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MAJOR SEAN A. SABIN, USAF

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COLLATERAL DAMAGE ON THE 21ST CENTURY BATTLEFIELD: ENEMY EXPLOITATION OF THE LAW OF ARMED CONFLICT, AND THE STRUGGLE FOR A MORAL HIGH GROUND

JEFFERSON D. REYNOLDS*

I. INTRODUCTION

“Whoso obeyeth Allah and the messenger, they are with those unto whom Allah hath shown favor, of the prophets and the saints and the martyrs and the righteous. The best of company are they.”

The Koran, Sūrah IV, Ayah 69

Subordinate only to a state’s decision to wage war, effective targeting of the adversary is the most important and decisive part of successful warfare. Target selection requires military planners and strategists to develop tactical, operational and strategic target sets that destroy the adversary’s centers of gravity to compel capitulation, surrender or defeat. Although collateral damage¹ has historically been an important factor in the targeting cycle, its

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¹ The U.S. Department of Defense [hereinafter DOD] defines collateral damage as, “unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack.” U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JP1-02, at 93 (2001); CHAIRMAN OF THE JOINT CHIEFS OF STAFF JOINT METHODOLOGY FOR ESTIMATING COLLATERAL DAMAGE AND CASUALTIES FOR CONVENTIONAL WEAPONS: PRECISION, UNGUIDED, AND CLUSTER, CJCSM 3160.01A (Draft), at A-4 (Feb., 2004). Using a different definition than DOD, U.S. Central Command [hereinafter CENTCOM] incorporates environmental damage into their definition. Collateral damage is defined as “unintended physical damage to any non-combatant person(s), property, or environment(s) occurring

prominence and visibility have grown as battlefield tactics become more antagonistic and less aligned with humanitarian interests and the law of armed conflict (LOAC). The avoidance of collateral damage can even be determinative for nations like the United States (U.S.) who value LOAC.² A decision based on avoidance becomes problematic where key objectives cannot be targeted because of an adversary's invitation or fabrication of collateral damage to discredit operations. Any targeting decision must be premised on LOAC; however, a decision based on avoidance must carefully evaluate the loss of initiative and tactical superiority, the increasing and persistent nature of these events in the context of a well organized strategy, and the effect on tactical, operational and strategic objectives. Adversaries will improve methods to effectuate collateral damage in an effort to complicate attack planning, promote disinformation campaigns, deter attack, exploit humanitarian interests and, ultimately, improve survivability.

This study illustrates a rising trend in the frequency and severity of adversary violations of LOAC and humanitarian principles to gain a strategic advantage. A proposed solution to this problem requires attacking target sets that are prohibited according to some humanitarian interest groups, improving awareness and understanding of collateral damage, promoting the application of emerging technology, including non-lethal technology, and the use of aggressive information campaigns designed to expose deceptive reports of

incidental to military operations." CENTCOM OPLAN 1003V, COLLATERAL DAMAGE ESTIMATION POLICY & METHODOLOGY 6 (Table 1)(Mar., 2003).

² See William M. Arkin, *Fear of Civilian Deaths May Have Undermined Effort*, L.A. TIMES, Jan. 16, 2002, at A(1)1. See also David A. Denny, U.S. Air Force Uses New Tools to Minimize Civilian Casualties: Avoiding Unintentional Damage Figures Into Targeting, U.S. DEP'T OF STATE WASH. FILE, Mar. 18, 2003, at 5. Brig. Gen. Charles Dunlap, Staff Judge Advocate for Headquarters, Air Combat Command, U.S. Air Force [hereinafter USAF], says that the Law of Armed Conflict [hereinafter LOAC], "is becoming a (and sometimes 'the') key factor influencing the conduct of combat air operations." *Id.* In one highly reported incident, concerns about collateral damage restrained an attack on Mullah Mohammed Omar, the Taliban leader who was found fleeing Kabul, Afghanistan in October, 2001. An un-manned aerial vehicle [hereinafter UAV] operated by the Central Intelligence Agency detected Omar and was prepared to engage with two Hellfire laser-guided missiles. The UAV tracked Omar to a building situated among civilian homes. The agency needed CENTCOM approval to attack. Rather than give immediate approval to directly target Omar, Gen. Tommy R. Franks, CENTCOM Commander, and his legal advisors authorized the agency to fire a missile in front of the building to see who came out. Omar safely departed from the rear of the building after the attack. Seymour M. Hersh, *King's Ransom*, NEW YORKER, Oct. 22, 2001, at 38. Lt. Gen. Michael Short, Commander of Allied Air Forces for OPERATION ALLIED FORCE (Kosovo) believes the concern about collateral damage during the conflict placed coalition pilots at risk. "Collateral damage drove us to an extraordinary degree The reaction to every incident, nationally and internationally was extraordinary and handcuffed." Lt. Gen. Short told the Senate Armed Services Committee that a lesson he took from the experience is that political leaders need "to let us do our jobs. The restrictions placed on us as a result of collateral damage made us predictable and put our crews at risk." Sheila Foote, *Commander Hits Excessive Focus on Collateral Damage*, DEF. DAILY, Oct. 25, 1999, at vol. 204(16).

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collateral damage. The study is divided into six sections. Part II provides a parallel review of U.S. targeting strategy, collateral damage, civilian immunity, and the development of LOAC. Although a number of significant incidents of collateral damage are reviewed, this section is not intended to be exhaustive for each conflict studied. Rather, this section illustrates particular events, strategies and principles that contribute to an analysis of LOAC and collateral damage. Part III discusses the application of LOAC to different types of adversaries. With an emphasis on the International Criminal Court, Part IV describes significant problems associated with the prosecution of crimes involving collateral damage. Part V illustrates that violations of LOAC and strategies provoking collateral damage provide the greatest assurance of survival and strategic success for adversaries. Part VI examines specific targeting principles of LOAC, and demonstrates that attempts to reduce the number of permissible target sets may result in greater danger to the civilian population. This section also examines methods to effectively counter an adversary's attempts to discredit operations where collateral damage occurs.

II. THE HISTORICAL DEVELOPMENT OF TARGETING STRATEGY, CIVILIAN IMMUNITY, AND CONCEALMENT WARFARE

“War is an act of force to compel our enemy to do our will [A]ttached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.”³
Carl von Clausewitz

In the early 19th century, Clausewitz surmised that warfare was a “true political instrument” to achieve the political objectives of the state waging war.⁴ Although Clausewitz may have understated the effect of international law and custom in his conclusions, he recognized that the social condition of the states at war and their relationship to one another gave rise to some restraint.⁵ The concept of restraint in warfare did not necessarily evolve from a philosophy of compassion and progressive ideology. More than likely, it evolved out of the necessity to spare resources and labor as a reward for conquest. Virtually all cultures throughout history have exercised restraint and

³ CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howare & Peter Paret eds. and trans., Princeton University Press 1984) (1832).

⁴ *Id.* at 87.

⁵ *Id.* at 76.

rules of engagement at some level.⁶ Even before the fifth century B.C., Greek combatants adopted normative rules of engagement referred to as the common customs of Hellenes or *koina nomima*, that specifically referenced the immunity of civilians in war.⁷ Appreciated for their value in new regimes, labor and resources were often spared for their economic benefit.⁸ Civilian immunity is a universally accepted principle in the international community, but the degree of compliance has varied drastically since the fifth century B.C. For example, Clausewitz advocated the targeting of civilian populations because it provided psychological and political advantages to the larger strategy of defeating the will and morale of the adversary.⁹ Although direct targeting of civilian populations was widely exercised in the 20th century, prohibition of this practice pursuant to custom and LOAC is now more widely observed.¹⁰ The amplified sensitivity to civilian casualties and other collateral damage, combined with increasing pressure from humanitarian interest groups to categorically exempt certain civilian object target sets from attack, should concern military strategists because of the rising incidence of warfare involving the use of the civilian population for shielding, sanctuary and deception. These asymmetric methods of warfare are described in this study as “concealment warfare.” Concealment warfare promotes target aversion and

⁶ See generally MICHAEL HOWARD, GEROGE J. ANDREOPOULOS AND MARK R. SHULMAN, *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 1-12* (1994).

⁷ See HOWARD ET AL., *supra* note 6, at 13, referencing THUCYDIDES 3.59.I, 6.4.56; *cf.* EURIPIDES HERACLIDAE 1010. According to Thucydides, early Greek rules governing interstate conflict included: 1) war should be officially declared before the commencement of hostilities and treaties; 2) sacred truces, especially those declared for the celebration of the Olympic games should be observed; 3) hostilities against sacred places and people under the protection of the gods should be observed; 4) the dead of the enemy should be returned when asked; 5) prisoners of war should be offered for ransom instead of summarily executed; 6) the surrender of enemy forces should not result in punishment; 7) noncombatants should not be the primary target of attack; 8) use of non-hoplite arms (nontraditional arms of the Greeks) should be limited; and 9) pursuit of defeated and retreating opponents should be limited in duration.

⁸ *Id.* at 13.

⁹ See generally CLAUSEWITZ, *supra* note 3, at 89. Clausewitz’ “remarkable trinity of war” suggests an enemy’s populace, government and military must be carefully balanced to successfully wage war. As a result, any element or combination thereof is an appropriate target in the context of attacking the will of the enemy. *Id.* See *infra* note 348 and accompanying text for Colonel John A Warden’s theory of targeting strategic rings.

¹⁰ See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, arts. 51-52 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, Part IV [hereinafter Protocol II]. Although the U.S. has not ratified Protocols I or II, they are recognized as customary international law. Michael J. Matheson, *Session I; The United States’ Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987).

protracted conflict that potentially results in a higher incidence of both military and civilian casualties.

A. The Early Philosophy of Civilian Immunity

Western warfare has been largely defined by Christian ethics developed between the Middle Ages and the Renaissance.¹¹ St. Augustine,¹² Thomas Aquinas,¹³ Francisco Suarez, Alberico Gentili, Francisco de Vitoria,¹⁴ and later Hugo Grotius and Emerich de Vattel¹⁵ were initially occupied with defining the just war (*jus ad bellum*), and determining under what conditions war could be declared by a state.¹⁶ One of their collective premises, that war can only be declared by a legitimate authority for reparations or restoration of

¹¹ See generally HOWARD ET AL., *supra* note 6, at 27-40.

¹² St. Augustine of Hippo was born in 354 at Thagaste, an inland city of the Roman province of Africa. He formed his principles of warfare from the Old Testament and religious leaders such as Abraham, Moses, Joshua, Samson, Gideon, David and Judas Maccabeus. COLM MCKEOG, *INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR* 21 (2002). St. Augustine established a punitive model for warfare, making no distinctions between combatants and civilians. No distinction was required under this model because there is no moral difference between the two. St. Augustine's moral emphasis on the guilt of the enemy population could justify violence against it. The premise of guilt as justification for war was also justification to protect those who were not guilty. *Id.* at 28.

¹³ While Aquinas' somewhat evolved opinion of warfare did not approve of the killing of innocent people, he did not absolutely prohibit it. *Id.* at 62-63.

¹⁴ A progressive theologian for the era, Francisco De Vitoria made a large step forward in the protection of civilians. He advocated it would violate natural law to kill innocent women, children, clerics, religious clergy, foreign travelers, guests of the country, agricultural workers and the civilian population. *Id.* at 88, *citing* FRANCISCO DE VITORIA, *DE JURE BELLI*, in J.B. SCOTT, *THE CLASSICS OF INTERNATIONAL LAW* 163-87 (1917), and FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 315 (Anthony Pagden & Jeremy Lawrence ed. 1991). Only those who bear arms or engage in fighting were presumed guilty in the absence of evidence to the contrary. MCKEOG, *supra* note 12, at 87. He remarked that it was lawful to attack civilians "with full knowledge of what one is doing, if this is an accidental effect; for example, during the justified storming of a fortress or city, where one knows there are many innocent people." FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 315 (Anthony Pagden & Jeremy Lawrence ed. 1991).

¹⁵ Both Grotius and Vattel placed great emphasis on civilian immunity in war. However, both also recognized that civilian casualties were acceptable as an unintended and unforeseen consequence of an otherwise legitimate military objective. MCKEOG, *supra* note 12, at 116-18.

¹⁶ *Id.* at 2-3. Although *jus ad bellum* as a concept contributes greatly to the subject of just war, it is largely inapplicable to modern interpretation. Principles of *jus ad bellum* are codified by the United Nations [hereinafter U.N.] charter, authorizing the use of force only in the protection of collective security or self-defense. UNITED NATIONS CHARTER, arts. 2, 39 and 51 (1945).

something lost, is still well recognized in the international community.¹⁷ After the establishment of principles of *jus ad bellum*, attention was turned to the just method of war (*jus in bello*). Presently receiving the greatest emphasis of study, the methods and strategies of warfare have been the subject of wide debate for centuries, and will likely be central to the discussion of law and war so long as military strategists are driven by tactical creativity and the development of new technology. Notwithstanding the dynamic nature of the modern study of the subject, even the earliest scholars generally recognized that civilians should not be deliberately attacked. However, their incidental targeting was acceptable as a by-product of an attack on a legitimate military objective.¹⁸ In addition, it was customary that the amount of force be proportionate to the objective achieved.¹⁹

B. Early Codification of Civilian Immunity

Although the customs of LOAC were recognized in 15th–17th century America,²⁰ it wasn't until the height of the Civil War that the U.S. would codify the protection of civilians. The year 1863 most clearly marks the division between the era of customary LOAC and codified LOAC. In that year, the U.S. would adopt its first comprehensive code for the conduct of land warfare in Army General Order No. 100, *Instructions for the Government of Armies of the United States in the Field*, authored by Dr. Francis Lieber of Columbia College. Commonly known as the Lieber Code, the U.S. developed the rules in response to alarming violations of customary laws of war during the Civil War that amounted to domestic terrorism.²¹ These events could not

¹⁷ MCKEOG, *supra* note 12, at 2-3, 116-18.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Early American settlers from the 15th through the 17th centuries derived their customs of warfare predominantly from the experience of England. However, exceptions to custom were common and acceptable when engaging Native Americans, who were viewed as pagan, heathen and barbaric by European standards. HOWARD ET AL., *supra* note 6, at 59–61.

²¹ On August 21, 1863, guerrilla leader William Clarke Quantrill and 450 men from Missouri attacked Lawrence, Kansas. After looting and burning one fourth of the homes and businesses, the raiders proceeded to kill 150 unarmed men determined large enough to carry a weapon. In response to the event, Senator James Lane and General Thomas Ewing drafted orders for the forced evacuation of inhabitants from four nearby Missouri Counties. Union troops then surveyed the area for the possessions of the Lawrence citizens. If any were found, the house containing them was looted and burned in turn. Over 20,000 homes were destroyed as a result of the Union operation. CHARLES R. MINK, GENERAL ORDER 11: THE FORCED EVACUATION OF CIVILIANS DURING THE CIVIL WAR, *Military Affairs*, vol. XXXV, no. 1, pt. 2, 132–36 (1970). During the Civil War, President Abraham Lincoln and Secretary of War Edwin Stanton were concerned about reports of pillaging and plundering of private property, torching of farms, estates and entire communities. Further, the divergent conduct of officers respectful

be adequately resolved with traditional state and federal law. The Lieber Code specifically prohibited the targeting of civilians and civilian objects. It also recognized that collateral damage should be avoided, but was acceptable if it

of customary rules to exempt civilians from warfare from those officers who did not recognize the custom made a codified set of rules necessary. DONALD A. WELLS, *THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS 2-3* (1992). The Lieber code provides in pertinent part:

Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Art. 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war . . . it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist.

Art. 16. Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Art. 19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

Art. 20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.

Art. 21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

Art. 22. Nevertheless . . . so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

Headquarters, Dep't of Army, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field (1863), *available at* <http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt> (last visited Mar. 29, 2003).

was the result of an attack on a legitimate military objective.²² The Lieber Code articulates basic principles of the law of war, including the principle of military necessity in Articles 14 and 15. “Military necessity [consists of] . . . those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” Further, “Military necessity admits of all direction of destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable”²³ Lieber defined the principle of distinction when he stated, “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”²⁴ Finally, Lieber explained that even though war is naturally between sovereign states, citizens may be categorized as the enemy by virtue of their constituency, and therefore endure both the hardships and benefits of war.²⁵ The Lieber Code represented the prevailing custom of the time—although civilians should not be subject to direct attack, they were not categorically immune. Developing and adopting the first manual for soldiers on the laws of war, the U.S. had the remarkable distinction of creating a cornerstone for the law of war with the Lieber Code. The manual was adopted by Germany, France and Great Britain, and inspired codification of the law and custom of war at the Brussels Convention of 1874 and at the Hague Congresses in 1899 and 1907.²⁶

The next significant event in the development of LOAC occurred in 1868 with the Declaration of St. Petersburg. Although the Declaration adopted the principle of distinction, it lacked the clarity offered by the Lieber Code. “The only legitimate object which States should endeavor to accomplish during war

²² *Id.*

²³ *Id.* at arts. 14–15.

²⁴ *Id.* at art. 22.

²⁵ *Id.* at art. 21.

²⁶ WELLS, *supra* note 21, at 5. See Convention (II) with Respect to the Laws and Customs of War on Land, *opened for signature* Jul. 29, 1899, 32 Stat. 1803, *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 63 (3d ed. 1988); Convention (IV) Respecting the Laws and Customs of War on Land, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, *reprinted in* REISMAN & ANTONIOU at 63. “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.” *Id.* at arts. 25–26. Similar rules are applicable to naval forces. Undefended ports are generally forbidden from attack except for facilities that are “military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army.” If the port is attacked, the commanding officer of the attack must exercise restraint to spare civilian life and property, and give notice of the attack if military circumstances permit. Convention (IX) Concerning Bombardment by Naval Forces in Time of War, arts. 1–6, Oct. 18, 1907, 36 Stat. 2351, *reprinted in* W. MICHAEL RESIMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT* 82 (1994).

is to weaken the military forces of the enemy.”²⁷ The Declaration offered little more than a conceptual statement that war should be concentrated on military forces rather than civilians.

At the Hague Conference of May 1899, delegates from the international community were already envisioning the potential catastrophic consequences of air power to both combatants and civilians. Although limited to balloon reconnaissance at the time, there was growing awareness of the destructive nature of aerial combat operations like bombardment.²⁸ Consequently, the delegates adopted a five-year ban on “the launching of projectiles and explosives from balloons, or by other new methods of a similar nature.”²⁹ There was obvious concern for the decisive capabilities aerial weapons offered in warfare; but in the end, the members of the 1899 conference objected to placing any further limitations on the use of air power beyond the short term it would take to further explore its employment in warfare.³⁰

The Second Hague Peace Conference of 1907 emphasized civilian immunity in war through conventions concerning land and sea forces. Article 25 of the 1899 Convention on Land Warfare was amended to include bombardment from the air. The amendment states that the attack of undefended towns, villages, dwellings or buildings is prohibited.³¹ The same clause was introduced in Article 1 of the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War.³² Undefended ports are generally forbidden from attack except for facilities that are “military works,

²⁷ Declaration of St. Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (1868–9), *reprinted in* REISMAN & ANTONIOU, *supra* note 26, at 35.

²⁸ THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, THE CONFERENCE OF 1899, 354 (James Brown Scott ed. 1920). In support of the limited ban, Captain William Crozier offered: We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented, who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view.

²⁹ Declaration (IV, 1) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature, Jul. 29, 1899, 32 Stat. 1839, *reprinted in* SCHINDLER & TOMAN, *supra* note 26, at 202–03.

³⁰ The first aerial bombardment occurred on October 11, 1911, when Italy bombed Turkish troops and indigenous tribesmen in Libya during the Italian-Turkish War. MCKEOG, *supra* note 12, at 125 (2002).

³¹ Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 26, at art. 25, *reprinted in* REISMAN & ANTONIOU, *supra* note 26, at 63.

³² Convention (IX) Concerning Bombardment by Naval Forces in Time of War, arts. 1–6, *supra* note 26, *reprinted in* REISMAN & ANTONIOU, *supra* note 26, at 82.

military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army.”³³ If a port is attacked, the commanding officer of the strike must spare civilian life and property, and give notice of the attack if circumstances permit.³⁴ A similar rule to prohibit ground attack of “towns, villages, dwellings, or buildings which are undefended” was also introduced.³⁵ Recognizing that civilian facilities often serve a military purpose, the conventions were a catalyst to the development of requirements to distinguish the military significance of a target from its civilian purpose. The provision also illustrates early recognition of “dual-use” facilities providing services benefiting both the military and civilian populations.

C. World War I: Total War and Targeting Civilian Morale

Customary law and the Hague Conventions of 1899 and 1907 were the only existing legal frameworks for instruction on targeting at the beginning of WW I in 1914. Bombing strategy was tied to the basic custom that only military objectives were legitimate targets and indiscriminate attacks were prohibited.³⁶ The definition of military objective at the time, however, included more than military forces or military objects. The concept of total war included virtually anything supporting the war effort, inclusive of infrastructure, industry, labor and the will of a state’s population. Targeting civilians was an acceptable strategy insofar as it affected the morale of the enemy population as a military objective.³⁷ The collateral damage that resulted from injuring and killing civilians influenced the temperament of the population, resulting in failing support of the war effort and pressure on the respective leadership to capitulate.³⁸ Bombing campaigns were naturally indiscriminate because the practice of bombardment at the time was less precise due to limited technology, the high elevation of attack, environmental

³³ *Id.*

³⁴ *Id.*

³⁵ Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 26, at arts. 25–26, *reprinted in* REISMAN & ANTONIOU, *supra* note 26, at 63.

³⁶ J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 228–29 (3d ed. 1947).

³⁷ LEE KENNETT, THE FIRST AIR WAR 1914–1918 2 (1991). In 1917, Germany conducted an extensive bombing campaign against England’s military and defense industry to degrade British morale. England responded with attacks on military targets and “densely populated industrial centers” in an effort to destroy German morale. Both states intended to degrade morale among the civilian population to weaken support for the conflict. Richard J. Overy, *Strategic Bombardment Before 1939: Doctrine, Planning, and Operations*, in CASE STUDIES IN STRATEGIC BOMBARDMENT 20–21, 55 (R. Cargill Hall ed. 1998).

³⁸ KENNETT, *supra* note 37, at 44–45.

conditions, faulty intelligence, limited training and lack of experience.³⁹ Although there may not have been any specific intention to bomb indiscriminately, it was an acceptable outcome. The imprecise nature of targeting at the time, combined with strategic bombardment, provided an effective method to achieve the advantage of defeating enemy morale.

The concept of defeating enemy morale by attacking the civilian population had appeal to leading strategists of the time. Italian strategist Giulio Douhet argued that the resistance of the adversary could be defeated “more easily, faster, and more economically, and with less bloodshed by directly attacking that resistance at its weakest point.”⁴⁰ Douhet identified the civilian population as the weakest center of gravity in total war.⁴¹ Although less severe in tone, Air Marshal Hugh Trenchard, Royal Air Force Commander, defined the military objective as any objective that “will contribute effectively towards the destruction of the enemy’s means of resistance and the lowering of his determination to fight.”⁴² These views appropriately reflected the importance of the civilian population in determining a state’s psychological will to participate in war, but failed to observe early principles of distinction and humanity that exempted a civilian population from attack.⁴³

D. World War II: Total War and the Scale of Collateral Damage

Although an attempt was made at a Hague conference in 1923,⁴⁴ and again in Amsterdam in 1938⁴⁵ to develop a coherent, detailed set of rules for

³⁹ SPAIGHT, *supra* note 36, at 228–29.

⁴⁰ GIULIO DOUHET, *THE COMMAND OF THE AIR* 196 (Dino Ferrari trans., 1942).

⁴¹ *Id.*

⁴² C. WEBSTER & N. FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939-45* 74 (1961).

⁴³ *See supra* text accompanying note 26.

⁴⁴ Hague Rules of Aerial Warfare, Feb. 19, 1923, 32 A.J.I.L. (Supp.) 12 (1938), *reprinted in* SCHINDLER & TOMAN, *supra* note 26, at 83–84:

Art. 22. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

Art. 24. (1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

targeting, the effort failed because the decisive nature of air power proved too attractive. Douhet predicted the ending of civilian immunity amid the powerful forces of aerial warfare:

Now it is actually populations and nations, and not their armies or navies, which come to blows and seize each others' throats⁴⁶ We dare not wait for the enemy to begin using the so-called inhuman weapons banned by treaties before we feel justified in doing the same Owing to extreme necessity, all contenders must use all means without hesitation, whether or not they are forbidden by treaties, which after all are nothing but scraps of paper compared to the tragedy that would follow.⁴⁷

Although disturbing, Douhet's words were prophetic. WWII brought a massive blow to the movement to achieve civilian immunity in war. Morale and the civilian population were not initially a prominent piece of the bombing strategy in WWII, but quickly became one after Germany executed large scale bombing runs on London in 1940.⁴⁸ U.S. strategy was altered only slightly from WW I. Relying on high elevation bombing of the German industrial base, U.S. strategists believed that destruction of Germany's economy would

(3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

(5) A belligerent state is liable to pay compensation for the injuries to the person or to property caused by the violation by any of its officers or forces of the provisions of this article.

⁴⁵ Draft Convention for the Protection of Civilian Populations Against New Engines of War (1938), in SCHINDLER & TOMAN, *supra* note 26, at 223–25. The convention proposed civilian protection in war by restricting attacks on undefended towns, discriminating military targets from civilian objects in defended towns, restricting the use of bombardment to “terrorize” the enemy, the establishment of civilian safety zones immune from attack, and sanctions before the International Court of Justice for violation. *Id.*

⁴⁶ DOUHET, *supra* note 40, at 195.

⁴⁷ *Id.* at 189.

⁴⁸ See W.A. Jacobs, *The British Strategic Air Offensive Against Germany in World War II*, in CASE STUDIES IN STRATEGIC BOMBARDMENT 91, 118–19 (R. Cargill Hall ed. 1998). British bombing strategy focused on traditional economic targets, but civilian morale was a secondary objective. *Id.*

result in destruction of morale.⁴⁹ The immediate purpose of bombing by the Royal Air Force was based on the theory that “destruction of housing and public amenities would undermine both the ability and the willingness of the industrial workers to maintain their posts at the factories.”⁵⁰ Beyond this specific objective, the general intent was to erode the German citizen’s will to support the war by making life intolerable.⁵¹

After the German invasion of Poland, the Polish National Council taking refuge in London reported pervasive looting, mass murder of civilians and other war crimes. Allied forces were reluctant to modify military targeting strategy to counter the threat.⁵² On June 19, 1942 the Polish National Council again reported that 140,000 innocent civilians were dead, several times as many were sent to concentration camps, one and a half million were subject to forced labor camps in Germany and nearly two million were robbed of their property, businesses and homes, then expelled to eastern provinces of Poland.⁵³ Focused on the German economy, allied forces again rejected any strategy in response to the atrocities.⁵⁴ The targeting strategy continued to emphasize attacking manufacturing and assembly facilities, and other industrial infrastructure supporting Germany’s war machine.⁵⁵ A year later, however, indiscriminate targeting strategies resulted in devastating firestorms in Hamburg in July and August of 1943, raising the city’s air temperature to a catastrophic 800 degrees Celsius during one bombardment.⁵⁶ A similar strategy was used in Dresden on February 13, 1945 where refugees were fleeing west to escape the Russian advance. The firestorm there killed over 50,000.⁵⁷ The raids were viewed as “part of a climactic psychological warfare campaign” in which the attacks would cause panicking civilians to clog roads

⁴⁹ Overy, *supra* note 37, at 71. Commonly referred to as the Casablanca Directive, England and the U.S. resolved that the objectives of combined bombing campaigns should emphasize the “destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people.” WEBSTER & FRANKLAND, *supra* note 42, at app. 8, pt. 28.

⁵⁰ JOHN ELLIS, BRUTE FORCE: ALLIED STRATEGY AND TACTICS IN THE SECOND WORLD WAR 180 (1990).

⁵¹ *Id.*

⁵² ARIEH H. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT 21–22 (1998).

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 23–24.

⁵⁵ MCKEOGH, *supra* note 12, at 126.

⁵⁶ *Id.*

⁵⁷ *Id.*

and railroads, thus preventing the supply and movement of German troops.⁵⁸ Opting to schedule high elevation bombing runs in the evening to avoid German fighter aircraft and artillery, allied forces had difficulty identifying targets. For example, in 1941 only twenty percent of bombs fell within five miles of the target; and in 1943, sixty percent fell within three miles of the target.⁵⁹ These events demonstrate that tactical air strategy contributed to excessive collateral damage.

The indiscriminate effects of nuclear weapons used in Hiroshima and Nagasaki in 1945 present a more poignant example of a strategy to strike civilian morale. Further it is the most notable example of collateral damage in modern history. In an effort to achieve the surrender of a determined and resolute Japan without an allied invasion, the U.S. attacked Hiroshima with an atomic bomb on August 6, 1945.⁶⁰ The firestorm attained a velocity of 30–40 miles per hour for a period of two to three hours after the initial blast.⁶¹ Although it is impossible to determine the number of civilian casualties, best estimates from U.S. surveys suggest 70,000–80,000 were killed or presumed dead, and an equal number were injured.⁶² These numbers indicate that approximately sixty per cent of the city's population was killed or injured.⁶³ The Japanese Second Army Headquarters and the Chugoku Regional Army Headquarters were located in Hiroshima, making them important targets because of their command and control capability.⁶⁴ In addition, Hiroshima was the home of one of the largest military supply depots and military shipping facilities. Shipping had ceased prior to the attack, however, because of conventional mining in the Inland Sea.⁶⁵ The lawful military objectives were destroyed during the attack along with civilian facilities that were unlawful to target even under the tenuous interpretations of LOAC in 1945. The attack rendered any services by medical, fire, police and disaster relief non-existent. Infrastructure including water, gas, electric and communication were almost completely destroyed.⁶⁶ Approximately 62,000 of 90,000 buildings were

⁵⁸ RONALD SCHAFFER, *WINGS OF JUDGMENT: AMERICAN BOMBING IN WORLD WAR II*, 95–97, 103 (1985).

⁵⁹ ARCHER JONES, *THE ART OF WAR IN THE WESTERN WORLD* 579 (1987).

⁶⁰ THE U.S. STRATEGIC BOMBING SURVEY: *THE EFFECTS OF ATOMIC BOMBS ON HIROSHIMA AND NAGASAKI*, REPORT FROM THE CHAIRMAN OF THE U.S. STRATEGIC BOMBING SURVEY 3 (June 30, 1946).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 5.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.*

⁶⁶ *Id.* at 8.

leveled, and an additional 6,000 were severely damaged.⁶⁷ Hiroshima was completely devastated.

On August 9, 1945, another atomic bomb was dropped on Nagasaki, killing 35,000–40,000 people.⁶⁸ Damage to the city was reduced in large part by the natural landscape of the city, inclusive of hills, valleys, rivers, basins and other natural barriers that absorbed blast. A shift in wind direction also helped contain fires and prevented a firestorm.⁶⁹ The attack resulted in 52,000 homes destroyed.⁷⁰ These events perpetuated an ongoing problem of giving meaning to early principles of LOAC and customary norms providing protection to civilians during war. Moreover, it exemplified that whatever customary or codified law of war existing at the time was largely meaningless. The atrocities against humanity during WWII by all states involved generated a new and profound interest in civilian immunity, fostering the development of the modern international humanitarian movement, and an emphasis in international law to reform and restore rules protecting the civilian population in war.⁷¹ This movement resulted in a formalized introduction of the modern principle of necessity.

The principle of military necessity requires that there be some military advantage gained from destruction of a target.⁷² In *United States v. List* at the Nuremberg trials, the tribunal defined necessity:⁷³

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of

⁶⁷ *Id.* at 9. Conventional bombing in Tokyo also was indiscriminate. Attacks on March 9–10, 1945 destroyed 16 square miles of city and killed over twenty thousand people. *Id.* at 3.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.* at 13. Radiation exposure is responsible for seven to eight percent of all deaths in Hiroshima and Nagasaki. *Id.* at 15.

⁷¹ *See, e.g.*, 1949 Geneva Conventions, Protocols I & II, *supra* note 10. The International Committee of the Red Cross [hereinafter ICRC] was an early proponent of the Geneva Conventions, and later attempted unsuccessfully to prohibit use of aerial bombardment in combat because of the high risk of collateral damage. PROTECTION OF CIVILIAN POPULATION AGAINST THE DANGERS OF INDISCRIMINATE WARFARE, ICRC Res. XXVIII (1965).

⁷² Protocol I, *supra* note 10, at art. 52(2).

⁷³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279.

peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.⁷⁴

In 1949, the Geneva Conventions also introduced the first comprehensive provisions protecting civilians exposed to the consequences of war. Still in effect, these provisions allow any party to a conflict to declare neutral zones intended to shelter civilians and the wounded.⁷⁵ Furthermore, civilian hospitals, ambulances, evacuation aircraft and other medical services are protected from attack unless used to shield activities otherwise designed to cause harm to an adversary.⁷⁶

E. The Korean War: The Era of Limited War

Early in the Korean conflict, the Far East Air Force planned on bombing strategic targets to achieve a psychological advantage. By the Fall of 1950, United Nations (U.N.) air attacks had neutralized nearly every strategic target contributing to the support of the North Korean People's Army.⁷⁷ Since targets were scarce, strikes were focused on the destruction of infrastructure, including hydroelectric facilities and irrigation dams.⁷⁸ In June 1952, U.N. air strikes began attacking North Korean hydroelectric power facilities providing electricity to both North Korea and Manchuria, China. The U.N. intended these attacks to force negotiations, and to impress upon China, an ally of North Korea, that the continuation of the war would result in consequences to that country as well.⁷⁹ The air campaign included targeting irrigation dams because they provided water for rice cultivation. Although reluctant to directly attack rice crops, U.N. strategists were still prepared to interdict supply lines for North Korean forces. In 1953, approximately twenty irrigation dams were attacked, resulting in the flooding of rail and road systems, and the destruction

⁷⁴ *U.S. v. List*, Feb. 19, 1948, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1946–1949, at 1253–54.

⁷⁵ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 15.

⁷⁶ *Id.* at arts. 18–22.

⁷⁷ ROBERT F. FUTRELL, THE UNITED STATES AIR FORCE IN KOREA 1950–1953 439 (1961).

⁷⁸ STEPHEN T. HOSMER, PSYCHOLOGICAL EFFECTS OF U.S. AIR OPERATIONS IN FOUR WARS 1941-1991: LESSONS FOR U.S. COMMANDERS 19-20 (1996).

⁷⁹ *Id.*

of rice crops from floodwaters.⁸⁰ Ultimately, the campaign may have contributed to the end of the conflict, but it was very likely the threat of a nuclear strike and the threat to expand the war into China that brought closure in July, 1953.⁸¹

Soon after the close of the Korean conflict, the Convention on the Protection of Cultural Property was developed in 1954.⁸² Recognizing that cultural property suffered grave damage in armed conflict and was in increasing danger of destruction, the international community resolved that cultural resources required international protection.⁸³ The convention was guided by principles previously established in the Conventions at the Hague of 1899 and of 1907, and in the Washington Pact of 1935 (Roerich Pact).⁸⁴ The provisions of the convention were incorporated into U.S. Rules of Engagement for Vietnam restricting the targeting of civilian and cultural objects.⁸⁵ The legal protection afforded to cultural properties also made these sites attractive locations for the Vietcong to conduct military operations during the Vietnam War. The Vietcong would be among the first to exploit international law to achieve a strategic advantage by conducting military operations from sites immune from attack.

F. The Vietnam War: The Introduction of Concealment Warfare

In Vietnam, targeting strategy was focused, in part, on morale. Aerial combat operations aimed at morale were closely tied to targeting civilian resources. For example, between 1962 and 1967, the U.S. used 2,4-Dichlorophenoxyacetic acid, a toxic chemical defoliant commonly referred to as agent orange, to destroy 233,351 acres of food crops in South Vietnam.⁸⁶

⁸⁰ *Id.* at 20-21.

⁸¹ President Eisenhower wrote that the U.S. “intended to move decisively without inhibition in our use of weapons, and would no longer be responsible for confining hostilities to the Korean peninsula.” DWIGHT D. EISENHOWER, *THE WHITE HOUSE YEARS: MANDATE FOR CHANGE 1953–1956* 179–80 (1963).

⁸² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215. The Convention is not ratified by the U.S.

⁸³ *Id.* at 240.

⁸⁴ *Id.* Final Act Of the International Peace Conference, Jul. 29, 1899, *reprinted in* 1 AM J. INT’L L. 157 (Supp. 1907); Final Act of the Second Peace Conference, Oct. 18, 1907, *reprinted in* 36 Stat. 2277, Treaty Series No. 539 (Cmd. 4175, 1914); Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 279.

⁸⁵ *See infra* notes 102 and 105, and accompanying text.

⁸⁶ Russell Betts & Frank Denton, *An Evaluation of Chemical Crop Destruction In Vietnam, A Memorandum Prepared for the Office of the Assistant Secretary of Defense/International Security Affairs and the Advanced Research Projects Agency*, RAND Memo RM-5446-1-

During the same period, defoliant operations were conducted on 1,522,300 acres, resulting in exposure to adjacent agricultural land.⁸⁷ Although the program was directed at enemy Vietcong forces, it effectively destroyed and denied food to neutral civilian communities because the Vietcong regularly seized food from these communities to support their operations.⁸⁸ Although destroying supply lines and denying food is an effective strategy to degrade enemy force morale, the crop destruction program did not have the desired effect of denying food to the Vietcong because of their coercive access to rice at the consumer level.⁸⁹ The effected civilian communities resented the program because it destroyed their livelihood, exposed them to a toxic substance, and had limited success in achieving the objective of denying food to enemy forces.⁹⁰ The rural population felt the program was as much directed at the civilians as it was the Vietcong.⁹¹

From 1965 to 1972, air campaigns labeled Rolling Thunder, Linebacker I and II included 775,000 sorties over North Vietnam.⁹² The first phase of the Rolling Thunder campaign was designed to destroy the emerging industrial base of North Vietnam. The second phase attempted to degrade North Vietnam's ability to infiltrate troops and supplies into South Vietnam.⁹³ The third phase of the campaign attacked industrial and transportation infrastructure in and around Hanoi, Haiphong and buffer zones near the Chinese border.⁹⁴ The fourth phase of the campaign from April to November, 1968 was a de-escalation of the bombing to promote negotiations.⁹⁵ A

ISA/ARPA 1 (Oct., 1987). Irreversible nervous system damage may result from absorption of 2,4-D through the skin. Inhalation may cause coughing, dizziness or burning in the chest. Large doses have resulted in digestive and neuromuscular system distress. Ingestion of large quantities may lead to death within one to two days of exposure. Long-term exposure to 2,4-D may cause kidney, liver, muscular, digestive or nervous system damage. U.S. Dep't of Agriculture, Forest Service Pesticide Fact Sheet at <http://infoventures.com/e-hlth/pesticide/24d.html> (last visited Mar. 29, 2004).

⁸⁷ See *id.*, at 1.

⁸⁸ *Id.* at ix.

⁸⁹ *Id.* at xii.

⁹⁰ *Id.* at xiii.

⁹¹ *Id.* at xiii.

⁹² THOMAS C. THAYER, *WAR WITHOUT FRONTS: THE AMERICAN EXPERIENCE IN VIETNAM* 82 (1985).

⁹³ Robert A. Pape, Jr., *Coercive Air Power in Vietnam*, 15(2) INT'L SECURITY 114, 118 (Fall, 1990).

⁹⁴ *Id.* Gen. William Momyer states that the objectives of the campaign in Vietnam were generally the same throughout the war: 1) reduce infiltration of troops and supplies into South Vietnam; 2) continued aggression in the south would be met with continued aggression in the north and; 3) to raise the morale of the South Vietnamese people. GEN. WILLIAM W. MOMYER, USAF (Ret.), *AIR POWER IN THREE WARS*, 173 (1978).

⁹⁵ Pape, *supra* note 93, at 119.

psychological operation accompanying this campaign included dropping an estimated one billion leaflets and other pieces of printed material in conjunction with radio broadcasts warning civilians to stay away from military objects subject to attack.⁹⁶ The objective of the operation was to minimize civilian casualties, project a message of humanitarianism amidst reports of U.S. targeting misconduct, and discourage civilians from assisting in the restoration and repair of damaged military equipment.⁹⁷ While the bombing campaign caused some evacuation of civilians and depressed civilian morale, it did not have the desired effect of achieving concession. The North Vietnamese regime used the bombing campaign to fuel already inflamed perceptions of U.S. forces, and to posture their message that the conflict was a struggle to liberate South Vietnam from American imperialism.⁹⁸

Eager to remove itself from the war, the U.S. executed massive bombing attacks during Linebacker I and II to encourage the North Vietnamese to bring the conflict to a close in accordance with terms it had previously agreed.⁹⁹ During an eleven day bombing campaign in 1972 designed to force the North to end the war, the U.S. flew approximately 1,369 sorties targeting military installations, rail yards, petroleum stocks, bridges, roads, electric power production facilities, and steel works believed to support the North's war effort.¹⁰⁰ The dual-use infrastructure supported the civilian economic base and North Vietnam's ability to conduct military operations.

Vietnamese leadership described the Vietnam conflict as a "people's revolution," requiring the incorporation of the entire Vietnamese population into its defense.¹⁰¹ The strategy to incorporate the populace into the conflict increased the difficulty in distinguishing between civilian and military objects, and promoted collateral damage. The Vietcong commonly took advantage of objects normally legally immune from attack to conduct military operations and to obtain sanctuary for military personnel, equipment and supplies. Such objects included religious and historical buildings, private dwellings or other civilian structures.¹⁰² In some cases, the U.S. restricted targeting protected

⁹⁶ Jack L. Timies, Study on Psychological Operations Against North Vietnam: July 1972-January 1973, CHECO/CORONA Harvest Division, Operations Analysis Office, HQ PACAF, pp. 3-6, 15-20 & 32 (May 24, 1974).

⁹⁷ ROBERT W. CHANDLER, WAR OF IDEAS: THE U.S. PROPAGANDA CAMPAIGN IN VIETNAM 99-100 (1981).

⁹⁸ HOSMER, *supra* note 78, at 33.

⁹⁹ *Id.* at 39-40.

¹⁰⁰ *Id.* at 39.

¹⁰¹ *See generally* GEN. VO NGUYEN GIAP & VAN TIEN DUNG, HOW WE WON THE WAR 39-42 (1976).

¹⁰² Vietnam Rules of Engagement, 131 CONG. REC. S6261 (1985)[hereinafter Vietnam Rules of Engagement], *reprinted in* REISMAN & ANTONIOU *supra* note 26, at 119-121, which states in part:

objects used as sanctuary. For example, dikes on the Red River being used as platforms for air defense were restricted from attack.¹⁰³ Notwithstanding Vietcong transgressions in commingling military personnel and resources with the civilian population, their ability to leverage public sympathy from U.S. bombing campaigns and incidents of collateral damage was novel and well planned. The Vietcong ultimately achieved a strategic advantage that contributed to efforts to discredit U.S. operations and force a withdrawal from the conflict.

Although modern rules of targeting and civilian immunity were not fully codified at the time, the U.S. conducted operations in accordance with rules of engagement that were largely consistent with Protocols Additional I and II of the 1949 Geneva Conventions (Protocols I and II), rules that would not become codified until 1977.¹⁰⁴ U.S. rules of engagement recognized principles of distinction, proportionality, humanity, necessity and the general protection of civilians.¹⁰⁵ In recognition of the importance of observing civilian immunity, rules of engagement for aerial operations in Vietnam specifically stated, “pilots will endeavor to minimize civilian casualties and civilian property damage.”¹⁰⁶ Recognition was also given to the complexity of urban conflict. Rules of engagement required that attacks on targets “in urban areas must preclude unnecessary danger to civilians and destruction of civilian property, and by their nature require greater restrictions than the rules of engagement for less populated areas.”¹⁰⁷ The extent to which U.S. forces complied with rules to

6. a. All possible means will be employed to limit the risk to the lives and property of friendly forces and civilians. In this respect, a target must be clearly identified as hostile prior to making a decision to place fire on it
c. The enemy is known to take advantage of areas normally considered as non-military targets. Typical examples of non-military targets are places of religious or historical value and public or private buildings and dwellings. When the enemy has sheltered himself or installed defensive positions in such places, the responsible brigade or higher commander must positively identify the preparation for, or execution of, hostile enemy acts before ordering an attack. During the attack, weapons and forces used will be those which will insure prompt defeat of enemy forces with minimum damage to structures in the area.

Id. at 115.

¹⁰³ HOSMER, *supra* note 78 at 60–64.

¹⁰⁴ See Protocols I & II, *supra* note 10.

¹⁰⁵ See Vietnam Rules of Engagement, *supra* note 102 and *infra* note 107.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*

Restrictions and Rules of Engagement, RVN (Republic of Vietnam)

a. All targets selected for an air strike will be approved by the Province Chief directly or through higher Army of the Republic of Vietnam authority.

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- b. All pilots will endeavor to minimize non-combatant casualties and civilian property damage. A strike will not be executed where identification of friendly forces is in doubt.
 - c. All pilots will have a knowledge of the disposition of friendly forces and/or civilians prior to conducting a strike. This information may come from ground or air briefing.
 - g. . . . If the attack on a village or hamlet is in conjunction with any immediate ground operation, the inhabitants must be warned by leaflets and/or loudspeaker system prior to the attack and must be given sufficient time to evacuate the area.

Id. at 109–10.

Rules of Engagement

All enemy military personnel and vehicles transporting the enemy or their supplies may be engaged subject to the following restrictions:

- A. When possible the enemy will be warned first and asked to surrender.
- B. Armed force is the last resort.
- C. Armed civilians will only be engaged in self-defense.
- D. Civilian aircraft will not be engaged without approval from above Division level unless it is in self-defense.
- E. Avoid harming civilians unless necessary to save U.S. lives. If possible, try to arrange for the evacuation of civilians prior to any U.S. attack.
- F. If civilians are in the area, do not use artillery, mortars, armed helicopters, AC-130, lube or rocket-launched weapons, or M551 main guns against known or suspected targets without the permission of a ground maneuver Commander Lieutenant Colonel or higher.
- G. If civilians are in the area, all air attacks must also be controlled by a Forward Air Controller or Forward Observer.
- H. If civilians are in the area, close air support (CAS), white phosphorus, and incendiary weapons are prohibited without approval from above Division level.
- I. If civilians are in the area, Infantry does not shoot except at known enemy locations.
- J. If civilians are not in the area, you can shoot at suspected enemy locations.
- K. Public works such as power stations, water treatment plants, dams and/or other utilities may not be engaged without approval from above Division level.
- L. Hospitals, Churches, Shrines, Schools, Museums, and any other historical or cultural site will not be engaged except in self-defense.
- M. All indirect fire and air attacks must be observed.
- N. Pilots must be briefed for each mission on the location of civilians and friendly forces.
- O. No booby-traps. No mines except as approved by Division Commander. No riot control agents without approval from above Division level.
- P. Avoid harming civilian property unless necessary to save U.S. lives.
- Q. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if any publicly owned property can substitute. No requisitioning of civilian property without permission of a company-level Commander and without giving a receipt. If an ordering officer can contract for the property, then do not requisition it. No looting. Do not kick down doors unless necessary. Do not sleep in their houses. If

minimize attacks on civilians and civilian objects is widely debated, especially given the strategy of the Vietcong to commingle military personnel and resources with civilians. Essentially, Vietcong forces were able to achieve a remarkable degree of strategic superiority by exploiting U.S. rules of engagement designed to protect the civilian population. When attacks were initiated against legitimate targets commingled with civilians, the Vietcong could exploit the incident in the form of an information operation to obtain public sympathy for any collateral damage. The Vietcong were able to rally support from the international community through political protests of U.S. bombing operations. Worldwide and domestic protests isolated U.S. leadership, resulting in limited tactical, operational and strategic options.

Most importantly, the Vietnamese reached out to the American people, making a distinction between us [the American public] and our government. For a people facing American bombs, this was a heroic, calculated, and principled gesture. I realized how heroic it was when I met some of the victims of our own bombing and heard them transcend blind rage in order to send greetings to the American anti-war movement . . . Politically, the Vietnamese always believed in the importance of the anti-war movement . . . They encouraged it the best they could, knowing that creating a climate of opinion hostile to the war would be one important way of ending it.¹⁰⁸

Vietnam is the first example of a concerted, well-organized strategy by an adversary to exploit humanitarian concerns and discredit the U.S. for collateral damage from combat operations. The failure to effectively counter the Vietcong psychological offensive contributed to a remarkable loss of U.S. support for operations in Vietnam. The U.S. public was likely further agitated by the failure of U.S. decision-makers to comment on bombing operations considered classified. For example, the failure to respond to allegations of wanton destruction during Linebacker II operations isolated the Nixon administration and fueled resentment, leaving the North Vietnamese disinformation campaign unchallenged.¹⁰⁹ The Vietcong were so successful in

you must sleep in privately owned buildings, have an ordering officer contract for it.

R. Treat all prisoners humanely and with respect and dignity.

S. Annex R. the Operations Plan (OPLAN) provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

Id. at 128-29.

¹⁰⁸ GIAP & DUNG, *supra* note 101, quoting Danny Schechter at Introduction.

¹⁰⁹ See W. Hays Parks, *Rolling Thunder and the Law of War*, AIR UN. REV. 20–21 (1982).

their strategy to exploit U.S. rules of engagement and discredit U.S. operations that it would become an attractive model for future U.S. adversaries unable to effectively challenge the U.S. on the conventional battlefield. Finally, the Vietnam experience would begin a trend in U.S. military operations that reflects elevated sensitivity to humanitarian concerns and collateral damage.

G. The Modern Law of Targeting and Civilian Immunity

Following the Vietnam War, the ongoing effort to codify the international customs of warfare led to the development of the most recent and relevant rules for targeting. Protocols I and II of the 1949 Geneva Conventions were opened for signature in 1977.¹¹⁰ These Protocols codify the principles of distinction, proportionality, necessity and humanity. In addition, Protocol I restricts the targeting of cultural resources, the environment, objects containing dangerous forces (dams, dikes and nuclear power facilities), and other items necessary for survival like water purification plants and agricultural foodstuffs.¹¹¹ The protocol prohibits a combatant from using civilians or civilian objects as shields¹¹² or pretending to be a civilian.¹¹³ Article 52(2) of Protocol I, defining what constitutes a “military objective,” also focuses on the protection of civilian objects by attempting to establish criteria for a legitimate target. A military objective pursuant to Article 52(2) makes an effective contribution to the enemy’s military action, and its destruction must provide a definite military advantage to the attacker. More specific, forces may only attack military targets that by their nature, location, purpose or use, effectively contribute to enemy military action.¹¹⁴ Although the U.S. has not ratified Protocol I, it recognizes the Protocol insofar as it is consistent with customary international law.¹¹⁵ Moreover, it is thoroughly represented in U.S. military

¹¹⁰ See generally Protocols I & II, *supra* note 10.

¹¹¹ *Id.* at Protocol I, arts. 54–56.

¹¹² *Id.* at art. 51(3),(7).

¹¹³ *Id.* at art. 37.

¹¹⁴ *Id.* at art. 52(2).

¹¹⁵ See Memorandum from the President of the United States Transmitting Protocol I Additional to the Geneva Conventions of August 12, 1949, Concluded at Geneva on June 10, 1977, 1977 U.S.T. LEXIS 465 (Jan. 29, 1987). President Ronald Reagan rejected Protocol I in 1987, stating: “Protocol I is fundamentally and irreconcilably flawed. . . [it] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.” See also Hans-Peter Gasser, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Convention on the Protection of War Victims*, 81 AM. J. INT’L. L. & POL’Y 910 (1987).

doctrine, practice and rules of engagement.¹¹⁶ Protocol II enumerates similar restrictions on the attack of civilian objects and populations during non-international conflicts in less comprehensive form as Protocol I.¹¹⁷ This Protocol is not ratified by the U.S.¹¹⁸

The principles of distinction, proportionality, necessity, and humanity form a fundamental basis to determine whether a target may be attacked under LOAC. The principle of distinction requires that military objects be distinguished from civilian objects prior to attack.¹¹⁹ Distinction is the most important principle affording protection to civilians. Protocol I, Article 51(4) prohibits indiscriminate attacks. “Indiscriminate attacks are: (a) those which are not directed at a specific military objective; . . . and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”¹²⁰ Civilians enjoy this protection “unless and for such time as they take a direct part in hostilities,” and they may not be used as shields to deny attack of otherwise legitimate military objectives.¹²¹

This principle is supplemented by the principle of proportionality. Article 51(5)(b) directs that attacks on a specific military objective are impermissible if they “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹²² Placing further restriction on targeting is Article 50(3), stating

¹¹⁶ For a discussion of U.S. doctrine and strategy, *see infra* notes 369 to 398 and accompanying text.

¹¹⁷ *See generally* Protocol II, *supra* note 10 at arts. 13–17.

¹¹⁸ ICRC, *Treaties of International Humanitarian Law and States Parties: State Parties & Signatories* By Treaty, <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=53.1.96&Count=150&Expand=53.2> #53.2 (last visited Apr. 15, 2004).

¹¹⁹ Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE H.R. & DEV. L.J. 143, 148–49 (1999).

¹²⁰ Protocol I, *supra* note 10, art. 51. As of March 29, 2004, 159 states were party to the protocol.

¹²¹ *Id.* at art. 51(3). In addition, civilians may not be used as shields:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impeded military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Id. at art. 51(7).

¹²² The following types of attacks are considered indiscriminate:

(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a

that, “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”¹²³ A responsible military commander intent on the engagement of a particular target must determine first if it is a military objective, and then whether the collateral damage from destruction of the target is proportionate to the military advantage of destroying it. These articles do not forbid the loss of civilian life, but attempt to prevent civilian casualties and ensure any loss is well justified. In preparation for an attack, Article 57 requires planners to, “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹²⁴

The principle of humanity incorporates several concepts, including the principle commonly referred to as “chivalry.” In practice, the principle seldom receives considerable attention relative to other targeting principles because it is inherent to the letter and spirit of LOAC. For example, chivalry distinguishes acts of deception from those that undermine the goodwill of the enemy. Acts of perfidy are prohibited pursuant to Protocol I, Article 37.¹²⁵ In contrast, camouflage, decoys, mock operations, and misinformation used to deceive an adversary are not prohibited.¹²⁶

The Convention on Environmental Modification of 1976 was designed to prohibit military use of environmental modification techniques in war and to

specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Id. at art. 51(4).

Among others, the following types of attacks are considered indiscriminate: (a) an attack by bombardment by any method or means which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. at art. 51(5).

¹²³ *Id.* at art. 50(3).

¹²⁴ *Id.* at art. 57(2).

¹²⁵ *Id.* at art. 37. Prohibited acts include feigning truce or surrender, feigning incapacitation from wounds or sickness, feigning civilian or non-combatant status, and feigning protected status by the use of signs, emblems, or uniforms of the U.N. or neutral states. *Id.*

¹²⁶ *Id.*

eliminate the indiscriminate, pervasive, and long-term dangers to mankind.¹²⁷ The convention effectively restricts targeting the environment or attempting to use it as a weapon. For example, it would be a violation of the convention to spread aerosol into the atmosphere to dissolve ozone and create drought conditions. The term “environmental modification techniques” refers to any method that manipulates “natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.”¹²⁸ In comparison, Article 54(2) of Protocol I says it is prohibited to “attack objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population . . . whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.”¹²⁹

The final significant international instruments that limit targeting are a result of the Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Convention on Use of Indiscriminate Weapons of 1980).¹³⁰ The convention contributed to the international community’s ongoing effort to codify international law and provide clear instruction on the protection of the civilian population. The convention is separated into four protocols. The Protocol on Non-Detectable Fragments (Protocol I) restricts the use of any weapon that injures by fragments that escape x-ray detection in the human body.¹³¹ Examples of such fragments include ceramic, plastic or other non-metallic projectiles. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) prohibits direct use of mines and traps against the civilian population, and any indiscriminate use that potentially

¹²⁷ Convention On the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, *opened for signature* Dec. 10, 1976, 1108 U.N.T.S. 151; 31 U.S.T. 333, 16 I.L.M. 88. Signed by the U.S. on May 18, 1977 and ratified on January 17, 1980.

¹²⁸ *Id.* at art. II.

¹²⁹ Protocol I, *supra* note 10, art. 54(2).

¹³⁰ Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [hereinafter Convention on Indiscriminate Weapons], *as amended* Dec. 21, 2001, *opened for signature* Apr. 10, 1981, 1342 U.N.T.S. 137, 19 I.L.M. 1523 (1980). The U.S. ratified the Act and convention, and Protocols I and II with reservation on March 24, 1995. The U.S. does not formally recognize the amendment.

¹³¹ *Id.* at Appendix B, Protocol [I] on Non-Detectable Fragments, Oct 10, 1980, 19 I.L.M. 1523, 1529 (1980). The U.S. ratified the protocol with reservation on March 24, 1995.

causes injury or death to civilians.¹³² Protocol II does not forbid the loss of civilian life, but recognizes that these weapons must be directed against a military objective, and civilian casualties must not be excessive in relation to the military advantage anticipated. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) prohibits any use of incendiary devices against civilians.¹³³ The Protocol on Blinding Laser Weapons (Protocol IV) prohibits the employment of lasers specifically designed to cause permanent blindness;¹³⁴ however, the incidental or collateral effect of blindness is authorized.¹³⁵ The Convention on Use of Indiscriminate Weapons of 1980 and its Protocols repeat the principles already established in Protocols I and II of the 1949 Geneva Conventions. The U.S. is a party to the Convention on Use of Indiscriminate Weapons of 1980, Protocols I and II. It does not recognize Protocols III and IV.¹³⁶

H. The Era of Asymmetric Warfare and Precision Targeting

1. *The Persian Gulf War/OPERATION DESERT STORM*

Labeled the “technological revolution in warfare,” the Persian Gulf War introduced innovative technology and strategy to the battle space, including precision weaponry, improved surveillance, reconnaissance and stealth technology. Perhaps most widely praised were precision-guided munitions (PGM). These weapons were widely used during the Gulf War to minimize collateral damage and fine tune target sets to meet strategic objectives.¹³⁷ Limiting destruction of the civilian infrastructure through the use of PGM reduced some hardship on the Iraqi people while denying meaningful use by the military.¹³⁸ The initial U.S. coalition bombing campaign against Iraq

¹³² *Convention on Indiscriminate Weapons*, Protocol [II] on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *as amended* May 3, 1996, 35 I.L.M. 1206 (1996). The U.S. ratified the protocol with reservation on March 24, 1995. The U.S. ratified the amendment with reservation on May 24, 1999.

¹³³ *Convention on Indiscriminate Weapons*, Protocol [III] on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, art. 2, 19 I.L.M. 1534 (1980). The U.S. does not formally recognize the protocol.

¹³⁴ *Convention on Indiscriminate Weapons*, Protocol [IV] on Blinding Laser Weapons, art. 1, Oct. 13, 1995, 35 I.L.M. 1218 (1996). The U.S. does not formally recognize the protocol.

¹³⁵ *Id.* at art. 13.

¹³⁶ *See supra* notes 131 to 134 and accompanying text.

¹³⁷ *See* U.S. DEP’T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS [hereinafter PERSIAN GULF WAR FINAL REPORT] 75 (Apr., 1992).

¹³⁸ “Careful targeting and expert use of technological superiority—including precision guided munitions—throughout the strategic air campaign minimized collateral damage and casualties

identified key centers of gravity as: 1) the command, control, and leadership of Saddam Hussein's regime; 2) Iraq's capability to manufacture, service, and employ weapons of mass destruction; and 3) the Republican Guard.¹³⁹ Psychological operations were a key element of the campaign, proposing strikes against television and radio broadcast facilities that would reduce military and popular support of the regime.¹⁴⁰ The objective was to incapacitate and isolate the regime, then incite the Iraqi military and civilian population to revolt.¹⁴¹

The leadership, telecommunication infrastructure and C³ [Command, Control and Communication capabilities] became the essential target sets for producing change in the Iraqi government. In the view of the Coalition air campaign planners, these target sets constituted the key centers of gravity or central nervous system of the Baghdad regime, enabling Saddam and his associates to govern and control Iraq and its population. All told, there were 44 leadership and 146 telecommunications and C³ targets in Baghdad and other areas of Iraq.¹⁴²

Specific objectives included the destruction of Iraq's electric power system to deny electricity,¹⁴³ destruction of fuel production,¹⁴⁴ and bridges over the

to the civilian population, reflecting U.S. policy that Saddam Hussein and his military machine, not the Iraqi people, were the enemy." U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS [hereinafter PERSIAN GULF WAR INTERIM REPORT] 4-4 (Jul., 1991).

¹³⁹ PERSIAN GULF WAR FINAL REPORT, *supra* note 137, at 116.

¹⁴⁰ BARRY D. WATTS ET AL., GULF WAR AIR POWER SURVEY, VOL. II: OPERATIONS EFFECTS AND EFFECTIVENESS 30 (1993); *see also* PERSIAN GULF WAR FINAL REPORT, *supra* note 137 at 201-03:

Command Facilities: There were 45 targets in the Baghdad area, and others throughout Iraq, in the leadership command facilities target set. The intent was to fragment and disrupt Iraqi political and military leadership by attacking its C2 [command & control] of Iraqi military forces, internal security elements, and key nodes within the government. Specifically targeted were facilities from which the Iraqi military leadership, including Saddam Hussein, would attempt to coordinate military actions. Targets included national-level political and military headquarters and command posts (CPs) in Baghdad and elsewhere in Iraq.

¹⁴¹ WATTS ET AL., *supra* note 140, at 274-75.

¹⁴² PERSIAN GULF WAR FINAL REPORT, *supra* note 137 at 95-96.

¹⁴³ WATTS ET AL., *supra* note 140, at 202-03; *see also* PERSIAN GULF WAR FINAL REPORT, *supra* note 137 at 202-03:

Electricity Production Facilities: Electricity is vital to the functioning of a modern military and industrial power such as Iraq, and disrupting the

Tigris River in downtown Baghdad to disrupt logistics,¹⁴⁵ and the destruction of television and radio broadcasting facilities to isolate military forces from

electrical supply can make destruction of other facilities unnecessary. Disrupting the electricity supply to key Iraqi facilities degraded a wide variety of crucial capabilities, from the radar sites that warned of Coalition air strikes, to the refrigeration used to preserve biological weapons (BW), to nuclear weapons production facilities. To do this effectively required the disruption of virtually the entire Iraqi electric grid, to prevent the rerouting of power around damaged nodes. Although backup generators sometimes were available, they usually are slow to come on line, provide less power than main sources, and are not as reliable. During switch over from main power to a backup generator, computers drop off line, temporary confusion ensues, and other residual problems can occur. Because of the fast pace of a modern, massed air attack, even milliseconds of enemy power disruption can mean the difference between life and death for aircrews. Attacks on Iraqi power facilities shut down their effective operation and eventually collapsed the national power grid. This had a cascading effect, reducing or eliminating the reliable supply of electricity needed to power NBC [nuclear, biological & chemical] weapons production facilities, as well as other war-supporting industries; to refrigerate bio-toxins and some CW [chemical warfare] agents; to power the computer systems required to integrate the air defense network; to pump fuel and oil from storage facilities into trucks, tanks, and aircraft; to operate reinforced doors at aircraft storage and maintenance facilities; and to provide the lighting and power for maintenance, planning, repairs, and the loading of bombs and explosive agents. This increased Iraqi use of less-reliable backup power generators which, generally, are slow to come on line, and provide less power. Taken together, the synergistic effect of losing primary electrical power sources in the first days of the war helped reduce Iraq's ability to respond to Coalition attacks. The early disruption of electrical power undoubtedly helped keep Coalition casualties low.

¹⁴⁴ See *id.* at 207:

Oil Refining and Distribution Facilities: Fuel and lubricants are the lifeblood of a major industrial and military power. Iraq had a modern petroleum extraction, cracking, and distillation system, befitting its position as one of the world's major oil producing and refining nations. Coalition planners targeted Iraq's ability to produce refined oil products (such as gasoline) that had immediate military use, instead of its long-term crude oil production capability. The air campaign damaged approximately 80 percent of Iraq's refining capacity, and the Iraqis closed the rest of the system to prevent its destruction. This left them with about 55 days of supply at prewar consumption rates. This figure may be misleading, however, because the synergistic effect of targeting oil refining and distribution, electricity, the road, rail and bridge infrastructure, and the national C3 [command, control & communication] network, all combined to degrade amounts of oil and lubricants Iraqi commanders received.

¹⁴⁵ See HOSMER, *supra* note 78, at 53, n. 38 (1996); see also PERSIAN GULF WAR FINAL REPORT, *supra* note 137 at 207-08:

Railroads and Bridges: Most major railroad and highway bridges in Iraq served routes that ran between Baghdad and al-Basrah. Iraqi forces in the KTO [Kuwaiti Theater of Operations] were almost totally dependent for

their leadership.¹⁴⁶ Even though the air campaign would cause hardship to the civilian population, coalition planners followed stringent procedures to select and attack targets to minimize collateral damage and civilian casualties.¹⁴⁷

their logistical support on the lines of communication (LOCs) that crossed these bridges, making them lucrative targets. Although Iraqi forces had built large stockpiles of supplies in southeast Iraq by January, DIA [Defense Intelligence Agency] reported cutting the bridges prevented or reduced restocking, and prevented reinforcement of deployed forces once the air campaign began. About three fourths of the bridges between central Iraq and the KTO were severely damaged or destroyed. Iraqi LOCs into the KTO were vulnerable because they crossed bridges over the Tigris and Euphrates rivers. The bridges were destroyed at the rate of seven to ten a week, and the supply flow into the KTO dropped precipitously. While the supply routes into the KTO were being interdicted, Iraqi supply troops also were subjected to heavy air attacks. As bridges were destroyed, long convoys of military trucks waiting to cross were stranded and attacked. Air attacks also destroyed supplies stockpiled in the KTO and severely disrupted their distribution. In an environment where literally nothing was available locally, these efforts resulted in major shortages of food for fielded forces, particularly for those units farthest forward.

¹⁴⁶ WATTS ET AL., *supra* note 140, at 274–75; *see also* PERSIAN GULF WAR FINAL REPORT, *supra* note 137 at 203–05:

Telecommunications and Command, Control, and Communication Nodes: The ability to issue orders to military and security forces, receive reports on the status of operations, and communicate with senior political and military leaders was crucial to Saddam Hussein's deployment and use of his forces. To challenge his C3, the Coalition bombed microwave relay towers, telephone exchanges, switching rooms, fiber optic nodes, and bridges that carried coaxial communications cables. These national communications could be reestablished and so, required persistent re-strikes. These either silenced them or forced the Iraqi leadership to use backup systems vulnerable to eavesdropping that produced valuable intelligence, according to DIA assessments, particularly in the period before the ground campaign. More than half of Iraq's military landline communications passed through major switching facilities in Baghdad. Civil TV and radio facilities could be used easily for C3 backup for military purposes. The Saddam Hussein regime also controlled TV and radio and used them as the principal media for Iraqi propaganda. Thus, these installations also were struck.

¹⁴⁷ *Id.* at 147–153:

Constraints on the Concept Plan to Avoid Collateral Damage and Casualties: A key principle underlying Coalition strategy was the need to minimize casualties and damage, both to the Coalition and to Iraqi civilians. It was recognized at the beginning that this campaign would cause some unavoidable hardships for the Iraqi people. It was impossible, for example, to shut down the electrical power supply for Iraqi C2 facilities or CW factories, yet leave untouched the electricity supply to the general populace. Coalition targeting policy and aircrews made every effort to minimize civilian casualties and collateral damage. Because of these restrictive policies, only PGM were used to destroy key targets in downtown Baghdad.

The coalition was so earnest in this approach, a list of “off-limits” targets was developed that included historical, archaeological, economic, religious and politically sensitive sites.¹⁴⁸ Additionally, target analysts were tasked to look in a six-mile area around each target on the master attack list “for schools, hospitals, and mosques” to identify where extreme care was required.¹⁴⁹ The norm was to use PGM rather than less accurate gravity weapons in urban or populated areas. Attack procedures specified that if pilots could not identify the target or were not confident the weapon would guide properly for any reason, the weapon should not be delivered.¹⁵⁰ The U.S. conceded that collateral damage occurred in spite of the tremendous effort to minimize it. Some of the collateral damage was a result of the Iraqi regime’s invitation and fabrication of collateral damage.¹⁵¹ In an effort to deter attack, the Iraqi

¹⁴⁸ *Id.* at 147–153:

Off Limits Targets: Planners were aware that each bomb carried a potential moral and political impact, and that Iraq has a rich cultural and religious heritage dating back several thousand years. Within its borders are sacred religious areas and literally thousands of archaeological sites that trace the evolution of modern civilization. Targeting policies, therefore, scrupulously avoided damage to mosques, religious shrines, and archaeological sites, as well as to civilian facilities and the civilian population. To help strike planners, CENTCOM target intelligence analysts, in close coordination with the national intelligence agencies and the State Department, produced a joint no-fire target list. This list was a compilation of historical, archaeological, economic, religious and politically sensitive installations in Iraq and Kuwait that could not be targeted. Additionally, target intelligence analysts were tasked to look in a six-mile area around each master attack list target for schools, hospitals, and mosques to identify targets where extreme care was required in planning. Further, using imagery, tourist maps, and human resource intelligence (HUMINT) reports, these same types of areas were identified for the entire city of Baghdad. When targeting officers calculated the probability of collateral damage as too high, the target was not attacked. Only when a target satisfied the criteria was it placed on the target list, and eventually attacked based on its relative priority compared with other targets and on the availability of attack assets. The weapon system, munition, time of attack, direction of attack, desired impact point, and level of effort all were carefully planned. For example, attacks on known dual (i.e., military and civilian) use facilities normally were scheduled at night, because fewer people would be inside or on the streets outside.

¹⁴⁹ *See id.* at 153.

¹⁵⁰ *See id.* at 228.

¹⁵¹ *See id.* at 697–703.

On 11 February, a mosque at al-Basrah was dismantled by Iraqi authorities to feign bomb damage; the dome was removed and the building dismantled. US authorities noted there was no damage to the minaret, courtyard building, or dome foundation which would have been present had the building been struck by Coalition munitions. The nearest bomb crater was outside the facility, the result of an air strike directed against a nearby military target on

regime applied methods of concealment warfare. Iraqi military personnel, weapons, supplies and equipment were located near residential areas and protected objects like mosques, medical facilities, schools and cultural sites (Figures 1 and 2).¹⁵²



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 1—Iraqi Military Aircraft Staged Near Historical Site

January 30. Other examples include use of photographs of damage that occurred during Iraq's war with Iran, as well as of prewar earthquake damage, which were offered by Iraqi officials as proof of bomb damage caused by Coalition air raids.

¹⁵² A cache of Silkworm surface-to-surface missiles was found inside a school in Kuwait City. PERSIAN GULF WAR INTERIM REPORT, *supra* note 138, at 12–3.



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 2—Iraqi Military Vehicle Staged Near Mosque

Unfortunately, coalition attacks did not achieve the desired result of isolating the Hussein regime. According to battle damage assessments, approximately seventy percent of leadership telecommunications, thirty percent of the leadership, and twenty-five percent of the military communications targets were still operational after the air campaign.¹⁵³ One notable reason for the low percentage of targets destroyed was reluctance to engage targets after an estimated 288 Iraqi civilians seeking shelter were killed at the al-Firdos bunker on February 13, 1991.¹⁵⁴ Although the coalition was confident the site was a valid military objective, the event was a pivotal point in the war. All targets engaged after the incident were pre-briefed and approved by the highest ranking officer in the theater, General Norman Schwarzkoph, who took considerable time in his deliberation and denied attack approval for some targets altogether.¹⁵⁵ Moreover, bombing in Baghdad was discontinued following widely critical press throughout the international

¹⁵³ WATTS ET AL., *supra* note 140, at 289.

¹⁵⁴ Barton Gellman, *Iraqi Says 288 Bodies Removed From Bombed Structure*, WASH. POST, Feb. 15, 1991, at A29.

¹⁵⁵ RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR*, 294–95 (1993).

community.¹⁵⁶ The U.S. argued that Iraq utilized the incident and any other collateral damage incidents, including damage from its own air defenses, in disinformation campaigns designed to discredit coalition operations to the U.S. public and the international community.¹⁵⁷ The portion of the campaign targeting the Iraqi people's popular support of the regime was probably miscalculated. While the attacks achieved the objective of disrupting the lives of the Iraqi civilian population, an uprising did not occur and Saddam Hussein remained in power after the war. Human Rights Watch (HRW) alleged up to 3,000 civilians were killed from approximately sixty-five incidents of collateral damage.¹⁵⁸ In comparison, Iraqi officials claimed civilian casualties exceeded 7,000.¹⁵⁹ The bombing probably aggravated the already tenuous condition of the civilian population by contributing to the humanitarian crisis that existed from the 1990 U.N. embargo and previous war with Iran.¹⁶⁰ Although the embargo excluded food and medical supplies for humanitarian relief, the Iraqi population suffered a pervasive loss of water treatment, sewerage, electrical and telecommunication service.¹⁶¹ Further, the high reduction in the available food supply aggravated the tragedy.¹⁶²

Notwithstanding the collateral damage described above, the coalition bombing campaign in Iraq demonstrates a significant transition away from targeting the will and morale of the adversary insofar as it included civilians. Although coalition objectives initially included targeting civilian morale, the al-Firdos bunker incident was a turning point, creating a preoccupation to minimize civilian casualties and any other collateral damage. This is demonstrated by the decision to discontinue bombing in Baghdad and cancel plans to attack bridges over the Tigris River.¹⁶³ Additionally, plans to destroy a large statue of Saddam Hussein and a set of victory arches commemorating

¹⁵⁶ WATTS ET AL., *supra* note 140, at 278 n. 17.

¹⁵⁷ PERSIAN GULF WAR INTERIM REPORT, *supra* note 138, at 12–3.

¹⁵⁸ MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR., Intro. and 19 (1991).

¹⁵⁹ *See id.* at 18.

¹⁶⁰ *See generally*, SADRUDDIN AGA KHAN, REPORT TO THE SECRETARY GENERAL OF THE U.N., HUMANITARIAN NEEDS IN IRAQ., S22799 (July 15, 1991). “As usual, it is the poor, the children, the widowed, and the elderly, the most vulnerable amongst the population who are the first to suffer.” *Id.* at 5. U.N. Security Council Resolutions regarding sanctions on Iraq include S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/661 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939 mtg., U.N. Doc. S/RES/666 (1990); S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991); and S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (1995).

¹⁶¹ SADRUDDIN AGA KHAN, *supra* note 160, at 13–15.

¹⁶² *Id.*

¹⁶³ WATTS ET AL., *supra* note 140, at 287.

the Iran-Iraq war were cancelled because it was determined the psychological value of the attacks would not survive the potential political fallout after the al-Firdos attack.¹⁶⁴ The pervasive media attention given to the al-Firdos incident afforded the Iraqi regime a convenient, inexpensive, and highly-effective method to communicate with the international community, appeal to humanitarian interests, and exploit the event to discredit and discontinue coalition bombing operations in Baghdad.

2. *War in the Balkans/OPERATION ALLIED FORCE*

From March to June 1999, the U.S. and North Atlantic Treaty Organization (NATO) allies engaged in military operations to end Serbian atrocities in Kosovo, and force Slobodan Milosevic to withdraw forces from the area. The NATO coalition had three primary objectives in conducting the campaign: 1) prevent expansion of the conflict into Slovenia, Croatia and Bosnia; 2) end Milosevic's campaign of ethnic cleansing and repression in Kosovo; and 3) ensure NATO's credibility would not be damaged by allowing The Federal Republic of Yugoslavia and the Republic of Serbia to breach multi-lateral peace agreements.¹⁶⁵ During the course of the campaign, NATO developed an integrated targeting process that required allied approval for targets presenting a high risk of collateral damage.¹⁶⁶ Destruction of the Serbian military forces was a primary goal of the NATO coalition; however, an attack on the morale of the civilian population was also a focus of the campaign to isolate Milosevic and compel public pressure to end the war.¹⁶⁷ The targets destroyed or significantly damaged in the campaign included eleven railroad bridges, thirty-four highway bridges, twenty-nine percent of all Serbian ammunition storage facilities, fifty-seven percent of the petroleum reserves, all Yugoslav oil refineries, fourteen command posts, over one hundred aircraft, and ten military

¹⁶⁴ *Id.* at 243–45.

¹⁶⁵ U.S. DEP'T OF DEFENSE, REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER ACTION REPORT [hereinafter OAF AFTER ACTION REPORT] Intro.-1 (Jan. 31, 2000):

Phase 1 would establish air superiority over Kosovo (creating a no-fly zone south of 44 degrees north latitude) and degrade command and control and the integrated air-defense system over the whole of the Federal Republic of Yugoslavia. Phase 2 would attack military targets in Kosovo and those Yugoslav forces south of 44 degrees north latitude, which were providing reinforcement to Serbian forces in Kosovo. This was to allow targeting of forces not only in Kosovo, but also in the Federal Republic of Yugoslavia south of Belgrade. Phase 3 would expand air operations against a wide range of high-value military and security force targets throughout the Federal Republic of Yugoslavia. Phase 4 would redeploy forces as required. *Id.* at 7–8.

¹⁶⁶ *See id.* at xx.

¹⁶⁷ John A. Tirpak, *Victory in Kosovo*, 82 AIR FORCE MAG. 2 (July, 1999).

airfields.¹⁶⁸ Targets also included electrical and broadcast services, news media and two of Milosevic's homes reportedly used as command and control facilities.¹⁶⁹ Over the course of the fifty-seven day campaign, the emphasis was placed on PGM that increased the probability of destroying the target and minimized collateral damage. During the Persian Gulf War, only ten percent of munitions delivered were PGM compared to ninety percent in OPERATION ALLIED FORCE (OAF) in the Balkans.¹⁷⁰

Milosevic employed tactics designed to exploit NATO's political concerns about target selection and collateral damage by commingling military personnel with civilian refugees.¹⁷¹ Milosevic was compelled to resort to asymmetric methods because of his inability to directly challenge a superior NATO force:

He chose to fight chiefly through asymmetric means: terror tactics and repression directed against Kosovar civilians; attempts to exploit the premium the alliance placed on minimizing civilian casualties and collateral damage; creation of enormous refugee flows to create a humanitarian crisis, including in neighboring countries; and the conduct of disinformation and propaganda campaigns The humanitarian crisis created by Milosevic appeared to be an attempt to end NATO's operation by "cleansing" Kosovo of ethnic Albanians, overtaxing bordering nations' infrastructures, and fracturing alliance cohesion.¹⁷²

Serbian forces employed a wide variety of concealment warfare tactics to deceive NATO forces. For example, troops and equipment were dispersed, then hidden throughout the countryside in civilian homes, barns, schools, factories, and monasteries.¹⁷³ Serb forces dispersed among civilian traffic during movement,¹⁷⁴ and used human shields to protect military equipment.¹⁷⁵

¹⁶⁸ OAF AFTER ACTION REPORT, *supra* note 165, at 82.

¹⁶⁹ U.S. Dep't. of Defense, Joint Chiefs of Staff, Joint Statement on the Kosovo After Action Review (Oct. 14, 1999), *available at* http://www.defenselink.mil/releases/1999/b10141999_bt478-99.html.

¹⁷⁰ OAF AFTER ACTION REPORT, *supra* note 165, at 88.

¹⁷¹ *Id.* at 6–7.

¹⁷² *Id.*

¹⁷³ *Id.* at 60–63.

¹⁷⁴ *Id.*

¹⁷⁵ Chris Stephen, *Deaths Prove Kosovo Is No 'Free Fire' Zone*, THE IRISH TIMES, April 16, 1999, at (16)11.

NATO reported earlier this week that Serbia was using large numbers of ethnic Albanian refugees as human shields, bunching them around tank convoys, hoping thus to deter prowling jets. The practice came in with the

These tactics contributed to several incidents of collateral damage resulting in civilian casualties. Having what appears to be the most accurate and thoroughly researched accounting of collateral damage, HRW concludes that as few as 489, and as many as 528 civilians were killed in approximately ninety incidents of collateral damage.¹⁷⁶ Approximately sixty-four percent of the total civilian deaths occurred in twelve incidents.¹⁷⁷ In comparison, the Federal Republic of Yugoslavia claimed 1,200 to 5,000 civilian casualties from the war.¹⁷⁸ HRW reported that almost half of the incidents occurred during daylight hours, when civilians could reasonably be expected on roads, bridges, and in public buildings.¹⁷⁹ The most notable collateral damage events include inadvertent attacks on refugees over a twelve-mile stretch of the Djakovica-Decane road in Kosovo, resulting in seventy-three civilian casualties; attacks near Korisa, where as many as eighty-seven refugees were killed; and two incidents involving attacks on civilian buses at Luzane and Savine Vode.¹⁸⁰ The most politically significant collateral damage event was the bombing of

air strikes: two days after the first NATO bombing, Serbs rounded up refugees from around the village of Chirez Bunching them in the middle of a tank convoy, they forced them to march with the vehicles along a few miles of exposed road under a clear blue sky to the outskirts of Srbica, scene of recent heavy fighting. The refugees were released unharmed, having served their purpose. If there were any NATO jets overhead at the time, they would presumably have seen the great swarm Now, western officials said, the need for such “shields” was the reason why Serbia abruptly halted its “ethnic cleansing” of Kosovo last week. The “missing” refugees are in fact thought to be held as mobile shields—to be deployed as necessary. These people, assuming they have enough food to keep alive, could be used to protect tank convoys, or, more ambitiously, could perhaps be sent back to villages that Serbia does not want to bomb. . . . Human shields also bring NATO face-to-face with the problem of limited war, another problem that is relatively new. In previous centuries armies would give it their all. Now NATO is humbled not by Serb firepower but by a list of constraints which say it must not itself lose casualties, must take care about “collateral” damage, and must even avoid killing too many of its enemy, or destroying its economy too comprehensively, lest that enrage world opinion Partly this is the fault of the politicians, who in their urge to make everything—school closures, tax rises—seem all right, try to present the coming battles as no more horrible than an arcade game, with technology ensuring that only the bad guys get killed—and no more of them than is necessary.

Id.

¹⁷⁶ HUMAN RIGHTS WATCH, THE CRISIS IN KOSOVO [hereinafter HRW, THE CRISIS IN KOSOVO], at http://www.hrw.org/reports/2000/nato/index.htm#P217_53015 (last visited Feb. 17, 2004).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

the Chinese Embassy in Belgrade. Reported as a failure in the process of identifying and validating proposed targets, NATO forces were attempting to target the headquarters of the Yugoslav Federal Directorate of Supply and Procurement, a legitimate military target.¹⁸¹ None of the military or intelligence databases used to validate targets contained the correct location of the Chinese Embassy.¹⁸²

OAF set the stage for more aggressive challenges of dual-use targets, objects having utility for both the military and civilian population. For example, the destruction of the Serb Radio and Television (SRT) Headquarters in Belgrade that resulted in sixteen dead and sixteen wounded,¹⁸³ the “Marshal Tito” Petrovaradin (Varadinski) Bridge in Novi Sad, and the attack on the Belgrade Heating Plant all received significant attention from humanitarian interest groups and the international community.¹⁸⁴ Regardless of NATO’s legal determination that the targets were legitimate military objectives, HRW argued that NATO did not take adequate precautions in warning civilians of the attacks, nor were proportionality principles satisfied because the targets were located in dense urban areas.¹⁸⁵ Ultimately, HRW argued the risks involved to civilians in the attacks were disproportionate to any perceived military benefit achieved.¹⁸⁶ Although NATO targeted the headquarters because it was being used to transmit propaganda supportive of Milosevic, HRW contended it had no military importance because it was not being used to “incite violence,” citing the appropriate destruction of Radio Milles Collines

¹⁸¹ OAF AFTER ACTION REPORT, *supra* note 165, at xx.

¹⁸² *Id.*

¹⁸³ HRW, THE CRISIS IN KOSOVO, *supra* note 176.

According to military sources, there was considerable disagreement between the United States and French governments regarding the legality and legitimacy of the target, and there was a lively public debate regarding the selection of Yugoslav civilian radio and television as a target group. The NATO attack was originally scheduled for April 12, but due to French disapproval of the target, it was postponed. According to military, media, and Yugoslav sources, Western news organizations, who were using the facility to forward material from Yugoslavia, were alerted by NATO government authorities that the headquarters would be attacked. Attacks also had to be rescheduled because of rumors that foreign journalists ignored warnings to leave the buildings. When the initial warnings were given to Western media, the Yugoslav government also found out about the intended attack. When the target was finally hit in the middle of the night on April 23 . . . authorities were no longer taking the threats seriously, given the time that had transpired since the initial warnings.

¹⁸⁴ See generally HRW, THE CRISIS IN KOSOVO, *supra* note 176.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

during the Rwandan genocide.¹⁸⁷ HRW went on to argue that even if the attack could be justified, the destruction of the transmitter equipment instead of the building and its occupants would have easily disrupted communication.

Another significant issue that emerged from OAF is the use of cluster munitions. Seven incidents of collateral damage resulted in 90–150 civilian deaths from cluster bombs used by the U.S. and Britain. The most serious incident involved the mid-day attack on Nis airfield, killing fourteen civilians and injuring twenty-eight.¹⁸⁸ Cluster bomb sub-munitions fell in three widely separated areas; near the Pathology building of the Nis Medical Center in southeast Nis, in the town center near the Nis University Rector's Office and central city market place, and a bus station near the Nis Fortress and the "12 February" Health Center. NATO confirmed the attack on Nis airfield, and on May 8, 1999, NATO Secretary General Solana accepted responsibility, stating that "NATO has confirmed that the damage to the market and clinic was caused by a NATO weapon which missed its target." The CBU-87 cluster bomb container failed to open over the airfield. Instead, it opened after release from the attacking aircraft, projecting sub-munitions a great distance into the city.¹⁸⁹ An investigation conducted by a committee of the International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that none of the foregoing collateral damage incidents presented sufficient evidence to warrant additional review or prosecution for violations of LOAC.¹⁹⁰

3. OPERATION ENDURING FREEDOM: An Emerging Crisis in Distinguishing Combatants from Civilians

OPERATION ENDURING FREEDOM (OEF) gave prominence to the term "effects-based operations." The term refers to the full integration and interoperability of military forces and other national assets to create a cascading series of effects that achieve strategic goals instead of resorting to traditional force-on-force combat emphasizing physical destruction.¹⁹¹ More simply, strikes focus on the effects they have on behavior rather than on observable physical damage to objects. The initiative relies heavily on the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA [Hereinafter ICTY FINAL REPORT], vol. 39(5) (Sep., 2000); 39 I.L.M. 1257, 1282-83 (2000), available at <http://www.un.org/icty/pressreal/nato061300.htm>.

¹⁹¹ U.S. JOINT FORCES COMMAND, CONCEPTS DIVISION, WHITE PAPER ON EFFECTS-BASED OPERATIONS (Oct. 2001).

application of precision-strike technology.¹⁹² Since OEF was largely designed as a coalition operation to remove the Taliban government and eliminate the al-Qaeda terrorist network taking refuge in Afghanistan, targeting the already subjugated civilian population in any form provided no meaningful benefit. The focus of attacks on Taliban and al-Qaeda rather than civilian infrastructure such as bridges, electrical power and water supply services minimized the humanitarian crisis experienced in previous operations.¹⁹³ Al-Qaeda and Taliban targets included ground forces, early warning radars, command and control facilities, basing operations, al-Qaeda infrastructure, airfields, aircraft and targets of opportunity—those targets that presented themselves in the course of the campaign that were not pre-planned.¹⁹⁴ The coalition was protective of infrastructure and religious sites, an expression that was instrumental in minimizing conditions contributing to a humanitarian crisis and avoiding any message that the war against terrorism was a war against Islam. Rules of engagement were designed “so as to not needlessly shame or antagonize the enemy, tilt allied or U.S. public opinion in a particular direction, or escalate hostilities.”¹⁹⁵

Although Taliban and al-Qaeda were unable to organize any significant challenge, numerous collateral damage incidents suggest there was difficulty in distinguishing civilians and civilian objects from combatants. This problem would seem predictable since the al-Qaeda terrorist network was composed of unlawful combatants who were difficult to distinguish from civilians.¹⁹⁶

¹⁹² See Conrad Crane, *Effects-Based Operations: A Blast From The Past*, DEFENSE WEEK, May 14, 2001, at (22)20.

¹⁹³ Rowan Scarborough, *Bombing Plan Sparing Civilian Structures*, WASH. TIMES, Oct. 4, 2001, available at <http://nucnews.net/nucnews/2001nn/0110nn/011004nn.htm#300> (last visited Mar. 15, 2005).

¹⁹⁴ See Global Security.Org, *Operation Enduring Freedom: Operations*, at <http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm> (last visited Mar. 7, 2005).

¹⁹⁵ *Id.*

¹⁹⁶ See e.g., White House, Fact Sheet: Status of Detainees at Guantanamo, 2002 WEEKLY COMP. PRES. DOC. 205 (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> (last visited Mar. 15, 2005). “Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the [Geneva] Convention, and the President has determined that the Taliban are covered by the Convention.”); see also Ambassador Pierre-Richard Prosper, *Status and Treatment of Taliban and al-Qaeda Detainees*, at <http://www.state.gov/s/wci/rm/2002/8491pf.htm> (last visited Mar. 7, 2005):

[T]he Geneva Conventions do apply . . . to the Taliban leaders who sponsored terrorism. But, a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention that would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war.

Many Taliban and al-Qaeda forces were well integrated into the civilian community,¹⁹⁷ and did not fall under a responsible command that conducted operations in accordance with LOAC. Further, they did not have a fixed distinctive sign recognizable from a distance, nor did they carry their arms openly pursuant to article 4(a) of Geneva Convention III.¹⁹⁸

Concealment tactics used by the adversary in Afghanistan resulted in a number of collateral damage incidents. As many as thirty-five Afghan civilians were killed on October 22, 2001 when a U.S. coalition aircraft attacked the village of Chowkar-Karez.¹⁹⁹ Witnesses interviewed by HRW were unaware of any Taliban or al-Qaeda positions in the area of the attack.²⁰⁰ The incident in Chowkar-Karez occurred one day after twenty-three civilians were killed when bombs hit the village of Thori, located near a Taliban military base in Oruzgan province.²⁰¹ According to witness accounts, U.S. coalition aircraft bombed the area three times on the evening of October 21.²⁰² The target of the attack was a large Taliban military base known as Gar Mao, located approximately one kilometer from the village. The base was an ammunition depot, defunct military prison, and barracks for Taliban military personnel.²⁰³ Near Hutala, Afghanistan, U.S. A-10 attack aircraft targeting a terrorist suspect, Mullah Wazir, mistakenly killed nine children playing

They do not have a fixed distinctive sign recognizable from a distance and they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.

Id.

¹⁹⁷ “Taliban and the al-Qaeda were using Red Crescent buildings and facilities, as well as vehicles, to attempt to provide them cover so that they could go out and kill innocent men, women and children.” Press brief by U.S. Dep’t of Defense Secretary Donald Rumsfeld (2003), at <http://www.defenselink.mil/transcripts/2003/tr20030425-secdef0126.html> (last visited Feb. 20, 2004).

¹⁹⁸ See Prosper, *supra* note 196; see also Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(a), 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III].

¹⁹⁹ Human Rights Watch, *Afghanistan: New Civilian Deaths Due to U.S. Bombing* (Oct. 31, 2001), at <http://www.hrw.org/press/2001/10/afghan1026.htm> (last visited Feb. 19, 2002).

²⁰⁰ *Id.*

²⁰¹ Human Rights News, *Afghanistan: U.S. Bombs Kill Twenty-Three Civilians* (Oct. 26, 2001), at http://www.Afghanistan_U_S_Bombs_Kill_Twenty-three_Civilians.htm (Human Rights Watch Press Release, Quetta, Pakistan, October 26, 2001) (last visited Feb. 19, 2004).

²⁰² *Id.*

²⁰³ *Id.*

marbles in a field.²⁰⁴ In another highly publicized event, a U.S. AC-130 gunship attacked a wedding party in the village of Deh Rawud, Uruzgan Province, killing “dozens” of civilians. Reports suggest that a large group of guests at the wedding party were firing weapons into the air in celebration while standing near an artillery site. The aircraft observed directed, sustained gunfire, suggesting an attempt to engage, then returned fire in self-defense.²⁰⁵ In the Summer of 2002, reporters made a total accounting of eleven locations where civilian casualties were reported: Gardez (Nov. 14, 2001, 23 dead), Khost (Nov. 16, 2001, at least 65 dead), Zani Khel (Nov. 16, 2001, 20 dead), Madoo (Dec. 1, 2001, 55 dead), Khan-i-Merjahuddin (Dec. 1, 2001, 48 dead), Asmani and Pokharai (Dec. 20, 2001, approximately 50 dead), Niazi Qala (late Dec. 2001, 52 dead) Zhawara (Feb. 4, 2002, 3 dead), Char Chine (May 12, 2002, 5 dead) and Kakrak (Jul. 1, 2002, 54 dead).²⁰⁶

If the Taliban or al-Qaeda had any plan to mount a campaign of deception or misinformation based on collateral damage, it was not readily identifiable from western media and did not achieve any significant public support.²⁰⁷ This is probably a result of the popular political and public support of OEF altogether with at least seventy countries participating in the coalition.²⁰⁸ In some cases, the Afghan population was relatively tolerant of collateral damage. For example, an Afghan group protesting the deaths of forty civilians from a U.S.-led raid on a village near Kandahar were upset with the incident, but

²⁰⁴ Aijaz Rahi, *Afghan Village Angry After Gunship Attack* (Dec. 7, 2001) at http://story.news.yahoo.com/news?tmpl=story&cid=514&e=12&u=/ap/20031207/ap_on_re_as/afghan_us_attack (last visited Feb. 19, 2004).

²⁰⁵ Barbara Starr, *Afghans Protest Over Wedding Party Bombing*, CNN.Com/World (Jul. 4, 2002) at <http://www.cnn.com/2002/WORLD/asiapcf/central/07/04/afghanistan.bombing/> (last visited Feb. 19, 2004).

²⁰⁶ Global Security.Org, *Operation Enduring Freedom: Operations*, <http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm> (last visited Feb. 19, 2004).

²⁰⁷ But see IslamOnline.net, *More Civilian Deaths Confirmed in Afghanistan; U.S. Increases Pressure On Taliban, Bin Laden*, at <http://www.islamonline.net/English/News/2001-10/22/article10.shtml> (last visited Feb. 20, 2004).

Residents say at least 10 civilians died in the raids, nine of them members of the same family killed by stray ordnance as they sat down to breakfast . . . MSNBC also quoted a news agency reporter as saying that he has seen the bodies of women and children in the carnage of two houses that were hit by U.S. missiles. It was the highest civilian toll independently confirmed by foreign media since the October 7 start of the U.S. air campaign on Afghanistan. A Taliban spokesman said 18 civilians died in Sunday's raids. The Taliban have reported that at least 400 civilians have been killed since the beginning of the U.S. onslaught two weeks ago.

Id.

²⁰⁸ CENTCOM, *The Coalition Bulletin, Seventy Countries—Common Values—One Mission*, vol. 1(1) (Oct. 22, 2002).

expressed an objective view: “We are not against the Americans, but it doesn’t mean they should drop bombs on residents, happy ceremonies and sanctuaries instead of military targets The United States should get through to its officers that this kind of incident could destroy relations and the trust between the two nations.”²⁰⁹

4. *OPERATION IRAQI FREEDOM: Integration of Combatants and Civilians on a Strategic Scale, and the Era of Concealment Warfare*

OPERATION IRAQI FREEDOM (OIF) goals were largely aligned with the elimination of weapons of mass destruction (WMD), elimination of any terrorist threat, and the removal of the regime.²¹⁰ These political goals were translated into operational objectives: 1) defeat or compel capitulation of Iraqi forces; 2) neutralize regime leadership and its command & control systems; 3) neutralize or control all Iraqi WMD delivery systems and infrastructure; 4) ensure the territorial integrity of Iraq; 5) posture forces for post-hostility operations and initiate humanitarian assistance where feasible; 6) establish conditions for a provisional/ permanent government to assume power; 7) maintain international and regional support; 8) neutralize the Iraqi regime’s security forces; and 9) acquire air, maritime and space supremacy.²¹¹

Though a complete accounting of damage to civilian objects and civilian casualties resulting from the war is impossible, some attempts to quantify the dead have been made. Iraq claimed 1,252 civilians were killed and 5,103 injured from coalition attacks as of April 3, 2003.²¹² A review of records at sixty of Iraq’s 124 hospitals in June of the same year indicated 3,420 dead, including 1,896 in Baghdad.²¹³ The Associated Press described the count as “fragmentary” and said, “the complete toll, if it is ever tallied, is sure to be

²⁰⁹ Starr, *supra* note 205; *see also* Rahi, *supra* note 204.

²¹⁰ Specifically stated goals were detailed as: 1) stabilize and maintain the territorial integrity of Iraq and promote a broad-based government that renounces weapons of mass destruction [hereinafter WMD] and terrorism; 2) leverage success in Iraq to compel other countries to cease support to terrorists and to deny access to WMD; 3) destabilize, isolate, and overthrow the Iraqi regime and provide support to a new, broad-based government; 4) destroy Iraqi WMD capability and infrastructure; 5) protect allies and supporters from Iraqi threats and attacks; and 6) destroy terrorist networks in Iraq. T. MICHAEL MOSELEY, LT. GEN., COMMANDER, U.S. CENTRAL AIR FORCE, ASSESSMENT AND ANALYSIS DIVISION, OPERATION IRAQI FREEDOM—BY THE NUMBERS (Apr. 30, 2003).

²¹¹ *Id.*

²¹² *See* Niko Price, *Tallying Civilian Death Toll in Iraq War Is Daunting*, PHILADELPHIA INQ., Jun. 11, 2003, at A-03; Laura King, *Baghdad’s Death Toll Assessed*, L.A. TIMES, May 18, 2003, at Foreign Desk 1(1); Peter Ford, *Survey Pointing to High Civilian Death Toll in Iraq*, CHRISTIAN SCI. MONITOR, May 22, 2003, at 1.

²¹³ *See supra* combined sources in note 212 and accompanying text.

significantly higher.”²¹⁴ Cluster munitions were reportedly responsible for 273 civilian casualties at al-Hilla and al-Najaf, and ground combat was responsible for 381 civilian deaths at al-Nasiriya.²¹⁵ The *Los Angeles Times* completed a survey of twenty-seven hospitals in Baghdad and the local area, reporting that at least 1,700 civilians died and more than 8,000 were injured in the capital.²¹⁶ Problems leading to an accurate count of civilian casualties include the dead being buried almost immediately in observance of Islamic tradition, and the low priority to record and assemble data during combat operations. Part of the problem in maintaining statistics was the inability to distinguish civilians from soldiers who were dressed in civilian clothes. The U.S. does not have a formal requirement to investigate collateral damage incidents, nor does it have any requirement to acquire data on the number of civilians killed or injured during operations. Like previous operations, the most accurate data available is from media, non-government organizations (NGOs) and humanitarian interest groups.

Significant collateral damage incidents resulted from Iraqi forces using civilian shields, feigning surrender, commingling with the civilian population, and misusing emergency relief vehicles or hospitals to conduct military operations (Figures 3–5).²¹⁷ Iraqi forces transferred ammunition from military depots to smaller bunkers in civilian neighborhoods, schools, cultural sites, religious sites and other civilian facilities to avoid attack (Figures 6–9).²¹⁸

²¹⁴ Niko Price, *3,240 Civilian Deaths in Iraq*, ASSOC. PRESS, Jun. 10, 2003, at International News.

²¹⁵ HUMAN RIGHTS WATCH [hereinafter HRW], OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 128–32 (2003).

²¹⁶ King, *supra* note 212.

²¹⁷ Richard Whittle, *U.S. Accuses Iraq Forces Of Engaging In War Crimes*, DALLAS MORNING NEWS, Mar. 27, 2003, at A-21.

²¹⁸ HRW, *supra* note 215, at 74–76.

In at least some cases, the placement of this military hardware suggested that Iraqi armed forces failed to take the necessary precautions to spare civilians from the dangers of urban warfare. From Baghdad to Basra, Human Rights Watch documented dozens of examples of such lack of precautions. Iraqi forces established positions in civilian areas in the weeks before the war. They brought military vehicles and weapons into Nadir, a crowded slum in al-Hilla, a week or so before the conflict began and several weeks before the battle there. In a village on the road between al-Hilla and Baghdad, Human Rights Watch saw three tanks wedged into three narrow alleyways. Such placement would not have been the result of ordinary maneuvers during battle. At al-Najah Intermediary School for Girls, located in a Karbala’ residential area, Iraqi troops had dug fighting positions with anti-aircraft guns in the schoolyard. Human Rights Watch found dug-in mortar positions and anti-aircraft cannons between homes in Hay al-Zaitun in Basra. Such placements appear to have been intentional, not merely the result of falling back into urban areas during fighting. Iraqi forces also placed large caches

Anti-aircraft weapons were placed on the roof of the Ministry of Information (Figure 10)²¹⁹ and the Iraqi 51st Warning and Control Regiment relocated to a mosque before hostilities.²²⁰ Perfidy, deception and attempts to acquire sanctuary in civilian communities was commonplace for Iraqi forces:

To sum up, we are now observing an activity that has been going on for over 10 years. The Iraqis have regularly placed air defense missile systems and associated equipment in and around civilian areas, including parks, mosques, hospitals, hotels, crowded shopping districts, and even in cemeteries. They have positioned rocket launchers next to soccer stadiums that are in active use, and they've parked operational surface-to-air missile systems in civilian industrial areas. This is a well-organized, centrally managed effort, and its objectives are patently clear: preserve Iraq's military capabilities at any price, even though it means placing innocent civilians and Iraq's cultural and religious heritage at risk.²²¹

of weapons and ammunition in civilian neighborhoods. For example, residents said troops established caches in Hay al-Khadra, a neighborhood of Baghdad, the week before the war started. Several munition stores seemed to pre-date the war. Human Rights Watch visited a huge storage facility near al-Maqal Airfield in Basra that was only a half-kilometer (.3 miles) from a civilian neighborhood. The quantity and nature of the munitions stored at this facility were such that if it had been attacked, the civilian neighborhood would have suffered extensive damage.

Id.

Some Iraqi civilians interviewed by Human Rights Watch interpreted the location of military hardware in neighborhoods as an intentional attempt by the Iraqi armed forces to use civilians to protect military objectives. "They put anti-aircraft guns in civilian areas to have a safe place. They thought the Americans would not hit them because it was between civilians," said Dr. Muhammad Hassan al-Ubaidi of al-Najaf Teaching Hospital. Human Rights Watch also found examples of Iraqi troops failing to take any steps to protect the population, including the implementation of evacuation plans. Four residents in Nadir, for example, said no precautions had been taken to ensure their safety. Residents of Hay al-Khadra'a in Baghdad provided similar testimony. "There were . . . vehicles, armor, and weapons (anti-aircraft and rocket launchers) in the streets, highway, and homes. . . . The Iraqi forces did not make any attempt to evacuate us. They did nothing else to protect us and other civilians from the battle," said Munkith Fathi Abd al-Razzaq. On the contrary, it appears the Iraqi troops hoped the presence of civilians would deter enemy attacks. *Id.*

²¹⁹ *Id.* at 74–76.

²²⁰ Interview with Col Brett Williams, Chief of CENTCOM Checkmate Division in Tampa, Florida (Oct. 29, 2003).

²²¹ DOD, Open Briefing on Use of Human Shields in Iraq (Feb. 26, 2003) at http://www.defenselink.mil/news/Feb2003/t02262003_t0226humanasst.htm (last visited Mar. 30, 2004).

**IRAQI SIGINT AMBULANCE:
CAPTURED AT ONLY FUNCTIONING MOSUL HOSPITAL
ON 18 APR 03**



CAPABLE OF INTERCEPTING AND DIRECTION-FINDING HF, VHF AND UHF SINGLE-CHANNEL UNENCRYPTED SIGNALS

Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 3—Iraqi Civilian Ambulance Used for Military Communications



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 4—Military Radio Equipment Inside Iraqi Civilian Ambulance



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 5—Military Radio Components Inside Iraqi Civilian Ambulance



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 6—Iraqi Military Vehicles Staged Near Mosque



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 7—Iraqi Military Revetments Near Civilian Village and School



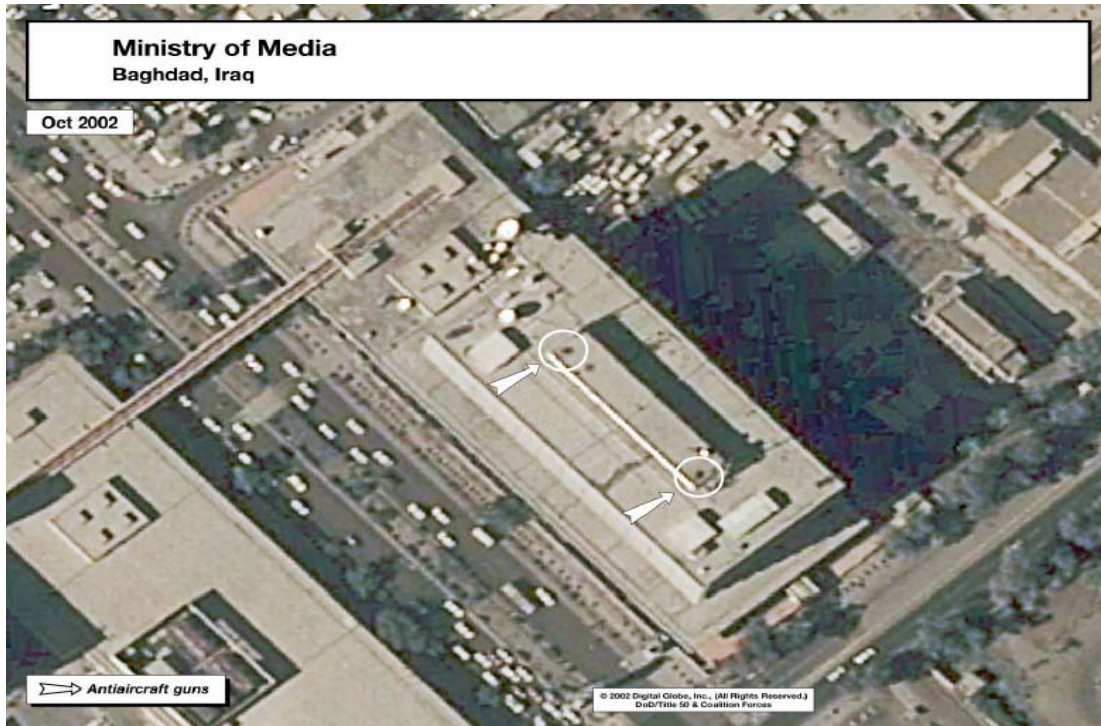
Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 8—Iraqi Military Revetments Near Civilian Food Storage Warehouse



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 9—Iraqi Military Ammunition Depot Located Near Mosque



Source: Courtesy of U.S. Department of Defense, Defense Intelligence Agency

Figure 10—Anti-aircraft Guns Located on the Roof of the Iraqi Ministry of Defense

Iraqi forces were in many cases very well integrated with the civilian community, even to the point of commingling with civilians on buses during combat.²²² Iraqi civilians regularly reported seeing Iraqi troops out of

²²² James Pinkerton, *Marine Tells of Confusion in Warfare*, HOUSTON CHRONICLE, Apr. 4, 2003, at A-23.

Simmons, a crew chief on a light tank, described a confusing, harrowing type of warfare in which Iraqi troops take off their uniforms to blend in with the civilian population and Marines have learned to trust no one. “I mean, you don’t know what to do,” Simmons said. “You just got to be careful.” He told how a humanitarian mission had turned into a fierce firefight and how his Marines had “lit up,” or fired upon, buses filled with Iraqis in civilian clothes. The Marines, he said, surmise that the Iraqis were civilians being used by Saddam Hussein’s troops as human shields. But the bus passengers could also have been Iraqi soldiers. He spoke of having to kill Iraqis who may have been civilians near al Nasiriyah after his unit was called in to support another Marine outfit. After dark, he said, the Marines watched as several local buses stopped near their position and large numbers of people got off. A short time later, he said, the Marines came under attack by Iraqi troops. “We thought it was just a bus stop,” Simmon said, adding that Marines quickly surmised that Iraqi soldiers were mixed in with the passengers. “We were ordered to shoot after the first two buses stopped,” he said. “It was dark. The civilians were sitting in the seats, and the Iraqi

uniform. One witness expressed concern that the practice resulted in numerous civilian casualties. Dr. `Abd al-Sayyid, director of al-Nasiriya General Hospital, said “Fedayeen were among the civilian homes. . . . [T]he problem was with the Iraqi troops and Fedayeen dressed as civilians.”²²³ Iraqi witnesses in al-Najaf and in the al-Yarmuk neighborhood of Baghdad reported similar practice among Iraqi forces.²²⁴ Almost every member of the Coalition interviewed by HRW commented on the practice. One senior officer observed, “By March 24 [the fourth day of the war], we were already seeing a large number of irregulars out of uniform. It was clearly a combination of systematic and conscious [strategy].”²²⁵

The Iraqi strategy to conceal military assets with civilian objects, wear civilian clothes, and commingle with the civilian population was problematic to operations, creating a high potential for civilian casualties and increasing stress on U.S. forces instructed to spare civilian life when engaged.²²⁶

troops were standing in the aisles with their guns out the windows. It was like a rolling gunship. “Once we started firing at the bus and the civilians got down on the floor,” Simmons said, “the Iraqi soldiers came out and started coming toward us. We have thermal imaging, so they didn’t have a chance. “In the morning, the Marines found dead people in civilian clothes in and around the bus, Simmons said. He believes that “we did kill some civilians.” “On each bus we’d find 30 or 40 civilians. We felt bad about it,” Simmons said.

²²³ HRW, *supra* note 215, at 78–79.

²²⁴ *Id.*

²²⁵ *Id.* Other reports of Iraqi combatants fighting in civilian clothes came from Marines caught in an ambush along the route from al-Nasiriyya to al-Kut, and from soldiers in the Second Brigade, Third Infantry Division, who fought in al-Najaf. The Iraqis often combined disguise with use of civilian vehicles, particularly orange-and-white taxis. On April 7, 2003, for example, Special Republican Guard forces launched a counterattack on Second Brigade forces entering Baghdad while firing from civilian vehicles and wearing civilian clothes. *Id.*

²²⁶ CENTCOM, Appendix E: Rules of Engagement for U.S. Military Forces in Iraq, Issued by CENTCOM Combined Forces Land Component Commander (Jan., 2003), *reprinted in* HRW, *supra* note 215, at App. E, p. 138.

1. On order, enemy military and paramilitary forces are declared hostile and may be attacked subject to the following instructions: a) Positive identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target. If no PID, contact your next higher commander for decision. b) Do not engage anyone who has surrendered or is out of battle due to sickness or wounds. c) Do not target or strike any of the following except in self-defense to protect yourself, your unit, friendly forces, and designated persons or property under your control: Civilians, Hospitals, mosques, national monuments, and any other historical and cultural sites. d) Do not fire into civilian populated areas or buildings unless the enemy is using them for military purposes or if necessary for your self-defense. Minimize collateral damage. e) Do not target enemy infrastructure (public works, commercial communication facilities, dams), Lines of Communication (roads, highways, tunnels,

Soldiers from the U.S. Army's 3rd Infantry Division opened fire on an unidentified four-wheel drive vehicle as it was approaching a U.S. checkpoint near al-Najaf on March 31, 2003.²²⁷ Personnel in Bradley Fighting Vehicles attempted to direct the vehicle to stop, then opened fire with 25mm cannons, killing seven of the fifteen civilian passengers.²²⁸ The *London Times* reported Iraqi soldiers in civilian dress used women as their scouts to lure U.S. Marines into a firefight. Sixteen Iraqi soldiers were killed in the battle along with twelve civilians.²²⁹ In another event, Marines shot a speeding civilian truck that failed to halt, killing three men only to find bags of rice and no weapons inside.²³⁰ Commenting on the Iraqi Regime's methods, Vice President Taha Yassin Ramadan threatened: "This is the beginning, and you will hear more good news in the coming days. We will use any means to kill our enemy in our land, and we will follow the enemy into its land."²³¹ In a measure to minimize civilian casualties, Coalition forces routinely dropped leaflets from the air advising Iraqi civilians of pending attacks, and to stay away from military assets. The Iraqi regime responded by issuing erroneous warnings that the leaflets were coated with harmful chemical residue.²³²

bridges, railways) and Economic Objects (commercial storage facilities, pipelines) unless necessary for self-defense or if ordered by your commander. If you must fire on these objects to engage a hostile force, disable and disrupt but avoid destruction of these objects, if possible.

2. The use of force, including deadly force, is authorized to protect the following: Yourself, your unit, and friendly forces, Enemy Prisoners of War, Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape, Designated civilians and/or property, such as personnel of the Red Cross/Crescent, UN, and US/UN supported organizations.

3. Treat all civilians and their property with respect and dignity. Do not seize civilian property, including vehicles, unless you have the permission of a company level commander and you give a receipt to the property's owner.

4. Detain civilians if they interfere with mission accomplishment or if required for self-defense.

5. CENTCOM General Order No. 1A remains in effect. Looting and the taking of war trophies are prohibited.

²²⁷ Press Release, Amnesty International, Iraq: U.S. Must Investigate Civilian Deaths, News Service No: 075 (Apr. 1, 2003).

²²⁸ *Id.*

²²⁹ Elizabeth Neuffer, *City Battles Will Boost Growing Civilian Toll*, BOSTON GLOBE, Apr. 7, 2003, at A-25.

²³⁰ *Id.*

²³¹ Press Release, Amnesty International, Iraq: Soldiers' Surprise Likely to Rebound on Civilians, News Service No: 076 (Apr. 1, 2003), Bruce Cheadle, *Attack on Iraq: War Crime Allegations Flying: Both Sides in Conflict Charge Each Other with Violating Conventions of Warfare*, WINDSOR STAR, Mar. 31, 2003, at B-2.

²³² Richard Whittle, *United States 'Preparing the Battlefield' with Anti-Hussein Messages*, DALLAS MORNING NEWS, Mar. 10, 2003, at A-1.

Reports indicate that Iraqi political leaders may have also used Thuraya cell phones to provoke attacks on protected facilities. On March 24, 2003 two high profile Iraqi political leaders arrived at the same al-Nasiriya hospital where Pvt Jessica Lynch was captive. In an apparent effort to seek protection from attack or to provoke an attack on the hospital, the governor of al-Nasiriya, Adel Mehdi, and head of security, Kamil Bahtat, arrived brandishing Thuraya satellite phones.²³³ Aware that the phones could be electronically detected and targeted, physicians at the hospital “were screaming at the Ba’athists to leave One of my colleagues even threatened to shoot them if they did not.”²³⁴ The two Ba’athists remained at the hospital unharmed. Although two Red Crescents marked the roof of the hospital and a flag bearing the same symbol was openly displayed, a coalition attack killed four and injured 70 patients.²³⁵ In addition, a physician recalls how ambulances responding to the incident were also attacked: “As the ambulances moved in to take the injured to the other hospital, they fired at them, too, from helicopters.”²³⁶

Although there were no reports of casualties, volunteer human shields in OIF were prominent in the media, introducing another dynamic to the already difficult issue of civilian presence in the battle space. Not an entirely novel idea, volunteer human shields also placed themselves at strategic locations during OAF. In a notable demonstration protesting the war, more than 200 foreign volunteers, including some from the U.S., placed themselves at Iraqi power plants, water treatment facilities, hospitals and other installations critical to the civilian population.²³⁷ Upon arrival, however, some volunteers were disappointed to find that Iraqi officials refused to let them shield their preferred sites, hospitals and schools. Instead, they were directed to food storage and utility sites, including one with a large military camp around it.²³⁸ Although it is difficult to determine the effect of volunteer human shields on the overall campaign, their presence is recognized as a key factor in CENTCOM’s targeting process.²³⁹ Notwithstanding the ability to qualify volunteer human shields as combatants pursuant to Protocol I, Article 51(3),²⁴⁰ the presence of

²³³ Ed Vulliamy, *Cover Story: Battle Cries*, OBSERVER, Jul. 6, 2003, at 22.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Rajiv Chandrasekaran, *Human Shields Face the Risks; 200 Activists in Baghdad Protecting Power Plant*, WASH. POST, Feb. 25, 2003, at A-18.

²³⁸ Fawn Vrazo, *Human Shields Return from Iraq with Mixed Experiences*, PHILADELPHIA INQ., Apr. 6, 2003, at A-11.

²³⁹ See *infra* note 396 and accompanying text.

²⁴⁰ Protocol I, *supra* note 10, at art. 51(3). The article states, “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”

volunteer human shields in both OAF and OIF suggests another dynamic in the growing trend to use civilians to gain a strategic advantage. When questioned about his motives for being a human shield, one volunteer expressed satisfaction in achieving at least one goal, “What would you expect the American generals to say? The fact that they even talk about us is already something. It means we are on their agenda. We are trying to annoy them as much as possible.”²⁴¹

III. TO WHOM DO THE RULES APPLY?

“No nation is fit to sit in judgment on any other nation.”
Woodrow Wilson

“I do not know the method of drawing up an indictment against a whole people.”
Edmund Burke

A. Application of the Law of Armed Conflict to State Adversaries

As the U.S. attempts to reach an understanding of the evil that exists in its adversaries, it must reflect on the relationships between historical and recent demonstrations of evil—from the genocide of indigenous populations in North and South America, to the extermination of Jews in WWII, to more recent ethnic cleansing campaigns in Bosnia and Rwanda. Civilians have always been central to conflict and the subject of strategy. The U.S. must also reflect on its own history at war to understand the motive of its adversaries to make civilians central to conflict. To conduct an objective and thoughtful analysis of targeting and LOAC, one must set aside the notion that there is a universal sense of fair play and decency innate to states at war. However noble the ideal, it also presents a paradox when the subject of collateral damage is introduced. These notions create a false sense of superiority and principle that encourage attack from adversaries. The question that requires thoughtful consideration is in whose interest the laws of warfare are developed? Further, to what extent do states manipulate or violate the rules to gain a strategic advantage?

Like many areas of international law, LOAC has been defined by states with the most influence, and by those states with the ability and the interest to enforce it.²⁴² If international law is not enforced, persistent violations can

²⁴¹ David Filipov, *Westerners Taking on Role of ‘Human Shields,’* BOSTON GLOBE, Feb. 27, 2003, at A-22.

²⁴² When addressing the subject of collateral damage to Secretary of State Henry Kissinger during the Vietnam War, President Richard Nixon stated: “You’re so goddamned concerned about the civilians, and I don’t give a damn. I don’t care.” Brian Braiker, *The Best of the Nixon Years: Newly Released Documents From Henry Kissinger’s Time at the White House*

conceivably be adopted as customary practice, permitting conduct that was once prohibited.²⁴³ A rationalist approach to international law suggests compliance is largely achieved through perceived mutual benefit. Cooperation among states can be sustained as long as it is in their interest to do so.²⁴⁴ Failure to comply with obligations under international law are traditionally countered with distrust, cultural and social alienation, economic sanction, political estrangement, and in extreme cases, war. In the end, international law is only as strong as the state willing to defend it. States defending it have a political interest to do so, and it is selectively defended according to that interest. For example, U.S. political objectives presented an interest to enforce international peace agreements and prevent genocide in Kosovo²⁴⁵ that did not exist for the U.S. in Rwanda where 500,000 to 800,000 Tutsi tribesmen, nearly all civilians, were slaughtered by Hutus in 1994.²⁴⁶ The necessity of

Supplement an Already Rich Record of Tidbits about the 37th President, NEWSWEEK, (May 27, 2004) at <http://www.msnbc.msn.com/id/5079259/site/newsweek/> (last visited Jun. 22, 2004). In the context of a decision to forbid a number of allied countries from bidding on U.S. reconstruction contracts abroad, President Bush was informed that Prime Minister Schroeder believed the decision might violate international law. In response, “the President responded with a sarcastic gibe: ‘International law? I better call my lawyer.’” Editorial, Boomerang Diplomacy, WASH. POST, Dec. 12, 2003, at A-36.

²⁴³ Professor Michael J. Glennon of the Fletcher School of Law & Diplomacy explains:

Massive violation of a treaty by numerous states over a prolonged period can be seen as casting that treaty into desuetude, as transforming its provisions to paper rules that are no longer binding. Or those violations can be regarded as subsequent custom that creates new law, supplanting the old treaty norms and permitting conduct that was once a violation. Or state practice can be considered to have created a non-liquet, to have thrown the law into a state of confusion where legal rules are not clear and where no authoritative answer is possible. It makes no practical difference which analytic framework is applied. The “default position” of international law has long been that when no restriction can be authoritatively established, a state is seen as free to act.

Michael J. Glennon, *The U.N. Security Council in a Unipolar World*, VIRGINIA J. INT’L L. 98 (Fall, 2003).

²⁴⁴ For a discussion of the rationalist approach to compliance with international law, see, e.g., John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139, 142-47 (1996); Kenneth W. Abbott, *Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT’L L.J. 1(1993); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989).

²⁴⁵ See *supra* note 165 and accompanying text.

²⁴⁶ Although the U.S. was disturbed by the atrocities in Rwanda, and attempted to negotiate reforms for multi-lateral peace operations, relatively little U.S. military support was offered to end hostilities and protect the civilian population from genocidal activity. U.S. Dep’t. of State, White Paper, *The Clinton Administration’s Policy on Reforming Multi-National Peace Operations* (May, 1994).

international law, however, is also made evident by these same events, and by strategists like Douhet, who openly advocated opening the wrath of war on the civilian population.²⁴⁷

Generally, international law in the form of treaties or other international agreements is binding only on the states that enter into them.²⁴⁸ Customary international law is generally binding on all states regardless of agreement or objection because custom emanates from universal norms of behavior among states.²⁴⁹ Custom is also like natural law in the sense that certain acts are so fundamentally and morally wrong that it is presumably understood universally without codification. After WWII, the International Law Commission of the United Nations established principles common to all states that were derived from custom. The basic text of the document establishes that anyone committing an act which constitutes a crime under international law may be punished regardless if the individual has acted appropriately under their domestic laws or was acting under the authority of their state government.²⁵⁰

²⁴⁷ DOUHET, *supra* note 40, at 189.

²⁴⁸ See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 26, 29 & 34–38, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969). A treaty does not create obligations or rights for a third state without its consent, but nothing precludes a rule in a treaty from becoming binding upon a third state as a customary rule of international law. *Id.* at art. 38.

²⁴⁹ *Id.*

²⁵⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Jan. 25, 1974, 13 I.L.M. 540; Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal (1950) 2 Y.B. Int'l L. Comm'n 374, 377, U.N. Doc. A/CN.4/SER.A/1950/Add.1:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefore and liable [for] punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

(a) *Crimes against peace*: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements

The International Law Commission also maintained that basic rights and responsibilities are inherent to the maintenance of world order. In their Draft Declaration on Rights and Duties of States, the Commission wrote that states have the duty to “refrain from the threat or use of force against the territorial integrity or political independence of another State in any other manner inconsistent with international law and order.” Further, “Every State has the right of individual or collective self-defense against an armed attack.”²⁵¹

or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War Crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime. *Id.*

²⁵¹ Draft Declaration on Rights and Duties of States, Report of the International Law Commission Covering its First Session (12 Apr.–9 Jun., 1949) U.N. GAOR, 4th Sess., Supp. No. 10 (A/925):

Whereas the States of the world form a community governed by international law,

Whereas the progressive development of international law requires effective organization of the community of States,

Whereas a great majority of the States of the world have accordingly established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order,

Whereas a primary purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose, and

Whereas it is therefore desirable to formulate certain basic rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations,

The General Assembly of the United Nations adopts and proclaims this Declaration on Rights and Duties of States:

Article 1. Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.

Article 2. Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.

Article 3. Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

Combined with the 1945 U.N. charter, these instruments demonstrate an attempt to establish a minimum set of rules applicable to all states, including in warfare.

The U.N. attempted to specifically codify the protection of civilians in the Geneva Conventions of 1949. The devastating aftermath of WWII on civilians demanded that the international community develop universally acceptable principles for the protection of civilians. Protocols I and II of the Geneva Conventions provide the most modern and comprehensive protection.²⁵² However, the popularity of the Protocols in the international community was initially mixed. Consistent with a rationalist theory of what compels states to cooperate, the Protocols did not provide mutual benefits to all concerned. Differing agendas of the states present at the conventions resulted in differing interpretations and objections that have relevance today. During negotiations, under-developed states recognized the superior capabilities of western defense

Article 4. Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

Article 5. Every State has the right to equality in law with every other State.

Article 6. Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

Article 7. Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.

Article 8. Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 9. Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State in any other manner inconsistent with international law and order.

Article 10. Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 9, or against which the United Nations is taking preventive or enforcement action.

Article 11. Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9.

Article 12. Every State has the right of individual or collective self-defense against armed attack.

Article 13. Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

Article 14. Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

Id.

²⁵² See generally Protocols I & II, *supra* note 10.

technology and argued for restrictions.²⁵³ Attempts by weaker states to negotiate restrictions on states with superior defense technology is one effective method to level the playing field for potential adversaries. Conversely, superior states seek to compel compliance with LOAC principles, restricting a weaker state's ability to wage war.

The Supreme Court articulated the U.S. resolve to enforce LOAC against U.S. adversaries as early as WWII. In February, 1946 General Douglas MacArthur affirmed the death sentence imposed on Japanese General Tomayuki Yamashita by a U.S. military commission prosecuting him for war crimes in the Philippines. His crimes included the murder of 8,000 civilians and rape of 500 women over a two-week period.²⁵⁴ Yamashita appealed the conviction to the U.S. Supreme Court on the basis that he did not personally commit the crimes, did not order them, and generally was not aware of them.²⁵⁵ It was not alleged by the prosecution that Yamashita had knowledge or ordered the crimes, nor was it a requirement for conviction.²⁵⁶ The Supreme Court denied the petition, explaining there was no error in the tribunal's judgment. The Court reasoned that Yamashita could or should have known about the atrocities committed by his subordinates.²⁵⁷ "These [law of war] provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian

²⁵³ In his statement concerning the Geneva Convention, Ambassador George H. Aldrich stated:

Some countries have been led by their experience, geography, industrial development, and other factors to invest in and rely on certain weapons for their military forces, and other countries have been led to invest in and rely on other weapons. All of these differences, and others, continue to produce profoundly different views of both priorities and possibilities in the development of legal restraints on the means and methods of warfare.

U.S. Dep't of State, Report of the U.S. Delegation to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 54 (1972). Of the 191 members of the United Nations, 191 are party to the Geneva Conventions of 1949, 161 are party to Protocol I and 156 are party to Protocol II. Data accurate as of January 27, 2004. ICRC, States Party to the Geneva Conventions and their Additional Protocols: Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpaList74/77EA1BDEE20B4CCDC1256B6600595596> (last visited Jan. 27, 2004).

²⁵⁴ *In re Yamashita*, 327 U.S. 1 (1946).

²⁵⁵ *Id.*

²⁵⁶ William H. Parks, *Criminal Responsibility for War Crimes*, 62 MIL. L. REV. 1, 23–24 (1973). Parks argues that evidence in the record of trial indicates Yamashita ordered the summary execution of 2,000 people. *Id.* at 27 n. 92.

²⁵⁷ *In re Yamashita*, 327 U.S.1, 16.

population.”²⁵⁸ Although the court carefully avoided application or mention of a standard of strict liability, a review of the decision suggests it would be difficult to reach a finding of guilt without it. The Court summarized U.S. determination to enforce LOAC against U.S. adversaries as follows:

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin, supra*, 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. See *United States v. Anderson*, 9 Wall. 56, 70; *The Protector*, 12 Wall. 700, 702; *McElrath v. United States*, 102 U.S. 426, 438; *Kahn v. Anderson*, 255 U.S. 1, 9-10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See *Stewart v. Kahn*, 11 Wall. 493, 507.²⁵⁹

In sharp contrast to the Yamashita case, U.S. First Lieutenant William Calley was convicted of the premeditated murder of twenty-two infants, children, women, and elderly men, and the assault with intent to murder a child of approximately two years of age.²⁶⁰ The crimes took place on March 16, 1968 in the South Vietnamese village of May Lai.²⁶¹ Testimony provided by witnesses and circumstantial evidence also suggested his immediate commanding officer, Captain Ernest Medina, also failed in his command responsibility:

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 12.

²⁶⁰ *United States v. Calley*, 22 U.S.C.M.A. 534 (1973).

²⁶¹ *Id.* at 536.

He instructed his troops that they were to destroy the village by “burning the hootches, to kill the livestock, to close the wells and to destroy the food crops.” Asked if women and children were to be killed, Medina said he replied in the negative, adding that, “You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense.” However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing—men, women, children, and animals—and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages enroute to their final objective. Other witnesses gave more or less support to both versions of the briefing.²⁶²

Communication between the officers involved, as well as witness statements from the trial, indicates Medina *may have* given orders to commit war crimes. A more conservative analysis suggests Medina had or could have had at least some knowledge of Calley’s crimes because he was in close enough proximity to the village to hear small arms in the battle space, knew the My Lai village was not contested by the Vietcong, and had regular communication with Calley.²⁶³ In spite of this evidence, Medina was acquitted of charges that he failed to exercise command responsibility.²⁶⁴ A comparison of the legal standard applied in the *Yamashita* case with that in *Calley* indicates divergent and different applications of the same law. No knowledge was required for the conviction and subsequent execution in *Yamashita*, while knowledge was specifically required to obtain a conviction of Medina.²⁶⁵ The failure to apply a near strict liability standard against an

²⁶² *Id.* at 538.

²⁶³ *Id.* See also Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea For a Workable Standard*, 97 MIL. L. REV. 1, 12 (Summer, 1982).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 15. Citing Instructions to the Court Members, United States v. Medina, Appellate Exhibit XCIII, 18.

INSTRUCTION: In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. *Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure*

enemy commander, but require actual knowledge in cases involving U.S. commanders, illustrates international legal standards favor, and are a function of the state enforcing them. The elements of criminal liability under the current command responsibility doctrine are: 1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; 2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts that violate the law of war; and 3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.²⁶⁶ The current

compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act (emphasis added).

A Senate report describing Yamashita's holding states that the Supreme Court found a foreign general "responsible for a pervasive pattern of war crimes (1) committed by his officers when (2) he knew or should have known they were going on but (3) failed to prevent or punish them." *In re Yamashita*, *supra* note 254 at 10, *citing* S. Rep. No. 102-249, at 9 (1991). The International Criminal Tribunals for the Former Yugoslavia and Rwanda have statutes containing substantively similar language for imposing commander responsibility. "The fact that any of the acts referred to in article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808, art. 7(3) (1993), *annexed to Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 & Add. 1 (1993). "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, art. 6(3) (1994).

²⁶⁶ *Ford v. Garcia*, 289 F.3d 1283, 1288 (2002). *Compare*, The Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute], art. 28:

Responsibility of commanders and other superiors In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (b)

U.S. command responsibility doctrine is similar in many ways to the doctrine applied in *Yamashita*.

B. Application of the Law of Armed Conflict to Non-State Adversaries

The application of international law to non-state adversaries is problematic, and in most cases inappropriate. Non-state actors can be broken into two separate groups: 1) non-state actors who are part of a wholly internal civil conflict where the state's self determination is at issue; and 2) *hostes humani generis*, otherwise known as the common enemies of humankind. The popular phrase "one person's terrorist is another's freedom fighter" helps make a relevant distinction. Article 3 of the 1949 Geneva Convention provides humanitarian protections to non-state combatants when participating in an internal armed insurgency without questioning the motive or method of the insurgents.²⁶⁷ The parties to the insurgency are also encouraged to enter into special domestic agreements adopting all the other provisions of the Convention.²⁶⁸ Applicability of LOAC to non-state actors is complicated by the fact that these actors are not otherwise bound in any way by international law or custom.

The second group of non-state actors, *hostes humani generis*, includes actors who have no formal state alignment, and whose acts are generally considered criminal to the international community. Since private warfare violates even the earliest principles of international law,²⁶⁹ the international

With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

²⁶⁷ See The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 75, at art. 3.

²⁶⁸ *Id.*

²⁶⁹ See, e.g., early Greek normative rules of warfare, *supra* note 7. EMMERICH DE VATTTEL, THE LAW OF NATIONS, BOOK III, OF WAR, CHAP. IV. OF THE DECLARATION OF WAR—AND OF WAR IN DUE FORM, § 4 (1758) ("It would be too dangerous to allow every citizen the liberty of doing himself justice against foreigners Thus the sovereign power alone is possessed of authority to make war."); LIEBER, *supra* note 21, at art. 82:

Men . . . who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without

community is obliged to destroy the threat of *hostes humani generis* where it exists to maintain international order.²⁷⁰ This is particularly true where terrorism is concerned. The U.N. has promulgated specific language to deny sanctuary and eliminate terrorist groups wherever they exist.²⁷¹ Although state-sponsored terrorism is a significant and constantly emerging threat, these groups do not enjoy the protections or benefits of international law regardless of their state sponsorship.

IV. INTERNATIONAL CRIMES INVOLVING COLLATERAL DAMAGE

“The nation that draws too great a distinction between its scholars and its warriors will have its thinking done by cowards and its fighting done by fools.”

Thucydides

Until the creation of the International Criminal Court (ICC) in 1998 at the Hague, Netherlands,²⁷² war crimes were traditionally prosecuted in tribunals assembled at the end of a conflict.²⁷³ States may also independently prosecute their service members for war crimes under individual military criminal codes like the U.S. Uniform Code of Military Justice. Although the ICC is fully

being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

Id.

²⁷⁰ Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18 at 339, U.N. Doc. A/8018 (1970) (establishing the requirement that every State has a duty to deter terrorists from organizing, instigating, assisting or participating in terrorist acts in another state, or acquiescing in organized activities within its territory directed towards the commission of such acts); G.A. Resolution 2131, U.N. GAOR, 20th Sess., Supp. No. 14 at 107, U.N. Doc. A/6221 (1965); G.A. Res. 40/61, U.N. Doc No A/RES/40/61 (1985); S.C. Res. No 748, U.N. Doc No. S/RES/748 (1992).

²⁷¹ *Id.*

²⁷² See e.g., Rome Statute, *supra* note 266.

²⁷³ See e.g., Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *supra* note 73; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808, at. 1 (1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, art. 1 (1994).

functional, tribunals and military criminal courts are still legitimate forums to prosecute LOAC crimes.

Claims for war crimes have customarily arisen from those states participating in the conflict; however the range of potential claimants seeking redress and influence over LOAC is expanding. For example, families of victims of the SRT attack in Belgrade during OAF attempted to recover monetary damages from the allied attack.²⁷⁴ HRW and Amnesty International alleged the attack was a violation of LOAC and should be prosecuted as a war crime.²⁷⁵ The Prosecutor for the ICTY considered reports from both Amnesty International and HRW when determining if indictments were appropriate against NATO for targeting practices in OAF.²⁷⁶ A group of European law professors independently investigated British and U.S. use of cluster munitions in OIF that resulted in collateral damage at al-Hilla on April 1, 2003, the destruction of al-Jazeera television station on April 8, and a marketplace bombing on April 28. The group referred the report to the ICC for potential prosecution.²⁷⁷ These examples suggest individuals, NGOs and humanitarian interest groups seek to influence the ICC and promote restrictive interpretations of LOAC, and particularly Article 52(2) of Protocol I. States attempting to subvert LOAC policies and interpretive legal rulings may also be able to obtain a strategic advantage by supporting legal or political restraint of

²⁷⁴ Serb families attempted to sue seventeen countries over NATO's bombing of the Serbian Radio and Television Headquarters. Penny Lewis, *Do Civilian Casualties of War Have Any Rights?* LONDON TIMES, Aug. 8, 2000, at Features Section.

²⁷⁵ Amnesty International accused NATO forces of violating the laws of war. "The April 23, 1999 bombing of the headquarters of Serbian state radio and television, which left 16 civilians dead, was a deliberate attack on a civilian object and as such constitutes a war crime." Richard Norton-Taylor, *Revealed: How War in Kosovo Exposed Weaknesses in Britain's Armed Forces: MoD Failed with Resources and Hid Cost of Conflict, Says Watchdog*, LONDON GUARDIAN, Jun. 6, 2000, at Home Pages, p. 5. See also notes 184–187 and accompanying text for further accusations of war crimes in OAF.

²⁷⁶ See INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *supra* note 190 at par. 6, 39 I.L.M. at 1258.

²⁷⁷ British use of cluster bombs in OIF is an alleged war crime. Special interest groups like Peacerights recommend further investigation by the ICC for prosecution. Seven legal specialists from Britain, Ireland, France and Canada interviewed eyewitnesses and examined evidence to see if there was a case for referring British conduct to the court. "There is a considerable amount of evidence of disproportionate use of force causing civilian casualties," said Professor Bill Bowring of London Metropolitan University. "The U.S. cannot be tried before the court because it refuses to sign up to it. The UK did." Peter Apps, *UK Cluster Bombs May be War Crime*, (Jan. 21, 2004) at <http://www.reuters.co.uk/newsPackageArticle.jhtml?type=topNews&storyID=442590§ion=news> (last visited Apr. 1, 2004); Tosin Sulaiman, *Group Investigating Whether U.S., British Troops Committed War Crimes*, KNIGHT-RIDDER WASH. BUREAU, Apr. 24, 2003, KR-ACC-No. K6299.

military operations.²⁷⁸ Although the ICC has not adjudicated a case concerning collateral damage as of the date of this study, it has drafted and codified expansive jurisdiction over the “War Crime of Excessive Incidental Death, Injury, or Damage.”

A. International Criminal Court Jurisdiction

In order to properly prosecute pursuant to the Rome Statute for the International Criminal Court (Rome Statute), the ICC must have both personal and subject matter jurisdiction. Personal jurisdiction refers to a court’s ability to exercise authority over the parties of a case. Subject matter jurisdiction refers to a court’s authority to adjudicate a particular type of case. The ICC has personal jurisdiction over individuals who meet any of three criteria.²⁷⁹ First, the court has jurisdiction over nationals of an ICC party state.²⁸⁰ Second, the court has jurisdiction over an act by any individual, including nationals of non-party states, if that act was committed in a party state.²⁸¹ Third, the court has jurisdiction over an act by any individual, including nationals of non-party states, if the act was committed in a non-party state and the non-party state requests that the court take jurisdiction of the matter.²⁸²

The ICC cannot assert jurisdiction over U.S. military members under the first criterion since the U.S. is not a party state to the Rome Statute;²⁸³ however, both the second and third criteria may grant the court jurisdiction over U.S. military personnel. If the U.S. conducts an operation of any kind in a party state, the ICC would have jurisdiction over criminal matters associated with the operation. Similarly, if the U.S. conducts operations in a non-party state, that state could request the ICC to exercise jurisdiction over U.S. actions. As a practical matter, the U.S. has entered into separate international agreements, commonly referred to as Article 98 Agreements, with various

²⁷⁸ Al Santoli described “international law warfare” as a state’s deceptive participation in “international or multinational organizations in order to subvert their policies and the interpretation of legal rulings.” See introduction by AL SANTOLI in LIANG & XIANSUI, *infra* note 412 and accompanying text for a discussion of Chinese perceptions of LOAC. Brig Gen Charlie Dunlap describes the strategy of using law as a means to limit strategy as “lawfare.” Dunlap, *Brief on Air and Information Operations: A Perspective on the Rise of “Lawfare” in Modern Conflicts*, presented at the Naval War College (Jun., 2003).

²⁷⁹ The Rome Statute, *supra* note 266, at art. 12.

²⁸⁰ *Id.* at art. 12(2)(b).

²⁸¹ *Id.* at art. 12(2)(a).

²⁸² *Id.* at art. 12(3).

²⁸³ ICRC, *Treaties of International Humanitarian Law and States Parties: State Parties & Signatories By Treaty*, <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=53.1.96&Count=150&Expand=53.2#53.2> (last visited Apr. 15, 2004).

states to refuse cooperation with ICC jurisdiction in those areas where it conducts operations.²⁸⁴

The court's jurisdiction is limited by the principle of complementarity, which mandates that the ICC cannot prosecute a case where jurisdiction is already asserted. In other words, if the U.S. or another state asserts jurisdiction over a war crime, then the ICC must defer adjudication to that state.²⁸⁵ The ICC must also defer where a state investigates a war crime and determines prosecution is inappropriate.²⁸⁶ This rule has an exception. The ICC is not required to defer to another state if the state is either "unwilling or unable genuinely" to investigate or prosecute.²⁸⁷ In evaluating a state's unwillingness, the court will consider whether the purpose of a state's proceedings regarding a war crime is to shield the individual from criminal liability, whether there is unjustifiable delay in prosecution or investigation,

²⁸⁴ The Rome Statute allows states to enter into international agreements that waive ICC jurisdiction. Article 98 states:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Rome Statute, *supra* note 266, at art. 98.

²⁸⁵ Rome Statute, *supra* note 266, at art. 17. U.S. commanders are more appropriately prosecuted under applicable provisions of the Uniform Code of Military Justice [hereinafter UCMJ] for war crimes. The UCMJ, however, is limited in the ability to assert jurisdiction over foreign military nationals suspected of war crimes. A court-martial convened under the UCMJ has jurisdiction to try a foreign enemy combatant only if the individual has been granted prisoner of war [hereinafter POW] status. To obtain POW status, the individual must be sufficiently aligned to a state. *See* notes 196–198 and accompanying text for criteria to qualify as a POW. POWs may only be tried and sentenced in a U.S. forum that is substantially equivalent to the proceedings and rights provided to members of the armed forces of the detaining power. *See* Geneva Convention III, *supra* note 198, at arts. 84, 87, 88, 95, 100, 102, 103, 106, & 108. Although this would normally be a court-martial, a military commission that provides similar rights and proceedings to a court-martial would also satisfy the requirement. Individuals that lack POW status like terrorists or non-combatants are subject to military commissions, tribunals or other venues established by the capturing state. These types of non-state actors are prosecuted under U.S. jurisdiction pursuant to UCMJ art. 2(a)(9)(2002). The U.S. may also exercise jurisdiction in U.S. District Courts pursuant to 18 U.S.C. §2441 (2004) over individuals committing war crimes pursuant to the U.S. War Crimes Act of 1996, 18 U.S.C. §2441 (2004).

²⁸⁶ Rome Statute, *supra* note 266, at art. 17.

²⁸⁷ *Id.*

and whether the proceedings are being conducted independently and impartially. Thus, the ICC will decide whether a state's investigation into a crime is sufficient to preclude the ICC from asserting jurisdiction.²⁸⁸

Also posturing the ICC's jurisdiction and authority over war crimes is the principle of insularity. The ICC is the sole arbiter of its jurisdiction and of any challenges to the propriety of its legal decisions. Article 19, paragraph 1 empowers the ICC alone to resolve all judicial decisions, including decisions relating to jurisdiction, the application of complementarity, and actions that constitute a crime.²⁸⁹ The court also has an appeals process that is exclusive and internal to the ICC. Thus, the ICC alone decides whether a crime was committed, what actions are sufficient to constitute a crime, and whether a state's actions are sufficient to invoke the principle of complementarity and preclude the court from exercising its jurisdiction.²⁹⁰ The Rome Statute permits the Security Council to order the ICC, through a resolution adopted under Chapter VII of the U.N. Charter, to defer a prosecution or investigation for a twelve month period; but absent such a resolution, the ICC would be free to proceed.²⁹¹ The breadth of the Rome Statute's provisions grants the ICC sufficiently broad authority to permit jurisdiction while ensuring rulings cannot be appealed to any outside legal forum.

B. Collateral Damage as a War Crime at the International Criminal Court

The ICC has subject matter jurisdiction over crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.²⁹² The category of

²⁸⁸ *Id.* at art. 17(1).

²⁸⁹ *Id.* at art. 19

²⁹⁰ *Id.*

²⁹¹ *Id.* at art. 16.

²⁹² *Id.* at art. 5(1). The crime of aggression has not yet been defined and currently is outside the court's jurisdiction. *Id.* at art. 5(2). Once a definition for the crime of aggression is adopted in accordance with the requirements of the Rome Statute, the court will be able to exercise jurisdiction over such acts. *Id.* Defining aggression suffers from several problems. First, aggression has never been defined in any multilateral treaty. Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute for an International Criminal Court, U.N. GAOR, 49th Sess., Supp. No. 10, at 72, art. 20(b), U.N. Doc. A/49/10 (1994). Second, there does not exist a commonly accepted definition of aggression. David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 265 (1999). Third, historically, aggression has been considered to be a crime of a state, not of an individual. *Id.* Fourth, the crime of aggression equates to finding that there has been an illegal breach of the peace. Under the U.N. Charter, the Security Council has the power to determine whether an act constitutes a breach of the peace, and there is a reluctance to give that power to the ICC. Depending on the conditions by which the court could take jurisdiction over the crime of aggression, prosecutions could be brought without the Security Council

war crimes is the most relevant to incidents of collateral damage. The war crimes category contains fifty separate criminal acts.²⁹³ Many crimes described in the Rome Statute are identical or similar to provisions found in other widely accepted international conventions, such as the 1949 Geneva Conventions.²⁹⁴ The Rome Statute proscribes that war crimes that are not identical or substantially similar to provisions in other international agreements and conventions emanate from “the established framework of international law.”²⁹⁵ However, the ICC has been criticized for modifying some well-established criminal definitions and adding other crimes where there is no real consensus in the international community. Accused of advancing a political agenda, the ICC has adopted criminal provisions for acts that are not clearly criminal under current international law.²⁹⁶ The criminal provision regarding the principle of proportionality is sufficiently vague to allow, and perhaps even invite, prosecutions for almost any collateral damage incident. Article 8, paragraph 2(b)(iv) states it is a crime if an individual “Intentionally launch[es] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”²⁹⁷

having found that an anticipatory attack constituted a breach of the peace. Thus, the ICC could find that an anticipatory attack was an illegal act and a breach of the peace even though the Security Council declined to do so. In the face of these problems, a working group on defining aggression is attempting to find a solution. See, Daryl A. Mundis, *Current Development: The Assembly of States Parties and the Institutional Framework of the International Criminal Court*, 97 AM. J. INT’L L. 132 (2003); Silvia A. Fernandez de Gurmendi, *Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT’L L.J. 589 (2002).

²⁹³ Rome Statute, *supra* note 266, at art. 8.

²⁹⁴ Examples of war crimes included in the Rome Statute that are derived from previous conventions include the willful killing, torture, or taking of hostages. *Id.* at art. 8(2)(a).

²⁹⁵ *Id.* at art. 8(2)(b).

²⁹⁶ See, e.g., *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 233 (1999) (Professor Halberstam argues that the Rome Statute alters well established definitions of crimes, adds new crimes, and is being used for political purposes).

²⁹⁷ The text of the elements of a crime of Article 8(2)(b)(iv), War Crime of Excessive Incidental Death, Injury, or Damage:

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in

A close analysis requires that a crime be separated into individual elements:²⁹⁸ 1) the perpetrator launched an attack; 2) the attack was such that it would cause incidental death or injury to civilians, damage civilian objects or cause widespread, long-term and severe damage to the natural environment; 3) the perpetrator knew that the attack would result in excessive collateral damage; and 4) the attack was such that the extent of the collateral damage would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.²⁹⁹ In any war, it is likely that a great number of attacks would easily meet the first, second, and third elements. Many attacks are launched with the knowledge that they will result in some civilian casualties. Whether such acts are criminal depends on the fourth element. The fourth element hinges on the familiar principle of proportionality. What value is placed on collateral damage in comparison to the value placed on the military advantage achieved.³⁰⁰ Further, the question is whether the former was “clearly excessive” in relation to the latter. An analysis on this subject inevitably becomes subjective and provokes a discussion of “value judgment.”

The third and fourth elements require that the defendant know the collateral damage is clearly excessive in relation to the concrete and direct military advantage achieved. This element may provide a defendant with some

relation to the concrete and direct overall military advantage anticipated. 4. The conduct took place in the context of and was associated with an international armed conflict. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Rome Statute, *supra* note 266, at art. 8(2)(b)(iv). Compare definition of proportionality provide by Protocol I, art 51(5)(b) at note 122 and accompanying text.

²⁹⁸ The Assembly of State Parties of the ICC drafted elements of crimes to assist the court in interpreting the Rome Statute’s provisions. See Assembly of State Parties to the Rome Statute of the International Criminal Court, First session, Official Records, U.N. Doc ICC-ASP/1/3, at 112 (2002) [hereinafter Elements of Crimes].

²⁹⁹ An example of the imprecision of the crime’s definition is that the elements do not explicitly require that the attack actually result in civilian casualties. Although the elements could reasonably be interpreted in such a way to require civilian deaths, poor drafting can result in different constructions of the provision and subject the language to challenge.

³⁰⁰ The ICC recognizes that incidental “injury” and “collateral damage” may occur to achieve a military advantage. However, the footnote excludes “incidental death.”

The expression “concrete and direct overall military advantage” refers to a military advantage *that is foreseeable by the perpetrator at the relevant time*. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict (emphasis added).

Elements of Crimes, *supra* notes 297–298, at 131 n. 36.

protection. A defendant would not be criminally liable if an attack was executed under the personal belief that any collateral damage was not excessive compared to the military objective achieved.³⁰¹ Under this interpretation, a defendant's culpability depends entirely and exclusively on that individual's own value judgment.³⁰² If the defendant believed the collateral damage was not excessive, then there could not be a finding of guilt.³⁰³ The court's own evaluation of the defendant's value judgment as to the excessive character of the damage is irrelevant.³⁰⁴ Defendants are able to make an independent value judgment that ultimately determines their own criminality and rewards willful ignorance.

This method of evaluating proportionality for criminality becomes problematic on a number of levels. Although the same discussion applies to damage to objects and the environment, the point is most poignantly and appropriately addressed in the context of the most important aspect of collateral damage, civilian casualties. The value of life ranges among individuals and cultures, making a value determination of civilian casualties compared to a military objective highly variable.³⁰⁵ The evaluation of proportionality and the practice of humanity are linked insofar as they are based on an individual's life experience, conscience, moral perspective, culture, spirituality, human condition, and resolve. Moreover, it must be measured on the basis of the defense technology available to a defendant and the circumstances present in the battle space. A defendant given the ability to make an independent value judgment under these circumstances inevitably leads to testimony that the collateral damage in any form is never excessive. Confronted with this dilemma, the ICC may attempt to apply a reasonableness standard to a defendant's value judgment that would also fail. For example, a military commander from a depressed, under-developed state with little access to the resources necessary to make the most prudent command decisions cannot be held to the same standard of reasonableness as commanders from highly advanced military states with extensive resources, information, technology, and high situational awareness of the battle space. Evaluating the actions of commanders from dissimilar states inevitably leads to a high degree

³⁰¹ Elements of Crimes, *supra* note 298, at 132 n. 37. "As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgment as described therein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time." *Id.*

³⁰² Michael Bothe, *War Crimes, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 379, 400 (Cassese et al. eds. 2002).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ For a discussion of how an individual's experience and condition effects LOAC, *see infra* notes 329-333 and accompanying text.

of discrimination, disparity, and variable definitions of reasonableness among states. Further, holding under-developed states to the standards of developed states perpetuates the belief that international law is a product of advanced, western states seeking to regulate conflict on western terms.³⁰⁶ Although the ICC appears to adopt this approach in the ICC Elements of Crimes, it is also free to disregard it. The Rome Statute states that the Elements of Crimes “shall assist” the court in applying the articles set forth in the various crimes.³⁰⁷ This language relegates the Elements of Crimes to be mere guidelines in interpreting the substantive provisions of war crimes.³⁰⁸ Thus, the judges in the ICC have substantial authority and discretion in determining what activities constitute a crime.

C. Economic Sanctions and Collateral Damage

Military strategy that targets centers of gravity valuable to an adversary has similarities to traditional diplomatic tools that leverage states to change behavior. For example, an economic embargo or sanctions can have similar effects to collateral damage. The effects can also create direct or indirect collateral damage in varying degrees. The severity of the collateral damage can be isolated or expansive, depending on the breadth of the sanctions and what sectors of an economy are targeted. Naturally, many products, markets and sectors of a state’s economy targeted for sanction are dual-use for both the military and civilian population. Similar to traditional military strategy, the effect of sanctions can be devastating, and even more fatal to a civilian population than warfare. The generally accepted purpose and emphasis of sanctions lies in modifying a state’s behavior.³⁰⁹ However, increased use of this method has also resulted in various shortcomings and problems traditionally encountered in warfare. Effectiveness depends on such factors as the policy goals set for the sanctions, criteria used to measure success, the economic condition of the target state, and the level and priority of economic relations with other states.³¹⁰ Similar to military strategy related to targeting civilian behavior, economic sanctions “theory” maintains that economic

³⁰⁶ See LIANG & XIANSUI, *infra* note 412 and accompanying text for a discussion of Chinese perceptions of LOAC.

³⁰⁷ Rome Statute, *supra* note 266, at art. 9.

³⁰⁸ Mauro Politi, *Elements of Crimes*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 302, at 447 (“[T]he elements are meant to be used by the judges as simple guidelines in reaching determinations as to individual criminal responsibility.”).

³⁰⁹ See, e.g., MARGARET P. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE (2d ed. 1996).

³¹⁰ See, e.g., DANIEL W. DREZNER, THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS (1999); GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED (2d ed. 1990).

pressure on a civilian population will translate into pressure on their leadership to change.³¹¹ However, the targeted leadership is often immune to these strategies by communicating messages to their civilian population that portray sanctions as retribution and punishment. Like a poorly planned military strategy, the result of poorly planned sanctions can result in the exact opposite effect intended—enhanced popular support for the leadership that was targeted.

It is incongruent that prudent military members are accountable for the loss of civilian life when seemingly well-intentioned diplomatic measures also result in significant collateral damage, including economic depression, excessive reduction in public health services, non-availability of food, water and basic infrastructure, and subsequent death. For example, the strategy to isolate Iraq's economy after the Persian Gulf War by embargo in 1991 resulted in the same devastating effects as collateral damage from military warfare.³¹² Although the embargo excluded food and medical supplies for humanitarian relief, the Iraqi population suffered a pervasive loss of water treatment, sewerage, electrical and telecommunication service, and a high reduction in the available food supply that was directly associated with the embargo.³¹³

Crimes before the ICC for collateral damage specifically require that the “conduct took place in the context of and was associated with an international armed conflict.”³¹⁴ Essentially, failures in diplomacy are exempt as international crimes regardless of their motive, means, intent, and severity. Failure to establish a fair and just standard, and to assert accountability for failed diplomatic strategies resulting in collateral damage, advocates inconsistent, flawed principles that discriminate against the international military community. Moreover, collateral damage as an international crime is left unchecked where diplomacy is concerned. It seems plausible, at the very least, that the same careful and detailed planning and proportionality analysis required to determine collateral damage for warfare should also be used when applying economic sanctions.

311 *Id.*

312 *See generally*, Sadruddin Aga Khan, Report to the Secretary General of the United Nations, *supra* note 160, at 13-15, and accompanying text for a discussion of the effects of U.N. economic sanctions of Iraq.

313 *Id.*

314 Elements of Crimes, *supra* notes 297–298, at art. 8(2)(b)(iv).

V. CONCEALMENT WARFARE AND THE LAW OF ARMED CONFLICT

Because of this the land mourns, and all who live in it waste away,
the beasts of the field and the birds of the air and the fish of the
sea are dying

Hosea 4:3

Part of the design of concealment warfare is to encourage a dilemma in the observation of LOAC's humanitarian principles. Adversaries exploit LOAC first by violating provisions prohibiting commingling among the civilian population. The dilemma in observing LOAC occurs when the fundamental premise to protect civilians in war is nullified because engagement of both civilians and an adversary is justified to achieve a military advantage pursuant to Article 52(2) of Protocol I. The adversary exploits LOAC again by accusing the attacker of violating humanitarian principles in LOAC to protect civilians. Strategically, the adversary exploits the loss of civilian life resulting from an attack that is otherwise justified.

A. Civilians in the Center of the Battle Space: The Blame Never Ends

The civilian population has often been subject to the perils of warfare.³¹⁵ Despite convenient or timely accusations against any one state for an incident of collateral damage, the only states in a probable position to maintain the moral high ground are those states that have never been to war. Ironically, some states attempting to draw attention to non-compliance with LOAC also have the worst records of human rights violations. In the Persian Gulf War, the Iraqi regime targeted the Israeli civilian population with Scud missiles,³¹⁶ and took Kuwaiti hostages for use as human shields.³¹⁷ The Government of Kuwait estimates that 1,082 civilians were murdered during the occupation, and many more were forcibly deported to Iraq and remain missing.³¹⁸ The Iraqi regime damaged or destroyed 590 Kuwaiti oil well heads, set 508 of them ablaze, and released seven to nine million barrels of oil into the Persian Gulf.³¹⁹ Similarly, Milosevic was unable to challenge superior coalition forces during war in the Balkans. As a result, he used terror tactics against Kosovar civilians, exploited efforts by NATO to minimize civilian casualties

³¹⁵ See *supra* notes 6-15 and accompanying text.

³¹⁶ Joseph P. Englehardt, LTC, USA, *Desert Shield and Desert Storm: A Chronology and Troop List for the 1990-1991 Persian Gulf Crisis* 52 (1991).

³¹⁷ PERSIAN GULF WAR FINAL REPORT, *supra* note 137, at app. O, 692-96.

³¹⁸ *Id.* at 714-15.

³¹⁹ *Id.* at 695, 714-15.

and collateral damage, triggered large movements of refugees to provoke a humanitarian crisis, and dispersed forces and equipment among the civilian communities they occupied.³²⁰

Although the incidence of collateral damage in U.S. combat operation has declined since World War II due to improved technology and strategy, the number of civilians killed in conflict has generally increased. The relationship between concealment warfare strategies and high numbers of civilian casualties generated is evident from conflicts in virtually every corner of the world from Cambodia and Uganda to Kosovo and Colombia.³²¹ The number

³²⁰ OAF AFTER ACTION REPORT, *supra* note 165, at Intro.-2.

³²¹ In 1936, Italy unsuccessfully attempted to coerce Ethiopian Emperor Haile Selassie to negotiate a surrender by bombing and spraying the Ethiopian population with mustard gas. When accompanied with ground assaults, the air attacks ultimately achieved surrender in May, 1936. During WWII in China, repeated Japanese air strikes against Chinese cities were designed to “create terror and excite antiwar sentiments.” ERNEST R. MAY, *LESSONS OF THE PAST* 135 (1973). In 1971, Idi Amin overthrew the government of Uganda, killing over 300,000 civilians in the process. DAVID W. ZIEGLER, *WAR, PEACE, AND INTERNATIONAL POLITICS* 95 (1984). In 1975, Cambodian leader Pol Pot embarked on a revolution to transform the country into an entirely rural and traditional Cambodian community. To promote his campaign, he ordered the execution of anyone with a western education or who adopted western ideals. An estimated 2 million people in a country populated by only seven million were killed in less than four years. U.S. CENTRAL INTELLIGENCE AGENCY, NATIONAL FOREIGN ASSESSMENT CENTER, *KAMPUSHEA: A DEMOGRAPHIC CATASTROPHE* (May, 1980). On August 29, 1990, Syria killed several dozen civilian Iraqi demonstrators supporting Iraq’s invasion of Kuwait. Englehardt, *supra* note 316, at 18. Philippine Armed Forces Southern Command sources said on November 27, 2001 that followers of Philippine Muslim insurgency leader Nur Misuari had taken fifty Christian Filipinos hostage as “human shields” in a firefight at a Philippine Government complex at Cabatangan. *Insurgent Conflict in Philippines Continues to Escalate*, DEFENSE & FOR. AFFAIRS DAILY, vol. XIX(187), Nov. 28, 2001. In Qasim Nagar, India, 27 were killed and at least 35 others wounded when militants dressed as Hindu sadhus (holy men) threw hand grenades and opened fire with automatic weapons on local residents. The victims were primarily Hindu women and children. Press Release, Amnesty International, India: Civilians Are Not Legitimate Targets, ASA 20/013/2002, News Service No. 121 (Jul. 15, 2002). For over a decade, Israel, Lebanon, Hizballah and Palestinian groups indiscriminately lobbed shells and fired rockets at civilian population centers during various stages of their conflict, causing civilian casualties and damage to residential homes and civilian infrastructure. HUMAN RIGHTS WATCH, *ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CIVILIANS*, Lib. of Cong. Control No. 2002114404, ISBN 1-56432-280-7 (2002). A single Israeli missile successfully targeting Hamas leader Salah Shehadeh on July 22 killed 15 Palestinian civilians. Israel came under strong international criticism for the deaths of the civilians in the attack. Robert Morton Klein, *No Questioning Legality of Israel’s Operation*, NEW JERSEY JEWISH NEWS, vol. LVI(31) p. 22, Aug. 1, 2002. More than 415 Israeli and other civilians were killed, and more than 2,000 injured, as a result of attacks by Palestinians suicide bombings between September 30, 2000 and August 31, 2002. Bombers traditionally pack explosives with nails and pieces of metal, then attempt detonation at high-density civilian locations. *Id.* Israel came under sharp criticism for an attack in Jenin where suspected Palestinian suicide bombers were launching attacks and killed 13 Israeli soldiers in an ambush. Israel launched missiles from helicopters and used armored bulldozers to destroy civilian houses, making 4,000 people homeless. Reports suggest Israeli soldiers executed one

of civilians killed in conflict since 1900 is estimated at 62.2 million compared to 43.9 million military personnel. Further, the incidence of civilian deaths has increased since the 1949 Geneva Conventions.³²² One explanation for this rising trend is that concealment warfare is the method of choice with higher frequency among adversaries. A subjective review of media and special

unarmed civilian and wounded an unarmed Palestinian prisoner. Additionally, Palestinian civilians were used as human shields—in one case forcing a father and son to remain in place for three hours as soldiers fired over their shoulders. Doctors and ambulances were prevented from entering the area for 11 days. At least 52 Palestinians were killed along with 23 Israeli soldiers. Twenty-seven of the 52 Palestinians were suspected members of armed Palestinian movements such as Islamic Jihad, Hamas and the Al Aqsa Martyrs Brigade. At least 22 civilian casualties included children, the physically disabled and elderly. Andrew Laxon, *Signs of Atrocities at Jenin Refugee Camp Piling Up*, NEW ZEALAND HERALD, May 6, 2002, at World Section. In Indonesia, bombings on October 12, 2002 killed 88 Australians among the 190 or more killed. Video footage of a Jemaah Islamiyah member indicated the bombings were targeted at Australia and Britain because they are close allies of the U.S. The attack was retaliation for “200,000 innocent men, women and children killed in Afghanistan” by the U.S. and its allies. *New Admissions by Terror Suspects Confirms That Australians Were Targeted in Bali*, DEFENSE & FOR. AFFAIRS DAILY, vol. XXI(20), Feb. 11, 2003. Fighting in Burundi on July 6, 2003 resulted in dozens of shells hitting the central market, bars, pharmacies, a bank and the central prison. At least two civilians were killed and ten detainees injured. Press Release, Amnesty International, Burundi: War on Civilians Demands Immediate Action, AFR 16/009/2003, News Service No. 170 (Jul. 15, 2003). In the city of Florencia, Colombia, 11 people died and more than 50 were injured when a motorcycle packed with explosives was detonated by remote control in a busy street. Press Release, Amnesty International, Colombia: Targeting Civilians is Unacceptable, AMR 23/064/2003, News Service No. 224 (Sep. 29, 2003). The disputed region of Kashmir has been the source of dozens of attacks on civilians resulting in hundreds of civilian casualties for both parties in the conflict. In Nadimarg village in the Indian state of Jammu, approximately 15 men wearing army fatigues disarmed police officers at a nearby police station and ordered villagers out of their homes. All 24 villagers were gathered and killed by gunfire. Press Release, Amnesty International, India/Kashmir: Safeguard the Lives of Civilians, ASA 20/013/2003, News Service No. 65 (Mar. 24, 2003). In Laos, thousands of predominantly Hmong ethnic minority members involved in an armed conflict with the Lao military were subject to starvation tactics. Approximately twenty rebel groups with their families were surrounded by Lao military who prevented them from foraging for the food they rely on to survive. Press Release, Amnesty International, Laos: Use of Starvation as a Weapon of War Against Civilians, ASA 26/013/2003, News Service No. 228 (Oct. 2, 2003). Attacks in Darfur, western Sudan, on civilians and civilian objects resulted in the death of hundreds of civilians and displacement of tens of thousands. The attacks were committed by “bandits,” armed militia or in the course of fighting between the Sudanese army and the Sudan Liberation Army. Press Release, Amnesty International, Sudan: Immediate Steps to Protect Civilians and Internally Displaced Persons in Darfur, AFR 54/079/2003, News Service No. 201 (Aug. 29, 2003).

³²² GEOFFREY PARKER, CAMBRIDGE ILLUSTRATED HISTORY OF WARFARE 369 (1995); see also, ERIC V. LARSON & BOGDAN SAVYCH, MISFORTUNES OF WAR: IMPACTS OF COLLATERAL DAMAGE INCIDENTS IN RECENT U.S. WARS 2-4 (Mar., 26 2004)(unpublished manuscript on file with the RAND Corporation and author). Ruth Sivard estimates 109.7 million people were killed from war between 1900 and 1995, including 62.2 million civilians and 43.9 million military. RUTH LEGER SIVARD, WORLD MILITARY AND SOCIAL EXPENDITURES 1996, 18-19 (16th ed. 1996).

interest group reporting suggests a similar conclusion—civilians and civilian objects account for the majority of deaths and destruction in 21st century warfare.³²³

Most easily achieved in an urban conflict scenario, placing the civilian population at the center of conflict creates a more favorable battle space, and a higher probability of survival for forces unable to engage under conventional terms. Minimizing collateral damage, while successfully engaging the adversary, is a dilemma common to any responsible state in modern war. However, there is a high degree of variance among states in their appreciation of civilian immunity and how it effects overall strategy. One goal of Soviet forces fighting in Afghanistan was inflicting “massive collateral damage to the civilian infrastructure rapidly in order to erode popular support.”³²⁴

The efforts of the Soviet and Afghan governments to keep Afghanistan socialist, and to impose on that society an ideology alien to its values and traditions has led to: the slaughter of an estimated 200,000 people; the destruction of entire villages; the systematic devastation of the countryside and the nation’s agriculture; a massive violation of human rights and the laws of war; and one of the largest refugee movements in history. Some four million Afghans have fled the country, about a quarter of the total population.³²⁵

In Chechnya, Russian forces were indifferent to enemy forces attempting to invite or fabricate collateral damage. When advancing on the city of Grozny in 1999, Russian forces were challenged by Mujahedin forces deployed in surrounding villages to attract Russian fire on the civilian population.³²⁶ When villagers protested, they were sometimes beaten or fired at by Mujahedin. Russian forces ignored the attempts to use the villages as a shield and directed “heavy fire—tube and rocket artillery as well as aerial bombing—in order to subdue the centers of resistance.”³²⁷ The number of civilian fatalities was estimated from hundreds to thousands in 1999.³²⁸

³²³ See *supra* note 321 and accompanying text.

³²⁴ *Afghanistan: The Soviet Air War*, DEFENSE & FOR. AFFAIRS STRAT. POLICY, Sept., 1985, at 12.

³²⁵ *Strategy ‘85 Conference Attracts Some 40 National Delegations*, DEFENSE & FOR. AFFAIRS STRAT. POLICY, Aug., 1985, at 2.

³²⁶ Yossef Bodansky, *Tinder Box in the Caucasus*, DEFENSE & FOR. AFFAIRS STRAT. POLICY, Apr., 2000, at 4.

³²⁷ *Id.*

³²⁸ *Id.* Reports from hospitals operating in the region indicate that many patients were landmine or ordnance victims, amounting to 66 killed and 166 injured in 2000 alone. *Id.*

B. An Illusive Moral High Ground

Weaker adversaries unable to directly challenge superior forces in the battle space will seek vulnerabilities that can be easily exploited. Concealment warfare as a sub-category of asymmetric warfare attempts to apply strategy where an adversary cannot effectively respond in kind. The simple application of concealment warfare tactics involves any employment of civilians and civilian objects in the battle space to achieve a strategic advantage. Principles of decency, morality, and humanity reflected in LOAC to protect the civilian population present attractive centers of gravity to exploit where concealment warfare is effectively employed. A state adopting a military doctrine consistent with LOAC must be prepared for adversaries to exploit this commitment to achieve a strategic advantage. In many respects, a state's value for LOAC and the humanitarian principles supporting it can be central to an adversary's success.

History would suggest the practice of sparing civilians in war occurs only on the basis of conscience, moral perspective, culture, spirituality, life experience, human condition and resolve. These qualities are highly divergent among individuals in the same community let alone among adversarial states. As a result, one state's centric ideal of what is ethical and humane in the battle space is subject to question and exploitation by another, regardless of what may be dictated in LOAC. For example, asymmetric tactics labeled "terrorism" by western society must be impartially studied through the eyes of an adversary to see the conventional wisdom of their methods, how they produce successful results, and why it is a highly preferred practice among adversaries. In comparison, regardless of any principle of law, custom or sense of morality, western warfare doctrine principally emanates from the achievement of political and strategic goals.³²⁹ Even the U.S. is postured to exercise the employment of nuclear weapons again if necessary.³³⁰ Although committed to use these weapons in accordance with LOAC, it is the best example that even the most powerful of states with the loftiest of principles is

³²⁹ VON CLAUSEWITZ *supra* note 3 at 75. Commenting on the Iraqi Regime's resolve to survive, Vice President Taha Yassin Ramadan threatened, "We will use any means to kill our enemy in our land, and we will follow the enemy into its land." Press Release, Amnesty International, Iraq: Soldiers' Surprise Likely to Rebound on Civilians, News Service No: 075 (Apr. 1, 2003), Cheadle, *supra* note 231, at B-2.

³³⁰ See *e.g.*, JOINT CHIEFS OF STAFF, JOINT PUB. 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS (Dec. 15, 1995). "Collateral Damage. U.S. forces will limit collateral damage consistent with employment purposes and desired effect on the target." *Id.* at II-6.

prepared to exercise extreme measures to achieve strategic ends.³³¹ Adversaries seeking only to survive are equally likely to resort to any method of war, including the use of their civilian populations, to achieve a strategic advantage. Historically, there is no precedent that parties to a conflict play by the rules. Very simply, states will resort to any method of attack or defense available to them, however extreme, to achieve strategic goals or merely to survive.

The rules of war largely created by western society over generations of conflict have resulted in a false sense of principle and moral superiority that translates into a key center of gravity for adversaries to exploit. The more effort made to comply with LOAC's principles and to achieve the moral high ground, the greater the strategic advantage to potential adversaries. Strict compliance with LOAC fosters highly predictable military doctrine, strategy, operations and tactics. U.S. force structure and strategy is largely defined and influenced by LOAC. In contrast, adversaries operating unrestricted by LOAC gain a strategic advantage over states that value compliance with LOAC. Adversaries deriving little or no benefit from LOAC seek to provoke a conflict that challenges its principles, assails moral uncertainty, and exploits public sympathy. This strategy affords the most convenient, efficient and assured method of success. Concealment warfare challenges western strategy, technology, ideology, morality and resolve. The basic strategy is that one party fights by the rules while another does not. Moreover, a state's value and compliance with LOAC is essential to the effective execution of an adversary's strategy to exploit it. As adversaries employ concealment warfare with greater frequency, the incidence of civilian casualties will rise as a result of prudent command decisions consistent with LOAC.³³²

³³¹ Edinburgh Resolution of the Institute of International Law, On the Distinction Between Military Objectives and Nonmilitary Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 66 A.J.I.L. 470-71 (1972).

³³² Article 48 of Protocol I requires commanders to distinguish military personnel from civilians, and military objects from civilian objects. As a practical matter, however, the majority of responsibility to minimize collateral damage must remain with the adversary who governs the civilian population and controls the military. The most effective method to ensure the protection of a civilian population and civilian objects is the comprehensive, regulated and careful separation of military personnel from civilians, and military objects from civilian objects, pursuant to Articles 51(7) and 58 of Protocol I. Unfortunately, the violation of these requirements are central to the execution of concealment warfare strategy.

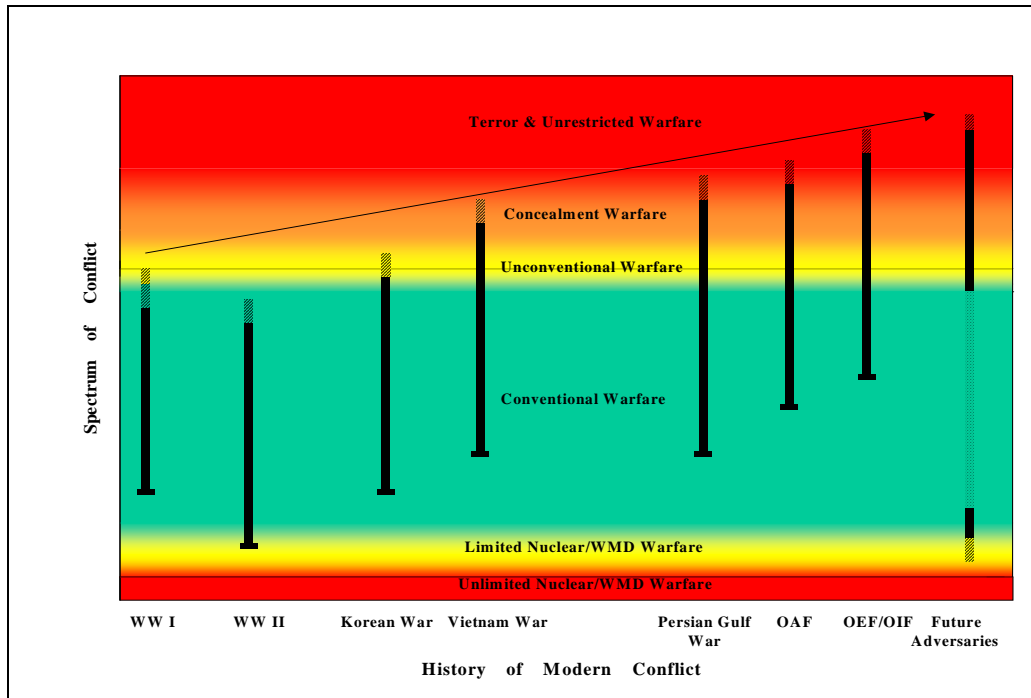


Figure 11—Subjective Spectrum of Modern Conflict

In Figure 11, LOAC clearly applies to the conventional realm of conflict. As warfare moves from the conventional realm in either direction, LOAC becomes less observed in the conflict and more prone to violation. States with superior defense capability like the U.S. are extremely difficult, if not impossible, to challenge in the conventional and unconventional realms of war. Challenges in these realms would likely result in defeat. As a result, concealment and terror warfare provide the most efficient and greatest assurance of survival and success for adversaries. Historically, the trend for conflict also suggests these methods of warfare will continue to be most effective and most favored by adversaries. Future adversaries will likely conduct warfare on the fringes of the spectrum to achieve the highest degree of strategic success. The last vertical line on the model contemplates a hypothetical adversary's diminished value of conventional warfare in comparison to concealment and terror warfare that exploits LOAC. Further, where an adversary can access weapons of mass destruction, this method of warfare is also preferred.³³³

³³³ In what was explained as an error in judgment, Pakistani scientist, Abdul Qadeer Khan, broadcast an open admission on February 4, 2003, that he sold nuclear weapons technology to Iran, Libya and North Korea. Products included intermediate range ballistic missiles, complete ultracentrifuge machines, high frequency inverters, flow meters, pressure-vacuum gauges and other equipment. The report did not indicate that there was a sale of weapons grade fissile material. Khan also associated with Iraq and Afghanistan when conducting transactions and

VI. TOWARD A UNIVERSAL UNDERSTANDING OF MILITARY STRATEGY AND COLLATERAL DAMAGE

We all should feel bad about the loss of life, anybody's life, because every life is precious. It doesn't matter whether it's an Iraqi soldier or a kid in a bunker in Baghdad, we should feel bad about the loss of one of God's creatures. On the other hand . . . we have nothing to be ashamed of Let the deaths of American, Saudi, and British troops, let the deaths of Iraqi civilians, remind each of us that war is a hateful thing.³³⁴

The high incidence of collateral damage in modern conflict combined with the observable benefits of concealment warfare requires effective counter strategies that achieve military objectives while minimizing civilian casualties. If an adversary achieves a strategic advantage on the basis of seeking concealment among the civilian population, then the strategy of concealment warfare continues to succeed and receive validation. Defense technology, strategy and LOAC are all challenged to defy methods of concealment warfare. Each must evolve to preempt an adversary's ability to exercise denial, deception and sanctuary among the civilian population. All states, NGOs and special interest groups should embrace this effort in support of the imperative to protect civilians in warfare. Perhaps the most important part of a solution to countering concealment warfare is the availability of a broad range of options for commanders to tailor and apply when countering concealment warfare strategies.

A. Dual-Use Targets and Protocol Additional I, Article 52(2)

Where concealment warfare is employed, engaging traditional targets like military objects or forces is problematic because of the high likelihood of civilian casualties. As a result, attacks on these targets have been avoided or cancelled in some cases, resulting in strategic targeting limitations. When these targets are engaged, civilian casualties and other collateral damage can easily be exploited to degrade public support for the conflict. Rather than emphasizing physical destruction of traditional military targets that produce high collateral damage, targeting strategy can focus more closely on those objects critical to an adversary's behavior and resolve to participate in war.

providing instructional services on weapons of mass destruction. Douglas Frantz & Josh Meyer, *For Sale: Nuclear Expertise*, L.A. TIMES, Feb. 22, 2004, at 1.

³³⁴ Statement from Gen. Chuck Horner, USAF, Ret., in TOM CLANCY, EVERY MAN A TIGER: THE GULF WAR CAMPAIGN 389-90 (1999).

Based on the concept of effects-based targeting strategy, operations focus on the destruction of objects highly valued by an adversary's military forces and population. The importance of these objects is so essential to military operations and the daily activities of a civilian population that the adversary is compelled to cease hostilities. One of the most appropriate target sets to achieve this goal includes private and public infrastructure, government institutions and other objects commonly referred to as dual-use objects. The U.S. defines a dual-use object as a facility used for both military and civilian purposes. These facilities provide services like communication, fuel, electricity, transportation, and other national infrastructure to the civilian population.³³⁵ The most obvious difficulty in targeting these objects is that it is impossible to assure avoidance of collateral damage because many objects intended for civilians are also used for military purposes. For example, roads, bridges, railroads, airports, seaports and other infrastructure critical to the civilian population are also vital to a state's participation in conflict. Communication facilities, power service and other utilities are also commonly shared. Attacking these dual-use objects naturally places the civilian population at risk because of a population's heavy reliance on these services for daily activity.

Article 52(2) provides essentially two requirements for an object, including one that is dual-use, to qualify as a military objective: 1) the target must make an effective contribution to the enemy's military action; and 2) its destruction must provide a definite military advantage to the attacker.³³⁶ The term embraces more than military personnel, weapon systems, and other military equipment. Military objectives also include objects that by their nature, purpose, use, or location, contribute to the military initiative and the destruction of which constitutes a "military advantage."³³⁷ Instead of using the term "military advantage," Article 52(2) uses the broader expression, "make an effective contribution to enemy action."³³⁸ This definition includes dual-use facilities and services used to support military operations, such as finance, communication, power generation, transportation, and economic centers of gravity that support and sustain an adversary's capability to participate in conflict. While dual-use objects may properly be included in target sets, they become increasingly controversial based on the value and level of dependence the civilian population places on the targeted facility or service.

³³⁵ U.S. DEP'T OF AIR FORCE PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE, par. A 4.2.2 (Feb. 1, 1998).

³³⁶ Protocol I, *supra* note 10, at art. 52(2).

³³⁷ *Id.* See U.S. DEP'T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, at 8.1.1 (1995)

³³⁸ Protocol I, *supra* note 10, at art. 52(2).

Basically, targets having the greatest influence over civilian resolve generate the highest amount of controversy.

The foregoing definitions are commonly manipulated and abused by states at war.³³⁹ Additionally, humanitarian interest groups working to protect civilians from the effects of war narrowly interpret the definitions.³⁴⁰ For example, when Amnesty International criticized NATO's attack of the SRT Headquarters in Belgrade, they suggested that Article 52 did not allow attacks on civilian media facilities used to disseminate propaganda:

Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" beyond the acceptable bounds of interpretation. Under the requirements of Article 52(2) of Protocol I, the SRT headquarters cannot be considered a military objective. As such, the attack on the SRT headquarters violated the prohibition to attack civilian objects contained in Article 52 (I) and therefore constitutes a war crime.³⁴¹

In sharp contrast, the ICRC has identified railways, roads, bridges, tunnels, *media broadcast stations*, and other facilities "which are of fundamental military importance" as appropriate military objectives.³⁴² Traditional

³³⁹ See e.g. *supra*, note 321 and accompanying text for a series of citations reporting collateral damage and civilian casualties from conflict worldwide.

³⁴⁰ HRW criticized NATO attacks on Serb bridges and the national media headquarters, stating the facilities did not effectively contribute to Serb military action and the attacks did not contribute to a military advantage. HRW, *Civilians Deaths in the NATO Air Campaign*, available at <http://www.hrw.org/reports/2000/nato/index.htm#Top-OfPage> (last visited Apr. 8, 2004).

³⁴¹ Amnesty International, *NATO/FRY, Collateral Damage or Unlawful Killings: Violations of the Laws of War by NATO During Operation Allied Force*, AI Index: EUR 70/18/00 (June, 2000) at <http://www.web.amnesty.org/ai.nsf/index/EUR700182000> (last visited March 8, 2004).

³⁴² In 1956, ICRC proposed several categories of military objectives:

I. The objectives belonging to the following categories are those considered to be of generally recognized military importance:

(1) Armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.

(2) Positions, installations or constructions occupied by the forces indicated in sub-paragraph 1 above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).

targeting theory suggests that destruction of dual-use targets provides the benefit of denying use of the infrastructure for any military purpose while also degrading civilian morale. Dual-use targets like the media headquarters in Kosovo are at the center of the targeting controversy because of highly subjective views of proportionality and uncertainty in its application. Specifically: 1) what is the value assigned to destruction of a dual-use object as a military objective compared to the value placed on subsequent collateral damage and loss of civilian life; 2) what is the value assigned to destruction of the target compared to the consequence of not destroying it; and 3) should the measurement of collateral damage be based on foreseeable physical effects in a defined impact radius or broader in scope to include intangible, non-physical damage.

The concept of effects-based targeting provides particular value in addressing these issues and minimizing collateral damage. Strikes focus on the effects they have on behavior rather than on observable physical battle damage

(3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defense, Supply) and other organs for the direction and administration of military operations.

(4) Stores of army or military supplies, such as munition dumps, stores of equipment or fuel, vehicles parks.

(5) Airfields, rocket launching ramps and naval base installations.

(6) Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.

(7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.

(8) Industries of fundamental importance for the conduct of the war:

(a) industries for the manufacture of armaments such as weapons, munitions, rockets, armored vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;

(b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment of the armed forces;

(c) factories or plants constituting other production and manufacturing centers of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;

(d) storage and transport installations whose basic function it is to serve the industries referred to in (a)–(c);

(e) installations providing energy mainly for national defense, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.

(9) Installations constituting experimental, research centers for experiments on and the development of weapons and war material.

ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 632-633.

to objects or casualties.³⁴³ If the strategic goal is to end a war on favorable terms while reducing the length of the conflict, minimizing damage, loss of life and expense, then the most highly valued targets must be destroyed early in the conflict. Essentially, the strategy requires immediate, precision strikes on an adversary's jugular with little collateral damage. Ironically, the most efficient and humane approach to achieving this goal may involve early engagement of the most controversial targets. For example, strikes on property and services that destroy the convenience and lifestyle, rather than the survival of an adversary's civilian population.

St. Augustine's punitive model to warfare roughly followed the principle that a nation and its people are undivided.³⁴⁴ He made no distinctions between combatants and civilians on this level because there was no moral difference between them in the context of a state entity.³⁴⁵ Lieber also recognized that the state and its people are one, both enduring the consequences of success or failure for the decisions of leadership:

Art. 20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.

Art. 21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

Art. 22. Nevertheless . . . so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.³⁴⁶

In 1947, J.M. Spaight recognized that the destruction of morale can be achieved without destruction of the civilian population. He proposed attacks centered on the wealth, business, and daily lifestyle of the population rather

³⁴³ U.S. Joint Forces Command, Concepts Division, White Paper on Effects-based Operations (Oct. 18, 2001).

³⁴⁴ MCKEOG, *supra* note 12, at 21.

³⁴⁵ *Id.* at 28.

³⁴⁶ Headquarters, Dep't of Army, Gen. Orders No. 100, *supra* note 21.

than its survival.³⁴⁷ Destruction of these target sets temporarily disrupts commerce, employment, and other activities valued by a civilian population. More recently, Colonel John A. Warden summarized five decades of targeting theory in a simple model called the theory of strategic rings.³⁴⁸ Although this theory has limited application to non-state adversaries, it is still valuable in understanding potential targets. According to Warden, an adversary's centers of gravity can generally be illustrated with five concentric rings. The innermost ring is leadership, followed by organic essentials, infrastructure, the civilian population and a nation's military.³⁴⁹ Organic essentials and infrastructure translate into dual-use objects like communication, electrical, transportation and other public and private infrastructure. Effects-based targeting strategies conform well to this model. Both propose a theory emphasizing the destruction of specific target sets like organic essentials and infrastructure to promote the disabling of the other target sets by cascading effects. Further, the long-term, catastrophic consequences and humanitarian crises encountered from the traditional targeting of centers of high resistance like the military can be avoided. While the civilian population should never be the subject of direct kinetic attack, the effects on this center of gravity are largely discomfort, morale and resolve to support their leadership in conflict participation. The primary obstacle to this type of campaign is that Article 52(2) arguably prohibits attacking these targets, even though their destruction may reduce the length, cost, damage and casualty rate typically encountered from the destruction of objects providing a distinctly military advantage. Objects providing a military advantage typically translate into the highest center of resistance and the most difficult to engage, especially when they are commingled among the civilian population in concealment warfare.

The term "military objective" in Article 52³⁵⁰ should be clearly interpreted to include the organic objectives contemplated by Warden. Targets would include traditional dual-use objects, as well as public or private infrastructure inherent to a nation's political or economic survivability. Specific targets may include local, regional and national government institutions, as well as financial, banking, and monetary exchange centers. Other infrastructure subject to targeting under these terms would clearly include dual-use objects like communication, transportation, power generation, media generation and broadcast, and industry contributing to the survivability of the adversary's military or contributes to the resolve of a civilian population. The intent is to include private and public services that directly degrade resolve of a civilian population, and promote a societal opinion that participation in a conflict is

³⁴⁷ SPAIGHT, *supra* note 36, at 17-18.

³⁴⁸ John A. Warden, *The Enemy as a System*, AIRPOWER JOURNAL 42 (Spring, 1995)

³⁴⁹ *Id.*

³⁵⁰ Protocol I, *supra* note 10, at art. 52(2).

hopeless. The foregoing definitions should always be construed in a fashion that minimizes collateral damage and the loss of life.

B. Redefining Collateral Damage

OAF illustrates that perceptions of what qualifies as a military objective and what is acceptable collateral damage varies among states. The problem becomes most obvious in the context of targeting dual-use facilities like the SRT Headquarters. Unresolved differences in opinion among coalition states can result in the loss of an organized, cohesive alliance. As a coalition partner, the U.S. was criticized in a U.S. General Accounting Office report for failing to execute operations according to doctrine:

The departures from doctrine ranged from not having clear and attainable objectives to not following various principles associated with conducting an air campaign to not having a fully functional command structure The departures were caused in large part by the NATO alliance's adoption of an operation of limited scope, a great emphasis on avoiding collateral damage and alliance casualties, and a desire to achieve its goals within a short time frame.³⁵¹

The failure ultimately effected operations. The extensive process of target review combined with a preoccupation to avoid collateral damage resulted in cancelled targets, delayed engagements, failure to produce enough targets to adequately mass, and limited strikes producing inconsequential effects.³⁵²

³⁵¹ U.S. GENERAL ACCOUNTING OFFICE, KOSOVO AIR OPERATIONS: NEED TO MAINTAIN ALLIANCE COHESION RESULTED IN DOCTRINAL DEPARTURES, GAO-01-784, 5 (Jul., 2001).

³⁵² *Id.*

To ensure that collateral damage was limited, alliance members were involved in the approval of individual fixed targets, which was not consistent with military doctrine. The alliance emphasized avoiding collateral damage because it was concerned that unfavorable public opinion could fracture the alliance. According to doctrine, the military commander of the operation would have much more discretion in selecting and prioritizing the individual targets to be struck. However, alliance members wanted to review individual targets to assess the potential for collateral damage and the sensitivity of the targets. This approach led to reviews by multiple levels of command above the commanding general that often included reviews by the U.S. National Command Authorities, NATO's North Atlantic Council, and some individual alliance members. This cumbersome review process often took an additional 2 weeks to get individual targets approved. A Center for Naval Analysis report on targeting stated that of 778 fixed targets that were approved by the commanding general, about 64 percent required a higher level of approval. At the end of the operation, over 150 targets were still

Although there will always be differences in what is politically and militarily tolerable by each member state of a coalition, these differences often go unresolved. If differences cannot be resolved through negotiation of a combined doctrine prior to the formation of a coalition, member states must be prepared to operate independently in accordance with their own doctrine to achieve the goals of a combined campaign.

Traditionally, collateral damage is a result of weapon system malfunction, human error, desperation in the fog of war or because it was intended. In more recent warfare, it occurs when an adversary's strategy includes concealment among the civilian population. Any formal definition of collateral damage must be largely based on perception, condition and tolerance. For example, the tolerance of collateral damage would be very different for an invaded nation in the desperate state of survival compared to a state participating in war for economic gain. Concomitantly, how should collateral damage be measured in the realms of time and physical effect? To conduct successful effects-based operations, this question is critical in determining the relationship between destruction of a particular target set and the effects anticipated on other centers of gravity. As an illustration, several hundred thousand workers in Yugoslavia were unemployed because key private industry sites supporting Serb forces were destroyed in the air campaign.³⁵³ The short-term effect of these attacks

waiting approval. The high level concern about collateral damage also led to some approved targets being canceled, which caused some missions to be canceled at the last minute or aborted. The commanding general had the authority to approve fixed targets that would potentially cause less than 20 civilian casualties and mobile targets. This authority was only given to him later in the operation. Several senior Air Force officials believed this led to an inefficient use of assets. Officials at the air operation center stated that the high level approval process also led to approved targets being provided on a sporadic basis, which limited the military's ability to achieve planned effects and mass and parallel operations as recommended in doctrine. For example, to achieve the effect of stopping production of an oil refinery, one official said that several targets were identified and submitted for approval. However, the approval was provided only for some of those targets, which reduced the effectiveness of the strike since the refinery was not totally disabled. Moreover, several officials said that the process could not produce enough targets in a timely manner for the number of aircraft involved to conduct parallel and simultaneous operations as called for in mass and parallel attack doctrine.

³⁵³ Gregory R. Copley, *The New Rome & The New Religious Wars, Conflict and Politics; the Kosovo Crisis*, DEFENSE & FOR. AFFAIRS STRAT. POLICY, Mar., 1999, at 3.

Civilian Targets: Despite claiming victory for the destruction of Yugoslavia's oil refining capability, the US and NATO failed to disclose the reality of their air strikes. This writer saw the results of some of the strikes. In the city of Pancevo, virtually a suburb of Belgrade, air strikes had repeatedly hit the oil refinery, the fertilizer factory and the petrochemical plant—all among the largest installations of their type in South-Eastern Europe—and an aircraft manufacturing facility. The damage was indeed

may crush military industry and incite a civilian population to urge early termination of a conflict. However, wholesale destruction of entire segments of industry conceivably leads to economic depression and effects traditionally encountered in a post-conflict humanitarian crisis.

In an effort to provide a better understanding of the perils of collateral damage in modern conflict, a definition must be divided into two categories, both requiring compliance with the principles of LOAC. “Involuntary collateral damage” contemplates any unintended, unanticipated effect of an attack resulting from system malfunction, human error or other errant cause. “Voluntary collateral damage” contemplates any anticipated incidental damage or other effect of an attack that is justified under the principle of proportionality.³⁵⁴ These definitions are useful when evaluating arguments of

enormous, but, despite repeated claims that only military-related targets were being hit, it was clear that at Pancevo, and at many other locations in Yugoslavia, strictly and unequivocally civil targets were being struck. This, given the precision of the targeting, indicated that the conduct of the war and its objectives were very different than those being cited by the White House. By April 19, 1999, a conservative estimate concluded that 400,000 to 500,000 Yugoslavs (not counting the Kosovo refugees) out of the approx. 11-million population had directly lost their employment because of the destruction of their factories. This meant that some two-million people were without income. But indirectly, the impact on employment was far greater. When the 300,000 car-a-year automobile factory—the one which made the Yugo car—was destroyed, for example, all of the component makers were themselves “hit”: they lost their customer, forcing their own closure or cutbacks. At Pancevo alone, some 10,000 people were thrown out of work, and the city began to empty as children were sent to stay with relatives in the country, and those rendered jobless took their families in search of safety. The air strikes against the oil refinery may have been understandable, given that a legitimate military or strategic target is indeed the fuel supply that services the Armed Forces. But it was struck, on one of the attacks, on the first day of the Orthodox Easter, a pointed reminder that the Clinton White House—which had hesitated to launch strikes against Iraq during the Muslim Ramadan holy period of fasting—cared little for the sentiments of the Orthodox communities worldwide. This did not pass unnoticed among the 300-million Orthodox Christians around the world. The total value of the damage in Pancevo was about \$1.3-billion, some \$650-million of this at the oil refinery, which was hit a total of three times (by April 19, 1999). [Total cost of the war to the Yugoslav infrastructure during the first 30 days of bombing is estimated at \$100-billion.] The flames at the Pancevo oil refinery, soaring 20 meters into the air, and billowing black smoke continued unabated two days after the last of the strikes.

³⁵⁴ The U.S. Joint Chiefs of Staff propose the term “additional damage” instead of “voluntary collateral damage” in their draft manual to estimate collateral damage. “Additional damage. Unintentional or incidental injury or damage to persons or objects that would be lawful military targets in the circumstances ruling at the time.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT METHODOLOGY FOR ESTIMATING COLLATERAL DAMAGE AND CASUALTIES FOR

proportionality, and communicating differences between collateral damage resulting from unforeseen causes and collateral damage that is defensible.

When applying collateral damage to an effects-based targeting strategy, the definition of collateral damage must be divided again. “Direct collateral damage” is any immediate physical effect incidental to any type of military attack.³⁵⁵ “Indirect collateral damage” is any delayed, long-term effect, including physical, economic, social, public health, political or other effect incidental to any type of military attack.³⁵⁶ Failure to adequately evaluate these definitions suggests a faulty proportionality analysis, a defective effects-based targeting strategy, and a flawed post-conflict reconstruction assessment.

CONVENTIONAL WEAPONS: PRECISION UNGUIDED, AND CLUSTER [hereinafter CJCS COLLATERAL DAMAGE METHODOLOGY], CJCSM 3160.01A (Draft), at A-4 (Feb., 2004).

³⁵⁵ Compare definition of “collateral damage” provided at footnote 1 *supra*.

³⁵⁶ A thorough indirect collateral damage assessment must evaluate all foreseeable effects of a military operation on violence, crime, political infrastructure, housing, environment, public health, water and sanitation infrastructure, power infrastructure, poverty, economy, labor and unemployment, and education. The U.S. Joint Chiefs of Staff propose the term “collateral effects” instead of “indirect collateral damage” in their draft manual to estimate collateral damage:

Collateral Effects. This term encompasses all non-CBRN [chemical, biological, radiological and nuclear] effects resulting from military operations, beyond the immediate incidental physical damage caused by the weapon’s detonation. These include unintentional or incidental effects or damage to the civilian infrastructure (e.g., industry, power, petroleum, communications, transportation, public services), economy, environment, political stability, Allied/Coalition partnerships, etc. within a region, country or affecting the territory of surrounding states, cross boundaries or buffer zones that were not intended in relation to the commander’s objectives or functional target systems being struck.

CJCS COLLATERAL DAMAGE METHODOLOGY, *supra* note 354, at A-4.

Targeting effects are categorized in two categories by the U.S. Joint Chiefs of Staff, direct or indirect:

Direct effects are the immediate, first order consequence of a military action (weapons employment results, etc.), unaltered by intervening events or mechanisms. They are usually immediate and easily recognizable. (For example, a parked aircraft is destroyed either by a direct hit from a bomb, or it is sufficiently close to the point of detonation that it receives the brunt of the weapon’s blast and fragments.) Indirect effects are the delayed and/or displaced second-and third-order consequences of military action. They are often accentuated by intermediate events or mechanisms to produce desired outcomes that may be physical or psychological in nature. Indirect effects are often difficult to recognize, due to subtle changes in adversary behavior that may hide their extent. (For example, the plane destroyed as a direct effect of an attack on an airfield, combined with similar attacks on all the assets of an adversary’s air defense system, over time may ultimately degrade the legitimacy of the regime by portraying them as incapable of protecting the populace).

U.S. DEP’T OF DEFENSE, DOCTRINE FOR TARGETING, JP 3-60, at I-6 (2002).

Although simple, the two categories of collateral damage promote better communication about the different types of collateral damage in modern warfare, as well as encourage a more profound proportionality and effects-based targeting analysis.³⁵⁷

Centers of gravity and target sets will change with the economic and political structure of an adversary. Strategically, the question must be asked who is better positioned to influence an early end to a conflict—the civilian population or leadership? Further, will effects on a population incite anger, resolve and persistence? Any campaign focusing on the morale of a civilian population must correctly estimate the strengths, weaknesses and overall condition of the population. Direct and indirect collateral damage may inflame public opinion, fuel resentment, reduce support for operations, and frustrate post-conflict reconstruction.³⁵⁸ For example, in the Persian Gulf War, the campaign to deny an already subjugated population of electricity and other services was far less effective than it would be in a developed country like the U.S., where a higher value is placed on the infrastructure and daily convenience. Attacking infrastructure may cause indirect collateral damage leading to a humanitarian crisis. For example, the campaign in the Persian Gulf War was designed to incite the Iraqi military and civilian population to revolt against the regime.³⁵⁹ Specific objectives against the Iraqi regime included the destruction of Iraq’s electric power system,³⁶⁰ fuel production,³⁶¹ bridges over the Tigris River in downtown Baghdad,³⁶² and media

³⁵⁷ The U.S. Joint Chiefs of Staff recognize that the “cumulative” and “cascading” effects of targeting strategy require assessment.

Direct and indirect effects possess three fundamental characteristics that qualitatively impact the influence they exert on adversary capabilities. Cumulative Nature of Effects . . . tend to compound, such that the ultimate result of a finite number of direct effects is greater than the sum of their immediate consequences. Likewise, indirect effects often synergistically combine to produce greater changes than the sum of their individual consequences. This may occur at the same or at different levels of war as the contributing lower order effects are achieved. Cascading Nature of Effects . . . can ripple through an adversary target system, often influencing other target systems as well; most typically through nodes that are common and critical to related target systems. The cascading of indirect effects, as the name implies, usually flows from higher to lower levels of war. As an example, destruction of a headquarters element will result in the loss of command and control (C2) and synergy of subordinate units.

Id. at I-6-7.

³⁵⁸ See e.g., Alissa J. Rubin, *Fallouja: No Good Options*, L.A.TIMES, Apr. 4, 2001, at A-1.

³⁵⁹ WATTS ET AL., *supra* note 140, at 274–75.

³⁶⁰ *Id.* at 291–92; see also PERSIAN GULF WAR FINAL REPORT, *supra* note 137, at 202-03.

³⁶¹ *Id.* at 207.

³⁶² HOSMER, *supra* note 78, at n. 38; see also PERSIAN GULF WAR FINAL REPORT, *supra* note 137, at 207–08.

facilities.³⁶³ It was recognized that the air campaign would cause hardship to the civilian population in Iraq regardless of their already depressed condition.³⁶⁴ Thorough planning can anticipate some of these concerns. As a simple illustration, striking an adversary's power facility to deny electricity to an entire city presumably denies power to hospitals and other emergency services needed for survival. Where these facilities do not already maintain back-up electric generators, they can be provided by aerial delivery or through NGOs prior to attack in an effort to minimize civilian casualties and other indirect collateral damage. In an effort to further minimize civilian casualties, advance notice of a pending attack is often used to evacuate target areas.

C. Non-lethal Coercive Measures and Article 54

The destruction of foodstuffs is also a legitimate target, and potentially a highly effective strategy insofar as it is directly aimed at an adversary's forces. For example, a leading reason for poor morale among North Korean forces in the Korean War was the shortage of food in 1950–51, after bombing campaigns focused on interdicting supply lines.³⁶⁵ The high loss of supply trucks was so serious the North Koreans forced American prisoners of war to drive supplies to the front lines.³⁶⁶ Further, a high number of desertions and surrenders in the Persian Gulf War were attributed to inadequate food and water rations in 1991.³⁶⁷ Protocol I, Article 54 forbids denying food and water to the civilian population.³⁶⁸ However, this provision may be shortsighted in

³⁶³ See e.g., WATTS ET AL., *supra* note 140; see also PERSIAN GULF WAR FINAL REPORT, *supra* note 137, at 203–05.

³⁶⁴ *Id.* at 147–153.

³⁶⁵ HOSMER, *supra* note 78, at 106.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 158 and 185.

³⁶⁸ Protocol I, *supra* note 10, at arts. 51 & 54. Article 54 states:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (a) As sustenance solely for the members of its armed forces; or (b) If not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian

its preservation of civilian life. Where concealment warfare is used by an adversary, denial of sustenance may in limited circumstances be the most humane method to assure the survival of civilians occupying a contested area. Denial of basic sustenance combined with constructive information operations provides one potential option that avoids employment of conventional warfare and collateral damage. For example, the combined effect of denying basic infrastructure, food, and water to a contested rural village or several blocks in an urban area would likely encourage all occupants to exit a contested area. Secured exit points may be used to receive, disarm, and provide food, water and other humanitarian services to occupants leaving the contested area. Coercive denial of infrastructure and sustenance requires that a defensible cordon can be established around the contested area, and occupants exiting the area can be effectively managed. Although this method violates Protocol I, Article 54, it may be one method that offers protection of commingled civilians victimized by concealment warfare when used as a coercive, rather than a lethal measure. Ideally, a coercive cordon operation could achieve four objectives: 1) the strategy allows both civilian and combatant occupants to exit the contested area unharmed; 2) anyone exiting the contested area can be disarmed and immediately provided food, water, shelter and other humanitarian services as needed; 3) the conflict can be diffused; and 4) the contested area can be secured with the greatest assurance that the loss of civilian life and collateral damage has been minimized.

Ideally, extreme methods that deny infrastructure and sustenance would diffuse conflict while achieving the surrender or capitulation of any combatants in a contested area without the use of conventional warfare emphasizing battle damage. Coercive denial of infrastructure and sustenance does not distinguish disguised combatants commingled among the civilian population. Further, there is little to prevent combatants from forcibly holding or harming civilians in a prolonged standoff. In either case, however, adversaries will likely become disorganized, lose the initiative, and become directly accountable for any action taken against civilians held hostage or otherwise disallowed from exiting the contested area. Where civilians are held hostage or harmed, adversaries may attempt to defer accountability for their misconduct to the coercive conditions. Similar to a domestic hostage crisis, it is important to note practically and ethically in any information operation that the adversary violated LOAC by seeking sanctuary at the risk of the civilian population, and by taking civilians hostage to achieve a strategic advantage.

Responsible use of coercive methods necessitates rejection of Protocol I, Article 54. Paradoxically, where concealment warfare is designed to exploit LOAC and civilian life, denying sustenance may actually protect civilian lives when compared to the alternative method of traditional kinetic warfare.

population with such inadequate food or water as to cause its starvation or force its movement.

Although the letter of the law in LOAC is violated, the spirit of LOAC to preserve civilian life is maintained.

D. U.S. Military Doctrine and Targeting

U.S. military doctrine permits targeting behavior, but there are inconsistencies among service targeting definitions, and weak description of the relationships between collateral damage, proportionality and effects-based targeting. The U.S. Joint Chiefs of Staff define strategic air warfare as:

Air combat and supporting operations designed to effect, through the systematic application of force to a selected series of vital targets, the progressive destruction and disintegration of the enemy's war-making capacity to a point where the enemy *no longer retains the ability or the will to wage war*. Vital targets may include key manufacturing systems, sources of raw material, critical material, stockpiles, power systems, transportation systems, communication facilities, concentrations of uncommitted elements of enemy armed forces, key agricultural areas, and other such target systems (emphasis added).³⁶⁹

Consistent with this definition, U.S. Air Force doctrine is premised on the notion that a successful air campaign is not necessarily quantified by the number of casualties inflicted, how many engagements were won or lost, or the amount of territory occupied, but by whether or not the overarching political objectives were achieved. Greater than any preceding factor, the political objectives, both one's own and the enemy's shape the scope and intensity of war." Armed conflict "is a clash of opposing wills While physical factors are crucial in war, the national will and the leadership's will are also critical components of war. The will to prosecute or the will to resist can be decisive elements."³⁷⁰ Identifying will and morale as potential targets, centers of gravity are "those characteristics, capabilities, or localities from which a

³⁶⁹ U.S. DEP'T OF THE AIR FORCE, BASIC AEROSPACE DOCTRINE OF THE UNITED STATES AIR FORCE, AFM 1-1, vol. II, at 302 (March, 1992). Clearly recognizing the value of "behavior" and "perception" in targeting strategy, the U.S. Joint Chiefs of Staff also define a target as, "an area, complex, installation, force, equipment, capability, function, or *behavior* identified for possible action to support the commander's objectives, guidance, and intent (emphasis added)." U.S. DEP'T OF DEFENSE, DOCTRINE FOR TARGETING, *supra* note 356 at I-2. "When choosing targets, the commander must be focused on the purpose of the fires striking chosen targets Targeting effects are the cumulative results of actions taken to engage geographical areas, complexes, installations, forces, equipment, functions, perception, or information by lethal and non-lethal means. *Id.* I-5-6.

³⁷⁰ U.S. DEP'T OF THE AIR FORCE, AIR FORCE DOCTRINE, AFDD 1, at 6 (1997).

military force, nation, or alliance derives its freedom of action, physical strength, or will to fight.”³⁷¹

The U.S. Marine Corps also recognizes that centers of gravity can include intangible attributes such as resolve or morale. Nevertheless, “we should recognize that most enemy systems will not have a single center of gravity It will often be necessary to attack several lesser centers of gravity or critical vulnerabilities simultaneously or in sequence to have the desired effect.”³⁷² U.S. Army doctrine adds that “[f]acilities and installations are studied to identify critical nodes and those of importance in the military, political, and economic infrastructure (center of gravity).”³⁷³ Finally, the U.S. Navy defines a center of gravity as “something the enemy must have to continue military operations, a source of his strength, but not necessarily strong or a strength in itself. There can only be one center of gravity. Once identified, we focus all aspects of our military, economic, diplomatic, and political strengths against it.” The Navy views the morale and will of an adversary more as vulnerabilities instead of centers of gravity.³⁷⁴

³⁷¹ U.S. DEP’T OF THE AIR FORCE, STRATEGIC ATTACK, AFDD 2-1.2, at 13 (1998); *see also* U.S. DEP’T OF DEFENSE DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JP1-02, at 80 (2001).

³⁷² U.S. DEP’T OF THE NAVY, U.S. MARINE CORPS, WARFIGHTING, MCDP 1, at 46-47 (1997).

³⁷³ U.S. DEP’T OF THE ARMY, THE TARGETING PROCESS, FM6-20-10, at 3-11 (1996). “Center of gravity usually relates to the main enemy force or capability. The concept of center of gravity is useful as a tool to analyze enemy strengths and vulnerabilities. By identifying and controlling decisive points, commanders gain a marked advantage over the enemy and can influence the outcome of an action.” U.S. DEP’T OF THE ARMY, DECISIVE FORCE: THE ARMY IN THEATER OPERATIONS, FM 100-7, at 1-5 (1995).

³⁷⁴ U.S. DEP’T OF THE NAVY, NAVAL WARFARE, NDP 1, at 35-37.

As an example, a lengthy re-supply line supporting forces engaged at a distance from the home front could be an enemy’s center of gravity. The re-supply line is something the enemy must have, a source of strength, but not necessarily capable of protecting itself. Opportunities to access and destroy a center of gravity are called critical vulnerabilities. To deliver a decisive blow to the enemy’s center of gravity, we must strike at objectives affecting the center of gravity that are both critical to the enemy’s ability to fight and vulnerable to our offensive actions Some, such as electrical power generation and distribution facilities ashore or the fleet oilers supporting a task group may be obvious. On a strategic level, examples may include a nation’s dependence on a certain raw material imported by sea to support its war-fighting industry, or its dependence on a single source of intelligence data as the primary basis for its decisions. Alternatively, a critical vulnerability might be an intangible, such as morale. In any case, we define critical vulnerabilities by the central role they play in maintaining or supporting the enemy’s center of gravity and, ultimately, his ability to resist. We should not attempt to always designate one thing or another as a critical vulnerability. A critical vulnerability frequently is transitory or time-sensitive. Some things, such as the political will to resist, may always be critical, but will be vulnerable only infrequently. Other things, such as

One notable flaw in military doctrine generally is how new weapons technology and strategy should be employed where collateral damage is a concern. For example, non-kinetic warfare methods that include electronic and information network attacks are very difficult to measure for potential collateral damage. If a computer program virus is released into an adversary's computer network, it is extremely difficult to ensure confinement of the attack to a specific terminal or group of terminals. Moreover, if a communication frequency is jammed from an electronic attack, then it is impossible to limit the effects of the attack to a particular frequency user. In either case, the effects can disrupt emergency services required for civilian relief.³⁷⁵ Although these methods offer some of the greatest potential to challenge concealment warfare tactics, the concept of collateral damage is noticeably absent from their doctrine.³⁷⁶ Finally, U.S. military doctrine incorporates "indirect effects" into effects-based strategy, while comprehensively failing to incorporate "indirect collateral damage" into a proportionality analysis.³⁷⁷ Conceptually, the collateral damage analysis and the measurement of strategic effects are the same.³⁷⁸ However, a different conclusion can be reached when attempting to

capital cities or an opponent's fleet, may often be vulnerable, but are not always critical. What is critical will depend on the situation. What is vulnerable may change from one hour to the next. Something may be both critical and vulnerable for a brief time only.

Id.

³⁷⁵ When coalition forces proposed a "cyber attack" during OAF, the idea was quickly reviewed for potential LOAC violations.

When the DOD considered hacking into Serbian computer networks to disrupt military operations and basic civilian services, the Pentagon held back because of continuing legal uncertainties and limitations relative to the new field of "cyber warfare." It is theoretically possible for soldiers at computer terminals to invade an opponent's networks and shut down electrical facilities, interrupt telephone service, crash trains and disrupt financial systems; but the Defense Department's Office of General Counsel issued a 50-page "Assessment of International Legal Issues in Information Operations," stating that the misuse of cyber attacks could subject US authorities to war crimes charges. Commanders should apply the same "law of war" principles to computer attacks that they do to the use of bombs and missiles. These principles restrict attacks to targets that are of military necessity only, minimizing collateral damage and avoiding indiscriminate attacks.

Kernan Chaison, *Cyber Warfare Rules "Bumfuzzle" DOD Lawyers*, J. ELECTRONIC DEF., Jan. 1, 2000, no. 1, vol. 23(16).

³⁷⁶ See generally DEP'T OF DEFENSE, JOINT DOCTRINE FOR ELECTRONIC WARFARE, JP3-51 (2000); and DEP'T OF DEFENSE, JOINT DOCTRINE FOR INFORMATION OPERATIONS, JP3-13 (1998).

³⁷⁷ See *supra* note 356 and accompanying text for definitions of "indirect effects" and "indirect collateral damage."

³⁷⁸ In effects-based targeting, measures of effectiveness [hereinafter MOEs] are defined as:

anticipate the comprehensive value of an attack for effects-based operations and the analysis required to conduct a thorough proportionality analysis.

In preparation for any attack, including attacks with new technology, Article 57(2)(a) of Protocol I requires planners to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”³⁷⁹ Article 51(5)(b) directs that attacks on a specific military objective are impermissible if they “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁸⁰ A responsible commander must determine whether the collateral damage from destruction of the target is proportionate to the military advantage of destroying it. The benefit of incorporating both direct and indirect collateral damage into the proportionality analysis is a more comprehensive effects-based strategy, as well as a more defensible proportionality review.

MOEs in military operations are defined as tools used to measure results achieved in the overall mission and execution of assigned tasks. MOEs are a prerequisite to the performance of combat assessment. Assessment of such indicators normally takes place at the tactical, operational, and even strategic levels of war, and goes beyond counting craters or vehicles destroyed. The key is to determine when the predetermined conditions have been met that affect adversary operational employment or overall strategy and whether or not the anticipated effects are occurring. The continuing intelligence analysis process helps to ensure that proper combat assessment measurements take place.

U.S. DEP’T OF DEFENSE, DOCTRINE FOR TARGETING, *supra* note 356, at I-8.

³⁷⁹ Protocol I, *supra* note 10, at art. 57(2).

³⁸⁰ The following types of attacks are considered indiscriminate:

(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Id. at art. 51(4).

(a) an attack by bombardment by any method or means which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. at art. 51(5).

E. Defense Technology, Strategy and the Law of Armed Conflict

Improved interoperability of command, control, and communication systems with sensors for intelligence, surveillance and reconnaissance (C³ISR) have been combined with enhanced precision technology to provide capabilities inconceivable when Protocols I and II were opened for signature in 1977.³⁸¹ This technology is especially promising in urban environments, where concealment warfare is most effective and prevalent. Improvement in the munitions industry affords the ability to pacify infrastructure without extensive damage or civilian casualties. For example, carbon fiber weapons are able to render electrical infrastructure temporarily disabled. Non-lethal weapons employing electro-magnetic pulse³⁸² and directed energy³⁸³ have the potential to disable infrastructure without casualties.³⁸⁴ Although lethal, thermobaric weapons provide the important capability of combining blast concussion with high burn temperatures to incinerate biological and chemical agents.³⁸⁵

³⁸¹ Avocating initiatives to ensure all of weapon systems and platforms are inter-operable and able to move data seamlessly, Gen. Lester Lyles, Commander of USAF Air Force Materiel Command, testified before the U.S. Senate Armed Services Committee: “As a result of this AFMC-wide enterprise, our special tactics warriors will soon have a digital machine-to-machine capability that helps to quickly connect the right aircraft with the right munitions, guided precisely to the right target, at just the right time, to achieve the desired effect. This new automated process helps to reduce the time it takes to target the terrorist threat, while at the same time reducing human error in the targeting process.” Kerry Gildea, *Services Investing in S&T Areas To Avoid Friendly Fire Incidents*, DEFENSE DAILY, Apr. 1, 2003, vol. 218(1).

³⁸² *Id.* The electromagnetic-pulse (EMP) weapon is ideal for military objects located in fortified underground facilities or beneath civilian buildings. In theory, EMP can penetrate bunkers using cables, ventilation ducts, pipes and other openings to transmit a pulse spike. Although these weapons may cause relatively extensive collateral damage, their employment is far more humane than their kinetic counterparts that rely on blast. “The EMP weapon is powered by a large conventional high-explosive charge and generates an electromagnetic spike that fries electronics wherever it reaches. Some reported performance numbers for an earlier version are: a 50-microsecond electromagnetic spike with 30-million peak amps and 20-million peak joules. This makes lightening look like static electricity.” *Id.*

³⁸³ Ray Nelson, *Directed Energy Efforts Increase at AFRL*, SPACE & MISSILE, Sep. 15, 2003, vol. 4(36).

³⁸⁴ Lisa Troshinsky, *Non-Lethal Weapons Move Beyond Tactical Arena and Into The Navy*, NAVY NEWS & UNDERSEA TECH., Mar. 27, 2000, vol. 17(13).

³⁸⁵ Commentary, *The High End Crusader, High Tech Weapons Key to Iraq War*, NEW TECH. WEEK, Jan. 6, 2003, vol. 17(1). Thermobaric technology is a significant enhancement to operations in urban environments. A thermobaric weapon combines the effects of a fireball with the pressure of a blast concussion, filling the space into which it is fired. “It is capable of turning corners and traveling upwards through openings between building floors. Coupled with a penetrating warhead, a thermobaric weapon can penetrate indoor or underground spaces

Attack aircraft delivering these munitions have the capability of selecting and delivering the most appropriate and preferred munition to a target even while airborne. Munition fuse settings can be adjusted before delivery for a desired level of impact.³⁸⁶ The hard target smart fuse can be set for timing or programmed to count the number of void spaces or barriers it travels through when entering a target structure. The fuse provides the ability to detonate the munition in the exact room or floor of the targeted structure.³⁸⁷ Fuse technology combined with the development of fifty to seventy-five pound small diameter PGM has promise in further minimizing the risk of involuntary and indirect collateral damage.³⁸⁸ Available as early as 2006, smaller PGM will likely become highly preferred for employment in urban close combat because they do not create as much damage in comparison to the larger PGM currently in use.³⁸⁹

Ground forces use advanced communications, laser guidance target designators and surveyors to calculate target coordinates and guide munitions to a target to further improve accuracy in target selection.³⁹⁰ These forces are also able to provide other benefits, including near immediate battle damage or effects-based assessments.³⁹¹ The future of nano-energetics offers immense promise to minimize collateral damage. Nano-energetics relies on nano-structured explosives and fuel additives, as well as catalytics and photovoltaics. The technology provides more effective control of blast, resulting in the direction of energy and impact to a designated target.³⁹² This technology will someday provide adaptive materials with properties that can be changed according to the type of target, condition of the target or evolving ISR. Perhaps most promising of all are non-lethal weapons that can be applied

and then set off a blast of heat and pressure strong enough to destroy biological or chemical agents.” *Id.*

³⁸⁶ OAF AFTER ACTION REPORT, *supra* note 165, at 95.

³⁸⁷ David Atkinson, *Smart Fuses Improve Weapon Efficiency*, DEFENSE DAILY, Aug. 13, 1998, vol. 199(95).

³⁸⁸ Lorenzo Cortes, *Britain Interested in SDB, But Boeing Concentrating Efforts On Air Force Use*, DEFENSE DAILY INT., Jun. 6, 2003, vol. 3(23). Boeing is currently testing a 250-pound small diameter bomb designed to provide accuracy and minimize the effects of collateral damage. The munition is slated to enter service with the F-15E in September, 2006 and then the F/A-22.

³⁸⁹ Hunter Keeter, *Marines, SOCOM Plan Greater Cooperation*, DEFENSE DAILY INT., Mar. 1, 2002, vol. 3 (17).

³⁹⁰ Frank Wolfe, *Ground Forces Aided Recon, Targeting, Damage Assessment*, DEFENSE DAILY, Aug. 13, 2002, vol. 215(30).

³⁹¹ *Id.*

³⁹² Ray Nelson, *Nano-technology and Biotechnology for Future Defense*, SPACE & MISSILE, Aug. 15, vol. 3(22).

against enemy combatants commingled with civilians.³⁹³ Non-lethal weapons are “explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.”³⁹⁴ They are designed to have “relatively reversible effects” on people and materiel.³⁹⁵ Although wider and more extensive application of these weapons to the battle space requires further development and understanding, they provide the most interesting and promising solution to concealment warfare methods without causing the level of collateral damage and casualties traditionally caused by conventional munitions.

As a practical measure, U.S. planners participating in the targeting cycle already employ an extensive methodology to minimize collateral damage. Each of the following factors is considered in target evaluation: 1) type of object to be destroyed; 2) structural integrity of the target; 3) location of target in relation to the presence of non-military objects, protected structures, civilians and human shields; 4) defensive posture of the target; 5) tactical, operational and strategic importance of the target; 6) specific type and accuracy of the weapon delivery system and munition used; 7) manipulation of weapon for use on the specific target (e.g. fuse adjustment); 8) measurement of bomb impact radius; 9) specific tactical strategy tailored to engage the target (e.g. attack heading and weapon impact angle to minimize fragmentation impact); 10) time of attack to strike when the presence of civilians is lowest; 11) necessity of advance warning of a strike to alert civilians to evacuate the target area; and 12) use of non-lethal or non-kinetic weapons.³⁹⁶ Target analysts use an impact-modeling program named Fast Assessment Strike Tool for Collateral Damage, commonly referred to as “FAST-CD,” to assess the potential for direct collateral damage. The program is able to evaluate a

³⁹³ The U.S. Army’s concept for non-lethal capabilities includes weapons that can incapacitate, disorient, temporarily disable, irritate, stun, confuse, subdue, immobilize, and disburse. Weapons could include sonic generators, acoustic generators, inorganic and organic substances causing pungent odors, discomfort and temporary disability, non-penetrating projectiles, strobe lights, stun weapons, water cannons, optical munitions, adhesive coatings, anti-traction and immobilizing agents, combustible dispersants, entanglement agents and devices, and aqueous foams. U.S. DEP’T OF THE ARMY, TRADOC PAMPHLET 525-73, CONCEPT FOR NONLETHAL CAPABILITIES IN ARMY OPERATIONS, App. B (Dec. 1, 1996).

³⁹⁴ U.S. DEP’T OF DEFENSE DIR. 3000.3, DOD POLICY FOR NON-LETHAL WEAPONS para. 3 (July 9, 1996).

³⁹⁵ *Id.*

³⁹⁶ Interview with Brett A. Plentl, Lt. Col., USAF, conducted at the RAND Corporation in Santa Monica, California (Dec. 11, 2003). Lt. Col. Plentl holds a Senior Navigator Aeronautical Rating, and was detailed as a planner in the targeting cycle for CENTCOM Combined Air Operations Center (CAOC) during OPERATION ENDURING FREEDOM and the Air Force Central Command CAOC during OPERATION IRAQI FREEDOM. *See also* CENTCOM Brief, *Targeting and Collateral Damage*, March 5, 2003.

specific target, surrounding terrain, direction, angle of attack, and the particular characteristics of a selected munition to generate an image of a probable field of damage.³⁹⁷ The program is not capable of evaluating indirect collateral damage.

Although technology and thoughtful targeting process offers the ability to further minimize civilian casualties and collateral damage, adversaries can still complicate or deter attack using concealment warfare. The benchmark for high precision and low collateral damage potentially creates unrealistic expectations of technology where an adversary invites or fabricates collateral damage. Relying too heavily on precision technology may result in overestimation that it cannot be rendered errant by guidance system jamming or other counter-measures employed by an adaptive adversary.³⁹⁸ Further, inadequate or incorrect ISR will always result in the danger of delivering a PGM to precisely the wrong target. This is especially important for mobile targets. ISR for stationary targets generally has a high degree of confidence, while the same information for a mobile target may be useless only hours after collection. As a result, adversaries may effectively remain mobile and concealed among the civilian population to escape detection and complicate attack.

F. An Emerging Role for Media, Non-Governmental Organizations and Humanitarian Interest Groups

The collateral damage events occurring during U.S. operations provide valuable information about targeting strategy, collateral damage, and the concealment tactics used by adversaries. They also illustrate the value of

³⁹⁷ David A. Denny, *U.S. Air Force Uses New Tools to Minimize Civilian Casualties: Avoiding Unintentional Damage Figures Into Targeting*, U.S. DEP'T OF STATE WASHINGTON FILE, Mar. 18, 2003, at 5.

³⁹⁸ Steven Sifers, LTC, USA, *An Infantryman's Doubts About Smart Weapons*, DEFENSE WEEK, April 2, 2001, vol. 22(14). Cautioning that leaders should not fall prey to the myth that PGM can execute "bloodless surgical strikes." Adversaries of PGM will attempt to provoke collateral damage for propaganda. Use in previous operations demonstrates PGM are vulnerable to neutralization by software failure, terrain, weather and adaptive adversaries. *Id.* The successful development of new PGM like the Tomahawk Land Attack Missile (TLAM) and the Joint Direct Attack Munition (JDAM), both of which use Global Positioning System (GPS) information for guidance, have improved overall target accuracy. OAF AFTER ACTION REPORT, *supra* note 165, at 6-7. However, PGM with GPS guidance also presents the potential vulnerability of jamming, resulting in the ability to render a munition errant and provoke collateral damage. *Id.* at xxiii. Even though jamming systems are typically among the first targets destroyed in an air campaign, their existence is a warning that these systems can be improved to create effective counter-measures that increase collateral damage. Christian Lowe, *Lockheed Answers GPS Jamming Threat*, SPACE & MISSILE, Nov. 30, 2000, at 5(10); David Whitman, *Keeping Our Bearings*, U.S. NEWS & WORLD REP., Oct. 21, 2002, at 72.

media, special interest groups, and NGOs in providing important information to the military community about these topics. These groups have a recognizable ability to access and report incidents of collateral damage.³⁹⁹ Presumably, as non-combatant organizations, these groups have freedom of access and movement to contested areas otherwise denied to an opposing force. Moreover, it is in an adversary's best interest to provide access because these groups are instrumental to any information operation designed to exploit humanitarian concerns and degrade public support. Their constituency and political influence provide valuable leverage over both political and public opinion. In contrast, these groups also provide objective, accurate information about collateral damage incidents that expose deception or disinformation. For example, an HRW investigation of the bombing of the Dubrava Penitentiary in Kosovo reported that Yugoslav forces killed at least seventy prisoners to fabricate a collateral damage incident.⁴⁰⁰

The level of investigative detail in HRW reporting about collateral damage in OIF is also notable, deserving greater objective value than is traditionally given to data or analytical conclusions from humanitarian interest groups. HRW acquired credible witness summaries, aerial and ground imagery, and significant operations information regarding collateral damage, cluster munitions and time sensitive targeting (TST) in OIF.⁴⁰¹ HRW concludes that: "For the most part, the collateral damage assessment process for the air war in Iraq worked well, especially with respect to preplanned targets. HRW's month-long investigation in Iraq found that, in most cases, aerial bombardment resulted in minimal adverse effects to the civilian population."⁴⁰²

Adversaries since the Vietnam War have adopted strategies attempting to degrade support for conflicts through attrition, protraction, and exploitation of humanitarian interests by concealment warfare. This strategy incorporates engagement of the international community by leveraging humanitarian interest groups, anti-war movements, and media. It also implies that the public is concerned about civilian casualties as much as they are about military casualties. Although there is debate on the efficacy of public opinion data on collateral damage and the support for military operations, one can safely assume that there is a relationship between the two at some level.⁴⁰³ Further,

³⁹⁹ ICTY FINAL REPORT, *supra* note 190 at 39 I.L.M. 1282—83; *compare* HRW, THE CRISIS IN KOSOVO, *supra* note 176.

⁴⁰⁰ *Id.*

⁴⁰¹ *See generally* HRW, *supra* note 215.

⁴⁰² HRW, *supra* note 215, at 20.

⁴⁰³ MARK LORELL, CHARLES KELLEY, JR. CASUALTIES, PUBLIC OPINION, AND PRESIDENTIAL POLICY DURING THE VIETNAM WAR v., RAND Project Air Force Study R-3060-AF (March, 1985). The report examines the relationship between casualties and public support for U.S. military intervention in Korea and Vietnam:

public support can be lost based on the number of civilian casualties.⁴⁰⁴ A March, 2003 Gallup poll indicates 57 percent of those surveyed would oppose a war in Iraq because “many innocent Iraqi citizens would die.”⁴⁰⁵ Public opinion regarding military or civilian casualties is partly dependent on how much value the public places on the end state of the conflict, and partly dependent on whether the public perceives the end state as achievable.⁴⁰⁶ Although U.S. polling data offers some level of value in assessing domestic public opinion, its value is highly limited where U.S. operations are exceedingly dependent on foreign state coalition support, and the opinions of those state populations as well.

The Gulf War marks a point in history where the media’s capability to report real-time combat operations provided a highly-effective, cost efficient vehicle for an adversary to communicate battlefield events to the international community. Respectful that the media should never be limited in accurate, objective reporting, it is an immensely powerful medium subject to exploitation with impunity by any party to a conflict. Humanitarian interest groups like HRW have also benefited from access to operational and collateral damage information, even in contested areas, to better communicate their agenda. The combination of expanded media access, greater disclosure of military activities, and increased presence of humanitarian interest groups in the battle space translates into an improved level of influence over domestic and international opinion by these groups.⁴⁰⁷ Moreover, the humanitarian interest lobby has become far more organized and gained remarkable popularity since the Vietnam War. As the international community becomes more informed and aligned with these causes, humanitarian interest groups will attempt to leverage public concern and improve their involvement in military operations. As pressure from these groups and the international community to minimize civilian casualties and other collateral damage increases, they will also become more attractive targets for adversaries to exploit.

Casualties were probably the single most important factor eroding public support for each of the conflicts Poll data indicate that any U.S. commitment of combat personnel to a sustained Third World conflict that . . . is not perceived as a direct and immediate threat to the continental United States will in all probability provoke considerable public opposition once the brief “rally around the flag” effect dissipates. This includes situations involving threats to oil sources in the Middle East.

⁴⁰⁴ *Id.*

⁴⁰⁵ Katie Fairbank & Doug J. Swanson, *U.S. War Support Hinges on Sparing Civilians*, DALLAS MORN. NEWS, Mar. 26, 2003, at 1(A).

⁴⁰⁶ Interview with Eric V. Larson, Media Analyst, RAND Corporation in Santa Monica, California (Mar. 26, 2004); *see generally* LARSON & SAVYCH, *supra* note 322, at 106.

⁴⁰⁷ *See generally*, MIDDLE EAST WATCH, *supra* note 158. The report attempts to provide a full accounting of coalition violations of the laws of armed conflict.

Concealment warfare provoking collateral damage requires the employment of effective counter-measures that deny the ability to influence humanitarian interest groups, media, and public opinion. At the strategic level, these counter-measures must inform adversaries in both peace and wartime that meaningful targeting and information based methods can and will be employed to deter concealment warfare. A uniform strategy to pro-actively respond to collateral damage would effectively expose and preempt adversary disinformation campaigns and limit adverse political effects. To illustrate, if a dual-use target like a broadcast facility is destroyed because it supports an adversary's military operations, transmissions should be recorded prior to attack that indicate its use for C³ or another military purpose. The careful and thorough collection of "evidence" prior to attack of a controversial target provides a valuable, readily available case to advocate the destruction of the target should a challenge arise. This information could be made available to both media and humanitarian interest groups to support an attack, counter disinformation and deception, and reduce conspiracy theories.

Incidents of both voluntary and involuntary collateral damage should be investigated where feasible to expose adversary disinformation, as well as to responsibly report collateral damage. Thorough investigation of these incidents by a dedicated theater-level collateral damage response team provides two benefits. Information from these investigations provides the ability to apply counter-measures, and the necessary knowledge to confidently engage media and humanitarian interest groups most likely to initiate a challenge. Currently, U.S. military doctrine does not require the investigation of collateral damage incidents, estimations of civilian casualties or levels of damage to civilian objects after attack. One disadvantage to not obtaining this information is that adversaries are left with the ability to fabricate and extort it. A model collateral damage response team would require, at a minimum, dedicated experts with backgrounds in law,⁴⁰⁸ public affairs, information operations, intelligence, operation planning, engineering, and munitions. Experts in economics, public health, environment, housing and urban development, labor, and education would also be required to assist in the assessment of indirect collateral damage.

A collateral damage response team would also eliminate the notable lack of competence in discussing complex issues associated with LOAC, targeting, and collateral damage among U.S. Department of Defense personnel.⁴⁰⁹

⁴⁰⁸ JAGs are required to review and coordinate on "all operation plans . . . concept plans, rules of engagement, execute orders, deployment orders, policies, and directives . . . to ensure compliance with domestic and international law." U.S. DEP'T OF DEFENSE, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, CJCSI 1810.01A, par. 6(c)(5) (Aug., 1999).

⁴⁰⁹ The following transcript from a daily DOD press briefing illustrates the difficulty some senior officials have addressing issues associated with LOAC:

These issues should be addressed exclusively by those officials most familiar with the subject matter to provide clear, accurate information to the public, prevent exploitation of any uncertainty on these issues, promote military policy, and improve education of the media, humanitarian interest groups, and international community. In many cases, the officials most competent to respond to LOAC queries on a consistent basis are attorneys well educated in LOAC. These attorneys are traditionally the one group with the greatest familiarity and unique ability to prepare and educate an audience about the complex dynamics of LOAC and military operations. Commanders and other officials discussing military operations with the media must also be aware that their statements, however flamboyant, confused, intimidating or mundane, can

Media Question: Going to that, using foreign volunteers, why do you not consider those folks to be enemy combatants since they voluntarily place themselves there?

Sr. Defense Official: I'm not a legal expert, but you certainly could argue that since they're working in the service of the Iraqi government, they may, in fact, have crossed the line between combatant and noncombatant.

Media Question: And just one sort of technical question. It's often stated that the use of human shields is in violation of the international law of armed conflict. When you say that, are you referring to a recognized body of law? Or, you know, where can we go look that up? Is it a series of—

Sr. Defense Official: Yeah. I'm going to refer you to the OSD general counsel, but my—I know there are certain portions of the Geneva Convention that state that explicitly, that it is not permissible to use the civilians. I don't know if they—I think they may even use the term "shield."

Media Question: It seems to me—I want to go back to this point here. This is a really critical distinction. Are these people, once they volunteer, are they putting them—taking themselves away from civilians and they're there now on the combatant side? This to me seems like the crux of the whole matter. And you're saying, "I don't know, I'm not a legal expert." Somebody must have figured this out at the Pentagon.

Sr. Defense Official: Again, yeah, I'm—I'm an intelligence expert. It's not that I'm trying to dodge the question, but I think we would need OSD policy and legal affairs folks to answer your question.

Media Question: In this room and also at the White House, we've had warnings given from the United States to Iraqi military that if you follow orders of Saddam's regime to deploy weapons of mass destruction, that you will be subject to a war crimes trial. Since what you're discussing today is violations of the Geneva Convention and other international law, are you at this point also saying that if people in Iraq follow Saddam's orders to use civilians, to use mosques, schools and other things, that that would be in violation of international law; they also are subjecting themselves to a potential for prosecution in war crimes trials after the war?

Sr. Defense Official: I can't answer that. I don't have the legal expertise. But certainly there is that implication here.

U.S. Dept. of Defense Briefing on Use of Human Shields in Iraq (Feb. 26, 2003) at http://www.defenselink.mil/news/Feb2003/t02262003_t0226humanasst.htm (last visited Feb. 19, 2004).

be presented to the ICC as evidence to support a war crime alleged against a U.S. commander or official.⁴¹⁰

Both humanitarian interest groups and the media are instrumental in the education of the international community through informed, accurate and objective reporting of targeting strategies, collateral damage and concealment warfare. These groups serve as a witness to a judgmental public that supports or objects to participation in conflict. Their access to military operations and the battle space creates an informed public, provides a counter-measure to disinformation and deception, and ensures state responsibility. For example, destruction of the Iraqi regime's communication infrastructure and embedding reporters in coalition units during OIF reduced the ability of the regime to exploit the media and degrade U.S. public support for operations. In effect, destruction of the communication infrastructure denied the ability to conduct information operations.

Facilitating media and humanitarian interest group access to operations invites objective, third party investigation of collateral damage incidents. Conceivably, cooperation and information exchange with humanitarian NGOs like the ICRC on collateral damage incidents would benefit both military and humanitarian interests. NGOs often have access to contested areas where collateral damage occurs, their level of reporting is often more thorough, they provide valuable data in measuring both direct and indirect collateral damage, and they provide valuable insight on the human condition. In turn, humanitarian interest groups could achieve greater access to post-targeting information to identify operational trends that effect humanitarian concerns. Often viewed as divergent, both military and humanitarian interest groups seek to preserve life and reduce destruction to the extent possible. In pursuit of this goal, it seems plausible that both interests could be well served through mutual sharing of collateral damage information and instruction on operational issues associated with it. On this basis, it is conceivable that an NGO representative could participate in a collateral damage response team to perform as a humanitarian affairs consultant and liaison. Cooperation with humanitarian interest groups on this basis also provides valuable insight into post-conflict reconstruction requirements.

⁴¹⁰ A discussion of the International Criminal Court, potential war crimes and jurisdiction is provided in Chapter IV.

VII. CONCLUSION

“Therein are rivers of water unpolluted, and rivers of milk whereof the flavor changeth not, and rivers of wine delicious to the drinkers, and rivers of clear-run honey; therein for them is every kind of fruit, with pardon from their Lord.”

The Koran, Sūrah XLVII, Ayah 15.

The rules of war created on the basis of ideals adopted by western society have become central to adversaries employing concealment warfare methods. Concealment warfare affords the most convenient, efficient and assured means of defying a conventionally superior force by challenging strategy, technology, ideology, morality and resolve. States that value LOAC will naturally make efforts to comply with its principles. Highly influenced by LOAC, the U.S. has comprehensively incorporated it into military doctrine, force structure, strategy, weaponeering, and rules of engagement to the point that it is predictable to an adversary employing concealment warfare.

Throughout its history of warfare, the U.S. has adapted to adversaries and developed defense technology, strategies and processes that are impossible for most nations to meaningfully challenge in the conventional battle space. As a result, adversaries seek to challenge the U.S. with concealment and terror tactics on the fringes of the traditional spectrum of conflict. The relative success of these methods compared to traditional force-on-force methods makes it conceivable that future adversaries will not wear uniforms at all, incorporate more aggressive use of civilian shields, apply more aggressive deception and disinformation campaigns, and commingle military objects and personnel with civilians to the point where U.S. forces are unable to discern any difference between civilians and combatants. Concealment warfare on this basis produces a protracted, complicated and problematic war resulting in a deterioration of principle and U.S. public support for operations.

Potential adversaries well recognized for their repression and human rights violations are most likely to attempt further strategic integration of military forces and objects with their civilian communities. Kim Jong II of North Korea and HuJintao of China rank among the highest targets of concern among humanitarian interest groups for human rights abuses.⁴¹¹ Chinese defense strategists publicly recognize compliance with LOAC leads to certain defeat, and “non-traditional strategies” must be employed for any success against conventionally superior forces.⁴¹²

⁴¹¹ David Wallechinsky, *The World's 10 Worst Dictators*, PARADE/L.A. TIMES, Feb. 22, 2004, at 4-5.

⁴¹² Col. Qia Liang and Col. Wang Xiangsui, Chinese People's Army, embrace the use of computer viruses, drug trafficking, environmental attacks, information warfare, stock market manipulation and other nontraditional strategies to challenge the U.S. military and economic

Although improvement in technology is important to a comprehensive solution to concealment warfare, targeting strategies and improved public communication are also necessary to a comprehensive solution. Improved understanding and communication of collateral damage and concealment warfare at all levels of military operations and the public is perhaps the easiest counter-measure. The meaningful deterrence of concealment warfare also necessitates the aggressive defense of target sets like dual-use targets currently authorized by LOAC, and the consideration of target sets in the category of organic infrastructure. The use of coercive and non-lethal methods that subdue, incapacitate and diffuse an adversary commingled among civilians without creating civilian casualties is imperative. Finally, difficult and subjective decisions to engage forces employing concealment warfare methods are inescapable. Where humanitarian interest groups, media, members of the international community, the ICC or other NGOs challenge a prudent command decision that involves civilians, well-prepared, thorough, fact-based arguments should be made aggressively and swiftly to defend command action, to maintain the initiative, and prevent operational degradation. Failure to exercise measures that counter concealment warfare will continue to improve an adversary's survivability while increasing the potential for civilian casualties in future conflicts.

advantage. Col. Wang said, "we are a weak country, so do we need to fight according to your rules? No. War has rules, but those rules are set by the West . . . if you use those rules, then weak countries have no chance." John Pomfret, *China Ponders New Rules of 'Unrestricted War'*, WASH. POST, Aug. 8, 1999, at A-1. Labeled "unrestricted warfare" that includes both military and non-military tactics, the two strategists identify U.S. refusal to "consider means that are contrary to tradition" as a primary weakness in its outlook on warfare. Perspective, *The New Book on Fighting Goliath: Chinese Officers Lay Out How Weak Foes Can Stymie Strong*, CHICAGO TRIB., Apr. 13, 2003, at C-3.

In cases such as Chechnya vs. Russia, Somalia vs. the United States, Northern Ireland guerrillas vs. Britain and Islamic Jihad vs. the entire West, without exception we see the consistent, wise refusal to confront the armed forces of the strong country head-to-head. Instead, the weaker side has contended with its adversary by using guerrilla war (mainly urban war), terrorist war, holy war, protracted war, network war and other forms of combat. . . . Mostly the weaker side selects as its main axis of battle those areas or battle lines where its adversary does not expect to be hit. The center of mass of the assault is always a place which will result in a huge psychological shock to the adversary It often makes an adversary which uses conventional forces and conventional measure as its main combat strength look like a big elephant charging into a china shop. It is at a loss as to what to do, and unable to make use of the power it has.

COL. QIAO LIAN & COL. WANG XIANGSUI, *People's Liberation Army of China, UNRESTRICTED WARFARE: CHINA'S MASTER PLAN TO DESTROY AMERICA* 182 (2002).

THE AIR BRIDGE DENIAL PROGRAM AND THE SHOOTDOWN OF CIVIL AIRCRAFT UNDER INTERNATIONAL LAW

MAJOR DARREN C. HUSKISSON*

I. INTRODUCTION

In August 2003, President George W. Bush approved a plan to resume a key component of U.S. counter-drug operations in Latin America, allowing the U.S. to again share real-time intelligence with Columbia to track, intercept and even shootdown aircraft suspected of carrying drugs.¹ The recommencement of similar operations with Peru in the near future is possible, and the initiation of such an operation with Brazil is now under discussion. These types of operations have proven quite effective in their ability to deter airborne drug traffickers.

The shootdown of suspected drug aircraft by countries such as Colombia and Peru is not new, and the success of such operations relies heavily on the airborne tracking and intelligence that only the United States is equipped to provide. This U.S. support was suspended in 2001 for more than two years in the wake of an unfortunate incident in which a Peruvian A-37 interceptor, operating as part of a joint U.S.-Peruvian counter-narcotics mission, fired two salvos of machine gun fire into a small Cessna floatplane (OB-1408),² after it had been identified as a probable drug trafficking aircraft. Unfortunately, the aircraft was not ferrying drugs but rather carried members of an American Baptist Missionary Group. Two people on the aircraft were killed, a U.S. missionary and her infant daughter, both killed by the gunfire from the Peruvian aircraft. This incident was the low-water mark in the history of the shootdown program code-named the Air Bridge Denial Program (ABDP). The ABDP had long operated as one part of a larger “war on drugs.” The target of this war, the drug trade in South America, has been classified as a threat to the national security of the United States and is known to support such terrorist and insurgent groups as the Revolutionary Armed Forces of Colombia (FARC) and the Sendero Luminoso (SL) or “Shining Path” group of Peru, insurgent forces responsible for enormous suffering in these countries.

While the shootdown of civil aircraft engaged in drug running dates

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¹ See Stephen J. Hedges, *U.S., Colombia to Resume Air Patrols; Anti-Drug Flights Halted in '01 After Missionary's Death*, CHICAGO TRIBUNE, Aug. 20, 2003, at 3.

² The designation “OB” indicates a Peruvian-registered aircraft.

back at least to the early 1990s, the ABDP has been officially involved in the shutdown of suspect aircraft since 1995. Despite objections from the Defense Department and from other Cabinet Agencies in the early 1990s, the Governments of Colombia and Peru introduced this shutdown component to interdiction operations. Until the shutdown of OB-1408 in 2001, the interceptor forces of Colombia and Peru had shot down, forced down or strafed with gunfire a number of civil aircraft suspected of carrying illegal drugs on the basis of real-time intelligence provided by the United States Government.

While one cannot argue with the general success of the shutdown component of the ABDP, the shutdown of civil aircraft has long been a thorny legal issue. From the beginning of the Cold War, the U.S. had maintained a consistently negative attitude toward the use of weapons against civil aircraft in flight,³ a disapproval that peaked in 1983 when the Soviet Union shot Korean Airlines Flight 007 (KAL 007) out of the sky and surfaced again in reaction to the Cuban shutdown of civil aircraft belonging to the Brothers to the Rescue (BTTR) Group in 1996. The U.S. is not alone in its stance. As evidenced by international reactions to a number of civil aircraft shutdowns, it is safe to say that the international community as a whole generally abhors the shutdown of civil aircraft; nevertheless it has remained surprisingly silent on the issue of ABDP shutdowns. While there has been no large-scale outcry over the shutdown operations being conducted in the skies over South America, there are potential international legal problems inherent in these shutdowns.

Along with questions specific to ABDP operations are additional questions regarding the shutdown of civil aircraft generally. What exactly does international law forbid? What defenses to internationally wrongful conduct could potentially excuse the shutdown of a civil aircraft? Is it a violation of international law for a State to shutdown planes suspected of carrying illegal drugs even when the operation is conducted in that State and is targeted against an aircraft registered in that State? Are there previously unaddressed human rights concerns with shutdown operations? Can such operations go beyond targeting drugs to target perhaps illegal weapons, weapons of mass destruction (WMDs) and missile technology transfers, or even terrorists themselves aboard civil aircraft in flight? The implications of these answers will not only affect the international perception of the legality of ABDP shutdowns, but will also clarify the law relating to other possible uses of force against civil aircraft in the now three-year-old Global War on Terror (GWOT).

ABDP shutdowns have escaped international legal analysis largely due to the fact that the States involved have asserted “sovereignty,” arguing that the subjacent State alone has the right to deal with aircraft flying over its territory as it sees fit. However, as we will see, the drug operations that are the

³ See 140 CONG. REC., 12785 (Sept. 12, 1994) (Statement of Sen. Kassebaum).

target of the ABDP are inherently international and invoke international legal concerns that far surpass the reaches of sovereignty. To ignore the shutdown of these aircraft is to ignore the development of international law.

In the examination of today's potential shutdown situations, one must do away with the mentality that was pervasive during the Cold War and with the KAL 007 shutdown specifically. The shutdown of KAL 007 and other shutdown events of the Cold War have the similarity of being "intrusion shutdowns." The aircraft were targeted with deadly force solely for *where* they were (in most cases, illegally flying over repressive Eastern Bloc countries), not for *what* they were doing. An international legal consensus has developed holding that intrusion shutdowns are *per se* illegal under international law.

Modern analysis must move beyond this mindset and take a close look at the *what* and not the *where*. The ABDP shutdowns target the actions of drug traffickers and the threats posed by their flights; therefore, the legality of these operations must be analyzed from that standpoint. With this change in view, one must be mindful that such analysis could have repercussions for civil aviation and for international law issues in general, especially in the midst of the international upheaval that has resulted from the GWOT.

Part II of this article will examine the history of the ABDP shutdown operations, from their inception to the 2003 resumption of operations. Part III will examine the various sources of international law relating to the use of force against civil aircraft and will attempt to distill some specific rules that are applicable to the legal analysis of ABDP operations and shutdowns in general. Part IV of this article will look at the circumstances under international law in which a State may be relieved of its international obligations, focusing on the options that could be used to justify the shutdown of civil aircraft and will seek to apply these options in an effort to determine the international legality of the ABDP shutdowns. Finally, Part V will examine other potential issues relating to the shutdown of civil aircraft as part of the ABDP.

II. THE HISTORY OF THE AIR BRIDGE DENIAL PROGRAM AND THE SHUTDOWN OF SUSPECTED DRUG AIRCRAFT

The Air Bridge Denial Program derives its name from its goal: to deny the South American drug network the "air bridge" used to transfer semi-refined cocaine from growing areas in rural Peru, Bolivia and Colombia to processing plants in Colombia and onward to destination countries. While this transportation network also includes land and water routes, its lifeblood is aerial transportation.⁴ The denial of this air bridge, initially through the

⁴ At times, almost 90 percent of the drug trafficking operations between Peru and Colombia have been conducted by air. See GENERAL ACCOUNTING OFFICE, U.S. DRUG INTERDICTION

interdiction of suspect planes on the ground and later through the use of weapons against aircraft in flight, is seen as a key component of the overall success of U.S. counter-drug operations. However, while this component has had a long and successful history, it has been controversial.

A. Early Counter-Drug Operations in South America

1. *The Origin of the Program*

In the 1980s, the production and international transshipment of cocaine, along with other illegal drugs from Latin America, morphed into a national security problem, necessitating involvement from more than just police forces and the U.S. Coast Guard. In response, there has been a constant U.S. counter-drug presence in Latin America since at least the early years of the Reagan Administration. Starting in 1985, the U.S. began funding Peruvian operations, code-named “Condor,” aimed at destroying airstrips used by drug-running aircraft, hoping to destroy the pillars of the air bridge.⁵ While “Condor” involved increased logistical and intelligence support, the real increase in military activity began in 1989 with President George H. W. Bush’s so-called “Andean Initiative.” This initiative involved the deployment of seven Special Forces teams and approximately 100 military advisors to Colombia, Bolivia and Peru to train the armies of the region to fight the drug war.⁶

Beginning in the early 1990s, the United States Southern Command began a program called “Support Justice” to assist in the aerial monitoring of the air bridge. “Support Justice” involved the use of P-3 and AWACS surveillance aircraft, the goal of which was to “confirm anecdotal law enforcement information regarding the frequent use of small private aircraft to move . . . cocaine” and to “provide objective data on the non-commercial routes being used by trafficking aircraft, the flight times, departure points and final destinations.”⁷ Peru used this information to implement a program of

ISSUES IN LATIN AMERICA 1 (1994), available at <http://www.fas.org/irp/gao/nsi95032.htm> [hereinafter Testimony of Joseph E. Kelley] (Statement of Joseph E. Kelley, Director-in-Charge, International Affairs Issues, National Security and International Affairs Division, Testimony Before the Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives).

⁵ See JoAnn Kawell, *Closing the Latin American Air-Bridge: A Disturbing History*, FOR. POL’Y IN FOCUS (2001), available at www.fpif.org/pdf/gac/0105airbridge.pdf.

⁶ See CONGRESSIONAL RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCE ABROAD, 1978-1999 (1999).

⁷ DEPARTMENT OF STATE, PERU INVESTIGATION REPORT: THE APRIL 20, 2001 PERUVIAN SHOOTDOWN INCIDENT (2001), available at http://www.fas.org/irp/news/2001/08/peru_shootdown.html [hereinafter STATE DEPARTMENT PERU REPORT]. The major operations under this code name were Support Justice III, September 1991 – April 1992 (halted when a U.S. C-130 was fired upon by Peruvian jets), and Support Justice IV, November 1992 – May 1994. See INSTITUTE FOR DEFENSE ANALYSIS, DETERRENCE EFFECTS AND PERU’S FORCE-DOWN/SHOOT-DOWN POLICY: LESSONS LEARNED

interdiction at the points of departure and arrival of suspect aircraft, thereby avoiding the need to use force against drug trafficking aircraft in flight.⁸ While “Support Justice” provided much needed intelligence and surveillance support to Peru, the focus of the United States was about to move far beyond “Support Justice” levels with the Presidential election of 1992.

2. *The Introduction of a Shootdown Component*

While both the Reagan and Bush administrations had focused on countering the South American drug trade under operations such as “Condor,” the “Andean Initiative,” and “Support Justice,” President Clinton was determined to take the fight directly to the enemy. In 1993, President Clinton signed Presidential Decision Directive 14 (PDD 14),⁹ which shifted the focus of U.S. counter-drug operations from the “transit zone in the Caribbean Sea and the Gulf of Mexico to the source zone, chiefly Colombia, Peru and Bolivia.”¹⁰

As one of the first moves in support of PDD 14, the U.S. began using ground radar stations and aerial tracking platforms to provide real-time intelligence for the interception of suspect aircraft.¹¹ Peru and Colombia used this information to go one step beyond the original intent of some policy makers in Washington. In 1993, Peru began the implementation of Peruvian Decree Law Number 25426, which authorized the Peruvian military to use force against suspected drug aircraft in flight.¹² In early 1994, Colombia confirmed to State Department officials their intention to implement a similar program.¹³ In a response to an American request for assurances that Peru

FOR COUNTER-COCAINE INTERDICTION OPERATIONS 18 (2000) [hereinafter DETERRENCE EFFECTS].

⁸ See STATE DEPARTMENT PERU REPORT, *supra* note 7.

⁹ See U.S., OFFICE OF THE WHITE HOUSE PRESS SECRETARY, PRESS RELEASE REGARDING PRESIDENTIAL DECISION DIRECTIVE 14 (1993), *available at* <http://www.fas.org/irp/offdocs/pdd14.htm>.

¹⁰ SELECT COMMITTEE ON INTELLIGENCE UNITED STATES SENATE, A REVIEW OF UNITED STATES ASSISTANCE TO PERUVIAN COUNTER-DRUG AIR INTERDICTION EFFORTS AND THE SHOOTDOWN OF A CIVILIAN AIRCRAFT ON APRIL 20, 2001 3 (2001) [hereinafter SENATE PERU REPORT].

¹¹ See STATE DEPARTMENT PERU REPORT, *supra* note 7.

¹² See SENATE PERU REPORT, *supra* note 10 at 3.

¹³ In 1990, the Colombian government had conceived of a nearly identical shootdown program, the implementation of which had been suspended under U.S. pressure. See State Department Message 1994Bogota01852, Revised Colombian Interception Procedures, 2 (1994), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc1.pdf> [hereinafter February 1994 Bogotá Cable] (Cable sent from the U.S. Embassy in Bogotá to the U.S. Secretary of State). The idea of resorting to the use of weapons against airborne drug traffickers was not new, and it is not just a Colombian or Peruvian idea. A law sponsored by a U.S. Senator would have allowed U.S. law enforcement to use force against suspected drug aircraft in flight. That effort was strongly opposed by the Department of State in 1989, and the bill never became law. See State Department Memorandum, Position Paper on the Use of

would not use U.S.-provided intelligence to attack civil aircraft in flight, Peru stated that it would continue to “frontally combat, with the means of which it itself disposes, against illicit trafficking in drugs within the parameters of its internal legal regime”¹⁴ There was a similar response from Columbia.¹⁵

3. *The 1994 Interruption of Real-Time Intelligence*

The nascent shutdown program proved enormously effective early on in Peru, and by some accounts Peru shot down over 30 aircraft while tracking and stopping an additional 190.¹⁶ With this budding success, legal questions surrounding the shutdown policies might very well have been ignored by the U.S. Government, but for an opinion by lawyers at the Department of Defense (DoD) warning that U.S. forces supplying the real-time information to the Colombian and Peruvian forces could be subject to criminal prosecution under U.S. domestic law. This opinion led the DoD to immediately implement an interruption in cooperation with Colombia and Peru, including the sharing of real-time intelligence. Both Peru and Colombia responded angrily, and drug traffickers immediately increased their operations via the air bridge.¹⁷

Agreement with the DoD position that shutdown operations could expose U.S. forces to legal jeopardy was quickly forthcoming lawyers in the Departments of Justice, State, Defense, Treasury and Transportation, all of whom concluded that U.S. support of shutdown operations was probably a violation of U.S. law.¹⁸ In a final opinion, the Office of Legal Counsel of the Department of Justice concluded that the ABDP operations supporting the shutdown of civil aircraft created substantial risk that such operations would constitute aiding and abetting a violation of the Aircraft Sabotage Act of 1984.¹⁹ In its sweeping opinion, the DoJ stated that:

Weapons Against Aircraft Suspected of Carrying Drugs, (1989) [hereinafter October 1989 Position Paper], *reprinted in* State Department Memorandum, Forcedown Policy: Options for Colombia and Peru (1994), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc2.pdf>.

¹⁴ State Department Message 1994Lima04197, Suspension of Provision of DOD Real-Time Radar Track Data to Peru 2-3 (1994), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc5.pdf> (Message from U.S. Embassy in Lima to the U.S. Secretary of State).

¹⁵ See February 1994 Bogotá Cable, *supra* note 13, at 5.

¹⁶ See 140 CONG. REC. 8254-55 (July 1, 1994) (Statement of Sen. John Kerry). Another count had Peru having shot down 41 aircraft from 1992-94. See Eric Edward Geiser, *The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime*, 4 J. INT’L LEGAL STUD. 187, 218 (1998) [hereinafter *Fog of Peace*].

¹⁷ See Testimony of Joseph E. Kelley, *supra* note 4 at 2.

¹⁸ See DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL, UNITED STATES ASSISTANCE TO COUNTRIES THAT SHOOT DOWN CIVIL AIRCRAFT INVOLVED IN DRUG TRAFFICKING 2 (1994), available at <http://www.usdoj.gov/olc/shutdown.htm> [hereinafter Opinion of the Office of Legal Counsel].

¹⁹ Pub. L. No. 98-473, 98 Stat. 2187 (1984).

USG [United States Government] agencies and personnel may not provide information (whether ‘real-time’ or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.²⁰

In light of such an opinion, it was impossible to restart the cooperation without a change in U.S. law. What resulted was an interagency review to find ways to resume the support while immunizing U.S. participants.

Legislation, sponsored by Senator John Kerry of Massachusetts,²¹ quickly found its way to Congress as an amendment to the 1995 National Defense Authorization Act.²² The legislation passed, and it was signed into law on 5 October 1994 as Section 1012 of the National Defense Authorization Act, entitled “Official Immunity for Authorized Employees and Agents of the United States and Foreign Countries Engaged in Interdiction of Aircraft Used in Illicit Drug Trafficking.”²³ A Presidential determination, required under section 1012, was signed by President Clinton in December making the necessary findings related to Colombia²⁴ and signed a nearly identical one a week later regarding Peru.²⁵ Both determinations recognized the threat posed by drugs and found that steps were in place to prevent the shutdown of innocent civil aircraft.²⁶

²⁰ Opinion of the Office of Legal Counsel, *supra* note 18 at 35.

²¹ Senator Kerry had criticized the DoD’s decision to end cooperation with Colombia and Peru, saying that it “cut off at the knees a program that was working.” 140 CONG. REC. 8255 (July 1, 1994) (Statement of Sen. John Kerry). He firmly believed that the amendment was in compliance with international law, specifically citing the sovereign right of a State to act as it sees fit within its own territory.

²² The amendment was not without its detractors, and the speed with which it came to a vote was duly noted. Senator Malcolm Wallop condemned the amendment, stating that it had been adopted “without the benefit of hearings and in the face of significant opposition by affected organizations” and that it “sets troubling precedents for U.S. and international law and contradicts key international conventions governing air safety....” 140 CONG. REC. S12771 (Sept. 12,) (Statement of Sen. Malcolm Wallop). Another Senator stated her belief that the amendment set the stage for a “deadly game of chance,” in effect authorizing the shutdown of civil aircraft on an “educated guess.” 140 CONG. REC. S12785 (Sept. 12, 1994) (Statement of Sen. Nancy Kassebaum).

²³ Pub. L. 103-337, sec. 1012, 108 Stat. 2883 (1994).

²⁴ OFFICE OF THE PRESIDENT OF THE UNITED STATES, *PRESIDENTIAL DETERMINATION 95-7* (1994), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc11.pdf>.

²⁵ OFFICE OF THE PRESIDENT OF THE UNITED STATES, *PRESIDENTIAL DETERMINATION 95-9* (1994), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc12.pdf>.

²⁶ The memoranda signed by President Clinton contemplated that ICAO Intercept Procedures would be used in the operations. See MEMORANDUM OF JUSTIFICATION FOR PRESIDENTIAL DETERMINATION REGARDING THE RESUMPTION OF U.S. AERIAL TRACKING INFORMATION

While these determinations laid the foundations for putting the U.S. government back in the shutdown business, the legal success was a domestic one at best. The fact that international legal issues still lingered was not lost on the State Department.²⁷ Notwithstanding these potential international legal issues, the U.S. resumed real-time intelligence sharing in 1995, for the first time under the name “Air Bridge Denial Program.”²⁸

B. 1995 – Present

I. Six Years of Air Bridge Denial Operations

During the period after the resumption of intelligence sharing in 1995 until 2001, the U.S. participated in 14 shutdown operations with the Peruvians, with Peruvians claiming 38 total shutdowns.²⁹ The Colombians conducted an unknown number of shutdowns during this time, with most of their attacks targeting aircraft already on the ground.³⁰

One cannot question the program’s behavioral modification and deterrence effects on drug runners, as even the mere perception that authorities might use force against suspected drug aircraft had the effect of reducing flights.³¹ Such was the case with the resumption of U.S. support. In 1995, Peruvian interdiction of only 13% of all flights had the effect of reducing trafficking flights by 64% overall.³² The cocaine market was crippled in that country, with farmers abandoning two-thirds of their fields³³ and forced

SHARING AND OTHER ASSISTANCE TO THE GOVERNMENT OF PERU 2 (1994) [hereinafter PRESIDENTIAL JUSTIFICATION MEMO], reprinted in Senate Peru Report, *supra* note 10. Peru, for its part, complied, codifying the use of ICAO Intercept Procedures into Peruvian Law 24883 in late 1994. *See id.* at 5.

²⁷ *See* Department of State, Cable to U.S. Embassy Bogotá, Presidential Determination Demarche, December 15, 1994, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc13.pdf> [hereinafter Presidential Determination Demarche].

²⁸ *See* SENATE PERU REPORT, *supra* note 10 at 5.

²⁹ *See id.* at 10.

³⁰ *See* Fog of Peace, *supra* note 16 at 218.

³¹ Before an official shutdown policy was in place during one of the earlier “Support Justice” operations, an “accidental” shutdown of a trafficking aircraft alone led to a temporary 60% reduction in flights. *See* DETERRENCE EFFECTS, *supra* note 7 at IV-41.

³² *See id.* at 2.

³³ *See id.*

production into a few “safe havens” in Colombia.³⁴ The effects felt in the U.S. were astonishing.³⁵

With the success of the program came a slowdown in “end-game” operations in the late 1990s. Despite huge shutdown numbers initially, from 1998 to 2000 there was only one shutdown.³⁶ This was unquestionably the result of ABDP becoming a victim of its own success.

2. *The Shootdown of OB-1408 to Today*

On 20 April 2001, OB-1408 left Islandia, Columbia bound for Peru. On board were Americans James and Veronica Bowers, missionaries with the Association of Baptists for World Evangelism (ABWE), their daughter Charity and son Cory, and pilot Kevin Donaldson (also with the ABWE). The Bowers had been in nearby Leticia, Colombia to obtain a residence visa for Charity, whom they had recently adopted. Because OB-1408 was a floatplane, it needed to stay close to the Amazon River in case of an emergency, which made for an unusual flight path, actually necessitating a brief penetration of Brazilian airspace.³⁷

The unusual flight path of OB-1408 soon attracted attention. OB-1408 was soon identified by U.S. and Peruvian authorities as a possible drug flight, and the Peruvians had scrambled fighter aircraft for an interception. When the occupants noticed a Peruvian military jet following the aircraft, Donaldson radioed the Iquitos tower of his position and mentioned that he was being trailed by military jets.³⁸ Shortly thereafter, the Peruvians opened fire. The plane landed on the Amazon River near Pebas, and Veronica and Charity Bowers were dead.

In the wake of the tragedy that took two innocent lives, programs in both Peru and Colombia were suspended pending a review of safety procedures. After several years of fact-finding and diplomacy, no doubt lengthened by attention focused elsewhere, such as the 9/11 attacks and the

³⁴ The Putumayo and Caqueta regions of Colombia, isolated and, for all practical purposes, beyond the reach of the Colombian Government, saw a rapid rise in cocaine production after the implementation of the ABDP. *See id.* at II-23. Success in slowing down production in one jurisdiction often leads to more production elsewhere, as drug lords have no use for international boundaries.

³⁵ After four years of ABDP operations, cocaine prices in the U.S. dropped by 40%, and casual use dropped by 15%. *See id.* Additionally, there was a corresponding rise in the U.S. street price for cocaine and a reduction in positive drug test rates. *See id.* The ABDP was credited as being “the only consistent and plausible explanation for the collapse of the illicit coca markets in Peru.” *Id.* at III-2.

³⁶ *See* SENATE PERU REPORT, *supra* note 10 at 10.

³⁷ *See* SENATE PERU REPORT, *supra* note 10 at 20.

³⁸ *See id.* at 21. That very same controller had just before responded to a Peruvian military request for information on the location of OB-1408. That controller had reported that he was still on the water at Islandia, as Leticia air traffic control had not advised him of OB-1408’s departure.

wars in Afghanistan and Iraq, operations in Colombia have restarted. Under the newly established rules, there are checklists of steps that must be followed in shutdown situations to avoid the taking of innocent life.³⁹

The program is already showing results in reducing drug production. The recommencement of U.S. cooperation led to the seizure of 18.5 tons of cocaine in its first nine months.⁴⁰ Colombian forces have intercepted 26 aircraft, nine of which flew in from Brazil (a very important fact in the legal analysis), capturing 13 of them and destroying the other 13 on the ground.⁴¹ No aircraft have been shot down so far.

Despite the success in Colombia, drug cultivation is on the rise in many other countries, including Peru and Brazil, two countries that are waiting to join in the shutdown game. Peru awaits a U.S. Presidential Determination, and Brazil is in the final stages of a law that would allow them to shoot down aircraft that enter Brazil and refuse to identify themselves and refuse orders to land.⁴² Brazil has in fact firmly warned the U.S. that it will enact its own shutdown plan, with or without a Presidential Determination.⁴³

C. Legal Issues Still Unresolved

As the ABDP enters a new phase of operations, questions of domestic law remain largely a non-issue. However, questions of international law remain a holdover from the very commencement of shutdown operations. The U.S. Government, particularly the State Department, has sought an international legal basis for the shutdown portion of ABDP since its very inception. A State Department cable to the U.S. Embassy in Bogotá shortly after the first restarting of ABDP recognized the importance of an international legal justification. “Now that we have resumed the sharing of intelligence, it is important that we work carefully to gain acceptance by the international legal system of what we are doing”⁴⁴

One means of achieving international acceptance is to seek the creation of a narrow exception in international law where “drug trafficking threatens the political institutions of a state and where the country imposes strict procedures

³⁹ See *Drug-Runners Beware*, THE WASHINGTON TIMES, Aug. 8, 2003, at A18.

⁴⁰ See *Brazil: Visiting Colombian Delegation Explains Results of Shoot-Down Law*, BBC WORLDWIDE MONITORING, June 5, 2004, LEXIS, News Library (Translated by the BBC from *Correio Braziliense*).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *Brazil: Ultimatum to US on ‘Shutdown’ Law*, LATIN AMERICA WEEKLY REPORT, June 1, 2004, LEXIS, News Library.

⁴⁴ Presidential Determination Demarche, *supra* note 27. Even Senator Strom Thurmond, never one to be overly concerned about international law, worried that the shutdowns would expose U.S. persons to international liability. See 140 CONG. REC. S8222 (July 1, 1994).

to reduce the risk of attack against non-drug trafficking aircraft.”⁴⁵ Such an exception has never been articulated by any legal authority, nor has it achieved international recognition; however, international law may be broad enough for the recognition of just such an argument.

III. INTERNATIONAL LAW GOVERNING THE SHOOTDOWN OF CIVIL AIRCRAFT

International law is the law that governs relations among nations and is based on the consent of sovereign States by their status as State parties to international conventions or by their conduct amounting to customary international law. International law may be ascertained from various sources.⁴⁶ Since the birth of aviation, especially since the Second World War, a great deal of international law has developed relating to the use of weapons against civil aircraft in flight.

A. United Nations Charter

1. Prohibition on the Use of Force under Article 2(4)

The UN Charter is often seen as being at the apex of international law. The obligations assumed by States under the Charter trump all other conflicting obligations.⁴⁷ When determining the limits placed on a State’s ability to project force against another State, including perhaps the use of force against foreign civil aviation, the primary authority is the Charter. The use of force against another State is prohibited under the Charter unless it is conducted in self-defense or in accordance with Chapter VII of the Charter.

Article 2(4) of the Charter is seemingly clear in its mandate:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

⁴⁵ State Department Memorandum, Implementing the President’s Decision on Colombia Peru Forcedown Policy 2-3 (1994), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc10.pdf> [hereinafter June 1994 Memo to Secretary of State] (Decision Memorandum to Secretary of State Warren Christopher concerning drug aircraft shootdowns).

⁴⁶ Under Article 38 of the Statute for the International Court of Justice, the sources of international law are found in international agreements, international custom, and general principles of law, with subsidiary determination of the law being garnered through judicial decisions and the teachings of the world’s most highly qualified publicists. STAT. OF THE INT’L CT. OF J., June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945).

⁴⁷ “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” U.N. CHARTER, art. 103.

inconsistent with the Purposes of the United Nations.⁴⁸

While the notion of what constitutes a use of force has not been clearly established either by state practice or by scholars, it is clear that Article 2(4) certainly includes all uses of armed force as well as other types of physical force that might typically be used against civil aircraft in flight.⁴⁹ Additionally, while States are the primary focus of this prohibition, a State may be held accountable for the acts of others in certain circumstances.⁵⁰

Any analysis of conduct potentially in violation of Article 2(4) is full of pitfalls. There are few other provisions of international law with such political implications as Article 2(4) and certainly few others with such ambiguous meaning in its key provisions.⁵¹ A full-scale analysis of what is and is not a use of force has been the subject of scores of works of international law and is far beyond the scope of this article. It is useful, however, to examine how this provision of international law can potentially impact operations involving the shutdown of civil aircraft, including those conducted as part of ABDP operations.

2. *The Shutdown of Civil Aircraft as a Use of Force*

Many potential shutdown scenarios do not implicate the rules on the use of force under the Charter, as they do not involve cross-border activity.⁵²

⁴⁸ *Id.*, art. 2(4).

⁴⁹ See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112-13 (Bruno Simma, ed., 1994). There is strong support for the proposition that it includes *any* cross-frontier military action, regardless of scope or purpose. See *id.* at 117-118. This almost certainly includes not only actions in other States, but also actions conducted in places beyond the sovereign control of any State, such as the high seas, outer space, and Antarctica.

⁵⁰ For example, a State may be guilty of an unlawful use of force if it is in control of armed bands or terrorists sent across borders to use armed or physical force in another State, including engaging in the shutdown of civil aircraft. See *id.* at 115.

⁵¹ “The prohibition on the use of force . . . is burdened with uncertainties resulting from the, undoubtedly ambiguous, wording of the relevant provisions of the UN Charter, as well as from their unclear relations to one another. These ambiguities leave room for individual states to interpret the Charter provisions in accordance with their particular political interests.” *Id.* at 127-8.

⁵² See David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT’L L. 245, 387 (1991) [hereinafter *Iran Air Flight 655*]. The notion that a State may be guilty of an unlawful use of force through actions conducted in its own territory has been subject to considerable doubt in international law. The issue was before the International Court of Justice (ICJ), but the court refused to consider the question of whether a use of force could occur on a State’s own territory. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Reports 226, para. 50. [hereinafter *Nuclear Weapons Case*]. In his in-depth analysis of every use of force from 1945-1991, Professor Mark Weisburd does not include any civil aircraft shutdowns as “uses of force.” He does however, include two lesser operations against civil aircraft. He classifies both the 1985 interception over the high seas of an Egypt Air 737 by U.S. fighters as a use of force. He also

However, evidence suggests that the use of weapons against a foreign civil aircraft in international airspace is a use of force and must therefore be justified under the rules of the UN Charter. After the 1996 BTTR shutdown, President Clinton is reported to have considered a missile attack on Cuban MiG-29 bases in response.⁵³ Since there was no Chapter VII authorization from the Security Council, President Clinton would have been acting under the inherent right to self-defense, necessarily implying that the U.S. was the victim of an armed attack, an aggravated form of force and a violation of Article 2(4). It can therefore be said that any planned shutdown operation outside the area of sovereign control of a State is subject to the limits of the UN Charter and may not take place unless the strict requirements of Article 51 are met, or the operation is conducted under a Chapter VII authorization from the UN Security Council.

At present, ABDP programs are conducted by States inside their own territorial airspace. As such, there is no implication of Article 2(4).⁵⁴ However, should there be any plans to conduct shutdown operations non-consensually over another sovereign State, such an action would be a use of force and a violation of Article 2(4). Professor Schmitt has agreed in theory, stating that an action such as conducting a no-fly zone conducted without the consent of the subjacent State, even without the shutdown of aircraft, would be a use of force.⁵⁵

classifies a similar operation by the Israeli Air Force over the high seas as a use of force. This implies that even an action against civil aviation that does not result in a shutdown can be a use of force if it is done outside sovereign territory. Conversely, a shutdown done inside an area of sovereign control is not a use of force under Article 2(4). See A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 291-93 (1997). We shall therefore proceed under the understanding that a use of force has some measure of extraterritoriality that is not applicable to a State's actions in areas under its sovereign control.

⁵³ See Andres Oppenheimer, *Missile Attack Weighed After Shutdown*, MIAMI HERALD, Oct. 10, 1996 at 25A.

⁵⁴ If there were an international agreement among participating States to conduct cross-border operations, this too would not precipitate an Article 2(4) violation amongst its participants, as the potential victim would have consented to the operation.

⁵⁵ See Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOY. L.A. INT'L & COMP. L.J. 727, 743 (1998). There is one interesting situation in which such a non-consensual shutdown could take place. Recall that in 2002, the CIA used a hellfire missile launched from a Predator Unmanned Aerial Vehicle (UAV) operating over Yemen to kill 6 suspected terrorists riding in a car. See Norman G. Printer, Jr., *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 U.C.L.A. J. INT'L & FOREIGN AFF. 331, 335-36 (2003). This raises the question as to when the situation will arise when a military or intelligence arm of a government will decide to target a terrorist who is being transported in a civil aircraft. Could such an aircraft be shot down? Foreign assassination has been seen as a violation of Article 2(4). See Louis Rene Beres, *The Newly Expanded American Doctrine of Preemption: Can it Include Assassination?*, 31 DENV. J. INT'L L. & POL'Y 157, 160 (2002). In response to the U.S. Predator strike in Yemen, the Swedish Foreign Minister said if the U.S. did it without Yemeni permission, then it was an unlawful use of force. See Heinz Klug, *Civil Liberties in a*

The point may not be academic; non-consensual shutdown operations against hostile targets may be on the horizon. The U.S. military is currently working to fit Predator UAVs with sidewinder missiles, possibly designed for this very purpose.⁵⁶ Such a broadening of ABDP operations could take place in a situation in which a country fails to take adequate steps to stop the flow of illegal drugs from inside its borders, leading to the implementation of non-consensual shutdown operations over that State's territory. While the rules on the use of force do not directly impact current ABDP operations, they do certainly lay down rules regarding where such operations can lawfully be conducted. The shutdown of civil aircraft, including shutdowns conducted under ABDP, may not extend beyond the area of sovereign control of a State without implicating the UN Charter norms regulating the use of force.

B. Public International Air Law

While the UN Charter contains rules governing State behavior that will necessarily govern *any* operation involving the use of force among nations, public international air law is more specific. It covers a wide range of topics, only a small slice of which is relevant here.

1. The Chicago Convention of 1944

The Convention on International Civil Aviation,⁵⁷ commonly known as the Chicago Convention, is the primary international agreement relating to international civil aviation. Under the penumbra of this convention are three major provisions that relate to the shutdown of civil aircraft: Article 3d, Annex 2 and Article 3*bis*. While one would expect these provisions to be universally applicable among parties to the convention⁵⁸ and to have relatively clear meanings, neither is absolutely true. Nonetheless, an examination of these provisions is important in a review of the normative structure of this area of law.

While the Chicago Convention is not generally applicable to state

Time of Terror: The Rule of Law, War, or Terror, 2003 WIS. L. REV. 365, 380 (2003) [hereinafter *Civil Liberties*]. There is no reason to believe that the same would not be true if the operation had been targeted at a terrorist in an aircraft versus one riding in a vehicle on the ground. It should be noted that these types of targeted killings have been justified under international law under self-defense. While the question of whether such operations are legal under a self-defense argument is beyond the scope of this article, if such operations are indeed justified under self-defense, then they could necessarily be conducted against civil aircraft, so long as the requirements of self-defense, necessity, and proportionality are met.

⁵⁶ See CONGRESSIONAL RESEARCH SERVICE, HOMELAND SECURITY: DEFENDING U.S. AIRSPACE 6 (2003), available at <http://www.fas.org/sgp/crs/RS21394.pdf>.

⁵⁷ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

⁵⁸ Of the 191 UN members, 188 are parties to the Chicago Convention.

aircraft, the Convention contains two provisions relating to the operation of state aircraft. First, States are forbidden to fly state aircraft over the territory of another State without permission from that State.⁵⁹ The second requirement for state aircraft is contained in Article 3(d), which requires that parties “undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.”⁶⁰

The requirements of Article 3(d) are quite general in scope. It certainly obligates States to set up some type of regulatory regime for state aircraft, but what this means specifically is subject to debate. One view, and probably the best, is that the “word ‘regulation’ is subject to a broad interpretation in order to include military orders, including rules of engagement given by military hierarchy to its pilots and air traffic controllers.”⁶¹ Both the United States and Canada have taken such a position in the past.⁶² In fact, the United States has gone even further, taking the position that Article 3(d) prohibits the shutdown of civil aircraft, even in the setting of ABDP-style shutdowns.⁶³ The ICAO Council has recognized that a shutdown event can be contrary to the provisions of the Convention, implying that the relevant provision is Article 3(d).⁶⁴

The generalities of Article 3(d) should not operate to render void its applicability to the shutdown of civil aircraft. The requirement to refrain from shooting down civil aircraft is properly within its general mandate and is binding upon signatories, unless some provision of international law excuses the State from such an obligation. After an examination of Article 3*bis* and Annex 2, the importance of Article 3(d) will be apparent, as it is the only universally binding provision contained in the original Chicago Convention.

Complementing Article 3d is Annex 2. ICAO has a power that few international organizations have, quasi-legislative power. The Chicago Convention mandates that ICAO adopt standards and recommended practices (SaRPs) on a whole host of matters relating to international civil aviation.⁶⁵

⁵⁹ See Chicago Convention, *supra* note 57, art. 3(c).

⁶⁰ *Id.*, art. 3(d).

⁶¹ Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago OPUS 3*, 66 J. AIR L. & COM. 885, 926-27 (2001) [hereinafter *Chicago OPUS 3*].

⁶² See *id.* at 927.

⁶³ See *October 1989 Position Paper*, *supra* note 13. *After the shutdowns started, the U.S. again called such actions a violation of Article 3(d)*. See June 1994 Memo to Secretary of State, *supra* note 45 at 2.

⁶⁴ *Council Resolution Concerning Israeli Attack on Libyan Civil Aircraft*, ICAO, 12 INT’L LEGAL MATERIALS. 1180 (1973) [hereinafter *ICAO Resolution on Libyan Shutdown*]. In this resolution the Council implied that the Israeli attack did indeed violate the Chicago Convention. Such an understanding was also implied by the U.S. in internal Department of State communications. See February 1994 Bogotá Cable, *supra* note 13 at 3. Article 3(d) has been described as the “principle treaty obligation imposed upon States for the regulation of the flight of military aircraft applicable during times of peace and armed conflict found in the Chicago Convention.” *Chicago OPUS 3*, *supra* note 61 at 913.

⁶⁵ Chicago Convention, *supra* note 57, art. 37.

These SaRPs are contained in annexes to the Convention that may be amended by the ICAO Council with a 2/3 vote.⁶⁶

Every interception of an aircraft by fighter jets is potentially dangerous, even in the most routine situation. As such, ICAO has promulgated rules in Annex 2, entitled “Rules of the Air,” which deal with the rules to be followed when undertaking to intercept a civil aircraft.⁶⁷ Annex 2 had previously contained a provision calling on States to refrain from the use of weapons against civil aircraft, but that provision was removed in 1984.⁶⁸ Nevertheless, Annex 2 contains important rules relevant to issues surrounding the shutdown of civil aircraft.

Annex 2 provides that interceptions must be undertaken as a last resort, and when undertaken, their purpose must be solely to identify the suspect aircraft,⁶⁹ using a three-phased approach for the identification. Communication is standardized for those aircraft undertaking interceptions, with phrases for oral communication⁷⁰ and signals for visual communication provided.⁷¹ While the use of weapons is not addressed, Annex 2 does warn that using “tracer bullets to attract attention is hazardous, and it is expected that measures will be taken to avoid their use”⁷²

The applicability of Annex 2 is subject to debate. Annex 2 contains no recommended practices, only standards requiring notice from States that refuse to comply. Most of the major provisions relating to the interception of civil aircraft contained in Annex 2 came in 1984 in the form of Amendment 27. Both the U.S. and the U.S.S.R. believed that the amendments were *ultra vires*, in that the amendments unduly attempted to regulate state aircraft in violation of the Chicago Convention. However, the majority of States did not believe that the amendments regulated state aircraft, but rather were designed to protect international civil aviation, well within the ambit of the Chicago Convention.⁷³ The U.S. never registered a difference regarding Amendment

⁶⁶ *Id.*, art. 90. While recommended practices are of no binding effect, standards are binding on all State parties, unless they file a difference with ICAO. *See id.*, art. 38. But even then, the differences are of limited effect. A State can only promulgate rules in areas over its own sovereign control, and ICAO rules are in force over the high seas. *See id.*, art. 12.

⁶⁷ *Id.*, annex 2, app. 2, attach. A.

⁶⁸ It was believed that, since this prohibition was already a part of general international law, it had no place in an annex from which States could deviate from compliance under Article 38 by filing a difference with ICAO. *See* Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation*, 11 ANNALS OF AIR AND SPACE LAW 105, 113 (1986) [hereinafter *Interception of Civil Aircraft*].

⁶⁹ Chicago Convention, *supra* note 57, annex 2, attach. A, para. 2.1. The implication here is that an interception may not be undertaken for the purpose of engaging in a shutdown operation.

⁷⁰ *Id.*, table A-1

⁷¹ *Id.*, annex 2, app. 1.

⁷² *Id.*, attach. A, para. 8.

⁷³ *See* KI-GAB PARK, *LA PROTECTION DE LA SOUVERAINETE AERIENNE*, 306 (1991) [hereinafter *SOUVERAINETE AERIENNE*].

27, mainly because it does not accept the premise that any part of Annex 2 applies to the operation of state aircraft.⁷⁴ Complicating the issue is the status of Annex 2 relating to areas outside the jurisdiction of any State. Article 12 of the Chicago Convention gives ICAO the power to issue rules relating to the air space over the high seas.⁷⁵ Also, Annex 2 is only applicable to the interception of aircraft. Some countries do not have interception capabilities and are reliant solely on anti-aircraft artillery (AAA) forces for anti-aircraft capability. Annex 2 would not apply to AAA operations. Thus, while its provisions are important, the legal effect of Annex 2 is not without limitations.

Soon after the shutdown of KAL 007, nations recognized the weaknesses in the Chicago Convention and work began to create a protocol to the Chicago Convention that would codify more specific rules regarding the use of weapons against civil aircraft in flight. What resulted was the Montreal Protocol of 10 May 1984, which amended Article 3 of the Convention and became known as Article 3*bis*.⁷⁶

Article 3*bis* of the Chicago Convention governs the issue of the use of weapons against civil aircraft:

The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.⁷⁷

The requirement that States refrain from the use of weapons against aircraft in flight is balanced by measures designed to protect the sovereignty of the subjacent State.

[E]very State . . . is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations Each contracting State agrees to publish its regulations in force

⁷⁴ See *Interception of Civil Aircraft*, *supra* note 68 at 121.

⁷⁵ *Chicago Convention*, *supra* note 57, art. 12.

⁷⁶ *Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft*, ICAO Doc. 9437, A25-Res. (May 10, 1984), reprinted in 23 INT'L LEG. MATERIAL 705 (1984) [Article 3*bis*].

⁷⁷ *Id.*, art. (a).

regarding the interception of civil aircraft.⁷⁸

While it was adopted unanimously at the Twenty-fifth Session (Extraordinary) of the ICAO Assembly, the amendment lingered without receiving the required number of ratifications to come into force for 14 years. Article 3*bis* finally came into force for State parties on October 1, 1998, with the ratifications of Guinea and, ironically, Cuba.⁷⁹

The actual legal effect resulting from the coming into force of Article 3*bis* may be less important than for most treaties, as the use of the words “contracting States recognize that every State must refrain from the resort to weapons against civil aircraft” in paragraph (a) of the amendment seems to indicate that this amendment is a codification of already existing customary international law. In fact, it has been pointed out that “no delegation [at the Extraordinary ICAO Assembly in 1984] challenged the fact that the prohibition of use of force against civil aircraft is already part of general international law.”⁸⁰ Many imminent scholars, including Professor Michael Milde, the head of the ICAO Legal Bureau at the time, believe that it is indeed reflective of customary international law.⁸¹ However, such a belief is not universal.

While it seems clear that Article 3*bis* covers all international civil aviation, regardless of the type of airframe and regardless of whether the aircraft is engaged in service as a commercial airliner, different views have also been put forth. The Government of Colombia took the position that Article 3*bis* covered only “commercial airliners” and other aircraft with legitimate flight plans and not all civil aircraft.⁸² Such an interpretation would render many general aviation flights that might stray across international boundaries unprotected by international law.

There is also a question about the protection afforded to domestic civil aviation under Article 3*bis*. While the amendment does not make a distinction between foreign and domestic civil aircraft, the prevailing view is that protection afforded by Article 3*bis* is for foreign aircraft, not aircraft of a State’s own registration.⁸³ Such an interpretation would be *ultra vires* and would exceed the scope of the Chicago Convention, the focus of which is international civil aviation.⁸⁴

⁷⁸ *Id.*, art. (b).

⁷⁹ See *Shootdown Law Ratified*, 149 AIR TRANSPORT 33 (1998).

⁸⁰ *International Organizations: 25th Session (Extraordinary) of the ICAO Assembly*, 9 ANNALS OF AIR AND SPACE L. 455 at 457 (1984).

⁸¹ See *Interception of Civil Aircraft*, *supra* note 68 at 125.

⁸² See February 1994 Bogotá Cable, *supra* note 13 at 5.

⁸³ *Interception of Civil Aircraft*, *supra* note 68 at 126.

⁸⁴ “At no stage to the deliberations and drafting did the Assembly . . . contemplate regulation of the status of an aircraft in relation to the state of its own registration, as this would have exceeded the scope of the Convention, which limits it to international civil aviation.” Ruwantissa Abeyratne, *Crisis Management Toward Restoring Confidence in Air Transport* –

The critics of Article 3bis are many. Some have called it an attempt to “codify the almost uncodifiable,”⁸⁵ others have said it “had something for everyone and resolved nothing.”⁸⁶ There is one glaring weakness in Article 3bis. Article 3bis lacks provisions regarding what a State can do when a suspect aircraft refuses to comply with instructions, thus prompting the question, how does a State “play by the rules and yet deal effectively with someone who does not?”⁸⁷ Although that question was asked about terrorists, it is equally applicable to the drug traffickers in South America and to other non-State misuses of civil aviation. Therein is contained the fundamental weakness of Article 3bis: the lack of practical enforcement measures to be employed when a suspect aircraft refuses to land. Notwithstanding this, the amendment is an honest attempt to put an end to the shootdowns that were an all too common part of the Cold War.

2. Customary International Law

States are not only bound by international agreements that they sign and ratify, but also by norms that are developed through state practice.⁸⁸ When attempting to ascertain customary international law, one looks to the actual practice of States and to what degree that practice reflects *opinio juris*, a sense of legal obligation versus mere comity.⁸⁹ It is useful here to briefly discuss the law that can be ascertained from past shootdowns of civil aircraft.⁹⁰ The reaction of States to these shootdowns is telling, and some useful rules can be deduced from these events and from the reactions following them that are helpful to serve as gap-fillers in situations where treaty law is inapplicable.

Attack on an Air France Airliner in the Berlin Corridor – 29 April 1952. On 29 April 1952, an Air France airliner is alleged to have deviated

Legal and Commercial Issues, 67 J. AIR L. & COM. 595, 616 (2002). The proposed words “aircraft of the other contracting State” were deleted to show that the obligation was not to other signatories of Article 3bis but to all States, not to aircraft of a State’s own registration. However, this view may be stretched, as Article 3bis does not seem concerned with the nationality of those on board, only with the State of registration of the aircraft.

⁸⁵ Peter Ateh-Afac Fossungo, *The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions*, 26 TRANSP. L.J. 1, 22 (1998).

⁸⁶ R.W. JOHNSON, *SHOOTDOWN: THE VERDICT ON KAL 007 237* (1986).

⁸⁷ Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145 (2000).

⁸⁸ It has been recognized that customary international law can exist alongside identical norms contained in treaty law. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua V. U.S.) Merits, 1986 I.C.J. Rep. 14, para. 178 [hereinafter *Nicaragua Case*].

⁸⁹ See *Nuclear Weapons Case*, *supra* note 52 at para. 64.

⁹⁰ A number of works have discussed these events in great detail. See Bernard E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 A.F. L. REV. 49, 54-63 (1989) [hereinafter *Attacks on Foreign Civil Aircraft*].

from its designated route through the Berlin Corridor, straying over East German Territory. In response, Soviet MiG-15 fighters attacked the aircraft with cannon and machine gun fire. The attack, though it did not result in a total loss of passengers and crew as is the case in other situations, did nonetheless lead to several injuries.⁹¹ This event proved to be the first in a series of Cold War attacks on civil airliners, and state reaction is useful in ascertaining the first hint of developing international norms regarding the use of force against civil aircraft.

In opposition to the Soviet attack, the French, joined by the Americans and the British, stated that, regardless of where the aircraft was located, any use of weapons, even to warn a stray aircraft, was “entirely inadmissible and contrary to all standards of civilized behavior.”⁹² In their defense, the Soviets stated that they were responding to a border incursion and had made attempts to warn the aircraft and order it to land.⁹³ They further bolstered their claims of innocence by saying that the shots were only meant to be warning shots.⁹⁴

The reaction by the Allies confirms their belief that it was not lawful under international law to use force against a civil aircraft in such a situation. What is even more interesting is the Soviet reaction. They never asserted a right to shootdown an aircraft in response to a mere trespass. In fact, their response sounds more like “it was an accident” rather than an attempt to put forth a legal justification for the shootdown.

Cathay Pacific Shootdown by PRC Forces Near Hainan Island – 23 July 1954. In this incident, fighter aircraft from the People’s Republic of China shot down a British registered Cathay Pacific airliner carrying 12 passengers and 6 crew *en route* from Bangkok to Hong Kong in the vicinity of Hainan Island. The surprise attack by PRC forces forced the small airliner to crash in the sea, resulting in 10 deaths.⁹⁵

The attack was described by the U.S. as “barbarity” and was condemned by both the U.S. and the British Governments.⁹⁶ The Chinese formally apologized for the incident and offered to pay compensation, calling it an unfortunate accident, having mistaken the aircraft for a Nationalist Chinese military aircraft. The facts of the case seem to indicate that the Chinese did indeed believe the aircraft belonged to a hostile air force and was *en route* to attack a Chinese naval base on Hainan Island.⁹⁷

The reaction to this case is quite similar to the Air France incident.

⁹¹ See John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 276-77 (1985) [hereinafter *Aerial Intrusions*].

⁹² Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT’L L. 559, 574 (1953).

⁹³ See *Aerial Intrusions*, *supra* note 91 at 277.

⁹⁴ See Farooq Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COMM. 555, 571 (1984) [hereinafter *Legal Analysis of KAL 007*].

⁹⁵ See *Fog of Peace*, *supra* note 16 at 193-94.

⁹⁶ See *id.* at 194.

⁹⁷ See *Aerial Intrusions*, *supra* note 91 at 278.

What makes this case even stronger evidence of the international norm prohibiting the use of force against civil airliners in flight is the formal apology offered by the Chinese, at a time shortly after the Korean War and during a time of tension with the U.S. and U.K. when the Chinese could have easily hid behind Cold War rhetoric. This strongly supports the binding nature of the prohibition contained in customary international law.

El-Al Constellation Shootdown over Bulgaria – 27 July 1955. While both the attack on the Air France aircraft over Berlin and the Cathay Pacific aircraft near Hainan Island prompted international rebuke, the gravity and scale of these two incidents would pale in comparison to the next shootdown the following year. On 27 July 1955, an Israeli-registered El-Al Constellation carrying 51 passengers and 7 crewmembers *en route* from London to Tel Aviv strayed over Bulgarian airspace and was shot down by Bulgarian interceptors. Everyone on board was killed.⁹⁸

The attack came with no warning to the crew and without any attempt to force the aircraft to land before Bulgarian forces opened fire.⁹⁹ Israel, the U.S. and the U.K. were the strongest critics. Israel said that the Chicago Convention (presumably Article 3d) codified general international law and that simple defense of airspace was never enough to justify the destruction of a civilian aircraft.¹⁰⁰ The United Kingdom stated that it was unacceptable for any State to shootdown a civil aircraft in peacetime.¹⁰¹ The French joined in, going so as to call the shootdown an act of war.¹⁰²

In a very contrite note to the United States, Bulgaria expressed regret for the incident, promised to punish the pilots, and offered compensation for the deaths and material damage.¹⁰³ This regret was short-lived, as Bulgaria later denied responsibility for the incident and offered only *ex gratia* payments. They eventually made a complete reversal, laying the blame squarely on the El-Al crew.¹⁰⁴ Dissatisfied with the Bulgarian actions, the United States, the U.K., and Israel filed suit in the ICJ. Bulgaria refused to submit to the jurisdiction of the court, and the case was never heard, thus leaving the legal aspect of the event unresolved.

Israeli Shootdown of a Libyan Airlines 727 over the Sinai Peninsula – 21 February 1973. In this case, Israeli fighters intercepted a suspicious Boeing 727 airliner with the markings of the Libyan national airline over the Israeli-occupied Sinai Peninsula. After attempts to get the airliner to land failed, the judgment was made that the aircraft was hostile and had to be shot down.

⁹⁸ See *Attacks on Foreign Civil Aircraft*, *supra* note 90 at 54; See *Aerial Intrusions*, *supra* note 91 at 279.

⁹⁹ See *Attacks on Foreign Civil Aircraft*, *supra* note 90 at 55.

¹⁰⁰ See *id.* at 56-57.

¹⁰¹ See *Fog of Peace*, *supra* note 16 at 194-95.

¹⁰² See *id.* at 195.

¹⁰³ See *Attacks on Foreign Civil Aircraft*, *supra* note 90 at 55.

¹⁰⁴ See *id.* at 56.

Israeli warplanes fired at the airline, causing it to crash and resulting in the death of 106 persons. Various factors played into the erroneous decision to fire. The aircraft was flying near the Dimona Research Facility and an Israeli nuclear separation plant, two extremely critical national security facilities.¹⁰⁵ The aircraft was also near Israeli troop concentrations, and the Israelis had intelligence of possible suicide attacks using civil aircraft.¹⁰⁶

International reaction was overwhelmingly negative. Israel itself stated that had it known it was a passenger jet, it would not have fired on the aircraft.¹⁰⁷ In a most general statement, the ICAO Council concluded that the shootdown violated the “principles enshrined in the Chicago Convention.”¹⁰⁸

While the aircraft had intruded over Israeli-occupied territory, this case is not an “intrusion shootdown.” The aircraft was targeted because it was seen as a threat. What is critical here is the quantum of evidence ascertained by Israel in making the judgment that the aircraft was hostile. International law will clearly excuse the shootdown of an airliner being used in a suicide attack as the Israelis suspected, but the criterion used in this case to make the determination was insufficient. At the very least, the Israelis acted in haste before confirming anecdotal data. The negative reaction internationally reflects a belief that Israel’s actions were not warranted by the nature of the threat posed by the aircraft.

Korean Airlines Flight 902 Shootdown over the USSR – 20 April 1978. In a nearly forgotten incident of the Cold War, Korean Airlines flight 902, a Boeing 707, was fired upon by a Soviet MiG after it strayed over the USSR near the Kola Peninsula. The aircraft descended rapidly after losing pressure and nearly half of a wing in the missile attack, and Soviet authorities believed it had crashed. The captain eventually put the aircraft down on a frozen lake. Amazingly, only two persons were killed.

There was little diplomatic outcry, primarily because absent protests from the U.S. and ROK, others were unwilling to protest themselves.¹⁰⁹ One can speculate that this silence was perhaps due to the low casualty figure or to a desire on the part of the Koreans to retrieve their flight crew from Soviet custody. Whatever the reason, the Soviets were quite strong in their justification, asserting the right to defend their airspace against any intruders. However, evidence suggests that the Soviets did not intend to shoot down a civil aircraft and had no “shoot on sight” rules for intruding civil aircraft.

When the Soviet pilot was ordered to destroy KAL 902,
he protested telling his controller that he could clearly see the

¹⁰⁵ See Jacob Sundberg, *Legitimate Responses to Aerial Intruders: The View from a Neutral State*, 10 ANNALS OF AIR & SPACE LAW 258, 267 (1985).

¹⁰⁶ See *Attacks on Foreign Civil Aircraft*, *supra* note 90 at 59.

¹⁰⁷ See *id.*

¹⁰⁸ See *ICAO Resolution on Libyan Shootdown*, *supra* note 64.

¹⁰⁹ See *Attacks on Foreign Civil Aircraft*, *supra* note 90 at 61.

civil markings. When the ground controllers repeated the order, the pilot again questioned the order. At this point a Soviet general identified himself to the pilot and ordered him to destroy KAL 902. Only then did the pilot fire at the aircraft. An American intelligence officer who was listening to the conversation later commented that, evident from the pilot's incredulous tone, it was an exception to policy for Soviet interceptor pilots to shoot at passenger airlines.¹¹⁰

American RC-135 reconnaissance aircraft use the 707 airframe, likely leading to the confusion by Soviet leaders. Only because those on the ground were convinced that KAL 902 was a spy aircraft, did the order to fire come.¹¹¹ While the lesson is subtle, it can be said that even the Soviets, who certainly had the most aggressive Cold War policy for intruders, realized that such a use of force against a civil airliner was not appropriate under international law.

The Shootdown of Korean Airlines Flight 007- 31 August 1983. On the night of this incident, Soviet air defense forces began tracking a suspected American RC-135 reconnaissance flight. They tracked this aircraft for 78 minutes and made a failed interception attempt over the Kamchatka Peninsula. A second attempt resulted in a successful interception just off Sakhalin Island, and Soviet fighters fired on the target, causing it to crash into the Sea of Japan southwest of Sakhalin Island. It was Korean Airlines flight 007, off course on its path to Seoul, South Korea.

The international outcry was unprecedented. The U.S. Government called it a crime against humanity and said that such a shootdown of a foreign civil airliner violated international law.¹¹² Others followed suit. The Australian Government focused not on the location of the aircraft but rather on its function, saying that it was never permissible to shoot down an unarmed civil aircraft that had no military purpose.¹¹³ The shootdown was denounced by a wide range of countries from the French and Italians to the PRC. At no point did the Soviets ever challenge the argument that customary international law prohibited the shootdown of civil aircraft.¹¹⁴

This international disapproval is strongly supportive of the principle that the use of force against civil aircraft is a violation of international law. However, despite its importance in Cold War politics and how its outcome affected events at ICAO regarding the approval of Article 3*bis* and Amendment 27 to Annex 2, it is of limited use because of its factual setting. The Soviets, however outrageously reckless their actions might have been,

¹¹⁰ *Id.* at 61-62.

¹¹¹ *See id.* at 62.

¹¹² *See Aerial Intrusions, supra* note 91 at 257.

¹¹³ *See id.* at 257.

¹¹⁴ *See Note, Legal Argumentation in International Crisis: The Downing of Korean Air Lines Flight 007*, 97 HARV. L. REV. 1198 at 1201 (1984).

were likely operating under a belief that they were firing on a state aircraft that was violating their territory for an unfriendly purpose. “[S]ome evidence suggests that neither the Soviet pilot nor ground controller ever appreciated that the target was a civilian passenger airliner.”¹¹⁵ The visual identification was made from below, at an angle from which the silhouette of KAL 007 would be similar to that of an RC-135. Because the Russian pilots never had an opportunity to see the most distinctive feature of the 747, the hump at the front of the aircraft, they simply assumed it was an RC-135 because it had 4 jet trails.¹¹⁶ Also, KAL 007 had flown over some of the most sensitive Russian military sites on the Kamchatka Peninsula and Sakhalin Island.¹¹⁷ The real lesson arising from the KAL 007 incident is not so much that it is illegal to shootdown civil aircraft, already a well-accepted rule, but that the Soviet procedures for the identification of hostile aircraft subject to attack were abysmally lacking.

The Shootdown of Iran Air Flight 655 – 3 July 1988. While the U.S. held the moral high ground in the KAL 007 incident, this would change when the *U.S.S. Vincennes* shot down Iran Air flight 665 off the coast of Iran. This shootdown was unique in that it was the first major shootdown involving surface fire. All other shootdowns had been conducted by interceptors, which by their nature make identification easier. To complicate matters in this case, the shootdown came contemporaneously with surface action against forces of the Islamic Revolutionary Guard.¹¹⁸

The U.S. asserted that the shootdown of IR 655 was not a violation of international law, claiming that since the *U.S.S. Vincennes* acted in self-defense, albeit mistaken self-defense, the shootdown was not unlawful. As the argument goes, while the crew of the *Vincennes* mistakenly identified IR 655 as a threat, the mistake was reasonable, thereby relieving the U.S. of liability under international law.¹¹⁹ This view was not widely accepted. Third State criticism was strong, but a subsequent resolution of the ICAO Council only reaffirmed the general international law prohibition on the use of force against civil aircraft.¹²⁰

Like the Libyan shootdown of 1973, the lesson to be learned from this case is less legal than it is factual. One can conclude that the factors relied upon by the crew of the *Vincennes* to make the determination that IR 655 was hostile and had to be destroyed were insufficient to afford sufficient protection to international civil aviation. The international community would simply require more positive identification before it would tolerate such shootdowns.

¹¹⁵ *Attacks on Foreign Civil Aircraft*, *supra* note 90 at 62.

¹¹⁶ *See id.* at 62.

¹¹⁷ *See Legal Analysis of KAL 007*, *supra* note 94 at 556.

¹¹⁸ *See Resolution and Report Concerning the Destruction of Iran Air Airbus on July 3, 1988*, ICAO, 28 I.L.M. 896 at 908 [hereinafter *ICAO Report on IR 655*].

¹¹⁹ *See Iran Air Flight 655*, *supra* note 52 at 260.

¹²⁰ *See ICAO Report on IR 655*, *supra* note 118 at 899.

Brothers to the Rescue Shootdowns – 24 February 1996. The “Brothers to the Rescue” was a Miami-based Cuban exile group conducting private search and rescue missions in the Florida Straits looking for Cuban rafters. In addition to their search and rescue operations, they took up political protest as part of their flights, conducting up to 1,700 violations of Cuban airspace. Their operations became increasingly bold. One operation, on 13 January 1996, included an airdrop of Anti-Castro pamphlets over Havana.¹²¹

The Cuban government was most unhappy with these flights, seeing their purpose as the destabilization the Cuban Government. This displeasure led Castro to plan a covert operation to disrupt BTTR activities and to lure the BTTR aircraft out of U.S. airspace for the purpose of shooting them down. Evidence suggests that they went so far as to have a Cuban Air Force officer defect to the U.S. to provide Cuba with information on BTTR flights.¹²²

If indeed this was the plan of the Cubans, it worked. On 24 February 1996, three small Cessna aircraft took off from Opa Laca Airport and flew out over the Florida Straits. The Cubans scrambled MiG-29s and intercepted and shot down two of the aircraft 16 & 21 miles off the Cuban shore, well into international waters. There was no doubt that the Cubans acted deliberately and intended to target civil aircraft. The recordings of the pilots and ground control reveal that they indeed knew they were shooting at civil aircraft and that they were shooting to kill.¹²³ There had been no warning to the aircraft, only an earlier warning from the Havana tower not to come south of the 24th Parallel.¹²⁴

The U.S. reacted with anger to this shootdown. President Clinton himself took the opportunity to rebuke Cuba for this action.

These small aircraft were unarmed and clearly so. Cuban authorities knew that. The planes posed no credible threat to Cuba’s security. Although the group that operated the planes had entered Cuban airspace in the past on other flights, this is no excuse for the attack and provides . . . no legal basis

¹²¹ See Joshua Spector, *The Cuba Triangle: Sovereign Immunity, Private Diplomacy and State (In-) Action, Reverberations of the ‘Brothers to the Rescue’ Case*, 32 U. MIAMI INTER-AM L. REV. 321, 323 (2001) [hereinafter *The Cuba Triangle*].

¹²² See *id.* at 332-33; see also Press Release, Federal Bureau of Investigation, Miami Office, Federal Grand Jury Indicts Cuban MiG Pilots and a Cuban Air Force General for Murder of American Nationals in Connection with 1996 Shoot Down of Brothers to the Rescue Planes, online: Federal Bureau of Investigation Miami Office (Aug. 21, 2003), available at <http://miami.fbi.gov/pressrel/2003/mm082103a.htm> [hereinafter FBI Statement on BTTR Indictments].

¹²³ See *Alejandro v. Republic of Cuba*, 996 F. Supp 1239, 1244-46 (S.D. Fla. 1997).

¹²⁴ See *The Cuba Triangle*, *supra* note 121 at 325-26.

under international law for the attack.¹²⁵

While the Cubans were not a party to Article 3*bis* at that time, the U.S. Secretary of State said that the prohibition against the use of force against civil aircraft was longstanding and a part of customary international law and did not rely on Article 3*bis*.¹²⁶ International outcry was strong as well. By a vote of 13-0-2, the UN Security Council condemned the shutdown, stating that it violated customary international law as contained in Article 3*bis* and the Annexes of the Chicago Convention.¹²⁷

It is probably true that even the most egregious actions of the BTTR pilots, the dropping of leaflets over Havana, did not amount to a threat to the national security of Cuba. This action by the Cubans was more punitive than preventative. This case is important in determining what level of threat a civil aircraft has to pose before the international community will accept the use of force against it in flight. It is clear from this case that the actions of the BTTR pilots did not meet this level of a threat.

The Shootdown of Drug Aircraft in South America – 1990s to Today. The shutdown of drug aircraft in South America is different from other shutdowns as it involves a series of shutdowns and not one isolated incident. Each shutdown of drug aircraft has one thing in common; there has been no international outcry in reaction to any such use of force against civil aircraft.¹²⁸ Even the shutdown of OB-1408 did not raise concerns internationally, but this may be because the victims were from the United States, a participant in the operation. One can take the position that the international community is unwilling to criticize such operations out of a desire to keep fingers from being pointed at their own domestic police operations. One could also take it a step further, saying that State practice may indeed be leading us to the creation of an internationally recognized exception to the prohibition against the shutdown of civil aircraft, at least as far as the South American experience has proven.

It is also interesting to note that this lack of outrage against the shooting down of domestic civil aircraft is not limited to general aviation. In a 1991 incident in Peru, police shot down a commercial airliner operated by Aerochasqui Airlines on a regularly scheduled flight, killing 15 people, after it

¹²⁵ Department of State, *U.S. and the UN Respond to Cuban Shootdown of Civilian Aircraft*, President Clinton UN Security Council Presidential Statement, 7 U.S. DEP'T OF STATE DISPATCH 101 (1996).

¹²⁶ See *Cuba Elaborates on Sovereignty Violations*, XINHUA NEWS AGENCY, Mar. 6, 1996, LEXIS, News Library.

¹²⁷ See *Security Council Condemns Use of Weapons Against Civil Aircraft; Calls on Cuba to Comply with International Law*, FEDERAL NEWS SERVICE, July 31, 1996, LEXIS, News Library.

¹²⁸ See *Fog of Peace*, *supra* note 16 at 219.

was mistaken for an aircraft used by drug traffickers.¹²⁹ While the police were eventually charged with murder, and may have been drunk when the incident happened, the lack of international outrage is important in the analysis of state practice.¹³⁰

While the practice of States is clouded by Cold War rhetoric, factual disputes and grossly negligent misjudgments, some conclusions about the practice of States and customary international law can be drawn. The first concerns the class of shootdowns that can be classified as “intrusion shootdowns,” namely the Air France attack, the El Al Shootdown, and the KAL shootdowns of 1978 and 1983. In each case, while the perpetrators may or may not have fully understood that they were shooting down civil aircraft, the reaction of the world community came from the perspective that they did indeed recognize these aircraft as civil in nature. The international reaction was overwhelmingly negative in each case. While these cases are very interesting factually, they are of limited value and largely irrelevant in today’s world. In international relations, we are mostly beyond the shootdown of civil aircraft for mere trespass. It can therefore be said that it is never permissible under international law to shootdown a civil aircraft merely based on where it is. Simply put, “there is no per se right to use force based upon the mere violation of territorial airspace”¹³¹

The BTTR shootdown, a lingering relic of the Cold War, can be seen as the last nail in the coffin of the intrusion shootdown. Even if a foreign aircraft is engaging in or has in the past engaged in the misuse of civil aviation involving a trespass, that in and of itself is insufficient to justify the use of weapons. An analysis of the threat posed by the aircraft and a proportionate response to the threat is absolutely required. Another interesting conclusion that can be drawn from the BTTR shootdown is that general aviation is indeed included in the protections offered by customary international law. This is directly contrary to previous assertions that it covered only regularly scheduled commercial transportation and aircraft with flight plans. All international civil flights, including general aviation, are protected.

A more difficult area in which one can search for a conclusion is the situations under which a State may take action against a perceived threat, as was the case in the Libyan and IR 655 shootdowns. One could conclude that, because of the negative international reaction to these threats that were honestly but mistakenly perceived, the international community demands an “err on the side of caution” standard for determining self-defense. For

¹²⁹ See *Police Shoot Down Commercial Airliner, Killing 17 People*, AGENCE FRANCE PRESSE, July 11, 1991, LEXIS, News Library. The crew was killed by machine gun fire and crashed, killing the passengers. See *Peru Minister Promises to Reform Police After Downing of Airplane*, ASSOCIATED PRESS, July 14, 1991), LEXIS, News Library.

¹³⁰ See *Five Policemen Charged with Murder in Airplane Crash*, AGENCE FRANCE PRESSE, July 16, 1991, LEXIS, News Library.

¹³¹ *Aerial Intrusions*, *supra* note 91 at 293.

example, the perceived threat posed to the *Vincennes* by IR 655 was simply not sufficient to justify the shootdown.¹³²

Such a conclusion is historically true and would probably still be operative had 9/11 not occurred. After 9/11, we can probably say that the rule has moved farther toward the “err on the side of shootdown” end of the spectrum as opposed to the conclusions drawn from the pre-9/11 cases. The mass movement to implement shootdown policies is evidence of this, and a true change in worldviews will be tested as soon as the first post-9/11 shootdown takes place, especially if it involves a mistake. How forgiving the world will be will likely depend on how fresh the memories of 9/11 still are at that time.

While no one would doubt the propriety of shooting down a civil aircraft on a suicide mission, the BTTR shootdown has set at least a minimum level as to what a threat must be. As one author noted, “the core question raised by this incident is whether the use of civil aircraft for [private] political purposes intended to destabilize a government is sufficiently threatening to that government to warrant the use of weapons.”¹³³ The answer is a resounding no. Under the current state of international law, any planned shootdown on a civil aircraft believed to be hostile must at least pose a greater danger than did the three light aircraft in the BTTR case.

Another sweeping conclusion can be made as to operations that are purely domestic in nature. So long as a State is acting inside an area of its own sovereign control against its own registered aircraft, the world community does not seem willing to pass judgment. Such a standard is probably not limited to drug aircraft. It is not unknown in the domestic law of States to have internal laws that allow for the use of force against aircraft that penetrate restricted zones and do not obey the orders of the authorities.¹³⁴ Such actions will likely be subject only to human rights law.

¹³² The following were factors used by the *U.S.S. Vincennes* in determining IR 655 hostile: 1. The Flight profile, which includes such things as speed range, rate of climb/decent, rate of turn, and altitude, 2. Electronic emissions from suspect aircraft, 3. Radio communications, 4. IFF Mode 3 responses. In addition, the following were also factors that were specific to IR 655: 1. IR 655 took off from Bandar Abbas, a joint civilian/military aerodrome, 2. Recent deployment of Iranian F-14s to Bandar Abbas, 3. The possibility of Iranian Air Force being used in an air support role for the ongoing surface engagements, 4. An unrelated IFF mode 2 response, 5. The inability to correlate IR 655 to a scheduled civil flight, 6. IR 655 had already labeled an F-14, 7. Incorrect reports that IR 655 had maneuvered into an attack profile, 8. IR 655 was not directly on the centerline of airway A59. See *ICAO Report on IR 655*, *supra* note 118 at 913, 923-24.

¹³³ *Fog of Peace*, *supra* note 16 at 229.

¹³⁴ See *SOUVERAINETE AERIENNE*, *supra* note 73 at 317, n. 94.

C. Human Rights Law

Law enforcement operations conducted on the ground are fundamentally different from those conducted against aircraft in flight. While the police may pull over a vehicle suspected of being involved in a criminal offense, the opportunity to “pull over” an aircraft is almost completely limited to the pilot’s willingness to comply. The inability or unwillingness on the part of a pilot to follow instructions to land may result in the decision to use weapons in order to force the aircraft to comply or to terminate the flight altogether. Should a vehicle on the ground fail to follow orders to stop, police may employ devices to disable the vehicle or may even resort to more forcible measures, such as shooting out the tires. Only in the most extreme situations will deadly force be authorized. The use of force against an aircraft in flight is, in most circumstances, the equivalent of a death sentence for all on board. Such killings would inevitably raise concerns under human rights law.

1. Human Rights and the Right to Life

The law of human rights is grounded in a multitude of international agreements, UN Resolutions, and jurisprudence of international criminal tribunals and state practice. This area of law is concerned with how States treat persons within their own sovereign control. Violations can come in many forms, from torture and the deprivation of life to the withholding of economic and civil rights.

The most important right afforded by this area of law is the right to life. Reference to this right is found time and again in human rights law, including in the Universal Declaration of Human Rights (UDHR).¹³⁵ The UDHR is the cornerstone of modern human rights law, and although only a General Assembly resolution, it is widely seen as reflective of customary international law. The UDHR provides that “[e]veryone has the right to life, liberty and security of person.”¹³⁶ This right is not subject to arbitrary forfeiture, even in the event of the commission of a serious crime. The UDHR provides that all persons charged with a crime have “the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”¹³⁷ This customary right is codified in a number of multilateral treaties.¹³⁸

¹³⁵ G.A. Res. 217A(III), U.N. Doc A/810 at 71 (1948).

¹³⁶ *Id.*, art. 3.

¹³⁷ *Id.*, art. 11.

¹³⁸ The most widely applicable of which is the *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).. The ICCPR mandates that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court.” *Id.* at

States violate international law if they “as a matter of state policy ... practice[], encourage[], or condone[] ... the murder or causing the disappearance of individuals”¹³⁹ This arbitrary taking of human life is known as an “extrajudicial killing” when committed by police, military and security forces. This prohibition is applicable to all States under international law and would be applicable to shutdown operations conducted under the ABDP. However, this is not to imply that every killing, even those conducted in ABDP shutdowns, is a violation of that right. A closer look must be taken at how the right to life intersects with law enforcement’s duty to enforce the law.

2. *Extrajudicial Killings and Law Enforcement*

Interpreting the right to life so as to declare illegal all extrajudicial killings would fail to take into account situations where the safety of law enforcement officers and the general public is at risk. It as well fails to recognize that there are criminals who will simply not allow themselves to be taken alive just to allow the State the opportunity to afford them the required due process.¹⁴⁰ But it does raise the question of how one determines the line between the lawful application of deadly force and the illegal extrajudicial killing of persons.¹⁴¹

As a starting point, one notes that the Basic Principles on the Use of

Art. 6. This is an obligation from which there can be no derogation. Additionally, the right to life is found in other international instruments. The European Convention on Human Rights provides that Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law. *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force Sept. 3, 1953) at art. 2(1). A similar provision is found in the American Convention on Human Rights.

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 1144 U.N.T.S. 123, O.A.S.T.S. 1970 No. 36, 9 I.L.M. 673, Nov. 22, 1969 (entered into force Jul. 18, 1978) at art. 4.

¹³⁹ AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD): THE FOREIGN RELATIONS LAW OF THE UNITED STATES, VOL. 2 sec. 702 [hereinafter RESTATEMENT ON FOREIGN RELATIONS].

¹⁴⁰ A very interesting argument has been made that even the killing of Uday and Qusay Hussein in Iraq was an extrajudicial killing. Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 SAN DIEGO JUST. J. 317 (2003), LEXIS. This is a very dubious assertion. Some persons, like the Hussein brothers, are not interested in their day in court.

¹⁴¹ Even the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, despite being quite extensive in its recommendations, do not endeavor to formulate an appropriate situation in which force may and may not be used. ESC Res. 44/162, UN ESC, 1989, Supp. No. 1, UN Doc. E/1989/89 (1989).

Force and Firearms by Law Enforcement Officials, a non-binding UN work,¹⁴² purports to limit the use of deadly force to situations involving the protection of life. However, there are circumstances under which a killing may take place in a law enforcement context short of the protection of life. In American practice, the requirement has been broadened slightly to include the protection of so-called “critical infrastructure” as well.¹⁴³ Even then, it is only authorized when lesser means have been exhausted and there is no significant increase in the risk of death or serious bodily harm to others. The Restatement goes a bit further, making a general exception to the right to life in the prevention of serious crimes.¹⁴⁴

The fundamental illegality in extrajudicial killings centers on the lack of due process. The U.S. Government has recognized that the shutdown of civil aircraft suspected of carrying drugs could violate the U.S. Constitution as a violation of due process, a concept that is not unlike the same notion under international law.¹⁴⁵ In international law, the due process standard that is to be applied before the use of deadly force is authorized is found in the case of *Garcia and Garza v. United States*, heard before the U.S.-Mexican Claims Commission.¹⁴⁶ In April 1919, an infant was killed by an officer with the U.S.

¹⁴² UNHCR, 1990, UN Doc. A/CONF.144/28/Rev.1, available at www.unhcr.ch/html/menu3/b/h_comp43.htm.

¹⁴³ For example, the GARDEN PLOT Rules of Engagement, in force for the most extreme U.S. domestic emergency situations, include, in addition to self-defense and the defense of others, the prevention of crime that involves the imminent danger of death or serious bodily injury, the prevention of the escape of persons who pose imminent danger of death or serious bodily injury, and the prevention of the destruction of critical infrastructure as circumstances in which deadly force may be used. See CENTER FOR LAW AND MILITARY OPERATIONS, DOMESTIC OPERATIONAL LAW (DOPLAW) HANDBOOK FOR JUDGE ADVOCATES 71 (2001). It could also be used in situations to prevent crime, such as the prevention of the theft of “vital” assets and property inherently dangerous to others. See W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE, & the Rules of Deadly Force*, 2000 Army Law. 1, 6 (2000) [hereinafter *How to Keep Military Personnel from Going to Jail*]. Most rules on the use of force for U.S. law enforcement agencies only allow for the use of deadly force to protect life and prevent serious bodily injury, but there do exist specific rules on when deadly force can be used to prevent crime. See *DHS Standards for Enforcement Activities*, 8 C.F.R. 287.8 (2003) (Immigration officers may only use deadly force to protect from death or serious bodily injury), see also *NASA Security Programs; Arrest Authority and the Use of Force by NASA Security Force Personnel*, 14 C.F.R. 1203b.106, compare to *DOE Limited Arrest and Use of Force by Protective Force Officers*, 10 C.F.R. 1047.7 (Authorizing the use of deadly force to prevent the theft and sabotage of nuclear weapons or nuclear explosive devices).

¹⁴⁴ “[I]t is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime.” RESTATEMENT ON FOREIGN RELATIONS, *supra* note 139 at sec. 702 comment f. (emphasis added).

¹⁴⁵ See October 1989 Position Paper, *supra* note 13.

¹⁴⁶ *Teodoro Garcia and M. A. Garza v. United States* (1926), 21 AM. J. INT’L L. 581, (U.S.-Mexican Claims Commission).

military whose unit was charged with enforcing laws against illegal boarder crossings and smuggling on the U.S.-Mexican frontier. The officer fired on a raft, which was loaded with persons making an illegal crossing on the Rio Grande River, killing the young girl.¹⁴⁷ In determining that international law did indeed forbid the extrajudicial taking of human life, the tribunal held that the following criteria were required before the resort to deadly force was legal under international law:

- An offense must be sufficiently established;
- The importance of preventing or repressing the offense by force must be in proportion to the danger arising from it;
- The firing should not be undertaken if there are other ways of preventing or repressing the offense; and,
- There must be sufficient precaution not to create unnecessary danger, unless it is the intention to hit, wound, or kill.¹⁴⁸

The tribunal noted that the most serious offense of which the occupants of the raft were suspected of committing was smuggling mescal into the United States.¹⁴⁹ Had the crime being committed been more serious, deadly force might have been authorized. Implicit in this due process requirement is the duty to warn before deadly force is used. Such a warning gives the perpetrator the chance to choose compliance with the instructions of law enforcement and submission to the judicial process before facing deadly force. Simply put, the right to life is limited by “the right to self-defense, acting in defense of others, the prevention of serious crime involving a grave threat to life or serious injury, and the use of force to arrest or prevent the escape of persons presenting such threats.”¹⁵⁰

¹⁴⁷ See *id.* at 582.

¹⁴⁸ See *id.* at 584.

¹⁴⁹ See *id.* In another military border incident decades later, U.S. Marines on a counter-drug mission on the Mexican border shot and killed a 17-year-old boy. What distinguishes this from the Garcia and Garza case is that the boy was not summarily shot out of some notion of crime prevention. He had fired two shots at the marines and had raised his weapon apparently to fire again when he was killed. Nonetheless, the State of Texas initiated a homicide investigation against the Marines. See *How to Keep Military Personnel from Going to Jail*, *supra* note 143 at 1.

¹⁵⁰ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 A.J.I.L. 1,10 (2004).

3. *Human Rights and the Shootdown of Civil Aircraft*

There is little doubt that human rights norms are applicable to the shootdown of civil aircraft.¹⁵¹ Due process consists of making some type of effort to get the individual to surrender and face established criminal justice and the application of the subsequent judicial procedures for the determination of guilt and innocence. It therefore follows that ABDP shootdown operations require some form of due process. The requisite due process in these cases comes from the proper identification of suspect aircraft and from the use of appropriate measures to allow suspects to land and surrender before being subjected to deadly force. So long as the threat posed by drug trafficking is a serious enough crime and suspects are properly identified and given an opportunity to submit to justice, ABDP operations would generally fall within the realm of legitimate law enforcement and would not fall short of recognized human rights norms. This is not to suggest that the violation of human rights does not take place in the war on drugs, but it seems that ABDP operations as put on paper make sufficient efforts, through the requirement of pilots to file flight plans, the real-time monitoring of flights, and the use of ICAO Standards, to positively identify suspects. Additionally, sufficient efforts are required to compel a landing in lieu of a shootdown if the pilot chooses to comply.

IV. CIRCUMSTANCES IN WHICH INTERNATIONAL LAW COULD PERMIT THE SHOOTDOWN OF CIVIL AIRCRAFT

It is certain that international law exists in some form prohibiting the use of force against civil aircraft in flight. However, just as domestic law has excuses or defenses that prevent otherwise wrongful conduct from being unlawful in certain circumstances without jeopardizing the validity of the underlying law, international law allows for similar justifications without abrogating the underlying legal obligation.

The law of treaties governs the law to be applied in the formation, performance, and termination of treaties, including the law on determining when a binding norm of treaty law is no longer in force. It is, however, distinct from the international law of state responsibility, wherein we find many of the circumstances that preclude wrongfulness, which are more of a case-by-case

¹⁵¹ For example, in *Alejandro v. Republic of Cuba*, a U.S. Federal Judge held that the destruction of the BTTR aircraft and the resulting deaths of those aboard was an extrajudicial killing under U.S. law, applying a standard similar to the international standard. *Alejandro*, 996 F. Supp at 1242. “The unprovoked firing of deadly rockets at defenseless, unarmed civilian aircraft undoubtedly comes within the statute’s meaning of ‘extrajudicial killing.’” *Id.* at 1248. Although it was an extrajudicial killing under U.S. law, not necessarily under international law, the judge did refer to it as a violation of basic human rights. *Id.* at 1242.

examination of justifications for deviations from international law, including the law of treaties.¹⁵²

It has been asserted that self-defense under Article 51 of the UN Charter is the only circumstance in which international law would excuse the shutdown of civil aircraft.¹⁵³ However, the simple application of this hard-line approach to one scenario proves that this cannot be the case. Would international law not certainly allow for the destruction of an errant aircraft, such as the one in which golfer Payne Stewart was killed, after it went out of control, if the impending impact threatened lives on the ground? The answer is absolutely yes, although such a threat would certainly not be an armed attack. Since it is certain that there exist other circumstances, short of an armed attack and the corresponding right of self-defense, in which the shutdown of civil aircraft would be authorized, it is necessary to closely examine the circumstances that preclude wrongfulness under international law and to apply the relevant norms to potential shutdown operations.

Peru and Colombia have found no need to put forth any such international justification for their ABDP shutdown operations. These countries have focused solely on sovereignty over national airspace under Article 1 of the Chicago Convention. These countries see it as an issue of domestic law only, but this is not the case. While there are certainly domestic law issues inherent in ABDP shutdowns, such shutdown operations, especially in the tri-border region of Colombia, Peru, and Brazil, are inherently international in character.¹⁵⁴ Therefore, one cannot simply call the ABDP a domestic issue and ignore the search for international justification. While Colombia, Peru, and, in the near future, Brazil will likely not complain when their nationally registered aircraft¹⁵⁵ are shot down over one of the other countries, there will probably be international outrage, along with accusations of violations of international law, when a mistake like the one in the OB-1408 scenario leads to the accidental shutdown of an aircraft from a country not

¹⁵² See Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997.] I.C.J. Rep. 7, para. 47 [hereinafter Gabcikovo-Nagymaros Case].

¹⁵³ See Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 LOY. L.A. INT'L & COMP L.J. 513, 516 (1994), Opinion of the Office of Legal Counsel, *supra* note 18 at 6-7, October 1989 Position Paper, *supra* note 13.

¹⁵⁴ This is certainly the view of the United States. Secretary Rumsfeld, at the restarting of the Colombian arm of the program, said ABDP is not a single country issue. See *Donald H. Rumsfeld Holds a News Conference with Colombian Minister of Defense Ramirez*, FEDERAL DOCUMENT CLEARING HOUSE, Aug. 19, 2003, LEXIS, News Library. [hereinafter *Rumsfeld-Ramirez News Conference*.]

¹⁵⁵ The reliance on conducting a shutdown operation based on the registration of an aircraft is somewhat absurd. Aircraft engaged in drug trafficking might not display any registration, just as it is common for waterborne smugglers to not fly a flag of registration. See Rachel Canty, *Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force*, 31 U. MIAMI INTER-AM. L. REV. 357, 372 (2000) [hereinafter *Coast Guard Use of Force*]. In fact, the DoJ has noted that trafficking aircraft often obscure or paint over registration numbers. See Opinion of the Office of Legal Counsel, *supra* note 18 at 13, note 12.

involved in ABDP operations or when nationals of another country are accidentally killed in a shutdown operation.

Countries should not rely on “sovereignty,” nor should we allow the development of a regional custom justifying such shutdowns. This could lead to a needless broadening of the law to a degree that may eventually lead the world to call into question its own condemnation of Cuba in the BTTR shutdown, which could have just as easily been justified on sovereignty grounds. International law as it stands is broad enough to allow States to deviate from compliance with established norms to respond to an armed attack, to conduct armed conflict, to preserve human life, and to protect the essential interests of the State.

A. Self-Defense

1. *The Inherent Right of Self-Defense*

The first legal justification for the shutdown of civil aircraft that requires examination is also the one with the most international support: self-defense. The right to respond to an armed attack in self-defense has been codified in Article 51 of the UN Charter.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.¹⁵⁶

While its place in the UN Charter scheme on the regulation of armed force is as an exception to the prohibition on the use of force under Article 2(4), it is recognized as a circumstance precluding wrongfulness for internationally wrongful acts under the Draft Rules on State Responsibility as well.¹⁵⁷ The “inherent right” of self-defense is also part of customary international law, and it is triggered in all cases by an “armed attack,” which is not definitively defined in the Charter or in customary international law.¹⁵⁸ One can see that with an armed attack as the requirement, the bar to trigger self-defense has been set deliberately high. In determining whether such a standard is met, one must look at two issues: the affiliation of those carrying out the attack, and the severity of the attack. The answers to these two issues will determine if there is indeed an armed attack in a potential shutdown situation.

¹⁵⁶ U.N. CHARTER, art. 51.

¹⁵⁷ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int'l Law Comm'n, 53d Sess., arts. 4-11, 34-39, U.N. Doc. A/CN.4/L.602/Rev.1 (2001), art. 24(2) [hereinafter Draft Articles].

¹⁵⁸ See Nicaragua Case, *supra* note 88, para. 176.

When Article 3bis was drafted, the State was seen as the major threat to international peace and security and as the likely misuser of civil aviation as a threat against another State. But does the law of self-defense afford the same right to States when actors commit armed attacks in the name of themselves and not a State? Such private entities are more likely today than States to be the perpetrators of such acts using civil aircraft. It is implicit in Article 51 of the Charter that an armed attack must originate from a State. An armed attack is a subcategory of aggression that has been recognized as something that comes from an act of a State and not private actors.¹⁵⁹ It has been noted that “[t]he United Nations Charter is an agreement among nations and does not authorize actions against individual persons.”¹⁶⁰ This view would lead to the conclusion that there would have been no right of self-defense available to the U.S. on 9/11, as there was no attack by a State. This view is certainly not without support.

The problem with this view of self-defense is that it ignores the danger posed by private actors, especially when they are “armed” with fuel-laden aircraft or perhaps even more dangerous devices. There is growing support, especially after 9/11, for the consideration of such acts of terrorists or other private actors as “armed attacks,” and thus triggering the inherent right of self-defense. The Charter’s language does not limit self-defense to armed attacks committed by States.¹⁶¹ The concept of an armed attack was left deliberately open to the interpretation of Member States and UN Organs, and the wording is broad enough to include the acts of non-State actors as “armed attacks.”¹⁶² Such an interpretation would be consistent with the evolution of world realities, as non-State actors are an increasing threat today.¹⁶³

¹⁵⁹ See Giorgio Gaja, *In What Sense was There an ‘Armed Attack?’*, EUR. J. INT’L L. (2001), available at www.ejil.org/forum_WTC/ny-gaja.html. This point of view is shared by Judge Antonio Cassese. He believes that self-defense is only justified by the actions of an aggressor State and that calling the use of aircraft as weapons by a private group, as happened on 9/11, an “armed attack” would be a broadening of self-defense. See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 997 (2001).

¹⁶⁰ Steven B. Stokdyk, *Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?*, 38 UCLA L. REV. 1287, 1309 (1991) [hereinafter *Shootdown Policy*].

¹⁶¹ “An interpretation extending the right of self-defense to attacks by non-State actors is ... consistent with both the ordinary meaning of the text [of the Charter] and the purposes of the United Nations.” Michael N. Schmitt, *Bellum Americanum Revisited: U.S. National Security and the Jus ad Bellum*, 176 MIL. L. REV. 364, 384 (2003) [hereinafter *Bellum Americanum Revisited*].

¹⁶² See Carsten Stahn, *Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER FOR. WORLD AFF. 35, 35-36 (2003) [hereinafter *The Right to Self-Defense*]. The author bases this accretion on the reaction to the September 11th attacks. “The first lesson on September 11 is the almost unanimous recognition in state practice that acts of terrorism carried out by independent private actors fit within the parameters of Article 51.” *Id.* at 37.

¹⁶³ The UN Security Council seems to have agreed. The Security Council referred to the right to self-defense in Security Council Resolutions 1368 and 1373, made shortly after 9/11, with

While the use of force against terrorists has become more and more acceptable under a self-defense theory, it will have increasing applicability to the justification of the shutdown of civil aircraft. Defending against activities by non-State entities engaged in the violent misuse of civil aviation will be included in a State's rights under self-defense. This will take the focus off of the identity of the attacker and put it on the act itself.

Professor Schmitt has recognized that “[w]hile it has become plain that non-State actors can be the source of an ‘armed attack’ under the law of self-defense, the issue of when an individual act of terrorism [or any private violent act for that matter] will rise to that level is murkier.”¹⁶⁴ Low-level violence will generally not constitute an armed attack, as it does not rise to the level of a sufficient scale and effects. Judge Cassese has echoed this, saying that the use of force is not authorized against sporadic or minor attacks.¹⁶⁵ For example, the ICJ has held that mere frontier incidents are not necessarily armed attacks, nor is the provision of weapons or logistical support to an armed band,¹⁶⁶ as an attack must be “most grave” in order to trigger the inherent right of self-defense.¹⁶⁷ Therefore, while self-defense might be applicable to the acts of terrorists and other private actors as well as States, the potential for such an attack to justify the shutdown of a civil aircraft seems limited. Attacks by a single aircraft, especially a general aviation aircraft, might not rise to a sufficient scale to amount to an armed attack under the test put forth by the ICJ.¹⁶⁸ Thus, a literal application of the test to measure an armed attack would require awaiting an attack by a civil aircraft and either determining its severity before acting, or guessing as to the expected gravity of the potential attack and conducting shutdown operations accordingly. Such an application makes self-defense a very unworkable option in a shutdown scenario.

It also seems that the potential for the use of self-defense as a justification for the shutdown of civil aircraft is limited by the very acts of the

the full understanding by the world that Osama bin Ladin's al-Qaeda network was likely responsible for the attacks. It appears that the world has accepted this self-defense justification for the war in Afghanistan, aimed not only at the government but also at the non-State actors that perpetrated 9/11. See *Civil Liberties*, *supra* note 55 at 372.

¹⁶⁴ *Bellum Americanum Revisited*, *supra* note 161 at 387.

¹⁶⁵ See Antonio Cassese, *The International Community's 'Legal' Response to Terrorism*, 38 INT'L. COMP. L.Q. 589, 596 (1989).

¹⁶⁶ See *Nicaragua Case*, *supra* note 88, para. 195.

¹⁶⁷ *Case Concerning Oil Platforms (Iran v. U.S.)*, Merits (Int'l Ct. Justice Nov. 6, 2003), para. 51 [hereinafter *Oil Platforms*]. This case left open the issue of whether the Iranian missile attack on the U.S.-flagged tanker *Sea Isle City* and another U.S.-owned merchant ship, as well as the firing on U.S. military helicopters was grave enough to be an armed attack. It seemed to indicate that it was not, but the decision is too clouded with issues of intent and attribution to determine the court's measure of the gravity of the attack. *Id.*, para. 64. The court did provide some guidance when it determined that the mining of a single warship, in this case the U.S.S. *Samuel Roberts*, could in itself be an armed attack. *Id.*, para. 72).

¹⁶⁸ The events of 9/11 would be the obvious exception.

aircraft in question. When used by a State or other lawful belligerent entity to attack, an aircraft will likely immediately lose its civil status, thereby allowing the use of force against what would become, through its own actions, a state aircraft. While the use of force against state aircraft may breach other rules of international law in some circumstances, it would not violate Article 3bis or any related provision of international law relating to civil aircraft. The lingering question stems from the status of the aircraft used by non-state actors; do their aircraft become “quasi-state” aircraft?¹⁶⁹

2. *ABDP Shootdowns as Self-Defense*

As the legal position that offers the strongest justification for the use of weapons against civil aircraft, one can see that it would be desirable for ABDP countries to classify these operations against drug trafficking as a form of self-defense, thereby not only justifying the use of force against civil aircraft, but

¹⁶⁹ Major General Huang Suey-sheng of the Taiwanese Air Force said prophetically, “In the wake of the 9-11 tragedy . . . the distinctions between war and non-war and the differences between military and non-military have become blurred.” *MND says Troops Ready for 9-11 Style Attacks*, TAIWAN NEWS GLOBAL NEWS WIRE, Sept. 12, 2002, LEXIS, News Library. While this observation has been made many times since the start of the “war on terror,” the general’s statements are interesting in that they came at a time when Taiwan was announcing its plans to shoot down hostile aircraft. While the phrase “quasi-war” is typically used in U.S. Constitutional Law in reference to the Presidential powers to conduct the 18th Century “quasi-war” with France, the term has been creeping into the “war on terror” lexicon. See George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J. L. & PUB. POL’Y 635, 651 (2002), Richard J. Kozicki, *The Changed World of South Asia: Afghanistan, Pakistan, and India after September 11*, 2 ASIA PAC. PERSP. 1, 8, (2002), available at <http://www.pacificrim.usfca.edu/research/perspectives>. With General Suey-sheng’s description of the situation involving the terrorist use of civil aircraft as a confusing distinction between that which is military and that which is civilian, we could easily see the evolution from the “quasi-war” to the “quasi-state” aircraft. The U.S. used the state aircraft justification to target terrorists when it intercepted an Egypt Air 737 carrying terrorists that had hijacked the *Achille Lauro* in the Mediterranean. See *Chicago OPUS 3*, *supra* note 61 at 907-08.

They simply reclassified the aircraft, which had been in service as a civilian airliner, as a state aircraft based on its mission, being chartered by the Government of Egypt to ferry a suspected terrorist out of the country. One author has even gone so far as to use a similar argument for drug trafficking aircraft. “[A]ircraft involved in illegal narcotics traffic arguably do not fall within the definition of ‘civil aircraft’ and thus the protections of the Chicago Convention do not apply to them.” *Shootdown Policy*, *supra* note 160 at 1306. This is based on the paramilitary nature of their activities. See *id.* A move to classify unfriendly civil aircraft, particularly those used by terrorists, as state aircraft would certainly give States more flexibility in how they intercept and apply force to such aircraft. However, one could see such a move as being quite subject to abuse. Moreover, it could cause harm and uncertainty to the whole framework on international civil aviation based on the Chicago Convention. It would be preferable to use the existing framework of prohibitions and defenses to ensure the security of States rather than to see the phrase “state aircraft” become subject to contortions in order to meet the needs of States.

also justifying the use of force in general without the consent of other States. While such a desire is understandable, it is not in keeping with the spirit and intent of Article 51 of the UN Charter, even under a broad reading.

One author has found that drug trafficking can indeed be tantamount to an armed attack.¹⁷⁰ In one sense, he is correct, as its effects can be the same as those of an armed attack. The corrosive nature of the drug lords' operations can have devastating impacts on a country. Death, misery, and even the potential downfall of the government are all consequences of drug activities, consequences no less than those that a State would face if it were actually attacked by another State.

Notwithstanding these concerns over the devastating impact of the drug trade, the shutdown of civil aircraft involved in drug trafficking is troubling under a self-defense analysis. The acceptance of such an interpretation would lead to the potential for the acts of any dangerous criminal organization as well as many other acts of low-level violence to be classified as an armed attack. While such a result would probably not be an intended consequence, it would likely happen. As such, while it would be a good defense in some shutdown situations, self-defense is a poor fit when looking for international justification for ABDP shutdowns.

B. Armed Conflict

While a state of armed conflict is not a circumstance precluding wrongfulness under international law as are the other justifications analyzed in this section, such a state of armed conflict would allow for the invocation of more permissible wartime norms, thus relieving States of the strict burdens under international law prohibiting the shutdown of civil aircraft. The state of armed conflict is examined here because it is a natural follow-up to an armed attack and reflects the state of the law that might very well be in effect subsequent to an armed attack.

The Chicago Convention contains a number of obligations relating to civil aviation that are, by their very nature, incompatible with a state of armed conflict. Therefore, the Chicago Convention has provided for States to forgo some or possibly all of their obligations under Chicago if they invoke Article 89 of the Convention. However, it is of very limited effect.

Article 89, entitled "War and emergency conditions" states:

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state

¹⁷⁰ *Shutdown Policy*, *supra* note 160 at 1308.

of national emergency and notifies the fact to the Council.¹⁷¹

What the practical effect of a declaration under Article 89 would be is not clear. Senator Kerry, in the 1994 debates over the ABDP, stated his belief that an Article 89 would go so far as to relieve a State of all international wrongfulness relating to a shutdown.¹⁷² This may, however, be an overstatement. Such a notice would only have the potential to make the provisions of the Chicago Convention inoperative. It would have no effect on customary international law or other treaty law. The likely effect of the emergence of a state of armed conflict is that the requirements of international obligations relating to the shutdown of civil aircraft would be supplanted by the laws applicable to armed conflicts. This is consistent with the general rule of international law, supported by the ICJ in the *Nuclear Weapons Case*, that the *lex specialis*, in this case the law of armed conflict (LOAC), prevails over more general international obligations. LOAC would still prevent the shutdown of “civil aircraft” in most circumstances, but it would loosen the criteria for States wishing to use force against civil aircraft by the application of LOAC targeting requirements.

With the suspension of appropriate obligations under the Chicago Convention and customary international law,¹⁷³ the corresponding obligations under LOAC would be dependent on the existence of an international or internal armed conflict under international law.¹⁷⁴ The law of armed conflict includes

¹⁷¹ Chicago Convention, *supra* note 57, art. 89.

¹⁷² 140 CONG. REC. 8256 (July 1, 1994) (Statement of Senator John Kerry).

¹⁷³ The Vienna Convention on the Law of Treaties does not affect a State’s right to avoid treaty obligations in case of armed conflict. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), art. 73. There is support for a customary norm suspending treaties incompatible with a state of armed conflict. The test has been put forth as follows: If there is no specific language in a treaty as to its effect in a state of armed conflict, we look at “whether the object and purpose of the treaty is or is not compatible with a state of armed hostilities between the parties.” DEPARTMENT OF DEFENSE, OFFICE OF THE GENERAL COUNSEL, *AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS* 2ND ED. 3 (1999). This is particularly difficult in multinational treaties.

¹⁷⁴ Different provisions of LOAC apply depending on whether the conflict is an international or an internal armed conflict. In international armed conflicts, the vast majority, and most restrictive of the provisions of LOAC apply. See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 75 U.N.T.S. 31, *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 75 U.N.T.S. 85, *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 U.N.T.S. 135, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, Aug. 15, 1977, UN Doc. A/32/144. [hereinafter Protocol I]. In an internal armed conflict, only a small part of LOAC applies, most of it reflected by Protocol II to the Geneva Conventions. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, Aug. 15, 1977, UN Doc. A/32/144.

the four Geneva Conventions, which are considered reflective of customary international law, the 1977 Protocols, and various other treaties. An extensive analysis of these provisions is far beyond the scope of this article, but the basic thrust of this body of law can be distilled into four general principles of law that reflect much of the vast body of LOAC that would govern the targeting of aircraft in war.

Under the “principle of necessity,” the selected target must be a military objective, defined as an object that contributes effectively to the military action of the enemy and the destruction, capture, or neutralization of which offers a definite military advantage for the targeting forces. If a civil aircraft meets this test, it is a potential target as defined under the laws of war and may be attacked. If it is not, or if there is a doubt as to whether it is a military object, it may not be attacked.¹⁷⁵ In contrast, objects classified as “civilian objects,” including civil aircraft not amounting to a military objective, may not be targeted in armed conflict.

The “principle of distinction,” as used in LOAC, requires States to “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives”¹⁷⁶ This would of course include civil aircraft that are not by their nature military objectives. An attack that is indiscriminate is an illegal attack.¹⁷⁷ States must take steps to ensure that they are indeed focusing their attacks on a lawful objective.

The “principle of proportionality” also applies in the course of an otherwise necessary and discriminate attack, when there is a risk of incidental loss of civilian life or damage to civilian objects, as would be the case in nearly every shutdown of a civil aircraft.

[T]hose who plan or decide upon an attack shall ... refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁷⁸

If it is determined that the attack poses a risk to civilians or to civilian objects, a balancing test must be done. One must weigh the probability of death or destruction to protected persons or places and the extent of that damage against the military advantage that would be gained. If the planned attack does not pass the test as articulated above, the attack must not be undertaken. Thus, if a civil aircraft carrying civilians was also carrying some military material in its cargo or engaging in some military mission, one must balance the military

¹⁷⁶ *Protocol I*, *supra* note 174 art. 48

¹⁷⁷ *See id.*, art. 50(4).

¹⁷⁸ *Id.*, arts. 57(2)(a)(iii), 51(5)(b), and 57(2)(b).

necessity to be gained from its destruction against the loss of civilian life before using force. This principle would act to prohibit attacks on aircraft carrying civilians in most circumstances, unless the military advantage to be gained is substantial.

That principle is balanced by the principle of chivalry, which forbids dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict. This principle prohibits perfidy, which involves tricking the enemy by treacherously relying on his adherence to the law of armed conflict in an effort to kill or wound the enemy. It would therefore be unlawful to hide military objectives behind civilian objects, such as civil aircraft.

The classification of the South American drug trafficking problem as part and parcel of an armed conflict is an inviting theory. Such a characterization would be limited in scope to situations that involve an actual armed conflict under international law.¹⁷⁹ Under LOAC, the act of distinguishing between civil and state aircraft would be changed to that of differentiating between military objectives and non-military objectives. Viewing drug traffickers as part of the enemy in an armed conflict requires a factual finding that shows an actual combination of effort between the two. Such a fusion has already been recognized.¹⁸⁰ In the late 1980s, the FARC began to tap into drug activities to gain resources to set up their military operations.¹⁸¹ “Some terrorist groups have been linked to drug smuggling primarily to finance their activities. The profits from even one consignment of narcotics could provide small terror cells with substantial operating capital.”¹⁸² While it is a factual determination, if a State determines that drug traffickers are part of enemy forces in an armed conflict, they may be shot down without warning as lawful military objectives.

There is precedent for the shutdown of otherwise civil aircraft acting

¹⁷⁹ Such a situation probably exists only in Colombia at this time. In fact, the International Committee of the Red Cross recognizes the civil war in Colombia as the only major armed conflict in Latin America. See INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2003 180 (2004), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_annual_report_2003.

¹⁸⁰ “The fusion between drug traffickers and illegal armed groups ... makes it ... no longer possible to credibly distinguish between the two.” UNITED STATES SENATE, TRIP REPORT, SENATE FOREIGN RELATIONS COMMITTEE, MINORITY STAFF DELEGATION TO COLOMBIA, MAY 27-31 1 (2002) [hereinafter *2002 SENATE TRIP REPORT*]. President Bush also spoke about these connections in his National Security Strategy, issued in 2002. “In Colombia, we recognize the link between terrorist and extremist groups that challenge the security of the state and drug traffickers’ activities that help finance the operations of such groups.” OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 10(2002)

¹⁸¹ See RAND CORPORATION, PROJECT AIR FORCE, 2001 ANNUAL REPORT 75 (2001), available at www.rand.org/publications/AR/AR7068.pdf.

¹⁸² OFFICE OF THE PRESIDENT OF THE UNITED STATES, *NATIONAL SECURITY DECISION DIRECTIVE NUMBER 221 2* (1986).

in private support of rebel forces in non-international armed conflicts. For example, in 1983, Nicaragua's pro-Soviet Sandinista Government shot down a DC-3 that was ferrying supplies, including munitions, medical supplies and provisions, to the *Contras*, a rebel force fighting to overthrow the Sandinistas.¹⁸³ In a similar event, Nicaraguan forces shot down a DC-6 operating on a resupply flight from Swan Island in Honduras with a Colombian and Nicaraguan crew.¹⁸⁴ There was no international protest resulting from either incident, despite the fact that the flights were not linked to any State, were international in character, and were manned, in some cases, by persons of other than Nicaraguan nationality. In an even more infamous shootdown, Nicaragua shot down a C-123 flying for the U.S. carrier Southern Air Transport that was acting on behalf of what was described as "private benefactors."¹⁸⁵ The flights were later determined to be part of the Iran-Contra Affair and connected to unauthorized actions of U.S. and other nationals; however, the aircraft was civilly registered to Doan Helicopter in the U.S. with the registration number N4410F.¹⁸⁶ Again, there was no international outrage over this U.S. registered civil aircraft being shot down. One can certainly conclude that it was seen as a lawful target based on military necessity under a LOAC analysis. The shootdown of these flights stands in support of the proposition that civil aircraft engaging in activities for a belligerent may be attacked without warning.

However, while seemingly useful in theory, the characterization of drug trafficking as part of an armed conflict is very unlikely, due to the reverberations that would invariably result from such a classification. While it might free up restrictions on Colombian, Peruvian and other forces in the targeting of rebel aircraft, the corresponding obligations that would arise with the invocation of LOAC would bind the State far too much. A State would not be allowed to "cherry pick" provisions of LOAC and disregard others. As the situation in Colombia is a civil war, if the Colombian forces started treating drug traffickers as part of the belligerent forces for targeting purposes, Protocol II to the Geneva Conventions would then apply to all counter-drug activity in Colombia. The obligations under Protocol II would likely be too restrictive to lead States to classify drug trafficking as a rebel act, and the States involved are not likely to do so out of a desire to operate under their own domestic law as opposed to the international law of armed conflict. While the battle against

¹⁸³ See State Department Message, Sandinistas Shoot Down a Contra DC-3, (1983), available at Digital National Security Service (Cable from the U.S. Embassy in Managua to the U.S. Secretary of State).

¹⁸⁴ See *Survivor from Contra Plane Interrogated, Search for Others*, ASSOCIATED PRESS (Jan. 25, 1988), available at LEXIS, News Library.

¹⁸⁵ U.S., Central Intelligence Agency, *Testimony before the House Permanent Select Committee on Intelligence Regarding to the Crash of a C-123 in Nicaragua* (1986) 2. The CIA, while once connected to Southern Air Transport, denied involvement. *Id.*

¹⁸⁶ See Federal Aviation Administration, *Fact Sheet on C-123 Shot Down in Nicaragua*.

the FARC and others in Colombia is recognized as a non-international armed conflict, the fight against drug traffickers is but a law enforcement action with potential international implications. As such, States' actions against such operations are bound only by human rights law, not LOAC.

C. Distress

On 25 October 1999, a Learjet 25 carrying golfer Payne Stewart and five others lost contact with air traffic controllers and went out of control, flying aimlessly over the central United States. After drifting for several hours and being intercepted several times by Air Force and Air National Guard fighter aircraft, the Learjet ran out of fuel and crashed in rural South Dakota.¹⁸⁷ While all six on board perished, no one on the ground was injured or killed. This was not the first such scenario.¹⁸⁸

But what if the Payne Stewart aircraft had been projected to crash in, for example, downtown Des Moines as opposed to a remote field in South Dakota? Would it be lawful for military interceptors or AAA forces to terminate such a flight in order to prevent the death of persons on the ground, even at the cost of the lives of those on board? Under what authority may a State save lives in a manner that would otherwise violate its international obligations?

1. *The Defense of Distress in International Law*

International law recognizes that it may be necessary to deviate from accepted international norms in order to save lives. The invocation of the defense of distress allows a deviation from international obligations to save lives in some circumstances. The defense of distress has been codified in the Draft Articles on State Responsibility in Article 24.

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of

¹⁸⁷ See Doug Mills, *Crash Mystery; Jet Carrying Payne Stewart Drifted for Hours*, CHICAGO SUN-TIMES Oct. 26, 1999, at 1.

¹⁸⁸ In 1988, an errant Learjet flying from Tennessee to Texas was intercepted by Air Force fighters after having overflown its destination. It subsequently left U.S. airspace where it eventually ran out of fuel and crashed into a mountain in Mexico. See *'Learjet Set' Shocked by Crash of Stewart's Plane: Investigators Don't Expect the Site to Reveal too Many Clues as to What Caused the Deaths of the Six on Board*, THE VANCOUVER SUN, Oct. 27, 1999, at A4. In a similar event, a Vienna to Hamburg flight lost contact with authorities and went out of control, subsequently being intercepted by RAF fighters over Scotland before it as well ran out of fuel and crashed in the sea 200 miles off the coast of Iceland. See *RAF Chase Over Scotland May Hold Clue to Stewart Death Flight*, THE JOURNAL, Oct. 29, 1999, at 28.

other persons entrusted to the author's care.¹⁸⁹

The Draft Articles go on to say that the defense of necessity does not apply if the “situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or . . . [if t]he act in question is likely to create a comparable or greater peril.”¹⁹⁰

Distress as a circumstance precluding international wrongfulness is recognized as a well-established rule under customary international law. It was accepted by the tribunal in the *Rainbow Warrior Case* as a lawful reason to not comply with international obligations.¹⁹¹ The tribunal said it applies when one “acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish.”¹⁹² It should also be noted that the interest in saving lives as contemplated by this defense is in that which involves an *immediate* threat to human life.¹⁹³ A speculative or long-term threat would not suffice.

2. *Distress and the Shootdown of Civil Aircraft*

If indeed a situation ever presented itself where a foreign civil airliner poses a threat to persons on the ground, for whatever reason (catastrophic mechanical failure, crew incapacitation, deliberate misuse) the defense of distress could be invoked as a justification for destroying the aircraft, even though it would involve killing all on board. This is even more significant in a 9/11-type scenario. There is no need to determine the nationality of an aircraft before shooting it down, nor would there be a need or to engage in some calculation as to whether an attack will be of a certain gravity or will be committed by the right entity in order to invoke self-defense. All that is

¹⁸⁹ Draft Articles, *supra* note 157.

¹⁹⁰ *Id.*, art. 24(2).

¹⁹¹ See Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on July 9, 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, 20 R.I.A.A. 217, 253 (1990) [Rainbow Warrior Case]. The *Rainbow Warrior Case* resulted from the sinking of the Rainbow Warrior, while docked in a New Zealand port, by agents of the French Ministry for External Affairs. The agents were convicted in a New Zealand court and were sentenced to 10 years confinement. A subsequent international agreement between France and New Zealand called for them to be confined in French custody on the French island of Hao for not less than 3 years. A year later, the French evacuated one of the agents to France for urgent medical treatment that was not available on Hao. New Zealand claimed that France had breached its international duties under their agreement. See also Commentaries to the Draft Articles on Responsibility of States for internationally Wrongful Acts 191 (2001) [hereinafter State Responsibility Commentaries], available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf).

¹⁹² Rainbow Warrior Case, *supra* note 191 at 254.

¹⁹³ See State Responsibility Commentaries, *supra* note 191 at 189.

needed in order to authorize a shutdown on the grounds of the defense of distress is an immediate threat to human life.

It is important to note the balancing of interests requirement contained in the use of distress. “Distress can only preclude wrongfulness where the interests sought to be protected . . . clearly outweigh the other interests at stake in the circumstances.”¹⁹⁴ Thus, the use of this defense would probably not be appropriate to justify the shutdown of an aircraft that is likely to crash far from populated areas, as did the Payne Stewart aircraft, nor would it justify the shutdown of an airliner carrying hundreds of persons in order to save the lives of a few on the ground.¹⁹⁵ However, when the threat is immediate enough, the defense of distress is more important in this area of law than even the law of self-defense.

The application of distress as a justification for ABDP shutdowns is troublesome. There is no doubt that stopping the flow of drugs saves lives. One U.S. general compared the drug trade to WMDs, noting that drugs were responsible for over 19,000 American deaths annually.¹⁹⁶ The saving of human lives in general terms has been put forward as a potential justification for the shutdown of drug trafficking aircraft. However, the saving of lives by the shutdown of an aircraft carrying drugs is quite likely too speculative and long term in nature, thus rendering the defense inoperative for ABDP operations. The identity of those to be saved is completely unknown. While one would not be required to identify specific persons to be saved in a potential Payne Stewart-like scenario, one can at least identify citizens of a specific area that will potentially be saved from the crash of a derelict aircraft. In a drug trafficking situation, the destination of the drugs cannot even be narrowed down to a particular continent, and it is not certain that these drugs will result in any deaths. As the defense is not to be applied liberally, it would appear to be inapplicable to ABDP operations.

D. State of Necessity

It goes without saying that a State has a vital interest in defending itself from armed attack, a right enshrined in Article 51 of the UN Charter. But what about the protection of other vital interests in situations short of an armed attack? The deviation from international norms, including the prohibition on

¹⁹⁴ *Id.* at 194.

¹⁹⁵ One could certainly make an argument that in a situation such as 9/11, the lives of those on board, while not yet terminated, are all but lost and should not factor into the balancing test. In a situation where the aircraft is merely having flight control problems and it is not certain that all on board will be lost, as was the case in the crash of United Flight 232 in Sioux City, Iowa in 1989, then the lives on board should be factored into the analysis.

¹⁹⁶ See *Posture Statement of General James T. Hill, United States Army, Commander, United States Southern Command Before the 108th Congress House Armed Services Committee* (2003), available at http://www.globalsecurity.org/military/library/congress/2004_hr/040401-hill.pdf [hereinafter *Posture Statement of General Hill*].

shooting down civil aircraft, to safeguard essential State interests may be allowed if it is done in a state of necessity. The doctrine of necessity dates back centuries¹⁹⁷ but fell into disfavor in the 20th Century, being linked to the pre-WWI unilateral right to wage war out of necessity. It has since reemerged in a more benign form, becoming, on a case-by-case basis, an excuse for a failure to comply with international obligations.

1. The State of Necessity in International Law

As codified in the Draft Articles on State Responsibility, the requirements for a state of necessity are worded in the negative:

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.¹⁹⁸

In the *Gabcikovo-Nagymaros Case*, the ICJ took occasion to pass judgment on the validity of the defense of necessity as provided in the Draft Articles in a case of non-compliance by Hungary of treaty obligations with Slovakia concerning the construction and operation of the Gabcikovo-Nagymaros system of locks on the Danube River. The ICJ held that the defense of necessity does indeed exist in customary international law.¹⁹⁹ The court recognized that by invoking a state of necessity, or presumably any other circumstance precluding wrongfulness, a State implies that, absent a state of necessity, its conduct would be wrongful.²⁰⁰ A State does not argue that the international obligation no longer exists, merely that the violation is excused in that situation. In the *Gabcikovo-Nagymaros Case*, the court denied the application of the defense under the facts of the case, mainly because the imminent peril, the threat to the environment, proffered by Hungary remained uncertain.²⁰¹

¹⁹⁷ See JOHN TAYLOR MURCHISON, *THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW* 60 (1955).

¹⁹⁸ Draft Articles of State Responsibility, *supra* note 157, art. 25.

¹⁹⁹ See *Gabcikovo-Nagymaros Case*, *supra* note 152, para. 51.

²⁰⁰ See *id.*, para. 48.

²⁰¹ *Gabcikovo-Nagymaros Case*, *supra* note 152, para. 55. While the *Gabcikovo-Nagymaros Case* has little to do factually with the use of force against civil aircraft, a recent case out of the

2. Elements of Necessity

Mindful of the danger posed by the potential use of necessity, the burden is placed on the State claiming such a circumstance to make out the appropriate elements. The first requirement is that the deviation from international standards must be the only way to protect an essential interest. What is an essential interest? “It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency and ensuring the safety of a civilian population.”²⁰² Also, the defense has been invoked in several instances to justify the use of force against another State in the post-Charter era.²⁰³ Additionally, Tanzania, Jordan and Macedonia have all eschewed obligations under the Refugee Convention by closing their borders to would-be refugees under a state of necessity defense in order to protect their

International Tribunal for the Law of the Sea (ITLOS) does bear some factual resemblance to the issue at hand. In the case of the *M/V “Saiga,”* a St. Vincent-registered ship was attacked by Guinean patrol boats in the outer fringes of the Guinean exclusive economic zone (EEZ), resulting in the wounding of two crewmen, the arrest of the ship, and the detention of crewmembers. The *M/V Saiga*, 38 I.L.M. 1323, 1335 (Int’l Trib. L. Sea 1999). When St. Vincent sought relief at the ITLOS, Guinea pleaded necessity, justifying its need to extend its customs laws into its EEZ to prevent the *Saiga* from “offshore bunkering” (refueling operations conducted from a ship off shore), which it perceived as a threat to its vital interests. *See id.* While accepting necessity as a circumstance that could preclude international wrongfulness, the court held that Guinea was not acting under a state of necessity and had no excuse not to comply with UNCLOS. There was no evidence that the “bunkering” by the *Saiga* was placing the essential interests of Guinea in grave and imminent peril. *See id.* at 1335.

²⁰² State Responsibility Commentaries, *supra* note 191 at 202.

²⁰³ Belgium used the defense to justify its 1960 intervention in the Congo, as well as in the Coalition intervention in post-war Northern Iraq to protect the Kurds in 1991. *See* Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT’L L. 485, 514-15 (2004) [hereinafter *State of Necessity*]. More recently, Belgium invoked the defense to justify the use of force against Kosovo as part of Operation Allied Force in 1999 to protect Kosovar Albanians from Genocide. *See id.* at 514-518. Under a recent ICJ decision, it is questionable whether the claim of essential interests could ever be used, in the absence of an armed attack, to justify a violation of Article 2(4) of the UN Charter. *See* Oil Platforms, *supra* note 167 para. 40. It has also been determined to be appropriate for use in several more minor uses of armed force. For example, the British bombed an abandoned Liberian-flagged vessel, the *Torrey Canyon*, outside British waters to prevent the spilling of oil. *See State Responsibility Commentaries, supra* note 191 at 199. In another case involving the use of force against a ship at sea, the French Navy sank the *Ammersee*, a civilian cargo vessel that was 25 miles off the French coast, after the ship, loaded with 200 tons of dynamite, caught fire in a storm and was abandoned by the crew. When the owners sought compensation in a French court, the court held that there had been no violation of international law because of the “grave and imminent danger” posed by the ship, and of the fact that “no other measure would have been sufficient to remove the danger.” *See State of Necessity, supra* note 203 at 495-96, quoting *Nochfolger Navigation Company Ltd. And Others*, 89 INT’L L. REP. 3, 3-5 (1987).

countries from the devastating effect of the massive influx of refugees.²⁰⁴ It has also been used to justify the assumption of jurisdiction over persons of other States in circumstances involved a threat to the security of the State, such as counterfeiting currency and plotting against the rulers. Almost anything that is “self-destructive” to the State can be held to be an essential interest. While an essential interest must be of an exceptional nature,²⁰⁵ it need not be linked with the very survival of the State.²⁰⁶ It can involve lesser interests, as determined by the circumstances of the case.²⁰⁷ Of course these lesser interests would not justify the avoidance of every international obligation, especially certain critical ones. As will be seen in the last requirement, the essential interest must be subject to a balancing test in relation to the obligation that is breached.

Not only must the State be protecting an essential interest, but the danger posed to that interest must be a grave and imminent peril. There are no specifics as to what “grave and imminent peril” means. “The peril has to be objectively established and not merely apprehended as possible.”²⁰⁸ This does not mean that the actual consequence must be at the imminent doorstep of a State.²⁰⁹ This test put forth by the court seems to allow for some degree of preemption on the part of the State in invoking necessity. However, the threat must be identifiable, even if remote in time.

As a final element in the invocation of the defense, the breach of the international obligation must not involve an impairment of the essential interests of other States or the international community as a whole. This element creates a balancing test under which the interest sought to be protected “must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests”²¹⁰ While it is up to the State making out the defense to establish that the balancing test weighs in its favor, it must be noted that the ICJ has recognized that the individual State putting forth the defense will not be the sole judge of

²⁰⁴ See Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE H.R. & DEV. L.J. 1, 4 (2000) [hereinafter *State of Necessity*].

²⁰⁵ *State of Necessity*, *supra* note 204 at 15.

²⁰⁶ See *Gabcikovo-Nagymaros Case*, *supra* note 152, para. 53. “Although a link between preservation of a State’s very existence and the plea of necessity as an excuse for noncompliance with an international obligation of the State has been intimated in several cases, the predominant trend . . . is to expand the notion of necessity to cover ‘essential interests’ other than threats to a State’s very existence.” *State of Necessity*, *supra* note 204 at 10.

²⁰⁷ Interests at the lesser end of the spectrum have included the protection of the fur seal population, which led the Russians to unilaterally halt fur sealing on the high seas. See *State Responsibility Commentaries*, *supra* note 191 at 197. Canada used it in a similar situation to prevent the extinction of fish off the Grand Banks, even boarding a Spanish fishing ship on the high seas to enforce the ban. See *id.* at 200.

²⁰⁸ *Id.* at 202.

²⁰⁹ *Gabcikovo-Nagymaros Case*, *supra* note 152, para. 54.

²¹⁰ *State Responsibility Commentaries*, *supra* note 191 at 204.

whether the element has been met.

3. *The Shootdown of Civil Aircraft in a State of Necessity*

The idea of using a state of necessity defense to justify the shutdown of drug trafficking aircraft in South America has not been advanced before, but the basic idea behind it is not new. During the debates on the 1994 ABDP immunity amendment, Senator Sam Nunn stated that there was to be found in international law a “national security” exception that would justify the shutdowns.²¹¹ The protection of national security would seem to be the precise type of essential interest that a State could protect from a grave and imminent peril, as envisioned under the defense. The use of necessity could very well be applicable as a justification for ABDP-style shutdown operations under certain circumstances.

It has been observed that “Rome succumbed [partially] to . . . a death of a thousand cuts from various barbarian groups.”²¹² Such is the situation in Colombia and Peru with the drug traffickers. While each cut inflicted by these groups might not be, in and of itself, enough to justify self-defense under Article 51, the cumulative effect has disastrous implications for the State. The defense of necessity operates to allow States the right to protect their essential interests without requiring that the underlying international obligation to be violated be rendered null and void. While some would argue that such an invocation of necessity would weaken the international system, it could, in reality, strengthen it, serving as a natural pressure release for States when they cannot comply with international obligations because of great risk to themselves, yet have no desire to do away with the entire legal framework. It is therefore necessary to apply the elements of necessity to the facts of ABDP shutdowns to determine if this defense is available in these cases.

First and foremost, we must determine whether there is an essential interest that is threatened by a grave and imminent peril. The protection of internal order and security can be an essential interest protected under a claim of necessity, and the maintenance of internal security is certainly one interest that is threatened by the activities of the drug trade. Evidence of this fact is abundant. Simply put, drugs are the mother’s milk of terrorism and insurgency in South America. All insurgent groups in Colombia depend on drugs,²¹³ and Colombian drug lords have what has been characterized as a “stranglehold on

²¹¹ See CONG. REC. S8222 (July 1, 1994).

²¹² Joseph Nye, *The New Rome Meets the New Barbarians*, THE ECONOMIST, Mar. 23, 2002, at 25.

²¹³ See DEPARTMENT OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT II-3 (2002), available at <http://www.state.gov/g/inl/rls/nrcrpt/2002/pdf/> [hereinafter INCSP 2002].

the power of Colombia's government.²¹⁴ The drug trade finances corruption and lawlessness in numerous remote growing regions.²¹⁵

These threats spread beyond Colombia into the whole Andean Region. "The narcoterrorist organizations operating primarily out of Colombia are spreading their reach throughout the region, wreaking havoc, and destabilizing legitimate governments."²¹⁶ One example is Peru. The Anti-Peruvian SL is supported by drug operations.²¹⁷ Despite being beaten back during President Fujimori's rule, the SL has recently reemerged, mainly due to the funding provided by the drug trade.²¹⁸ The threat to these States' essential interest of maintaining internal order posed by drug trafficking goes beyond drugs. The air bridge used by drug trafficking aircraft is the same as that used by weapons traffickers, whose actions stoke the fires of civil war.²¹⁹ In addition, the suppliers of drugs threaten the populations of these countries through crimes such as kidnappings, murder and other illicit activities throughout South America.²²⁰ Much of the drug trafficking in South America is linked to international terrorism, including Islamic terrorists in South America's tri-border region.²²¹ Other countries feel the effects as well. Caribbean governments have compared the drug problem to that of military repression.²²²

Beyond national security issues, damage to the environment is also a notable consequence of drug trafficking activities. "Narcotraffickers are by far the biggest source of environmental damage in Colombia."²²³ In their attacks on oil pipelines, drug-fueled terrorists have spilled oil in amounts reaching 12 times that spilled by the Exxon Valdez,²²⁴ and they are responsible for 2.4 million hectares of rain forest destruction.²²⁵

Simply put, the effects of drug trafficking on the States of this region are an attack on the legitimate sovereign governments themselves.²²⁶ The cumulative effect of the damage being done by drug traffickers appears to be the exact type of situation that requires a State to deviate from international law in order to protect its essential interests. The threat posed by drug

²¹⁴ CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53 at 59 (2000) [hereinafter *Transnational Organized Crime*].

²¹⁵ See DETERRENCE EFFECTS, *supra* note 7 at 5.

²¹⁶ *Posture Statement of General Hill*, *supra* note 196 at 5-6.

²¹⁷ See DETERRENCE EFFECTS, *supra* note 7 at II-7.

²¹⁸ See *Posture Statement of General Hill*, *supra* note 196 at 8. Before its first demise, the SL used drugs to finance a war that killed 30,000 people. See INCSP 2002, *supra* note 213 at II-4.

²¹⁹ See *Posture Statement of General Hill*, *supra* note 196 at 9.

²²⁰ See *Posture Statement of General Hill*, *supra* note 196 at 7.

²²¹ See Hale E. Sheppard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625 at 630-31(2002).

²²² See *Coast Guard Use of Force*, *supra* note 155 at 363.

²²³ 2002 SENATE TRIP REPORT, *supra* note 180 at 3.

²²⁴ See *Posture Statement of General Hill*, *supra* note 196 at 8.

²²⁵ See 2002 SENATE TRIP REPORT, *supra* note 180 at 3.

²²⁶ See *Transnational Organized Crime*, *supra* note 214 at 64.

trafficking goes far beyond the ICJ's requirements regarding the establishment of the threat. The threat to the national security of these countries is real and present, and the legitimate governments in this region are under assault.

While a strong case can be made that drug trafficking is, across the board, a grave and imminent peril to the essential interests in maintaining internal security of these South American countries, a much more limited case can be made that the shutdown of trafficking aircraft is the *only way* to protect that interest. As was noted by an American Coast Guard officer, deadly force is rarely required in the interdiction of drug traffickers.²²⁷ We can establish that the shutdown of civil aircraft trafficking in drugs is certainly one way to put a halt to drug trafficking activities and to protect the vital interests of a State.²²⁸ But while shutdowns are one way to halt the drug trade, are they, as is required under the defense of necessity, the only way?²²⁹

There are lesser available means of dealing with drug traffickers other than the resort to using weapons against aircraft in flight. One of these includes forcing the aircraft to land, although this is dependent on the pilot's willingness to comply. Another option could be the use of specially trained counter-drug forces to conduct raids at their points of embarkation and arrival.²³⁰ However, such lesser means have not proven effective in Colombian and Peru. "With enough time and resources, there are risks that traffickers will find ways around static blockades or the initial tactical plans being executed."²³¹ In addition to the ability of the traffickers to find ways around the lesser means, the lack of effective control over territory is a major factor

²²⁷ See Michael T. Cunningham, *The Military's Involvement in Law Enforcement: The Threat is Not What You Think*, 26 Seattle U.L. Rev. 699, 715 (2003).

²²⁸ "Illegal flights by general aviation aircraft are the lifeline of the traffickers operations. They move narcotics and related contraband, such as chemicals, currency, and weapons ... as they ferry logistical supplies to production sites and staging areas." Presidential Justification Memo, *supra* note 26 at 1. Shutdown operations are closely followed by traffickers, and these operations have a dramatic effect on their actions. Even a short stand down in the ABDP in November 1995 caused an immediate increase in drug flights. See DETERRENCE EFFECTS, *supra* note 7 at IV-44.

²²⁹ An example of using lesser means than using force against an aircraft is seen in the French response to the use of aircraft in a string of jailbreaks. To thwart attempted breakouts using helicopters, the French officials simply installed mesh coverings over jails where the most dangerous prisoners were held. See *France Announces Measures to Prevent Prison Escapes*, ASSOCIATED PRESS WORLDSTREAM, Oct. 18 2001, LEXIS, News Library. This plan ultimately met with failure as criminals began cutting through the meshing and a second string of prison escapes was soon underway. See *Chopper Key to Jailbreak*, NATIONWIDE NEWS PTY LIMITED, MX, Apr. 15, 2003, at 8, LEXIS, News Library.

²³⁰ In Mexico, with the use of U.S.-provided helicopters, such assault forces do indeed conduct raids on suspected drug trafficking bases, and Mexico conducts no shutdown operations. See GENERAL ACCOUNTING OFFICE, REVISED DRUG INTERDICTION APPROACH IS NEEDED IN MEXICO 19 (1993).

²³¹ DETERRENCE EFFECTS, *supra* note 7 at 49.

that hampers the use of lesser means of controlling drug flights.²³² In South America, Coca production purposefully clusters in areas that have poor infrastructure with the intention of avoiding governmental authorities.²³³ This lack of control over certain critical territory that is closely linked with the drug lords is the key point as to why shutdown operations may indeed be the only way to stop the flow of drugs out of these countries. Raids are almost out of the question. The drug traffickers can land and off-load their drug cargo in 10 minutes.²³⁴ Even if raids were logistically possible, it would be suicide for a government to send small raiding parties into rebel-controlled areas to attack a clandestine airfield or production site.

The unique facts of the drug trade in South America make for a strong argument that the use of shutdown operations is indeed the only way for governmental forces to control the effects of the drug trade. However, as the facts are unique to this area, this analysis should not be extended to other areas in the world in which drugs are a problem without a close examination of the facts to determine whether the shutdown of aircraft is the only way to deal with the problem.

In the balancing of interests, the available facts seem to weigh in favor of allowing countries to engage in shutdown operations under a claim of necessity, at least as far the Andean example shows. In this situation, the obvious interest of both individual States and the world as a whole is the safety of international civil aviation. The implementation of a “free-fire zone” over Colombia or Peru would threaten international civil aviation to such a degree that other States would find it intolerable, regardless of the threat posed to these countries by drug trafficking. The degree to which Colombia and Peru can control the threat to the safety of international civil aviation will determine the amount of support that their policies receive from other States.

The threat to international civil aviation comes when countries engaging in shutdown operations are unable to adequately protect all international flights from being accidentally shot down. In addition to the steps that are needed to ensure the proper identification of target aircraft in order to keep the operation in compliance with human rights norms, several steps can be taken to ensure that other States are aware of the threat and can take action to protect their flights that might enter countries engaged in ABDP shutdowns. First, as is already a part of ABDP operations, countries engaging in a shutdown campaign should limit the operations to specific

²³² See INCSP 2002, *supra* note 213 at II-4. “[T]he Government of Peru lacks the resources to control all of its airspace and to respond when trafficker aircraft land at remote locations outside the effective control of the government. Accordingly, drug smuggling aircraft flagrantly defy Peru’s sovereignty, penetrating its borders at will and flying freely through the country.” Presidential Justification Memo, *supra* note 26 at 1.

²³³ See DETERRENCE EFFECTS, *supra* note 7 at ES-2.

²³⁴ See *Colombia Angered by U.S. Action; End of Data-Sharing Seen as harming Drug War*, DALLAS MORNING NEWS, May 28, 1994, at 1A.

zones of high drug trafficking activity, as opposed to extending them to the entire country. For example, not every foreign flight in Peru is under the threat of shutdown as soon as it crosses the border into Peru. Only aircraft flying in a specifically designated and publicly declared Air Defense Identification Zone (ADIZ) without a flight plan are targeted.²³⁵ Countries could also issue notices to airmen (NOTAMs) or use an Article 89 declaration to properly warn foreigners that such an operation is underway and that all foreign aircraft should stay clear or be prepared to engage in specifically issued governmental directives to avoid being targeted. States should also be sure to limit shutdown operations to general aviation type aircraft. Larger aircraft, such as 727s, have been used to ferry drugs,²³⁶ however, such larger aircraft, with their need for longer runways and more ground equipment, are more easily tracked to a known ground destination, making shutdown operations less necessary. As most foreign aircraft will be larger commercial-style aircraft and not general aviation, this will help prevent the accidental shutdown of a foreign civil aircraft. The shutdown of commercial aircraft would likely never meet the balancing test required under necessity and any shutdown of such an aircraft would almost certainly have to rely on self-defense or distress in times of peace.

Strangely enough, the shutdown of drug trafficking aircraft might even make civil air transportation safer. After all, the main goal of the whole program is not to shoot down aircraft, but rather to make sure that the aircraft do not fly at all.²³⁷ These shutdown operations have proven to cause drug traffickers to move to truck and boat transport, thus keeping drug trafficking aircraft out of the sky. Keeping unmarked, unregistered, and uninspected aircraft, along with their potentially unlicensed and untrained pilots, out of the sky can only make aviation safer. A large number of shutdowns would not be needed to achieve this goal. It has been noted that “[d]eterrence amplifies the effect of a modest number of interdictions by discouraging the great majority of air trafficker pilots from flying; thus, a relatively low level of air interdiction can virtually deny traffickers this essential mode of transport.”²³⁸ Studies have shown that a 3% interdiction rate will deter 80% of all traffic.²³⁹

The shutdown of civil aircraft, while potentially being a threat to international civil aviation, can also be seen as an attempt by these countries to fulfill their international duties. If a State has knowledge that its territory is

²³⁵ See STATE DEPARTMENT PERU REPORT, *supra* note 7.

²³⁶ See *Coast Guard and Maritime Transportation Drugs and Addiction*, FEDERAL DOCUMENT CLEARING HOUSE, Aug. 1995, LEXIS, News Library (Lee P. Brown, Director ONDCP, Testimony before House Committee on Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation).

²³⁷ See DETERRENCE EFFECTS, *supra* note 7 at 17.

²³⁸ *Id.* at ES-3.

²³⁹ See *id.* at 20. In the same study, interviews with trafficker pilots who had been caught revealed that a 10% chance of being caught would deter almost all of them from flying. *Id.* at 21.

being used for acts that are hostile to other countries, international law requires that the State take some action to put a stop to such acts.²⁴⁰ The drug trafficking emanating from the Andean Region is certainly a threat, not only to those countries but also the United States. Over a decade ago, the White House realized that “the operation of internationally criminal narcotics syndicates is a national security threat requiring an extraordinary and coordinated response by civilian and military agencies”²⁴¹ Even a small number of flights can have a huge impact. Sixty flights a month can carry 80% of the coca needed to supply the U.S.²⁴² This is also a problem that effects the world. There have been a number of UN and ICAO initiatives to stop the flow of drugs by air.²⁴³ Thus, these shutdown operations, while protecting the host States, are also protecting the rest of the world from the adverse effects of the flow of drugs out of these countries. This is another factor that helps to place the balance of interests in favor of a limited shutdown operation in South America under a necessity analysis, and that provides a potential legal justification for ABDP shutdowns using a necessity defense.

V. OTHER ISSUES RELATING TO ABDP OPERATIONS

In using State security as an excuse for the shutdown of civil aircraft under international law we must not be too hasty to lower the bar for all shutdown operations. International law does not evolve in a vacuum, and other States are likely to see the ABDP as an opportunity to loosen the legal requirements as well if they too desire to shoot down civil aircraft, for whatever reason. This warning was sounded in the U.S. Senate in 1994:

[B]y creating a national security exception to the international prohibition on the use of force against civil aircraft, the United States will open the door for other countries to do the same. We should not forget that in 1983 the Soviets justified the shooting down of Korean Airlines Flight 007 on national security grounds²⁴⁴

The expansion of ABDP-style operations could take two forms. One could involve the shutdown of drug trafficking aircraft in other parts of the world, outside the Andean Region, as drugs are also a national security threat

²⁴⁰ See Justin S. C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT’L L. REV. 341, 373 (2002).

²⁴¹ *Statement by the White House Press Secretary*, Nov. 3, 1999, available at <http://www.fas.org/irp/offdocs/pdd14.htm>.

²⁴² See DETERRENCE EFFECTS, *supra* note 7 at ES-2.

²⁴³ See generally, R.I.R. Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, 63 J. AIR L. & COM. 289 (1997).

²⁴⁴ 140 CONG. REC. 12785 (Sept 12, 1994) (Statement of Sen. Kassebaum).

in other parts of the world. For example, heroin has financed the Taliban,²⁴⁵ and terrorists in Asia.²⁴⁶ Even the organization that could be said to be the greatest threat to the free world, al-Qaeda, has used heroin to finance its operations.²⁴⁷ Many of these terrorist organizations are large enough to control some territory. This has possible implications in the war on terror; because the United States has placed a priority on disrupting terrorist financing, any of these areas could see an implementation of an ABDP-style operation as part of counter-terrorist operations.

In a second morphing of ABDP-style operations, shutdown operations could be authorized to target aircraft carrying other contraband that is seen as a threat to national security. For example, diamonds serve the same function as drugs in some areas, fueling conflicts and funding belligerents in such African countries as Sierra Leone and Angola,²⁴⁸ and they have also been reported to have financed al-Qaeda.²⁴⁹ Could a similar plan be implemented against diamond trafficking aircraft?

Weapons trafficking could also be the target. Secretary of Defense Rumsfeld has already indicated a belief that the ABDP will include weapons as well as drugs.²⁵⁰ The U.S. has examined the possibility of conducting interdiction operations to stop WMD, which could include some form of aerial blockade in certain places.²⁵¹ In fact, the Bush Administration recently announced the creation of the Proliferation Security Initiative (PSI). The PSI is a multilateral effort to interdict WMDs through the search of ships and planes that might contain illegal weapons and missile technologies.²⁵² One of the actions to which PSI States have committed is to “require suspicious aircraft in their airspace to land for inspection.”²⁵³ If such a landing cannot be compelled, is the destruction of the aircraft in flight on the table?

While we can see that the international support of ABDP shutdowns may result in the potential spread of shutdown operations to other areas, we must in each instance remember to apply international law as put forth here to the analysis. Some might meet the criteria and be permissible, and some might not. For example, while drugs might be a serious problem in other parts of the

²⁴⁵ See *INCSP 2002*, *supra* note 213 at II-3.

²⁴⁶ See GENERAL ACCOUNTING OFFICE, TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMICALLY ASSESS TERRORISTS’ USE OF ALTERNATE FINANCING MECHANISMS 11(2003).

²⁴⁷ See *id.*

²⁴⁸ See CONGRESSIONAL RESEARCH SERVICE, DIAMONDS AND CONFLICT: BACKGROUND, POLICY, AND LEGISLATION 2 (2003).

²⁴⁹ See *id.* at 7.

²⁵⁰ “We understand these interdiction flights would not only fight drugs but also will be extended to illegal weapons.” *Rumsfeld-Ramirez News Conference*, *supra* note 154.

²⁵¹ See CONGRESSIONAL RESEARCH SERVICE, WEAPONS OF MASS DESTRUCTION COUNTERPROLIFERATION: LEGAL ISSUES FOR SHIPS AND AIRCRAFT 25 (2003).

²⁵² See generally Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT’L L. 355.

²⁵³ *Id.*

world, those places might offer better access to ground interdiction than do Colombia and Peru, thus allowing for other possibilities, short of the shootdown of civil aircraft. One must not circumvent the analysis and declare planned operations illegal merely because the shootdown of civil aircraft is involved, or declare similar operations legal simply because the shootdown of civil aircraft is permissible in ABDP operations. Each situation must be evaluated in terms of the facts at hand.

Beyond the potential unintended expansion of civil aircraft shootdowns, one must also be mindful of the hidden danger for ABDP operations that is to be found at the intersection of international and domestic law. The Montreal Convention²⁵⁴ was drafted to create what would amount to universal jurisdiction over persons engaging in a number of unlawful acts involving civil aviation, including the destruction of aircraft. While the treaty creates no new laws, it obligates States to enact a domestic system that will allow for jurisdiction over persons guilty of such offenses, wherever committed, and enact a “prosecute or extradite” policy. This was implemented in U.S. law as the Air Sabotage Act of 1984,²⁵⁵ enacted partly in response to the KAL 007 shootdown.

While international law lacks teeth, especially when dealing with individual perpetrators, domestic law does not. Domestic law was recently applied in a shootdown case. In August 2003, Brigadier General Ruben Martinez Puente, the head of Cuba’s Air Force, and two MiG-29 pilots were indicted in a U.S. District Court on charges of murder, conspiracy, and destruction of aircraft.²⁵⁶ Many wanted Castro indicted as well. The use of domestic law against perpetrators of aerial incidents is not new.²⁵⁷

A former Clinton advisor on Cuba called the indictments of the Cuban pilots politically motivated.²⁵⁸ While this may or may not be true, it certainly leads one to question the possibility of a State indicting pilots, or others aiding pilots, who shoot down civil aircraft in another country. If it is possible for the U.S. to do it in the BTTR case, it is possible for another State to do it in the case of ABDP shootdowns, should a State be displeased enough with the operations to engage in such an act. In the implementation of shootdown

²⁵⁴ Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, 974 UNTS 177.

²⁵⁵ See Marian Nash Leich, *Four Bills Proposed By President Reagan to Counter Terrorism*, 78 AM. J. INT’L L. 915, 920 (1984).

²⁵⁶ See *Cuban Airmen Indicted on Charges of murder, conspiracy, and destruction of aircraft*, THE WASHINGTON POST, Aug. 22, 2003, at A03, LEXIS, News Library. See also, *FBI Statement on BTTR Indictments*, *supra*, note 122.

²⁵⁷ Some years ago, China used its domestic law against aerial intrusion and threats against national security to convict four U.S. Air Force officers whose aircraft had strayed into Chinese airspace. They were sentenced to deportation and their aircraft was confiscated. See Oliver J. Lissitzyn, *Judicial Decisions*, 50 Am. J. Int’l L. 431, 442 (1956).

²⁵⁸ See *U.S. Indicts Three Cubans in '96 Shootdown*, FORT LAUDERDALE SUN-SENTINEL, Aug. 22, 2003, at 1A, LEXIS, News Library.

operations, one must keep an eye on the foreign domestic law that is or may be implemented under the Montreal Convention.

VI. CONCLUSION

Two things are needed in the law when it comes to the shutdown of civil aircraft. The first is the need to protect civil aircraft in flight. It would be nice, in a perfect world, to flatly prohibit such uses of force and be done with the issue; however, a policy of employing an across-the-board prohibition on the use of force against civilian aircraft is doomed to fail, even if it allows for shutdowns in self-defense. Any time a line such as self-defense is drawn, hostile forces will seek a way to circumvent it, which would negate the second requirement, the need to allow States a measure of action to protect their essential interests. This would necessitate either moving the line or doing away with the norm altogether. Such is the beauty of using the defenses offered by international law to justify an otherwise solid rule that weapons will not be used against civil aviation in flight. It permits the norm to stay intact while allowing for a case-by-case analysis of possible exceptions to the rule. The use of the defenses outlined above would allow that norm to stay intact and to meet the security needs of States. In particular, the use of the defense of necessity is by far the strongest argument to be made for the international legality of ABDP shutdowns, without a corresponding lessening of the protections accorded to international civil aviation. For their own protection and for the protection of countries around the world, international law should recognize the legality of ABDP shutdowns conducted in the Andean Region.

DOING BUSINESS WITH THE DEVIL: THE CHALLENGES OF PROSECUTING CORPORATE OFFICIALS WHOSE BUSINESS TRANSACTIONS FACILITATE WAR CRIMES AND CRIMES AGAINST HUMANITY

KYLE REX JACOBSON*

If you want to indict industrialists who helped to rearm Germany, you will have to indict your own too. The *Opel Werke*, for instance, who did nothing but war production, were owned by your General Motors.—No, that is no way to go about it. You cannot indict industrialists.¹

—Hjalmer Horace Greeley Schacht, major war crimes defendant at the International Military Tribunal at Nuremberg

I. INTRODUCTION

When the chief prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, signaled that persons involved in the trade of “blood diamonds” may be subject to charges of complicity in war crimes and genocide,² at least one reader of the *ABA Journal* cried foul: “Doesn't the ICC have any sense of the foundations of criminal law: a legitimate definition of the proscribed act, *mens rea*, and conscious and deliberate action? The sort of arbitrary, unlimited liability nonsense espoused by prosecutor Luis Ocampo is sufficient to reject the ICC and

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¹ G.M. GILBERT, NUREMBERG DIARY 430 (1947). Before his acquittal, Schacht “was being interrogated for information on the German industrialists to be indicted in the next [war crimes] trial,” and made this comment to Dr. Gilbert afterwards. *Id.* Dr. Gilbert had incredible access to Schacht and the other major war crimes defendants in his role as the prison psychologist in the Nuremberg detention facility. *Id.* at 3.

² James Podgers, *Corporations in Line of Fire*, A.B.A. J., Jan. 2004, at 13, 13. The article reported that Mr. Ocampo suggested that “[i]f, for instance, companies that are engaged in trade of natural resources from the Congo feed money into rebel forces or the government that allows them to continue the fighting, then it is possible that officials of those companies be prosecuted.” *Id.*

its jurisdiction out of hand.”³ Mr. Ocampo’s statements have been a bit more guarded than the summary in the *ABA Journal*: “If they received diamonds and knew that the people delivering them were getting them because of genocide then they could well be part of the crime.”⁴

But the dilemma remains: at what point should a corporate official be held liable for facilitation of the four core international crimes—war crimes, crimes against humanity, genocide or wars of aggression⁵—when his or her central motive is to make a profit? And should that determination also account for the great harm that can be caused by the amoral decision making of corporations?⁶

³ James F. Blackstock, *ICC Prosecutor Goes Too Far*, A.B.A. J., Mar. 2004, at 10, 10 (letter to the editor).

⁴ BBC News, *Firms Face “Blood Diamond” Probe* (Sept. 23, 2003), available at <http://news.bbc.co.uk/go/pr/-/1/hi/business/3133108.stm>.

⁵ These four types of crimes are ones that are generally considered proper subjects of international criminal tribunals. See, e.g., the Rome Statute of the International Criminal Court, July 17, 1998, art. 5, U.N. Doc. A/CONF.183/9. The laws captured by the terms, “law of war” and “law of armed conflict,” the violations of which are considered war crimes, are often considered to fall within the rubric of “international humanitarian law.” See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INTL. L. 239, 239 (2000); Louise Doswald-Beck and Sylvain Vité, *International Humanitarian Law and Human Rights Law*, INT’L REV. OF THE RED CROSS, Apr. 1993, at 94, 94. Crimes against humanity, while potentially occurring during an armed conflict, need no nexus with armed conflict. *Id.* at 253, 263-64. Although genocide is an international crime that has special significance, it nonetheless falls within the rubric of a crime against humanity. See, e.g., Ronald C. Slye, *Apartheid as a Crime against Humanity: A Submission to the South African Truth and Reconciliation Commission*, 20 MICH. J. INT’L L. 267, 296-97 (1999). The title to this article thus is intended to include genocide as subject matter as well.

While the four crimes listed are the ones that are subject to adjudication by tribunals, they are certainly not the only international crimes. There are other universal crimes, like piracy, that ordinarily have no connection to armed conflict. One manageable—but still not fully satisfying—term that has been used to describe these four types of crimes is “core crimes.” See John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1 (1999). For the sake of simplicity, terms like “core international crimes,” “serious international crimes” and “tribunal crimes” will be used throughout this article.

⁶ Professor Beth Stephens has explained the consequences of the profit motive:

Profit-maximization, if not the only goal of all business activity, is certainly central to the endeavor. And the pursuit of profit is, by definition, an amoral goal—not necessarily immoral, but rather morally neutral. An individual or business will achieve the highest level of profit by weighing all decisions according to a self-serving economic scale. Large corporations magnify the consequences of the amoral profit motive. Multiple layers of control and ownership insulate individuals from a sense of responsibility for corporate actions. The enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate.

Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INTL. L. 45, 46 (2002).

If one doesn't ordinarily think of businessmen and businesswomen as war criminals, such a prosecution is not without precedent. Even though concerns about corporate involvement in wars and in international crimes are not new,⁷ history shows that prosecution is difficult when the acts forming the basis of the charges are the corporation's everyday acts of commerce with persons who also commit core international crimes. Part of the hesitance to prosecute people for just "doing business" is the difficulty that "aggressive pursuit of accomplices . . . may reach so far into the realm of ordinary and 'legitimate' commercial activity."⁸ Although prosecution is feasible when corporate officials supply a means or instrumentality while knowing it will be used to commit a crime, it is far more difficult to criminalize the conduct of a corporate official whose business transactions provide criminals with funds or multipurpose goods. Both to deter facilitation of crimes and to provide proper notice of criminality, this paper proposes that future prosecutions be based on a decision regarding, or notice of, criminality given by the United Nations Security Council or other authoritative international body, rather than at the initiation of the ICC prosecutor

II. HISTORICAL PRECEDENTS—POST-WORLD WAR II CASES

In order to understand how successful modern prosecutions against corporate officials might be, it is best to first look at the circumstances under which business or corporate officials⁹ were convicted in the past. It is also helpful to understand the general principles of accessory liability as determined by international tribunals.

A. The Trial of Major German War Criminals before the International Military Tribunal at Nürnberg¹⁰

It is hard to overstate the significance of the strengthening of international humanitarian law that resulted from the charter and judgment of the International Military Tribunal.¹¹ There was a general failure to bring war criminals to justice

⁷ See George Wald, *Corporate Responsibility for War Crimes*, 15 N.Y. REV. OF BOOKS, July 2, 1970, at 4 (suggesting that Dow Chemical Corporation should be prosecuted for supplying napalm to U.S. forces fighting in the Vietnam conflict).

⁸ William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, INT'L REV. OF THE RED CROSS, June 2001, at 439, 451.

⁹ In this article at least, there is no distinction between the terms "corporations" and "businesses" when discussing officials of those organizations.

¹⁰ This is the German spelling for the name of this German city, but it has also been spelled "Nuernberg" and "Nuremberg" in post-World War II legal documents. A similar change in spelling can be seen in Hermann Göring's last name.

¹¹ The International Military Tribunal presided over only one, albeit lengthy, proceeding: the case of the *United States et al. v. Göring et al.* Afterwards, the prosecution of war criminals was conducted under Control Council Law No. 10. See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL

following World War I,¹² and even when war criminals were tried, their criminal liability was somewhat dependent on, and hampered by, domestic law.¹³ The charter of the tribunal, which set out the composition, jurisdiction, principles and powers of the tribunal,¹⁴ was heralded as a statement of international law almost by acclamation. Although it was initially an agreement of only four states—the United States, the U.S.S.R., the United Kingdom and France,¹⁵ nineteen additional states joined the agreement later in 1945,¹⁶ and the principles of the charter and the judgments of the tribunal were affirmed as customary international law by the United Nations General Assembly in 1946.¹⁷ As noted by the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹⁸ crimes against humanity were officially recognized for the first time in the Nürnberg Charter.¹⁹ Individual criminal responsibility for crimes against humanity was likewise recognized for the first time.²⁰ Thus, in many ways, the charter and judgment of the International Military Tribunal at Nürnberg set the standard for future prosecutions of persons

LAW NO. 10 at 250. The Control Council was comprised of the commanders-in-chief of the four powers occupying Germany—the United States, the U.S.S.R., the United Kingdom and France. See Statement on Control of Machinery in Germany, June 5, 1945, Instruments of the Initial Occupation and Control of Germany, U.S. DEPT. OF STATE, BULLETIN, June 10, 1945, at 1054.

¹² See, e.g., SHELDON GLUECK, WAR CRIMINALS: THEIR PROSECUTION & PUNISHMENT 19-36 (1944); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 20 (1997).

¹³ ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 35-36 (1960).

¹⁴ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, annex, 59 Stat. 1544, 82 U.N.T.S. 279. The charter can also be found at 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10 (1947).

¹⁵ *Id.*

¹⁶ *Id.*, 82 U.N.T.S. at 280 n.1.

¹⁷ *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal* G.A. Res. 95(I), U.N. GAOR, 1st Sess., 2d part, at 188, U.N. Doc. A/236 (1946).

¹⁸ The formal, lengthy name of this tribunal is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex (1993). The opinions of this tribunal may be accessed at <http://www.un.org/icty/cases/jugemindex-e.htm>.

¹⁹ *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, May 7, 1997, para. 618 (citing ANTONIO CASSESE, VIOLENCE AND LAW IN THE MODERN AGE 109 (1988)). Under Article 6(c) of the Nürnberg Charter, crimes against humanity were defined as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, annex, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279. This category allowed prosecution for acts committed against stateless victims and victims who were nationals of the Axis powers (German Jews, for example) that might not have otherwise been possible under the laws of war. *Tadić*, Opinion and Judgment, para. 619.

²⁰ *Tadić*, Opinion and Judgment, para. 618 (discussing effect of Article 6(c) of the Nürnberg Charter).

responsible for core international crimes and are the “basic documents” of prosecutions for war crimes, crimes against peace, and crimes against humanity, particularly the latter.

The prosecutors charged the major German war criminals under four multi-faceted counts.²¹ Count One, entitled “Common Plan or Conspiracy”, charged all of the defendants with being “leaders, organizers, instigators, or accomplices in the formation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity.”²² This count charged the Nazi Party as being the “central core of the common plan or conspiracy,”²³ the central aim of which was to wage aggressive war to acquire *lebensraum* (“living space”) for the German “master race.”²⁴ In the course and in furtherance of the plan, the Nazi conspirators were charged with using “organizations of German business as instruments of economic mobilization for war” and they, “in particular the industrialists among them, embarked upon a huge re-armament program.”²⁵

Count Two charged the defendants with crimes against peace by their participation “in the planning, preparation, initiation, and waging of wars of aggression.”²⁶ Count Three charged the defendants with war crimes in that they murdered and mistreated civilians in occupied territory or on the high seas,²⁷ forced civilians in occupied territories to unwillingly migrate for the purpose of slave labor and other purposes,²⁸ murdered and mistreated prisoners of war,²⁹ took and killed civilian hostages,³⁰ plundered public and private property,³¹ imposed collective punishment on the civilian populations in occupied territories,³² destroyed cities, towns and villages without having any military necessity for doing so,³³ and forced civilians to labor beyond the requirements needed to sustain

²¹ The prosecutors charged the major German war criminals both individually and as members of various organizations, including the Reich Cabinet, the Leadership Corps of the Nazi Party, the Gestapo and *die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (the “SS”). 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MIL. TRIB. 27-28 (1947). So, from the beginning of the case, criminal liability based on associations and assistance to others was at issue.

²² *Id.* at 29.

²³ *Id.* at 30.

²⁴ *Id.* at 30-31.

²⁵ *Id.* at 35. They were also charged with committing war crimes and crimes against humanity in furtherance of their plan and conspiracy, *id.* at 41, but the International Military Tribunal “disregarded” this part of Count One because the tribunal’s charter only defined conspiracy as a crime when its aim was the waging of aggressive war. *Id.* at 226.

²⁶ *Id.* at 42.

²⁷ *Id.* at 43. The words, “murder and ill-treatment” fail to fully convey the inhumanity the civilians suffered at the hands of the Nazi-led German government. The indictment includes some detail, detail that fills almost eight full pages of text. *See id.* at 43-50.

²⁸ *Id.* at 51-52.

²⁹ *Id.* at 52-54.

³⁰ *Id.* at 54-55.

³¹ *Id.* at 55-60.

³² *Id.* at 60-61.

³³ *Id.* at 61-62.

the basic needs of occupation and to also labor for the German war effort.³⁴ Count Four charged the defendants with crimes against humanity in that they murdered, persecuted, exterminated, enslaved, deported and committed other inhumane acts against the civilian populations of Germany and of the occupied territories, particularly against the Jewish population.³⁵

Chief among the defendants was Hermann Göring. As noted in Appendix A to the indictment, Göring held a number of leadership positions in Nazi Germany, including generalship in the SS, Trustee of the Four-Year Plan (to prepare the German economy for war), Commander-in-Chief of the German Air Force, membership in the Secret Cabinet Council, and Successor Designate to Adolf Hitler.³⁶ There were initially twenty-four defendants, and the ones whose cases dealt with criminal liability for their assistance to the commission of crimes will be of greatest significance in examining the issue of criminal liability for corporate officials whose dealings facilitate the commission of war crimes and crimes against humanity.

The International Military Tribunal rejected the prosecution's position "that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation [*sic*] in a conspiracy that is in itself criminal," concluding that "conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and action."³⁷ Only those participants in a "concrete plan" could be held criminally liable.³⁸ The judgment of the International Military Tribunal set out what levels of participation would result in criminal liability.

Among the participants in the concrete plan were Göring and others who were privy to one or more of the secret meetings at which Hitler disclosed his plans for aggression.³⁹ One who did not attend and was nevertheless still convicted was Rudolf Hess. Hess was convicted of participating in the common plan to wage aggressive wars because as "Hitler's closest personal confidant," he "must have been informed of Hitler's aggressive plans when they came into existence."⁴⁰ For the International Military Tribunal, this conclusion was confirmed by Hess' concrete actions in support of Hitler's plans of wars of aggression.⁴¹ Alfred Rosenberg, who held a number of high-level Nazi Party

³⁴ *Id.* at 62. The defendants were also charged with forcing civilians in occupied territory to swear allegiance to a hostile power and with the "Germanization" of occupied territories. *Id.* at 63-64

³⁵ *Id.* at 65-67.

³⁶ *Id.* at 68.

³⁷ *Id.* at 226.

³⁸ *Id.* at 226.

³⁹ These meetings were held in November 1937, May 1939, August 1939 and November 1939. *Id.* at 188. The meeting in November 1937 was attended by three of the defendants: Göring, Erich Raeder and Constantin von Neurath. *Id.* at 190. The meeting in November 1937 was attended by three of the defendants: Göring, Erich Raeder and Wilhelm Keitel. *Id.* at 200.

⁴⁰ *Id.* at 284.

⁴¹ *Id.* at 283-84.

posts and was Reich Minister for the Eastern Occupied Territories,⁴² was convicted as well despite his non-attendance. His conviction was due instead to his involvement in laying the groundwork for the invasion of Norway and his involvement in pre-invasion preparations for the occupation of the U.S.S.R. and other eastern countries.⁴³ Alfred Jodl was also not present at the four secret meetings, but his diary and other documentary evidence showed his prior knowledge and assistance in planning wars of aggression.⁴⁴

Another person not present at one of the four secret meetings was Joachim von Ribbentrop, who was involved heavily in Germany's foreign affairs, including holding the posts of Ambassador Extraordinary and Reich Minister for Foreign Affairs.⁴⁵ Nonetheless his involvement in the preparation for wars of aggression was clear, even to the point of suggesting wars of aggression to Germany's east.⁴⁶ The International Military Tribunal saw his diplomatic maneuverings to be conducted in clear knowledge of Hitler's ultimate plans.⁴⁷ He was, for example, notified in advance of the invasions of Norway, Denmark, Belgium, Luxemburg and the Netherlands and prepared the official justifications for the attacks.⁴⁸

The tribunal found inadequate evidence as to a number of other defendants. A number of these acquittals involved defendants who did not attend the early secret planning conferences at which Hitler announced his plans for wars of aggression. These included Ernst Kaltenbrunner and Franz von Papen, who had both been heavily involved in the taking of Austria (an aggressive act not deemed a "war" by the tribunal) but not in any other conquest,⁴⁹ and the "avid Nazi" Wilhelm Frick,⁵⁰ who was a general in the SS and held a number of positions overseeing occupied territories⁵¹ but who only aided the aggression after it began.⁵² Similarly, the vicious anti-Semite Julius Streicher may have been "a staunch Nazi and supporter of Hitler's main policies[, but] there [wa]s no evidence to show he was ever within Hitler's main circle of advisers" or that he was "closely connected with the formulation of the policies which led to war."⁵³

⁴² *Id.* at 70.

⁴³ *Id.* at 294-95.

⁴⁴ *Id.* at 322-23.

⁴⁵ *Id.* at 69.

⁴⁶ *Id.* at 285-86.

⁴⁷ *Id.*

⁴⁸ *Id.* at 286.

⁴⁹ *Id.* at 291, 327.

⁵⁰ *Id.* at 299. The tribunal found that "Frick was only concerned with domestic administration within the Reich." *Id.* The tribunal specifically noted that there was "no evidence that he was ever within Hitler's inner circle of advisers" and that "[h]e was never present . . . at any of the important conferences when Hitler explained his decisions to his leaders." *Id.* at 302.

⁵¹ *Id.* at 65-67.

⁵² *Id.* at 299-300.

⁵³ *Id.* at 302.

Walter Funk was Reich Minister of Economics, President of the Reichsbank, and economic advisor to Hitler, and he also held press and propaganda posts.⁵⁴ He was also acquitted of being part of the common plan to wage aggressive war because he “was not one of the leading figures in originating the Nazi plans for aggressive war.”⁵⁵ Yet, Funk was found guilty of planning and waging war due to his participation in the economic preparations for war “after the Nazi plans to wage aggressive war had been clearly defined.”⁵⁶ The tribunal particularly described how Funk participated heavily in the economic planning for the attack on the U.S.S.R.⁵⁷ In essence, he was convicted for joining in once the plan for aggressive war was more widely revealed.

Admiral Karl Dönitz was Commander-in-Chief of the Germany Navy and had been an advisor to Hitler.⁵⁸ He was found guilty of waging an aggressive war, but he too was acquitted of participating in the common plan or conspiracy.⁵⁹ The tribunal observed that Admiral Dönitz “was a line officer performing strictly tactical duties,” and it found that “[h]e was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there.”⁶⁰ Hans Fritzsche, who held significant press and propaganda posts,⁶¹ also never “achieved sufficient stature to attend the planning conferences which led to aggressive war . . . [n]or is there any showing that he was informed of the decisions taken at these conferences.”⁶² Martin Bormann was also acquitted of participation in the common plan or conspiracy to wage aggressive wars because he did not attend the meetings and because knowledge of the plans could not “be conclusively inferred from the positions he held,”⁶³ which included being chief of staff to Hitler’s deputy when the plans were formed.⁶⁴

Allied prosecutors did attempt to hold corporate interests accountable, but the major industrialist defendant, Gustav Krupp von Bohlen und Halbach, was never tried due to the onset of dementia.⁶⁵ Gustav Krupp was president of the

⁵⁴ *Id.* at 74.

⁵⁵ *Id.* at 305.

⁵⁶ *Id.* at 304-05.

⁵⁷ *Id.* at 305.

⁵⁸ *Id.* at 78. Admiral Dönitz also held a variety of other positions in the German navy, with emphasis on U-boats, and was the actual successor to Hitler as the head of the German government following Hitler’s death. *Id.*

⁵⁹ *Id.* at 310, 315.

⁶⁰ *Id.* at 310.

⁶¹ *Id.* at 79.

⁶² *Id.* at 337.

⁶³ *Id.* at 339.

⁶⁴ *Id.* at 338. The tribunal did note that most of Bormann’s power developed later. *Id.* Similarly, the tribunal noted that Albert Speer did not hold his positions as Reich Minister for Armaments and Munitions and other posts important to German armament early enough to infer knowledge of Hitler’s plans. *Id.* at 330-31.

⁶⁵ See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 143 (1947) (Order of the Tribunal Granting Postponement of Proceedings against Gustav Krupp

Reich Union of German Industry and head of the Group for Mining and Production of Iron and Metals under the Reich Ministry of Economics.⁶⁶ He led efforts to coordinate industrial reorganization to complement Hitler's political aims, reorganization that was essential to German rearmament and preparedness for war.⁶⁷ As the International Military Tribunal noted, "In this reorganization of the economic life for military purposes, the Nazi Government found the German armament industry quite willing to cooperate, and to play its part in the rearmament program."⁶⁸

Hjalmer Schacht was in a similar position to Gustav Krupp and other industrialists⁶⁹ subsequently prosecuted for supporting the Nazi regime because he too provided economic support to the Nazi government; he was in a sense the first "corporate" war crimes defendant.⁷⁰ During rearmament, Schacht was Minister of Economics, President of the Reichsbank, and Plenipotentiary General for the War Economy.⁷¹ He "was seen as the genius behind the Nazi economic miracle . . . and a major player in Germany's rearmament."⁷² Schacht was believed by the prosecution to be individually responsible because he was a supporter of Hitler and a member of Hitler's cabinet during a number of early events in the war, including the *Anschluss* and the capture of the Sudetenland.⁷³ The prosecutor leading the case against Schacht summarized the case against Schacht by noting, "Certainly in this setting Schacht did not proceed in ignorance of the fact that he was assisting Hitler and Germany along the road to armed aggression."⁷⁴

Perhaps fortunate for his later prospects as a defendant before the International Military Tribunal, Schacht had resigned from two of his positions, was sacked by Hitler from the third long before the war was over, and was imprisoned for almost the entire last year of the war in various concentration

von Bohlen); *see also* DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 23 (2001). Gustav Krupp's son, Alfred, was ultimately tried in a later proceeding. *See United States v. Krupp* (hereinafter *The Krupp Case*), in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [hereinafter TRIALS OF WAR CRIMINALS] (1948).

⁶⁶ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT'L MIL. TRIB. at 75.

⁶⁷ *Id.* at 183-84.

⁶⁸ *Id.* at 183.

⁶⁹ The trials of industrialists referenced are *United States v. Krauch* (hereinafter *The Farben Case*), in 7-8 TRIALS OF WAR CRIMINALS (1948), *The Krupp Case*, in 9 TRIALS OF WAR CRIMINALS (1948), and *United States v. Flick* [hereinafter *The Flick Case*], in 6 TRIALS OF WAR CRIMINALS (1947). These trials are discussed in more detail *infra* section II-B.

⁷⁰ In the view of Major A. Poltorak, an officer on the Soviet delegation to the International Military Tribunal, Schacht's "fate . . . was watched with the closest attention by business circles in Germany and abroad. The world of big business was by no means inclined to sacrifice Hjalmer Schacht to Themis in Nuremberg." A. POLTORAK, THE NUREMBERG EPILOGUE 376 (David Skvirsky trans., 1971).

⁷¹ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT'L MIL. TRIB. 307 (1947).

⁷² DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 22 (2001).

⁷³ 5 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT'L MIL. TRIB. 141 (1947).

⁷⁴ *Id.*

camps.⁷⁵ Schacht was charged with participating in the German wars of aggression and with conspiracy, but he was acquitted because the prosecution failed to prove the key “inference that Schacht did in fact know of the Nazi aggressive plans” to wage war.⁷⁶ The tribunal specifically refused to find criminal liability based on his economic activities, and it rejected the argument that Schacht could have figured out the plans, despite not having specific notice of them, due to the information he had at his disposal.⁷⁷ The tribunal specifically considered the argument that, “Schacht, with his intimate knowledge of German finance, was in a peculiarly good position to understand the true significance of Hitler’s frantic rearmament, and to realize that the economic policy adopted was consistent only with war as its object.”⁷⁸

The tribunal clearly recognized Schacht’s contribution to rearmament, but the language the tribunal used showed that his activities could have easily been conducted in ignorance of Hitler’s plans: “He made detailed plans for industrial mobilization and the coordination of the Army with industry *in the event of war*.”⁷⁹ The tribunal found that Schacht may have carried out plans for the rearmament of Germany but that the evidence did not prove he did so in preparation to wage aggressive war.⁸⁰ As the tribunal put it, “rearmament of itself is not criminal under the Charter.”⁸¹ Re-emphasizing the need for notice and knowledge, the tribunal stated that Schacht “was clearly not one of the inner circle around Hitler, which was most closely involved with this common plan.”⁸²

The International Military Tribunal did not set out much in the way of firm criteria in its decision making, but some principles can be gleaned from the judgment. The International Military Tribunal cautioned that all subsequent tribunal cases should be conducted “in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.”⁸³ It distinguished between a person with mere membership in a criminal organization, which is an insufficient basis to convict that person, and members of that organization who committed the

⁷⁵ 2 DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT* 936-37 (1999).

⁷⁶ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MIL. TRIB. 310 (1947). Telford Taylor, who assisted Justice Robert Jackson in the prosecution of the major German war criminals, observed that Schacht “escaped by the skin of his teeth.” TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 592 (1992). Schacht was later tried and convicted by the German *Spruchkammer* (denazification court), but his conviction was later overturned. *Id.* at 612-13.

⁷⁷ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MIL. TRIB. 309 (1947).

⁷⁸ *Id.* The Soviet member of the tribunal, in his dissent, considered the scale and nature of rearmament to be key evidence that should have left Schacht convicted. *Id.* at 344-45 (Nikitzenko, IMT memb., dissenting).

⁷⁹ *Id.* at 307 (emphasis added).

⁸⁰ *Id.* at 308-09.

⁸¹ *Id.* at 309.

⁸² *Id.* at 310.

⁸³ *Id.* at 256.

criminal acts or who had knowledge of them, a basis upon which they could be convicted.⁸⁴

When later reviewing the acquittals rendered by the International Military Tribunal, the U.S. military tribunal hearing the *Farben Case* observed, “From the foregoing it appears that the [International Military Tribunal] approached a finding of guilty of any defendant under the charges of participation in a common plan or conspiracy or planning and waging an aggressive war with great caution.”⁸⁵ The *Farben* tribunal addressed the knowledge element in depth, noting that what Hitler said in public “differed widely” from the disclosures he made during four secret meetings, during “which Hitler disclosed his plans for aggressive war.”⁸⁶ The *Farben* tribunal concluded that the International Military Tribunal only convicted those, “like Hess, [who was] in such close relationship with Hitler that he must have been informed of Hitler’s aggressive plans and took action to carry them out, or attended at least one of the four meetings at which Hitler disclosed his plans for aggressive war.”⁸⁷ Thus, in the view of the *Farben* tribunal, the basic precedent of the judgment of the International Military Tribunal was that “personal guilt” was dependent upon “personal knowledge” and “motives determined from the situation as it appeared, or should have appeared, to them at the time.”⁸⁸ In large part, the *Farben* tribunal concluded, personal knowledge was the sole basis for conviction because “[t]here was no [] common knowledge in Germany that would apprise any of the defendants of the existence of Hitler’s plans or ultimate purpose.”⁸⁹

B. Prosecutions of Corporate Officials before Post-World War II Tribunals

1. Prosecutions of German Corporate Officials

The industrialists from the Krupp, Farben and Flick concerns were prosecuted as war criminals due to their symbiotic relationship with Adolf Hitler and the Nazi Party—they were inextricably intertwined with Hitler, his rise to power, and the illegal conduct of Germany in World War II. The relationship began early on in Hitler’s rise, in February 1933, when representatives of Krupp and Farben met with Hitler and Hermann Göring at Göring’s home; it was there that Hitler outlined how he would support private enterprise if brought to power,

⁸⁴ *Id.* at 256.

⁸⁵ *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1102.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1107-08. The *Flick* tribunal also applied the requirement of proof of personal guilt before conviction, as well as other principles of “Anglo-American criminal law”—proof beyond a reasonable doubt, the prosecution’s bearing the burden of proof, the presumption of innocence, and the requirement that a fact-finder, if choosing between two reasonable inferences, “one of guilt and the other of innocence,” must draw the inference that leads to acquittal. *The Flick Case*, 6 TRIALS OF WAR CRIMINALS 1189.

⁸⁹ *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1113.

and it was there that he secured industrialist support.⁹⁰ From that point on, the prosecution argued, “Industry organized to support Hitler’s political programs, including rearmament and territorial aggrandizement.”⁹¹ Although they were in large part convicted of war crimes and crimes against humanity to one degree or another, these industrialists benefited from significant clemency after their trials.⁹² “Alfred Krupp even found himself in possession of his properties again, which the American court had earlier confiscated.”⁹³

a. The Farben Case

In the *Farben Case*,⁹⁴ twenty-four officials of the Farben firm were prosecuted before United States Military Tribunal VI in Nürnberg, Germany.⁹⁵ The crimes they were charged with

included planning, preparing, initiating, and waging wars of aggression and invasions of other countries . . . ; deportation to slave labor of members of the civilian population of the invaded countries and the enslavement, mistreatment, terrorization, torture, and murder of millions of persons . . . ; plunder and spoliation of public and private property in the invaded countries pursuant to deliberate plans and policies, intended not only to strengthen Germany in launching its invasions and aggressive wars and secure the permanent economic domination by Germany of the Continent of Europe, but also to expand the private empire of the defendants . . .⁹⁶

The prosecution alleged an alliance between Farben and Adolf Hitler and his Nazi party, in which Farben, *inter alia*, “synchronized” its industrial activities with the military plans of the German High Command and participated in the rearmament of Germany and in the creation and equipping of the Nazi military for wars of aggression.⁹⁷ The defendants as a group were charged with five counts of war crimes:

Count One planning, preparation, initiation and waging of wars of aggression and invasions of other countries;⁹⁸

⁹⁰ *The Farben Case*, 7 TRIALS OF WAR CRIMINALS 17.

⁹¹ *Id.* at 18.

⁹² FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-55 63 (1989).

⁹³ *Id.*

⁹⁴ *The Farben Case*, 7-8 TRIALS OF WAR CRIMINALS.

⁹⁵ *The Farben Case*, 7 TRIALS OF WAR CRIMINALS 11-14.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 15-28.

⁹⁸ *Id.* at 14.

- Count Two plunder and spoliation of public and private property;⁹⁹
- Count Three slavery and mass murder;¹⁰⁰
- Count Four membership in *Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (the “SS”), which was declared to be a criminal organization by the International Military Tribunal;¹⁰¹ and
- Count Five participation in a common plan or conspiracy to commit war crimes and crimes against humanity.¹⁰²

The tribunal considered Counts One (crimes against peace) and Five (conspiracy) together, considering the judgment of the International Military Tribunal as its main precedent.¹⁰³ As to crimes against peace, the tribunal used personal knowledge as its key decisional factor in determining whether the defendants participated in the planning or preparation of aggressive wars: “[P]articipation in the rearmament of Germany was not a crime on the part of any of the defendants in this case, unless that rearmament was carried out, or participated in, with knowledge that it was part of a plan or was intended to be used in waging aggressive war.”¹⁰⁴ For each Farben defendant, the tribunal examined the position and activities for Farben and any positions they held in the German government “and their authority, responsibility, and activities thereunder.”¹⁰⁵ This approach led to generally favorable results for the Farben defendants.

The primary defendant in the *Farben Case* was Carl Krauch.¹⁰⁶ Although Krauch held a fairly high-level government position in assisting Göring in the chemical production aspect of German rearmament,¹⁰⁷ the tribunal found insufficient evidence that Krauch *planned* or *prepared* aggressive wars, finding that Krauch was not within the “closely guarded circle” privy to Hitler’s plans for

⁹⁹ *Id.* at 39-40.

¹⁰⁰ *Id.* at 50.

¹⁰¹ *Id.* at 59. This article will not discuss this count in the text because the purported criminal liability sprang from personal, rather than corporate, associations. Personal knowledge again played a key role, though, in disposing of Count Four. Using the tribunal case of *United States v. Pohl*, where Tribunal II required personal knowledge of or involvement in criminal activities of the SS as a prerequisite for conviction, see 5 TRIALS OF WAR CRIMINALS at 1018, and other similar tribunal precedents, the *Farben* tribunal acquitted four Farben defendants whose involvement in the SS was honorary or, at worst, peripheral.

¹⁰² *The Farben Case*, 7 TRIALS OF WAR CRIMINALS 59.

¹⁰³ *The Farben Case*, 8 TRIALS OF WAR CRIMINALS 1098. The tribunal did limit the scope of that precedent somewhat with the language used: “That well-considered judgment is basic and persuasive precedent *as to all matters determined therein.*” *Id.* (emphasis added).

¹⁰⁴ *Id.* at 1112-13.

¹⁰⁵ *Id.* at 1108.

¹⁰⁶ *Id.* at 1108.

¹⁰⁷ *Id.* at 1109-10.

aggressive wars.¹⁰⁸ The tribunal found that the other Farben defendants were also not involved in planning or preparing for aggressive war because they were “further removed from the scene of Nazi governmental activity than was Krauch.”¹⁰⁹ Because the Farben officials did not participate in the secret planning by Hitler and his inner circle, the tribunal also acquitted the defendants of the conspiracy charge under Count Five.

Although Krauch and the other defendants knew that Germany was rearming and indeed participated in the rearmament,¹¹⁰ “[e]ven people in high places were kept in ignorance and were not permitted to disclose to each other their individual activities in behalf of the Reich.”¹¹¹ The tribunal did add, “If we were trying military experts, and it was shown that they had knowledge of the extent of rearmament,” they could conclude “that the magnitude of the rearmament effort was such to convey” knowledge “that what they did in aid of rearmament was preparing for aggressive war.”¹¹² As to one defendant, the tribunal commented that “his support of the war,” which included approving cooperation between German army officials and Farben, “did not exceed that of the normal, substantial German citizen and businessman.”¹¹³

When the tribunal faced the issue whether the Farben officials committed the crime of *waging* wars of aggression, the tribunal saw the precise issue to be resolved:

In this case, we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their government during its period of rearmament and who continued to serve that government in the waging of war, the

¹⁰⁸ *Id.* at 1110.

¹⁰⁹ *Id.* at 1117. The tribunal also considered the substantial financial contributions made to the Nazi party as potential evidence of Farben officials being privy to Hitler’s plan to wage aggressive war. The tribunal opined that what were voluntary contributions during German rearmament became “exactions” after “Hitler’s power grew and the Nazi party became more arrogant.” *Id.* at 1119.

¹¹⁰ The tribunal found that a number of the Farben defendants “participated in the rearmament of Germany by contributing to her economic strength and the production of certain basic materials of great importance to the war.” *Id.* at 1123.

¹¹¹ *Id.* at 1112.

¹¹² *Id.* at 1113.

¹¹³ *Id.* at 1120. This particular defendant, Georg Von Schnitzler, had made a statement that Farben officials “and all heavy industries well knew that Hitler had decided to invade Poland if Poland would not accept his demands,” but the tribunal believed that his statements to interrogators had “questionable evidentiary value” because of his repeated changes and “corrections” to his earlier statements. The tribunal believed that this admission and others reflected Von Schnitzler’s “eagerness to tell his interrogators what he thought they wanted to know and hear.” *Id.*

initiation of which has been established as an act of aggression . . .

¹¹⁴

The tribunal decided this issue in the context of an important legal principle that the crime of waging a war of aggression could not “apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war” in light of the declaration of the International Military Tribunal that “mass punishments should be avoided.”¹¹⁵

The tribunal observed that, “[o]f necessity, the great majority of the population of Germany supported the waging of war in some degree. They contributed to Germany’s power to resist, as well as to attack.”¹¹⁶ The International Military Tribunal had determined that the leaders of Germany bore criminal responsibility for leading their country into an aggressive war, but the *Farben* tribunal was “unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent.”¹¹⁷ The *Farben* tribunal adopted what they viewed as the only rational mark they could find, which was also the mark that limited criminal responsibility the most:

We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations, like those of Speer, “were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.”¹¹⁸

From this judgment of acquittal in the *Farben Case*, a legal principle emerges that individuals—including corporations and their officials—cannot be held criminally liable for crimes against peace (planning, preparing for or waging an aggressive war) if they “merely follow the leaders” of their country, however despicable those leaders might be. However, a different outcome would result from charges arising from Count 2, the plunder and spoliation of property.¹¹⁹

¹¹⁴ *Id.* at 1125.

¹¹⁵ *Id.* at 1124 (quoting—without citation—the International Military Tribunal). See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MIL. TRIB. 256 (1947).

¹¹⁶ *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1125.

¹¹⁷ *Id.* at 1126.

¹¹⁸ *Id.* at 1126-27 (quoting *United States et al. v. Göring et al.*, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MIL. TRIB. 330 (1947)).

¹¹⁹ The tribunal followed the precedent of the *Flick Case* and ruled that, although these offenses were charged as both war crimes and crimes against humanity, if the offense was wholly one against property, it could not constitute a crime against humanity. *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1129-30 (citing *The Flick Case*, 6 TRIALS OF WAR CRIMINALS 1215-16). The *Farben* tribunal also held that offenses against property in Austria and the Sudetenland were not war crimes because there was no actual state of war during the *Anschluss* and the acquisition of

Farben officials were not so fortunate in the tribunal's consideration of Count Two. The *Farben* tribunal used the 1907 Hague Regulations¹²⁰ as a guide in determining what property offenses constitute war crimes:

[T]he Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.¹²¹

The *Farben* tribunal found that commercial agreements during military occupation may be found to be involuntary, but that involuntariness must be proven by more than the existence of the occupation itself; there must be proof of illegal pressure applied during the transaction, and that illegal pressure must affect the resulting transaction.¹²²

The Farben defendants argued that they could not be held liable because they were following the direction, or acting on the approval, of the German government.¹²³ The *Farben* tribunal quickly dismissed this argument, holding that “[i]t is beyond the authority of any nation to authorize its citizens to commit acts in contravention of international penal law.”¹²⁴ The defendants also argued that their actions were taken to fulfill the occupying power's obligation under the Hague regulations to “restore an orderly economy in the occupied territory.” The

the Sudetenland even if the lack of war was due to an incapacity to resist an aggressor state. *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1130.

¹²⁰ Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

¹²¹ *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1132-33.

¹²² *Id.* at 1135-36.

¹²³ *Id.* at 1137.

¹²⁴ *Id.* at 1137-38.

tribunal also rejected this argument, finding that Farben acted to enrich itself “as part of a general plan to dominate the industries involved.”¹²⁵

The *Farben* tribunal reviewed the findings of the International Military Tribunal, which had determined that “the territories occupied by Germany ‘were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.’”¹²⁶ The *Farben* tribunal found that Farben and its officials were in the thick of this exploitation. In some cases, Farben took permanent title to property already illegally confiscated by the German government, and in others, Farben permanently acquired “substantial or controlling interests in property contrary to the wishes of the owners.”¹²⁷ The tribunal found that their actions as private individuals were in essence no different than the illegal plundering and pillaging of German government officials and included a “studied design” to take property in order to build Farben a “chemical empire through the medium of the military occupancy at the expense of the former owners.”¹²⁸ The tribunal then held those individuals who knowingly participated in any act of plunder or spoliation individually responsible.¹²⁹

The tribunal explained that individual criminal liability could only be predicated on “evidence [that] clearly establishes some positive conduct on [a defendant’s] part which constitutes ordering, approving, authorizing or joining in the execution of a policy or act which is criminal in character.”¹³⁰ To be convicted, the corporate official that authorized an illegal action had to know “those essential elements of the authorized act which give it its criminal character. With regard to transactions apparently legal in form, this means positive knowledge that the owner is being deprived of his property against his will during military occupancy.”¹³¹

In determining individual responsibility, the tribunal looked at the positions held in the company when the crimes were committed. The Farben defendants had differing responsibilities within the firm. Some were members of the company’s *aufsichtsrat*, an entity much like a supervisory board of directors not involved in day-to-day administration,¹³² others were members of the *vorstand*, a group whose members actually managed the company.¹³³ These *vorstand* members in turn managed different specific activities of the company.¹³⁴

¹²⁵ *Id.* at 1141.

¹²⁶ *Id.* at 1139 (quoting *United States et al. v. Göring et al.*, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 329 (1947)).

¹²⁷ *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1140.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1141.

¹³⁰ *Id.* at 1157.

¹³¹ *Id.*

¹³² *Id.* at 1086, 1154.

¹³³ *Id.* at 1086-87.

¹³⁴ *Id.* at 1087.

For example, each major Farben unit was usually personally supervised by an individual member of the *vorstand*.¹³⁵

Significantly, the *Farben* tribunal did not impute knowledge to individual officers due to the actions of the company as a whole. For example, the tribunal observed that defendant Hermann Schmitz, as chairman of the *vorstand*, had responsibilities and opportunities for knowledge “far beyond those” of an ordinary member of the *vorstand*.¹³⁶ Yet, due to the dispersed power structure of the company, he apparently did not know the details, including any coercion, of certain acquisitions the company made—those made in Poland, Russia and Alsace-Lorraine. Indeed, the minutes and reports of the meetings he presided over or attended did not reveal anything incriminating. Although he could have concluded that Farben made illegal acquisitions, the tribunal concluded that he could have also inferred from the information before him “that the acquisitions might have been effected in a legal manner.”¹³⁷ Yet, the tribunal ultimately found Schmitz guilty under Count Two as to a different acquisition. Schmitz was shown to be aware of pressure tactics being used by Farben to acquire a French company and “was in a position to influence policy and effectively to alter the course of events.”¹³⁸ The tribunal found that his knowledge and power together constituted his approval of this acquisition.¹³⁹

A third count of slavery and mass murder was also before the tribunal. The *Farben* tribunal continued to critically examine the personal responsibility of the defendants under Count Three. The prosecution charged the defendants with involvement in the government’s slave-labor program, with supplying poison gas that was used to kill inmates at concentration camps, with supplying pharmaceutical drugs for medical experimentation on slave laborers, and with the illegal and inhumane practices committed at the Farben plant at Auschwitz.¹⁴⁰ With regard to the poison gas, the tribunal found no guilt because the gas was actually supplied by a company organized as a joint venture with two other companies; no one outside the management of the joint venture company clearly knew the grim purpose for which the gas was supplied.¹⁴¹ As to the medical experiments, the tribunal found that although there was illegal Nazi experimentation, there was no evidence that Farben officials, at the onset of their supply activities, suspected any unlawful experimentation; there was, however, evidence that when they clearly did suspect it, Farben stopped supplying the drugs.¹⁴²

¹³⁵ *Id.*

¹³⁶ *Id.* at 1154-55.

¹³⁷ *Id.* at 1155.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1167-68.

¹⁴¹ *Id.* at 1168-69. The gas also had been used as an insecticide. *Id.* at 1168.

¹⁴² *Id.* at 1171-72.

As to Farben's participation in the slave-labor program, the defendants pled a defense of necessity, arguing that they were bound by the strict labor regulations of the German government, the violation of which included "[h]eavy penalties, including commitment to concentration camps and even death."¹⁴³ The *Farben* tribunal reviewed other war crimes cases that had also involved asserted defenses of necessity.¹⁴⁴ From these cases, the *Farben* tribunal concluded that

a law or governmental decree will not justify the defense of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence of execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.¹⁴⁵

Utilizing this rule, the *Farben* tribunal found little support for the asserted defense of necessity. The tribunal found that Farben officials had "considerable freedom and opportunity for initiative," which they used to decide upon their plant location at Auschwitz (they had factored in the availability of concentration-camp labor), to decide to acquire interests in two mines (that could not have been operated successfully without slave labor), and to decide to procure and use forced laborers and concentration camp inmates.¹⁴⁶ Not only did the tribunal find that the use of slave labor constituted war crimes and crimes against humanity, but it also found the treatment of the concentration-camp inmates at the Farben plant aggravated their already miserable condition.¹⁴⁷ Officials that held positions responsible for production and construction—the Farben efforts that benefited from slave labor—were convicted as a result.¹⁴⁸

Yet once again, knowledge was not imputed throughout the company or even throughout divisions of the company. For example, defendant Fritz ter Meer was chairman of Farben's technical committee and was heavily involved in the labor at the Auschwitz plant,¹⁴⁹ but other members of the technical committee, as a group of individual plant leaders, were not privy to the conditions at other plants, particularly those at Auschwitz, where Farben's crimes occurred.¹⁵⁰ At the end of

¹⁴³ *Id.* at 1174.

¹⁴⁴ *Id.* at 1174-79.

¹⁴⁵ *Id.* at 1179.

¹⁴⁶ *Id.* at 1186-87.

¹⁴⁷ *Id.* at 1187.

¹⁴⁸ Defendant Krauch was also convicted of enslavement, but it resulted from his governmental rather than from any role he held with Farben at the time. *Id.* at 1187-89.

¹⁴⁹ *Id.* at 1190-92.

¹⁵⁰ *Id.* at 1192-93.

the case, the tribunal fully acquitted ten defendants and sentenced the remainder to terms of confinement ranging from one and one-half years to eleven years.¹⁵¹

b. The Krupp Case

In the *Krupp Case*, twelve officials from the Krupp firm were prosecuted before United States Military Tribunal IIIA in Nürnberg.¹⁵² Like the *Farben* defendants, they were charged with participating in wars of aggression, in enslavement, in plunder and spoliation of property, and in a common plan or conspiracy to commit crimes against peace.¹⁵³ The *Krupp* tribunal granted a defense motion for a judgment of acquittal as to Counts One and Four, which charged conspiracy and participating in wars of aggression.¹⁵⁴ The tribunal therefore was ultimately concerned with Krupp's use of forced labor and appropriation of foreign property.

The lead defendant was Alfried Krupp, the "sole owner, proprietor, [and] active and directing head" of the company,¹⁵⁵ the commercial purpose of which was the production of metals, particularly steel and iron, the mining or other acquisition of the raw materials for these metals, and the processing of these metals into war materials, including ships and tanks.¹⁵⁶ Similar to the *Farben* company, the Krupp company was governed principally by the *vorstand*, and individual members of the Krupp *vorstand* were personally involved in one or more subsidiaries.¹⁵⁷ The Krupp *vorstand*, however, coordinated closely on the firm's major undertakings.¹⁵⁸

As to the count of plunder and spoliation, there was particularly damning evidence against Alfried Krupp, detailing how he and other industrialists began planning to take private property as soon as they finished listening to a May 1940 radio broadcast describing how the German army had firmly occupied Holland:

At the conclusion of the broadcast the four men talked excitedly and with great intensity. They pointed their fingers to certain places on the map indicating villages and factories. One said, "This one is yours, that one is yours, that one we will have

¹⁵¹ *Id.* at 1206-09.

¹⁵² *The Krupp Case*, 9 TRIALS OF WAR CRIMINALS 4.

¹⁵³ *Id.* at 1329.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 8. Initially, Alfried Krupp's father and the previous head of the company, Gustav Krupp, was to be included as one of the defendants at the major war criminals trial before the International Military Tribunal, but he was advanced in age and suffered from dementia, which made him ineligible for trial. Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* 23 (2001).

¹⁵⁶ *The Krupp Case*, 9 TRIALS OF WAR CRIMINALS 1332-33.

¹⁵⁷ *Id.* at 1336.

¹⁵⁸ *Id.* at 1337.

arrested, he has two factories.” They resembled, as the witness Ruemann put it, “vultures gathered around their booty.”¹⁵⁹

Similarly, six months before the entry of the United States into the war, Krupp officials also discussed plans to obtain interests in American companies should the German government confiscate them in retaliation for future U.S. involvement in the war.¹⁶⁰ This sort of behavior at the outset of the war gave great insight to Alfried Krupp’s motives and intentions throughout the war, insight *specifically* used by the *Krupp* tribunal.¹⁶¹

The Krupp firm turned the above division-of-spoils discussion into reality in France; it took advantage of German occupation and the German confiscation of Jewish properties to seize machinery and to take control of a number of factories and other properties.¹⁶² The Krupp firm also participated in the systematic removal of machinery and materials from the Netherlands when it appeared the Allies would regain control of that country.¹⁶³ There was also evidence that Krupp officials used the German military to exert pressure on owners who did not wish to sell to Krupp.¹⁶⁴ There was a great deal of evidence of personal involvement in these activities by Alfried Krupp and certain other Krupp officials, and they were thus convicted under Count Two.

The circumstances that were insufficient to establish individual criminal responsibility gives one a better idea of where the tribunal set the bar on criminality. Defendants Max Ihn, Karl Pfirsch, Friedrich von Buelow, and Heinrich Korschan were acquitted on Count Two even though Pfirsch, Ihn and Korschan were deputy members of the Krupp *vorstand*.¹⁶⁵ In May 1941, Pfirsch, Korschan and other Krupp officials received a circular from one of the convicted officials, Loeser, asking that they keep him apprised of any information that would be essential to the acquisition of other plants in France.¹⁶⁶ Pfirsch and Korschan were also provided with information on the company’s credits, which included one item describing “booty machines.”¹⁶⁷ Although the *Krupp* tribunal simply stated there was insufficient evidence against these men,¹⁶⁸ the evidence failed to show that these men had any critical information on Krupp’s illegal activities and, as deputy members of the *vorstand*, apparently no substantial powers to stop it.

With respect to the count of enslavement, the tribunal had no doubt that the Krupp firm participated extensively in the German forced labor program. In

¹⁵⁹ *Id.* at 1347-48.

¹⁶⁰ *Id.* at 1372-73.

¹⁶¹ *Id.* at 1348.

¹⁶² *Id.* at 1348-64.

¹⁶³ *Id.* at 1364.

¹⁶⁴ *Id.* at 1370.

¹⁶⁵ *Id.* at 1337.

¹⁶⁶ *Id.* at 1352.

¹⁶⁷ *Id.* at 1371.

¹⁶⁸ *Id.* at 1373.

August 1943, 2412 prisoners of war (in violation of the 1907 Hague Regulations) and 11,557 foreign workers were forced to produce war materials at the firm's main plant at Essen.¹⁶⁹ There was significant evidence that Krupp managers were explicitly aware of the illegality of this arrangement,¹⁷⁰ and a number were aware of the deplorable treatment of prisoners, particularly Russian prisoners.¹⁷¹ As to the foreign workers, even those who were "free" workers were subject to harsh and punitive conditions of employment.¹⁷² Workers from Eastern Europe were "subject to obligatory service for an unlimited period" and were treated the same inhumane way the company treated prisoners of war.¹⁷³

Krupp was not simply following governmental direction in these matters. Krupp officials specifically sought concentration camp labor,¹⁷⁴ Russian prisoners of war,¹⁷⁵ and conscripted foreign workers¹⁷⁶ for the company's production efforts.¹⁷⁷ Krupp sought increased numbers of impressed foreign workers¹⁷⁸ and not only maintained penal camps for foreign workers but created a new camp just for Krupp workers.¹⁷⁹ Krupp imposed horrid conditions; not only did Krupp condone beatings of workers, the company supplied the "[w]eapons with which the workers were beaten."¹⁸⁰

The tribunal found all but one defendant, Pfirsch, guilty under Count Three. The tribunal adopted American law on individual liability of corporate officials for acts by their company or by other corporate officials.¹⁸¹ The *Krupp* tribunal thus used a rule of criminal liability for (1) acts personally done, (2) acts done by others but by one's permission or at one's direction, and (3) acts done where one knows of the crime and has authority over the matter.¹⁸² This is

¹⁶⁹ *Id.* at 1374-75.

¹⁷⁰ *Id.* at 1378-79. There was an improbable attempt at legal justification of the prisoner arrangement by Krupp officials at one point when they posited that there would be no violation if the prisoners could not clearly discern that the equipment would become part of a weapon. *Id.* at 1375.

¹⁷¹ *Id.* at 1380-89. The only concern that Krupp officials seemed to have was that the inadequate food given to prisoners adversely affected Krupp productivity. *Id.*

¹⁷² *Id.* at 1396-98. Once again, Krupp officials only became concerned at the conditions suffered by these workers when it affected their ability to "recruit" more of these workers. *Id.* at 1397-98.

¹⁷³ *Id.* at 1405.

¹⁷⁴ *Id.* at 1412-26, 1441-42.

¹⁷⁵ *Id.* at 1439.

¹⁷⁶ *Id.* at 1440-41.

¹⁷⁷ The defendants also sought cover by a plea of necessity, but the tribunal dismissed that argument noting that the defense evidence at best portrayed the belief of the defendants that they were obligated by a sense of duty rather than by necessity. *Id.* at 1443.

¹⁷⁸ *Id.* at 1404.

¹⁷⁹ *Id.* at 1399. This was no benign "company town." The camp was to be used primarily for disciplinary purposes, but the workers would labor at Krupp plants if properly "educated." *Id.* at 1399-1400.

¹⁸⁰ *Id.* at 1409.

¹⁸¹ *Id.* at 1448 (citing 19 C.J.S. 2D at 363-64 (1940)).

¹⁸² *The Krupp Case*, 9 TRIALS OF WAR CRIMINALS 1448 (quoting 19 C.J.S. 2D at 363-64 (1940)). The quoted language in the tribunal's opinion is somewhat oblique on the third point: "He is liable

consistent with the formulation of the *Farben* tribunal that established criminal liability for “ordering, approving, authorizing or joining in the execution of a policy or act which is criminal in character.”¹⁸³

c. The Flick Case

In the *Flick Case*, Friedrich Flick and five other officials of the Flick concern were tried before Military Tribunal IV at Nürnberg, Germany.¹⁸⁴ The principle charges of war crimes and crimes against humanity against them were:

Count One (all defendants): Forced deportation, enslavement, use of prisoners of war for war production.¹⁸⁵

Count Two (all defendants): Plunder and spoliation of property in occupied territories.¹⁸⁶

Count Three (defendants Flick, Otto Steinbrinck & Konrad Kaletsch): The “Aryanization,” or illegal acquisition, of Jewish properties.¹⁸⁷

Count Four (defendants Flick & Steinbrinck): Complicity in murders and other crimes by the Nazi party and other Nazi organizations.¹⁸⁸

As to the use of forced or slave labor, the tribunal found that the slave-labor program was run wholly by the German government and that the Flick officials could not object to its mandates, including the use of the labor in Flick plants.¹⁸⁹ Moreover, the tribunal found that the government set production quotas for industrial plants, and the failure to meet these quotas would have resulted in penalties, including losing control of the Flick plants and perhaps tenure in a concentration camp for Flick officials.¹⁹⁰ The tribunal observed that the criminal combinations that were generally present in Germany between industry and the slave-labor program “did not prevail in the plants and establishments of the defendants.”¹⁹¹

The tribunal acquitted four defendants because of this “mere” compliance with the German government’s mandate. Even though acting pursuant to government orders was specifically disallowed as a defense to criminal liability under Control Council Law No. 10, the tribunal distinguished the defense of

where his scienter or authority is established, or where he is the actual present or efficient actor.”
9 TRIALS OF WAR CRIMINALS 1448.

¹⁸³ *The Farben case*, 8 TRIALS OF WAR CRIMINALS 1157.

¹⁸⁴ *The Flick Case*, 6 TRIALS OF WAR CRIMINALS 28.

¹⁸⁵ *Id.* at 13.

¹⁸⁶ *Id.* at 17.

¹⁸⁷ *Id.* at 21.

¹⁸⁸ *Id.* at 23.

¹⁸⁹ *Id.* at 1196-97. “This was the only way workers could be procured.” *Id.* at 1197.

¹⁹⁰ *Id.* at 1197.

¹⁹¹ *Id.* at 1199.

necessity and also reasoned that corporate officials are not like military men who might claim the defense of superior orders.¹⁹² The one exception to the success of this duress claim was certain activity by defendant Bernhard Weiss, who with the knowledge and approval of Friedrich Flick, sought an increase in one production quota (which would necessitate more forced labor) and specifically sought Russian prisoners of war to meet the increased quota.¹⁹³ Both were convicted on Count One, Weiss for going beyond the government mandate and Flick for his knowledge and approval of Weiss' initiative.¹⁹⁴

As to Count Two, Flick himself was found guilty of one instance of exploiting a seized factory in an occupied territory, but the remaining defendants were acquitted. The facts did not support any other plunder or spoliation because Flick officials generally did nothing to take advantage of the occupation of territories; they simply entered into business arrangements as they did in peacetime. Those crimes that occurred in occupied territories grew from actions of the government generally and not from Flick officials.¹⁹⁵ In the case of the seized factory for which Flick was convicted, the other defendants had no decisional authority in the matter.¹⁹⁶

None of the defendants were convicted under Count Three (charging crimes against humanity), despite their "taking advantage of the . . . Aryanization program by seeking and using State economic pressure to obtain from the owners, not all of whom were Jewish, the four properties in question."¹⁹⁷ The Flick concern, for example, was able to take title to the Petschek coal mines after the German government expropriated them and put them in trust for sale; the tribunal reasoned that the crime of expropriation had already been completed by the time Flick became involved¹⁹⁸ even if they received stolen property, whether or not it was considered "stolen" under the German law of the Nazi era. Moreover, the tribunal reasoned, even if the Flick concern had gained property through the misery of others, crimes against humanity were traditionally considered crimes against people and not their property.¹⁹⁹

As to their membership in the SS, both Flick and Steinbrinck were not only members of the SS but were also members of an industrialist group that became known as the Himmler Circle of Friends after the head of the SS, Heinrich Himmler.²⁰⁰ Both Flick and Steinbrinck made substantial contributions to the Himmler Circle beginning in 1936, "[w]hen the criminal nature of the SS was not generally known."²⁰¹ "Flick suggested in his testimony that he regarded

¹⁹² *Id.* at 1200-01.

¹⁹³ *Id.* at 1198.

¹⁹⁴ *Id.* at 1202.

¹⁹⁵ *Id.* at 1209-12.

¹⁹⁶ *Id.* at 1206, 1212.

¹⁹⁷ *Id.* at 1212.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1213-16.

²⁰⁰ *Id.* at 1216-20.

²⁰¹ *Id.* at 1219-20.

membership in the Circle as in the nature of insurance,” and the tribunal recognized that it might be dangerous for Flick and Steinbrinck to terminate their contributions after the SS’s criminal activities became known.²⁰² Nonetheless, the tribunal convicted both men for giving Himmler a “blank check” that he could use to maintain his criminal organization.²⁰³ For all of their crimes, Flick was sentenced to seven years’ confinement, Steinbrinck to five and Weiss to two and one-half.²⁰⁴

d. Commissioner v. Roechling

Hermann Roechling and four other leading officials of his family firm, Roechling Enterprises, were tried for war crimes before a military tribunal in the French Zone of Occupation in Germany.²⁰⁵ The trial was premised on a similar principle as that of the *Farben Case*: German wars of aggression and war crimes “could not have been rendered possible, except with the conscious assistance of certain great German industrialists and financiers.”²⁰⁶ All five defendants were also accused of plunder and spoliation and for using forced labor, and Hermann Roechling himself was also tried for participation in the preparation and planning of wars of aggression.²⁰⁷ By his own admission, Roechling was at several secret conferences with Hermann Göring in 1936 and 1937 where long-term national plans were discussed, but he denied being privy to any discussion of wars of aggression, merely to discussions on German rearmament and economic development, the purposes of which were not necessarily the same as those for the waging of aggressive war.²⁰⁸ Roechling was also credited with proposing the use of poor-grade iron ore found in Germany (when proper iron ore could not be obtained from abroad) to support mass production of German armaments.²⁰⁹ At trial, the tribunal found no evidence to show Roechling knew of the eventual wars of aggression and acquitted him of preparing for wars of aggression, but the tribunal convicted him for contributing to their continuance.²¹⁰ The tribunal pointed out that Roechling “*stepped out of his role of industrialist*, demanded and

²⁰² *Id.* at 1220-21.

²⁰³ *Id.* at 1221.

²⁰⁴ *Id.* at 1223.

²⁰⁵ *Commissioner v. Roechling*, Indictment, in 14 TRIALS OF WAR CRIMINALS 1061, 1061.

²⁰⁶ *Commissioner v. Roechling et al.*, Indictment, in 14 TRIALS OF WAR CRIMINALS 1061, 1061-62.

²⁰⁷ *Id.* at 1072-74.

²⁰⁸ *Commissioner v. Roechling*, Judgment of the General Tribunal of Military Government for the French Zone of Occupation in Germany, June 30, 1948, in 14 TRIALS OF WAR CRIMINALS at 1075, 1077.

²⁰⁹ *Roechling*, Indictment, in 14 TRIALS OF WAR CRIMINALS 1061, 1065; *see also Roechling*, Judgment of the General Tribunal of Military Government, in 14 TRIALS OF WAR CRIMINALS at 1075, 1077.

²¹⁰ *Id.* at 1078-79.

accepted high administrative positions in order to develop German ferrous [iron] production.”²¹¹

For the other counts against him, the *Roechling* tribunal relied on Roechling’s administrative role in the German government, in which he endeavored to maximize steel production.²¹² To do this, he plundered plants in occupied territory and exploited them to “produce for the German war effort,”²¹³ for which the tribunal convicted him.²¹⁴ The tribunal also recounted how Roechling “lavished advice on the Nazi government in order to utilize the inhabitants of occupied countries for the war effort of the Reich.” and specifically requested certain categories of workers in occupied territories that he believed would aid production.²¹⁵ Given his conduct in requesting laborers who would be mistreated, mistreatment to which he was at best indifferent, the tribunal convicted him of crimes by using forced labor.²¹⁶

As to the defendant Ernst Roechling, Hermann Roechling’s cousin, he was acquitted largely due to his limited duties as a company liaison in Paris, even if he was a company official involved “mainly in the control and supervision of iron and steel plants and enterprises in the occupied countries.”²¹⁷ Hermann Roechling’s son-in-law, Hans Lothar von Gemmingen-Hornberg, did not fare as well; he was convicted of war crimes and crimes against humanity because, as plant manager, he knew of the horrid conditions in the plant and failed to use his power to alleviate the conditions of the workers.²¹⁸ His subordinate, Wilhelm Rodenhauer, was also convicted as he was “especially in charge of labor” and also failed to alleviate the conditions of the laborers despite his power to do so.²¹⁹

Under the French tribunal system, an appeal was allowed.²²⁰ On appeal, the Superior Military Government Court of the French Occupation Zone in Germany held that Roechling’s involvement in rearmament and in supporting the

²¹¹ *Id.* at 1078 (emphasis added).

²¹² *Id.* at 1080.

²¹³ *Id.* at 1080-81.

²¹⁴ *Id.* at 1085.

²¹⁵ *Id.* He specifically requested Russian youths of about sixteen years of age “for labor in the iron industry” and specifically requested Belgian males aged eighteen to twenty-five, stating, “If a large number of young Belgians are in our hands in close formations, they will also serve as hostages for the good conduct of their parents.” *Id.*

²¹⁶ *Id.* at 1086-89.

²¹⁷ *Id.* at 1089-91. Another defendant, Albert Maier, was also acquitted because he never “stepped out of his functions as financial director” and was not privy to the facts leading to the charges. *Id.* at 1093.

²¹⁸ *Id.* at 1092.

²¹⁹ *Id.* at 1093-95. On appeal, they were also found to have approved of the deportation of workers. *Commissioner v. Roechling*, Judgment of the Superior Military Government Court of the French Occupation Zone in Germany, Jan. 25, 1949, in 14 TRIALS OF WAR CRIMINALS at 1097, 1134.

²²⁰ ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 404 and n.2 (H. Lauterpacht ed., 1948).

war efforts (once they began) did not amount to participation in the waging of wars.²²¹ The court made this determination because Roechling

—in spite of his participation in certain conferences with Goering, in spite of his determination to get the principle of the utilization of low-grade ores accepted, in spite of his letter to Hitler of June 1940, in spite of his program for the Germinization of the annexed provinces, in spite of his appointment as “General Plenipotentiary,” “Reich Plenipotentiary,” and president of the Reich Association Iron, in which capacity he gave a lecture in Knuttange in order to explain his authoritative power, . . . in spite of numerous other actions, which are besides evaluated as component parts of war crimes—remains outside the boundary which “has been fixed very high by the” International Military Tribunal.²²²

Hermann Roechling’s other convictions were essentially upheld, but his cousin’s earlier acquittal was reversed on appeal. The appellate court found that he played an important role “in the enslavement of French industry and in its systemic spoliation.”²²³ The court specifically noted how Ernst obtained a large sum from the occupied French government to cover operating deficits in certain enterprises and how he surveyed French companies to see how they could be exploited.²²⁴ Hermann Roechling’s sentence on appeal included ten years’ confinement and confiscation of his entire property, and the other defendants received lesser punishments, all of which included confinement.²²⁵

*e. The Zyklon B Case*²²⁶

The *Zyklon B Case* contains perhaps the clearest example of criminal facilitation seen in any of the prosecutions of corporate officials. Dr. Bruno Tesch, the owner of a firm that supplied Zyklon B gas and other products, and two of his employees, Karl Weinbacher and Joachim Drosihn, were charged with a war crime for supplying “poison gas used for the extermination of allied nationals in concentration camps, well knowing that the said gas was to be so

²²¹ *Roechling*, Judgment of the Superior Military Government Court, in 14 TRIALS OF WAR CRIMINALS at 1097, 1108-09. This French Zone appellate court was international in its composition. See *id.* at 1097.

²²² *Id.* at 1109-10.

²²³ *Id.* at 1119.

²²⁴ *Id.* at 1119-24.

²²⁵ *Id.* at 1142.

²²⁶ *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, Brit. Mil. Ct. Hamburg 1946, in UNITED NATIONS WAR CRIMES COMMISSION, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947).

used.”²²⁷ Although Zyklon B was manufactured and shipped by another company, Tesch’s firm was the exclusive agent for the supply of the gas east of the Elbe River and thus arranged for the shipments, which included “vast quantities to the largest concentration camps in Germany east of the Elbe.”²²⁸

The key issue in the case was whether the defendants knew the criminal purpose for which the camp officials used the Zyklon B. Several officials in Tesch’s firm presented evidence that Tesch did in fact know how the gas was used. They described how Tesch revealed his knowledge in statements both made in his travel reports and made to them in conversations with Tesch. One witness reported he saw one of Tesch’s travel reports that recounted how Tesch himself had refined the idea of using gas to kill Jews and how “[h]e undertook to train the SS men in this new method of killing human beings.”²²⁹ There was no such smoking gun with which to convict Weinbacher, but he held the role of “procurist” in the firm, which essentially made him the alter ego of the head of the firm, and as such, he could conclude any business as if he were the head of the firm.²³⁰ The prosecutor argued that due to Weinbacher’s position within the firm, he must have known everything that Tesch knew, particularly so because he ran the firm for 200 days of the year and had to be familiar with all of the firm’s efforts, including those recounted in Tesch’s travel reports.²³¹ The prosecutor also argued that due to the large quantities of Zyklon B used by the concentration camps, particularly Auschwitz (it was the firm’s second biggest customer for 1942 and 1943), neither could have failed to know the purposes behind such large shipments.²³²

The third defendant, Drosihn, was admitted by the prosecution to be on the technical, rather than the sales or management, side of the firm,²³³ and Drosihn testified that he spent about half the year traveling to resolve technical issues.²³⁴ He admitted to have inspected the proper workings of the delousing chambers at two camps, but he had never been to Auschwitz.²³⁵ He also testified that he had reported to Tesch that he had seen inhumane treatment at the camps.²³⁶ The judge advocate assisting the tribunal asked the tribunal to evaluate Drosihn’s “subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the

²²⁷ *Id.* at 93-94.

²²⁸ *Id.* at 94.

²²⁹ *Id.* at 95.

²³⁰ *Id.*

²³¹ *Id.* at 101.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 98.

²³⁵ *Id.*

²³⁶ *Id.*

gas was being put could make him guilty.”²³⁷ The tribunal appeared to agree that he had no ability to influence the matter and acquitted Drosihn.

Tesch and Weinbacher, however, were convicted and sentenced to death by hanging.²³⁸ The judge advocate advised the tribunal that, to convict, they had to be sure that the defendants knew that the gas would be used for killing human beings when they supplied it.²³⁹ The judge advocate also discussed what amounts to a “deliberate avoidance” or “conscious avoidance” instruction.²⁴⁰

To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you reali[z]e what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask[s] you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask[s]: “Why is it that these competent business men are so sensitive about these particular deliveries? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings?”²⁴¹

Although the tribunal did not state the grounds upon which its decision rested, there was no out-of-court admission by Weinbacher as to his knowledge, and the decision would thus appear to rest on the inference that a competent business person in a leadership position will know the context behind the major efforts of his business. Indeed, it is only logical that a person selling a product will try to assess the needs of his or her customer in order to increase sales. Thus, tribunals will impute knowledge to certain corporate officials if the officials ordinarily must have knowledge of that type to effectively carry out his or her duties.

²³⁷ *Id.* at 102.

²³⁸ *Id.*

²³⁹ *Id.* at 101.

²⁴⁰ “A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact.” *United States v. Ferrini*, 219 F.3d 145, 154 (2d Cir. 2000) (citing *United States v. Adeniji*, 31 F.3d 58, 62 (2d Cir. 1994)), see also *United States v. Brown*, 50 M.J. 262 (1999) (“deliberate avoidance” instruction).

²⁴¹ *The Zyklon B Case*, Brit. Mil. Ct. Hamburg 1946, in UNITED NATIONS WAR CRIMES COMMISSION, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 101 (1947).

2. Prosecutions of Japanese War Criminals

a. Economic and Financial Leaders Tried before the International Military Tribunal for the Far East

There were two prominent financial leaders who were defendants before the International Military Tribunal for the Far East: Hoshino Naoki and Kaya Okinori.²⁴² Both were convicted of the same five counts, although each had been charged with other crimes.²⁴³ Both were convicted of conspiring to wage and indeed of aiding in the waging of various wars of aggression against China, the United States, the British Commonwealth, and the Netherlands.²⁴⁴ Both were sentenced to prison for life,²⁴⁵ but both were paroled in 1955.²⁴⁶

Hoshino served in several important posts, particularly financial posts, in Japanese occupied Manchuria (Manchukuo). “In these positions he was able to exercise a profound influence upon the economy of Manchukuo and did exert that influence towards Japanese domination of the commercial and industrial development of that country.”²⁴⁷ Further, he was “[i]n effect, if not in name, . . . a functionary of [the Japanese] Army whose economic policy was directed to making the resources of Manchukuo serve the warlike purposes of Japan.”²⁴⁸ His later cabinet roles also allowed him to join in planning for and waging aggressive wars.²⁴⁹

Kaya was twice Finance Minister and twice was an advisor to the Finance Ministry; he also held posts in the Manchurian Affairs Bureau, on the Asia Development Committee and as President of the North China Development Company.²⁵⁰ “In these positions he took part in the formulation of aggressive policies of Japan and in the financial, economic and industrial preparation of Japan for the execution of those policies.”²⁵¹ More specifically, “he was actively engaged in the preparation for and the carrying out of aggressive wars in China and against the Western Powers,” and thus played an active role in the conspiracy

²⁴² See *United States v. Araki*, R. at 48414, Int’l Mil. Trib. Far East (1948), reprinted in 101 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard ed., 1998) [hereinafter TOKYO MAJOR WAR CRIMES TRIAL].

²⁴³ These were Counts 1, 27, 29, 31 and 32. *Id.*, R. at 49793-95 (Hoshino) and 49801-02 (Kaya), reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁴⁴ *Id.*, R. at 49793-95 (Hoshino) and 49801-02 (Kaya), reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL. For the indictment, see *id.*, R. at 33, 51-52, reprinted in 2 TOKYO MAJOR WAR CRIMES TRIAL.

²⁴⁵ *Id.*, R. at 49855-58, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁴⁶ ARNOLD C. BRACKMAN, THE OTHER NUREMBERG 407-08 (1987).

²⁴⁷ *Araki*, R. at 49793, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁴⁸ *Id.*, R. at 49793, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁴⁹ *Id.*, R. at 49793-94, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁵⁰ *Id.*, R. at 49801, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁵¹ *Id.*, R. at 49801, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

to wage aggressive war.²⁵² The judgment of the tribunal revealed that the guilt of these men was derived from their role as government officials rather than from any of their personal or corporate commercial activities, but their convictions nonetheless serve as a reminder that war—and war crimes—are dependent in part upon economic support.

b. In re Awochi

Washio Awochi was tried by the Netherlands Temporary Court-Martial at Batavia for forcing Dutch women into prostitution during the Japanese occupation of Batavia.²⁵³ After the Japanese occupied the Dutch East Indies, Awochi began operating the Sakura Club, which consisted of a restaurant, bar and brothel, all of which was exclusively reserved for Japanese civilians.²⁵⁴ Awochi initially recruited women to be staff at the restaurant or bar without revealing his brothel operation. Then, once they were hired, he gave them a choice: work as a prostitute in his brothel or be turned over to the Japanese police for imprisonment, deportation or beatings.²⁵⁵

Awochi argued that his mistress, Lies Beerhorst, actually ran the brothel and issued the threats that forced these women into prostitution.²⁵⁶ The court-martial found that Awochi's financial interest and profits were too great, and his relationship with Beerhorst too close, for him to be unaware of the compelled nature of the prostitution.²⁵⁷ Despite Awochi's additional argument that he was compelled to conduct this business at the order of the Japanese government, the court-martial found Awochi guilty of the war crime of "enforced prostitution" and sentenced him to ten years' imprisonment.²⁵⁸ Awochi is another example of a business person, like many of the industrialists in Germany, who took illegal advantage of military occupation to make a greater profit and thus committed a crime.

*3. The Acquittal of Karl Rasche in the Ministries Case*²⁵⁹

In the *Ministries Case*, twenty-one defendants, including three Reich ministers, were tried for crimes alleged to have occurred as a result, principally, of their authority as officials of the Reich government.²⁶⁰ Of what is particular

²⁵² *Id.*, R. at 49801-02, reprinted in 103 TOKYO MAJOR WAR CRIMES TRIAL.

²⁵³ *In re Awochi*, Neth. Temp. Ct. Martial Batavia 1946, in UNITED NATIONS WAR CRIMES COMMISSION, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122 (1949).

²⁵⁴ *Id.* at 122.

²⁵⁵ *Id.* at 122-23.

²⁵⁶ *Id.* at 123, 125.

²⁵⁷ *Id.* at 125.

²⁵⁸ *Id.* at 123.

²⁵⁹ *United States v. von Weizsaecker* (hereinafter *The Ministries Case*), in 12-14 TRIALS OF WAR CRIMINALS (1949).

²⁶⁰ *Id.*, 12 TRIALS OF WAR CRIMINALS at 1.

concern to a discussion of prosecution of corporate officials is the judgment of U.S. Military Tribunal IV regarding defendant Karl Rasche. Rasche was a member of the *vorstand* of Dresdner Bank, an official in a number of other banks and firms, an officer in the SS, a member of the Nazi party, and a member of the Himmler Circle of Friends.²⁶¹

The tribunal characterized Rasche as “a banker by profession,” whose main activities were that of an executive officer of Dresdner Bank.²⁶² The tribunal noted that the bank was involved in financing Nazi activities in which crimes occurred: “The evidence clearly establishes that Dresdner Bank loaned very large sums of money to various SS enterprises which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the so-called resettlement program.”²⁶³ As part of this charge (Count Five), Rasche also funneled large contributions from Dresdner Bank to the Himmler Circle of Friends.²⁶⁴ The tribunal declined to find Rasche criminally responsible for the donations to the Himmler Circle of Friends as there was no evidence “that Rasche knew any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for unlawful purposes.”²⁶⁵

Although the tribunal found the bank loans made by Dresdner bank to be a closer case, the tribunal also acquitted²⁶⁶ Rasche of aiding crimes through his approval of Dresdner Bank loans, reasoning—in essence—that a business transaction does not convert the businessman into a partner of a criminal enterprise:

The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

The real question is, is it a crime to make a loan, knowing or having reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in

²⁶¹ *Id.*, 12 TRIALS OF WAR CRIMINALS at 18.

²⁶² *Id.*, 12 TRIALS OF WAR CRIMINALS at 621.

²⁶³ *Id.*, 14 TRIALS OF WAR CRIMINALS at 621.

²⁶⁴ *Id.*, 14 TRIALS OF WAR CRIMINALS at 621-22.

²⁶⁵ *Id.*, 14 TRIALS OF WAR CRIMINALS at 622.

²⁶⁶ Rasche was, however, found guilty of spoliation of property and of membership in a criminal organization, the SS, while knowing of its criminal activities. *Id.*, 14 TRIALS OF WAR CRIMINALS at 784, 863.

any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? *A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.*²⁶⁷

Rasche was also acquitted of financing the use of slave labor and the illegal use of prisoners of war for labor (Count Seven) on a number of grounds, including inadequate proof as to knowledge of the criminal activities that were funded, but the tribunal again emphasized the reasoning that they did in his acquittal under Count Five: “We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from the loans or which may have been contemplated by the borrower.”²⁶⁸

Because of this reasoning that makes the arms-length business transaction a safe harbor for a corporate official, the prosecution of Rasche in the *Ministries Case* may be one of the more important precedents to consider in future prosecutions of corporate officials for violations of international humanitarian law. Can Mr. Ocampo’s statement, that purchasers of blood diamonds, knowing that their payments will be used to finance a group that commits genocide, may be prosecuted, be correct in light of the judgment of Rasche in the *Ministries Case*? Does the crime of complicity in genocide, as it stands today, differ enough from Rasche’s prosecution for his financial support (through Dresdner Bank) of SS and Reich efforts to “Aryanize” occupied territories, to deport maltreat civilians in occupied territories, and to persecute Jews and other “undesirables”?²⁶⁹

III. MAKING GENOCIDE A CRIME

In 1948, the world community established the crime of genocide with the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).²⁷⁰ Under the convention, genocide consists of killings and other acts “committed with intent to destroy, in whole or in part, a national,

²⁶⁷ *Id.*, 14 TRIALS OF WAR CRIMINALS at 622 (emphasis added).

²⁶⁸ *Id.*, 14 TRIALS OF WAR CRIMINALS at 854.

²⁶⁹ *See id.*, 12 TRIALS OF WAR CRIMINALS 49 (Count Five of the indictment).

²⁷⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

ethnic, racial or religious group.”²⁷¹ The Genocide Convention specifically allows prosecution of the designated crimes in both domestic and international courts.²⁷² Naturally, genocide itself is punishable as a crime, but the Genocide Convention also separately lists the crimes of conspiracy to commit genocide, incitement to commit genocide, attempted genocide, and complicity in genocide.²⁷³

As William Schabas points out, “[c]omplicity is sometimes described as secondary participation, but when applied to genocide, there is nothing ‘secondary’ about it. The ‘accomplice’ is often the real villain, and the ‘principal offender’ a small cog in the machine.”²⁷⁴ However, complicity is not an offense *additional to* aiding, abetting, assisting or whatever other term of facilitation one chooses to use. For example, when the United Kingdom incorporated the Genocide Convention into its domestic law, it did not include a separate provision on complicity in genocide because of the redundancy of such a provision with the existing UK law on aiding and abetting.²⁷⁵

IV. MODERN PROSECUTIONS OF PERSONS COMPLICIT IN GENOCIDE, IN WAR CRIMES AND IN CRIMES AGAINST HUMANITY: CASES ARISING BEFORE THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND FOR RWANDA

There have been only a few opportunities since World War II for any international tribunals to develop the law concerning war crimes and crimes against humanity. The two principal tribunals that have developed that law are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Although the conflicts in Yugoslavia and in Rwanda were not generally considered to be conflicts between states, the international community saw to it that the crimes that occurred during these “internal” conflicts would be prosecuted. Accordingly, in *Prosecutor v. Tadić*, the ICTY Appeals Chamber ruled that certain crimes arising in internal armed conflicts are crimes under international law, allowing for jurisdiction by the tribunal.²⁷⁶ When ICTR was created, the rule announced in *Tadić* was made part of ICTR’s charter.²⁷⁷ Although neither tribunal has heard a case of an

²⁷¹ *Id.*, art. II, 78 U.N.T.S. at 280.

²⁷² *Id.*, art. VI, 78 U.N.T.S. at 280, 282.

²⁷³ *Id.*, art. III, 78 U.N.T.S. at 280.

²⁷⁴ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 286 (2000).

²⁷⁵ *Id.* at 287 (citing 777 PARL. DEB., H.C. (5th ser.) (1969) 480-509).

²⁷⁶ *Prosecutor v. Tadić*, Decision on the Def. Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995, paras.102-03, 127, 141.

²⁷⁷ International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, S.C. Res.

industrialist, financier or corporate official, their decisions on individual responsibility for assistance rendered to persons engaged in criminal activity are important analogies in the analysis of how corporate officials may become criminally liable for their business transactions.

A. *Prosecutor v. Tadić*

Duško Tadić was a leading member of the Serb Democratic Party and a soldier in Serb paramilitary forces.²⁷⁸ He was ultimately convicted of, among other things, participating in killings “committed during an armed conflict as part of widespread or systematic attack on a civilian population.”²⁷⁹ His case was one of the first cases decided by either of the ad hoc tribunals. As part of a wide-ranging judgment, the trial chamber in *Tadić* examined the “Parameters of Individual Responsibility” that may allow a person to be held criminally responsible for rendering assistance in the planning, preparation or execution of a crime against humanity.²⁸⁰ The Trial Chamber turned to “the Nürnberg war crimes trials, which resulted in several convictions for complicitous conduct,” and distilled the criteria those tribunals used to determine guilt. In what amounted to a restatement of post-World War II tribunal law, the *Tadić* trial chamber concluded that before an individual could be convicted, the prosecution must prove intent,²⁸¹ direct contribution to the commission of the crime,²⁸² and sufficient individual participation.²⁸³

With regard to intent, the *Tadić* Trial Chamber’s review of the post-World War II cases revealed that intent can be shown when a person renders assistance to a person in committing a crime while knowing specifically that the crime will be committed.²⁸⁴ These post-World War II cases also showed that knowledge can be presumed or inferred from certain circumstances, such as killings in a concentration camp where the accused is employed in *any* capacity due to the systematic and widespread nature of the killing, making such knowledge

955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 1, at 3, UN Doc. S/INF/50 (1994) [hereinafter ICTR Statute]. The tribunal was created at the request of the Rwandan government. *Id.* at 2.

²⁷⁸ *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, Sentencing Judgment, 14 July 1997, slip op. at 23.

²⁷⁹ *Prosecutor v. Tadić*, Appeals Judgment, Case No. IT-94-1-A, July 15, 1999, para. 233. He was also responsible for cruel and inhumane treatment detainees who were at camps or in the process of being forcibly transferred from their homes; this treatment included beatings and one particularly gruesome sexual mutilation. *Tadić* Sentencing Judgment, slip op. at 8, 14, 16, 19-20. A number of these victims ultimately died. *Id.* He was also convicted of taking part in the persecution of Muslims, which included killings and forced transfers. *Id.* at 21.

²⁸⁰ *Id.*, paras. 670-87.

²⁸¹ *Id.*, paras. 675-77.

²⁸² *Id.*, paras. 678-80.

²⁸³ *Id.*, paras. 681-87.

²⁸⁴ *Id.*, para. 675.

unavoidable.²⁸⁵ The *Tadić* Trial Chamber also concluded that criminal liability is not dependent upon a prior agreement to render assistance in a crime; the person assisting need only know that his or her acts were done in furtherance of the shared criminal activity.²⁸⁶

The *Tadić* Trial Chamber also found in post-World War II cases a requirement for “a deliberate act if an accused is to be held criminally culpable[,] and this deliberate act must directly affect the commission of the crime itself.”²⁸⁷ Although physical presence without direct contribution to the crime is insufficient for criminal liability, direct contribution without physical presence during the commission of the crime, on the other hand, can allow for criminal liability.²⁸⁸ The Trial Chamber in *Tadić* used the *Zyklon B Case* as an example of direct contribution without physical presence: the prosecutor had argued that because the suppliers “put the means of committing the crime of extermination in the hands of concentration camp officials,” knowing “that the gas was to be used for the purpose of killing human beings,” the suppliers themselves were war criminals.²⁸⁹ Since two of the Zyklon B suppliers had been found guilty after a court finding that the act of supplying the gas was done with the knowledge of its intended purpose, the trial chamber in *Tadić* reasoned that the military “court necessarily must have made the determination that without the supply of gas the exterminations would not have occurred in that manner, and therefore that the actions of the accused directly assisted in the commission of the illegal act of mass extermination.”²⁹⁰

The *Tadić* Trial Chamber then turned to the tricky question of what extent of participation is required for criminal liability. A review of post-World War II cases revealed several examples of sufficient participation: (1) providing information that enables the commission of a crime is sufficient participation;²⁹¹ (2) preventing interference in a joint criminal enterprise is sufficient participation;²⁹² and (3) failure to intervene and prevent a crime when empowered to do so is sufficient participation.²⁹³ The Trial Chamber then went on to announce its findings on the state of the law:

²⁸⁵ *Id.*, paras. 675-76.

²⁸⁶ *Id.*, para. 677.

²⁸⁷ *Id.*, para. 678.

²⁸⁸ *Id.*, para. 679.

²⁸⁹ *Id.*, para. 680 (citing and quoting *The Zyklon B Case*, 1 L. Rep. Trials War Crim. 93, 93 (Brit. Mil. Ct. 1946)).

²⁹⁰ *Tadić* Opinion and Judgment, para. 680 (citing *The Zyklon B Case*, 1 L. Rep. Trials War Crim. 93, 93 (Brit. Mil. Ct. 1946)).

²⁹¹ *Tadić* Opinion and Judgment, paras. 684 (citing the case of Karl Hocker in Vol. II, *War Crimes Reports* 418-19) & 687 (citing the case of *France v. Becker et al.*, 7 L. Rep. Trials War Crim. 67, 70 (Fr. Perm. Mil. Trib.)).

²⁹² *Tadić*, Opinion and Judgment, para. 685 (citing *Trial of Sandrock et al.*, 1 L. Rep. Trials War Crim. 35, 43 (Brit. Mil. Ct. 1947)).

²⁹³ *Tadić* Opinion and Judgment, para. 686 (citing *United States v. Goebell et al.*, Case no. 12-489, Report, Survey of the Trials of War Crimes Held at Dachau, Germany, 2-3 (Sep. 15, 1948)).

The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is ignorant or unwilling presence. However, if the presence can be shown or inferred . . . to be knowing and to have a direct and substantial effect of the commission of the illegal act, then it is sufficient.

. . . However, actual physical presence when the crime is committed is not necessary; . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be “concerned with the killing.” However, the acts of the accused must be direct and substantial.

In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.²⁹⁴

As an example of this reasoning, the trial chamber examined evidence that a Muslim prisoner, who had been severely beaten, was thrown into a room by Tadić, who stated, “You will remember, Sivac, that you cannot touch a Serb or say anything to a Serb.”²⁹⁵ Even though there was no direct evidence that Tadić had physically beat the man, his act of throwing the man and his verbal parting shot, which occurred after the beating, was found to directly and substantially assist the common purpose of the group of Serbs to beat this prisoner severely.²⁹⁶

Upon Tadić’s appeal, the appeals chamber explained further, while distinguishing aiding and abetting from criminal liability arising from a joint criminal enterprise:

- (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
- (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-

²⁹⁴ *Tadić* Opinion and Judgment, paras. 689, 691-92.

²⁹⁵ *Id.*, para. 735.

²⁹⁶ *Id.*, paras. 735 & 738. Tadić’s act was considered both a war crime because the victim was a prisoner and a crime against humanity because it occurred as part of a systematic attack on a civilian population. *Id.*, paras. 734 & 737.

existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.²⁹⁷

In its explanation, the Appeals Chamber supported the Trial Chamber's conclusion that the prosecution must prove, in an aiding or abetting prosecution, that the accused's actions had a *direct and substantial* effect on the commission of the offense.

B. *Prosecutor v. Akayesu*

Jean-Paul Akayesu was convicted by the ICTR Trial Chamber of various crimes against humanity—murder, rape, extermination, torture and other inhumane acts—and of genocide.²⁹⁸ The *Akayesu* judgment was an early judgment rendered by ICTR, and this decision—like *Tadić*—included a wide-ranging review of basic law of the tribunal. Although the trial chamber ultimately acquitted Akayesu of complicity in genocide because it found the prosecution had established the underlying crime of genocide (he could not be both the perpetrator and accomplice to the same offense),²⁹⁹ the discussion in the ruling gave some guidance on how one can be found guilty for facilitating a crime. For example, the *Akayesu* judgment cited with approval one key determination of the *Tadić* judgment, that aiding and abetting requires intent, knowledge and a direct and substantial contribution to the commission of an offense.³⁰⁰

²⁹⁷ *Prosecutor v. Tadić*, Appeals Judgment, Case No. IT-94-1-A, July 15, 1999, para. 229.

²⁹⁸ *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, Sept. 2, 1998, § 8 (verdict).

²⁹⁹ *Id.*, paras. 700 & 734.

³⁰⁰ *Id.*, paras. 477 & 548.

Although it is somewhat unclear since Akayesu actually ordered some attacks,³⁰¹ the trial chamber seemed to find that he was also complicit in genocide by not exercising his authority to stop the killings of Tutsis: “Indeed, the Chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present to such criminal acts.”³⁰² This is similar to the criminal liability imposed in the Industrialist Cases upon corporate officers who, while having authority to intervene, fail to stop a crime being committed by the corporation.

Along the way, the *Akayesu* trial chamber did state its opinion on what constitutes the crime of complicity in genocide. The trial chamber first held that one could not be complicit in genocide unless in fact genocide did occur.³⁰³ The trial chamber also concluded that an accused need not share the specific intent to commit genocide as long as “he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide. . . .”³⁰⁴ In other words, an accomplice may not even wish the crime to occur, but he is still willing to provide the aid to the principal offender for another reason, such as profit.³⁰⁵

The tribunal also discussed the forms that the crime of complicity can take. It noted that “three forms of accomplice participation are recognized in

³⁰¹ *Id.*, para. 704.

³⁰² *Id.*, para. 705 As to Akayesu’s authority, the trial chamber found that

Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as “leader” of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions.

Id., para. 704.

³⁰³ *Id.*, para. 530. The tribunal determined this after reviewing what it means to be complicit in a crime: “[T]he conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.” *Id.*, para. 528. Certain U.S. jurisdictions do punish “attempted complicity.” See Robert Weisberg, *The Model Penal Code Revisited: Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 234 (2000).

³⁰⁴ *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, (Sept. 2, 1998), para. 545.

³⁰⁵ Diane Maria Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 327, 328 (2001). Although she favors imposing criminal liability on corporations in certain circumstances, Professor Amann is troubled by this standard of criminal liability:

It is essential that the standards of knowledge and intent to which corporate defendants are held satisfy strict penal standards. Criminal conviction for what approaches a crime of association ought to be avoided. The *Akayesu* complicity standard may have value in civil litigation against corporations, but in the criminal context that standard invites doubt about the fairness of conviction even of an individual sentient being. These concerns increase in the context of a collective, artificially intelligent being.

Id. at 336.

most criminal Civil Law systems: complicity by instigation, complicity by aiding and abetting, and complicity by procuring means.”³⁰⁶ The tribunal saw little difference in common law systems, which punished “aiding and abetting” and “counseling and procuring.”³⁰⁷ The tribunal described these forms of complicity simply:

Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.³⁰⁸

What seems to be clear is that “any other means” would include items that are directly useful in committing genocide, like weapons or like Zyklon B gas. What is far from certain is whether “any other means” includes items—like money—that are *indirectly* useful for committing genocide.

C. Further Development on the Nature of Intent Required to be Proven for Aiding and Abetting

Radoslav Brdjanin was tried before ICTY, charged with the crime of genocide based on joint criminal enterprise liability, specifically the “third category of joint criminal enterprise liability,” which concerns “criminal liability of an accused for crimes which fall outside of an agreed upon criminal enterprise, but which crimes are nonetheless natural and foreseeable consequences of that agreed upon criminal enterprise.”³⁰⁹ The Trial Chamber determined that the specific intent required for a conviction of genocide could not be “reconciled with the *mens rea* required for a conviction pursuant to the third category of [joint criminal enterprise],”³¹⁰ which “requires that the Prosecution prove only awareness on the part of the accused that genocide was a foreseeable consequence of the commission of a separately agreed upon crime.”³¹¹

The appeals chamber in *Brdjanin* reversed the trial chamber, agreeing that the prosecution need only prove “that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed-upon crime made it reasonably foreseeable to him that the crime

³⁰⁶ *Akayesu* Judgment, para. 533.

³⁰⁷ *Id.*, para. 535.

³⁰⁸ *Id.*, para. 536.

³⁰⁹ *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, Case No. IT-99-36-A, Mar. 19, 2004, para. 1.

³¹⁰ *Id.*, para. 3.

³¹¹ *Id.*, para. 2.

charged would be committed by other members of the joint criminal enterprise, and it was committed.”³¹² The appeals chamber elaborated further:

For example, an accused who enters into a joint criminal enterprise to commit the crime of forcible transfer shares the intent of the direct perpetrators to commit that crime. However, if the Prosecution can establish that the direct perpetrator in fact committed a different crime, and that the accused was aware that the different crime was a natural and foreseeable consequence of the agreement to forcibly transfer, then the accused can be convicted of that different offence. Where that different crime is the crime of genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent.

. . .

This is the approach that the Appeals Chamber has taken with respect to aiding and abetting the crime of persecution. An accused will be held criminally responsible as an aider and abettor of the crime of persecution where, the accused is aware of the criminal act, and that the criminal act was committed with discriminatory intent on the part of the principal perpetrator, and that with that knowledge the accused made a *substantial contribution* to the commission of that crime by the principal perpetrator.³¹³

Judge Shahabuddeen wrote a concurring opinion to emphasize that the prosecution still needed to prove an accused’s specific intent to commit another crime and to prove that the accused had full awareness that genocide was a foreseeable result of the other crime intended:

In *Tadic*, the Appeals Chamber did use the word “aware” but its judgment shows that it was speaking of more than awareness. It was referring to a case in which the accused, when committing the original crime, was able to “predict” that a further crime could be committed by his colleagues as the “natural and foreseeable consequence of the effecting of [the] common purpose” of the parties—and not the consequence of “negligence”—and that he nevertheless “willingly” took the “risk” of that further crime being committed. In effect, for the purposes of determining a no-case [motion for judgment of acquittal] submission . . . , the accused in

³¹² *Id.*, para. 5.

³¹³ *Id.*, paras. 6 & 8 (emphasis added).

this case knew that genocide could be committed; any uncertainty in his mind went to the question whether it would in fact be committed, not to acceptance by him of it (if and when it was committed) as something which he could “predict” as the “natural and foreseeable consequence” of the activities of the joint criminal enterprise to which he was a willing party. In that important sense and for the purposes of determining such a submission, he contributed to the commission of the genocide even though it did not form part of the joint criminal enterprise. Putting it another way, his intent to commit the original crime included the specific intent to commit genocide also *if and when genocide should be committed*.³¹⁴

Although the decision in *Brdjanin* explains the *mens rea* required for joint criminal enterprise well, it is not particularly instructive for aiding and abetting as there are key differences in the *mens rea*. As the Appeals Chamber explained in *Prosecutor v. Vasiljevic*:

Participation in a joint criminal enterprise is a form of “commission” under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor’s contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and

³¹⁴ *Id.*, para. 7 (separate op. of Judge Shahabuddeen) (emphasis in original).

abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.³¹⁵

The Appeals Chamber in *Vasiljevic* found that there was insufficient evidence that Vasiljevic shared an intent to commit genocide,³¹⁶ but the court concluded that he was nevertheless guilty of aiding and abetting murder.³¹⁷ The Appeals Chamber was faced with a rather clear-cut set of facts with which to find support that Vasiljevic criminally facilitated murder:

The Appeals Chamber has already found that the Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber believes that the only reasonable inference available on the totality of evidence is that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant's actions had a "substantial effect upon the perpetration of the crime."³¹⁸

Thus, this is an example of assistance that comprises "substantial effect" in an aiding and abetting case. Even if Vasiljevic played a supporting role, his containment of the victims was a direct contribution to the crime.

In *Prosecutor v. Krstić*, the Appeals Chamber again distinguished between joint criminal enterprise and aiding and abetting. Radislav Krstić was an officer in the Bosnian Serb Army, the VRS,³¹⁹ and he assumed command of the Drina Corps of the VRS in July 1995.³²⁰ Krstić was sentenced to forty-six years' confinement by the ICTY Trial Chamber, which had convicted him of genocide, murder, persecution through murders, cruel and inhumane treatment, and other war crimes and crimes against humanity.³²¹ One of Krstić's convictions was

³¹⁵ *Prosecutor v. Vasiljevic*, Appeals Judgment, Case No. IT-98-32-A, Feb. 23, 2004, para. 102.

³¹⁶ *Id.*, para. 131.

³¹⁷ *Id.*, para. 136.

³¹⁸ *Id.*, para. 135 (citing *Tadic* Appeals Judgement, para. 229).

³¹⁹ *Prosecutor v. Krstić*, Appeals Judgment, Case No. IT-98-33-A, Apr. 19, 2004, para. 3.

³²⁰ *Id.*, para. 45.

³²¹ *Id.*, para. 3.

based on the conclusion of the Trial Chamber that Krstić was part of a joint criminal enterprise to commit genocide.³²²

The Appeals Chamber had set aside some findings of the trial chamber that pointed to direct participation by Krstić in a joint criminal enterprise to commit genocide and to specific intent on his part to commit genocide.³²³ The Appeals Chamber summed up the now changed case against him, noting that even without the direct participation, the “evidence can establish . . . Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings.”³²⁴ Therefore, the Appeals Chamber did not uphold Krstić’s conviction for taking part in a joint criminal enterprise but instead found him guilty of aiding and abetting genocide.³²⁵

One final example of aiding and abetting comes from an ICTR case. *Prosecutor v. Rutaganda*, decided by the ICTR trial chamber in 1999, contains a classic example of aiding by providing the means or instrumentality to commit an offense. The evidence showed that Rutaganda thrice supplied guns for killing Tutsis. On the first occasion, he distributed both guns and machetes he had brought in his pick-up truck and noted that “there was a lot of dirt that needed to be cleaned up.”³²⁶ The trial chamber determined that Rutaganda aided the killing of and the causing of serious bodily harm to various Tutsis.³²⁷

V. COMPARISON OF THE LAW DEVELOPED BY POST-WORLD WAR II TRIBUNALS AND THE LAW OF THE AD HOC U.N. TRIBUNALS

There are a number of important legal principles that were established or reiterated in the post-World War II tribunals. A critical principle that was established was that civilians (including corporate officials) could be held individually responsible for war crimes and crimes against humanity. These tribunals also established a number of principles regarding individual responsibility, particularly as to business officials.

First, personal guilt was generally dependent upon personal knowledge. The tribunals refused to impute knowledge of criminal activity to all officials of a company. A person must have actual knowledge of another’s crime to be held guilty for assisting that crime; having the facts with which to deduce that a crime is being or will be committed is not enough. For example, Hjalmer Schacht avoided criminal liability for Hitler’s wars of aggression, even though he held a significant government post, because he wasn’t privy to Hitler’s plans. On the

³²² *Id.*, para. 79.

³²³ *Id.*, paras. 80-134.

³²⁴ *Id.*, para. 134.

³²⁵ *Id.*, para. 143.

³²⁶ *Prosecutor v. Rutaganda*, Judgment and Sentence, Case No. ICTR-96-3-T, Dec. 6, 1999, para. 385.

³²⁷ *Id.*, para. 386.

other hand, in certain concentration camps, knowledge of crimes was unavoidable for all who ran the camp, even the lowest-level guard because the abuses were widespread, open and notorious. Similarly, in the *Zyklon B* case, the tribunal held that a competent business official in a key leadership post will have knowledge of the activities under his direction.

The *Zyklon B* case also reveals a second important principle—that a business official cannot escape liability for selling a multi-use product if that official had personal knowledge of the criminal purpose for which that multi-use product was used. The other side of that principle is that no matter how much one assisted a criminal, one cannot be liable without knowledge if that assistance could have been used for non-criminal purposes. For example, Schacht's efforts were central to rearmament (he helped provide the instrumentality of the wars of aggression), but in pre-war Germany, arms were dual-use products—they could be used both for aggression and for national defense.

A third principle is that a corporation is not liable for merely operating in a criminal system it finds itself in. If a corporation has no freedom of decision about a government policy (*i.e.*, they are penalized for not adhering to its mandates), and if they have taken no steps to expand on the criminal mandates of that policy, then the corporate officials may escape liability. The *Farben* case examined this idea in light of the crime of spoliation, determining that a company could not be convicted for apparently legal business transactions absent some positive knowledge that the other party to the transaction was concluding it against his will.

However, there are many instances of business officials going beyond mere participation in the system by taking advantage of and participating in ongoing crimes to commit crimes of their own. Awochi, for example, used the coercive power of Japanese occupation to force women into prostitution at his brothel. This individual responsibility also included acts that directly facilitated the criminal conduct of others. Similarly, Tesch and Weinbacher didn't kill the inmates at the concentration camps, but they knowingly made those crimes more "efficient" by supplying Zyklon B gas.

Because the current ad hoc tribunals, ICTY and ICTR, have not faced a corporate or business case, a comparison can only be made as to the general principles of individual responsibility that those tribunals have examined. The most important principle (at least for purposes of this paper) that both tribunals recognize is the requirement for direct and substantial assistance to sustain a conviction for aiding and abetting. There are other important points as well, such as the *Tadić* trial chamber's determination that a person can be held criminally liable for aiding and abetting by providing direct and substantial assistance *after* the crime has been committed. Like *Tadić*, who assisted a beating after the fact by throwing a prisoner back into his room and implying the prisoner's beating was punishment for talking to or touching a Serb, a corporate official could assist after the fact as well if a business transaction constituted direct and substantial assistance. The tribunals have also clarified the *mens rea* required for aiding and

abetting; it is an intent to aid another while knowing that the aid will assist the other person in the commission of a crime or while intending that the crime itself be committed.

VI. THE LAW APPLICABLE TO THE INTERNATIONAL CRIMINAL COURT (ICC)

The Rome Statute of the International Criminal Court³²⁸ is the extent of the law for the ICC since the ICC is still in its infancy and is without any court decisions to elaborate on the Rome Statute. Moreover, the law of the ICC is essentially static as no amendments may be made to the statute until seven years after its entry into force (July 1, 2002).³²⁹ What the statute reveals is that the ICC is a permanent court with its own legal personality, and the jurisdiction of the ICC is complementary to domestic criminal jurisdiction.³³⁰

The ICC may exercise jurisdiction if a state party or the U.N. Security Council refers a case to it or if the ICC prosecutor initiates the case.³³¹ However, the ICC can only exercise jurisdiction over crimes committed in the territory of, or by a national of, one of the states parties to the Rome Statute, but those limitations do not apply to cases referred to the ICC by the Security Council.³³² The ICC also cannot try a case if a state that has domestic jurisdiction is exercising, or has exercised, that jurisdiction to investigate and to consider prosecuting the case.³³³

The ICC has jurisdiction over only four classes of crimes: genocide, war crimes, crimes against humanity and the crime of aggression.³³⁴ Unlike previous international criminal tribunals,³³⁵ the ICC does provide a mechanism for the court to determine appropriate levels of reparations and to order persons convicted by

³²⁸ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.1839/9, "as corrected by the process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002." See content at <http://www.un.org/law/icc/statute/rome.htm> (last visited March 28, 2005).

³²⁹ *Id.*, art. 121.

³³⁰ *Id.*, arts. 1, 3.

³³¹ *Id.*, art. 13.

³³² *Id.*, art. 12(2). For potential limits on this worldwide jurisdiction, see Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 820-41 (2003).

³³³ Rome Statute of the International Criminal Court, July 17, 1998, art. 17, U.N. Doc. A/CONF.1839/9. There is an exception allowing the admissibility of the case if the state exercising domestic jurisdiction is genuinely unable or unwilling to carry out the investigation or prosecution. *Id.*, art. 17(1). Although the inability exception has clear application to a failed or failing state, the complete manner in which the unwillingness exception will be applied is unclear even if the Rome Statute does provide some guidance in Article 17(2).

³³⁴ *Id.*, art. 5.

³³⁵ Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, INT'L REV. OF THE RED CROSS, Sep. 2003, at 497, 523. Both the ICTY and ICTR statutes allow those tribunals to determine and order restitution of property only. *Id.*

the court to pay reparations to victims as a means of restitution, compensation or rehabilitation.³³⁶

The ICC operates under an agreed-upon set of general principles of criminal law that are generally the same as used by ICTY and ICTR. One of these is *nullum crimen sine lege*, which directs that no one may be held criminally responsible under the Rome Statute “unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”³³⁷ Further, for purposes of the ICC, it is criminal conduct for a person, “[f]or the purpose of facilitating the commission of [a crime within the jurisdiction of the Rome Statute], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”³³⁸ As to the *mens rea* required to commit an offense, one must have both knowledge and intent.³³⁹ One has knowledge when one is aware “that a circumstance exists or a consequence will occur in the ordinary course of events.”³⁴⁰ For the offense of aiding, abetting or assisting another crime, intent is present when the “person means to cause that consequence or is aware that it will occur in the ordinary course of events.”³⁴¹ Thus, in some circumstances knowledge subsumes intent—where one assists while aware that criminal conduct will occur in the ordinary course of events. This is similar to ICTY and ICTR decisions, with the caveat that ICTY and ICTR clarify the need for direct and substantial assistance.

Professor William A. Schabas has pointed out that the statute creating the ICC (the “Rome Statute”) does not specifically mention any degree of aiding or abetting required for conviction like the requirement in *Tadić* that participation must be direct and substantial.³⁴² Schabas also points out the absence of such a requirement may actually imply that there is no such requirement: “The absence of words like “substantially” in the Statute, and the failure to follow the International Law Commission draft, may imply that the Diplomatic Conference meant to reject the higher threshold of the recent case law of the Hague.”³⁴³ The counter argument to Schabas’ point is that neither the ICTR statute (in Article 6)

³³⁶ Rome Statute of the International Criminal Court, July 17, 1998, art. 75(1)-(2), U.N. Doc. A/CONF.1839/9.

³³⁷ *Id.*, art. 22(1).

³³⁸ *Id.*, art. 25(3)(c). The Statute of the Iraqi Special Tribunal created by the U.S.-led Coalition Provisional Authority has essentially identical language regarding individual criminal responsibility. A person tried by the tribunal may be found criminally responsible if he or she, “[f]or the purpose of facilitating the commission of [a] crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” Coalition Provisional Authority, the Statute of the Iraqi Special Tribunal, Dec. 10, 2003, 43 I.L.M. 231, 242 (2004).

³³⁹ Rome Statute of the International Criminal Court, July 17, 1998, art. 30(1), U.N. Doc. A/CONF.1839/9.

³⁴⁰ *Id.*, art. 30(3).

³⁴¹ *Id.*, art. 30(2)(b).

³⁴² William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, INT’L REV. OF THE RED CROSS, June 2001, at 439, 448.

³⁴³ *Id.*

nor the ICTY statute (in Article 7) includes language requiring direct and substantial assistance, yet those tribunals adopted it nonetheless.

VII. OTHER MEANS OF DETERRING COMMERCE WITH PERPETRATORS OF WAR CRIMES AND CRIMES AGAINST HUMANITY

A. Domestic Enforcement Mechanisms

1. Civil Liability Schemes

Criminal prosecution is certainly not the only way to try to deter corporations from facilitating violations of international humanitarian law. Victims of human rights violations may also try to hold corporations civilly accountable for their facilitation of crimes. What is beneficial about this method of deterrence is that the victims are highly motivated to hold corporations accountable. As Professor Craig Forcese points out, criminal prosecutions are dependent upon the impetus of a government—or a collection of governments—while civil actions against a corporation can provide a personal, individual remedy for victims of crimes in which that corporation may be complicit.³⁴⁴ It is very beneficial in certain circumstances for victims to be able to vindicate their rights without waiting on a politically unwilling or unable government, but in certain cases, like genocide, civil actions cannot speak for every victim.

In the United States, the Alien Tort Claims Act (ATCA)³⁴⁵ provides U.S. district courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or by a treaty of the United States.”³⁴⁶ In *Filartiga v. Pena-Irala*,³⁴⁷ the U.S. Court of Appeals for the Second Circuit held that ATCA opens “the federal courts for adjudication of the rights already recognized by international law,”³⁴⁸ at least as to “well-established, universally recognized norms of international law.”³⁴⁹ Two of the more recent ATCA cases that followed the Second Circuit’s decision in *Filartiga* are *Sinaltrainal v. Coca-Cola*³⁵⁰ and *Doe I v. Unocal*³⁵¹ Both cases allege that these

³⁴⁴ Craig Forcese, *Deterring “Militarized Commerce”: The Prospect of Liability for “Privatized” Human Rights Abuses*, 31 OTTAWA L. REV. 171, 201 (2000). See also Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, INT’L REV. OF THE RED CROSS, Sep. 2003, at 497, 523.

³⁴⁵ It is also known as the Alien Tort Statute. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, No. 03-339, slip op. at 1, 2004 U.S. LEXIS 4763 (June 29, 2004).

³⁴⁶ 28 U.S.C. § 1350 (2004).

³⁴⁷ 630 F.2d 876 (2d Cir. 1980).

³⁴⁸ *Id.* at 887.

³⁴⁹ *Id.* at 888.

³⁵⁰ 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

³⁵¹ 110 F. Supp. 2d 1294 (C.D. Cal 2002). This case was vacated in hearing *en banc* 395 F.3d 978 (9th Cir. 2003).

corporations' overseas operations benefited from human rights abuses committed in Columbia (as to Coca-Cola) and in Burma (as to Unocal). In *Doe I v. Unocal*, the district court held, in granting Unocal's motion for summary judgment, that Unocal could only be held liable for *active* participation of the human rights abuses in its host country, not for its mere knowledge and acceptance of the benefits of forced labor.³⁵² The *Sinaltrainal* court followed this reasoning in granting summary judgment for Coca-Cola as well.³⁵³ Thus, these courts reflect a hesitancy similar to that of the tribunals following World War II, a hesitancy to hold a corporation or its officials liable unless they took special advantage of, or increase, the abuses in order to increase profits. Yet, the civil liability mechanism is nonetheless there—in a limited fashion—to deter the more egregious cases where corporations are actively engaged in human rights abuses.

The limits of ATCA were further explained by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*.³⁵⁴ The Supreme Court held “that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”³⁵⁵ Similarly, in the Supreme Court's view, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”³⁵⁶ The Court did hold out the possibility that federal courts can discern newly developed norms of international law, the violation of which may be the basis for a suit under ATCA,³⁵⁷ but noted that it would be best for Congress to provide guidance on jurisdiction and that Congress could, if it chooses, to limit further bases for suit at any time.³⁵⁸

However, whatever remains of the promise of *Filartiga* and its progeny, “ATCA plaintiffs face a long haul from filing a claim to actually collecting on a judgment.”³⁵⁹ Even if ATCA plaintiffs successfully complete that long haul, they may never see any money as experience has shown that collection is difficult.³⁶⁰ However, this failing may be irrelevant to the plaintiff who seeks to hold another responsible for human rights violations.³⁶¹

³⁵² 110 F. Supp. 2d at 1310.

³⁵³ 256 F. Supp. 2d at 1355.

³⁵⁴ 124 S. Ct. 2739 (2004).

³⁵⁵ *Id.* at 2754 .

³⁵⁶ *Id.* at 2762.

³⁵⁷ *Id.* at 2764 (“[J]udicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”).

³⁵⁸ *Id.* at 2765

³⁵⁹ Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 261 (2004).

³⁶⁰ Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 9-11*, 36 GEO. WASH. INT'L L. REV. 1, 25 (2004).

³⁶¹ *Id.*

The difficulty in civil suits litigated in U.S. courts is not unique. Most private claims—worldwide—have failed, with the grounds for failure falling into three primary categories: “individual claims were precluded by a peace agreement; sovereign immunity; or the non-self-executing nature of the right to reparations under international law.”³⁶² Professor Beth Stevens argues that, while there has been some success in the United States in lawsuits alleging human rights abuses abroad, only international regulation and enforcement can regulate corporations that are themselves international in character.³⁶³

2. *Regulatory and Statutory Prohibitions in the United States*

Although there may be a number of schemes elsewhere in the world that may be worthy of study, the United States’ efforts at using its domestic law to combat human rights violations may be the most important. Because the United States is a world economic and military superpower,³⁶⁴ its efforts are most especially worthy of study because those efforts have the potential for the greatest world impact. Although the latter-day efforts of the United States are more comprehensive, the United States has for a long time used trade bans and other economic tools to advance foreign policy goals. For example, in *United States v. Curtiss-Wright Corporation*, the United States Supreme Court upheld a corporation’s conviction for trading with Bolivia, one of the belligerents in the war in the Chaco region of South America; this trading was made criminal by the President using power delegated by Congress to impose such a ban on trade if he believed the imposition of the ban would “contribute to the reestablishment of peace.”³⁶⁵ This sort of Presidential power has since become more structured and is now a standing power under International Emergency Economic Powers Act.

³⁶² Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, INT’L REV. OF THE RED CROSS, June 2001, at 529, 537.

³⁶³ Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 90 (2002).

³⁶⁴ The Central Intelligence Agency World Fact Book describes the United States as the world’s “leading industrial power” with an economy that is “the largest and most technologically powerful” in the world. U.S. Central Intelligence Agency, *The World Factbook 2004*, Country Profile: The United States, available at <http://www.cia.gov/cia/publications/factbook/geos/us.html> (last visited March 27, 2005). The United States also holds a seat on the U.N. Security Council, see U.N. CHARTER art. 23, and is seen, with its powerful economy and formidable military forces as the world’s strongest power, no longer just a superpower but now a “hyperpower.” Michael Mandelbaum, *The Inadequacy of American Power*, FOREIGN AFF., Sept.-Oct. 2002, at 61, 61.

³⁶⁵ 299 U.S. 304, 312 (1936) Questioned: validity questioned by citing references.

a. *International Emergency Economic Powers Act (IEEPA)*³⁶⁶

Under IEEPA, Congress provided the President with the authority to impose certain economic sanctions³⁶⁷ when the President declares a national emergency due to “any unusual and extraordinary [foreign] threat . . . to the national security, foreign policy, or economy of the United States.”³⁶⁸ The sanctions the President may impose include the regulation or ban of “transactions in foreign exchange,” “transfers of credit,” and “the importing or exporting of currency or securities.”³⁶⁹ The President may further impose restrictions on U.S. property “in which any foreign country or a national thereof has any interest.”³⁷⁰ Anyone violating restrictions imposed pursuant to IEEPA may be fined up to \$10,000, and anyone who willfully violates IEEPA restrictions is subject to criminal prosecution and a maximum of ten years’ imprisonment and a fine of not more than \$50,000.³⁷¹ Significantly, IEEPA specifies that corporate officers, directors and agents who knowingly participate in an IEEPA violation may be punished for the acts of their corporations.³⁷²

Although various Presidents have used IEEPA in the past to counter significant security threats such as terrorism and nuclear proliferation,³⁷³ IEEPA has been used to attempt to influence certain human rights violations to the extent that they affect the foreign policy of the United States (as IEEPA requires). Past efforts include the blocking of property controlled by persons “undermin[ing] Zimbabwe’s democratic processes or institutions,”³⁷⁴ blocking the property of the Burmese government and prohibiting certain commercial transactions with Burma,³⁷⁵ and blocking Sudanese government property and prohibiting most transactions with Sudan.³⁷⁶

In certain cases, U.S. efforts under IEEPA are bolstered by additional Congressional legislation. For example, Congress passed the Sudan Peace Act in 2002, which mandated Presidential action if the Sudanese was not moving

³⁶⁶ 50 U.S.C. §§ 1701-1707 (2004).

³⁶⁷ 50 U.S.C. § 1702 (2004).

³⁶⁸ 50 U.S.C. § 1701 (2004).

³⁶⁹ 50 U.S.C. § 1702(a)(1)(A) (2004).

³⁷⁰ 50 U.S.C. § 1702(a)(1)(B) (2004). When the United States has been attacked or is engaged in armed hostilities, the President also has the power to confiscate certain property. 50 U.S.C. § 1702(a)(1)(C) (2004).

³⁷¹ 50 U.S.C. § 1705 (2004).

³⁷² 50 U.S.C. § 1705(b) (2004).

³⁷³ See, e.g., Exec. Order No. 13159, 65 Fed. Reg. 39,279 (June 21, 2000) (blocking property of the government of the Russian Federation relating to the disposition of highly enriched uranium extracted from nuclear weapons).

³⁷⁴ See Exec. Order No. 13288, 68 Fed. Reg. 11,457 (Mar. 6, 2003).

³⁷⁵ Exec. Order No. 13310, 68 Fed. Reg. 44,853 (July 28, 2003). This included a ban on all Burmese imports. *Id.*, §3.

³⁷⁶ Exec. Order No. 13067, 62 Fed. Reg. 59,989 (Nov. 3, 1997).

towards a peaceful resolution to the civil war.³⁷⁷ The Sudan Peace Act included a Congressional finding that the government of Sudan had committed genocide and a finding that the Sudan government would use sales of oil to finance continued military action to regain control of Sudanese territory, the same military action that led to genocide.³⁷⁸ Congress also passed the Burmese Freedom and Democracy Act of 2003, which recounted the ethnic cleansing and other human rights abuses of the Burmese military government and banned all trade that would support the military regime in Burma.³⁷⁹ Thus, in these circumstances, Congress allowed or created criminal sanctions for what would otherwise be ordinary corporate trade.

This redoubling of efforts also occurred with respect of the former Yugoslavia in 1992 and 1993, as the bloodshed occurred in the former Yugoslavia, the President exercised his powers under IEEPA to impose sanctions on Yugoslavia and on Serbia and Montenegro individually.³⁸⁰ Then, Congress passed an act imposing further sanctions against Serbia and Montenegro in November 1993.³⁸¹

IEEPA has also been used to combat the trade in “blood diamonds” (or “conflict diamonds”) from Africa. In July 2000, the U.N. Security Council called for a ban on uncertified rough diamonds, asking states parties to take “necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory.”³⁸² The resolution of the Security Council also called for a scheme by which non-contraband diamonds certified by the government of Sierra Leone would be exempt from the ban.³⁸³ The Kimberley Process Certification Scheme was thus created to stop the trade in conflict diamonds and to ensure consumers that the diamonds that they purchase have not contributed to violent conflict and human rights abuses in their countries of origin.³⁸⁴ By itself, it is a “voluntary system of industry self-regulation.”³⁸⁵ However non-binding it may be, the Kimberley Process Certification Scheme was welcomed and strongly supported by the U.N. Security Council, which encouraged all member states to participate in the process.³⁸⁶

³⁷⁷ Pub. L. No. 107-245, 116 Stat. 1504, § 6 (2002).

³⁷⁸ *Id.*, § 2. Congress further directed the Secretary of State to collect information on war crimes, genocide, and other violations of international humanitarian law. *Id.*, §11.

³⁷⁹ Pub. L. No. 108-61, 117 Stat. 864, §§ 2-3 (2003).

³⁸⁰ See Exec. Order No. 12808, 57 Fed. Reg. 23,299 (May 30, 1992), and Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (June 5, 1992).

³⁸¹ Pub. L. No. 103-160, §1511, 107 Stat. 1839 (1993).

³⁸² S.C. Res. 1306, U.N. SCOR, 55th Sess., 4168th mtg. at 2, U.N. Doc. S/RES/1306 (2000).

³⁸³ *Id.*

³⁸⁴ Alan Cowell, *40 Nations in Accord on “Conflict Diamonds,”* N.Y. TIMES, Nov. 6, 2002, at A6; see also www.kimberleyprocess.com. There have been recent assertions that the Kimberley Process is ineffective. Nicol Degli Innocenti, *Retailers Face Flak Over “Blood Diamonds,”* FIN. TIMES, Mar. 30, 2004, at 1.

³⁸⁵ U.N. GAOR, 57th Sess., Agenda Item 27, annex 2, at 6, U.N. Doc. A/57/489.

³⁸⁶ S.C. Res. 1459, U.N. SCOR, 58th Sess., 4694th mtg. at 2, U.N. Doc. S/RES/1459 (2003).

In January 2001, the President banned trade in rough diamonds from Sierra Leone, citing concerns that trade in rough diamonds was “fueling the conflict in Sierra Leone.”³⁸⁷ The ban did not apply to rough diamonds cleared by the United Nations-sanctioned Kimberley Process Certification Scheme.³⁸⁸ The President then expanded the ban to rough diamonds from Liberia, citing the Liberian government’s complicity in the illegal diamond trade from Sierra Leone.³⁸⁹ Similar to earlier responses to human rights crises abroad, again Congress bolstered the effects of IEEPA, this time by passing the Clean Diamond Trade Act in 2003.³⁹⁰

b. Clean Diamond Trade Act

Under the Clean Diamond Trade Act, Congress instructed the President to ban “the importation into, or exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme,” while allowing the President to waive the ban if he determines a waiver is in U.S. national interests.³⁹¹ When Congress passed the Clean Diamond Trade Act, it made a number of findings. Among them was that

Funds derived from the sale of rough diamonds are being used by rebels and state actors to finance military activities, overthrow legitimate governments, subvert international efforts to promote peace and stability, and commit horrifying atrocities against unarmed civilians. During the past decade, more than 6,500,000 people from Sierra Leone, Angola, and the Democratic Republic of the Congo have been driven from their homes by wars waged in large part for control of diamond mining areas.³⁹²

In July 2003, President George W. Bush signed an executive order that implemented the Clean Diamond Trade Act and strengthened previous presidential bans (under IEEPA) on rough diamonds from Sierra Leone and Liberia.³⁹³ The President, in the July 2003 executive order, banned trade, attempted trade, and conspiracy to trade in rough diamonds that had not been cleared through the Kimberley Process Certification Scheme.³⁹⁴

³⁸⁷ Exec. Order 13194, 66 Fed. Reg. 7389 (Jan. 18, 2001).

³⁸⁸ *Id.*, § 2.

³⁸⁹ Exec. Order 13213, 66 Fed. Reg. 28,829 (May 22, 2001).

³⁹⁰ 19 U.S.C. §§ 3901-13 (2004).

³⁹¹ 19 U.S.C. § 3903 (2004).

³⁹² 19 U.S.C. § 3901 (2004).

³⁹³ Exec. Order No. 1,312, 68 Fed. Reg. 45,151 (July 29, 2003) (citing Exec. Order 13194, 66 Fed. Reg. 7389 (Jan. 18, 2001) and Exec. Order 13213, 66 Fed. Reg. 28,829 (May 22, 2001)).

³⁹⁴ Exec. Order No. 13312, 68 Fed. Reg. 45,151 (July 29, 2003).

3. *Evaluating the Success of Domestic Enforcement Schemes*

Because international humanitarian law is seen as a part of public international law, which applies to states rather than individuals, individuals often cannot take advantage of international law as private litigants in domestic courts.³⁹⁵ As a whole, states have eschewed applying international law in domestic courts, even if there is some promise in U.S. and Dutch courts.³⁹⁶ Further, there is uneven enforcement among states and perhaps no enforcement in failed states.³⁹⁷ Professor Stephens argues that “[m]ultinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law’s ability to impose basic human rights norms.”³⁹⁸ She notes that “host state enforcement has seemingly clear advantages, because it permits local control over local events,” but that those advantages may be uneven or inconsistent, even in the United States, and that they disappear “if the host government is complicit in the human rights abuses.”³⁹⁹ Thus, with the lack of fully effective domestic schemes, it is important to consider what international schemes can help counter violations of international humanitarian law.

B. International Enforcement Mechanisms

Certain international fora, such as claims commissions, have been successful in providing compensation for violations of international humanitarian law.⁴⁰⁰ However, because these fora are usually created by treaty and don’t explicitly concern themselves with violations of international humanitarian law,⁴⁰¹ they fail to show widespread promise as they are haphazard at righting wrongs and are generally only in existence due to the impetus of the states involved. Although there is some criticism of international mechanisms,⁴⁰² there are some advantages. The ad hoc tribunals for Rwanda and the former Yugoslavia, for

³⁹⁵ See Zegveld, *supra* note 335, at 507.

³⁹⁶ *Id.* at 512.

³⁹⁷ By definition, law and order holds no sway in failed states. See Daniel Thürer, *The "Failed State" and International Law*, INT’L REV. OF THE RED CROSS, Dec. 1999, at 731, 731.

³⁹⁸ Stephens, *supra* note 363, at 54. She notes, “General Motors, for example, is larger than the national economies of all but seven countries.” *Id.* at 57.

³⁹⁹ *Id.* at 82-85.

⁴⁰⁰ Gillard, *supra* note 362, at 539.

⁴⁰¹ *Id.* at 539-40. The United Nations Compensation Commission, which handles compensation claims resulting from the Iraqi invasion of Kuwait, is an example of a body not created by treaty but rather by the U.N. Security Council. *Id.* at 540-41.

⁴⁰² See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 60 (1997) (arguing that ad hoc tribunals raise questions of fairness and of victors’ vengeance and that ad hoc tribunals “generally do not provide equal treatment to individuals in similar circumstances who commit similar violations”).

example, have the support of the U.N. Security Council and states parties in the investigation and prosecution of cases.⁴⁰³ Because of this political and financial support, they have the potential for great success, at least within their respective bailiwicks.

1. The Special Court for Sierra Leone

The Special Court for Sierra Leone was created in a process that differed from that of ICTY and ICTR. The U.N. Security Council requested that the U.N. Secretary-General negotiate with the government of Sierra Leone to create a court to prosecute crimes against humanity, war crimes, “other serious violations of international law,” and violations of “relevant Sierra Leonean law.”⁴⁰⁴

This showed a marked divergence from the approach taken in establishing the ICTY and ICTR, where the governments of the territorial States were not involved in the tribunals’ creation, and where the Statutes were drafted by the UN Secretariat and adopted by the Security Council. The manner of the Special Court’s creation is directly related to its funding. There was no political support for setting up another, very expensive, international criminal tribunal, and the Court could be established only with the full support and cooperation of Sierra Leone, which, in any event, wanted a mixed tribunal with national and international components. It is thus a *sui generis* Special Court, not so much because this was necessarily the best or most effective approach to take in the particular circumstances of Sierra Leone, but because it was the only politically acceptable option.⁴⁰⁵

Even if the Special Court for Sierra Leone is not the most effective approach, it is a circumstance where the international community may be appreciative for having something rather than nothing. The bigger concern may be in deterring future conduct.

2. The Role of the U.N. Security Council

The only international body that has the sort of authority needed to put the world on notice of a group’s or government’s criminality is the U.N. Security Council. Even if the world is not wholeheartedly behind its every move, it is a deliberative body that no one party can control. With its five permanent veto-wielding members, consensus is difficult in some respects, but that has its advantages and disadvantages. It may be unable at times to act to stop crimes

⁴⁰³ E.g., ICTR Statute, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 28, at 14, UN Doc. S/INF/50 (1994).

⁴⁰⁴ S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg. at 2 (2000).

⁴⁰⁵ Avril McDonald, *Sierra Leone’s Shoestring Special Court*, INT’L REV. OF THE RED CROSS, Mar. 2002, at 121, 124.

against humanity, and it may seem to move slow and deliberately. But that slowness will also avoid wrongfully labeling a state or group as criminal.

There is criticism of the Security Council concerning its limited representation and its occasional ineffectiveness. As to effectiveness, it appears better at some tasks than others and is not usually effective when involved in places where conditions have deteriorated so much that U.N. peacekeepers are given early authority to use force.⁴⁰⁶ Concerning the politics of the Security Council, one commentator observed, “I am concerned about the selectivity involved in a system where the establishment of a tribunal for a given conflict situation depends on whether consensus to apply chapter VII of the UN Charter can be obtained.”⁴⁰⁷ Yet, the Security Council does have the authority to intervene, even in internal armed conflicts, to prevent further humanitarian crises,⁴⁰⁸ and thus it has power to effect change even if it has trouble at times wielding it.

With Rwanda and the former Yugoslavia, the collective security system was unable to effectively stop many atrocities. This may be in part due to the difficulty of getting the Security Council involved in an enforcement action under Chapter VII or with providing a peacekeeping force substantial enough to prevent mass atrocities.⁴⁰⁹ With another lesser form of action at its disposal—making it a crime to trade in certain items or with certain groups or countries—the Security Council may not be as paralyzed when faced with ongoing mass atrocities.⁴¹⁰ Consensus may actually be easier to come by since a determination that trade is facilitating crime does not require funds or troops.

Because the Security Council can create ad hoc courts and because it can refer cases to the ICC, it stands in an unequaled position from which to effect change. Arguably, the purchase of blood diamonds cannot be made a basis for ICC prosecution until the Rome Statute is amended, which is something that the statute itself doesn’t allow for the first seven years. On the one hand, aiding and abetting is already a proper basis for prosecution, and the determination of the Security Council would merely put corporations on notice of someone else’s

⁴⁰⁶ Erik Suy, *Is the United Nations Security Council Still Relevant? And Was it Ever?*, 12 TUL. J. INT’L & COMP. L. 7, 22 (2004).

⁴⁰⁷ Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 555 (1995).

⁴⁰⁸ Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 61-62 (2002) (citing U.N. Charter art. 39).

⁴⁰⁹ Joseph Keeler has observed “six basic factors that delayed and weakened the U.N.’s intervention” in the genocides in Rwanda and Bosnia. They include the “personal interests of the members of the Security Council”; “disinterest of the members of the Security Council”; “aversion to intervene in internal matters of a sovereign state”; “belief that the groups were reciprocating deeply engrained hatred or prior genocidal acts”; “desire to end the conflict peacefully as a ‘neutral’ intermediary”; and “inadequate funding.” Joseph A. Keeler, *Genocide: Prevention through Nonmilitary Measures*, 171 MIL. L. REV. 135, 172-76 (2002).

⁴¹⁰ Keeler has proposed a system to identify genocide early and prevent before it transforms from small-scale to large-scale genocide. He proposes modifying the Genocide Convention by creating an “early warning system.” *Id.* at 179.

criminality. Thus, instead of referring a particular case to the ICC under Article 13 of the Rome Statute, the Security Council would give notice of a class of cases it might refer to the ICC or to an ad hoc tribunal.

But on the other hand, one can argue that aiding or abetting by purchasing is not a crime, even with the notice of criminality given by the Security Council. If so, once the initial seven-year period has passed, the Rome Statute could be amended to allow prosecutions for facilitation of crimes when the Security Council has determined that trading with a person or entity provides them the means to commit crimes. Such a change to the Rome Statute would only affect the states parties to that statute, however.

Yet, it is nonetheless possible that the U.N. Security Council could effect worldwide change. Professor Kenneth Gallant argues that the United Nations, acting through its Security Council, has the authority to prescribe international criminal law.⁴¹¹ The Security Council, he argues, has done so when it created the Rwandan and Yugoslav tribunals and set out the crimes over which they have jurisdiction.⁴¹² The basis for the Security Council's power in this regard comes from its duty to achieve international peace and security under Chapter VII, a power that is, however, limited by the need to "choose substantive international criminal law from a source with international law legitimacy."⁴¹³

Professor Gallant sees further power to prescribe in the Rome Statute since "the referral scheme of the ICC Statute regularizes the exercise of the Security Council's jurisdiction to prescribe that a certain court shall have jurisdiction to adjudicate cases arising from a given situation."⁴¹⁴ He also argues that the ICC has prescriptive authority, at least as limited to the states parties to the Rome Statute, not to define new crimes but to elaborate on the crimes set out by the states parties.⁴¹⁵ Professor Gallant argues that his assertions arise "from traditional notions of jurisdiction in international law" because these international organizations were created under traditional sources of international law—treaties and customary—created agreement or by practice of the various states, states that also connect "the prescribing authority and those individuals for whom acts are proscribed."⁴¹⁶

Professor Gallant also notes that the Security Council has since "burst the bonds it appeared to impose on itself in creating the ad hoc tribunals."⁴¹⁷ Whereas those tribunals were created to adjudicate cases based on existing international law, the Security Council has since mandated that states ensure that their domestic

⁴¹¹ Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 783-84 (2003).

⁴¹² *Id.* at 784.

⁴¹³ *Id.* As noted earlier, this power of the Security Council is global. See Rome Statute of the International Criminal Court, July 17, 1998, arts. 12 & 13, U.N. Doc. A/CONF.183/9.

⁴¹⁴ Gallant, *supra* note 411, at 790.

⁴¹⁵ *Id.* at 790-91.

⁴¹⁶ *Id.* at 791-92.

⁴¹⁷ *Id.* at 793-94 (citing S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001)).

law criminally punishes terrorism and willful funding of terrorism. Even if the Security Council did not require states to punish terrorism in a uniform manner, “the Security Council acted as though it does have legislative authority to create criminal law, if the creation of that law would lead to restoration of international peace and security.”⁴¹⁸ Professor Lois Felding has similarly concluded that “not only are Security Council decisions binding as to the current meaning of ‘threats to peace, breaches of peace, and acts of aggression,’ but they also affect how to determine certain matters within the domestic jurisdiction of the state.”⁴¹⁹ The mandate on states to ban terrorism and funding of terrorism is but one example. The Security Council’s *decision* “that all States *shall take* the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory” is another.⁴²⁰

⁴¹⁸ *Id.* at 794.

⁴¹⁹ Lois Felding, *Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, 73 U. DET. MERCY. L. REV. 551, 559-60 (1996).

⁴²⁰ See S.C. Res. 1306, U.N. SCOR, 55th Sess., 4168th mtg. at 2, U.N. Doc. S/RES/1306 (2000) (emphasis added). Resolution 1373, which is the resolution concerning terrorism that Professor Gallant cited, uses similar language and has rather detailed dictates:

[The Security Council] *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful [*sic*] provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

C. International and Domestic Enforcement Mechanisms Working Together

Given the limitations of both domestic and international enforcement mechanisms, it certainly makes sense to use both in a complementary fashion. Neither is fully effective, and both can help deter facilitation of crimes in their own way. Yet, international efforts are widespread and have more potential for being effective. International criminal prosecution is just one method to deter potential corporate facilitation of crimes. How effective is it?

VIII. THE KNOWLEDGE REQUIREMENT AND THE NEED FOR NOTICE

In order for any law to have a deterrent effect, the persons at whom it is aimed must know its general proscriptions. Corporate officials will not stop doing what they have previously viewed as legitimate business transactions unless they know the transactions are prohibited. They may believe it is the job of the political process to determine what acts are criminal and who they cannot trade with. In other words, they may ask, “Who are we to judge? After all, isn’t one person’s terrorist another person’s freedom fighter?” Because all persons, natural or corporate, rely on the political process to make the determination of who is “bad”, criminal prosecution should rest only on clearly-defined prohibitions.⁴²¹

Examples of laws making certain types of ordinary transactions illegal can be found in the United States. As Professor Steven Ratner has pointed out, there are laws such as the U.S. Racketeer Influenced and Corrupt Organizations (RICO)

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001) (emphasis in original).

⁴²¹ Or, as the U.S. Supreme Court has observed, “We should not derive criminal outlawry from some ambiguous implication.” *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952).

Act that criminalize financing of criminal enterprises.⁴²² There are also other U.S. laws regulating monetary transactions focusing on specific types of money transactions.⁴²³ However, those are specific statutory provisions (derived from the political process) rather than general principles of criminal law.

Professor Robert Weisberg has explained that the drafters of the Model Penal Code rejected a *mens rea* for complicity that seems much like the ICTY and ICTR formulations: one could be found complicit if one substantially facilitated a crime, knowing that another person was committing or would be committing that crime.⁴²⁴ Instead, the Model Penal Code requires that a person have “the purpose or promoting or facilitating the commission of the offense.”⁴²⁵ One of the reasons given by the drafters was that the reach of the law could reach unintended actors, such as “lessors of property or vendors of multi-purpose goods.”⁴²⁶ Weisberg cites *People v. Beeman*, a 1984 California Supreme Court case that required that an aider or abettor act with the intent to facilitate or encourage the commission of the crime, as an example of a case that follows the Model Penal Code approach.⁴²⁷ But Weisberg argues that the Model Penal Code formulation has “not kept up with . . . the most notable . . . developments concerning complicity law.”⁴²⁸ For an example of a different approach, he cites New York statutes on criminal facilitation, which criminalize providing “means or opportunity for the commission” of a crime when one “believ[es] it probable that he is rendering aid . . . to a person who intends to commit a crime.”⁴²⁹ Yet, even that statute will not allow a conviction if the state relies on the actual perpetrator of the offense for proof absent corroboration “by such other evidence as tends to connect the defendant with such facilitation.”⁴³⁰

Professor Schabas notes that “knowledge that the person or persons being assisted by the accomplice are actually committing international crimes is a *sine qua non* for criminal liability” and that knowledge may be particularly hard to prove in a domestic criminal court because the criminal probably is not committing crimes in an open, notorious or widespread fashion.⁴³¹ For Schabas, however, this difficulty should not present itself as often in prosecutions under

⁴²² Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 529 (2001) (citing a portion of the RICO statute, 18 U.S.C. § 1961-62).

⁴²³ E.g., 18 U.S.C. § 1957 (2004) (prohibiting engaging in monetary transactions in property derived from specified unlawful activity) and § 2314 (2004) (prohibiting the transfer of stolen money).

⁴²⁴ Robert Weisberg, *The Model Penal Code Revisited: Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 237-38 (2000).

⁴²⁵ *Id.* at 233 (citing Model Penal Code § 2.06(3)).

⁴²⁶ *Id.* at 238.

⁴²⁷ *Id.* at 241-43 (discussing *People v. Beeman*, 674 P.2d 1318 (Cal. 1984)).

⁴²⁸ *Id.* at 236.

⁴²⁹ *Id.* at 262-64 (citing N.Y. Penal Law §§ 115.00, 115.01, 115.05, 115.08 (McKinney 1998)).

⁴³⁰ *Id.* at 264 n.107 (2000) (citing N.Y. Penal Law § 115.15 (McKinney 1998)).

⁴³¹ William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, Int'l Rev. of the Red Cross, June 2001, at 439, 450.

international humanitarian law because “establishing knowledge of the end use should generally be less difficult because of the scale and nature of the assistance.”

For Schabas, notice can be provided by “intense publicity about war crimes and other atrocities,” whether by the media, by organs of the United Nations or by various international non-governmental organizations (NGOs).⁴³² Professor Ratner makes a similar point with regard to blood diamonds: “The notoriety of the RUF’s [Revolutionary United Front’s] atrocities—especially amputations of the limbs of innocent civilians—suggests, as a prima facie matter, that the diamond companies that knew they were trading with the RUF also knew of their abuses.”⁴³³ He goes on to comment on the potential for criminal liability for diamond purchases: “As to whether purchasing of diamonds constitutes material assistance to the group rising to the level of aiding and abetting, one can lean in favor of a positive answer as it seems that the RUF depended heavily upon the diamonds as a source of income.”⁴³⁴

The problem with this solution is that the media is often wrong⁴³⁵ or can be played for effect by one political side or another. Even the most serious assertions by top leaders in a government can be wrong.⁴³⁶ Beyond that, there is also the problem of the slippery slope. Some may believe the Israeli government—due to their treatment of the Palestinians—is akin to the RUF. One can easily imagine the global defense contractors that would be seen then as criminal facilitators potentially open to prosecution. This proposal begs many questions. What level of notoriety is sufficient? How heavily must a criminal depend upon income supplied by the facilitator for the facilitator to be criminally liable? More importantly, who makes these determinations? Hopefully they are not made by a court *post hoc*. NGOs are not seen as authoritative either not only due to their lack of power (of the official sort) but also because they are perceived as having an agenda. The one NGO that has considerable status, influence, and the “right of initiative” to investigate human rights abuses is the International Committee of the Red Cross (ICRC).⁴³⁷ Yet, even the ICRC does not speak for

⁴³² *Id.* at 450-51.

⁴³³ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L. J.* 443, 528 (2001).

⁴³⁴ *Id.* at 529.

⁴³⁵ See, e.g., David Bianculli, *Rush to Judgment: Media Focus on Bomb Suspect is a Crime*, FT. WORTH STAR TELEGRAM, Aug. 2, 1996, at 12 (discussing the media labeling of Richard Jewell as the likely Olympic Park bomber).

⁴³⁶ See, e.g., Warren P. Strobel, *Powell Admits Weapons In Doubt; Stance Less Defiant Than White House’s*, CHARLOTTE OBSERVER, Jan. 25, 2004, at 1A (“U.S. Secretary of State Colin Powell acknowledged Saturday that former Iraqi President Saddam Hussein might not have had the massive weapons stockpiles the Bush administration used to justify a war against him.”).

⁴³⁷ Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 *MIL. L. REV.* 1, 63 (2002) (citing Herman Salinas Burgos, *The Application of International Humanitarian Law as Compared to Human Rights Law in Situations Qualified as Internal Armed Conflict, Internal Disturbances and Tensions, or Public Emergency, with Special*

the international community or for states in an area where traditional notions of sovereignty come into play.

IX. POTENTIAL FOR POSITIVE IMPACT: CAN THE THREAT OF CRIMINAL PROSECUTIONS OF CORPORATE OFFICIALS CURTAIL VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW?

Preventing corporate facilitation of human rights abuses and crimes not only is a morally worthy cause but also is a matter of need. As Professor Ratner points out, “Corporations are powerful global actors that some states lack the resources or will to control.”⁴³⁸ Thus, where corporations do business with persons committing serious international crimes, the threat of prosecution can be another arrow in the quiver of deterrence. Yet, that deterrence may not be effective in every situation.

During the Rwandan genocide in 1994, at the very least hundreds of thousands of people were killed, mainly ethnic Tutsis at the hands of the Hutu government.⁴³⁹ The genocide began when the Rwandan president’s plane was shot down and core members of his “pseudo-party” began a coup that included the launch of “a planned, coordinated, directed, controlled attack” to commit genocide.⁴⁴⁰ Eventually larger segments of the Hutu population joined in the genocide, leading outside observers to seek to understand why the population participated.⁴⁴¹ Theories as to why genocide occurred in Rwanda generally blame poverty, competition for scarce land, and a successful propaganda campaign by the leaders of the genocide that preached fear of the rebel movement and that sent the message, “kill or be killed.”⁴⁴² In light of such a situation, where financing seemed to have very little impact on a genocide “horrific even by the standards of a century repeatedly marred by mass political and ethnic slaughters,”⁴⁴³ deterring corporate officials may have made absolutely no difference in outcomes.

The case of Rwanda does reveal another important characteristic of humanitarian crises—the hesitance of the international community to intervene militarily. During the Rwandan crisis, there was an apparent desire to avoid calls to military action by not publicly concluding that genocide was in progress:

[L]egal experts in the U.S. government were asked, in the words of a former State Department lawyer, “to perform legal gymnastics to

Reference to War Crimes and Political Crimes, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 15 (Frits Kalshoven & Yves Sandoz eds., 1989).

⁴³⁸ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 461 (2001).

⁴³⁹ Bruce D. Jones, PEACEMAKING IN RWANDA: THE DYNAMICS OF FAILURE 1, 38 (2001).

⁴⁴⁰ *Id.* at 26, 32, 37-39.

⁴⁴¹ *Id.* at 39.

⁴⁴² *Id.* at 39-41.

⁴⁴³ *Id.* at 1.

avoid calling this genocide.” And as Rwandan Hutus slaughtered hundreds of thousands of Tutsis, the Clinton administration instructed its spokespeople not to describe what was happening as genocide lest this “inflame public calls for action,” according to the New York Times. Instead, the State Department and National Security Council reportedly drafted guidelines instructing government spokespeople to say that “acts of genocide may have occurred” in Rwanda.⁴⁴⁴

Thus, prosecuting corporate officials will not save the world or substantially aid in preventing certain episodes of widespread international crimes. If world leaders want to avoid labeling a humanitarian crisis as certain genocide to avoid calls for military action, they may carry over into a decision whether or not to identify areas of corporate facilitation. If the genocide is still developing, identifying the facilitation is one of many measures short of military intervention that the U.N. Security Council may use. Yet, if genocide can only be stopped by a military intervention the Security Council is unwilling politically to authorize, the members may want to once again avoid using the term “genocide” in any way, including the identification of corporate facilitation.

However, in situations such as those involving blood diamonds or other natural resources at the hands of serious criminals, cutting off the flow of funds and materiel can have a significant impact. The U.N. Security Council has indeed tried to make that impact by deciding that all states should ban trade in non-certified rough diamonds. It is that kind of high-profile act that can be used to effectively change the outlook of corporate officials. Corporate officials can then see that what may seem like an ordinary, amoral, and non-criminal business transaction is actually a method by which criminals obtain the means to commit further atrocities.

Absent prohibitions on its use, money is perfectly fungible, and unlike Zyklon B, it has many, many uses. Money that a warlord or criminal receives could theoretically go to building a school as easily as to weapons and killing. Does a corporation’s profit motive necessarily displace the intent to commit a crime against humanity? No, a businessperson may intend to commit a crime or join in a conspiracy to commit a crime in order to make the desired profit.⁴⁴⁵ That

⁴⁴⁴ Diane F. Orentlicher, *Genocide, in* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 153, 153 (Roy Gutman & David Rieff eds., 1999). This is not to say that there was no international effort at preventing bloodshed in Rwanda. Before the genocide occurred, “there was a meaningful effort under way long prior to the genocide to mitigate and contain the Rwandan civil war. These efforts were not designed specifically to prevent genocide, but they were designed to prevent an escalation of the crisis and to lay the groundwork for peace.” Bruce D. Jones, PEACEMAKING IN RWANDA: THE DYNAMICS OF FAILURE 2-3 (2001).

⁴⁴⁵ One commentator makes this point well in the context of the crimes in the former Yugoslavia:

I believe that it is a mistake to treat the [Genocide] convention’s use of the term *intent* as though it were synonymous with *motive*. That Serb perpetrators of ethnic cleansing may have slaughtered Muslims so that they could obtain control

case is an easy call; that person can and should be prosecuted. The harder case is the businessperson who is deliberately blind to the impact of his or her dealings. It is true that domestic enforcement mechanisms can also prevent a corporate official from avoiding the unpleasant knowledge that corporate money or multipurpose goods are regularly converted into the means by which another commits genocide, war crimes or crimes against humanity. But, only international mechanisms can truly have the reach to have an adverse effect on the transnational criminals of the world.

X. CONCLUSION

Due to the problem of “cascading complicity” inherent in business transactions and due to the problems inherent in proving knowledge on the part of a corporate official whose business transactions have benefited a criminal, the U.N. Security Council should put corporate officials on notice that certain persons or governments are presumed to be committing war crimes and crimes against humanity and that any transactions with them will constitute a criminal violation of international humanitarian law. This alerting of business entities is simply a way to let these entities know that the funds or multipurpose goods they may supply will be transformed into the means or instrumentalities for others to commit crimes. This limited form of prescriptive authority is clearly within the powers of the Security Council. Even if alerting corporate officials to behavior that will be considered criminal complicity cannot by itself prevent genocide and other serious international crimes, such a notice scheme can help deter those who may have otherwise assisted and allow for easier post hoc prosecution.

At the end of the day, Mr. Ocampo’s statement that diamond buyers can be prosecuted is correct, albeit in a limited fashion. Buyers of rough diamonds could now be prosecuted in U.S. courts under the Clean Diamond Trade Act, and they could be prosecuted in other states that have similar domestic laws. As to Mr. Ocampo’s ICC, assuming the prerequisites to jurisdiction and admissibility are satisfied, the buyers could be prosecuted if part of a conspiracy or joint criminal enterprise if they intended the genocide so that they could receive the diamonds at a lower price. However, the international prosecution of the “mere” diamond buyer is not allowed; such a prosecution would violate the principle of *nullum crimen sine lege*, a core principle in all international tribunals and one of the principles set out in the Rome Statute.⁴⁴⁶ To get there, the U.N. Security Council must first decide that rough diamond purchases represent a *de facto* facilitation of the crimes committed by the sellers to obtain them. It remains to be

over territory does not negate their intent to destroy Muslims “as such” in order to achieve their ultimate goal.

Diane F. Orentlicher, *Genocide*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 153, 156 (Roy Gutman & David Rieff eds., 1999) (italics in original).

⁴⁴⁶ Rome Statute of the International Criminal Court, July 17, 1998, art. 22(1), U.N. Doc. A/CONF.1839/9.

seen whether the Security Council will be willing to take that additional step to contain the financing of persons committing genocide in Africa.

STATE MILITIAS AND THE UNITED STATES: CHANGED RESPONSIBILITIES FOR A NEW ERA

JOHN F. ROMANO*

I. INTRODUCTION

The Constitution of the United States was established, in part, to “insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”¹ Written over two hundred years ago, the Constitution seeks to achieve these goals in ways that frequently reflect the times of a bygone era. Perhaps no other aspect of this document and the plan of government it established is more indicative of the unique time period in which it was drafted than those provisions that concern themselves with state militias and the presence of a standing army.² Although these provisions generated a great deal of debate at the time,³ the rationale behind them is largely meaningless to modern Americans.⁴ In fact, as will be discussed in this article, the present-

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¹ U.S. CONST. pmb1.

² As discussed *infra*, the Militia Clauses of the Constitution are found in Article I, section 8. The provisions relating to the armed forces are similarly located in that section.

It could be argued that slavery is an issue which more accurately reflects the unique time period in which the Constitution was drafted. Although this argument has merits, it is hard to disregard the plethora of scholarly writings at the time which dealt in large part with the ideals of representative government in contradistinction to absolutism and military rule. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett 1980) (1690); JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in THE BASIC POLITICAL WRITINGS (Donald A. Cress trans., Hackett 1987) (1754); ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan 2004 .ed., Bantam 2003) (1776).

³ As discussed *infra* in Part I.B., the writers of “The Federalist Papers” deal extensively with the subject, often advancing arguments and rebutting criticisms that many modern readers would find unthinkable. *See, e.g.*, THE FEDERALIST NO. 46 (James Madison) (engaging in mathematical calculations to show that a standing army created by the federal government could not possibly succeed at oppressing the people of the various states).

⁴ *See* Robert J. Spitzer, *The Second Amendment “Right to Bear Arms” and United States v. Emerson*, 77 ST. JOHN’S L. REV. 1, 15 (2003) (arguing that the Second and Third Amendments, which deal with militias and standing armies, respectively, have become obsolete due to changes in society); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 186 (1940) (stating that “the fears of the ratifiers were not

day organization and responsibilities of the National Guard, the modern equivalent of a state militia, directly contravene the principles and rationales of the framers.⁵

Part I of this article will discuss the various provisions in the Constitution and other documents of the United States dealing with state militias. It will also discuss the arguments made by the framers espousing the constitutional theory behind these provisions, as well as the history and contemporaneous thoughts regarding these institutions. Part II will explore the evolution of the militia in American history and analyze this evolution in light of the constitutional underpinnings of its existence. This article will conclude that state militias, while serving an integral purpose in modern American society, no longer fulfill their purpose as originally planned in the Constitution.

II. STATE MILITIAS AND THE CONSTITUTION

A. Militias, Armies, and the Texts of United States Documents

The Constitution makes mention of militias in two separate provisions—one relating to the powers of Congress and the other to the powers of the President. In the former, in what are known as the militia clauses,⁶ the Constitution details the specific powers of Congress and the limitations on that power as regards state militias. Article I, section 8, clause 15 states that Congress shall have the power “[t]o provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.”⁷ Article I, section 8, clause 16 provides that Congress shall have the power of “organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”⁸ In order to better understand these limitations, they must be contrasted with Congress’s power as regards the Army, which is stated in Article I, section 8,

well-founded” given that the Third Amendment has never been invoked, yet noting that this shows “the prevalence of views then entertained”).

⁵ See, e.g., Spitzer, *supra* note 4, at 15 (remarking that the National Guard is primarily under the control of the federal government).

⁶ See Wiener, *supra* note 4, at 181 n.1 (discussing the term that should be used for these provisions).

⁷ U.S. CONST. art. I, § 8, cl. 15. In addition to these three reasons for calling forth the militia, courts have stated that Article IV, section 4 also states a valid reason for calling forth the militia. See *Laird v. Tatum*, 408 U.S. 1, 3 n.2 (1972) (indicating that 10 U.S.C. § 331, which allows calling forth the militia upon the request of a state legislature or executive, is based on the guarantee provided for in Article IV, section 4 of the Constitution).

⁸ U.S. CONST. art. I, § 8, cl. 16.

clause 12. That provision simply states, “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁹ While the latter limitation does serve to limit Congress’s ability to fund a large standing army, unlike as in the militia clauses there is no limitation on Congress’s ability to use that army.¹⁰

The second mention of the militia occurs in Article II, which details the powers of the President. Section 2 states that “[t]he President shall be Commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States.”¹¹

Militias are also explicitly mentioned in the Second Amendment to the Constitution. That amendment states, “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹²

⁹ U.S. CONST. art. I, § 8, cl. 12.

¹⁰ See *Perpich v. Dep’t of Defense*, 496 U.S. 334, 348–50 (1990) (pointing out that the limitations of the militia clause do not apply to armies and similarly do not apply to militias when federalized).

¹¹ U.S. CONST. art II, § 2. The original provision recommended by the Committee of Detail at the constitutional convention left off the clause “when called into the actual service of the United States.” This addition was recommended by Roger Sherman and approved by the convention. See SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT* 42 (3d ed. 1999).

Note that this was an important check on military power, since it would at all times be under the administration of civilians. See Strom Thurmond, *The Military Officer and the Constitution*, 1988 *ARMY LAW* 4, 6 (crediting civilian control of the military for the lack of military problems in this country); see also SMITH, *supra* note 2, at 898–99 (stating that standing armies should not be feared when they are placed in the hands of those with the greatest interest in preserving civil authority).

¹² U.S. CONST. amend. II. The right to bear arms is an issue unto itself, and thus outside the scope of this article. Needless to say, much debate has taken place over whether that right inheres in “the people” or whether it is inextricably linked to service in the militia. The Supreme Court has expended little ink on this subject. In *Presser v. Illinois*, 116 U.S. 252 (1886), the Court determined that the amendment applies only against actions of Congress, and not the states. *Id.* at 265. The Court thus held that an Illinois statute forbidding unauthorized men to parade with arms did not violate the Second Amendment. *Id.* at 264–65. In *United States v. Miller*, 307 U.S. 174 (1939), the Court held that the National Firearms Act did not violate the Second Amendment because the prohibited weapons, sawed-off shotguns, had no relationship to the preservation of a well-regulated militia. *Id.* at 178. Although these cases are far from clear, one commentator has stated, “All of the Court’s decisions make clear that the Second Amendment is invoked only in connection with citizen service in a government organized and regulated militia.” Spitzer, *supra* note 4, at 13. Recently, however, a 5th Circuit panel questioned this “collective rights” model of the Amendment and espoused an “individualist” model, which would protect the right to bear arms independent of service in the militia. See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). See generally Michael Busch, Comment, *Is the Second Amendment an Individual or a Collective Right: United States v. Emerson’s Revolutionary Interpretation of the Right to Bear Arms*, 77 *ST. JOHN’S L. REV.* 345 (2003).

Integral to understanding the constitutional role of state militias is a comprehension of how other military issues are treated in the Constitution and other state papers. For example, although the Constitution allows Congress to raise an army, the earlier Articles of Confederation relied on the states to provide all land forces.¹³ Similarly, the Declaration of Independence lists several military issues as grievances against the King. It states that he “has kept among us, in time of peace, standing armies, without the consent of our legislatures,” and that he has “affected to render the military independent of, and superior to, the civil power.”¹⁴ These criticisms of military use and power can also be seen in the Bill of Rights. The Third Amendment prohibits the quartering of soldiers¹⁵ and the Fifth Amendment explicitly places the rule of civil law above military might.¹⁶ Although these provisions quite clearly indicate the mindset of the framers, a look at the arguments in the Federalist Papers further elucidates the theories at work.

B. The Constitutional Theory—“The Federalist Papers”

The authors of the Federalist Papers discuss militias and standing armies in several of the papers. These papers espouse two main arguments regarding these institutions and the requirement that both be present in the Constitution.¹⁷ The first argument is that standing armies pose a threat to liberty, and that militias will serve as a bulwark to this threat. The second, somewhat contradictory argument,¹⁸ is that militias are ineffectual and cannot be relied upon to furnish for the common defense.

1. The Militia is Necessary to Curb the Need for, and the Power of, the Standing Army

Those papers that espouse the first argument above generally begin by pointing out that some sort of military will be required to defend the nation. For example, in Federalist 8, Alexander Hamilton states that “[s]afety from

¹³ ARTICLES OF CONFEDERATION art. IX. That article provided that each state would supply forces “in proportion to the number of white inhabitants” in that state. In addition, Article VI required each state to “always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred.” ARTICLES OF CONFEDERATION art. VI.

¹⁴ THE DECLARATION OF INDEPENDENCE paras. 13–14 (U.S. 1776).

¹⁵ The Third Amendment states, “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law . . .” U.S. CONST. amend. III.

¹⁶ In relevant part, the Fifth Amendment provides, “[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

¹⁷ See *Perpich v. Dep’t of Defense*, 496 U.S. 334, 340 (1990) (discussing the two arguments); Wiener, *supra* note 4, at 184–85.

¹⁸ See Wiener, *supra* note 4, at 184 (stating that the meshing of these institutions was a compromise).

external danger is the most powerful director of national conduct.”¹⁹ In Federalist 24, Hamilton argues that “savage tribes” as well as the British and Spanish pose threats that must be protected against.²⁰ It is even conceded that force will sometimes be needed simply to govern. Likely referring to Shays’ Rebellion,²¹ Hamilton writes in Federalist 28 that “the idea of governing at all times by the simple force of law . . . has no place but in the reveries of those political doctors, whose sagacity disdains the admonitions of experimental instruction.”²²

After establishing this, these papers argue that it would be unwise to create a large standing army. In Federalist 8, Hamilton describes standing armies as having “a tendency to destroy [a nation’s] civil and political rights.”²³ The authors of the Federalist Papers conclude, however, that this is not a legitimate fear under the Constitution.²⁴ Because the Constitution provides for state militias, they argue, there will never be a need for a large standing army. In Federalist 26, Hamilton writes that a large army will not be needed because of “the aid to be derived from the militia, which ought always to be counted upon, as a valuable and powerful auxiliary.”²⁵

In Federalist 29 and 46, Hamilton and James Madison, respectively, also argue that a standing army need not be feared because the militia itself could be used to defend the people from any oppression that the army might inflict. Hamilton writes, “[I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.”²⁶ Madison is even more forceful in his comments. In Federalist 46, he argues that any standing army created by the federal government would be opposed by a “half

¹⁹ THE FEDERALIST NO. 8, at 45 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²⁰ THE FEDERALIST NO. 19, at 156–57 (Alexander Hamilton).

²¹ Shays’ Rebellion was led by a former Continental Army officer who was dissatisfied with debts, taxes, and the threat of land seizures. Shays led a group of farmers in a revolt against the government of Massachusetts in September 1786. The rebellion was not quashed until January 1787. See MICHAEL D. DOUBLER, I AM THE GUARD: A HISTORY OF THE ARMY NATIONAL GUARD, 1636-2000, at 65 (2001), http://www.arng.army.mil/guard_docs/presentations/guardhistorybook.pdf.

²² THE FEDERALIST NO. 28, at 176 (Alexander Hamilton).

²³ THE FEDERALIST NO. 8, at 45 (Alexander Hamilton).

²⁴ See THE FEDERALIST NO. 26, at 170 (Alexander Hamilton).

²⁵ *Id.* at 170–71; see also THE FEDERALIST NO. 29, at 182 (Alexander Hamilton) (noting that the militia will curb the need for a standing army). *But see* THE FEDERALIST NO. 25, at 162 (Alexander Hamilton) (stating that the militia is ineffectual).

²⁶ THE FEDERALIST NO. 29, at 184 (Alexander Hamilton). *But see* THE FEDERALIST NO. 25 (Alexander Hamilton) (stating that the militia is ineffectual); SMITH, *supra* note 2, at 890 (“A militia, however, in whatever manner it may be either disciplined or exercised, must always be much inferior to a well-disciplined and well-exercised standing army.”).

a million [] citizens with arms in their hands” which would “form[] a barrier against the enterprises of ambition more insurmountable than any which a simple government of any form can admit of.”²⁷

Although the prospect of state militias protecting the freedom of the people from the standing army of the United States might sound incredible and completely unnecessary to the modern reader, a look at the history and prevailing notions at the time of the framing reveal this to be a major concern.²⁸ Fear of standing armies can be traced to ancient times. Julius Caesar, upon crossing the river Rubicon with his army, broke an ancient law which forbade armies from crossing that barrier and entering Italy.²⁹ After the Roman Empire was established, standing armies which protected the borders from invasions became anathema to the rule of the emperor, and thus these armies were separated into small groups so as to disperse their power.³⁰ In more modern times, all Englishmen would be aware of the English Civil War that had occurred in the mid-1600’s. After King Charles I raised an army and unsuccessfully stormed Parliament, war broke out. Eventually Oliver Cromwell seized the military power, purged Parliament of dissenters, and named himself “Lord Protector.”³¹ After Cromwell’s death, an army simply marched on London and installed Charles II as King of England.³² The problem of standing armies in England would not be resolved until 1689, when William and Mary peacefully gained control of England and agreed not to raise a standing army without the consent of Parliament.³³

²⁷ THE FEDERALIST NO. 46, at 321–22 (James Madison).

²⁸ See *Ex Parte* Milligan, 71 U.S. 2, 120 (1866) (“The history of the world had taught [the framers] that what was done in the past might be attempted in the future.”).

²⁹ See SMITH, *supra* note 2, at 898 (remarking that Caesar and his army destroyed the Roman Republic by their actions); SUTTONIUS, THE TWELVE CAESARS 23–24 (Robert Graves trans., Penguin Books 1957). Caesar is said to have reached the Rubicon and declared to his troops, “We may still draw back but, once across that little bridge, we shall have to fight it out.” *Id.* at 23. After seeing an apparition cross the river, Caesar exclaimed, “Let us accept this as a sign from the Gods, and follow where they beckon, in vengeance on our double-dealing enemies. The die is cast.” *Id.* at 23–24.

³⁰ See SMITH, *supra* note 2, at 895–96 (explaining that either Diocletian or Constantine dispersed these armies so as to avoid further trouble). Interestingly enough, Smith goes on to declare that this action, in effect, made these troops into militias because they formed small enclaves and became citizens. The result was that they later proved too ineffective to repel invasions. See *id.*

³¹ See LYNN HUNT ET AL., THE CHALLENGE OF THE WEST 578–81 (1995); Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL’Y 99, 103 (2003) (giving a brief history of the English Civil War and noting that Cromwell instituted a “military tyranny” which caused enhanced fear of standing armies by the people); see also THE FEDERALIST NO. 21, at 131 (Alexander Hamilton) (posing the question of what Shays’ Rebellion could have resulted in had it been led by Caesar or Cromwell); SMITH, *supra* note 2, at 898.

³² HUNT ET AL., *supra* note 31, at 581.

³³ See *id.* at 600; see also Anthony Gallia, Comment, “Your Weapons, You Will Not Need Them,” 33 AKRON L. REV. 131, 146–47 (1999) (stating that the English Bill of Rights of 1689

This concern also found itself into the political philosophy of the time. In his *Second Treatise of Government*, John Locke writes extensively about the need for a government that relies on the “consent of the governed” and which has declared laws and rules that are known by, and applicable to, all persons.³⁴ This form of government is contrasted with tyranny, which Locke defines as “*the exercise of power beyond right*, which no body can have a right to.”³⁵ Thus Locke argues that a government which exceeds its bounds may be rightly opposed by the people.³⁶ Similarly, in his *On the Social Contract*, Jean-Jacques Rousseau identifies the same problem with a government that exceeds its powers. For Rousseau, the people form a social contract which advances the “general will.”³⁷ When the government no longer administers the state in accordance with this will, then the state is deemed dissolved and the government nothing more than an unlawful tyrant.³⁸ Given this prevailing political philosophy and the history of might exercised by standing armies, it is not surprising that the framers as well as all “[m]en of republican principles [were] jealous of a standing army as dangerous to liberty.”³⁹

2. *The Militia is an Ineffective Body and Thus a Standing Army is Required*

Although the framers feared a standing army, they did think it was necessary to provide for one in the Constitution. The reason for this is evident from Federalist 25. In that paper, Alexander Hamilton makes clear that state militias alone would not be sufficient to provide for the common defense of the nation.⁴⁰ Hamilton writes of the suggestion that the militia would be sufficient for such a purpose, that “[t]his doctrine in substance had like to have lost us our independence. It cost millions to the United States, that might have been saved. The facts, which from our own experience forbid a reliance of this kind, are too recent to permit us to be dupes of such a suggestion.”⁴¹ Hamilton concludes that a “regular and disciplined army” can only be successfully opposed “by a force of the same kind.”⁴²

also contained the right to bear arms, in order for the people to protect themselves from oppression).

³⁴ LOCKE, *supra* note 2, at 70–76.

³⁵ *Id.* at 101.

³⁶ *Id.* at 103 (“[W]hosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command . . . and, acting without authority, may be opposed, as any other man, who by force invades the right of another.”).

³⁷ ROUSSEAU, *supra* note 2, at 154–55.

³⁸ *Id.* at 193.

³⁹ SMITH, *supra* note 2, at 898; *see also Ex Parte Milligan*, 71 U.S. 2, 125 (1866) (declaring that the framers knew that “unlimited power, wherever lodged at such a time, was especially hazardous to freemen”).

⁴⁰ THE FEDERALIST NO. 25 (Alexander Hamilton).

⁴¹ *Id.* at 161–62 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁴² *Id.* at 162.

Just as their fear of standing armies, the framers' lack of confidence in state militias was grounded in history and theory. Although the militia "by their valour on numerous occasions, erected eternal monuments to their fame"⁴³ during the American Revolution, it was generally realized afterwards that it was not a force that could compete with the regular British army.⁴⁴ In fact, early in the war effort, George Washington informed Congress that " '[t]o place any dependence upon Militia, is, assuredly, resting upon a broken staff.' "⁴⁵ Thus, the Continental Congress created the Continental Army in 1775, and this force handled most of the war effort.⁴⁶

In his *Wealth of Nations*, Adam Smith emphasized the inferiority of militias as compared to trained standing armies.⁴⁷ Smith studied the history of military encounters and concluded that it bears testimony to the "irresistible

⁴³ *Id.* There are numerous tributes to the efforts of the militiamen during the early years of war. An obelisk erected in the memory of those killed in the Battle of Lexington proclaims, "On the morning of the ever memorable/ Nineteenth of April, An. Dom. 1775. The Die was cast!!!! The Blood of these Martyrs, In the cause of God & their Country/ Was the Cement of the Union of these States, then/ Colonies; & gave the spring to the spirit, Firmness and resolution of their Fellow Citizens." ALLEN FRENCH, *HISTORIC CONCORD & THE LEXINGTON FIGHT* 7 (2d ed. 1992) (1942). Perhaps one of the most famous explications of the courage and bravery of the militiamen is found in Henry Wadsworth Longfellow's poem, "Paul Revere's Ride." The penultimate verse states:

You know the rest. In the books you have read,
How the British Regulars fired and fled,—
How the farmers gave them ball for ball,
From behind each fence and farmyard wall,
Chasing the redcoats down the lane,
Then crossing the fields to emerge again
Under the trees at the turn of the road,
And only pausing to fire and load.

HENRY WADSWORTH LONGFELLOW, *Paul Revere's Ride*, in *SELECTED POEMS* 60 (1992).

⁴⁴ See DOUBLER, *supra* note 21, at 46 ("[T]he militia proved incapable of prevailing in battle alone against British Regulars and usually failed to provide sustained combat power during independent, extended operations.").

⁴⁵ Wiener, *supra* note 4, at 183 (quoting Letter, Washington to the President of Congress, Sept. 24, 1776, in 6 *THE WRITINGS OF GEORGE WASHINGTON* 106, 110 (1932)). Washington went on to state, " 'If I was called upon to declare upon oath . . . whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.' " *Id.* (quoting Letter, Washington to the President of Congress, Sept. 24, 1776, in 6 *THE WRITINGS OF GEORGE WASHINGTON* 106, 112 (1932)). It does appear, however, that Washington later became supportive of state militias as a meaningful force for the defense of the nation. See *id.*; see also John W. Vessey, *Foreword* to DOUBLER, *supra* note 21, at 6–7 (indicating that after the war Washington proposed a five-point plan for the national defense which included a well-organized militia).

⁴⁶ See DOUBLER, *supra* note 21, at 50.

⁴⁷ Using his economic theory of division of labor, Smith predicted that as society became more advanced, militias would become increasingly obsolete. As will be discussed *infra*, his prediction and rationale are highly applicable to the evolution of the military in the United States.

superiority which a well-regulated standing army has over a militia.”⁴⁸ He noted that the Roman army routed those nations that depended upon militias, and that in the later years of the Empire, when militias took hold, it could not defend itself from the barbarous nations surrounding it.⁴⁹ Thus, Smith believed that the only proper way to provide for the common defense would be to have a standing army which was placed under the control of civilian authority.⁵⁰

Thus, these two prevailing opinions, that standing armies are dangerous, but also that they are necessary, shaped the Constitution and resulted in the creation of both a standing army and state militias.

III. THE EVOLUTION OF STATE MILITIAS IN THE UNITED STATES

An understanding of the evolution of state militias, and military power generally, in the United States is best undertaken by examining how the above two arguments regarding state militias played out after the ratification of the Constitution.

A. The Prescience of Federalist 25—Militias Prove Ineffectual

The very first action relating to militias was the Militia Act of 1792.⁵¹ The act formed the militia, which was essentially all men between the ages of eighteen and forty-five.⁵² In accordance with its constitutional powers and its fear of military use domestically, Congress also passed laws authorizing presidential use of the state militias to execute federal laws, suppress insurrections, and repel invasions.⁵³ This power was soon exercised by President Washington. After western Pennsylvanian farmers ejected the federal marshal and threatened to disturb all federal authority in the region, President Washington called forth the militia and personally led them to the site of the insurrection. Upon their arrival the rebels dispersed and the Whiskey Rebellion was quashed.⁵⁴

⁴⁸ SMITH, *supra* note 2, at 892.

⁴⁹ *See id.* at 895–96.

⁵⁰ *See id.* at 898–99.

⁵¹ 1 Stat. 264 (1792).

⁵² *See* Wiener, *supra* note 4, at 187.

⁵³ *See id.* These laws still exist and are codified at 10 U.S.C. §§ 331–334. The distaste for military use domestically and the concurrent preference for the use of militias, or *posse comitatus*, seems to have been derived from English history. The “Mansfield Doctrine” stated that uniformed soldiers acting as civilians in a *posse* could do what the actual military should not do—enforce the laws. *See* Canestaro, *supra* note 31, at 104–05. In fact, one of the colonists’ biggest complaints was the use of the British military, instead of a *posse*, to put down the insurrection that became the Boston Massacre in 1770. *See id.* at 106–07.

⁵⁴ *See* MILKIS & NELSON, *supra* note 11, at 79–81 (describing the Whiskey Rebellion, which

Following this success, however, the militia, as an institution, displayed its limitations and weaknesses. When called upon to assist with the War of 1812, the militia proved a spectacular failure.⁵⁵ In some states, the governor steadfastly refused to provide the militia that the president had requested.⁵⁶ In those instances where it did report, the militia frequently performed poorly. New York militiamen refused to battle the British in Canada, arguing that such behavior could not possibly be required to “repel invasions.”⁵⁷ In those battles which it did join, the militia distinguished itself as excelling in speedy retreats.⁵⁸ All-in-all, the War of 1812 seemed to confirm Hamilton’s belief that the militia could not possibly stand as the nation’s sole line of defense.

Following the war, the constitutional limitations placed on the militia continued to limit its use. The Mexican War, being fought on foreign soil, had no constitutional place for state militias.⁵⁹ The Civil War witnessed militia contributions, but the overall impact of state militias was small, due primarily to eighteenth-century congressional legislation limiting service to just three months.⁶⁰ The result was that the state militias became neglected and in a matter of years had become close to obsolete. It was not until the twentieth century, when President Theodore Roosevelt asked for an overhaul, that anything was done to improve the militia system.⁶¹

B. The Evolution of Militias and the Erosion of the State/Federal Distinction

With the ineffectiveness of the militia becoming readily apparent, the

took place in 1794); Wiener, *supra* note 4, at 188 (noting that the president used his powers under the recently-enacted statutes to quash the rebellion).

⁵⁵ See DOUBLER, *supra* note 21, at 79 (“The War of 1812 revealed glaring inadequacies in the militia system and raised serious questions regarding the responsibilities the federal government and the States shared for the common defense.”); see also Selective Draft Law Cases, 245 U.S. 366, 384–85 (1918) (explaining that Congress turned to its army powers when the militia failed to fulfill its war needs).

⁵⁶ See DOUBLER, *supra* note 21, at 79 (noting that the governors of the New England states did not support the war effort and thus questioned the constitutionality of calling forth the militia in this situation); Wiener, *supra* note 4, at 188.

⁵⁷ Wiener, *supra* note 4, at 189; see also DOUBLER, *supra* note 21, at 80 (“On as many as half a dozen occasions, Ohio and New York militia units refused to cross into Canada to attack British positions.”).

⁵⁸ DOUBLER, *supra* note 21, at 80–81 (detailing what became known as the “Bladensburg Races,” which led to the burning of Washington D.C. by the British).

⁵⁹ See Wiener, *supra* note 4, at 190. *But see* DOUBLER, *supra* note 21, at 92–93 (pointing out that many militiamen joined volunteer corps that were formed for the war).

⁶⁰ See Wiener, *supra* note 4, at 190–91.

⁶¹ See *Perpich v. Dep’t of Defense*, 496 U.S. 334, 341 (1990). Before President Roosevelt’s entreaty, the militia was still governed by eighteenth-century laws and requirements. A male between the ages of 18 and 45 in the year 1901 was expected, under the law, to furnish himself with “a good musket,” and “a sufficient bayonet.” See Wiener, *supra* note 4, at 194.

federal government moved to strengthen the militia so as to provide for a useful force for the common defense of the nation. In 1903, Congress passed the Dick Act.⁶² The Dick Act provided for an organized militia, the National Guard, which would be equipped and trained with the use of federal funds.⁶³ By 1908, this increased support and funding had transformed an unorganized militia into a supported, organized state militia system of 105,000 militiamen.⁶⁴

The National Defense Act of 1916 followed shortly thereafter. This act allowed for the “federalization” of the National Guard.⁶⁵ In effect, the act provided that the National Guard could be called into federal service, at which point guardsmen would be part of the army, and not the state militia.⁶⁶ This change in characterization had tremendous implications. As noted earlier in Part I.A., the militia clause of the Constitution limits the uses of the militia by the federal government. The use of the army, under the army clause, is not so limited. Thus, when federalized, the National Guard is no longer subject to the restrictions of the militia clause and may be used in the same way as the standing army.⁶⁷

Federalization also impacts the standing of the militia under an 1878 act of Congress—the Posse Comitatus Act.⁶⁸ That act, as amended, makes it a crime to authorize the use of the “Army or the Air Force as a posse comitatus or otherwise to execute the laws.”⁶⁹ When federalized, the militia is deemed a part of the Army, and thus the act would apply to prohibit its use in enforcing the laws.⁷⁰ The act, however, under its own terms, does not apply “in cases and under circumstances expressly authorized by the Constitution or Act of Congress.”⁷¹ Thus, the act has been deemed not to be violated when the army,

⁶² 32 Stat. 775 (1903).

⁶³ See *Perpich*, 496 U.S. at 343; *United States ex rel. Gillett v. Dern*, 74 F.2d 485, 486 (D.C. Cir. 1934); Wiener, *supra* note 4, at 193–97.

⁶⁴ See Wiener, *supra* note 4, at 197.

⁶⁵ See *Perpich*, 496 U.S. at 343.

⁶⁶ See *id.*; see also 10 U.S.C. § 12406 (giving the power to the president to call Guard members into federal service).

⁶⁷ See *Perpich*, 496 U.S. at 348–50 (explaining that since the army clause does not limit the federal government, the federalization of the National Guard subjects it to duty on the same terms as the Army); Wiener, *supra* note 4, at 200 (indicating that federalization thus means that guardsmen can serve abroad).

⁶⁸ 18 U.S.C. § 1385.

⁶⁹ *Id.*; see also *Gilbert v. United States*, 165 F.3d 470, 472 (6th Cir. 1999) (“The Act reflects a concern, which antedates the Revolution, about the dangers to individual freedom and liberty posed by use of a standing army to keep civil peace.”).

⁷⁰ See *Canestaro*, *supra* note 31, at 126. When not under federal control, the members of the National Guard are not covered by the act. See *Gilbert*, 165 F.3d at 472–73 (concluding that guardsman was under state control and thus his use in this arrest did not violate the act); *United States v. Hutchings*, 127 F.3d 1255, 1257–58 (10th Cir. 1997) (determining that guardsmen were not under federal control and thus did not violate the act).

⁷¹ 18 U.S.C. § 1385. There are numerous examples of such laws. See 10 U.S.C. §§ 331–334

including the federalized national guard, have been used to put down insurrections and to enforce federal laws in times of rebellion.⁷² In fact, these bases were used to authorize the use of federal troops and the national guard in desegregating the schools of Little Rock, Arkansas in 1957.⁷³

1933 amendments to the National Defense Act established two distinct organizations—the National Guard of the various States, and the National Guard of the United States.⁷⁴ Upon enlisting, guardsmen are members of both, and pledge allegiance to both the state and the federal government. Later amendments and cases have established that the National Guard may be federalized at any time and that guardsmen may be sent anywhere in the world.⁷⁵

C. Federal Power versus State Power—The Proper Role of Militias

As discussed above in Part I.B.1., the theory behind the necessity for state militias was that they could provide a necessary bulwark against the power of a standing army. With the increasing federalization of the National Guard, however, one must question what the proper role of the Guard is in a changing society.

A starting point to this analysis must be an examination of the state's

(allowing the use of the National Guard and the military to put down rebellions, enforce federal laws, and guarantee application of constitutional rights); 10 U.S.C. §§ 371–382 (allowing military involvement in certain aspects of the war on drugs and the war on terror).

⁷² See, e.g., 41 Op. Att’y Gen. 313, 329–30 (1957) (stating that the act does not apply because 10 U.S.C. §§ 332–333 allow for the use of military forces to put down rebellions which interfere with the enforcement of United States laws); 16 Op. Att’y Gen. 162, 163–64 (1878) (explaining the steps that the president would have to take to use troops to quash resistance to internal revenue collection in Arkansas).

⁷³ See Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957) (calling for use of troops in Arkansas because persons there have “wilfully obstructed the enforcement of orders of the United States District Court for the Eastern District of Arkansas”); 41 Op. Att’y Gen. 313, 327–30 (1957); see also 28 Fed. Reg. 5707 (June 11, 1963) (ordering the obstruction of justice in Alabama to end, and relying on 10 U.S.C. §§ 332–334 for this power). See generally DOUBLER, *supra* note 21, at 213–14 (discussing the National Guard’s role in desegregation).

⁷⁴ See *Perpich v. Dep’t of Defense*, 496 U.S. 334, 345 (1990). The Court explained that the creation of two organizations was necessitated by the aftermath of World War I. After having been federalized, guardsmen were not restored to state service, thus destroying the membership of state militias. The 1933 amendments rectified this problem by creating simultaneous enlistment and membership in two organizations. See *id.* at 345–46.

⁷⁵ See *id.* at 346–54. *Perpich* dealt with the Montgomery Amendment to the National Defense Authorization Act. The amendment eliminated gubernatorial consent as a prerequisite for federalization of the National Guard. The consent requirement was originally added in 1952 when the state of national emergency requirement was eliminated. The unanimous Court held that in the sphere of military affairs there is “supremacy of federal power.” *Id.* at 351. The militia clause in no way restrains the power of Congress over armies and the national defense, and thus the federal government may federalize the National Guard when it desires and use it how and where it desires. *Id.* at 348–50.

power over its militia. It is long-settled law that the governor of each state has almost unbridled power over its militia.⁷⁶ In *Martin v. Mott*, the Court dealt with the question of who decides when the militia is required for service.⁷⁷ Since in this case the President had called out the militia, the Court determined that he was the “sole and exclusive judge” of the necessity for their services.⁷⁸ Later courts have applied this principle to governors in their decisions to use the militia.⁷⁹ If governors have this power, and the original theory behind state militias was that they would curb excessive federal power, then the inevitable question is whether states can use their militias against what they view as intrusive and unauthorized federal power.

The Court dealt with this issue in *Sterling v. Constantin*.⁸⁰ In that case, the governor of Texas called out the National Guard to enforce a regulation limiting oil production from specific oil fields. This action was undertaken despite a federal court injunction that prohibited the governor from enforcing the regulation.⁸¹ The Court held that the governor’s actions were improper. While recognizing that the governor’s decision about when to use the militia is “conclusive,”⁸² the Court found that such use would only be proper if done to *uphold* the rule of law, rather than to “nullify it.”⁸³ Thus, the distinction made by the Court is that the governor’s decision to use the militia is beyond review,

⁷⁶ *Sterling v. Constantin*, 287 U.S. 378, 399–400 (1932); *Moyer v. Peabody*, 212 U.S. 78, 83 (1908); *Luther v. Borden*, 48 U.S. 1, 45–46 (7 How.) (1849); *cf.* *Martin v. Mott*, 25 U.S. 19, 29–30 (1827).

⁷⁷ 25 U.S. 19, 29–30 (1827).

⁷⁸ *Id.* at 32. The Court stated, “[I]n many instances, the evidence upon which the President might decide that there is imminent danger of invasion . . . might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.” *Id.* at 31.

⁷⁹ *See Sterling*, 287 U.S. at 399 (stating that governor’s decision as to need for National Guard “is conclusive”); *Morgan v. Rhodes*, 456 F.2d 608, 610–11 (6th Cir. 1972) (refusing to second-guess the decision of the governor to use the militia at Kent State), *rev’d on other grounds sub nom.*, *Gilligan v. Morgan*, 413 U.S. 1 (1973); *cf.* *United States ex rel. Gillett v. Dern*, 74 F.2d 485, 487 (D.C. Cir. 1934) (explaining that when not in federal service, the Guard is within the exclusive province of the state); *People ex rel. Leo v. Hill*, 126 N.Y. 497, 503–04 (1891) (finding that the governor’s power to disband portions of the militia is plenary).

This question seems dependent on what political actor is in charge of the militia at the time. A somewhat related issue was raised and dealt with following the death of four students at Kent State University in 1970. The Court in that case determined that the training of the National Guard had been vested in Congress, and thus it would be inappropriate for the judiciary to become involved. *Gilligan v. Morgan*, 413 U.S. 1, 6–10 (1973) (deeming the issue a non-justiciable political question).

⁸⁰ 287 U.S. 378 (1932).

⁸¹ *Id.* at 387–88.

⁸² *Id.* at 399 (“His decision to that effect is conclusive.”).

⁸³ *Id.* at 402–04. The Court stated that if the governor could simply disregard federal court rulings, then “fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land.” *Id.* at 397.

but only when used in furtherance of the rule of law. It cannot be used to undermine legitimate federal action.⁸⁴

The most striking examples of the above occurred during the school desegregation battles in the South. In 1957, Arkansas governor Orville Faubus stationed the state National Guard at high schools in Little Rock to prevent the integration of the schools that was ordered by the United States District Court for the Eastern District of Arkansas.⁸⁵ Relying on Attorney General Brownell's advice that the federal government could step in to enforce the federal court ruling,⁸⁶ President Eisenhower federalized the Arkansas National Guard and used federal troops to enforce the ruling and to implement integration.⁸⁷ Similarly, in 1963, the National Guard was caught between opposing forces. Alabama governor George Wallace used his state's National Guard to turn away black students from the University of Alabama at Tuscaloosa, despite a federal court-ordered integration plan.⁸⁸ In response, President Kennedy ordered the federalization of the Alabama National Guard.⁸⁹ Several days later, federal officials, supported by the National Guard, confronted Governor Wallace at the door of the University of Alabama and enforced the federal court's order of integration.⁹⁰

⁸⁴ Cf. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

⁸⁵ See 41 Op. Att'y Gen. 313, 315–17 (1957); DOUBLER, *supra* note 21, at 213.

⁸⁶ 41 Op. Att'y Gen. 313, 324–27 (relying on 10 U.S.C. §§ 332–333, which authorized the president to use the military to enforce federal laws where the states are unable or unwilling to do so).

⁸⁷ Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957); 41 Op. Att'y Gen. 313, 329; DOUBLER, *supra* note 21, at 214 ("Presented with orders straight from the federal commander in chief, the Arkansas National Guard responded by disregarding further directions from Governor Faubus. Angered by Eisenhower's move, Faubus referred to his own Arkansas National Guard as 'occupation troops.'").

The President acted under the powers granted in 10 U.S.C. §§ 332–333. The former authorizes action when "rebellion against the authority of the United States make[s] it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings." 41 Op. Att'y Gen. 313, 327. The latter is to be used when insurrection causes a situation where a class of people are "deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law" *Id.*; see also *In re Debs*, 158 U.S. 564, 582 (1895) ("If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."); 41 Op. Att'y Gen. 313, 332 ("When a local and State Government is unable or unwilling to meet [the threat of mob rule], the Federal Government is not impotent.").

⁸⁸ See DOUBLER, *supra* note 21, at 214 (stating that the students, who were escorted by Department of Justice officials, were turned away personally by Governor Wallace).

⁸⁹ See *id.*

⁹⁰ See *id.* at 215 (indicating that the governor made a short statement vowing to continue to work against integration, and then stepped aside and allowed the students to enter); see also *Alabama v. United States*, 373 U.S. 545, 545 (1963) (refusing to find any basis for damages by the state for the actions of the federal government in stationing troops in preparation of

The situation that the above examples illustrate, while revealing a supremacy of the federal government as against the states, was considered by the framers and wholeheartedly endorsed. In Federalist 16, Hamilton writes about just such a problem and concludes that the people and the federal government would be authorized to stop “illegal usurpation[s] of authority.”⁹¹ This, it seems, is the distinction. Illegal usurpations of power will not be tolerated by either the states or the federal government—and the militia will be available to ensure this.⁹²

IV. CONCLUSION

The militia of today is far different than that envisioned by the framers of the Constitution.⁹³ Although it is at least nominally a state body, the National Guard is more properly viewed as an extension of the Army. Capable of being federalized at any time, and of serving anywhere, the National Guard plays an integral role in the country’s national defense needs, both domestically and abroad.⁹⁴ Because of this relationship with the federal government, the National Guard no longer seems like the bulwark against that government which it was originally designed to play. In fact, the recent history of the Guard has seen its use in the hands of the federal government against the lawlessness of state governments. Thus, for now, the constitutional underpinnings of the state militias seem obsolete—the worries of the framers seem unimportant. In an age of increasing security measures and fears about government intrusion, however, it remains to be seen whether the framers were more prescient than we now believe.⁹⁵

action under 10 U.S.C. § 333).

⁹¹ THE FEDERALIST NO. 16, at 104 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁹² See *supra* notes 34–39.

⁹³ For a wonderful discussion of the natural progression from a militia-based force to a professional military force, see book five, chapter one of the *Wealth of Nations*. Smith gives two reasons for this development. The first is that advances in society make war more about skill than strength. The second is that as society grows, the goods and services offered by citizens become more essential, and thus citizens cannot simply leave their professions when militia service calls. He writes, “[I]t is necessary that [military service] should become the sole or principal occupation of a particular class of citizens, and the division of labour is as necessary for the improvement of this, as of every other art.” SMITH, *supra* note 2, at 886–87. It is hard to argue that this is not what happened in the United States.

⁹⁴ See generally *The Army National Guard: At Home . . . Overseas . . . America’s 911* (indicating that the Army National Guard composes 34% of the Army force structure and that guardsmen are currently deployed around the globe), <http://www.arng.army.mil>.

⁹⁵ See generally Canestaro, *supra* note 31 (discussing homeland security and the increasing presence of the military in the United States).

FIVE QUESTIONS ABOUT THE MILITARY JUSTICE SYSTEM

H. F. "SPARKY" GIERKE*

I. INTRODUCTION

Between my service on the North Dakota Supreme Court and the Court of Appeals for the Armed Forces, I have now been an appellate judge for more than two decades. One thing appellate judges certainly know how to do is ask questions. I hope to stimulate thought about the military justice system by posing five fundamental questions:

First, is it time for a comprehensive reevaluation of the military justice system?

Second, how can technology improve the military justice system?

Third, should the structure of the military trial judiciary be changed?

Fourth, how can the services best develop judge advocates to become military justice professionals?

Fifth, how will international concerns affect our military justice system?

II. QUESTION ONE: SYSTEMIC REEXAMINATION

In a speech that he delivered in 2000, Major General William A. Moorman, who was then the Judge Advocate General of the Air Force, addressed change in the military justice system.¹ He noted that the "central question" was whether the Uniform Code of Military Justice (U.C.M.J.)² needed to be changed.³ General Moorman responded, "There can be only one answer. Of course it needs to be changed!"⁴ He explained, "For 50 years, the U.C.M.J. and the Manual for Courts-Martial which implements it, have been anything but static documents. The real questions are: 'If change is inevitable, what changes should be made? Why should change occur? And, when should

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¹ Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. REV. 185 (2000).

² 10 U.S.C. §§ 801-941 (2000).

³ Moorman, *supra*, note 1, at 185.

⁴ *Id.*

changes be made?”⁵ General Moorman then urged caution in adopting changes to the military justice system, emphasizing the importance of ensuring that reforms do not interfere with ensuring good order and discipline in our military forces.⁶

Since enacting the current military justice system in 1950,⁷ Congress revisited and revised the system in 1968⁸ and 1983.⁹ The 1968 revisions were particularly substantial, including changing the old “law officer” position to the office of military judge, authorizing judge-alone courts-martial, and fundamentally reforming the special court-martial to require, in almost all instances, a lawyer to serve as the defense counsel and a military judge to preside.¹⁰

Those of us who were judge advocates before the Military Justice Act of 1968 grew to accept the thought of soldiers being confined for six months as the result of a special court-martial with no lawyers in the courtroom. It was part of the system that we learned about at Judge Advocate General (JAG) School. Now, of course, we look back in disbelief. Are there aspects of our current system that will seem just as anachronistic when we look back at it in 2040 (if I’m lucky enough to still be analyzing the system when I am 97)?

Congress reviewed the system again in 1983.¹¹ The results were revisions that “streamline[d]” the post-trial review process¹² and extended the Supreme Court’s certiorari jurisdiction to include decisions of what was then called the United States Court of Military Appeals.¹³

Now that more than twenty years have passed since the last major revision of the system, is it an appropriate time to determine how it is working? The military justice system is currently undergoing a period of great strain and scrutiny. This has affected both the established court-martial system and military commissions¹⁴--an entirely distinct process from the court-martial system with which our Court deals. Article 21 of the U.C.M.J.¹⁵ recognizes military commissions’ jurisdiction to operate independently of the court-

⁵ *Id.*

⁶ *Id.* at 187-88.

⁷ Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

⁸ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

⁹ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

¹⁰ See S. REP. NO. 90-1601 (1968), reprinted in 1968 U.S.C.C.A.N. 4501, 4501-02.

¹¹ Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1394.

¹² H.R. REP. NO. 98-549, at 13 (1983), reprinted in 1983 U.S.C.C.A.N. 2177, 2178.

¹³ Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a)(1), 97 Stat. 1394 (codified as amended at 28 U.S.C. § 1259 (2000)).

¹⁴ “[I]n the exercise of power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to ‘define and punish . . . Offences against the Law of Nations. . . ,’” Congress has recognized military commissions “as an appropriate tribunal for the trial and punishment of offenses against the law of war.” *In re Yamashita*, 327 U.S. 1, 7 (1946).

¹⁵ 10 U.S.C. § 821 (2000).

martial system. It is important for the public to appreciate the distinction between these two systems.

Can the military justice system withstand the current enhanced public scrutiny? Of course it can. Could our system be improved? Of course it can, no human product is perfect.

Since Congress' last substantial review of the military justice system in 1983,¹⁶ the face of America's military has changed. One particularly important development has been the civilianization of many military functions. This includes logistic support on the battlefield,¹⁷ and even the Navy's replacement of sailors on some ships with "civilian mariners."¹⁸

Should these civilians accompanying U.S. forces be subject to court-martial jurisdiction? A 1970 decision by the Court of Military Appeals is an impediment to doing so.¹⁹ Under Article 2(a)(10) of the U.C.M.J., "persons serving with or accompanying an armed force in the field" are subject to court-martial jurisdiction "[i]n time of war."²⁰ That time of war requirement is constitutionally significant, because the Supreme Court has held that civilians may not be subjected to court-martial jurisdiction in peacetime.²¹

Raymond Averette was a civilian who supervised a motor pool on behalf of a government contractor in the Saigon area in 1968.²² He was tried by a general court-martial for conspiring with several soldiers to steal 36,000

¹⁶ See Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

¹⁷ See generally Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1 (1995); Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111 (2001); Major Lisa L. Turner and Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 30-31 (2001) (discussing the various views of the different branches of the military regarding the risk to civilians who deploy with service members).

¹⁸ See, e.g., James W. Crawley, *Flagship Embarks on Dual-Purpose Journey; The Coronado Gets Into Shape for Challenging Future*, SAN DIEGO UNION TRIBUNE, March 6, 2004, at B-1.

¹⁹ *United States v. Avarette*, 40 C.M.R. 891, 892 (Army C.M.R. 1969), *rev'd*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (C.M.A. 1970).

²⁰ U.C.M.J., 10 U.S.C. § 802(a)(10) (2000).

²¹ See *McElroy v. United States ex rel. Guagliardo*, decided and reported with *Wilson v. Bohlender*, 361 U.S. 281 (1960) (enlarging the holding in *Grisham* to prohibit court-martial jurisdiction over civilian employees committing noncapital offenses); *Grisham v. Hagan*, 361 U.S. 278 (1960) (finding civilian employees committing capital offenses not subject to military jurisdiction); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (extending the holding in *Reid* to prohibit military jurisdiction over civilian dependents in time of peace, regardless of whether the offense committed was capital or noncapital); *Reid v. Covert*, 354 U.S. 1 (1957) (holding that civilian dependents accompanying troops overseas during peacetime cannot be tried by court-martial for capital offenses); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (holding civilians, including former service members, cannot be subject to court-martial and are entitled to the safeguards afforded those tried in Article III courts).

²² *Averette*, 40 C.M.R. at 892.

batteries from an Army warehouse and for carrying out that plan.²³ He was convicted and received a sentence that included a year of confinement.²⁴ After the Army Court of Military Review affirmed his conviction, the Court of Military Appeals reversed.²⁵ Over the dissent of Chief Judge Quinn, Judges Darden and Ferguson held that “for a civilian to be triable by court-martial in ‘time of war,’ Article 2 . . . means a war formally declared by Congress.”²⁶ That definition, however, is at odds with the definition of “time of war” for purposes of the Manual for Courts-Martial. R.C.M. 103 defines “time of war” as “a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists.”²⁷

In practice, the *Averette* decision exempts civilians from court-martial jurisdiction, since congressional declarations of war²⁸ have become a thing of the past.²⁹ Throughout its history, the United States has fought only five declared wars -- none since Congress adopted the U.C.M.J. in 1950.³⁰ Should Congress change Article 2?

When we think about reexamination of the military justice system, we must keep in mind that, every year, the system is reviewed by the Joint Services Committee,³¹ which reports to the Code Committee.³² That review serves as a sort of annual physical exam. But, every so often, we get a more comprehensive physical including blood work and an EKG. Is it time for the military justice system to receive a comprehensive examination?

In 2001, one of my predecessors as Chief Judge of the Court of Appeals for the Armed Forces--Walter T. Cox III--led a blue-ribbon panel that examined the military justice system.³³ Among other fundamental issues, the

²³ *Id.* at 893.

²⁴ *Id.*, 19 U.S.C.M.A. at 363, 41 C.M.R. at 363.

²⁵ *Id.*, 19 U.S.C.M.A. at 366, 41 C.M.R. at 366.

²⁶ *Id.*, 19 U.S.C.M.A. at 365, 41 C.M.R. at 365.

²⁷ Rule for Courts-Martial 103(19), Manual for Courts-Martial, United States (2002 ed.) [hereinafter R.C.M.].

²⁸ See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [t]o declare War”).

²⁹ See Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT’L & COMP. L. 851, 867 (2004) (“Today, formal declarations of war are as much an anachronism as ‘Letters of Marque and Reprisal’ . . .”).

³⁰ These were the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. Guillory, *supra* note 17, at 139 n.171 (quoting BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 169 (1998)).

³¹ Review of the Manual for Courts-Martial, 32 C.F.R. pt. 152 (2004).

³² Article 146, U.C.M.J., 10 U.S.C. § 946 (2000).

³³ See THE HONORABLE WALTER T. COX III, ET AL., REPORT OF THE COMMISSION ON THE 50th ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), at http://www.nimj.com/documents/cox_comm_report.pdf, reprinted with commentary and without Appendices at Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. MICH. ST. U.-DETROIT C.L. 57, 88-124.

Cox Commission examined the roles of the convening authority and the military judge, and offered proposals to shift some responsibilities from the former to the latter.³⁴ In our decision last term in *United States v. Dowty*, our court referred to the Cox Commission's recommendations to change the convening authority's role in selecting court-martial members.³⁵ At the September 2004 Code Committee meeting, the Army revealed that it is seriously scrutinizing the manner by which court-martial members are selected. The Army is also considering whether the U.C.M.J.'s sexual offense articles should be amended to parallel the federal sexual assault statute. Congress recently directed a similar review.³⁶ Perhaps a fundamental reexamination of the military justice system has already begun.

III. QUESTION TWO: USE OF TECHNOLOGY

I am astounded by how technology has changed the battlefield since I was a young captain presiding over special courts-martial in Vietnam. Technology has also helped us in the military justice system. For example, we use computerized legal research to quickly discover the law that applies to the cases we are litigating or deciding—and counsel even use on-line legal research services to track down witnesses.³⁷ Computers have also helped us more easily write motions, briefs, and opinions.

In May 2003, the Court of Appeals for the Armed Forces launched a pilot program to allow electronic filing of motions for first enlargement of time.³⁸ The program proved to be a huge success. In August of this year, we expanded e-filing to include counsel's notices of appearance and motions to withdraw in addition to motions for enlargement of time to respond to court orders.³⁹ E-filing will, no doubt, continue to expand and will almost certainly come to include all submissions to our court.⁴⁰

But many other technological innovations seem possible. For example, why in the 21st Century do we continue to print out massive records of trial,

³⁴ *Id.* at 6-8.

³⁵ *United States v. Dowty*, 60 M.J. 163, 175-76 (C.A.A.F. 2004), *reconsideration denied*, 60 M.J. 375 (C.A.A.F. 2004).

³⁶ National Defense Authorization Act for Fiscal Year 2005, H.R. REP. NO. 108-491, Title V, Subtitle H, § 571, at 324 (2004).

³⁷ See U.S. Army Legal Services Agency, *Litigation Division Note: Dead Men Tell No Tales, and Neither Do Missing Ones: Finding the Witness*, ARMY LAW., March 1999, at 41.

³⁸ See Rule Change, In re Electronic Filing, 58 M.J. 282 (C.A.A.F. 2003).

³⁹ See Rules Changes, In re Electronic Filing, 60 M.J. 308 (C.A.A.F. 2004).

⁴⁰ See generally Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467, 493-94 (2002) (discussing advantages of electronic filing of briefs and records); Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M.L. REV. 49 (2003) (discussing courts' movement toward electronic briefs and strategies for effective electronic written advocacy).

make four hard copies on a photocopier, bind them with metal two-hole prong fasteners, and mail the original and two copies to Washington, D.C.⁴¹ Wouldn't it be much faster, much cheaper, much less labor-intensive, and much more user-friendly to prepare an electronic copy – including electronic files depicting the trial exhibits – and e-mail it to the appellate courts and appellate counsel? Or perhaps the system should require only one hard-copy original record supplemented by electronic copies. Civil litigators who take depositions typically receive not only a hard copy of the transcript with a complete word index, but also an electronic copy that allows the lawyer to do a computer word search to quickly locate particular portions of the transcript.⁴² Why don't military appellate judges and appellate counsel have this capability?

Have we sufficiently used video teleconferencing and other remote means of communication to achieve efficiency without sacrificing justice?⁴³ I contemplated this area of change before I saw this year's Joint Services Committee proposals for Manual for Courts-Martial amendments that were published in the *Federal Register* on September 15, 2004.⁴⁴ So I was particularly gratified to see that the Joint Services Committee has already been thinking about the use of remote testimony as well as telecommunications technology that could facilitate Article 39(a) sessions when the parties are in different locations.

Finally, do we have a process for identifying technological innovations and integrating them into the military justice system? The Navy JAG Corps' motto is "A Better Practice."⁴⁵ How can we use technology to achieve a better practice?

IV. QUESTION THREE: STRUCTURE OF THE TRIAL JUDICIARY

The military trial judiciary is close to my heart because one of the formative experiences of my life was serving as a special court-martial judge in Vietnam from December 1969 to December 1970. The position of military

⁴¹ See R.C.M. 1103(g)(1) (requiring four copies of verbatim records); R.C.M. 1111 (requiring that the original and two copies of the record of trial be forwarded to the Judge Advocate General if the approved sentence includes death; dismissal of an officer, cadet, or midshipman; a punitive discharge; or confinement for one year or more and the accused has not waived appellate review). Of course, in the Army, records are mailed to Arlington, Virginia rather than Washington, D.C. itself.

⁴² See generally Michael R. Arkfeld, *The Wired Lawyer: Choosing—and Using—Digital Depositions*, AZ. ATT'Y, March 2001, at 9.

⁴³ See generally Major Edward J. O'Brien, *Are Courts-Martial Ready for Prime Time? Televised Testimony and Other Developments in the Law of Confrontation*, ARMY LAW., May 2000, at 63.

⁴⁴ See 69 Fed. Reg. 55,600, 55,601-02 (Sept. 15, 2004).

⁴⁵ See Navy Judge Advocate General's Corps, . . . A Better Practice, at [http://www.jag.navy.mil/html/BetterPracticepage .htm](http://www.jag.navy.mil/html/BetterPracticepage.htm) (last visited Mar. 15, 2005).

judge was brand new back then.⁴⁶ For general courts-martial, the military judge was a substantial evolution from the old position of “law officer.”⁴⁷ For special courts-martial, the military judge was not an evolution, but an entirely new species. Before the Military Justice Act of 1968, special courts-martial were presided over by the senior member, who was usually not a lawyer and who usually had no assistance from a lawyer.⁴⁸

Is it time to consider further developments? Courts-martial are not standing courts, but rather ephemeral tribunals that come into existence with a convening order and referral, then disappear upon authentication.⁴⁹ While already bearing the costs of a standing court infrastructure,⁵⁰ the military justice system does not receive some of the advantages standing courts would offer. For example, because courts-martial no longer exist after authentication, we cannot have a trial-level post-conviction hearing process like that in place in the federal and state criminal justice systems.⁵¹ Because there is no trial-level court to which an appellant can return to litigate collateral issues like ineffective assistance of counsel and *Brady* violations,⁵² we have been forced to cobble together a system replete with competing affidavits, application of the *Ginn*⁵³ framework,⁵⁴ and *DuBay*⁵⁵ hearings.⁵⁶ Would a post-conviction procedure similar to that established by 28 U.S.C. § 2255⁵⁷ for federal civilian prisoners be preferable?

⁴⁶ See S. REP. NO. 90-1601 (1968), reprinted in 1968 U.S.C.C.A.N. 4501, 4501-02.

⁴⁷ See *id.*

⁴⁸ Before the Military Justice Act of 1968, “[i]n special courts-martial, no law officer was appointed. The president of the court, the senior member and usually a person without any legal training, assumed the duties of the law officer, including instructing the court.” Colonel James A. Young III, *The Accomplice in American Military Law*, 45 A.F. L. REV. 59, 76 n.100 (1998). “As part of the Military Justice Act of 1968, the military judge replaced the law officer in general courts and was required to preside over any special court-martial which could adjudge a bad-conduct discharge.” *Id.*

⁴⁹ R.C.M. 201(b); R.C.M. 504(a), (b); see also Major Walter M. Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 81 (2000) (discussing the absence of standing courts-martial); OTJAG Standards of Conduct Office, *Professional Responsibility Notes*, ARMY LAW., Dec. 1994, at 54, 57 n.27 (same). See generally *Jackson v. Taylor*, 353 U.S. 569, 579 (1957) (“A court-martial has neither continuity nor situs and often sits to hear only a single case. Because of the nature of military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded.”).

⁵⁰ See generally Hudson, *supra* note 49, at 69-76, 81-85, 89-90.

⁵¹ See generally *id.* at 96-97.

⁵² See *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵³ See *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

⁵⁴ See generally Major Jan E. Aldykiewicz, *Recent Developments in Post-Trial: Failure to Demand Speedy Post-Trial Processing Equals Waiver of Collazo Relief for “Unreasonable” Post-Trial Delay*, ARMY LAW., July 2004, at 134, 156-57.

⁵⁵ *United States v. DuBay*, 37 C.M.R. 411, 17 U.S.C.M.A. 147 (C.M.A. 1967).

⁵⁶ See generally Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., Dec. 1991, at 9.

⁵⁷ 28 U.S.C. § 2255 (2000).

Should some of the functions currently vested in convening authorities or trial counsel be transferred to a standing court-martial system? For example, in civilian criminal justice systems, the clerk of court typically issues subpoenas, which are equally available to defense counsel and prosecutors.⁵⁸ Would that be more sensible than requiring one litigator to go to his or her opposing counsel to seek a subpoena?⁵⁹ Also, in civilian criminal justice systems, defense counsel seeking funds for expert assistance or other litigation support typically make that request to the court, which has its own budget to provide such funding.⁶⁰ Would a standing court-martial system have a dedicated source of funding for defense support? Would that be preferable to draining command Operation and Maintenance funds to provide defense support?⁶¹ Should the convening authority be removed from the process of assessing the necessity of providing assistance to the defense?⁶² Is it unfair to require the defense to disclose its trial strategy to the government to seek litigation support funds, while the trial counsel bears no similar requirement to reveal his or her trial strategy to the defense?⁶³ Should the military justice system instead follow the federal model – as it does in so many other areas⁶⁴ – by permitting the defense to appear before the judge in an *ex parte* hearing to try to establish the necessity of funding for an expert witness or other litigation support?⁶⁵

Would establishing a standing court-martial system also provide opportunities to further enhance military judicial independence? Do we need a separate judicial career track? In 1994, Professor Frederic Lederer and now-

⁵⁸ See FED. R. CIV. PRO. 45(a)(3).

⁵⁹ See R.C.M. 703(e)(2)(C).

⁶⁰ See 18 U.S.C. § 3006A(e) (2000); see also *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that, when a defendant demonstrates that sanity at the time of the offense is to be a significant factor at trial, Fourteenth Amendment due process requires the state to provide assistance of a competent psychiatrist for the defendant, if the defendant cannot otherwise afford such assistance).

⁶¹ See generally Lieutenant W.G. “Scotch” Perdue, *Weighing the Scales of Discipline: A Perspective on the Naval Commanding Officer’s Prosecutorial Discretion*, 46 NAVAL L. REV. 69, 97-100 (1999); Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1, 38-40 (2001).

⁶² See R.C.M. 703(d).

⁶³ See generally Major Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 MIL. L. REV. 1, 31-33, 37 (2002); Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143, 144-50 (1996). But see *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986) (holding that defense request for funds to obtain independent investigator was properly denied because defendant did not make adequate showing of necessity for the investigator).

⁶⁴ Article 36(a), U.C.M.J., 10 U.S.C. § 836(a) (2000).

⁶⁵ See 18 U.S.C. § 3006A(e) (2000); see also *Weeks v. Angelone*, 176 F.3d 249, 261-62 (4th Cir. 1999), *aff’d*, 528 U.S. 225 (2000); *Lawson v. Dixon*, 3 F.3d 743, 751 (4th Cir. 1993), *cert. denied*, 510 U.S. 1171 (1994).

Lieutenant Commander Barbara H. Zeliff, proposed a detailed judicial career path that promoted steady development and institutional independence.⁶⁶ What has happened to that proposal over the last decade? Should we take a fresh look at that plan?

The article proposed the creation of a permanent trial judiciary.⁶⁷ Permanent trial judges would be promoted to O-6, be allowed to continue in office until they had completed 30 years of commissioned service, and retire as O-6s.⁶⁸ At least two-thirds of the judges on each of the Courts of Criminal Appeals would be selected from the permanent trial judiciary.⁶⁹ They would serve in the grade of O-6, except each service's chief judge, who would serve as an O-7.⁷⁰ All Court of Criminal Appeals judges who served at least three years would retire as O-7s.⁷¹

Does the article's proposal strike the correct balance between trial and appellate judges? Should each service have a chief judge of the trial judiciary who serves in the rank of O-7? Should members of the trial judiciary who serve in that capacity for a certain amount of time also be retired as O-7s? Do the services currently regard the position of chief judge of the trial judiciary as one of the pinnacles of service as a military lawyer?

Again, I was gratified to learn at the Code Committee meeting that the Army is already considering the structure of the trial judiciary as well. The Army is studying possible revisions to ensure that a military judge is given jurisdiction to act on charges from the moment they are preferred or when pretrial confinement commences rather than only upon referral of charges.

V. QUESTION FOUR: DEVELOPMENT OF MILITARY JUSTICE PROFESSIONALS

As important as process is to the military justice system, the most important ingredient is the people who operate it. The best-designed legal system in the world would be a disaster in practice if it is staffed by ineffective counsel. The worst-designed system just might work if it is staffed by talented people who are trying to do the right thing. Obviously, our goal should be a well-designed system staffed by exceptional attorneys.

Congress recently directed the military services to consider "the desirability and feasibility of consolidating the separate Army, Navy, and Air Force courses of basic instruction for judge advocates into a single course to be

⁶⁶ Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary – A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994).

⁶⁷ *Id.* at 675-76.

⁶⁸ *Id.*

⁶⁹ *Id.* at 676.

⁷⁰ *Id.*

⁷¹ *Id.*

conducted at a single location.”⁷² What is the right answer to that question? Would combining the basic lawyer courses result in the consolidation of the Army’s Judge Advocate General’s Legal Center and School, the Naval Justice School, and the Air Force JAG School? I hold all three schools in extremely high regard. If the schools were combined, how would two of them be chosen for elimination?

Another major concern that has been raised – and partially addressed – relates to something that happens even before a military lawyer attends the JAG School’s basic course: the crushing burden of college and law school debt.⁷³ Can highly-marketable young men and women be expected to come into the military when a major portion of their take-home pay will be swallowed by their student loan payments?⁷⁴ Congress and the military services have taken some steps to address this concern through continuation pay programs.⁷⁵ Is it enough? Military service is not right for everyone. But military service should never be foreclosed because potential judge advocates bear too great a financial burden as a result of providing themselves with the very education necessary to become a military lawyer.

Military justice affects the lives of the accused and the lives of the accused’s victims. Military justice is vital to maintaining discipline. The people who make the military justice system work must be developed and receive support commensurate with the system’s importance.

How do we grow military justice practitioners? I recently compared the number of courts-martial in fiscal years 1970 and 2003.⁷⁶ I was not surprised to see that the Army tried 665 special courts-martial in fiscal year 2003. But I was surprised to rediscover that the Army tried more than 41,000

⁷² Bob Stump National Defense Authorization Act for Fiscal Year for Fiscal Year 2003, Pub.L. No. 107-314, § 582, 116 Stat. 2458, 2561 (2002).

⁷³ See generally Mark Hansen, *And Debt’s All, Folks: To New Lawyers Paying Off Student Loans, “Budget” is Not a Bad Word*, A.B.A. J., June 1999, at 24, 24; Bruce W. Neckers, *The Lifetime Costs of a Legal Education*, 81 MICH. B. J., March 2002, at 10.

⁷⁴ See generally Vince Crawley, *School Loans Force Skilled Personnel Away from the Military; Pentagon Proposal Would Help Services Retain Scarce Specialty Officers*, NAVY TIMES, June 10, 2002, at 6 (indicating that in 2002, Army lawyers averaged \$70,760 in student loans with monthly payments of \$970, while Navy lawyers averaged \$64,000 in student loans with monthly payments of \$675); Robert A. Stein, *In Support of Our Military: Standing Committee on Armed Forces Law Works to Maintain the Military Justice System*, A.B.A. J., June 2002, at 73 (“At a time when the military truly needs the best and the brightest, it is increasingly difficult to recruit and retain high-quality lawyers. Those leaving school with an average student loan debt of \$80,000 often cannot afford to choose military service, given the substantial gap between private sector salaries and those of junior judge advocates.”).

⁷⁵ See generally Major Mary E. Harney, et al., *Contract and Fiscal Law Developments of 1999: The Year in Review: Appendix A: Department of Defense Legislation for Fiscal Year 2000*, ARMY LAW., Jan. 2000, at 119, 136.

⁷⁶ See H. F. “Sparky” Gierke, *Message from the Mall*, FED. LAW., Oct. 2004, at 30, 34.

special courts-martial in fiscal year 1970.⁷⁷ Back then, judge advocates quickly learned the trial advocacy ropes because we were in court almost every day. That is no longer the case. What can the system do to substitute for the experience judge advocates gained trying those cases – and the mentoring that was available from senior military lawyers who had tried hundreds or thousands of courts-martial?

VI. QUESTION FIVE: GLOBALIZATION

The world is watching our military justice system.⁷⁸ What does the system tell the world about our fundamental American values? The global war on terror is a very real battle against enemies dedicated to attempting to destroy our nation, but it is also a battle of ideas. What ideas does our military justice system communicate to those who watch it? What messages are we sending? Military justice practitioners at every level must keep those questions in mind. Both the military commission system – which, as presently constituted, is entirely independent of the court-martial system – and the court-martial system with which our Court deals will be under an international microscope for at least the next several years.

Internationalization in the military justice arena is controversial. Concerns about national sovereignty arise for the military as a whole over issues like command and control in multinational operations.⁷⁹ They also arise for the military justice system in particular, such as in the debate over the Rome Statute.⁸⁰ International pressures will likely increasingly influence the United States' military justice system. For example, will the United States

⁷⁷ See Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation for the Period Jan. 1, 1970 to Dec. 31, 1970, at 17.

⁷⁸ See generally Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. Rev. 195 (2000).

⁷⁹ See, e.g., Anthony J. Rice, *Command and Control: The Essence of Coalition Warfare*, 27 PARAMETERS 152 (1997) (“The most contentious aspect of coalition operations is command and control. This sensitivity reflects the participants’ concern over who will command their forces and what authority that commander will have. The converse is equally significant to military and political leaders in each nation contributing forces to a coalition: the degree of day-to-day control national authorities will have over the employment of their own forces.”).

⁸⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998) (Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute]. See generally Lieutenant Colonel Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, ARMY LAW., Sept. 2002, at 1.

change aspects of its military justice system to better position itself regarding the Rome Statute's complementarity principle?⁸¹

How will our European allies resolve tensions between their commitments to us in the NATO Status of Forces Agreement and their obligations under the European Convention on Human Rights?⁸² Will this tension produce diplomatic pressures that lead us to change aspects of our military justice system?

Will we look to other countries, particularly those from the common law tradition, to discover best practices and bring them into our military justice system? In a famous dissenting opinion, Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁸³ Will we – and should we – come to see other nations' military justice systems as laboratories testing alternative procedures that we can then adopt if the experiment proves successful? Or is the United States' military justice system so different from all the others that our allies' experiences are simply irrelevant?

VII. CONCLUSION

I previously mentioned General Moorman's speech in which he discussed change in the military justice system.⁸⁴ The questions I have asked in this article are posed in the same spirit as General Moorman's questions. They are designed to stimulate thinking about – to borrow an old Army recruiting slogan – making the military justice system all it can be.⁸⁵ These questions are not motivated by any agenda – other than to start a dialogue about some of the fundamental issues facing our military justice system today. By discussing these issues, we may discover paths to an even better military justice system.

⁸¹ See Rome Statute, *supra* note 80, art. 1. See generally Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

⁸² See generally Major Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"*, 40 A.F. L. REV. 1, 12-13 (1996).

⁸³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸⁴ See *supra* notes 1 and 4-7 and accompanying text.

⁸⁵ For an interesting discussion of Army recruiting slogans, see Major General Kenneth D. Gray, *The Eighth Annual Hugh J. Clausen Lecture on Leadership*, 175 MIL. L. REV. 385, 396-97 (2003).

STATE PROPERTY TAX IMPLICATIONS FOR MILITARY PRIVATIZED FAMILY HOUSING PROGRAM

PHILIP D. MORRISON*

I. INTRODUCTION

The Military Housing Privatization Initiative (MHPI) is a recent Department of Defense and Congressional initiative to leverage private sector financing and construction methods in order to build adequate military-family housing. Originally passed in 1996, the initiative was designed to quickly provide military families with badly needed family housing. Military-family housing was not meeting current standards because many of the units were built over 30 years ago using outdated building materials and design standards.¹ The private sector had been deemed a necessary partner to assist in making up the shortfall. The reasons were simple. The private sector has the ability to attract private capital and complete projects faster than using traditional military construction methods.² Under the new privatization (MHPI) concept, the federal government asks private developers to submit proposals to build military-family housing. After a successful bidder is chosen, the federal government leases land to a developer under a long-term ground lease. In return, the private developers renovate or construct new housing units on the leased land. The developers then receive payments through monthly allotments made directly from the tenant's paycheck. In most cases, the projects span 50 years. This new initiative has created a complex tax problem because of the federal nature of the housing developments and the myriad of state and local taxing authorities affected by new construction. Local taxing authorities appear poised to take advantage of the projects and the property tax revenues.³

The purpose of this paper is to explore the problems and issues regarding local and state taxation of the military's new housing privatization

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¹ *Military Housing Privatization Initiative: Hearings Before the Subcomm. on Military Installations and Facilities of the House Comm. on National Security*, 102nd Cong. (1996) [hereinafter *1996 Hearings*] (statement of Robert E. Bayer, Deputy Assistant Secretary of Defense, Installations).

² *1996 Hearings*, *supra* note 1.

³ *1996 Hearings*, *supra* note 1.

program. The paper will not focus on the income tax issues. Rather, the discussions will focus on the property tax and ad valorem taxes assessed on these new military housing projects. This paper will explore the competing interests at stake. On the one hand, the MHPI is designed to meet the deficit of military-family housing and the immediate need of military families in a cost effective manner. On the other hand, local taxing authorities are increasingly reliant on property tax revenues to meet fiscal demands. A “battle royale” is in the making. If recent cases are any guidance, states and municipalities appear to be ignoring issues of constitutional and federal law in order to satisfy their insatiable urge to obtain local revenues. As the reader will see, at stake in a typically large housing project is between \$1-2 million dollars *per year* in property and ad valorem taxes on an average MHPI project. Numerous projects have taken place or will take place across the United States involving over 100,000 military-family units.

This paper will address the housing privatization initiative, the complex nature of the projects, how projects can claim tax exemption, and how state and local authorities will try to tax new MHPI developments. In Part II of this paper, the history of the MHPI will be discussed. This will also involve a look at the basics of commercial property taxation. In Part III, there will be a discussion of the four types of federal jurisdictions on federal installations. This discussion will explore whether a state taxing authority can reach the new housing developments. The new developments may involve one, two, or more of these jurisdictional areas and will directly affect the tax law that will apply. In Part IV, state property taxation on federal installations will be explored with a look at recent state case law. Developers who are taxed on projects in federal enclaves pay higher expenses. As will be discussed below, state taxation of privatized housing will have a direct impact on profitability of the private developers and a significant impact on reinvestment into the projects. Finally, Part V will conclude with some specific recommendations for housing privatization in order to increase project viability and reinvestment.

II. BACKGROUND OF MILITARY HOUSING PRIVATIZATION INITIATIVE (MHPI)

A. Legislative History

The Military Housing Privatization Initiative (hereinafter MHPI) gave the Department of Defense (DoD) special legislative authority designed to replace unsafe and dilapidated family housing.⁴ The MHPI is designed to make up for a vast shortage and awful state of military-family housing in the early Nineties. The military housing problem became readily apparent soon

⁴ Captain Stacie A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F.L. REV. 1 (2002).

after the first Gulf War as outdated and “cookie-cutter” military housing of the 1940’s and 1950’s had reached the end of its useful life.⁵

Prior military housing initiatives utilizing the private sector had just not worked effectively.⁶ Wherry Act military housing was begun under the authority of the National Housing Act of 1949 (a.k.a. the Wherry Military Housing Act of 1949),⁷ and was effectively terminated in 1955 over congressional concerns about developer windfalls. Capehart Housing, named for Senator Homer Capehart of Indiana, a WWI veteran, involved military-family housing using private financing like MHPI, but the projects were turned over to the government upon completion. Capehart Housing units were larger than Wherry Housing units, and therefore were preferred by military tenants. DoD made a mortgage payment and in return the tenants forfeited their monthly housing allowance or BAH. Approximately 115,000 Capehart units were constructed.⁸ Following Capehart, 801/802 Housing was the next military housing initiative.⁹ This program involved lease and rental guarantees to private developers in exchange for military housing. These projects were eventually costly and were discouraged.¹⁰

The Department of Defense currently owns, operates, and maintains an inventory of about 300,000 family housing units. Almost 200,000 units or two-thirds were considered unsafe and in immediate need of demolition or major renovation.¹¹ Many of the housing units were constructed during World War II (or just after) and were only designed to last a few years. The problem was severe enough that many feared that service members would leave the military due to the lack of adequate housing.¹² In addition, many older units had environmental problems such as lead-based paint, asbestos, and could not meet current building codes. Roofs leaked, plumbing was inadequate, and families struggled to live comfortably. The Department of Defense could not meet the need to improve the housing situation fast enough. Housing privatization seemed to be one alternative to get adequate housing built 3-4 times faster than other military construction methods (i.e. where the military directly contracts for the construction of the units on base and owns them upon completion).¹³ Some estimates placed the timeframe to fix the housing

⁵ Donald Else, CRS Report to Congress--Military Housing Privatization Initiative: Background and Issues 1 (Congressional Research Service 2001).

⁶ Else, *supra* note 5, at 3-4.

⁷ Pub. L. No. 81-221, 63 Stat. 570.

⁸ Else, *supra* note 5, at 3-4.

⁹ Military Construction Authorization Act of 1984, Pub. L. No. 98-115, § 801, 97 Stat. 757 (1983) (codified as amended at 10 U.S.C. § 2828 (2003)).

¹⁰ Else, *supra* note 5, at 4.

¹¹ *Military Housing Privatization Initiative: Hearings Before the Subcomm. On Military Installations and Facilities of the House Comm. On Armed Services*, 105th Cong. (1999) (statement of Mr. Randall Yim, Acting Deputy Under Secretary of Defense, Installations).

¹² 1996 *Hearings*, *supra* note 1.

¹³ Vest, *supra* note 4, at 2.

problems using traditional legislative authority (i.e. military construction) from 30-40 years.¹⁴ Inadequate housing gave many military families reason to leave after their service commitments were up. Retention was a deep concern on the minds of Congress and Pentagon leadership.¹⁵ Military Housing Privatization was a new tool designed to make up for the shortfall in housing and leverage the private sector in a new way. This paper will now focus on a discussion of the features of this new legislative initiative.

B. The Military Housing Privatization Initiative Features

Congress responded to the problem by passing a bold and innovative alternative to military construction. The National Defense Authorization Act of 1996¹⁶ was enacted with a goal of remedying this military housing shortfall. It permits faster construction of more military-family housing while meeting current market standards.¹⁷ It was designed to create a body of special legislative authority for the Services to enter into agreements with private companies to renovate or construct houses on military reservations.¹⁸ It was not designed to replace military construction of family housing altogether. Rather, it was another tool to leverage private sector resources when the conditions were right.

The new MHPI contains a number of features. It includes the ability to lease federal land to private companies.¹⁹ It also allows the military to enter into joint ventures and even share in ownership of project companies.²⁰ Special accounts are established to channel the project funds and authority to direct military tenants to pay developers by allotments.²¹ The military department can also enter into direct loans and loan guarantees in order to assist in financing private developers.²²

Currently, the Department of Defense has awarded 40 military family housing privatization projects. These projects include the construction and/or renovation of 80,000 units. Over 40 housing projects are in solicitation.²³ The

¹⁴ 1996 *Hearings*, *supra* note 1, at 2.

¹⁵ *Housing and Utilities Privatization, Statement Before the House Armed Services Comm.*, 106th Cong. (2000) (statement of Honorable Mahlon Apgar IV, Assistant Secretary of the Army, Installations and Environment).

¹⁶ Pub. L. No. 104-106, 110 Stat. 186 (codified at 10 U.S.C. §§ 2871-2885 (2003)).

¹⁷ 1996 *Hearings*, *supra* note 1, at 3.

¹⁸ *See Vest*, *supra* note 4, at 8-9.

¹⁹ 10 U.S.C. § 2878.

²⁰ 10 U.S.C. § 2875.

²¹ 10 U.S.C. § 2882.

²² 10 U.S.C. § 2873.

²³ Office of Undersecretary of Defense (Installations and Environment), *DoD Military Housing Privatization – Housing Projects*, at <http://www.acq.osd.mil/housing/projsumm.htm> (last visited Jan. 21, 2005).

Air Force, for example, has scheduled 26,500 units to be completed by 2005,²⁴ and more projects are scheduled for completion in the next few years.²⁵ The Army and Navy have numerous projects ongoing as well.²⁶ Legislative authority for the housing program was extended between 1996 and 2004,²⁷ until permanent authority for the program was provided in the National Defense Authorization Act for Fiscal Year 2005.²⁸

Before looking at the tax law, one must first look at the specifics of the housing projects in order to get an understating of the nature of the projects. The housing privatization projects are awarded through a competitive process. The Army, Navy and Air Force structure their competitive bidding processes slightly differently.²⁹ Construction typically begins after the real estate closing. Bidders are national construction firms or joint venture operations. After competitively bidding for a project, a developer is awarded the military project. The housing projects are projected to save the federal government hundreds of millions of dollars over the life of the Program because the new initiative involves no new military appropriations.³⁰ For example, military members receive a monthly housing allowance called Basic Allowance for Housing (BAH). This amount varies by rank, length of service, location or duty assignment of the military member. Members stationed in high cost-of-living areas such as Hawaii and Washington D.C. metropolitan area receive more money than members stationed in rural areas of the country. After a military member moves into a privatized housing unit, his or her housing allowance would be directed into a special lockbox account and the proceeds would be used to repay the developer and finance the new housing project. This would act as rent for the units. Special lockbox accounts are created to manage the cash flow. Under MHPI, Congress does not theoretically have to appropriate new monies for military construction because the projects are primarily funded through existing appropriated monies using the military member's BAH.³¹ As stated previously, this method is designed to replace and rehabilitate over

²⁴ HQ AFCEE, Design and Construction Directorate, Housing Privatization Division (HQ AFCEE/DCP), *United States Air Force Housing Privatization*, at <http://www.afcee.brooks.af.mil/dc/dcp/news> (last visited Jan. 21, 2005).

²⁵ HQ AFCEE, Design and Construction Directorate, Housing Privatization Division (HQ AFCEE/DCP), *United States Air Force Housing Privatization*, at <http://www.afcee.brooks.af.mil/dc/dcp/news> (last visited Jan. 21, 2005).

²⁶ Office of Undersecretary of Defense (Installations and Environment), *DoD Military Housing Privatization – Housing Projects*, at <http://www.acq.osd.mil/housing/projsumm.htm> (last visited Jan. 21, 2005).

²⁷ See Else, *supra* note 5, at 7.

²⁸ Pub. L. No. 108-375, 118 Stat. 1811 (codified at 10 U.S.C. §§ 2871-2884 (2004)).

²⁹ Vest, *supra* note 4, at 10-18.

³⁰ See 1996 *Hearings*, *supra* note 1.

³¹ See 10 U.S.C. § 2883a.

200,000 housing units several times faster than traditional methods and helps leverage existing appropriated funds to assist in financing new housing units.³²

Unlike traditional military construction projects, ownership of the privatized units is vested in the private developer—not the government. The developers build, own and manage the housing units. The military tenants provide an income stream for debt financing repayments through assignment of their BAH to the lockbox account. The developer companies incur financing for the projects.³³ This is vastly different from traditional military construction. Under traditional military construction, the federal government pays a builder directly and owns all the houses, equipment, and eventual management of the new units.³⁴ Under the MHPI, title to the housing units vests in private developers upon closing. The improvements are placed on 50-year leaseholds. The United States retains a reversionary interest at the expiration of the ground lease.³⁵

C. Financial Implications for State and Local Communities

The shift from federal military housing units to private ownership is not going unnoticed by local and state communities. Many projects range from \$50 to \$265 million dollars in housing market value.³⁶ For example, one of the first MHPI projects was located at Fort Carson, Colorado. The Fort Carson project involved construction of over 840 new single family and multifamily units, and the revitalization of over 1824 units totaling \$228.6 million dollars.³⁷

Construction of several hundred new housing units around a military base can be financially significant for a local community. Construction sub-contractors are hired and jobs are created. Building supplies are ordered and local businesses can add to their payrolls. Sales tax revenues are generated due to local purchasing of materials and supplies. As we will later see, the potential tax revenues of such a development to the local and state authorities are tremendous.

³² Vest, *supra* note 4, at 5

³³ See 10 U.S.C. §§ 2871-2884.

³⁴ Vest, *supra* note 4, at 6.

³⁵ See 10 U.S.C. §§ 2871-2884.

³⁶ Office of Undersecretary of Defense (Installations and Environment), *DoD Military Housing Privatization – Housing Projects*, at <http://www.acq.osd.mil/housing/projsumm.htm> (last visited Feb. 25, 2005).

³⁷ Office of Undersecretary of Defense (Installations and Environment), *DoD Military Housing Privatization – Housing Projects*, at <http://www.acq.osd.mil/housing/projsumm.htm> (last visited Feb. 25, 2005).

D. Calculation of Real Property Taxes—The Basics

Property taxes are a creature of state law. For the most part, state constitutional and legislative requirements have historically used the fair market value of real property. This value is estimated and administratively determined as the base for imposing tax liability. Typically, the fair market value of the property is taken into account and only a percentage of that value is actually taxed. The relevant percentage is called the “assessment ratio.”³⁸ Depending upon the locality, commercial properties are assessed in three different ways: income approach, replacement cost approach, or sales comparison approach. Once a value is established, this value is multiplied by the applicable tax rate. This yields the “taxable value” for a given commercial or housing complex. Real property tax rates vary with the taxing jurisdiction. The result is the property tax. Each state administratively determines its own method for determining the value of a particular property and will vary from state to state.³⁹

Commercial property appraisals are not static. Re-appraisals to account for property value increases are also set by State statute or handled administratively. The method used by a state must be fair and not unfairly discriminate against taxpayers.⁴⁰ The process of state and local taxation is handled differently depending on the particular state. There is no uniformity. All 50 states and the District of Columbia have their own set of tax laws. Some states even allow subsidiary governmental units such as municipalities, townships, and special taxing authorities the ability to authorize, assess and collect their own taxes.⁴¹ These may be carried out by special levies or voter-approved bonds.

An examination of what a typical multi-family housing project might pay in property taxes per year is instructive. Although an over-simplification, the assumptions are based upon a hypothetical housing project involving 1,000-1,200 homes and using a hypothetical tax rate for a state. The sample calculation below does not take into account any applicable exemptions or abatements. The tax rates are merely illustrative and will vary by jurisdiction. Local levy and applicable tax rates will vary depending upon the location of the project. A hypothetical \$150 million dollar commercial housing project would yield the following:

³⁸ Mildred Wigfall Robinson, *Difficulties in Achieving State and Local Fiscal Policy At The Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 523 (2002).

³⁹ Samuel J. McKim III, *Is Michigan's Ad Valorem Property Tax Becoming Obsolete*, 77 U. DET. MERCY L. REV. 655 (2000).

⁴⁰ McKim, *supra* note 39, at 669

⁴¹ Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS 171 (1997).

EXHIBIT

--\$150 million project x 4.0 % tax rate = 6 million taxable value

--\$ 6 million tax value x 425 mills* (.425 levy) = \$ 2.55m annual property tax

Total: \$2.55 million per year

* Amount may vary by local taxing authority

E. Importance of Property Tax Revenue to Local Governments

The \$2.5 million annual revenue in this example is illustrative of the types of annual property tax revenue at stake in a typical MHPI project. Some larger projects may even involve higher property appraisals and annual property taxes. If a project is constructed in a federal enclave, those savings can provide additional revenue for the developer and reinvestment back into the project. The reason is that tax savings increase net profits to the developer. Based upon the special lockbox account structure, net profits (after debt repayment and project expenses) are generally paid to the developer and a percentage is put back into a “reinvestment account.” This reinvestment account, as will be discussed later, can create a better quality of life for military families.

However, the payment of property taxes is an incredibly important source of revenue for local communities. Although total state revenue from property taxes collections has declined from 35% to 18% since 1948, property tax revenues still remain the primary source of revenue, which can be controlled by local governments.⁴² Some states, primarily New England states, place a heavy reliance on property tax revenue. This is their primary source of general revenue. Property tax revenues in Maine, for example, comprise almost 50% of state revenue.⁴³ Property tax revenue comprises a higher percentage of *local* government revenue. Property taxes make up about 75% of local government revenues based upon the national average.⁴⁴

⁴² Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 754-755 (2000).

⁴³ Kirk G. Siegel, *Weighing the Costs and Benefits of Local Property Tax Exemption: Non-Profit Organization Land Conservation*, 49 ME. L. REV. 399, 421 (1997).

⁴⁴ Siegel, *supra* note 43, at 424-425.

⁴⁵ *See* Use of Real Property Facilities, Air Force Instruction 32-9002, ¶ A1.9 (1993).

III. LOCATION...LOCATION...LOCATION: WHAT LAW WILL APPLY—FEDERAL OR STATE?

The location of the projects has enormous implications for a particular MHPI project as will become readily apparent. Location of a housing project within a federal installation (and, in some instances, *where* on the installation) may determine whether a particular project is exempt from State or County property taxes. The law reserved in a particular area of a base may vary greatly depending upon the type of legislative jurisdiction. The applicable legislative jurisdiction (e.g. exclusively federal, concurrent, proprietary, or partial) has a direct bearing on whether state tax law will apply to a housing project and whether the developer will incur property taxes.

The legislative jurisdiction of a federal reservation or military installation is divided into four broad categories: proprietary, partial, concurrent, and exclusively federal.⁴⁵ Mere ownership of lands by the federal government within a state does not create areas of federal jurisdiction.⁴⁶ The lands remain part of the territory of the state despite federal ownership or title in real property.⁴⁷ The key facts to look at in any housing project is when the State entered the original Union and when the military installation was originally created. Legislative jurisdiction determines which law applies—federal or state. This will in turn determine which tax law applies, if any at all.

A. Establishing Jurisdiction on a Military Reservation

The key to finding out whether a state tax law will reach a privatized housing project is to first look at how legislative jurisdiction was established on a military reservation. This is important to understanding whether state tax law will apply. Legislative jurisdiction is a cornerstone of any tax exemption case when dealing with federal enclaves. This is more a real property question than a tax question. Nevertheless, the two concepts are necessarily intertwined.

Legislative jurisdiction on military installations (e.g. proprietary, concurrent, partial and exclusively federal) is established in two primary ways. First, a state can cede the property to the United States.⁴⁸ Often times, the state in question will reserve certain rights such as the right to effect civil process service or criminal process service on the lands ceded to the United States. The federal government must consent to the acquisition or acceptance of jurisdiction and file notice of acceptance with the Governor of the State.⁴⁹ This process usually results from direct negotiations with the particular State. The

⁴⁶ See *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930).

⁴⁷ *Id.* at 650.

⁴⁸ 40 U.S.C. § 3112 (2002).

⁴⁹ 40 U.S.C. § 3112.

process is memorialized through written correspondence and proper documents executed by the appropriate state and federal officials.⁵⁰ There is a presumption that the United States has not accepted exclusively federal jurisdiction over a military base until the Government files a notice of acceptance with the Governor of the State.⁵¹ States can even cede jurisdiction piecemeal. For example, Hanscom AFB, Massachusetts, is a federal enclave created primarily after World War II. The entire base was in exclusive federal legislative jurisdiction, except for a small portion of the base. This small portion of the base comprised about 34 acres of the base and was deemed concurrent legislative jurisdiction. In 1985, the Massachusetts legislature passed a bill (and signed by the Governor) ceding legislative jurisdiction of the remaining 34 acres to the Federal Government. The special legislation contained the legal description of the property, metes and bounds, and special language ceding jurisdiction to the United States.⁵²

There is a second way the Federal Government could acquire title.⁵³ Aside from states ceding lands to the Federal Government, the Federal Government could have simply acquired the original title to lands prior to statehood. In these cases, the United States would have exclusive legislative jurisdiction. One might find this scenario in a number of western states where the Federal Government acquired original ownership and then subsequently granted title to settlers and others around a military reservation.

B. Types of Federal Legislative Jurisdictions

There are four types of legislative jurisdictions on military installations. These jurisdictional or legislative areas are proprietary jurisdiction, partial state/federal jurisdiction, concurrent jurisdiction, and exclusively federal jurisdiction.⁵⁴ Federal installations may involve a mix of one, two, or all four jurisdictional zones on a particular military base. There is no uniformity among federal lands due to the elimination of the requirement that all federal lands have exclusive legislative jurisdiction in 1939.⁵⁵

The focus of this paper will be tax exemption as it applies to the various areas of jurisdiction, but primarily exclusively federal jurisdiction.

⁵⁰ 40 U.S.C. § 3112. *See, e.g.,* *Visicon, Inc. v. Tracy*, 83 Ohio St. 3d 211 (Ohio 1998) (discussing the correspondence relating to establishing jurisdiction over the hotel).

⁵¹ 40 U.S.C. § 3112(c).

⁵² 1985 Mass. Acts 456.

⁵³ For the sake of brevity, condemnation procedures are being omitted from this discussion. Condemnation is another procedure for the United States to obtain title. However, it is normally used to acquire lands from private entities and not from a State. Regardless of how the federal lands are acquired, however, the United States must affirmatively accept exclusive federal jurisdiction over the lands acquired for exclusively federal jurisdiction to be created. *See*, 40 U.S.C. § 3112(c).

⁵⁴ *See* Use of Real Property Facilities, Air Force Instruction 32-9002, ¶ A1.9 (1993).

⁵⁵ *See* 39 Op. Att’y Gen. 285 (1939).

This is the clearest case in which a proposed development will likely have tax-exempt status.⁵⁶ However, privatized housing developments on military bases where jurisdictional zones are mixed can also enjoy tax-exempt status. Developments may become tax-exempt by simply steering the housing development to these exclusively federal areas, or by carefully analyzing the legislative reservations made by the State when the property was originally ceded to the United States. A closer examination of this concept warrants further analysis.

From a historical perspective, an area of exclusive federal legislative jurisdiction or “federal enclave” has its roots in the U.S. Constitution.⁵⁷ As the term implies, this type of jurisdiction gives the federal government *sole* authority to legislate. The area of exclusive jurisdiction can prevent many state laws from applying on a federal installation.⁵⁸ The Constitution states explicitly that the United States has the power to do the following:

To exercise *exclusive Legislation* in all Cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and acceptance by Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings

Article I, Section 8, Clause 17, of the U.S. Constitution (emphasis added). Exclusive legislation is synonymous with the term “exclusive jurisdiction.”⁵⁹

The burden of proving jurisdiction often rests with a State.⁶⁰ In some cases, a State may have elected to reserve some authority (for instance, authority to serve civil and criminal process on the property).⁶¹ If the state failed to reserve such authority, it is deemed waived.⁶² States cannot reacquire jurisdiction once land is ceded to the United States.⁶³ This is why it is important to carefully examine the cession letters or special legislative bills enacted by the State at the time a military base was created. The exact language of those documents will control what legislative jurisdictions apply

⁵⁶ This assumes the areas of exclusive federal jurisdiction are suitable for development (i.e. undeveloped land, environmentally clean, not presently being used for active missions, etc.).

⁵⁷ U.S. CONST. art. I, § 8, cl. 17.

⁵⁸ See *Consolidated Milk Producers v. Parker*, 123 P.2d 440 (Cal. 1942). See also *Miller v. Hickory School Board*, 178 P.2d 214 (Kan. 1947); *State v. Mack*, 47 P. 763 (Nev. 1897); *People v. Mitchell*, 395 N.Y.S.2d 340 (N.Y. Sup. Ct. 1977).

⁵⁹ *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930).

⁶⁰ *State v. Rodriguez*, 302 S.E.2d 666 (S.C. 1983).

⁶¹ *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964).

⁶² *Id.*

⁶³ *United States v. Heard*, 270 F. Supp. 198 (W.D. Mo. 1967).

on a military base or whether the State established any legislative prerogatives when it ceded jurisdiction to the United States. On occasion, states have reserved the right to tax during the cessation of exclusive federal jurisdiction to the federal government.⁶⁴

Prior to 1940, the Federal Government had to acquire exclusively federal legislative authority over all federal lands since federal law stated that no federal funds could be expended on an installation unless jurisdiction was exclusively federal.⁶⁵ This requirement had been the rule since 1841.⁶⁶ However, this requirement was changed in 1940.⁶⁷ The repeal of this requirement had a profound impact on the states. The states could now retain through negotiations with the Federal Government certain legislative prerogatives on federal installations that they deemed important.⁶⁸ Tenders of state land to the Federal Government resulted in numerous reservations of state legislative prerogatives. If the United States acquiesced, these areas then contained a mix of state and federal law.

There are three other types of legislative jurisdictions on federal lands. Concurrent legislative jurisdiction applies in those instances where the State has reserved to itself the right to exercise all of the same authority concurrently with the United States. As the name suggests, areas of concurrent jurisdiction are a hybrid of state and federal authority where state and federal law apply concurrently. Legislative authority is shared. If a state ceded jurisdiction to the United States, some (or all) legislative powers may have been reserved by the state at that time.⁶⁹ In the event of conflict of state and federal law in areas of concurrent jurisdiction, federal law would prevail under the Supremacy Clause of the Constitution.⁷⁰ The original grant letters (or state special legislation ceding jurisdiction) between the state and federal authorities will help determine whether local authorities may tax private developments on military bases.

Partial legislative jurisdiction applies to those instances where the Federal Government has legislative authority over an area ceded by the State. However, the State concerned has reserved to itself the right to exercise other authority over the federal lands. This reservation of authority is more than the right to civil or criminal service and may include the right to tax private property.⁷¹ The State cession bills and notice of acceptance by the Federal Government will contain the key reservations made by the State. These

⁶⁴ See, e.g., *Kansas City v. Querry*, 511 S.W.2d 790 (Mo. 1974).

⁶⁵ 40 U.S.C. § 355 (1940) (current version at 40 U.S.C. § 3112 (2002)).

⁶⁶ 39 Op. Att’y Gen. 285 (1939).

⁶⁷ 40 U.S.C. § 355 (current version at 40 U.S.C. § 3112).

⁶⁸ Letter to file from Lt Col Roberts Wells, Office of Staff Judge Advocate, Headquarters, Air Force Cambridge Research Center, Hanscom AFB, MA, November, 1959.

⁶⁹ Air Force Judge Advocate General School, *The Military Commander and the Law* 319 – 320 (6th ed. 2002)

⁷⁰ U.S. CONST. art. VI, cl. 2.

⁷¹ Air Force Judge Advocate General School, *supra* note 69.

historical documents will be important to deciding whether a particular privatized housing development is taxable by the State or not.

Finally, proprietary jurisdiction on military bases gives the United States no special privilege. This term applies to those instances where the Federal Government has acquired title to an area in a State but has not acquired any of the State's legislative authority. The State has full authority to tax a proposed housing development in areas of proprietary jurisdiction. The federal government only maintains immunity and supremacy for inherently governmental functions. Housing developments constructed by private companies are not inherently governmental functions. The only federal laws that apply to proprietary jurisdictional bases are those that do not rely upon federal jurisdiction (espionage, bank robbery, tax fraud, counterfeiting, etc.).⁷² Unlike areas of exclusively federal jurisdiction, no exemption from state property tax law would apply to these areas where privatized housing is located.

With an overview of the types of jurisdiction on a military base, it is necessary to now turn to a discussion of what federal law may apply to a housing development in an exclusively federal legislative jurisdiction. Even though private entities may appear to operate exclusively under federal law and appear to be tax-exempt, sometimes Congress will grant a State the right to tax certain activities regardless of the fact that the entity is operating in a federal enclave.

IV. STATUTORY AND CASE AUTHORITY TO TAX PRIVATE DEVELOPMENT IN FEDERAL ENCLAVES

A. Federal Authority for the Housing Project: Congressional Consent to Taxation

The location of private housing units does not end the legal inquiry. On the contrary, it just begins. Assuming private housing units under the MHPI are constructed in federal enclaves or areas of exclusive jurisdiction, the next step is to see whether Congress intended for State and local tax laws to reach the proposed military development even though it is located in a federal enclave. Generally speaking, some federal programs authorizing activities or operations on federal installations expressly authorize local taxation. An example is leasing of non-excess federal property under 10 U.S.C. § 2667 which will be discussed below. It is well settled that the States cannot tax the federal government or the lands owned by the Federal Government.⁷³ But this immunity raises questions as to whether private entities operating on military

⁷² Air Force Judge Advocate General School, *supra* note 69.

⁷³ *McCullough v. Maryland*, *United States v. New Mexico*, 455 U.S. 720 (1982); 17 U.S. (4 Wheat.) 316 (1819).

installations can enjoy this same immunity. In the era of public-private partnerships, the bright-line has faded considerably. A careful look at the federal statute authorizing non-federal entities' activities on the base will generally provide the answer as to whether or not a state may tax the private entity.⁷⁴

As a general rule, a State may acquire the right to tax private interests within a federal enclave *only if Congress consents*.⁷⁵ The U.S. Supreme Court has recognized a State's authority to exercise jurisdiction to levy taxes only when Congress permits.⁷⁶ Historical military housing programs, such as the National Housing Act of 1949 (a.k.a. the Wherry Military Housing Act of 1949),⁷⁷ permitted the taxation of lessee interests in areas of federal enclaves in which military construction is carried out according to those federal housing programs.⁷⁸ Other military housing programs that involve the federal leasing of property contain unambiguous Congressional grants of authority to tax. The special leasing authority under 10 U.S.C. § 2667(e) is one example mentioned previously. Under this special leasing authority, Congress expressly authorized states the power to tax private interests in leased property where the federal government is leasing under-utilized property, even though the project is located in a federal enclave.⁷⁹ Another example is the special legislation to develop the former Brooks Air Force Base in San Antonio, Texas.⁸⁰ This authority was termed the "Brooks Air Force Base Development Project." Congress granted permission to tax private entities in federal enclaves.⁸¹

B. MHPI: No Express Congressional Intent for Local Taxation

Congress does not appear to have granted states permission to tax private housing units in these projects pursuant to the legislative authority under the MHPI. Generally speaking, if the federal statute authorizing military construction or other activity allows for local taxation, then developers have no

⁷⁴ See, e.g., *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930) (Arkansas personal property tax on blankets located on the Army's Camp Pike were exempt in areas of exclusive federal jurisdiction). See also *Evans v. Cornman*, 398 U.S. 419 (1970); *S.R.A. Inc. v. Minnesota*, 327 U.S. 558 (1946).

⁷⁵ See Buck Act, Pub. L. No. 76-819, 54 Stat. 1059 (1940) (current version at 4 U.S.C. §§ 104-110(2005)) (this Act permits state sales tax, use tax and income taxes in federal enclaves).

⁷⁶ See, e.g., *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964).

⁷⁷ Pub. L. No. 81-221, 63 Stat. 570.

⁷⁸ See, e.g., *Offutt Housing Company. v. Sarpy* 351 U.S. 253 (1956); *Spokane County v. Air Base Housing, Inc.* 304 F.2d 494 (9th Cir. 1962) (illustrative Wherry Act military housing cases).

⁷⁹ 10 U.S.C. § 2667(e) (2003).

⁸⁰ Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, § 136, 114 Stat. 511 (2000).

⁸¹ *Id.* § 136(d)(4)(A).

tax-exempt status for their projects.⁸² This is clear. As previously discussed, the MHPI is a relatively new legislative authority and somewhat different from other traditional military construction programs. Local taxing authorities appear aggressively ready to challenge the tax-exempt status of privatized housing in search of scarce revenue. There are several reasons.

Local taxing authorities have a long history of challenging tax-exempt status in federal enclaves.⁸³ In most cases, states that broadly define taxable property, including leasehold interests, may feel emboldened and have more of an incentive to aggressively pursue sources of tax revenue.⁸⁴ The fact is that the more property a State can tax then the more income it will receive. Real and personal property can have a myriad of manifestations from intangible interests to long-term leaseholds. States typically define the property subject to ad valorem or real property taxes in their state laws or administrative codes.⁸⁵ Despite favorable state law, the ultimate success of a local taxing authority will depend on Congressional grant of authority under the military program for the state to tax in a federal enclave. Although no state has yet challenged the tax-exempt status of privatized housing in federal enclaves, the following case is illustrative of how states have challenged military family housing tax-exempt status in the past.

C. Ben Lomond Housing Project: A Case Study⁸⁶

Municipalities are successful in reaching private property on federal leaseholds when there is Congressional authority. The *Ben Lomond* case is one example. This case illustrates where Congress appears to have consented to taxation of military housing units (a.k.a. “801 Housing”) in federal enclaves. The Alaska Supreme Court had to creatively combine the interpretation of two federal statutes that made up the 801 Housing authorities (one authorizing taxation, the other not) in order to rule that Congress must have intended for the developments to be subject to state taxation. In this case, the Air Force entered into a long-term lease with a private developer, Ben Lomond, Inc., at Eielson Air Force Base. The consideration for the federal lease was \$1. In

⁸² See, e.g., *Chalet Navy Properties v. Town of Groton*, 23 Conn. L. Rptr. 39 (Conn. Super. Ct. 1998).

⁸³ See Footnote 95 for examples of numerous state tax cases related to military installations.

⁸⁴ See, e.g., FLA. STAT. ANN. §§ 6.04, 196.199 (West 2003); NEB. REV. STAT. § 77-103(5) (2003).

⁸⁵ See, e.g., NEB. ADMIN. CODE, Title 316, ch. 24, § 029.04 (2004).

⁸⁶ *Ben Lomond, Inc. v. Fairbanks North Star Borough Board of Equalization*, 760 P.2d 508 (Alaska 1988).

return for constructing 300 family housing units at Eielson Air Force base, Ben Lomond, Inc. would receive annual rental income of approximately \$3.5 million. The lease was for 23 years and involved approximately 57 acres of land. The Supreme Court of Alaska found that the government was leasing the land to Ben Lomond, Inc. (developer) in accordance with 10 U.S.C. § 2667 and 10 U.S.C. § 2828.⁸⁷ The court reasoned that these broad authorities, read in conjunction with specific language from 10 U.S.C. § 2667(e), permitted state taxation of private interests as part of military property development -- even though the housing project was in an area of exclusive federal jurisdiction -- since there was nothing in § 2828 that indicated the funds used and the lease executed under § 2667 would be exempt from taxes. In relying on *Offutt*,² the Alaska Supreme Court held that Congress has consented to the taxation of the developer's interest in the real property and improvements.⁸⁸

However, states cannot rely on the *Ben Lomond* case as good case law to support their ability to tax the new privatized housing developments in federal enclaves. There are two reasons.

First, the MHPI and 801 Housing programs are carried out under separate legislative authorities. In *Ben Lomond*, the 801 Housing was authorized under military leasing authority for non-excess federal property (10 USC § 2667). This military leasing authority is separate and distinct authority from the 1996 MHPI authority (10 USC §§ 2871-2885).⁸⁹ The key feature of the 1996 MHPI is that it was an *alternative* housing initiative passed by Congress to compliment existing military construction programs. MHPI gives the military departments new powers to use in filling the overwhelming need for adequate military family housing. MHPI created the new ability for the Department of Defense to assist the developers in financing the housing projects through direct or guaranteed federal loans.⁹⁰ As part of their proposals, developers can request government financing in order to assist in the construction of the housing units. Given the size of the projects, these

⁸⁷ Military Construction Authorization Act of 1984, Pub. L. No. 98-115, § 801, 97 Stat. 757 (1983).

⁸⁸ *Ben Lomond, Inc.*, 760 P.2d at 513.

⁸⁹ Many state and local taxing authorities may overlook this critical fact. For example, in a recent Nebraska Department of Property Assessment and Taxation opinion dated July 15, 2003, the State of Nebraska advised Sarpy County officials that newly privatized housing on Offutt Air Force Base would be subject to state taxation. The opinion relied on NEB, REV. STAT. §§ 77-103, 77-1374 (2002), which define leased privatized housing property as property properly subject to state taxation. The opinion heavily relied on two cases in rendering its opinion-- *Ben Lomond*, 760 P.2d at 508, and *Offutt Housing Company v. County of Sarpy*, 351 U.S. 253 (1956). Nebraska officials concluded that in these older cases, Congress did authorize state taxation of military housing involving private developers under the Military Leasing Act of 1947 or the National Housing Act of 1949 (a.k.a. the Wherry Military Housing Act of 1949), and, therefore, Nebraska may tax the newly privatized housing. However, Nebraska officials failed to address the glaring issue that Congress did not authorize states to tax privatized housing under the new Military Housing Privatization Initiative of 1996.

⁹⁰ 10 U.S.C. § 2873 (2004).

loans are often in the millions of dollars.⁹¹ Unlike historical military construction programs, MHPI allows the military departments to take up to one-third limited ownership interest in the private developer.⁹² In fact, MHPI was created and codified in its own subchapter of Title 10. No court could reasonably interpret MHPI with other military leasing authority such as the *Ben Lomond* court did in interpreting 10 U.S.C. § 2667.

Second, Congress did not intend the MHPI statute to be construed in conjunction with other military leasing authorities. Rather, it was intended by Congress, as the heading of the housing privatization initiative subchapter suggests, as an “Alternative Authority for Acquisition and Improvement of Military Housing”--a totally separate and distinct chapter within Title 10. For example, the MHPI states unambiguously that MHPI leaseholds shall not be subject to 10 USC § 2667.⁹³ This fact alone helps distinguish MHPI from the facts as stated in the Alaska *Ben Lomond* case. The analysis in this case relied upon the federal leasing authority pursuant to 10 USC § 2667. Congress made it clear that the MHPI was not to be read in conjunction with Section 2667. As such, without express Congressional approval, states cannot reasonably rely on past cases like the Alaska case of *Ben Lomond* in support of their position. Because of the money at stake, states are not likely to give up easily.

D. Impact on Local Taxing Authorities

Because of the tremendous local tax revenue at stake, states have historically challenged private developers claimed tax exemptions in federal enclaves or areas of exclusively federal jurisdiction. Litigation usually begins with a tax appeal by the housing developer. The tax appeal cases originate when the developer applies for tax-exempt status to the local county board of equalization (or other taxing authority) and tax exemption is denied. Typically, most jurisdictions allow unfavorable local tax board opinions to be appealed directly to the court of original jurisdiction.⁹⁴

Given the states success in the past challenging tax-exempt status for developers under other military housing programs, states may feel emboldened by their prior success in challenging tax-exempt status for developers under the MHPI. Although no state has challenged the tax-exempt status under the 1996 MHPI to date, there have been numerous other tax appeal cases filed by states

⁹¹ The following are some sample privatization projects: Camp Pendleton Marine Corps Base, California: 712 units and \$83 million project cost; San Diego Naval Complex, California: 3,302 units and \$ 421.5 million project cost; Kirtland AFB, New Mexico: 1,078 units and \$150.6 million project cost; Dyess AFB, Texas: 402 units and \$35.3 million project cost. Source: Office of Undersecretary of Defense (Installations and Environment), *DoD Military Housing Privatization – Housing Projects*, at <http://www.acq.osd.mil/housing/projsumm.htm> (last visited March 25, 2005).

⁹² 10 U.S.C. § 2875 (2004)

⁹³ 10 U.S.C. § 2878(d) (1) (2004).

⁹⁴ See, e.g., *Visicon, Inc. v. Tracy*, 83 Ohio St. 3d 211 (Ohio 1998).

under former statutes involving prior military housing projects constructed on federally leased land, such as the National Housing Act of 1949 (a.k.a. the Wherry Military Housing Act of 1949), whereby the courts expressly granted the states the right to tax the housing developments.⁹⁵ However, the 1996 MHPI contains no express authority for states to tax in areas of federal enclaves. Absent this express authority, states will have a difficult time proving their cases.

E. Federal Enclaves are Generally Tax-Exempt Absent Congressional Authority

Case law may give an advantage to private developers seeking tax exemption for their projects. There are several recent cases that support the conclusion that MHPI housing units in federal enclaves will be ruled tax-exempt.

One important case involves a case that originated at Barksdale Air Force Base, Louisiana.⁹⁶ In that case, a unanimous U.S. Supreme Court ruled that a private oil and gas lease of federal property does not permit the state to tax in areas of exclusive federal jurisdiction. The case involved the lease by Humble Pipe Line Company of areas of Barksdale Air Force Base in Louisiana. The county attempted to apply an ad valorem tax on the company's oil-drilling equipment and pipelines owned, used and kept on base by the

⁹⁵ See, e.g., *Ft. Dix Apartments Corp. v. Borough of Wrightstown*, 225 F.2d 473 (3d Cir.1955) (National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case--leasehold interests in United States land leased for construction of housing near military facility taxable under local real estate tax statute); *Quintard Terrace Apartments, Inc. v. State*, 111 So. 2d 602 (Ala. 1959) (National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case. North Carolina corporation liable for franchise tax for doing business in state although all land on which it did business located on military base: "We see no difference between a tax on the real estate of a corporation and the right to consider the lessee's value of the housing units in determining the amount of capital employed by this foreign corporation in the State..."); *Brookley Manor, Inc. v. State*, 90 So. 2d 161 (Ala. 1956) (National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case--buildings constructed on land leased from Air Force subject to ad valorem tax); *Gay v. Jemison*, 52 So.2d 137 (Fla. 1951) (National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case. Court upheld state revenue tax levied on materials to be used in constructing military housing project); *Meade Heights, Inc. v. State Tax Comm'n*, 95 A.2d 280 (Md. 1953) (National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case--leasehold interest in buildings on U.S. Army base taxable under real estate tax statute); *State v. Personnel Housing, Inc.*, 300 S.W.2d 506 (Mo. 1957)(National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case--interest of private corporation in military housing on land leased from United States subject to local taxation); *Bragg Investment Co. v. Cumberland County*, 96 S.E.2d 341 (N.C. 1957) (National Housing Act of 1949 (a.k.a. Wherry Military Housing Act of 1949) case--leasehold rights in land on military reservation are chattel real, therefore subject to ad valorem tax as statutorily defined "intangible personal property").

⁹⁶ *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964).

company. The base permitted the developer to make use of the property for nominal consideration.⁹⁷ This is similar to long-term leases under the MHPI in that the ground leases are provided to the successful bidders for nominal consideration. The unanimous Supreme Court held that Article I, Section 8, clause 17 of the U.S. Constitution empowers Congress to exercise exclusive legislative authority over all areas of exclusive federal jurisdiction and therefore the ad valorem tax on the private interests of a company were tax exempt.⁹⁸ Citing several cases, the Court reasoned exclusive jurisdiction was not lost for a lease of property for commercial purposes, nor for conveyance of a railroad right-of-way across a military reservation.⁹⁹ The Court stated that a contract clause in Humble's lease, stating that the company will pay all taxes when due and levied by the State, had no relevance.¹⁰⁰

Other recent state cases have reached similar results. In 1998, the Ohio Supreme Court ruled on whether a commercial hotel and conference center at Wright-Patterson AFB, Ohio, could be taxed by Greene County.¹⁰¹ The 250-room hotel was constructed for primarily military visitors and was in an area of exclusive federal jurisdiction. The developer, Visicon, Inc., filed a claim for tax exemption under state law.¹⁰² Visicon, Inc. lost and their appeal eventually went to the Ohio Supreme Court. The Court held, citing *Humble Pipe Line* and *Surplus Trading*, that the developer's interests were tax exempt because they were located in a federal enclave and the lessee's interest leased by the United States to the developer was the underlying land. Even though the lease was executed pursuant to 10 U.S.C. § 2667, in which Congress permitted taxation, the Court found that Ohio's statutory definition of taxable real property did not include leaseholds.¹⁰³ State courts recognize the inherent limitation of State taxing authorities to tax in areas of federal enclaves even when federal lands are leased to private developers.

Ohio was not the only state. A recent Navy military housing case in Connecticut is another case.¹⁰⁴ This case involved private construction on federally leased land pursuant to 10 USC § 2809. This statute, similar to MHPI, gives the military the ability to enter into long-term contracts for services with the private sector for construction, management, and operation of a facility on a military base.¹⁰⁵ The Navy project involved construction of housing units under the terms of a 32-year ground lease. The lease contained a provision that the private developer would pay all state and local taxes. The

⁹⁸ *Id.* at 374.

⁹⁹ *Id.* at 372 – 373. See *United States v. Unzeuta*, 281 U.S. 138 (1930); *Arlington Hotel v. Fant*, 278 U.S. 439 (1929).

¹⁰⁰ *Humble Pipe Line Co.*, 376 U.S. at 375.

¹⁰¹ *Visicon, Inc. v. Tracy*, 83 Ohio St. 3d 211 (Ohio 1998).

¹⁰² *Id.* at 212. See OHIO REV. CODE ANN. § 5709.08 (West 2003).

¹⁰³ *Visicon, Inc.*, 83 Ohio St. 3d at 216.

¹⁰⁴ *Chalet Navy Properties v. Town of Groton*, 23 Conn. L. Rptr. 39 (Conn. Super. Ct. 1998).

¹⁰⁵ 10 U.S.C. § 2809 (2003).

Court held that the lease to Chalet was executed pursuant to 10 USC § 2809 which contained no express Congressional grant of authority for state or local taxation. Therefore, there was no express authority for Connecticut to tax the newly built Bachelor Officer Quarters (BOQ) located in the federal enclave.¹⁰⁶ It is interesting to note that the town had to reimburse Chalet Navy Properties for the taxes it had paid for the previous 5-6 years. The State argued unsuccessfully that the 1-year statute of limitations was a bar to refunds beyond one year. The Court found that the statute of limitations was a creature of Connecticut law and, therefore, did not apply to areas of exclusive federal jurisdiction. The Town was ordered to reimburse Chalet for taxes previously paid.¹⁰⁷

VI. Conclusion and Recommendation

Although the privatization developer has responsibility for paying its own taxes, the military departments have an interest in directly or indirectly promoting the tax-exempt status of private developers. There are two primary reasons.

First, the tax savings to the developer will help assure developer profit and reduce the risk of bankruptcy. Since the housing units will be filled with military members and their families, a more profitable housing development will ensure buildings are properly maintained and housing units are serviced properly over the 50-year term of the project. The assumption is that a struggling developer may be compelled to cut corners on management of the project or necessary maintenance. A housing project in bankruptcy could mean uncertainty for military tenants as well as enormous litigation costs to the government. Reduced tax expenses and increase in net profits ensures management of the housing project is the best it can be. In other words, profitability assures a viable and sustaining housing project. Because many developers are borrowing federal money to finance these projects, bankruptcy could mean only a portion of the federal loan gets repaid.

As discussed previously, most of the military housing projects involve some form of direct or indirect government financing by the military departments.¹⁰⁸ These federal loans can be in the millions of dollars and payable over decades. A privatized housing development, which is tax-exempt, will theoretically have more income to cover debt service. In many instances, this would include debt service on military loans since many of the privatized military housing developments are now incorporating federal loans into their projects. In many of the projects to date, the military departments are loaning huge sums of money and taking back mortgages on the federally

¹⁰⁶ *Chalet Navy Properties*, 23 Conn. L. Rptr. at 43.

¹⁰⁷ *Id.* at 45.

¹⁰⁸ 10 U.S.C. §§ 2873, 2875 (2003).

leased land as security for these military loans. A loan default by a developer could cost the Federal Government millions of dollars in interest income over the life of a project. If a private developer can reduce his overall tax expenditures, this may mean more money to pay other permanent creditors such as the United States. However, tax-exempt status and the 1- 2 million dollars in potential annual revenue savings serves to reduce this credit risk to the United States in making these types of federal loans. The chances of debt-repayment are necessarily increased if a developer can reduce overall business expenses—including property taxes. It also may encourage more companies to bid on future projects because of increased profit potential. By making the projects more viable, the military departments reduce the risk of MHPI obtaining the same fate as Wherry/Capehart Housing programs and the 801/802 Housing Programs. As mentioned previously, these programs involved some degree of private sector development and have been allowed to expire or were discontinued because they were too costly to implement.¹⁰⁹

A second reason the Federal Government should take an active role in promoting tax-exempt status for private developers is the positive impact it will have on the quality of life improvements for the military families. An example will help illustrate this point. The military presently uses a complex “Lockbox” account to channel various payments for the housing project. An independent, third party oversees the account and directs payments to cash reserves, loan payments, insurance premiums, and other accounts. As it is presently structured, any surplus profit is directed toward a “Reinvestment Account.” These monies can be split with the company and are also used for quality of life improvements for the military families. Quality of life improvements might involve constructing a day-care facility, building recreation facilities, family playgrounds, or adding significant improvements to the housing units. All of these help ease the strain on the military family in an era of lengthy deployments and the realities of the domestic and international war on terrorism.

How can the developers or military departments promote tax-exempt development of privatized housing under the MHPI? This should include education and training in tax law at information sessions with prospective companies. These information sessions or “industry forums” are held prior to project announcements. They are a chance for companies to learn about the specifics of an upcoming project.

In addition, the federal government should actively locate housing projects in areas of exclusive jurisdiction if geographic terrain and other factors permit. Some military bases may have a mix of proprietary, partial, concurrent, and exclusively federal legislative jurisdictional areas. If practical, military leaders should opt to locate proposed projects in exclusively federal

¹⁰⁹ Else, *supra* note 5, at 3- 4.

legislative jurisdictions whenever possible. Private developers and military leaders should also closely examine documents ceding jurisdiction to the United States. As mentioned previously, many of these documents could contain reservations by the State to tax private entities within a federal enclave.

Moreover, contract documents should clearly contain clauses indicating that the military is reserving exclusive federal jurisdiction, including the 50-year ground leases. Another recommendation is to consider intervening in the developer's tax appeals if necessary. Intervention when economic justifications warrant has been used in the past.¹¹⁰

Despite the potential lost revenue to the states, the success of the MHPI housing program depends on promoting tax-exempt projects whenever and wherever possible.

¹¹⁰ See, e.g., *United States v. Allegheny County, Pa.*, 322 U.S. 174 (1944), *overruled on other grounds by* *United States v. City of Detroit*, 355 U.S. 466 (1958).

WHAT HAPPENED TO THE FEDERAL ACQUISITION STREAMLINING ACT'S PROTEST RESTRICTIONS ON TASK AND DELIVERY ORDERS?

RECENT DEVELOPMENTS IN PROTESTS (AND PROTESTS DISGUISED AS CONTRACT DISPUTES) RELATED TO THE ISSUANCE OF TASK AND DELIVERY ORDERS AND PROPOSALS TO IMPROVE AN IMPAIRED SYSTEM

MAJOR SEAN A. SABIN*

I. INTRODUCTION

The Federal Acquisition Streamlining Act (“FASA” or “the Act”) expressly prohibits most indefinite-delivery, indefinite-quantity (“IDIQ”) task or delivery order protests, stating, “A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.”¹ Instead of permitting a contractor to protest its failure to be selected for a task or delivery order, FASA provides for an agency ombudsman to hear issues ordinarily addressed in a protest.

FASA seems clear in its restrictions of protests of task and delivery order decisions and its mandate that contractor concerns regarding the issuance of task or delivery order contracts be addressed to an agency’s ombudsman. In the last few years, however, FASA’s restrictions on task and delivery order protests have been somewhat undermined by a series of administrative and judicial opinions. In light of these recent opinions, this paper will examine FASA, its incorporation into the Federal Acquisition Regulation (“FAR”),

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¹ 41 U.S.C. § 253j(d) (2005).

important judicial and administrative opinions pertaining to IDIQ contracts both prior to and after FASA's enactment (including opinions that appear to expand the limited grounds under which a protest may be filed as defined by FASA), and Section 803 of the National Defense Authorization Act for Fiscal Year 2002, which expanded the competition requirements for task order contracts within the Department of Defense ("DoD").

The paper will then address Congressional action that needs to occur in response to these recent opinions to better define the scope of FASA's protest restrictions. It also will advocate that Congress remove the requirement that an IDIQ contract must include the procedures that an agency will follow to ensure IDIQ contractors are given a fair opportunity to compete. While such a requirement was well intended, it has resulted in contractors alleging that the procedures were not followed and submitting multi-million dollar claims against the government under the Contract Disputes Act ("CDA"). Congress could not have envisioned such actions occurring when it defined the parameters of multiple-award IDIQ contracts via FASA. The paper will urge the Federal Acquisition Regulatory Council ("FAR Council") to take immediate action – even before any Congressional action on the matter – to prevent future large CDA claims by adding a FAR clause that addresses fair opportunity procedures. Finally, this paper will advocate that Congress strengthen and better define the role of the task and delivery order ombudsman position.

II. TASK AND DELIVERY ORDER CONTRACTS PRIOR TO FASA

A. The State of the Law Prior to 1994

Before addressing FASA and the impact it has had on IDIQ contracts, it is important to review cases that preceded its enactment and the state of the law prior to 1994 with regard to IDIQ contracts. In *Torncello v. United States*,² the Court of Claims established the legal characteristics of IDIQ contracts – they must state a minimum quantity amount to be purchased over a set period of time, each contractor is guaranteed that the stated minimum amount will be purchased, and the minimum amount must be more than a nominal amount in order to satisfy the requirement of consideration in the contract.³ These legal characteristics formed the cornerstone of what was required in an IDIQ contract and what duties the government owes an IDIQ contractor, and they have continued to serve that function to the present time.⁴

² 231 Ct. Cl. 20, 681 F.2d 756 (1982).

³ *Id.* at 28.

⁴ See 48 C.F.R. § 16.504(a) (2005).

In *Northeast Air Group, Inc.*,⁵ the General Accounting Office (“GAO”)⁶ established a very narrow basis upon which a contractor could protest a multiple-award contract order decision – when the item being procured is materially different from the type of items contemplated by the contract:

We generally will not consider protests against an agency’s decision to modify a contract since modifications involve contract administration, which is the responsibility of the contracting agency, not our Office

We will review, however, an allegation that a modification exceeds the scope of the existing contract and therefore should be the subject of a new procurement

In determining whether a modification is beyond the scope of the contract, we look to whether the contract as modified is materially different from the contract for which the competition was held.⁷

Thus, a standard was established that so long as an order did not fall outside the scope of those generally contemplated by the multiple-award contract at issue, a protest of a task or delivery order selection decision will not be heard.

B. The Need for Legislative Action

Since there was no statutory or regulatory guidance to regulate permissible behavior prior to FASA’s enactment in 1994, all guidance on multiple-award contracts was judicially created or resulted from GAO opinions. As a result, the use of multiple-award contracts was not prevalent since agencies preferred the relative safety of large, single award IDIQ contracts.⁸ They provided agencies the efficiency of not having to compete

⁵ Comp. Gen. B-228210, Jan. 14, 1988, 88-1 CPD ¶ 33.

⁶ In July 2004, the General Accounting Office became the General Accountability Office. The name change did not impact any of the functions performed by the office, nor did it impact the use of “GAO,” the acronym commonly used to identify the office.

⁷ *Id.* at 6-7 (citations omitted).

⁸ See Office of Federal Procurement Policy, Office of Management and Budget, Executive Office of the President, Best Practices For Multiple Award Task And Delivery Order Contracting, Ch. 2, Background (July 1997) available at <http://www.arnet.gov/Library/OFPP/BestPractices/BestPMAT.html> (last modified Feb. 19, 1999).

every contracting action necessary to meet their requirements while avoiding the unknown legal challenges of using multiple-award IDIQ contracts.⁹ Without regulatory guidance, an agency simply was not assured that when it awarded an order under a multiple-award IDIQ contract, it was not going to be subjected to protests similar to those found in regular contract procurements. This uncertainty and the risk of not gaining any efficiency despite a significant investment of time and resources served as a disincentive for the use of multiple-award contracts. However, while a single award IDIQ contract eliminated the possibility of a protest, since only one contractor was involved, it made “. . . it difficult for the government to secure the same price reductions and contractor performance improvements that would occur if the contractor was competing against other qualified contractors throughout the contract.”¹⁰

From this desire to ensure that the government receives the best price possible through an efficient multiple-award IDIQ system, came the push to enact FASA. As the United States District Court for the District of Columbia stated in *Corel Corp. v. United States*, Congress passed FASA with the intent of “. . . streamlin[ing] and simplify[ing] federal acquisition procedures.”¹¹

III. THE FEDERAL STREAMLINING ACT OF 1994

A. Congressional Intent

In 1994, Congress passed the Federal Acquisition Streamlining Act, and it was signed into law.¹² As stated in the Senate Report from the Committee on Governmental Affairs (“Report”), the purpose of FASA was to “. . . revise and streamline the acquisition laws of the Federal government in order to reduce paperwork burdens, facilitate the acquisition of commercial products, enhance the use of simplified procedures for small purchases, clarify protest procedures, eliminate unnecessary statutory impediments to efficient and expeditious acquisition, achieve uniformity in the acquisition practices of federal agencies, and increase the efficiency and effectiveness of the laws governing the manner in which the government obtains goods and services.”¹³

⁹ *Id.*

¹⁰ *Id.*

¹¹ 165 F. Supp. 2d 12, 20 (D.D.C. 2001) (citing S. REP. NO. 103-259 (1994), reprinted in 1994 U.S.C.C.A.N. 2598, 2598).

¹² Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.). The sections of the Act discussed in this paper can be found at Pub. L. No. 103-355, §§ 1004 and 1054, 108 Stat. 3243, 3252-53 and 3261-65 (codified at 10 U.S.C. 2304a-04d and 41 U.S.C. 253h-53k). While FASA’s IDIQ provisions are codified at 10 U.S.C. 2304a-04d and at 41 U.S.C. 253h-53k, the sections in the two United States Code titles are identical. For simplicity, this paper only cites the provisions found under title 41, but the same provisions can also be found under title 10.

¹³ S. REP. NO. 103-258, at 1-2 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2562.

Clearly, it was intended to simplify and streamline certain aspects of government acquisition.

Multiple-award task and delivery order contracts were one such area that FASA hoped to reform by making that form of procurement simple, straightforward, and more efficient. In furtherance of this goal, the Report stated, “The Committee intends that all federal agencies should move to the use of multiple task order contracts, in lieu of single task order contracts, wherever it is practical to do so.”¹⁴ In addition, the Report described the changes FASA was implementing in the area of task and delivery order contracts in the following manner:

The new provisions added to the procurement code by sections 1004 and 1054 of the bill are intended to give [sic] agencies broad discretion in establishing procedures for the evaluation and award of individual task orders under multiple award contracts. They do not establish any specific time frames or procedural requirements for the issuance of task orders, other than that there be a specific statement of work and that all contractors under multiple award contracts be afforded a reasonable opportunity to be considered in the award of each task order (with narrow exceptions). *Accordingly, contracting officials will have wide latitude and will not be constrained by CICA [Competition In Contracting Act] requirements in defining the nature of the procedures that will be used in selecting the contractor to perform a particular task order.* When contracting officials award task orders they will have broad discretion as to the circumstances and ways for considering factors such as past performance, quality of deliverables, cost control, as well as price or cost. In some cases, all that may be necessary is an oral discussion with each of the contractors, followed by the contracting officers [sic] decision. As far as the concept of multiple award contracts is concerned, the Administrator of OFPP [Office of Federal Procurement Policy] has assured the Committee that incentives would be created to encourage the use of such contracts and competition for orders under them where practicable.¹⁵

¹⁴ S. REP. NO. 103-258, at 15 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2576.

¹⁵ S. REP. NO. 103-258, at 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2576 (emphasis added).

Thus, Congress intended that IDIQ contracts be free from the requirements applicable to general procurements with regard to procedures to be followed, and, as a result, that contractors be very limited in their ability to protest task and delivery order decisionmaking.¹⁶

B. The Act's Language

FASA defines task order and delivery order contracts as contracts for services or property that do not procure or specify a firm quantity of services or property (other than a minimum or maximum quantity) and that provide for the issuance of orders for the performance of tasks or delivery of property during the period of the contract.¹⁷ It states a task or delivery order contract solicitation must include the period of the contract, the maximum quantity or dollar value of the services or property to be procured under the contract, and a reasonable description of the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.¹⁸ It also directs the FAR to “. . . establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property . . .” when implementing the subsection's provisions.¹⁹ Further, it states, “The scope, period, or maximum value of the contract may be increased only by modification of the contract.”²⁰

After tackling the above issues, FASA next addresses the fact the government does not have to engage in the normal notice requirements applicable to contract solicitations before awarding an order under a task or delivery order contract.²¹ Specifically, FASA states that the standard contract solicitation notice is “. . . not required for issuance of a task or delivery order under a task or delivery order contract . . .”²² It next removes normal procurement competition requirements and replaces them with the “fair opportunity” requirement.²³ This requirement states that all multiple award task and delivery order contractors will be provided a fair opportunity to be considered for all orders in excess of \$2,500, unless the order involves unusual urgency, can only be fulfilled by one contractor, is a logical follow-on to an

¹⁶ See *Corel Corp. v. United States*, 165 F. Supp. 2d 12, 20 (D.D.C. 2001) (Congress realized that the CICA's “open competition requirements often had the unintended effect of bogging down the federal procurement process in innumerable bid protests filed by the losing bidder who almost invariably claimed that the agency's award of a contract to a competitor was not made on a fully competitive basis.” (citing S. REP. NO. 103-259 (1994), reprinted in 1994 U.S.C.C.A.N. 2598, 2604).

¹⁷ 41 U.S.C. § 253k(1) (2005).

¹⁸ 41 U.S.C. § 253h(b) (2005).

¹⁹ 41 U.S.C. § 253h(d)(3)(A) (2005).

²⁰ 41 U.S.C. § 253h(e) (2005).

²¹ 41 U.S.C. § 253j(a) (2005).

²² *Id.* The standard contract solicitation notice is found at 41 U.S.C. § 416 (2005).

²³ 41 U.S.C. § 253j(b) (2005).

order already issued on a competitive basis, or is necessary to satisfy the underlying contract's guaranteed minimum.²⁴ The requirement also includes the seemingly innocuous mandate that procedures incorporating the fair opportunity requirement be put in task and delivery order contracts.²⁵ As is discussed below in Section V, this directive has become particularly important with regard to contract dispute actions arising under the CDA.²⁶ Next, FASA requires that task and delivery orders “. . . include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.”²⁷

The critical portions of FASA are stated in its next two paragraphs. As stated in the Introduction, the Act prohibits a protest in connection with the issuance or proposed issuance of a task or delivery order unless the protest is based on an allegation that the order increases the scope, period, or maximum value of the contract under which the order is issued.²⁸ In lieu of a protest vehicle for contractors, the Act mandates that every executive agency that awards multiple task or delivery order contracts appoint or designate a task and delivery order ombudsman who is responsible for reviewing contractor complaints and ensuring that all contractors are afforded a fair opportunity to be considered for all task and delivery orders other than those FASA exempts from the fair opportunity requirement.²⁹ In addition, the Act requires that the ombudsman position be filled by “. . . a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's competition advocate.”³⁰

In general, FASA is fairly straightforward with regard to task and delivery order contracts, but it does not directly address whether it is applicable

²⁴ *Id.* 41 U.S.C. § 253j(b) states that when multiple task and delivery order contracts are awarded, “. . . all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless--

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee. 41 U.S.C. § 253j(b) (2005).

²⁵ *Id.*

²⁶ Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13 (2005).

²⁷ 41 U.S.C. § 253j(c) (2005).

²⁸ 41 U.S.C. § 253j(d) (2005).

²⁹ 41 U.S.C. § 253j(e) (2005).

³⁰ *Id.*

to the General Services Administration (“GSA”) Federal Supply Schedule (“FSS”) contracts. However, the Court of Federal Claims has determined that FASA is inapplicable to GSA FSS contracts because: (1) the Act does not “limit or expand” the authority of the GSA “. . . to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law;” and (2) the last paragraph of 41 U.S.C. § 253j – the section that prohibits most IDIQ protests – states that the section applies to IDIQ contracts entered into under section 41 USC § 253h.³¹ The Court interpreted this somewhat confusing language to mean that FASA’s provisions do not apply to GSA FSS contracts because the Act’s provisions do not limit or expand GSA’s authority to enter into contracts.³²

IV. FEDERAL ACQUISITION REGULATION SUBPART 16.5 – INDEFINITE-DELIVERY CONTRACTS

The FAR incorporates FASA’s requirements into Subpart 16.5, which is entitled “Indefinite-Delivery Contracts.”³³ In addition, this subpart includes directives that were not created by statute, but were developed by the FAR Council.³⁴

The first area addressed by the subpart is its far-reaching scope – it prescribes the policies and procedures for making awards of indefinite-delivery (“ID”) contracts – and its establishment of a preference for the making of multiple-award IDIQ contracts.³⁵ Its broad scope, however, does not include GSA FSS contracts, as it removes such contracts from the requirements applicable to other ID contracts by stating, “. . . GSA regulations and the coverage for the Federal Supply Schedule program . . . take precedence over

³¹ 41 U.S.C. §§ 253h(g) and 253j(f) (2005) (emphasis added).

³² See discussion of *Labat-Anderson, Inc. v. United States*, 50 Fed. Cl. 99, 105 (2001), at pp. 16-18 *infra*. In addition, the discussion accompanying the final rule incorporating FASA into the FAR apparently uses this language from the Act to come to the conclusion that FASA “. . . specifically exempted GSA’s Federal Supply Schedule program.” Federal Acquisition Regulation; Task and Delivery Orders, 61 Fed. Reg. 39,201-03, 39,202 (Jul. 26, 1996); see discussion of the scope of FAR Subpart 16.5 vis-à-vis indefinite delivery contracts, at Section IV *infra*.

³³ 48 C.F.R. § 16.5 (2004).

³⁴ The FAR Council was established pursuant to the Office of Federal Procurement Policy Reauthorization Act. This Act gives statutory authority to the Procurement Executives at the Department of Defense, General Services Administration and National Aeronautics and Space Administration to issue and revise the FAR.

³⁵ 48 C.F.R. § 16.500(a) (2004). At § 16.504(c), the FAR expounds on the preference for making multiple award IDIQ contracts: “[T]he contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.” 48 C.F.R. § 16.504(c) (2004).

this subpart.”³⁶ Thus, correctly or incorrectly, the FAR clarifies the confusing language of FASA by stating in a straightforward manner that the Act does not apply to GSA FSS contracts.

The next important paragraphs of the subpart state FASA’s definition of task and delivery order contracts, and subdivide ID contracts into three types: definite-quantity, requirements, and indefinite-quantity.³⁷ Although the FAR does not say this directly, since task and delivery order contracts involve orders of an indefinite quantity, definite-quantity contracts are not task and delivery order contracts because they involve the “. . . delivery of a *definite quantity* of specific supplies or services for a fixed period”³⁸ Indefinite-quantity or IDIQ contracts, on the other hand, provide for the delivery of an indefinite quantity of supplies or services during a fixed period of time with a stated non-nominal, minimum quantity to be ordered and a stated maximum quantity that the contractor must be prepared to furnish.³⁹

The subpart states that an IDIQ solicitation and contract must “[s]tate the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order”⁴⁰ This incorporates FASA’s requirement that fair opportunity procedures be included in task and delivery order contracts and adds the requirement that these procedures also be put in solicitations for such contracts.⁴¹ Finally, if an IDIQ contract is awarded to multiple contractors, the subpart requires that the solicitation provide the name and contact information of the task and delivery order ombudsman.⁴²

The subpart next addresses protests and the required competition that must occur before a task or delivery order is issued. The scope of permissible protest actions is that which FASA mandates: unless an order increases the scope, period, or maximum value of an IDIQ contract, a protest in connection with the issuance or proposed issuance of an order under a task or delivery order contract is prohibited.⁴³ In addition, it describes the IDIQ competition requirement using language similar to that found in the FASA Senate Report. Specifically, it states that the contracting officer may use “streamlined

³⁶ 48 C.F.R. § 16.500(c) (2004). In its entirety, the paragraph states, “Nothing in this subpart restricts the authority of the General Services Administration (GSA) to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program in subpart 8.4 and part 38 take precedence over this subpart.” *Id.*

³⁷ 48 C.F.R. §§ 16.501-1 and 16.501-2 (2004).

³⁸ 48 C.F.R. § 16.502(a) (2004) (emphasis added); *see* discussion of *Teledyne-Commodore, L.L.C. – Recon.*, Comp. Gen. B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121, at pp. 20-22 *infra*.

³⁹ 48 C.F.R. § 16.504(a) (2004).

⁴⁰ 48 C.F.R. § 16.504(a)(4)(iv) (2004).

⁴¹ *See* 41 U.S.C. § 253j(b) (2005).

⁴² 48 C.F.R. § 16.504(a)(4)(v) (2004).

⁴³ 48 C.F.R. § 16.505(a)(8) (2004).

procedures,” should keep submission requirements to a minimum, and may exercise “broad discretion” in developing procedures for awarding orders.⁴⁴ It does not even require the contracting officer to contact each IDIQ contractor before selecting an order awardee “. . . if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order,” nor does it require formal evaluation plans or scoring of offers.⁴⁵

The subpart does not leave order decisions completely to the discretion of contracting officers, however. The contracting officer is required to: (1) develop placement procedures that will provide each awardee a fair opportunity to be considered for each order; (2) avoid any method that would not result in fair consideration being given to all awardees prior to placing each order; (3) tailor the procedures to each acquisition; (4) include the procedures in the solicitation and the contract; (5) consider price or cost under each order as one of the factors in the selection decision; and, (6) document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision.⁴⁶ In addition, the subpart states the contracting officer *should* consider the following when developing award procedures: (1) past performance on earlier orders under the contract; (2) potential impact on other orders placed with the contractor; (3) minimum order requirements; (4) the amount of time contractors need to make informed business decisions on whether to respond to potential orders; and, (5) whether to use outreach efforts to promote exchanges of information, such as seeking comments from contractors on draft statements of work or using a multi-phased approach.⁴⁷ Lastly, the subpart quotes essentially verbatim FASA’s exception to the fair opportunity process.⁴⁸ It adds the requirement that if an exception to the fair opportunity process is used, the rationale for its use must be documented in the contract file.⁴⁹

The subpart does not expand at all on the role of the task and delivery order ombudsman, providing no further guidance on the position beyond that which FASA provides.⁵⁰ In addition, while it lists solicitation provisions and

⁴⁴ 48 C.F.R. § 16.505(b)(1)(ii) (2004).

⁴⁵ *Id.*; 48 C.F.R. § 16.505(b)(1)(iii)(B) (2004).

⁴⁶ 48 C.F.R. § 16.505(b)(1)-(4) (2004).

⁴⁷ 48 C.F.R. § 16.505(b)(1)(iii) (2004).

⁴⁸ See note 24 *supra* and accompanying text.

⁴⁹ 48 C.F.R. § 16.505(b)(4) (2004).

⁵⁰ 48 C.F.R. § 16.505(b)(5) (2004). In the absence of FAR elaboration on the role of the task and delivery order ombudsman, some agencies have attempted to define the ombudsman’s responsibilities. However, such guidance often provides little insight. For example, while the Air Force’s supplement to the FAR, the Air Force Federal Acquisition Regulation Supplement (“AFFARS”), states that the “. . . ombudsman is responsible for reviewing complaints from multiple award contractors and ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders in excess of \$2,500,” it effectively

contract clauses that must be included in task and delivery order contracts, fair consideration procedures are not among those listed.⁵¹ Thus, contracting officers must draft the fair opportunity procedures that are required in solicitations and contracts in accordance with § 16.505(b)(1)(ii)(D), but they are not given any guidance on how these procedures should read.⁵² While this may further the subpart's goal of giving contracting officers broad discretion, it most likely leads to confusion among contracting officers as to how specific the procedures should be. For example, if a contracting officer develops very specific procedures to decrease confusion among the parties as to how the process will work, he or she will increase the risk of a contract dispute arising if a contractor believes any of the enumerated steps were not followed.⁵³

V. JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF FASA

In accordance with FASA, judicial and administrative hearings have permitted protests that contest the scope, period of time, or maximum value of a contract underlying a task or delivery order.⁵⁴ For example, in *Makro Janitorial Services, Inc.*,⁵⁵ the GAO sustained a protest that a task order for housekeeping services improperly exceeded the scope of a contract for preventive maintenance and inventory, repairs, and facility survey activities. The GAO based its decision on its finding that a modification to the original contract that addressed services covered by the protested task order was outside the scope of the original contract and that the resulting task order was likewise outside the scope of the task order contract.⁵⁶

prevents the ombudsman from taking any significant action by prohibiting the ombudsman from either preventing the issuance of a pending order or disturbing an existing order. AFFARS § 5352.216-9000(d) (2004).

⁵¹ See 48 C.F.R. § 16.506 (2004).

⁵² As with the role of ombudsman, some agencies have attempted to address the FAR's lack of guidance by writing fair opportunity to compete procedures that must be incorporated into their multiple award task and delivery order solicitations and contracts. For example, the Air Force has stipulated procedures that must be followed before a task or delivery order is awarded. See AFFARS §§ 5316.506 and 5352.216-9000 (2004). Once again, however, such guidance often provides contracting officers with insufficient information. For example, the Air Force leaves it to the contracting officer to determine the "technical and/or managerial approach" and "other factors" that will be used to ensure contractors are given a fair opportunity to compete. AFFARS § 5352.216-9000, ALTERNATE II (2004).

⁵³ See discussion of task and delivery order CDA action at pp. 27-33 *infra*.

⁵⁴ See discussion of the fact 41 U.S.C. § 253j(d) expressly limits IDIQ protests to these three areas, at pp. 8-9 *supra*.

⁵⁵ Comp. Gen. B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39.

⁵⁶ *Id.* at 5. See *Floro & Associates*, Comp. Gen. B-285451.3; B-285451.4, Oct. 25, 2000, 2000 CPD ¶ 172, which stated a task order is beyond the scope of the original contract if there is a material difference between the task order and the contract. Evidence of such a material difference is found by: reviewing circumstances surrounding the procurement; examining any

There have been a number of cases, however, that have expanded jurisdiction beyond the three areas enumerated by FASA. Below is a discussion of cases in which contractors were granted jurisdiction to contest the issuance or proposed issuance of orders under multiple-award IDIQ contracts, even though the bases of the actions were not one of the three permissible protest grounds.

A. The General Services Administration Federal Supply Schedule Program

The first case to expand protest jurisdictional boundaries beyond those enumerated by FASA was *Severn Companies, Inc.*,⁵⁷ which involved a protest of the decision to terminate for convenience a delivery order issued to the contractor against the agency's GSA FSS contract. In *Severn Companies, Inc.*, the agency issued a request for pricing among FSS contractors for a specific computer storage device.⁵⁸ The agency received four responses to the request that it considered acceptable, and ultimately selected Severn Companies to fulfill its need.⁵⁹ One of the four acceptable contractors not selected protested the agency's decision to the GAO, claiming Severn Companies' response was technically unacceptable.⁶⁰ In response to this protest, the agency terminated for convenience its order with Severn Companies because it decided that the specifications for the order were ambiguous.⁶¹ After Severn Companies protested the agency's decision to terminate for convenience, the agency argued that FASA prohibited the GAO from exercising jurisdiction to hear the protest of the FSS delivery order.⁶² The GAO rejected the agency's argument, stating there was no evidence that FASA was intended to preclude protests with respect to the placement of orders against GSA FSS contracts.⁶³ It also stated that the legislative history of the Act indicates that it was ". . . intended to encourage the use of multiple award order contracts, rather than single

changes in type of work, performance period, and costs between the contract as awarded and as modified by the task order; and, considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. *Id.* at 4. The overall inquiry should focus on whether potential offerors reasonably could have anticipated the task order. *Id.* See also *Computers Universal, Inc.*, Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78 (if services to be provided under a task order are of the type that potential offerors reasonably could have anticipated would be covered by the underlying contract, the task order will fall within the scope of the contract).

⁵⁷ Comp. Gen. B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181.

⁵⁸ *Id.* at 1-2.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 4 n.1.

⁶³ *Id.*

award order contracts.”⁶⁴ Without citing any provision in the Act or its legislative history, it reasoned that since the FSS already afforded users a choice of multiple contractors, no such encouragement was required with respect to the FSS.⁶⁵ It supported this argument by pointing out that FASA’s protest restrictions are listed only in FAR subpart 16.5 and that subpart “. . . treats FSS contracts as separate from other indefinite delivery contracts.”⁶⁶

In *Labat-Anderson, Inc. v. United States*,⁶⁷ the Court of Federal Claims accepted protest jurisdiction on a similar issue, but used a different rationale in making the decision to grant jurisdiction. *Labat-Anderson, Inc.* came to the Court of Federal Claims after the GAO denied the petitioner’s protest of its failure to be selected for a blanket purchase agreement (“BPA”) in which the agency limited quotation submissions to FSS contractors.⁶⁸ At the GAO, the government’s motion that the GAO did not have jurisdiction to hear the protest under FASA was denied based on the GAO’s holding in *Severn Companies, Inc.*⁶⁹ When the government moved for dismissal of the case for lack of jurisdiction at the Court of Federal Claims, its motion again was denied, but the court did not base its decision on FASA’s legislative history as the GAO primarily had “. . . because [the legislative history] does not shed meaningful light on the scope of the task order protest bar.”⁷⁰ Instead, since the protest concerned the issuance of a BPA under FAR Part 8, which addresses FSS purchases, and not the issuance of a task order under FAR Part 16, FASA’s prohibition was found to be inapplicable.⁷¹

In *Labat-Anderson, Inc.*, the court distinguished FSS BPA contracts from all other multiple-award IDIQ contracts in the following manner:

While the plain language of the statutory provision clearly bars task order protests, the critical point here is that the award at issue in this case constitutes far more than the mere issuance of a task order against an already-existing GSA FSS or multiple-award contract. Because [the plaintiff] is challenging the award of a FAR Part 8 BPA and not the issuance of a task order under FAR Part 16, [the intervenor’s] argument that the FASA task order protest

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 50 Fed. Cl. 99 (2001).

⁶⁸ *Id.* at 102.

⁶⁹ See *Labat-Anderson, Inc.*, Comp. Gen. B-287081; B-287081.2; B-287081.3, Apr. 16, 2001, 2001 CPD ¶ 79.

⁷⁰ *Labat-Anderson, Inc.*, 50 Fed. Cl. at 105.

⁷¹ *Id.* at 104.

exemption, 41 U.S.C. § 253j(d), strips the Court of jurisdiction in this case is rejected.⁷²

This strongly implies that an award decision made against an already-existing IDIQ contract, *including a GSA FSS contract so long as the award is not a FAR Part 8 BPA*, cannot be protested unless the protest concerns one of FASA's three enumerated areas. After making this implication, however, the court states, “. . . the language and regulatory history of FAR Part 16 support the interpretation that the task order restriction was not intended to apply to FSS procurements.”⁷³ The court then quotes the language from FAR § 16.500(c) that states the FAR's FSS provisions – FAR part 38 and subpart 8.4 – take precedence over subpart 16.5.⁷⁴ By citing the FAR's interpretation of FASA regarding GSA FSS contracts, the court removes the possibility of FASA's protest prohibition applying to any GSA FSS contracts. While this resolves the issue of the relationship between GSA FSS contracts and FASA's prohibition, it leaves open the question of why the court stated, “. . . the award at issue in this case constitutes far more than the mere issuance of a task order against an already-existing GSA FSS . . . contract.”⁷⁵ By later citing the subpart 16.5's FSS language, the court effectively removed the applicability of FASA's protest restrictions from *any* GSA FSS task or delivery order, thereby making the court's distinction between the case's BPA and other FSS contracts meaningless.

B. Protests at the General Accounting Office of a “Downselection”

In 1998, the GAO issued its opinion in *Electro-Voice, Inc.*,⁷⁶ in which it held that FASA's restrictions on IDIQ protests do not apply when a “downselection” has occurred.⁷⁷ The GAO defined a “downselection” as the placement of an order under a multiple-award IDIQ contract that causes the elimination of one or more of the non-selected contractors from consideration for future delivery orders.⁷⁸ In *Electro-Voice, Inc.*, the agency awarded two contractors IDIQ contracts for the production of a military helmet that contained a communications system.⁷⁹ The contract's request for proposal (“RFP”) informed both contractors that the agency intended to use the IDIQ contract to order four product demonstration models for testing in a

⁷² *Id.*

⁷³ *Id.* at 105.

⁷⁴ See note 36 *supra* and accompanying text.

⁷⁵ *Id.* at 104.

⁷⁶ Comp. Gen. B-278319; B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23.

⁷⁷ See also *Global Communications Solutions, Inc.*, Comp. Gen. B-291113, Nov. 15, 2002, 2002 CPD ¶ 194.

⁷⁸ *Electro-Voice, Inc.*, 98-1 CPD ¶ 23 at 9-10.

⁷⁹ *Id.* at 2-3.

“downselection” process.⁸⁰ The agency would then test these models to determine which contractor provided the best value, and the agency would then order its helmet requirements from that contractor using the IDIQ contract.⁸¹ The non-selected contractor would not be awarded future orders off the IDIQ contract.⁸²

The non-selected contractor filed a protest contesting the agency’s decision that the selected contractor’s helmet provided the best value.⁸³ When the agency contested the protest on the jurisdictional basis that FASA prohibits such a delivery award protest, the GAO denied the agency’s argument “. . . because there is no evidence that the provision is intended to preclude protests of downselection decisions.”⁸⁴ Citing the Act’s legislative history, the GAO stated that FASA was intended to “. . . promote an ongoing competitive environment in which each awardee was fairly considered for each order issued.”⁸⁵ It then referenced its opinion in *Severn Companies, Inc.*, as standing for the proposition that FASA’s “. . . protest restriction does not apply where the nature of the protested order contract is not that which could have been contemplated.”⁸⁶ Based on these findings, the GAO held that FASA’s protest restrictions were inapplicable to the case.⁸⁷

In *Electro-Voice, Inc.*, the GAO appears to strain to avoid FASA’s express language that a delivery order protest that is not based on the order increasing the scope, period, or maximum value of the underlying IDIQ contract is not authorized. Instead of addressing FASA’s protest restrictions, the GAO focuses on the fact that there is no evidence that the Act was intended to preclude downselection decisions. This reverse analysis, in which the burden is on the agency to prove FASA’s restrictions apply to a particular issuance or proposed issuance of a task or delivery order, is troublesome in light of the Act’s language – it clearly states a protest is not authorized unless one of the three exceptions apply. In addition, the opinion highlights the difference in interpretations of the scope of FASA’s protest prohibitions between the Court of Federal Claims, which rejected the use of legislative history to determine the span of FASA’s protest bar in *Labat-Anderson, Inc.*, and the GAO.

In *Teledyne-Commodore, L.L.C. -- Recon.*,⁸⁸ the GAO expanded the scope of the downselection theory. In *Teledyne-Commodore, L.L.C. -- Recon.*, the agency awarded multiple-award contracts to seven contractors for the

⁸⁰ *Id.* at 3.

⁸¹ *Id.*

⁸² *Id.* at 3-8.

⁸³ *Id.* at 8.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Comp. Gen. B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121.

demilitarization and disposal of chemical weapons.⁸⁹ In accordance with the RFP, the agency then awarded all seven contractors “task orders” to prepare a data gap resolution work plan.⁹⁰ After evaluating the first “task orders” using evaluation criteria from the RFP, the agency awarded six contractors, including the protestor, a second “task order” to prepare a demonstration work plan.⁹¹ Again using RFP evaluation criteria, the agency next awarded a third “task order” to two of the six contractors to perform demonstration testing on a cost-plus-fixed-fee basis.⁹² The protestor was not selected for the third task order, which was the last task order the agency anticipated awarding using the underlying contract.⁹³

In spite of the fact it called the three sets of contracts “task orders” throughout the opinion, the GAO held that FASA’s task order protest restriction was inapplicable.⁹⁴ In part, it based this decision on the fact the “task orders” did not come from a FASA “task order contract” because the agency was procuring a definite quantity of services as opposed to an indefinite quantity.⁹⁵ Based on FASA’s definition of a task order contract as one that does not specify a firm quantity of services, and the admission of the agency’s contracting officer that the RFP called for exactly three phases, this basis for GAO’s opinion seems correct.⁹⁶ It points out, however, an area in which the FAR can be improved since currently not all task orders come from task order contracts, some come from definite-quantity contracts. This is extremely confusing and unnecessary. Subpart 16.5 should define a term other than task or delivery order to describe an order made under a definite-quantity contract.

The troubling aspect of the *Teledyne-Commodore, L.L.C. -- Recon.* opinion is the fact GAO had “[a]nother reason” for its holding – the underlying contract was used to conduct what amounted to a competitive source selection.⁹⁷ Unfortunately, the opinion never directs the agency to the section of FASA that states the Act’s protest restrictions do not apply when an “. . . agency is essentially conducting a single source selection . . .”⁹⁸

Thus, while *Electro-Voice, Inc.* and *Teledyne-Commodore, L.L.C. – Recon.* made it clear that FASA’s restrictions do not apply when a downselection decision has occurred or when a multiple-award contract has

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 3-4.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 4.

⁹⁴ *Id.* at 7-11.

⁹⁵ The GAO explained this by stating, “. . . once the technology demonstration phase is completed under [the third task order], there are no recurring needs contemplated under the contract.” *Id.*

⁹⁶ *Id.* at 9 n.1.

⁹⁷ *Id.* at 10-11.

⁹⁸ *Id.* at 10.

been used to engage in a competitive source selection, neither case addressed whether protesting contractors have any requirement to seek redress from the ombudsman in light of FASA. In fact, the GAO in these cases did not discuss the role of the task and delivery order ombudsman at all.

C. Protests at the General Accounting Office of Solicitation Terms of the Underlying IDIQ Contracts

The GAO has carved another exception to FASA’s protest restrictions by holding the restrictions do not apply when, in the GAO’s opinion, the protestor is challenging whether the solicitation for an underlying IDIQ contract was handled properly, even if the underlying IDIQ contract was awarded years before the protest. The GAO first adopted this theory in *Ocuto Blacktop & Paving Co., Inc.*⁹⁹ In *Ocuto Blacktop & Paving Co., Inc.*, the contractor protested the award of a task order alleging that the award was made without regard to a statutory preference to contract with businesses located near military installations scheduled to be closed.¹⁰⁰ The IDIQ contract underlying the task order had been awarded over a year prior to the task order being awarded for the work in question.¹⁰¹ According to the agency, the solicitation for that IDIQ contract had been mailed to the protestor prior to it being awarded, but the protestor did not submit a response to the solicitation.¹⁰²

The GAO denied the agency’s argument that FASA barred it from exercising jurisdiction over the protest by stating that, while it recognized the protestor’s challenge on its face focused on the task order in dispute, the protestor was actually “. . . mounting a challenge to the terms of the underlying solicitation, not – as the [agency] argues – a challenge to a delivery order . . .”¹⁰³ Citing 4 C.F.R. 21.2(a)(1), the agency next argued that if the protest was “in essence” a protest of the underlying IDIQ solicitation as the GAO believed, it had not been filed in a timely manner since “. . . a protest based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed before the time set for receipt of such proposals.”¹⁰⁴ The GAO rejected this argument as well, holding that the agency’s solicitation did not give sufficient notice to potential offerors that projects involving a potential statutory preference for local businesses were

⁹⁹ Comp. Gen. B-284165, Mar. 1, 2000, 2000 CPD ¶ 32. See also *N&N Travel & Tours, Inc., et al.*, Comp. Gen. B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶ 146.

¹⁰⁰ *Id.* at 1.

¹⁰¹ *Id.* at 4.

¹⁰² *Id.*

¹⁰³ *Id.* at 3 (although the GAO used the term “delivery order,” it apparently meant “task order”).

¹⁰⁴ *Id.* at 4.

within the solicitation's reach.¹⁰⁵ The GAO based this conclusion on the fact the listed programs identified in the solicitation did not “. . . *explicitly* include remediation work associated with the closure or realignment of military installations under the base closure laws.”¹⁰⁶

In *LBM, Inc.*,¹⁰⁷ the GAO expounded on this theory of granting protest jurisdiction through reverting back to the terms of the underlying solicitation. In *LBM, Inc.*, the contractor protested the fact that upon expiration of a contract for motor pool services at Fort Polk, Louisiana, the United States Army was not going to continue setting aside the motor pool services requirement exclusively for small businesses, but instead was going to issue a contract for the services using a task order from an existing IDIQ contract.¹⁰⁸ The scope of work of the existing IDIQ contract, called LOGJAMSS, encompassed logistical functions for Army facilities within a region that included Fort Polk.¹⁰⁹ In 1998 and 1999, the Army had awarded nine contracts under LOGJAMMS, including two contracts with small businesses and two contracts with disadvantaged businesses.¹¹⁰ On May 31, 2002, the Army solicited the IDIQ contractors for proposals to perform motor pool services at Fort Polk with a June 26, 2002, closing date for receipt of proposals.¹¹¹ Upon discovering this fact, *LBM, Inc.*, filed a protest alleging that the Army must continue to set aside the motor pool services requirement at Fort Polk exclusively for small businesses.¹¹²

The GAO rejected the Army's argument that FASA prohibited the task order protest, stating the contractor was not protesting the proposed issuance of a task order for the motor pool services, but instead was protesting the fact the work was no longer being set aside exclusively for small businesses.¹¹³ The GAO held that it was “. . . a challenge to the terms of the underlying LOGJAMSS solicitation . . .” and thus was within its bid protest jurisdiction.¹¹⁴ The GAO explained its position in the following manner:

In our view, the limitation on our bid protest jurisdiction was not intended to, and does not, preclude protests that timely challenge the transfer and inclusion of work in ID/IQ contracts without complying with applicable laws or regulations, but was to preclude protests in connection

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ Comp. Gen. B-290682, Sep. 18, 2002, 2002 CPD ¶ 157.

¹⁰⁸ *Id.* at 1-3.

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 3.

¹¹² *Id.* at 4.

¹¹³ *Id.*

¹¹⁴ *Id.*

with the actual or proposed issuance of an individual task or delivery orders [sic] under those contracts. This view is consistent with the legislative history to this particular section, which was enacted in the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243, 3253. Specifically, the Joint Explanatory Statement of the Committee of Conference states:

In addition, the conference agreement would provide general authorization for the use of task and delivery order contracts to acquire goods and services other than advisory and assistance services. The conferees note that this provision is intended as a codification of existing authority to use such contractual vehicles. All otherwise applicable provisions of law would remain applicable to such acquisitions, except to the extent specifically provided in this section.

H.R. CONF. REP. NO. 103-712, at 181 (1994). The requirements of the Small Business Act and its implementing regulations, including the predecessor regulation to FAR § 19.502-2(b), were applicable to acquisitions prior to the enactment of FASA, and nothing in that statute authorizes the transfer of acquisitions to ID/IQ contracts in violation of those laws and regulations.¹¹⁵

The GAO next addressed the timeliness issue of a contractor being able to protest a solicitation that had been issued years earlier by stating, “. . . the increasing use of ID/IQ contracts with very broad and often vague statements of work may place an unreasonable burden upon potential offerors, who may be required to guess as to whether particular work, for which they are interested in competing, will be acquired under a particular ID/IQ contract.”¹¹⁶ The GAO felt that the burden was particularly problematic for small businesses.¹¹⁷ Based on these findings, the GAO concluded “. . . LBM could not reasonably be aware, and required to protest, at the time the LOGJAMMS contracts were being competed . . . that the broad and nonspecific scope of work in the LOGJAMSS solicitation could be improperly used as a vehicle for the agency to perform the motor pool services at Fort Polk without first taking

¹¹⁵ *Id.* at 4-5.

¹¹⁶ *Id.* at 5.

¹¹⁷ *Id.*

the steps legally required regarding a possible further acquisition of that work under a small business set-aside.”¹¹⁸ Citing 4 C.F.R. § 21.2(a)(1), the GAO found the protest to be timely because it was filed at the GAO within 10 days of the contractor learning of the basis of its protest.¹¹⁹

The GAO appears to be setting a dangerous precedent by permitting a contractor to protest an IDIQ solicitation years after the issuance of the solicitation. In these two particular cases, the GAO assisted a local business and a small business by granting them jurisdiction, but the holdings are not limited to such contractors. Using the GAO’s theory, a contractor not a party to an IDIQ contract that is unhappy with the way a task or delivery order is issued under that contract can protest the order alleging that it was not reasonably aware at the time of the IDIQ solicitation that the contract could be used to procure a supply or service in a manner that it believes violates a regulation. In addition, in light of the fact four of the nine IDIQ contractors in *LBM, Inc.*, were small or disadvantaged businesses, the GAO does not adequately explain why *LBM, Inc.*, had an unreasonable burden placed on it as a result of the LOGJAMSS contract. Even a small business should be aware that an IDIQ contract for regional logistics work will potentially cover motor pool services at a military base within that region.

In its development of this theory, the GAO again uses legislative intent to overcome the plain language of FASA’s protest restrictions. This is concerning in light of the Court of Federal Claims’ finding that the Act’s legislative history shed no meaningful light on the scope of the task order protest bar.¹²⁰ Also, the GAO again fails to comment at all on whether there is any requirement for a contractor to file a complaint with an agency’s task and delivery order ombudsman when it believes it has been treated unfairly.

D. Task and Delivery Order Dispute Actions under the Contract Disputes Act

Two recent cases at the Boards of Contract Appeals (“BCA”) have permitted IDIQ contractors to bring CDA actions against the government based on a theory that the government did not follow the IDIQ contracts’ fair opportunity procedures, procedures that FASA requires be inserted in all IDIQ contracts.¹²¹

¹¹⁸ *Id.* at 5-6.

¹¹⁹ *Id.* at 6-7.

¹²⁰ See discussion of *Labat-Anderson, Inc. v. United States*, 50 Fed. Cl. 99, 105 (2001), at pp. 16-18 *supra*.

¹²¹ The CDA provides the primary statutory guidance for rendering a judgment upon any claim founded on an express contract with the United States. 28 U.S.C. § 1491(a) (2005); 41 U.S.C. § 602(a) (2005).

In *Burke Court Reporting Co.*,¹²² the Department of Justice entered into a multiple-award IDIQ contract with two contractors to provide court reporting and deposition services.¹²³ The solicitation for the IDIQ contract informed bidders “. . . that the determination as to who will receive a purchase order ‘will be made on the basis of what is in the best interest of the Government, taking into account factors such as availability and suitability of contractor resources, quality of contractor past performance and prices.’”¹²⁴ Although awarded an amount in excess of the guaranteed minimum, the petitioner contractor received only a small fraction of the total work and filed a certified claim against the government for breach of contract.¹²⁵

In contesting the claim, the government did not raise the issue that the claim was essentially a protest of the issuance of task orders in violation of FASA, nor did the board address this issue. Instead, the government argued that since the contractor had received orders in excess of the guaranteed minimum set forth in the contract, the terms of the contract had been met.¹²⁶ The board rejected the government’s argument and found that it had jurisdiction to determine whether the government had violated its implied obligation to act in good faith during contract performance based on the allegation the contracting officer ignored factors that the contract required to be considered before a task order was issued.¹²⁷ The board held that the government “. . . chose to insert a provision informing bidders . . .” of the fair opportunity procedures, apparently unaware that the FAR requires that such procedures be placed in the solicitation.¹²⁸

In *Community Consulting Int’l*,¹²⁹ the multiple-award task order contract at issue was for technical services associated with sustainable urban management. It included a clause entitled “FAIR OPPORTUNITY TO BE CONSIDERED” that listed, “[p]ursuant to FAR 16.505,” the fair opportunity procedures that the government would use when awarding task orders.¹³⁰ Thus, the government followed the directive of 48 C.F.R. § 16.504(a)(4)(iv) and put the required procedures in the contract. The IDIQ contract was awarded to six contractors, and the petitioner contractor received task orders aggregating to more than \$1.7 million during the contract’s first 18 months, slightly less than 5% of the total value of all task orders issued.¹³¹ Based on its allegation that it was only given the opportunity to bid on 26 of the first 51 task

¹²² 97-2 B.C.A. (CCH) ¶ 29,323, 1997 DOT BCA LEXIS 11 (1997).

¹²³ B.C.A., 1997 LEXIS at *1-*2.

¹²⁴ B.C.A., 1997 LEXIS at *10-*11 (quoting Solicitation No. JOUSA-96-R-0001).

¹²⁵ B.C.A., 1997 LEXIS at *6-*7.

¹²⁶ B.C.A., 1997 LEXIS at *10-*13.

¹²⁷ B.C.A., 1997 LEXIS at *10-*13.

¹²⁸ B.C.A., 1997 LEXIS at *11 (emphasis added). See discussion of 48 C.F.R. § 16.504(a)(4)(iv) (2002), at p. 11 *supra*.

¹²⁹ A.S.B.C.A. No. 53489, 02-2 BCA ¶ 31,940 at 1 (2002).

¹³⁰ *Id.* at 3-4.

¹³¹ *Id.* at 6.

orders awarded, the contractor filed a CDA claim, alleging the government breached its duty to provide it a fair opportunity to compete and that, as a result, it should have been awarded more task orders.¹³² The contractor further asserted that for the term of the IDIQ contract, it should be awarded approximately 25% of the contract's estimated total of \$110 million in task orders, or \$27.5 million in task orders.¹³³

The board in *Community Consulting Int'l* first rejected the government's argument that FASA prohibited a CDA claim for an alleged breach of a contractual duty to provide a fair opportunity to compete for task orders by stating, ". . . respondent does not cite to any provision of FASA, and we know of none, in which Congress explicitly carved out multiple-award, task order contracts as an exception to our Contract Disputes Act jurisdiction."¹³⁴ Instead, the board found that the alleged breach was ". . . rooted squarely in the contractual promise . . ." found at the fair opportunity clause.¹³⁵ The board also rejected the government's argument that the agency's task and delivery order ombudsman provided the contractor its exclusive remedy.¹³⁶ It based this finding, in part, on the portion of the Act's legislative history that states that otherwise applicable provisions of law remain applicable, except to the extent specifically provided for by FASA.¹³⁷ The board also rejected the government's argument that it had met its contractual obligations to the contractor by ordering "34 times the \$50,000 minimum" of the IDIQ contract.¹³⁸ It held that "[w]hile the minimum quantity represents the extent of the Government's purchasing obligation, . . . it does not constitute the outer limit of all of the Government's legal obligations under an indefinite quantity contract."¹³⁹

In neither of these cases did the boards scrutinize the facts to determine whether the contractors had filed task order protests. Since a protest cannot be filed at a BCA, to determine whether these actions were protests the boards should have looked at the statutory definitions for the term as it is used at the GAO and the Court of Federal Claims. For actions filed at the GAO, a protest is defined as ". . . a written objection by an interested party to . . . [a] solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services . . ." or ". . . [a]n award or proposed award of such a contract."¹⁴⁰ For actions filed at the Court of Federal Claims, a protest is defined as ". . . an action by an interested party objecting to a . . .

¹³² *Id.* at 6-9.

¹³³ *Id.* at 7.

¹³⁴ *Id.* at 10.

¹³⁵ *Id.* at 9.

¹³⁶ *Id.* at 10.

¹³⁷ *Id.* (citing H.R. CONF. REP. NO. 103-712, *reprinted in* 1994 U.S.C.C.A.N. 2607, 2611).

¹³⁸ *Id.* at 13.

¹³⁹ *Id.*

¹⁴⁰ 31 U.S.C. § 3551(1)(A)-(C) (2005).

proposed award or the award of a contract . . .”¹⁴¹ For post-award protests, the Court of Federal Claims has adopted the GAO’s definition of interested party – “. . . ‘an actual or prospective bidder or offeror [sic] whose direct economic interest would be affected by the award of the contract or by a failure to award the contract.’”¹⁴² The claims filed by both contractors are actions that meet these definitions of protests – they are objecting to the award of task orders to other contractors. Likewise, both contractors are interested parties – they assert in their claims that their direct economic interests have been affected by the government’s failure to award them the task orders.

The board in *Community Consulting Int’l* got around FASA’s protest restrictions by couching the action in terms of a contract dispute arising from the government’s failure to give the contractor a fair opportunity to compete for all task orders as required by the IDIQ contract. However, a contract cannot give to a contractor what Congress has expressly taken away – the ability to protest the award of a task order.¹⁴³ As the Court of Appeals for the Federal Circuit stated in *Coastal Corp., et al. v. United States*, “[j]urisdiction . . . cannot be conferred by waiver or acquiescence” on the part of the government.¹⁴⁴

Neither board addressed the fact that contracting officers are required by statute and regulation to put fair opportunity procedures in all multiple-award IDIQ contracts. Based on these decisions, an agency potentially will be punished if it follows this mandate when awarding an IDIQ contract because it subjects itself to the possibility of a future CDA claim based on an allegation that the procedures were not followed during the award of an order; whereas another agency, which ignores the requirement, does not face such a risk.

While not discussed in *Burke Court Reporting Co.*, the board in *Community Consulting Int’l* addressed the issue of the task and delivery order ombudsman. It found that the ombudsman forum is not the exclusive place of remedy for an IDIQ contractor. By granting jurisdiction, however, the board undermined FASA’s stated purposes of encouraging efficient contracting through the use of IDIQ contracts and giving wide latitude to contracting officers. Based on these holdings, the BCAs may be deluged in the coming years with lawsuits from contractors unhappy they were not selected for task or delivery orders. The resulting unbridled ability to file lawsuits will leave the IDIQ contracting system *less* efficient than standard contract solicitations and the bid protest system in place for such contracts because IDIQ contractors will

¹⁴¹ 28 U.S.C. § 1491(b)(1) (2002).

¹⁴² *Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 669 (1997) (quoting 31 U.S.C. § 3551(2)).

¹⁴³ See RESTATEMENT (SECOND) OF CONTRACTS § 179(a) (1981) (“A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy . . .”).

¹⁴⁴ 713 F.2d 728, 730 (Fed. Cir. 1983).

have jurisdiction available to them to have *any* complaint heard regarding the awarding of task or delivery orders.¹⁴⁵

Another concern that arises from these board opinions is their rejection of the government's argument that it had met its contractual obligations to the contractors by ordering the IDIQ contracts' guaranteed minimums. In *Travel Centre v. Barram*,¹⁴⁶ the Court of Appeals for the Federal Circuit held that once the government purchases from a contractor the minimum guaranteed under the IDIQ contract, it has met its legal obligations under the contract.¹⁴⁷ Accordingly, an IDIQ contract “. . . requires the government to order only a stated minimum quantity of supplies or services[,] . . . [and] once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses.”¹⁴⁸ The court concluded in *Travel Centre* that an IDIQ contractor cannot have a “. . . reasonable expectation that any of the government's needs beyond the minimum contract price . . .” will be satisfied under the contract.¹⁴⁹

Finally, the potential for sizable monetary damages being awarded makes it likely that numerous future actions similar to these two BCA cases will occur. For example, in *Community Consulting Int'l*, the contractor's damages claim centered on its allegation that if the terms of the IDIQ contract had been enforced throughout the term of the contract, it would have received a total of about \$27.5 million in task orders. Thus, the amount of damages sought in claims such as these easily can reach multi-million dollar levels. Of even greater concern is the fact that calculating damages in cases like these is almost impossible. Even if it is established that a contract requires the government to give every IDIQ contractor a fair opportunity to compete for every task order and that requirement is breached, the contractor's damages should not be the profits it estimates it would have received if it had been awarded the contract. First, if the contractor had been fairly considered for the task order, that does not mean the contractor would have been selected for

¹⁴⁵ 48 C.F.R. §§ 33.101-06 (2005) provides guidance on how a bid protest is to be legally addressed when a contract solicitation has occurred. No such guidance exists on how to address an IDIQ contractor that protests its failure to be selected for a task order.

¹⁴⁶ 236 F.3d 1316 (Fed. Cir. 2001).

¹⁴⁷ *Id.* at 1319. See also *Mason v. United States*, 222 Ct. Cl. 436, 443 n.5 (1980) (“ . . . the buyer is required to purchase at least this minimum amount [of an IDIQ contract], but this is the extent of his legal obligation. He can purchase more if he chooses to but is under no obligation to do so.”); *Varilease Tech. Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002) (“[a]n ID/IQ contract . . . does not oblige the buyer to purchase more from the seller than a stated minimum quantity”); *J. Cooper & Assocs, Inc. v. United States*, 53 Fed. Cl. 8 (2002). While none of these cases involve multiple-award IDIQ contracts, the opinions do not make a distinction between multiple and single award IDIQ contracts nor do they imply that the holdings apply only to single-award IDIQ contracts.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

award of the task order. Second, anticipatory profits cannot be calculated with any accuracy on a contract for which a contractor, at most, has done nothing more than prepare a proposal. As the court stated in *Hi-Shear Tech. Corp. v. United States*, the government does not have to award damages that are remote and consequential.¹⁵⁰ It seems highly unlikely that a contractor could prove damages in these type cases with “. . . sufficient certainty so that the determination of the amount of damage would not be pure speculation.”¹⁵¹

VI. RECENT CONGRESSIONAL ACTION ON TASK AND DELIVERY ORDERS – SECTION 803 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2002

In an attempt to improve the IDIQ contract procurement process through more competition, Section 803 of the National Defense Authorization Act for Fiscal Year 2002¹⁵² requires the DoD to ensure that any purchase of a service in excess of \$100,000 made under a multiple-award contract be made on a competitive basis unless: (1) a contracting officer prepares a written justification that states one of FASA’s four exceptions to the fair opportunity to be considered requirement applies; or, (2) a statute expressly authorizes or requires that the purchase be made from a specified source.¹⁵³ It also requires that before the DoD purchases such a service: (1) all contractors offering such services under the multiple-award contract, or at least “as many contractors as practicable,” must have been provided a fair notice of the intent to make the purchase (including a description of the work to be performed and the basis on which the selection will be made); (2) all contractors responding to the notice must have been given a fair opportunity to make an offer; and, (3) all offers must have been fairly considered.¹⁵⁴

The requirements of Section 803 have been promulgated in the Defense Federal Acquisition Regulation Supplement (“DFARS”). In addition to the above requirements, DFARS states that the contracting officer: (1) should keep contractor submission requirements to a minimum; (2) may use streamlined procedures, including oral presentations; (3) shall consider price or cost under each order as one of the factors in the selection decision; and, (4)

¹⁵⁰ 53 Fed. Cl. 420, 436 (2002).

¹⁵¹ *G & H Mach. Co. v. United States*, 16 Cl. Ct. 568, 571 (1989).

¹⁵² Pub. L. No. 107-107, 115 Stat. 1012, 1178-80 (2001). This section of the National Defense Authorization Act for Fiscal Year 2002 is entitled “Competition Requirement for Purchase of Services Pursuant to Multiple Award Contracts.”

¹⁵³ *Id.* at § 803(b)(1)(A). See note 24 *supra* for the exact language of FASA’s four exceptions.

¹⁵⁴ *Id.* at § 803(b)(2)-(3). If the contracting officer did not provide notice to all contractors offering such services but instead only provided notice to “as many contractors as practicable,” the purchase will not be authorized unless: (1) offers were received from at least three qualified contractors; or (2) a DoD contracting officer made a written determination that, despite reasonable efforts, he or she could not identify any other qualified contractors. *Id.* at § 803(b)(4).

should consider past performance on earlier orders under the contract, including quality, timeliness, and cost control.¹⁵⁵

While the efforts of Congress to improve the fairness of the IDIQ contracting system are admirable, the provisions of this section do not do anything to clarify the scope of FASA's protest restrictions or the role of the task and delivery order ombudsman. In addition, the section only applies to the procurement of *services* by the DoD. Thus, non-DoD agencies need not abide by its provisions, and its provisions do not apply to supply procurement actions done by the DoD using multiple-award delivery order contracts. Quite simply, Congress must do much more to define how competition should occur and how contractor complaints should be addressed when multiple-award IDIQ contracts are used.

VII. RECOMMENDATIONS TO IMPROVE MULTIPLE-AWARD TASK AND DELIVERY CONTRACTING

In light of the areas discussed in this paper, Congress must take action to better define the scope of FASA. While the goals of the Act as expressed in the legislative history are commendable, recent judicial and administrative actions have addressed issues that the statutory language of FASA does not adequately cover. For example, it is not entirely clear that the scope of the Act was not meant to include GSA FSS contracts. Of even more importance is whether the Act truly meant to exclude "downselection" decisions from its restrictions. Also, Congress needs to determine to what extent, if any, FASA was meant to limit a contractor from contesting the issuance or proposed issuance of task or delivery orders by protesting the solicitation of the underlying IDIQ contract.

Congress also needs to remove the requirement that an IDIQ contract's fair opportunity procedures be placed in the contract. The potential for a plethora of CDA actions resulting from this requirement could eventually drive agencies to stop awarding multiple-award IDIQ contracts. No agency will want to risk paying millions of dollars in damages if a contractor is able to establish a breach of contract just for the sake of using task and delivery order contracting. If Congress does not tackle this issue by either removing the requirement that fair opportunity procedures be put in IDIQ contracts or by stating that such claims do not fall under CDA jurisdiction, FASA may end up causing the reverse of what it was intended to accomplish – the use of multiple-award IDIQ contracts may decrease.

If Congress does not address the CDA issue, or even if it eventually does take such action, the FAR Council should act immediately in response to the recent BCA cases discussed above. It should draft a clause, using as simple and uncomplicated language as possible, that lists the procedures that

¹⁵⁵ 48 C.F.R. § 216.505-70(d) (2005).

will be followed to ensure all IDIQ contractors are afforded a fair opportunity to compete for orders. This clause can be adapted for individual situations by contracting officers, but it at least will give contracting officers a place to start as they struggle with the requirement of putting such procedures in the contract. If this proposal is implemented, consistency among contracts should reduce the potential for an excessive number of CDA claims being filed by contractors alleging that fair opportunity procedures were not followed.

The clause also should state that the government is only liable for costs, if any, incurred as a result of the government's failure to follow fair opportunity procedures. The clause should make it clear that contractors will not get profits on these costs or any anticipatory profits. It also should state that costs are limited to those incurred by a contractor in preparation of a task or delivery order proposal that was not fairly considered by the government as specified by the fair opportunity procedures incorporated into the underlying IDIQ contract. Such a clause would eliminate the possibility of large damages for anticipatory profits based on a breach of contract theory and reduce the possibility of the fair opportunity procedures having "the unintended effect of bogging down the federal procurement process."¹⁵⁶

Finally, it is imperative that Congress better define what role the task and delivery order ombudsman is supposed to play when a contractor makes a complaint involving the award of a task or delivery order. If the position is going to make any impact on streamlining the procurement system, there should be a requirement that, at the very least, a task or delivery order complaint involving a matter other than an allegation that the order increases the scope, period or maximum value of the underlying IDIQ contract must first be brought to the attention of the ombudsman for potential action before an administrative or judicial review of the allegation can take place. Without such a requirement, the ombudsman position does not seem to serve a purpose because contractors appear to be ignoring that potential source of relief.

The ombudsman also should be given statutory authority to take action when a task or delivery order has been handled in an improper manner. Congress should set up a framework that gives the ombudsman: (1) the necessary independence to make such a decision; (2) the authority to prevent an agency from issuing a task or delivery order that violates statutory or regulatory guidance; and, (3) if an improper order has already been issued, the authority to terminate for convenience the award, thereby forcing the agency to reprocure the good or service following proper procedures.

VII. CONCLUSION

¹⁵⁶ See note 16 *supra* and accompanying text.

FASA hoped to “transform [the] outmoded system of regulating defense-dependent industries”¹⁵⁷ It accomplished that goal to a certain extent by strongly encouraging the use of multiple-award IDIQ contracts. Recent judicial and administrative opinions have cast doubt on the scope of the Act, however, and Congress must take action to clarify issues raised in the opinions. Without clarifying action, contracting officers may return to their former reluctance to use multiple-award IDIQ contracts because of uncertainty as to the ramifications of their use. Without Congressional action, contracting officers may come to prefer the relative safety and inefficiency of single-award IDIQ contracts over the use of multiple-award IDIQ contracts due to their unwillingness to subject their agencies to the risks of incurring long protest delays and large damages awards resulting from CDA claims.

¹⁵⁷ S. REP. NO. 103-259, at 6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2598, 2602.