement of the law that results in an alegalistic society which distrusts the law and prefers mediation and compromise instead. Additionally, the societal attitudes regarding child-rearing are reflected in the codified law. There are no special provisions protecting children. Therefore, children must rely on the moral and ethical conscious of the society. This impacts not only on the societal, but the legal perception of what constitutes child abuse.

With these general principles in mind, Part II will discuss the concepts of international law and how they impact on the criminal prosecution.

PART II: PROSECUTING CHILD ABUSE IN KOREA

Part I discussed at length the cultural milieu and legal attitude of Koreans. Why should any of this matter to the military prosecutor? If all child abuse occurred on the military installation and all perpetrators were service members, it would not matter at all. Unfortunately, all child abuse does not occur

on the installation and all perpetrators are not service members, therefore these concepts are important. Understanding that these concepts exist and their possible impact will aid in the preparation of one's case.

Any discussion of child abuse prosecution must begin with AR 608-18 because it "establishes policies which both inhibit and aid the prosecution of child abuse cases".¹²³ The decision to prosecute, although ultimately made by the commander, will be influenced by the recommendations of the interdisciplinary teams handling allegations of child abuse. "Thus, the parameters drawn by AR 608-18 provide an excellent starting point for formulating unified approaches to child abuse cases."¹²⁴

Once the decision is made to prosecute, the trial counsel in Korea will be challenged by a panoply of issues, many of which are beyond the parameters of purely criminal issues.

To illustrate the impact of the general principles discussed in Part I, and to show some of the legal problems raised when trying child abuse cases overseas, two actual cases will be discussed. These cases were

chosen because they both contain the "classic properties" of physical abuse cases: 1) the victim is usually less than five-years-old; 2) there is usually a history of prior physical abuse; 3) the perpetrator is usually a parent; 4) the report of abuse is usually generated by medical authorities; and 5) the case is usually defended on the basis of accident or alibi.¹²⁵

I. Case Histories.

A. Case Number 1

The accused, a specialist (hereinafter referred to as Spec D), was charged under the Uniform Code of Military Justice¹²⁶ with the aggravated assault¹²⁷ and murder¹²⁸ of his ten month old son. The accused, a white male, was married to a Korean female. The accused was assigned to an Engineer battalion located at a medium-sized installation about two hours south of Seoul. The accused and his family lived off-post on the economy. The family was non-command sponsored.

The facts were as follows: Spec D was due to depart Korea on or about 1 February 1989. The incident occurred on 31 January 1989, the night before departure. The wife was busy saying goodbye to

neighbors and friends. She and the baby had returned earlier that morning, from a visit to her family in the south. The baby had been sick most of the trip and was very cranky. About 10:00 p.m. the wife left the baby with Spec D to run across the courtyard and say goodbye to the landlady. When Mrs. D. left the baby was asleep.

Just before midnight Spec D appeared at the walk-through gate to the installation requesting assistance because his son, who he was carrying, had stopped breathing. The on-duty MP called an ambulance. The baby was transported to the MASH, whereupon medical personnel determined that the baby was having seizures, had shallow breathing, and appeared to be in medical distress. Because the MASH was ill-equipped to deal with a medical emergency of this type, the medical team attempted to medevac the baby to the main hospital at Yongsan, Seoul, Korea. Due to severe weather (an ice storm), this was not possible. Ground transportation to Yongsan was ruled out because of the icy road conditions and the belief that the child could not sustain the ride. The decision was made to transport the child to a local Korean hospital.

At the Korean hospital a CAT Scan was performed,

which revealed massive brain hemorrhaging and swelling. After stabilizing the baby with massive doses of medicine¹²⁹, the decision was made to ground transport the baby to Yongsan.

Upon arrival the baby was treated at Yongsan for several days, then transported to Clarke AFB, Philippines then to Tripler Army Medical Center, Hawaii, where he died.¹³⁰

An autopsy was conducted at Tripler which revealed evidence that the baby had the classic signs of a battered child.¹³¹ As a result, charges were preferred against the father for aggravated assault for the previous injuries, and murder for the fatal injury.

B. Case Number 2

The accused, a chief warrant officer four (hereinafter referred to as CW4 C) was charged under the UCMJ as an accessory after the fact¹³² to the aggravated assault¹³³ committed by his wife upon their 23 month old adopted Korean national daughter. CW4 C was also charged under a theory of culpable negligence¹³⁴ by failing to prevent injury to his adopted daughter.¹³⁵ The accused was an aviator

assigned to a sub-installation on the outskirts of Seoul. The family lived off-post on the economy. The family was non-command sponsored.

The facts were as follows: In the early evening of 6 March 1989, Mrs C attempted to feed her 23 month old daughter dinner. In the words of Mrs C, "the child was a very picky eater and feeding was always difficult".¹³⁶ What commenced was a power play over whether the child would eat, resulting in Mrs C taking the child out of the high chair and placing her on a mat on the floor. Mrs C then pinned the baby's hands under her own legs (presumably to prevent her from flailing about). Mrs C then started the forced feeding, which entailed her lifting the baby up into a seated position, forcing food into her mouth, covering her mouth with her hand, and then pulling the legs of the baby downward to force her to swallow.

This forced feeding went on for about 45 minutes. During the course of the forced feeding, the child's head would hit the floor when her legs were pulled downward. This occurred several times until the child "fainted".¹³⁷ CW4 C was present throughout the forced feeding and at all times was within two to four feet of the mother and child.

Upon the child losing consciousness, the parents attempted the Heimlich maneuver, believing the child had choked on food in her mouth.¹³⁸ They then administered first aid in an attempt to revive the baby, all to no avail. The baby was then lain on the sofa and allowed to remain there for almost six hours. It was not until the parent's noticed "funny movements" of the arm¹³⁹, that they decided to seek medical attention. The baby was presented at the emergency room several hours later. The doctors determined the baby was seizing, had shallow breathing and was in a coma.

A CAT Scan revealed massive brain hemorrhaging and swelling. After stabilizing her condition by applying a shunt to relieve the pressure on her brain, she was medevac'd to Clarke AFB, Philippines, then on to Tripler. After several months at Tripler, she was relocated to Children's Hospital, Oakland California for pediatric rehabilitation. She was still in a coma.

Because the Korean government refused to exercise jurisdiction over the mother, the U.S. military charged the father with the above offenses.

Both of these cases involved interaction with the Koreans. As such they raised international law issues which the prosecutor must resolve to have a successful prosecution.

II. IMPACT OF STATUS OF FORCES AGREEMENTS

A. Applicability of SOFA

All "members of the United States armed forces"¹⁴⁰ are covered under the United States/Republic of Korea Status of Forces Agreement (hereinafter referred as SOFA). "Members of the United States armed forces" includes uniform services active duty personnel, civilian component personnel and their dependents.¹⁴¹

The SOFA establishes the perimeters for exercising criminal jurisdiction over U.S. personnel.¹⁴² Exclusive jurisdiction can rest with either the sending state or the receiving state under certain circumstances.¹⁴³ Exclusive jurisdiction vests in the sending state "over members of the armed forces or civilian component and their dependents, with respect to offenses... punishable by the law of the United States, but not by the law of the Republic of Korea".¹⁴⁴

Likewise, exclusive jurisdiction vests in the Republic of Korea over the same personnel "with respect to offenses punishable by the its law but not by the law of the United States."¹⁴⁵

Absent a purely military offense occurring on-post or an off-post violation of an obscure Korean law, rarely will either party have exclusive jurisdiction over an offense. The more common occurrence is that concurrent jurisdiction exists. The question then becomes who has the primary right over the offense.

The U.S. has primary right to exercise jurisdiction over a member of the force when the offense is:

- "1) solely against the property or security of the sending state;
- 2) solely against the person or property of another member of the force or civilian component of that State or of a dependent; or
- 3) arising out of any act or omission done in the performance of official duty".¹⁴⁶

The primary right rests with the receiving state for

all other offenses.¹⁴⁷

For all practical purposes the U.S. will exercise jurisdiction over their members because the Koreans have granted a general waiver of primary right in all cases except those "of particular importance to the Korean government."¹⁴⁸

Therefore, the military prosecutor should assume that the military will be trying the case, unless it appears to be a "case of particular importance". In those instances the Koreans may exercise their right to recall the waiver.¹⁴⁹ This must be done within 15 days.¹⁵⁰ B. The Affect of the SOFA

As applied to Case #1, the SOFA had little to no affect. From the very beginning of the case the service member was the suspect. Although the offense occurred off-post, it was clear that the U.S. would have primary right since the offender was a service member and the victim was a dependent.

Case #2 was not as clear cut. The alleged offense occurred off-post and the initial suspect was a dependent. The problem arose with the status of the child. She was a Korean national. A Korean adoption

agency had placed her in the household several months before.¹⁵¹ CW4 and Mrs C were in the process of adopting her.

Pursuant to our obligations under the SOFA, the Seoul Criminal Prosecutor was notified and briefed on the case.¹⁵² Because of the extent of her injuries and her status as a Korean national, the case was initially considered one of "particular importance".¹⁵³ The military, realizing it had no criminal jurisdiction over the dependent wife¹⁵⁴, was concerned with the recall of waiver.

The Koreans did apprehend and question Mrs.C, but ultimately decided not to pursue a criminal prosecution. The Korean prosecutor believed the U.S. should handle it.¹⁵⁵

Hence, the military found itself with a critically injured child and a dependent mother who caused the injury, but who could not be tried by the military.¹⁵⁶ This forced military prosecutors to reexamine the case to determine proper disposition.

III. PROSECUTING CHILD ABUSE UNDER THE UCMJ

A. Application of the UCMJ

Once the SOFA issues are resolved, there are very few international law issues to consider during the charging phase. However, charging child abuse under the Uniform Code of Military Justice can present its own problems.

There are no federal child abuse statutes *per se*¹⁵⁷, and unlike our counterparts at CONUS installations, OCONUS attorneys have no state child abuse laws to assimilate.¹⁵⁸ Therefore the military attorney must rely solely on the UCMJ.

There is no specific child maltreatment provision under the code. However, physical abuse of a child may be charged under assault¹⁵⁹, battery¹⁶⁰, maiming¹⁶¹, murder¹⁶², or manslaughter.¹⁶³ Similarly, sexual abuse of a child may be charged under rape¹⁶⁴, carnal knowledge¹⁶⁵ or sodomy.¹⁶⁶ Child neglect may even be punishable.¹⁶⁷

Once the preliminary investigations in both cases raised the suspicion of child abuse, military prosecutors had to decide how to charge the offenders.

B. Charging Options

It was clear that the injuries in both cases resulted from nonaccidental trauma being inflicted on the children. Regarding Baby D, the father, Spec D, attempted to explain away the injuries by implying that they were the result of his attempt to discipline the child.

Assuming what he said was true, it raised an issue which prosecutors must be aware of.

In battered child cases, there is the consideration of legitimate parental discipline, a concept recognized by the law, including military law. This concept must be considered in recommending criminal charges. Where does the right of a parent to discipline end and criminal assault begin? In other words, how much is too much? Fortunately, we have guidance in a number of military cases. Parental discipline must be reasonable. Reasonableness, of course is a question of fact. Discipline must not exceed "due moderation" and must not exceed the child's "reasonable welfare demands". United States v. Schieffer, 28 CMR 417 (ABR 1959); United States v. Houghton, 31 CMR 579 (AFBR 1961), aff'd 32 CMR 3 (CMA 1962); United States v. Moore, 30 CMR 901 (ABR and 31 CMR 282 (CMA 1962) (good discussion and case cites in both the ABR and CMA opinions); United States v. Winkler, 5 M.J. 835 (ACMR 1978). Closely related to the question of parental rights is the common "defense" of lack of mens rea ("I didn't intend to hurt my son when I punished him"). Winkler, supra, discusses intent. Any brutal act (i.e., beyond reasonable limits) which results in injury "is proof of malice and of guilty

intent."¹⁶⁸

Spec D's allegation of parental discipline was thoroughly discounted upon the receipt of the autopsy report containing the findings that Baby D was the victim of "battered child syndrome".¹⁶⁹

Choosing the charges in Spec D's case was easy: murder and aggravated assault. Once the decision was made to charge CW4 C, choosing the charges was a little more difficult.

It was undisputed that Mrs C, the dependent wife, had inflicted the injuries. It was also undisputed that the husband had been present throughout the 45 minute forced feeding episode and the following six hours while the child was unconscious, her condition worsening due to lack of medical attention. At least to the latter behavior, caselaw provided a legal basis for charging acts of omission as a crime.¹⁷⁰ As to the former, it was reasonable to believe that charging CW4 C as a principal would result in the wife taking the stand and accepting blame for the injuries. How to resolve this dilemma?

"One charge that may be helpful is the charge of

Accessory after the fact - Article 78, UCMJ. It is important to note that as to this charge the principal need not be subject to the code so long as the offense committed is punishable by the code."¹⁷¹

Additionally under the facts that had developed thus far, the military could "also charge the accused with the failure to obtain timely and proper medical treatment".¹⁷²

Being OCONUS creates a distinct disadvantage when trying to charge an act of omission as a crime. Most states have statutes clearly proscribing this form of conduct. The UCMJ does not. Relying on caselaw¹⁷³, and using state statutes as examples, we fashioned an Article 134¹⁷⁴ offense using a culpable negligence standard.¹⁷⁵

Two other areas that bear noting are the requirement to give rights warnings¹⁷⁶, and speedy trial¹⁷⁷ considerations. Mention is made of them because they are potential pitfall areas. As to the latter, an OCONUS location exacerbates usual speedy trial problems.

Article 31 problems arise in conjunction with

medical personnel and social workers. The issue becomes whether these people should be advising the parents of their Article 31 rights prior to getting statements from them. In the normal context, the issue arises when the medical personnel ask the parent "what happened?". Generally, initial questions in the emergency room will be admitted in the absence of warnings, because they are done for the purpose of medical diagnosis and treatment.¹⁷⁸ The problem worsens when the medical personnel suspect that the cause of the injuries the child suffered were nonaccidental, and that the parents inflicted them.

Once a parent becomes a suspect, Article 31 rights should be given. Likewise, if the social services personnel are called in because child abuse is suspected, and they desire to question the parents, Article 31 rights must be given.

Social workers are given clear guidance in AR 608-18 regarding the requirement to give rights warnings. In my experience, rarely are they given.

During the charging phase, speedy trial considerations should be foremost in the trial counsel's mind. Child abuse cases generally take a

substantial amount of time to develop because of the type of evidence that is required to prove up the case, i.e. photographs, medical records/lab reports, and coordination with experts.¹⁷⁹ Being overseas just exacerbates the situation.

As seen in our sample cases, many times the victim is no longer in theatre. This results in long distance consultations with the treating physicians to determine diagnosis, prognosis, nature and extent of injuries.¹⁸⁰ Much time can be lost just trying to determine the status of the child.

If the child survives, oftentimes the child and the parents will be involved in civil proceedings in the states. Depending upon the nature of the hearing, the decision may be made to stay any criminal proceedings pending the outcome of the civil proceedings. Whether stayed or not, close coordination must be maintained with civil authorities to ensure that all interested parties are apprised of the current status of the case.

Because of all the events which may be happening concurrently, it is absolutely essential that prior to preferring charges, the trial counsel has the

fundamentals of the case in place. Trial counsel should take all the time they need (within reason)¹⁸¹ to accomplish this, for once charges are preferred, the speedy trial clock begins to run.

Rules for Courts-Martial 707 provides that the accused must be brought to trial within 120 days after the notice to the accused of preferral of charges or imposition of restraint. Rules for Courts-Martial 304 provides an expansive definition of restraint which includes any condition which directs a person to do or refrain from doing specified acts. In most child abuse cases, an accused will be restricted from the household or from contact with the victim. Trial counsel must be aware of any event that triggers this rule. Every action taken in developing this evidence should be documented in written form and not left to memory. The compilation of such a record will be a great assistance to trial counsel in responding to an allegation that the accused was denied a speedy trial.¹⁸²

The following mandatory actions could be triggering events: flagging actions, involuntary extension of DEROS, and placing the accused on International Hold.¹⁸³ There may also be times when the accused is out of theatre, e.g. to accompany the child to a different hospital, to attend the child's funeral in the states, or to be present at civil hearings in the states. These events must all be documented to account for or exclude from government time.

The charging process, Article 31 warnings and

speedy trial concerns are somewhat insulated from international law considerations. However, international law considerations will impact on other aspects of the case. The nature of the impact is discussed below.

IV. PRODUCTION OF WITNESSES AND EVIDENCE

In the area of producing witnesses and evidence, it is vitally important that the trial counsel understands two things: how the SOFA interfaces with MCM provisions regarding production of witnesses and evidence; and how both of these provisions impact on the production of foreign national witnesses and civilian witnesses located abroad, i.e. the United States. The failure to understand these two points can have disastrous affect as a trial counsel watches his entire case crumble because a pivotal witness or salient piece of evidence cannot be obtained.

A. SOFA Provisions

Cooperation in obtaining evidence is controlled by the SOFA.

The military authorities of the United States and the authorities of the Republic of Korea shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.¹⁸⁴

Attendance of foreign national witnesses is also controlled by the SOFA.

The military authorities of the United States and the authorities of the Republic of Korea shall assist each other in obtaining the appearance of witnesses necessary for the proceedings conducted by such authorities within the Republic of Korea.¹⁸⁵

When citizens or residents of the Republic of Korea are required as witnesses or experts by the military authorities of the United States, the courts and authorities of the Republic of Korea shall, in accordance with the law of the Republic of Korea, secure the attendance of such persons. In these cases the military authorities of the United States shall act through the Attorney General of the Republic of Korea, or such other agency as is designated by the authorities of the Republic of Korea.¹⁸⁶

The ROK government has designated the branch or district prosecutor, or the area police chief as the appropriate authorities to receive request for witnesses.¹⁸⁷

Although trial counsel are advised to make every effort to "obtain the voluntary attendance of all necessary civilian witnesses"¹⁸⁸, trial counsel would be well advised to have previously coordinated with the appropriate officials (police, public prosecutor or judicial authorities) to ensure their presence. From experience it is also wise to have CID/KNCI alerted in case the witness needs extra assistance in attending the hearing.¹⁸⁹

Understanding the mechanism for obtaining foreign national witnesses, and utilizing the system to ensure their presence is time-consuming but absolutely necessary. Generally, your case will involve Korean witnesses. In our sample cases, we had a large number of Korean witnesses, from Korean neighbors to medical personnel. Their testimony was important, so they had to be at the appropriate hearings. The SOFA provisions can and will help you, if followed properly.

B. Manual for Courts-Martial Provisions

The provisions of the SOFA must be complied with in obtaining civilian witnesses. R.C.M. 703 is controlling: "[I]n foreign territory, the attendance of

civilian witness may be obtained in accordance with existing agreements or in the absence of agreements, with principles of international law."¹⁹⁰

A different problem arises when the civilian witness is not located in Korea. The Manual does not have extra-territorial effect. "Process in courts-martial does not extend abroad... nor may it be used to compel persons within the United States to attend courts-martial abroad."¹⁹¹

The only recourse for the trial counsel is invitational travel orders. However, these are totally voluntary. If the witness declines, the trial counsel will have to go forward without live testimony.

Tied into the production of foreign national and civilian witnesses abroad is the issue of "reasonable availability".¹⁹² To justify using alternate forms of testimony, the trial counsel must be prepared to show that all reasonable steps were taken IAW the SOFA and R.C.M. to make the witness reasonably available.

Because of witness appearance problems¹⁹³, trial counsel must take steps early on to preserve testimony. The best means of doing this is by deposition¹⁹⁴ or

former testimony from the Article 32.¹⁹⁵ Stipulations may be employed at trial.

Without going into a long discussion about witnesses and evidence, the learning point for trial counsel in Korea is that the SOFA will control the production of both.

V. SEARCH AND SEIZURES

To determine the validity of a search and seizure in the U.S., trial counsel look to the Fourth Amendment.¹⁹⁶ However, in an OCONUS search, unless the search was conducted solely by military officials against U.S. personnel on the installation, the Fourth Amendment is just part of the inquiry. The trial counsel must also determine whether the search was done in compliance with international law principles. "The Fourth Amendment does not apply to aliens in foreign territory or in international waters. Any such restrictions must be imposed by Congress, diplomatic understanding, or treaty."¹⁹⁷

Just as the SOFA and Manual provisions interfaced

regarding the production of witnesses and evidence, they also interface regarding searches and seizures.

A. SOFA Provisions

The authority of the U.S. military to conduct an off-post search is derived from the same SOFA provision authorizing cooperation in investigations.¹⁹⁸

The military authorities of the United States and the authorities of the Republic of Korea shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper case, the handing over of objects connected with an offense.¹⁹⁹

How these searches and seizures are conducted are important with regards to their admissibility at trial. The MCM provides the standard.

B. Manual for Courts-Martial Provisions

The Military Rules of Evidence determine the "lawfulness" of a foreign search and seizure.

A search or seizure is "unlawful" if it was conducted, instigated, or participated in by ...[o]fficials of a foreign government or their agents and was obtained as a result of a foreign search or seizure which subjected

the accused to gross and brutal maltreatment.²⁰⁰

Generally, if a foreign government follows its own rules regarding search and seizure, it will be upheld by U.S. courts.²⁰¹ The participation of U.S. officials at an unlawful search will render it inadmissible.²⁰²

"A search or seizure is not 'participated in' merely because a person is present at a search or seizure conducted in a foreign nation by officials of a government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure."²⁰³

The interface between the SOFA and MRE provisions are important because routinely, the commander, military magistrate or judge will authorize an off-post search of a soldier's living area. Regardless of who authorizes the search, MPI or CID must coordinate the execution of the search with Korean National Police or Korean Criminal Investigators.²⁰⁴

It is not a valid defense that the search was conducted in violation of the SOFA provisions. It is a valid defense if the accuse alleges that the search was conducted in a "gross and brutal" manner.²⁰⁵ If

substantiated, the search is thrown out. The impact this could have on case is enormous. Since most cases of abuse will occur in the home, vital evidence may be excluded if the search is not conducted properly. Everyone in the process must understand this point. It is the trial counsel's responsibility to ensure that it happens.

VI. RECOMMENDATION

There are a number of studies dealing with child abuse in the military. As previously noted, none of the studies directly focus on child abuse in Korea. Although the Korean scenario is similar in some respects to the German scenario, it is significantly different in other respects.

Military installations in Korea suffer from many of the problems identified in Germany: a lack of family oriented resources. Military families in Korea experience many of the same problems as their Germany based counterparts: overcrowding in living quarters, insufficient employment opportunities, and a scarcity of medical/social service facilities.

However, the military family studies have

identified some problems which are more prevalent in Korea, such as the higher ratio of noncommand sponsored families, and the higher ratio of transcultural marriages. Both of these categories have been found to be contributing factors in child abuse.

Because it is a non-western nation, Korea has different attitudes about children. Anthropological studies show a correlation between cultural attitudes about child-rearing and the societal value placed on children. This impacts directly on the degree of protection children are afforded under the law. Taken in conjunction with the negative attitude many Koreans have toward the law, it is clear that the cultural and legal milieu of the country impacts on the identification, investigation and prosecution of child abuse.

As done previously in Germany, Department of the Army should commission a study to determine what factors contribute to the occurrences of child abuse in Korea. A study of this type is sorely needed. Occurrences of child abuse in Korea have been on a steady increase for the last few years.²⁰⁶

A better understanding of the Korean scenario can

only aid in the identification, investigation, and prosecution of child abuse.

VII. CONCLUSION

Child maltreatment is a fact of life. It is present in the civilian and military communities. Military officials have recognized this and have taken appropriate steps to prevent abuse through education. However, when abuse does occur, there is a system in place to identify, investigate, and manage it.

AR 608-18 establishes the Army's policy with regards to child abuse. Although our philosophy is to treat and rehabilitate the abuser, the most egregious cases of abuse will continue to be prosecuted.

Another unfortunate fact of life is the disproportionate incidence of child abuse at OCONUS locations. As discussed in Part I, the combined stresses of military and overseas life in conjunction with reduced accessibility to facilities join to create a family more prone to violence. Hence, the higher ratios of overseas abuse.

Cultural attitudes about childrearing and a

pervading distrust of the law makes the identification and investigation of child abuse more difficult in Korea. Decreased identification and hampered investigations have a direct impact on the successfulness of the prosecution. To get around this, the military prosecutor must understand the cultural milieu he's working in and make allowances for it.

While it is important that the military prosecutor be aware of ancillary cultural issues, it is imperative that he understand the significance of international laws and principles.

In Korea, the SOFA will govern criminal jurisdiction, the production of witnesses and evidence, and searches and seizures. Compliance with the applicable SOFA provisions is mandatory under the MCM. To fulfill the requirements under the SOFA, the military prosecutor must coordinate with the appropriate Korean officials (police, public prosecutors or judicial authorities). Failure to comply will invariably have a negative impact on the prosecution.

Prosecuting child abuse cases is always challenging. This challenge is heightened in Korea. By

being fully aware of all the issues impacting on the case - both cultural and legal - the military prosecutor can rise to the challenge and meet it. Only in this way can the system rectify the wrongs of the abuser and attempt to live up to the mandate of the 1959 United Nations declaration that "mankind owes to the child the best it has to give".²⁰⁷

1. United Nations Declaration of the Rights of the Child, 20 November 1959.

2. The statistics distinguish between substantiated, suspected and unsubstantiated cases of child maltreatment. Substantiated cases are those which have been thoroughly investigated and evaluated by the appropriate case review committee and an occurrence of maltreatment has been established. When a case determination is pending further investigation it is listed as suspected. When the evidence does not substantiate the allegation, the case is listed as unsubstantiated.

3. Child and Spouse Abuse Statistical Report FY 1990, obtained from the Army Child Advocacy Program Central Registry.

4. Report of Judicial Disciplinary Activity in the Army, Reporting Period from: 10/89 to 09/90. Obtained from the Clerk of Court, USALSA.

5. Id.

6. 42 U.S.C.A. secs. 5101-5107 (West 1985).

7. Id. at sec. 5102

8. Kempe, Silverman, Steele, Droegmueller, and Silver, The Battered Child Syndrome, 181 J.A.M.A. 17 (1962).

9. Hasty, Military Child Advocacy Programs:

Confronting Maltreatment in the Military Community,
112 Mil L. Rev. 67 n 15 (1986).

10.E. Hunter and T. Saylor (eds.), The military family and the military organization. Proceedings of a symposium held at the 1978 Annual American Psychological Association Convention, Toronto, September, 1978.

11.D.Soma, An Analysis of Child Maltreatment in the United States Army: 1983-1985 (August 5, 1987)(unpublished dissertation).

12.Id.

13.See, e.g. Wichlacz, Randall, Nelson & Kempe, The Characteristics and Management of Child Abuse in the U.S. Army-Europe, Clinical Pediatrics 545 (June 1975); Dubanoski & McIntosh, Child Abuse and Neglect In Military and Civilian Families, 8 Child Abuse & Neglect 55 (1984); and Prier & Gulley, A Comparison of Rates of Child Abuse in U.S. Army Families Stationed in Europe and in the United States, 152 Military Medicine 437 (Sept. 1987).

14.National Center on Child Abuse and Neglect (NCCAN), Child Abuse and Neglect Among the Military, DHHS Publication No.(OHDS) 80-30275, 1 (1980).

15.Id. at 3

16.Id. at 4.

17.Id. at 3.

18.Hasty, supra note 9, at 14.

19.Id.

20.Miller, The Maltreatment Syndrome in the Military Community, August 11-12, 1972, (unpublished paper presented to Current Trends in Army Social Work Course, San Antonio, Texas).

21.LTC Miller used the following definitional aspects of child abuse and neglect: 1) a neglected child is one who is denied the resources to meet his basic physical, material, and emotional needs; 2) an abused child is one who has received an insult to his body, the nature of the insult being such that it represents either an immediate or potential threat to his health. Id. at 7.

22.Id. at 13.

23.For a discussion of the effects of family problems upon military operations, See Hunter, supra note 10.

24.NCCAN, supra note 14, at 14.

25.42 U.S.C. secs. 5101-5107 (1976), as amended, supra note 6.

26.Army Reg. 600-48, Army Child Advocacy Program (1 Feb 1976), superceded by Army Reg. 608-1, Army Community Service Program (8 July 1985), superceded by Army Reg. 608-18, Army Family Advocacy Program (18 Sep 87).

27.NCCAN, supra note 14, at 4.

28.Wood, International Aspect of Child Abuse in the Military and the Army's New Role as "Child Advocate, 1 Child Abuse & Neglect 427, 431 (1977).

29.Army Reg. 608-1, Army Community Service Program (8 July 1985).

30.Broadhurst, Estey, Hughes, Jenkins & Martin, Child Protection in Military Communities, DHHS Publication No. (OHDS) 80-30260, 68 (May 1980).

31.C. Lewis, The Family Research Program FY 86 - FY 90, (April 1985)(unpublished manuscript). Note: This material has been reviewed by the Walter Reed Army Institute of Research, and there is no objection to its presentation and/or publication. The opinions or assertions contained herein are the private views of the author and are not to be construed as official or as reflecting the views of the Department of the Army or the Department of Defense.

32.Broadhurst, supra note 30, at 68.

33.Prier & Gulley, A Comparison of Rates of Child Abuse in U.S. Army Families Stationed in Europe and in the United States, 152 Military Medicine 437 (Sept. 1987).

34.Id. at n 2-6.

35.Id. See, n 17 and 20, and Soma, supra, note 11.

36.Id. See n 17 and 18.

37. Wichlacz, supra note 13; Lanier, Child Abuse and Neglect Among Military Families: A Part And Yet Apart, 101,103 (E. Hunter & D. Nice eds. 1978) (This was a study conducted at Madigan Army Medical Center, Fort Lewis, Washington); Schnall, Characteristics and Management of Child Abuse and Neglect Among Military Families, in Children of Military Families: A Part And Yet Apart, 141 (E. Hunter & D. Nice eds. 1978).

38. Scott-Brown, Stress and the naval child, 60 J.R. Nav. Med. Serv. 75 (1974); Accord, Child Abuse and Neglect in the Navy, 142 Military Medicine 862 (1977).

39. Myers, Child Abuse and the military community, 144 Military Medicine 23 (1979).

40. Dubanoski, supra note 13.

41. Broadhurst, supra note 30, at 68.

42. Id.

43. Prier & Gulley, supra note 33, at 439.

44. Soma, supra note 11, at 21.

45. Wichlacz, supra note 13.

46. Myers, supra note 39; Soma, supra note 11, at 21.

47. Dubanoski, supra note 13; Soma, supra note 11; Accord, supra note 38.

48. Soma, supra note 11.

49. Id. at 3.

50. "The Army Child Advocacy Program Central Registry was established in HQ, HSC on 1 February 1976 by AR 600-48. On 1 October 1978, AR 608-1 (Army Community Service Program) moved the registry to PAS & BA where it was established as a separate operating system. The registry provides specific information on prior child abuse to the medical team treating and/or investigating a suspected abuse incident. The central registry also serves as a data base from which semi-annual reports on the frequency and type of abuse at Army installations are reported to DOD, DA, and all Major Army Commands (MACOMS)". Id. at 5-6.

51. Id. at 5.

52. Id. at 93.

53. DOD Child and Spouse Abuse Statistics, FY 1987.

54. Wichlacz, supra note 13, (re: the rates of abuse in USAREUR in 1975); Dubanoski, supra note 13, (re: the rates of abuse in Hawaii in 1984); Soma, supra note 11, at 24, 68 (discussing the rates of abuse in Hawaii); and Prier, supra note 33, (re: the rates of abuse in USAREUR in 1987).

55. Lewis, supra note 31, at 7.

56. Wichlacz, supra note 13; Prier, supra note 33.

57. Dubanoski, supra note 13. "It was reported in 1979 that in Hawaii, where military personnel comprise 16 percent of the population, the incidence of child

abuse and neglect cases involving military families was 27 percent of all reported cases". NCCAN, supra note 14, at 1. Hawaii is unique because in the late 1970's/early 1980's it had the only unified services FAP operating. Address by Senator Inouye, U.S.Senate, Committee on Appropriations. Department of Defense Appropriations Bill, 1980. 96th Cong., 1st sess., 1979, Senate Report 96-393, p.76.

58. There have been no studies that I could find concerning the rate of child abuse in Korea. However, many of the findings as to the causes for increased abuse in Germany and to a limited extent, Hawaii, are also applicable to Korea. Therefore, in the discussion, I will analogize the German scenario to the Korean scenario.

59. Dubanoski, supra note 13, at 56.

60. Prier, supra note 33, at 439.

61. Id.

62. Wichlacz, supra note 13, at 545.

63. Id.

64. Lewis, supra note 31.

65. Prier, supra note 33.

66. Lewis, supra note 31, at 9.

67. In Europe and to a lesser extent in Korea, there exists a unique relationship between the major communities and their administratively-linked sub-

communities. The researchers of the Family Research Program found that military families at the sub-communities in USAREUR felt neglected by the major community. This lack of a sense of community only added to the families' feelings of isolation and frustration. Id.

The major community - sub-community relationship is even more extreme in Korea where there are only two command sponsored installations; Yongsan and Taegu in the south. The only full service military hospital in Korea is located at Yongsan. Noncommand sponsored military families living near installations other than Yongsan must travel great distances to receive the family services available at 121st Evac. Hosp., Yongsan.

68. Although a problem in Europe, researchers believe it is even a greater problem in Korea due to the length of the tour and the difficulty in obtaining command sponsorship. Tied into this is the higher occurrence of transcultural marriages in Korea.

These two factors led researchers to conclude that the transcultural spouse, if not a native of the host country, has an much more difficult time adjusting to OCONUS living; the same conclusion was reached regarding the noncommand sponsored family. With regard to the latter, researchers determined they were the

"least well-adjusted to the rigors of overseas living".
Id. at 8.

69.J. Korbin, *Child Abuse & Neglect: Cross-Cultural Perspectives*, at 1 (1981).

70.Id. at 139.

71.H. Pyong-Choon, *The Korean Political Tradition and Law*, at 8 (1967).

72.Id.

73.Id. at 9.

74.Korbin, supra note 70, at 141. Korbin discusses the concept of filial piety in Taiwan. However, since both countries have been greatly influenced by mainland China, the general principles of the philosophy are equally applicable to Korea.

75.Id.

76.Id. at 151.

77.Traditional legal codes provide for extremely harsh punishment of children who harm or kill their parents, yet parents who commit the same acts on their children are lightly dealt with or excused. Id. at 150.

This principle is reflected in the Korean Criminal Codes at Articles 250 and 251. This disparity of treatment is discussed infra in the text.

78.Id. at 147.

79.Id.

80.Id. at 148.

81.Id.

82.Id. at 139.

83.K. Yang, Law and Society Studies in Korea: Beyond the Hahm Thesis, 23 Law & Society Rev. 891 (1989).

84.Id. at 892.

85.Id. at 891.

86.Hahm received his B.A. in economics from Northwestern University in 1956, his J.D. from Harvard Law School in 1959. He taught at Yonsei University in Seoul, Korea, after 1959. He was also in the government service as special assistant to the president for political affairs and as ambassador to the United States. He died in a North Korean terrorist bombing in Rangoon, Burma, while accompanying the president on a state visit as his secretary-general.
Id. at 893 n 3.

87.Id. at 893.

88.International Cultural Foundation, Legal System of Korea (C. Shin-yong ed. 1982) at 204.

89.Pyong-choon, supra note 72, at 18.

90.Id. at 19.

91.Id. at 21.

92.Id.

93.Id. at 21, 22.

94.International Cultural Foundation, supra note 89, at 158. The distinction between goodness and lawfulness is not totally foreign to the Judeo-Christian tradition. See, e.g. Romans 3: 19-31 (for a discussion of the righteous man versus the law-abiding man); and 1 Timothy 1:8-11 (on the purpose of the law).

95.Id. at 159.

96.Id. at 203.

97.Id. at 205.

98.Id. at 207.

99.Yang, supra note 56, at 897.

100.Id.

101.Id. at 896.

102.International Cultural Foundation, supra note 89, at 66.

103.Yang, supra note 84, at 895.

104.International Cultural Foundation, supra note 89, at 176.

105.Id.

106.Id.

107.Id. at 180.

108.Id. at 176.

109.Laws of the Republic of Korea (H. Pophagwon trans. ed. 3d ed. 1983)(contains both the Criminal and

Civil Codes)[hereinafter Crim. Code art. or Civ. Code art.].

110.Id.

111.Crim. Code art 251. Id. at X-29.

112.Crim. Code art 250. Id. at X-29.

113.Crim. Code art 251. Id. at X-29.

114.Crim. Code art 250, sec. (2). Id. at X-29.

115.Crim. Code art 271, sec.(1). Id. at X-32.

116.Crim. Code art 272. Id. at X-32.

117.Crim. Code art 271, sec.(2). Id. at X-32.

118.Civil Code, Laws of the Republic of Korea, supra note 106, at VII-91.

119.Civ. Code art 915. Id. at VII-97.

120.Civ. Code art 924. Id. at VII-98.

121.Id.

122.Civ. Code art 909 et. seq. Id. at VII-96 through VII-99.

123.Twing, Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases, The Army Lawyer, May 1985, at 27.

124.Id.

125.Twing, Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases, The Army Lawyer, June 1985, at 47.

126.10 U.S.C. secs 801-940 (1982)[hereinafter UCMJ].

127. UCMJ art. 128.

128. UCMJ art. 118.

129. The Korean hospital administered an anti-inflammatory drug in the hopes of relieving some of the pressure on the brain and to help drainage. Administration of the drug is very controversial in the U.S. medical community.

130. The military medical system overseas follows a three-tiered system of hospitalization. The 121st Evacuation Hospital, Yongsan, Seoul, Korea is considered primary care. The hospital at Clarke AFB is secondary care; and Tripler Army Medical Center is tertiary care.

131. Battered child syndrome as defined in the literature is repeated nonaccidental trauma to a child by persons having custody and control of the child. The hallmarks of battered child syndrome are varying injuries of varying ages and degrees of severity.

132. Uniform Code of Military Justice art 78, 10 U.S.C. sec. 878 (1982)[hereinafter UCMJ].

133. UCMJ art. 128.

134. UCMJ art. 134.

135. A third charge of maiming under UCMJ art 124, was dismissed at trial.

136. Deposition of Mrs. C., taken on 4 October 1989

at the Office of the Staff Judge Advocate, Presidio of San Francisco, California.

137.Id. at 18.

138.Id.

139.Id. at 19.

140. United States/Republic of Korea Status of Forces Agreement art. I(a) and (c), 9 July 1966 [hereinafter SOFA].

141.Id.

142. SOFA art. XXII, 9 July 1966.

143. In this context, the U.S. would be the sending state and the Republic of Korea (ROK) the receiving state.

144. SOFA art. XXII, para. 2(a), 9 July 1966.

145.Id. at para 2(b).

146.Id. at para 3(a)(i).

147.Id. at para 3(b).

148. US/ROK SOFA art XXII and Exchange of Letters of 9 July 1966.

149.Id.

150.Id. The criminal jurisdiction waiver provisions of the SOFA were amended on 1 February 1991. The country exercising primary right over an offense now has 28 days to determine whether to exercise its right.

151. Just ten days before the incident occurred this same agency placed a newborn with the family. As a result of the forced feeding incident and the suspicion of abusive behavior, medical and social services personnel after consultation with JAG convinced the adoption agency that it would be in the newborn's best interest to remove her from the home.

152. SOFA art XXII, para 5(b), 9 July 1966.

153. US/ROK SOFA art XXII, para 3(b) and Agreed Minute Re: Paragraph 3 (b), 9 July 1966.

154. A problem arises in the case of a civilian offender who falls under the SOFA umbrella. In the late 1950's and early 1960's, the U.S. Supreme Court decided a series of cases which established that a U.S. civilian could not be tried by a military tribunal if the offense was committed in a foreign country. See, e.g., Reid v. Covert, 354 U.S. 1 (1957) and Kinsella v. US ex rel Singleton, 361 U.S. 234 (1960).

Because civilians are not subject to the UCMJ, they cannot be tried in a military court. Therefore, the only entity with jurisdiction over civilians, with certain exceptions, is the ROKG. The decision being made by the public prosecutor is not whether to exercise jurisdiction, as with a military member, but whether to prosecute. See, HQ, USFK, Legal Affairs Handbook, at 3.

155. There was a common sentiment among the Korean Criminal Prosecutors to keep "hands off" on any cases involving U.S. personnel unless they were exceedingly egregious. Cases of particular importance were determined (in my opinion) more by the amount of public outcry and less on legal theory.

An underlying sentiment throughout the case was that the baby girl, if she survived, would be severely brain damaged. As alluded to earlier, girls are considered less valuable than boys. Presumably, the Koreans did not want a damaged little girl returned to them.

As an aside, it was very difficult to convince the adoption agency to reclaim the 10 day old infant. They saw no reason for it, and only did it at the insistence of the medical/social services personnel.

156. Anecdotally, the mother departed Korea with the child as soon as the International Hold was lifted. Military officials had to lift the hold when the Koreans failed to recall their waiver within 15 days. Once out of country, she was beyond the reach of the Koreans.

157. Although there is no federal child abuse statute, certain offenses enumerated in Title 18 of the U.S. code would be applicable. These offenses include: assault (sec. 113); murder (sec. 1111); manslaughter

(1112); rape (sec. 2031); and sexual exploitation of children (sec. 2251).

158. An early TCAP article on this subject advised trial counsel to "always explore the state criminal law on child abuse. State law is normally much more wide-ranging and proscribes many specific forms of neglect as well as battering and sexual abuse. While the 'traditional' offenses in the UCMJ cover many situations, state law will cover virtually all types of crime perpetrated on children. This is true for all states. The state law can then be assimilated under Article 134, UCMJ, as federal law under the Assimilative Crimes Act, 18 U.S.C. sec. 13". Gravelle, Prosecution of Child Abusers, Trial Counsel Forum, July 1984, at 8.

159. UCMJ art 128.

160. Id.

161. UCMJ art 124

162. UCMJ art 118.

163. UCMJ art 119.

164. UCMJ art 120.

165. Id.

166. UCMJ art 125.

167. Hasty, supra note 9, at 35. See, United States v. Alexander, 18 M.J. 84 (CMA 1984).

168. Gravelle, Prosecution of Child Abusers, Trial Counsel Forum, July 1984, at 8.

169. This case illustrates the problem discussed previously regarding the identification of abuse. The Korean mother had repeatedly taken the baby to a Korean client for maladies ranging from a cold to broken bones. The Korean doctors accepted whatever explanation the mother gave them for the injuries. Many times no explanation was offered. The mother believed the child was accident prone. She also believed whatever explanation was offered by the father for the child's injuries. Other than at birth, the child had been seen by military doctors only one other time, about four weeks before the incident for severe dehydration. After hospitalization and release, the baby never returned for his follow up appointments. The next time the baby was seen by military doctors was the date of the incident.

170. See, e.g., United States v. Perez, 15 M.J. 585 (ACMR 1989); United States v. McGhee, 29 M.J. 840 (ACMR 1989).

171. Trial Counsel Assistance Program (TCAP) Memorandum, Sample Specifications, Accessory-after-the fact, TCAP Memorandum No.10, 1 June 1986. The memorandum goes on to say that "[T]he charge of Accessory after the fact affords the same punishment

that would be authorized for the principal offense except that no more than one-half of the maximum confinement authorized for the principal offense may be adjudged. In cases where the maximum confinement exceeds 10 years, the limit to confinement for an accused found guilty of accessory after the fact is 10 years." Id.

172.Id.

173.United States v. Perez, 15 M.J. 585(ACMR 1983); United States v. Alexander, 18 M.J. 84 (CMA 1984); United States v. McGhee, 29 M.J. 840 (ACMR 1989).

174.UCMJ art 134.

175.Charge II: Violation of the UCMJ, Article 134

Specification: In that Chief Warrant Officer Four _____, U.S. Army, _____, did, at Songnam, Korea, during the period of on or about 6 March 1989 to on or about 7 March 1989, with culpable negligence fail to prevent grievous bodily injury to (Baby C), his 23 month old adopted daughter, which injuries were within his power to prevent and which injuries it was his duty to prevent, such neglects and actions being of a nature to bring discredit upon the armed forces.

Although the military judge declared it "no model of clarity", this specification withstood judicial scrutiny.

176. Uniform Code of Military Justice art 31, 10 U.S.C. sec. 831 (1982).

177. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707, 304 [hereinafter R.C.M.].

178. A matter of concern in the Baby D case, was the questioning that was done by the Korean medical personnel to the parents. The parents answers were then recorded in the medical records, or verbally reported to the U.S. medical personnel. At trial, defense tried to raise Article 31 issues.

179. Twing, supra note 126, at 57.

180. This can be more difficult than it sounds. Because of the medevac procedures in Korea, both victims were treated at three different military hospitals. Baby C was treated at a fourth civilian hospital. Baby D was treated at a Korean hospital. The logistical drill of consulting with the treating physicians and obtaining medical records can be awesome.

181. Charges were preferred against CW4 C on 19 August 1989, more than five months after the incident.

182. Twing, supra note 126, at 57.

183. United States Forces Korea, Reg. 1-44, Criminal Jurisdiction Under Article XXII, Status of Forces Agreement, para. 6i (20 April 1984).

184. SOFA art XXII, para. 6(a), 9 July 1966.

185. US/ROK SOFA art XXII and the Agreed Minutes Re: Paragraph 6, 9 July 1966.

186. Id.

187. Agreed View No. 3, 23 February 1967 [amplifies the provisions of the Agreed Minute Re: Paragraph 6, art XXII, US/ROK SOFA, 9 July 1966]. A copy of the Agreed View is contained as an appendix in USFK Reg. 1-44, Criminal Jurisdiction Under Article XXII, SOFA, (20 April 1984).

188. EUSA Suppl. 1 to AR 27-10, Legal Services: Military Justice, para. 5-12.1c(4) (8 Nov 1985).

189. Any JAG who's prosecuted cases in Korea is all too familiar with the disappearing Korean witness. It is such a problem that most of us have adopted the unwritten policy of never building a case based on the testimony of a Korean witness.

Because they do not want to "^{loose}lose face" or cause you to "^{loose}lose face", Koreans witnesses during the interviews will lull you into a false sense of security by repeatedly assuring you that they will appear to testify. Many do not follow through.

In one case, I had CID/KNCI stake out the residence and business of a Korean witness, starting on the first day of trial. The witness never showed the entire time.

190.R.C.M. 703(e)(2)(E)(ii).

191.The Judge Advocate General's School, International Law Deskbook, JA-405, The Graduate Course Operational Law Deskbook, at 4-9.

192.Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 804 [hereinafter Mil. R. Evid.].

193.The normal tour of duty in Korea is 12 months. This in conjunction with the unpredictability of Korean witnesses, will invariably create witness appearance problems.

194.R.C.M. 702, MCM 1984. A deposition is the safest method of preserving testimony because it affords the accused notice, confrontation and cross-examination. If the witness later becomes unavailable, the deposition is admissible at trial.

195.Mil. R. Evid. 804(b)(1). Testimony from the Article 32 investigation is admissible at the subsequent court-martial if the witness is unavailable. United States v. Hubbard, 18 M.J. 678 (ACMR 1984). For a discussion on this matter, See, Twing, supra note 126, at 56.

196.U.S. Const. amend. IV.

197. United States v. Verdugo-Urgudez, U.S. Supreme Court, February 28, 1990, 29 I.L.M. 441 (1990).

198. SOFA art XXII, para.6(a), 9 July 1966.

199. Id.

200. Mil. R. Evid. 311(c)(3), MCM (1984).

201.

202.

203. Mil. R. Evid. 311(c)(3), MCM (1984).

204. EUSA Suppl.1 to AR 27-10, Legal Services: Military Justice, para. 5-1.6b (8 Nov 1985).

205. See, United States v. Morris, 12 M.J. 262 (CMA 1982); United States v. Whiting, 12 M.J. 253 (CMA 1982); United States v. Brinkley, 12 M.J. 240 (CMA 1982). All these cases discuss provisions of the NATO SOFA and/or the German Supplementary Agreement establishing cooperation among U.S. and foreign law enforcement officials. See, supra note 191, at 4-11.

206. DA Child and Spouse Abuse Statistical Report FY 1990.

207. See, supra note 1.