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ARTICLES

NOTES

COMMENT

LLM THESIS

Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict

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I. INTRODUCTION

International Obligations & Responsibilities and the International Rule of Law

The United States (U.S.) is currently detaining several hundred al-Qaeda and Taliban unlawful enemy combatants from more than 40 countries at a multi-million dollar maximum-security detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba. These enemy detainees were captured while engaged in hostilities against the U.S. and its allies during the post-September 11, 2001 international armed conflict centered primarily in Afghanistan. The conflict now involves an ongoing concerted international campaign in collective self-defense against a common stateless enemy dispersed throughout the world.

Domestic and international human rights organizations and other groups have criticized the U.S.,[1] arguing that al-Qaeda and Taliban detainees in Cuba should be granted Geneva Convention III prisoner of war (POW)[2] status. They contend broadly that pursuant to the international laws of armed conflict (LOAC), combatants captured during armed conflict must be treated equally and conferred POW status. However, no such blanket obligation exists in international law. There is no legal or moral equivalence in LOAC between lawful combatants and unlawful combatants, or between lawful belligerency

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[1] *See, e.g.,* Human Rights Watch: *Background Paper on Geneva Conventions and Persons Held by U.S. Forces - Human Rights Watch Press Backgrounder* (Jan. 29, 2002), at http://www.hrw.org/backgrounder/usa/pow-bck.htm (last visited Dec. 3, 2002); *see also generally e.g.,* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants,* 96 AM. J. INT'L L. 891 (2002); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint,* 19 CONN. J. INT'L L. 127 (2003); Joshua S. Clover, Comment, *Remember, We're The Good Guys": The Classification and Trial of the Guantanamo Bay Detainees,* 25 S. TEX. L. REV. 351 (2004).

[2] Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW].

and unlawful belligerency (also referred to as lawful combatantry and unlawful combatantry).

The U.S. has applied well-established existing international law in holding that the al-Qaeda and Taliban detainees are presumptively unlawful combatants not entitled to POW status.[3] Taliban and al-Qaeda enemy combatants captured without military uniforms in armed conflict are not presumptively entitled to, nor automatically granted, POW status. POW status is a privileged status given by a capturing party as an international obligation to a captured enemy combatant, if and when the enemy's previous lawful actions in armed conflict demonstrate that POW status is merited. In the case of captured al-Qaeda and Taliban combatants, their combined unlawful actions in armed conflict, and al-Qaeda's failure to adequately align with a state show POW status is not warranted.

The role of the U.S. in the international community is unique. The U.S., although relatively a young state, is the world's oldest continuing democracy and constitutional form of government. The U.S. is a permanent member of the United Nations Security Council, the world's leading economic power, and its only military superpower. The U.S. is the only country in the world capable of commencing and supporting effectively substantial international military operations with an extensive series of military alliances, and the required numbers of mission-ready expeditionary forces consisting of combat airpower, land and naval forces, intelligence, special operations, airlift, sealift, and logistics. Great influence and capabilities, however, exact great responsibility.

As a result of its unique role and influence within the international community, the U.S. has been placed at the forefront of respecting LOAC and promoting international respect for LOAC. The U.S. military has the largest, most sophisticated and comprehensive LOAC program in the world. The U.S. demonstrates respect for LOAC by devoting an extraordinary and unequalled level of resources to the development and enforcement of these laws, through an unparalleled LOAC training and education regimen for U.S. and allied

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[3] *See, e.g.*, David B. Rivkin, Jr., *et al*., *It's Not Torture, and They Aren't Lawful Combatants*, WASH. POST, Jan. 11, 2003, at A 19:

> The United States has not granted the rights of honorable prisoners of war to the Guantanamo Bay detainees because they are neither legally nor morally entitled to those rights. Only lawful combatants, those who at a minimum conduct their operations in accordance with the laws of war, are entitled to POW status under the Geneva Convention. By repudiating the most basic requirements of the laws of war -- first and foremost the prohibition on deliberately attacking civilians -- al Qaeda and the Taliban put themselves beyond Geneva's protections.

Id.

military members, and a conscientious and consistent requirement that its forces comply with these laws in all military operations.

Customary LOAC binds every country in the world including the U.S. International collective security and U.S. national security may be achieved only through a steadfast commitment to the Rule of Law. For the U.S. to grant POW status to captured members of al-Qaeda or the Taliban would be an abdication of these international legal responsibilities and obligations. It would set a dangerous precedent contrary to the Rule of Law and LOAC, and to the highest purpose of the laws of warfare, the protection of civilians during armed conflict.

This article begins by explaining how LOAC protects civilians through the enforcement of clear distinctions between lawful combatants, unlawful combatants, and protected noncombatants. It summarizes the four conditions of lawful belligerency under customary and treaty-based LOAC, and instructs why combatants who do not meet these conditions do not possess combatant's privilege; that is, the immunity provided to members of the armed forces for acts in armed conflict that would otherwise be crimes in time of peace.

The article then reviews why LOAC does not require that captured unlawful combatants be afforded POW status, and addresses specifically captured al-Qaeda and Taliban fighters. The practices and behavior of these fighters *en masse* in combat deny them privileges as lawful belligerents entitled to combatant's privilege. The article argues that al-Qaeda unlawful combatants are most appropriately described as *hostes humani generis*, "the common enemies of humankind."

The article subsequently explains why al-Qaeda members, as *hostes humani generis*, are classic unlawful combatants, as part of a stateless organization that *en masse* engaged in combat unlawfully in an international armed conflict without any legitimate state or other authority. The article explicates al-Qaeda's theocratic-political hegemonic objectives and its use of global terrorism to further those objectives. The article expounds as to why international law deems a transnational act of private warfare by al-Qaeda as *malum in se*, "a wrong in itself." Related to al-Qaeda's status as *hostes humani generis*, the article describes one of the Taliban's many violations of international law; that is, willfully allowing al-Qaeda *hostes humani generis* to reside within Afghanistan's sovereign borders from where al-Qaeda could and did attack unlawfully other sovereign states. The article then details a state's inherent rights if and when attacked by such *hostes humani generis*.

Following this, the article continues by asserting that there is no doubt or ambiguity as to the unlawful combatant status of the Taliban and al-Qaeda (shown by the failure of the Taliban *en masse* to meet the four fundamental criteria of lawful belligerency, al-Qaeda's statelessness *en masse*, and both their many acts of unlawful belligerency and violations of LOAC). As a result, the article states that there is no need or requirement for proceedings under

Geneva Convention III, art. 5 to adjudicate their presumptive unlawful combatant status and non-entitlement to POW status *pro forma*.

The article subsequently illustrates that, even though captured al-Qaeda and Taliban are unlawful combatants and not POWs, the U.S. as a matter of policy has treated and continues to treat all al-Qaeda and Taliban detainees humanely in accordance with customary international law, to the extent appropriate and consistent with military necessity and in a manner consistent with the principles and spirit of the Geneva Conventions. The article discusses that, under LOAC, the detainees are captured unlawful combatants that can be interned without criminal charges or access to legal counsel until the cessation of hostilities. However, the article then points out that the U.S. has no desire to, and will not, hold any unlawful combatant indefinitely.

The article then notes that al-Qaeda and Taliban detainees, as unlawful combatants, are subject to trial by U.S. military commissions for their acts of unlawful belligerency or other violations of LOAC and international humanitarian law. It expounds that, when an opposing force detains an unlawful combatant in time of armed conflict, the unlawful combatant's right to legal counsel or other representation only arises if criminal charges are brought against the unlawful combatant. The article illustrates the security measures, evidence procedures, and the many executive due process protections afforded to detainees subject to the jurisdiction of U.S. military commissions. The article states that, if tried and convicted in a U.S. military commission, a detainee may be required to serve the adjudged sentence, such as punitive confinement.

The article concludes that it is in the immediate and long-term national security interests of the U.S. to respect and uphold LOAC in all military operations. Ultimately, the United States has an obligation to the international community and the Rule of Law not to afford POW status to captured unlawful combatants such as the al-Qaeda and Taliban detainees in furtherance of both domestic and international security.

II. INTERNATIONAL LAW, THE U.S., AND TALIBAN & AL-QAEDA UNLAWFUL BELLIGERENCY

A. Lawful Combatants, Unlawful Combatants, and Noncombatants

1. Not all Captured Combatants are Entitled to POW Status

According to both customary and treaty-based LOAC, al-Qaeda and Taliban detainees do not meet the requirements to be lawful combatants. They are unlawful enemy combatants who are not legally authorized under LOAC to engage in armed conflict, but do so without authority. Unlawful combatants also include combatants who engage in armed conflict in a manner that violates certain international laws of armed conflict. Unlawful combatants are

proper objects of attack during an international armed conflict, and upon capture, may be denied Geneva Convention III POW status.[4] In such cases, whenever the U.S. withholds Geneva Convention III POW status from captured unlawful combatants, U.S. policy directs that they be treated humanely and similar to lawful combatants or POWs.[5] Additional to the

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[4] GPW, *supra* note 2, art. 4(A)(specifying categories of combatants entitled to POW status); U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW-THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31 (1976) [hereinafter AFP 110-31], at 3-3a:

> An unlawful combatant is an individual who is unauthorized to take a direct part in hostilities but does. The term is frequently used also to refer to otherwise privileged combatants who do not comply with requirements as to mode of dress, or noncombatants in the armed forces who improperly use their protected status as a shield to engage in hostilities. "Unlawful combatants" is a term used to describe only their lack of standing to engage in hostilities, not whether a violation of the law of armed conflict occurred or criminal responsibility accrued.

Id. *See also, e.g.*, R.R. Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT.Y.B. INT'L. L. 323, 328 (1951)(defining unlawful belligerents as "[a] category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949. . ."); A. ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR 419 (1976) ("persons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants."); INGRID DETTER, THE LAW OF WAR 148 (2d ed. 2000):

> The main effect of being a lawful combatant is entitlement to prisoner of war status. Unlawful combatants, on the other hand, though they are a legitimate target for any belligerent action, are not, if captured, entitled to prisoner of war status. They are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. They are often summarily tried and enjoy no protection under international law.

Id. *See also* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 549 (1954)(The difference between "privileged"/"lawful" combatants and "unprivileged"/"unlawful" combatants is the difference "between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection.").

[5] Part of waging armed conflict includes the capture and detention of combatants from opposing forces. Captured *lawful combatants* receive "POW status." As a matter of policy, the U.S. affords captured *unlawful combatants* "POW treatment and protections." "POW status" is legally distinct from "POW treatment and protections." *POW status* is a legal term denoting the legal status that entitles captured lawful combatants to numerous rights under GPW. A capturing party is legally required to provide captured lawful combatants all such rights. In contrast, *POW treatment and protections* is descriptive generally of how a capturing party, at its discretion, opts to care for captured unlawful combatants or, temporarily, for captured combatants whose lawful or unlawful combatant status is not yet clear. Whenever there is no doubt as to the legal status of captured unlawful combatants, the U.S. continues to provide them POW treatment and protections. OPERATIONAL LAW HANDBOOK JA 422, U.S.

Geneva Conventions of 12 August 1949 (Protocol I)[6] also recognizes that unlawful combatants captured during an international armed conflict are not

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ARMY 23 (2003); *see also* Marc L. Warren, *Operational Law – A Concept Matures,* 152 MIL. L.REV. 33, 58 n. 105 (1996)("[T]he difference between the two terms [of 'POW status' and 'POW treatment'] is not merely semantic; similarly, the distinction between 'treatment' and 'status' as a prisoner of war can be legally, practically, and politically profound."); *cf.*, DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, para. 5.3.1 (Dec. 8, 1998) saying that it is U.S. DoD policy to comply with LOAC "in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized").

[6] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, U.N. Doc A/32/144 [hereinafter Protocol I], *reprinted in* 16 I.L.M. 1391. Protocol I, art. 75, prohibits *inter alia* torture, hostage-taking, collective punishments, and respective threats to do such acts. Art. 75 requires, *inter alia*, that detainees be informed as to the reasons of their detention and that detainees be released when the circumstances of, and reasons for their detention no longer exist. Art. 75 requires that judicial proceedings, *inter alia,* afford an accused detainee the right to a speedy trial, proper notification of charges, the presumption of innocence, the right against self-incrimination, the right of confrontation, the right against double jeopardy, and the right of public announcement of any conviction. Art. 75 prohibits, *inter alia, ex post facto* charges and collective punishment. Protocol I, art. 75 further says in pertinent part:

> Fundamental guarantees:
>
> 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, *persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances* and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons…
> 6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
> 7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
>
> (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
> (b) *any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol*. … (emphasis added).

Id. *See also* Protocol I, at art. 45(c), *supra* note 6, also implicitly recognizing the category of unlawful combatants in LOAC ("*Any person who has taken part in hostilities, who is not*

required to be accorded POW status. Art. 75 describes unlawful combatants as individuals "who are in the power of a Party to the conflict and who do not benefit from the more favourable treatment under the Conventions or under this Protocol." Although the U.S. is not a signatory to Protocol I, the U.S. views art. 75 and its principle, that not all combatants captured in armed conflict are entitled to POW status, as a reiteration of existing customary international law.[7]

2. Lawful/Unlawful Combatants and Noncombatants

Armed conflict places large numbers of civilians on all sides of a conflict in grave situations where the risks of death, suffering, loss, and other depredations are extremely high. This is especially so when combatants disguise themselves unlawfully as protected noncombatant civilians.[8] LOAC has long been designed to mitigate the risks to civilians by clearly distinguishing *lawful combatants* (such as uniformed military personnel under a responsible chain of command, who carry arms openly, and who are obliged to and do follow international law) from *unlawful combatants* (such as members of the Taliban who *en masse* do not meet the four criteria of lawful belligerency and who *en masse* have willfully and continually failed to follow LOAC, and al-Qaeda who *en masse* are stateless and whose right to take up arms is not recognized under international law).[9]

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entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of the Protocol.")(emphasis added).

[7] *See, e.g.*, Adam Roberts, *The Prisoner Question: If the U.S. has acted lawfully, what's all the furor about?*, WASH. POST, Feb. 3, 2002, at B 01("The United States is not a party to Protocol I but has long viewed Article 75 as customary law, binding on all states."); *see also* Michael J. Matheson, *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. & POL'Y 419, 427-28 (1987); JORDAN J. PAUST, ET AL., INTERNATIONAL CRIMINAL LAW 817 (2d ed. 2000).

[8] *See* J.L. Whitson, *The Laws of Land Warfare: The Privileged Guerilla and the Deprived Soldier* (1984), at http://www.globalsecurity.org/military/library/report/1984/WJL.htm (last visited Jun. 16, 2004):

> Consistently failing to abide by the rules established in 1949, . . . unconventional forces have . . . conduct[ed] treacherous attacks against uniformed soldiers, and as an assurance of self protection by hiding amongst the immune civilian population. The dilution of [LOAC], as a result of inevitable civilian casualties, is an abomination which has accorded a special measure of protection to these forces while, at the same time, placing the conventional soldier in a situation of unacceptable risk.

Id.

[9] *See* Rivkin, *supra* note 3, at A 19:

Further, and perhaps more importantly, LOAC clearly distinguishes both lawful combatants and unlawful combatants from protected *noncombatants* (such as protected civilians, interned civilians, military medical personnel, military chaplains, civilian war correspondents and journalists, United Nations peacekeepers, military members who are *hors de combat*-meaning those individuals who are "out of the fight" such as sick or wounded combatants, non-aggressive aircrews descending by parachute after the destruction of their aircraft, shipwrecked combatants, interned battlefield detainees, POWs and other captured combatants).[10]

> The fundamental distinction between lawful armed forces, such as those of the United States, and unlawful combatants, such as al Qaeda and the Taliban, and the harsh treatment reserved for the latter, is not some legal technicality invented by the Bush administration. It is, in fact, part of the centuries-long effort by civilized states to eliminate private warfare and to ensure that civilian populations are protected. It is, in fact, at the core of . . . humanitarian law…

Id. *See also* Charles C. Hyde, 2 *International Law: Chiefly as Interpreted and Applied by the United States* § 652 (Little, Brown 1922):

> The law of nations, apart from the Hague Regulations . . . denies belligerent qualifications to guerrilla bands. Such forces wage a warfare which is irregular in point of origin and authority, of discipline, of purpose and procedure. They may be constituted at the beck of a single individual; they lack uniforms; they are given to pillage and destruction; they take few prisoners and are hence disposed to show slight quarter.

Id. See also generally Secretary to the Military Board, Australian Edition of Manual of Military Law 200 (1941)[hereinafter Australian Military Law]:

> [A]n individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen…Peaceful inhabitants . . . [i]f…they make an attempt to commit hostile acts, they are not entitled to the rights of armed forces, and are liable to execution as war criminals.

Id. *See also* BRITISH MANUAL OF MILITARY LAW: WAR OFFICE [hereinafter BRITISH MILITARY LAW] 238 (1914).

[10] *See* ex parte Quirin [hereinafter Quirin], 317 U.S. 1 (1942):

> *By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations* (n. 7) *and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful*. (n. 8). The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy

These essential customary international law distinctions between lawful/unlawful combatants and noncombatants prevent collateral deaths and suffering of protected civilians and other noncombatants during armed conflict. LOAC serves to protect noncombatants by providing all combatants an unambiguous positive incentive to constrain their behavior as well as the potential of future punishment for failing to do so.

3. Lawful Belligerency: Combatant's Privilege & POW Status

If a combatant follows LOAC during war, "combatant's privilege" applies and the combatant is immune from prosecution for lawful combat activities. For example, a lawful combatant may not be tried for an act (such as assault, murder, kidnapping, trespass, and destruction of property) that is a crime under a capturing party's domestic law in time of peace, when that act is committed within the context of hostilities and does not otherwise violate LOAC.[11] In addition, the captured lawful combatant receives Geneva

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> combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. Winthrop, Military Law, 2d Ed., pp. 1196-1197, 1219-1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V (emphasis added).

Id. at 31-32.

[11] *See* Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L.REV. 53, 59 (1983); *see also* Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/-V/II.116 Doc., 5 rev. 1 corr., (Oct. 22, 2002), *at* http:www.cidh.oas.org/Terrorism/Eng/toc.htm (last visited Dec. 9, 2003)("the combatant's privilege . . . is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives."). *Id*. at para. 68. *See also* Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflict*, 9 AM. U. J. INT'L L. & POL'Y 49, 58-59; *see also* Geoffrey S. Corn, et al., "*To Be or Not to Be, That is the Question": Contemporary Military Operations and the Status of Captured Personnel*, DA-PAM 27-50-319 ARMY LAW at 1 & 14 (Jun., 1999):

> [B]efore capture, many prisoners of war participate in activities that are, during times of peace, generally considered criminal. For example, it is foreseeable that soldiers will be directed to kill, maim, assault, kidnap, sabotage, and steal in furtherance of their nation state's objectives. In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts.

Id. The combatant's privilege entitles a lawful combatant to kill or wound enemy forces, and to destroy property while in the pursuit of lawful military objectives. Additionally, "[*a*] *lawful combatant* possessing the privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic laws of his captor for his hostile acts

Convention III POW status with its special rights, better conditions, and more extensive set of benefits.

Conversely, if a combatant ignores the criteria of lawful belligerency, the individual may be deemed an unlawful combatant. An unlawful combatant is also referred to with identical meaning as an illegal combatant, unprivileged combatant, *franc-tireur* meaning "free-shooter," unprivileged belligerent, dishonorable belligerent or unlawful belligerent. The unlawful combatant may then, upon capture in an international armed conflict at the discretion of the capturing party, forfeit combatant's privilege and Geneva Convention III POW status, and not be afforded full POW protections under Geneva Convention III. Further, if the unlawful combatant has committed grave breaches of LOAC, the individual may be tried in a military commission; and if convicted, be punished appropriately.

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which do not violate the laws and customs of war"(emphasis added). *Id. See also* MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY OF THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 243 (1982):

> [Combatant's privilege] provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflicts. The essence of prisoner of war status under the Third Convention is the obligation imposed on the Detaining Power to respect the privilege of combatants who have fallen into its power.

Id. at 243-44. *Accord*, Telfrod Taylor describes combatant's privilege as follows:

> War consists largely of acts that would be criminal if performed in time of peace – killing, wounding, kidnapping, and destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over its warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.

Cited in NATIONAL SECURITY LAW 359 (John Norton Moore et al. eds., 1990); *see also* John C. Yoo & James C. Ho, *International Law and the War on Terrorism*, 13-14 (Aug. 1, 2003), at http://www.law.berkeley.edu/cenpro/ils/papers/yoonyucombatants.pdf (last visited May 27, 2004)("The customary laws of war immunize only lawful combatants from prosecution from committing acts that would otherwise be criminal under domestic or international law. And only those combatants who comply with the four conditions are entitled to the protections afforded to captured prisoners of war...."). Combatant's privilege is also referred to as "combatant's immunity" or "belligerent's immunity."

4. Combatant Duty to Appear Visually Distinct from Noncombatant Civilians

Of paramount importance is that all combatants have an unconditional legal duty in armed conflict to protect noncombatant civilians by distinguishing themselves visually from the civilian population. Failure to do so with perfidious intent is a violation of LOAC. Geneva Convention III mandates as one of the four essential criteria of lawful belligerency that all combatants in international armed conflict must wear distinctive dress.[12] Similarly, customary international law, the practice among states over time, provides that spies, saboteurs, terrorists, resistance groups, guerrillas, irregulars, militias, insurgents, and other combatants, if captured in an international armed conflict while impersonating protected civilians perfidiously, do not necessarily share the same advantaged fate and implicit international stature as do uniformed lawful combatants.[13] International law

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[12] *See* GPW, *supra* note 2, at art. 4(A)(2)(b); *but see* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003)(arguing that wide-spread state practice over time has created customary international law that allows certain state armed forces to wear civilian clothes, "non-traditional uniforms," in armed conflict in certain circumstances and that therefore such specialized civilian-attired forces would not be in violation of international law, but acknowledges the increased risks of such conduct if captured in enemy-controlled territory because the capturing party could prosecute them as spies under the domestic criminal espionage laws of the capturing party).

[13] *See* GPW, *supra* note 2, at art. 4(A)(specifying categories of combatants entitled to POW status); *See also e.g.*, DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 31 para. 74 (Jul. 1956):

> Necessity of Uniform. *Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war* whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces. (emphasis added).

Id. cf.: Human Rights: Guantanamo European Parliament Resolution On the Detainees In Guantanamo Bay, PARL. EUR. DOC. 90/PE 313.865 (2002), *at* http://www.europarl.eu.int/meetdocs/delegations/usam/20020219/004EN.pdf (last visited Jun. 16, 2004) ("*The European Parliament* . . . Reaffirms its unwavering solidarity with the United States in combating terrorism with full regard for individual rights and freedom; 2. Agrees that the prisoners currently held in the US base in Guantanamo do not fall precisely within the definitions of the Geneva Convention")(emphasis in original); *see also* Protocol I, *supra* note 6, at art. 46 (explaining that spies do not have the right to POW status); *cf.*, Protocol I, art. 47 (another type of unlawful combatant, a mercenary, a soldier who is not a national of a party to the conflict and who is paid more than a local soldier, is similarly unprotected internationally; i.e., when captured in armed conflict, mercenaries are not entitled to POW status). *Id*. *See also generally* The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47)[hereinafter WWII War Crimes Trial], 8 L.Rpts. of Trials of War Criminals 34, 57-58 (U.N. War Crimes Comm. 1948) *at* http://www.ess.uwe.ac.uk/WCC/List3.htm#Yugoslavia (last visited Jun. 19,

has long recognized that combatants who hide among and attempt to blend into civilian populations during armed conflict are uniquely dangerous to protected noncombatant civilians.[14]

2004). The WWII war crimes court held that partisan bands and other irregulars who do not comply with the conditions of lawful belligerency may be prosecuted as war criminals, and, upon capture, are not entitled to POW status:

> *[T]he greater portion of the [Yugoslavian and Greek] partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent.* The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents. … They … had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. …The bands … with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. *This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs…*
>
> Guerilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applied to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, *members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured*. (emphasis added).

Id.

[14] *See* F. KALSHOVEN, THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS AND CONCLUSIONS 202 (2000)("A clear distinction between combatants and civilians is essential if the latter are to receive the protection which the law requires."); *see also generally* FRANCIS LIEBER, THE LIEBER CODE OF 1863, GENERAL ORDERS NO. 100, art. 83 (Apr. 24, 1863)("Scouts or single soldiers, *if disguised in the dress of the country, or in the uniform of the army hostile to their own*, employed in obtaining information, if found within or

If an opposing side is unable to differentiate between combatants who may legally engage in combat and protected noncombatant civilians who may not lawfully engage in combat, the opposing side might be tempted then to wrongfully and indiscriminately target everyone within an operational theater. A primary purpose of LOAC is to proactively stave off such desperate "cannot tell apart the enemy soldiers from the civilians, so shoot them all" criminal acts of reductionism. LOAC seeks to protect civilian populations by proscribing conduct that endangers such populations unreasonably, such as taking part in combat without wearing a distinctive uniform or other form of identification that is clear and visible at a distance. As stated earlier, the capturing party has the prerogative to deny such unlawful combatants POW status and some of its related benefits; and if applicable, try them for criminal acts of unlawful belligerency.[15] This is a balanced, time-honored, and practical method of encouraging compliance with LOAC.

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lurking about the lines of the captor, are treated as spies, and suffer death.")(emphasis added), *at* http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt (last visited Jun. 16, 2004); *see also* BOTHE, ET AL., *supra* note 11, at 256:

> Under the practice of States and customary international law, members of the regular armed forces of a Party to the conflict were deemed to have lost their right to be treated as prisoners of war whenever they deliberately concealed their status in order to pass behind enemy lines of the adversary for the purposes of: (a) gathering military information, or (b) engaging in acts of violence against persons or property.

Id. See also Andrew Apostolou, et al., The Geneva Convention is Not a Suicide Pact, *at* http://www.defenddemocracy.org/publications/publications_show.htm?doc_id=155712&attrib_id=7696 (last visited Jun. 16, 2004):

> If we want soldiers to respect the lives of civilians and POWs, soldiers must be confident that civilians and prisoners will not attempt to kill them. Civilians who abuse their noncombatant status are a threat not only to soldiers who abide by the rules, they endanger innocents everywhere by drastically eroding the legal and customary restraints on killing civilians. Restricting the use of arms to lawful combatants has been a way of limiting war's savagery since at least the Middle Ages.

Id.

[15] *See, e.g.*, Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 I.R.R.C. 45, 46 (Mar., 2003) ("It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law…If unlawful combatants furthermore commit serious violations of international humanitarian law, they may be prosecuted for war crimes."); DETTER, *supra* note 4, at 148 ("[Unlawful combatants] are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier."); Lisa L. Turner, et al., *Civilians at the Tip of the Spear,* 51 A.F.L.REV. 1, 32 (2001)("Unlawful combatants may be criminally prosecuted by the capturing state for their participation in hostilities, even when that participation would otherwise be lawful for a combatant.") *citing* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 105 (1993);

5. Enforcement of LOAC

It is important to appreciate that all combatants captured in armed conflict are not equal and should not be treated in the same manner. To relax or merge the categories of lawful combatants and unlawful combatants is to step backwards, diminish the effectiveness of LOAC, and begin to retrogress the difference between civilization and barbarism. It is reasonable to conclude that individual lawful combatants would be less likely to join and fight alongside rogue unlawful combatants if there is universal international illegitimacy of such aligned conduct, subsequent lack of Geneva Convention III POW status upon capture, and the potential for punitive sanctions. Not conferring POW status to captured unlawful combatants such as al-Qaeda and Taliban fighters who do not merit such status (and other armed forces who mimic protected civilians perfidiously), however, is the primary and most meaningful way of retaining, reinforcing, and not diluting the extremely vital lawful/unlawful combatant and noncombatant distinctions that are so central to LOAC and its enforcement.

The pragmatic incentives not to endanger, and deterrents against endangering, protected noncombatants (particularly the civilian population) are only useful if other parties to the armed conflict consistently comply with, and enforce strictly the requisite distinctions contained within international law. Laws that are not enforced will not deter the armed forces of countries that do not have the propensity to otherwise adhere to such laws. The U.S. is committed to conducting its military operations in accordance with LOAC and, more specifically, to protecting civilians in armed conflict by preserving and enforcing the indispensable distinctions between lawful combatants, unlawful combatants, and noncombatants.

ROSAS, *supra* note 4, at 305 ("[a] person . . . who is not entitled to the status of a lawful combatant may be punished under the internal criminal legislation of the adversary for having committed hostile acts in violation of its provision (e.g., for murder), even if these acts do not constitute war crimes under international law."); BOTHE, ET AL., *supra* note 11, at 244 ("Civilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status, do not enjoy [combatant's] privilege, and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any crime under municipal law which they might have committed."); *see also* WWII War Crimes Trial, *supra* note 13, at 58:

> [T]he rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. *Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender…*(emphasis added).

Id.

During WW II, for example, in *ex parte Quirin*,[16] the U.S. Supreme Court upheld the unlawful belligerency military commission convictions of eight German saboteurs, who disembarked German U-boats off the U.S. East coast, came ashore and discarded their military uniforms, and were later captured in civilian clothes in U.S. territory. Six of the unlawful combatants were then executed and the two remaining saboteurs were sentenced to and served lengthy terms of confinement.[17]

Admittedly, the 1949 Geneva Conventions, and other international laws of armed conflict, do not specifically envisage an armed conflict resembling the armed conflict against al-Qaeda continuing in Afghanistan and elsewhere across the globe. An asymmetric international armed conflict where one party (the Taliban, a *de facto* state) sponsors and partially incorporates members of a global stateless organization (the al-Qaeda) that directs relatively independent factions to engage in massive and worldwide suicidal terrorism against protected civilian populations, is a fairly new paradigm. Regardless of these atypical attributes of *de facto*-state sponsored international terrorism, determining the legal status of captured combatant Taliban and al-Qaeda members in accordance with existing LOAC remains a matter of relatively simple analogy.

The unconventional operations and attacks of al-Qaeda and the Taliban in armed conflict are much more dangerous and lethal to protected noncombatant civilians than has been seen historically with saboteurs, spies, guerillas, and other typical unlawful combatants who mask themselves perfidiously as protected civilians. In contrast to merely hiding among protected civilian noncombatants illegally, al-Qaeda has squarely targeted them and has attempted to maximize civilian casualties with the apparent approval of the Taliban. Nonetheless, al-Qaeda and Taliban behavior of exploiting civilian disguise in armed conflict unlawfully is related closely to the conduct of the types of civilian-attired unlawful combatants referenced above. Neither group is entitled to POW status upon capture.

Moreover, the novel and illegal manner in which al-Qaeda and the Taliban wage war bears little if any similarity to how lawful combatants (who would be granted POW status upon capture) conduct military operations. During the global armed conflict ongoing in Afghanistan and elsewhere throughout the world, al-Qaeda and Taliban combatants are much more representative of war criminals than they are of honorable, law-abiding armed forces. It follows that members of al-Qaeda and the Taliban are unlawful combatants, rather than lawful combatants, and therefore are not entitled to POW status upon capture. Further, al-Qaeda and Taliban detainees should be prosecuted, when appropriate, for substantiated violations of LOAC.

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[16] Quirin, *supra* note 10, at 1.

[17] George Lardner Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal: 1942 Precedent Invoked by Bush Against al Qaeda,* WASH. POST, Jan. 13, 2002, at W 12.

B. The Taliban and the Four Criteria of Lawful Belligerency

1. The Geneva Conventions Apply to the Taliban as the De Facto Government of Afghanistan

The Taliban was the primary faction fighting in a civil war within the failed state of Afghanistan from the mid to the late 1990s. Taliban militant extremists loosely controlled the majority of Afghani territory from 1996 to 2001 as a *de facto* regime. This is despite the fact that neither the United Nations nor the League of Islamic States recognized the Taliban regime as the *de jure* government of Afghanistan, nor did the rest of the world - only three regional Islamic countries diplomatically recognized the Taliban as the legitimate government of Afghanistan: Saudi Arabia, Pakistan, and the United Arab Emirates. These three countries each severed diplomatic ties with the Taliban during the weeks following al-Qaeda's terrorist attacks of September 11, 2001 and preceding the U.S.-led coalition international armed response in the exercise of their inherent right of collective self-defense.

Even though the Taliban was not the legitimate nor the predominantly recognized government of Afghanistan, the U.S. stipulated that the Geneva Conventions would apply to Taliban combatants because Afghanistan is a signatory to the Geneva Conventions and the Taliban exercised *de facto* governance over most of the failed state of Afghanistan.[18] However, as the *de facto* government, the Taliban then bore responsibility for Afghanistan, the international obligations of Afghanistan to include LOAC, the Taliban's conduct, and the conduct of the Taliban armed forces. When the U.S. subsequently applied the lawful belligerency criteria of LOAC to the collective conduct of the Taliban and its armed forces, such conduct was determined to be unlawful.

2. The Four Criteria of Lawful Belligerency: Being commanded by a person responsible for his subordinates; Having a fixed distinctive sign recognizable at a distance; Carrying arms openly; and Conducting military operations in accordance with the laws and customs of war.

After reviewing the substantiated institutional policy and practice in armed conflict of an armed force that *en masse* willfully and egregiously fails to follow the four requirements of lawful belligerency in armed conflict, an opposing party may then designate administratively the armed force *en masse* as a class of unlawful combatants. As a result, the U.S. regards captured Taliban as unprivileged combatants whose unlawful actions as a group (as

[18] *See e.g.*, White House: *Fact Sheet: Status of Detainees at Guantanamo, United States Policy* (Feb. 7, 2002), *at* http://www.whitehouse.gov./news/releases/2002/02/print/20020207-13.html (last visited Jun. 16, 2004).

described below) have presumptively excluded them from Geneva Convention III POW status that is afforded to captured privileged lawful combatants who have subscribed to and honored the four criteria of lawful belligerency contained within LOAC.[19]

Because the Taliban as an entity does not meet the standards of lawful belligerency, and therefore as an entity lacks lawful combatant status and combatant's privilege, the U.S. accordingly considers captured individual Taliban members to also lack lawful combatant status and combatant's privilege, and as such has not extended to them POW status. Such classification of the Taliban as unlawful combatants is not "collective criminal punishment." It is, however, a factually accurate collective administrative determination. Correspondingly, nor is it "criminal guilt by association." It is, however, the lack of lawful belligerency status by association (coupled with the lack of combatant's privilege and, upon capture, POW status).

The term "unlawful combatant" is not mentioned in international treaties that regulate armed conflict, but it is implicit within them.[20] The

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[19] *Id.* ("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. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs."); *see also* Ambassador Pierre-Richard Prosper, *Status and Treatment of Taliban and al-Qaida Detainees*, *at* http://www.state.gov/s/wci/rm/2002/8491pf.htm (last visited Jun. 16, 2004):

> [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 which 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. 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.

[20] *See* Dormann, *supra* note 15, at 46 ("[T]he terms 'unlawful combatant,' 'unprivileged combatant/belligerent' do not appear in [the treaties of the international laws of armed conflict and international humanitarian law]," but these terms have "been frequently used at least since the beginning of the last century in legal literature, military manuals and case law."); *see also* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 302 (Dieter Fleck ed., 1985)[hereinafter FLECK, HANDBOOK] ("If . . . persons who do not have combatant status participate directly in hostilities then they are treated as unlawful combatants"); Yoo & Ho, *supra* note 11, *at* 9 ("Although 'illegal combatant' is nowhere mentioned in the Geneva Conventions, it is a concept that has long been recognized by state practice in the law of war area."); James B. Steinberg, *Brookings Speakers Forum, Counterterrorism and the Laws of War: A Critique of the U.S. Approach* (Mar. 11, 2002), *at* http://www.brookings.edu/dybdocroot/comm/transcripts/20020311.htm (last visited Jun. 16,

Brussels Declaration of 1874, art. IX;[21] the 1899 Convention with Respect to the Laws and Customs of War on Land, Annex art. 1; the Hague Convention of 1907, No. IV, Annex art. 1;[22] and the Geneva Convention III of 1949, art.

2004); *quoting* Adam Roberts, Professor of International Relations, Oxford University, regarding the issue as to whether there exists in the customary international laws of armed conflict the category of unlawful combatants:

> There's been, as you know, a huge debate and in my view a huge debate on an issue on which there didn't need to be much debate. There is a long record of certain people coming into the category of unlawful combatants – pirates, spies, saboteurs, and so on. It has been absurd that there should have been a debate about whether or not that category exists.

Id. *See also* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 189 (1998):

> Not all those falling into the hands of a belligerent become prisoners of war or are entitled to prisoner of war status. Enemy civilians, for example, when taken into custody or interned do not fall into this category, and if captured are entitled to treatment in accordance with Geneva Convention IV, 1949, unless they have taken part in hostile activities when they may be regarded as unlawful combatants and treated accordingly.

Id.

[21] The Brussels Declaration of 1874, art. IX says:

> Who should be recognized as belligerents combatants and non-combatants:
> Art. 9. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: That they be commanded by a person responsible for his subordinates; That they have a fixed distinctive emblem recognizable at a distance; That they carry arms openly; and, That they conduct their operations in accordance with the laws and customs of war. In countries where militia constitute the army, or form part of it, they are included under the denomination 'army. '

The Brussels Declaration, July 27, 1874, *available in* BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS NO. 1, 1875, C. 1128, at 157-82. The U.S. did not ratify the 1874 Brussels Declaration.

[22] The 1899 Convention with Respect to the Laws and Customs of War on Land, Annex art. 1, and The Hague Convention IV, 1907, Annex art. 1 both identically affirm the four requirements of lawful belligerency:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

4A,[23] all list the four fundamental conditions of lawful belligerency. The immutability and stalwart enforcement of these four categorical pillars of lawful belligerency are indispensable to the prevention of war crimes and to the safety of protected civilians and other noncombatants in international armed conflict. To an armed force in armed conflict, the four requirements of lawful belligerency are not discretionary.

If an armed force *en masse* does not follow LOAC, the armed force *en masse* does not receive some of the protections of such laws, specifically POW status upon capture. Otherwise, the al-Qaeda and Taliban detainees would profit from an asymmetric and unequal application of LOAC, receiving the full protections and benefits of LOAC while *en masse* denying the same to their

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Hague Convention IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. 539, and the annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295. *See also* the Convention Between the United States of America and Other Powers, Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 342 (entered into force June 19, 1931), signed by 47 countries ("Article 1. The present Convention shall apply . . . (1) To all persons referred to in Articles 1, 2, and 3 of the Regulations annexed to the Hague Convention (IV) of 18 October 1907, concerning the Laws and Customs of War on Land, who are captured by the enemy…").

[23] GPW art. 4A (common to all four Geneva Conventions of 1949) says in pertinent part:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
> a. that of being commanded by a person responsible for his subordinates;
> b. that of having a fixed distinctive sign recognizable at a distance;
> c. that of carrying arms openly; and
> d. that of conducting their operations in accordance with the laws and customs of war.

GPW, *supra* note 2, at art. 4A; Although GPW art. 4A is worded slightly different from the applicable wording of the 1899 Convention with Respect to the Laws and Customs of War on Land, Annex art. 1, and The Hague Convention IV, 1907, Annex art. 1, GPW 4A did not modify the meaning. *See generally* ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 61 (J. Pictet ed., 1960)[hereinafter ICRC, COMMENTARY] ("[T]he present Convention (GPW) is not limited by the Hague Regulations nor does it abrogate them, and cases which are not covered by the text of this Convention are nevertheless protected by the general principles declared in 1907"); *cf.*, citations in note 24, *infra*.

foes. Again, an accurate designation *en masse* of unlawful belligerency so made, and the attendant forfeiture of POW status are not considered punitive to the individual combatant. Rather, an unlawful combatant designation with its denial of POW status is in accordance with the fundamental principle and maxim of international law, *jus ex injuria non oritur*, "a right does not arise from a wrong."

Such a collective administrative designation of unlawful combatant status is an adverse action that, when imposed suitably and fairly, is designed to accurately characterize *en masse* the conduct of the armed force that has acted unlawfully. More importantly, the potential for such a stigmatizing characterization with its concomitant negative consequences is to deter armed forces from failing *en masse* to follow the four requirements of lawful belligerency. Finally, the potential for lack of lawful belligerency status and POW status upon capture is to deter individual combatants from associating with stateless (or rogue state) armed forces that *en masse*, by institutional policies and practices in armed conflict, willfully and egregiously fail to follow the four requirements of lawful belligerency.

These four definitional criteria of lawful belligerency under Geneva Convention III, art. 4A apply *strictissimi juris*, "of the strictest right or law," to every unit or group within a state's regular armed forces as a matter of customary international law.[24] Also, these requirements specifically and

[24] Even though the specific text of Geneva Convention III, art. 4A(1), *supra* note 23, alone does not appear to require members of a state's armed forces to meet the four conditions of lawful belligerency, numerous previous treaties and customary international law require them to do so. *See also, e.g.*, BOTHE, ET AL., *supra* note 11, at 234-35:

> Other than the reference to the "armed forces to the Party to the conflict" in Article 4A(1), the Geneva Conventions do not explicitly prescribe the same qualifications for regular armed forces. It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered unnecessary and redundant to spell them out. It seems clear that regular armed forces are inherently organized, that they are commanded by a person responsible for his subordinates and that they are obliged under international law to conduct their operations in accordance with the laws and customs of war.

Id. See also Protocol I, *supra* note 6, at art. 44 (7)("[Article 44] is not intended to change *the generally accepted practice of States with respect to wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict*.")(emphasis added); *see also* ICRC, COMMENTARY, *supra* note 23, at 63 (explaining that GPW does not specifically state that GPW 4A(2) requirements of a responsible chain of command, a uniform, carrying arms openly, and fighting in accordance with LOAC apply to a state's regular forces because such requirements are the "material characteristics and all the attributes" of regular forces. Consequently, "[t]he delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph [art. 4A](2)(a), (b), (c), and (d)."); *see also* Yoo & Ho, *supra* note 11, *at* 12 ("It has long been understood … that regular, professional 'armed forces'

strictly bind volunteer forces, such as militia and other irregular forces, which form part of a state's armed forces.[25] By default, then, groups of combatants

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must comply with the four traditional conditions of lawful combat under the customary laws of war, and that the terms of article 4(A)(1) and (3) of GPW do not abrogate customary law."); JOSEPH BAKER & HENRY CROCKER, THE LAWS OF LAND WARFARE CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS 24 (Gov't Printing Office 1919)("It is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect, they are liable to lose their special privileges of armed forces."); Mohamed Ali and Another v. Public Prosecutor, 3 All E.R. 488 (P.C. 1968), *reprinted in* HOWARD LEVIE, ED., DOCUMENTS ON PRISONERS OF WAR 757, 763 (U.S. Naval War College 1979)("It would be anomalous if the requirements for recognition of a belligerent with its accompanying right to treatment a prisoner of war, only existed in relations to members of [militia and volunteer corps] and there was no such requirement in relation to members of the armed forces."); *see also* Corn, *supra* note 11, at 14, n. 127:

> The GPW does not specifically state that members of the regular forces must wear a fixed insignia recognizable from a distance. However, as with the requirement to be commanded by a person responsible, this requirement is arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member or the militia or resistance groups cannot. *Should a member of the regular armed forces do so, it is likely that he would lose this claim to immunity and be charged as a spy or as an illegal combatant.*(emphasis added).

Id. See also AUSTRALIAN MILITARY LAW, *supra* note 9, at 203:

> It is taken for granted that all members of the army as a matter of course will comply with the four conditions; *should they, however, fail in this respect (fn. 2: "For example, by concealing their uniform under civilian clothes, or using civilian clothes without a distinctive mark owing to their uniforms having worn out . . . .") they are liable to lose their special privileges of armed forces*. (emphasis added).

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 240. *See also* FLECK, HANDBOOK, *supra* note 20, at 76:

> Art. 44 para. 7 Protocol I refers to a rule of international customary law according to which regular armed forces shall wear the uniform of their party to the conflict when directly involved in hostilities. This rule of international customary law had by the nineteenth century already become so well established that it was held to be generally accepted at the Conference in Brussels in 1874. The armed forces listed in Article 4(1) of the GPW are undoubtedly regarded as 'regular' armed forces within the meaning of this rule. This is the meaning of 'armed forces' upon which the identical Articles I of the Hague Regulations of 1899 and 1907 were based.

Id. See also United States v. Lindh, 212 F. Supp. 541, 557 n.35 (E.D. Va. 2002):

> Lindh [an American Taliban member captured in Afghanistan] asserts that the Taliban is a "regular armed force," under the GPW, and because he is a

who do not fulfill these four specified conditions and do not fight in

> member, he need not meet the four conditions of the Hague Regulations because only Article 4(A)(2), which addresses irregular armed forces, explicitly mentions the four criteria. This argument is unpersuasive; it ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force…Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a "regular armed force." It would indeed be absurd for members of a so-called "regular armed force" to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label "regular armed force" cannot be used to mask unlawful combatant status.

Id.

[25] *See* GPW, *supra* note 2, at 4A(2); *see also* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 35-36 (2d ed. 2000) ("[The purview of the Geneva Conventions extend] to armies, militia units and voluntary forces, provided they are commanded by a person responsible for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry their arms openly and conduct their operations in accordance with the laws and customs of war."). *See also generally* AUSTRALIAN MILITARY LAW, *supra* note 9, at 288:

> As regards illegitimate hostilities in arms on the part of private individuals, the conditions under which private individuals may acquire the privileges of members of the armed forces [include "Be commanded by a person responsible for his subordinates; Have a fixed distinctive sign recognizable at a distance; Carry arms openly; and Conduct their operations in accordance with the laws and customs of war."]. If persons take up arms and commit hostilities without having satisfied these conditions, they are from the enemy's standpoint guilty of illegitimate acts, and when captured, are liable to punishment as war criminals.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 302; *see also* WWII War Crimes Trial, *supra* note 13, at 58-59:

> Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907….
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> [In regards to] [t]he question of the right of the population of an invaded and occupied country to resist, …the … Hague Regulations, 1907 … has remained the controlling authority in the fixing of a legal belligerency. *If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.* (emphasis added).

Id.

accordance with them are engaging in unlawful belligerency, and are therefore unlawful combatants. In this way, customary and treaty-based international law is designed specifically to deter violations of LOAC by defining unequivocally the four minimum requirements of lawful combatants and thereby excluding captured unlawful combatants from POW status. The four combatant requirements of lawful belligerency are explained in more detail below.

i. Have a responsible and effective military chain-of-command.[26] In other words, forces must have an operative, structured hierarchical system of military good order and discipline acting under an authority that expressly subjects itself to international law. The chain-of-command must proactively train its armed forces regarding LOAC, consistently mandate strict compliance with such laws, and diligently investigate allegations of violations committed by its forces or allies. Further, when allegations are substantiated, the chain-of-command must justly prosecute alleged violators and, if convicted, punish violators appropriately. The chain-of-command must also otherwise remain answerable for the conduct of its subordinates, enough so that it is reasonably clear that such subordinates are not acting on their own responsibility. Finally, the chain-of-command must possess sufficient military discipline over its forces to prevent violations of LOAC and be able to order effectively its forces to cease hostilities during a cease-fire, truce, armistice, or surrender.

ii. Conspicuously distinguish themselves from the civilian population in all combat operations by wearing a fixed distinctive sign, badge, or emblem visible from a distance.[27] To satisfy this requirement, forces usually should

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[26] *See* GPW, *supra* note 2, at 4A(2)(a)("that of being commanded by a person responsible for his subordinates").

[27] *See* GPW, *supra* note 2, at 4A(2)(b)("that of having a fixed distinctive sign recognizable at a distance"); *see also* ICRC, COMMENTARY, *supra* note 23, at 52:

> The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of the armed forces should have for the purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians.

Id. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 438 (1987) [hereinafter COMMENTARY, PROTOCOL I]:

> A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may never feign a civilian status and hide amongst a crowd. This is the crux of the rule.

Id. See also Howard S. Levie, *Prisoners of War in International Armed Conflict,* 59 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES at 46-47 (1977):

have a military uniform, but at a minimum, a distinctive sign visible at a distance in daylight using un-enhanced vision, in order to minimize civilian casualties. The use of a uniform or distinctive sign is the most basic of the four

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> The objective of the original draftsman of this provision [to wear a distinctive sign] was probably two fold: (1) to protect the members of the armed forces of the Occupying Power from treacherous attacks by apparently harmless individuals; and (2) to protect innocent, truly noncombatant civilians from suffering because the actual perpetrators of a belligerent act seek to escape identification and capture by immediately merging into the general population.

Id. See also AUSTRALIAN MILITARY LAW, *supra* note 9, at 201-02:

> The second condition, relative to the fixed distinctive sign recognisable at a distance, would be satisfied by the wearing of a military uniform, but less than a complete uniform will suffice. The distance at which the sign should be visible is left vague, but it is reasonable to expect that the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceful inhabitant, and this by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined. As encounters now take place at ranges at which it is impossible to distinguish the colour or the cut of clothing, it would seem desirable to provide irregulars with a helmet, slouch hat, or forage cap, as being completely different in outline for the ordinary civilian head-dress.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 239; *See also* FLECK, HANDBOOK, *supra* note 20, at 471:

> [T]he feigning of civilian, non-combatant status in order to attack the enemy by surprise constitutes the classic case of 'treacherous killing of an enemy combatant' which was prohibited by Article 23(b) of the Hague Regulations; it is the obvious case of disgraceful behavior which can (and should) be sanctioned under criminal law as a killing not justified by the laws of war, making it a common crime of murder. Obscuring the distinction between combatants and civilians is extremely prejudicial to the chances of serious implementation of the rules of humanitarian law; any tendency to blur the distinction must be sanctioned heavily by the international community; otherwise the whole system based on the concept of distinction will break down.

Id. Failure to wear a proper uniform, or other distinctive badge, armband, or emblem, is a calculated decision. The failure to be uniformed, or to wear the uniform of the enemy, provides a significant obvious military advantage to a combatant. But, the decision to "blend in" to the civilian population or opposing force carries with it, upon capture, the consequences of the enemy viewing them as unlawful combatants no longer immune for otherwise lawful combat activities, no longer entitled to POW status upon capture, and subject to penal sanctions for unlawful belligerency. Such has always been, and still is, the increased risks that spies, saboteurs, and other un-uniformed unlawful combatants must accept should they choose to not fulfill the required conditions of lawful belligerency when participating in an international armed conflict.

indicia of lawful belligerency. A lawful combatant may not endanger protected noncombatant civilians by concealing one's combatant status, with perfidious intent, by posing as a protected noncombatant civilian. An opponent attempting to gain such a tactical advantage in this manner, at the expense of protected noncombatant civilians, commits the illegal act of perfidy.

Aside from the secondary utility of preventing fratricide within one's own forces, the use of a uniform or other distinctive sign by combatants provides substantial protection to noncombatant civilians during armed conflict. The distinctive uniform or sign should be sufficiently permanent, in that the distinguishing characteristics (of military status vice civilian status) cannot be perfidiously concealed or quickly removed. A military uniform or outwardly distinctive accouterment that clearly distinguishes a combatant from the protected civilian population allows the opposing side to differentiate and then spare protected civilians, without fearing a subsequent treacherous counter-offensive by enemy forces who were illegally masquerading as protected civilians.

iii. Carry arms openly.[28] Along with a military uniform or distinctive sign in accordance with paragraph two above, forces are required to carry weapons openly, to plainly and further distinguish combatants from all protected noncombatants in order to minimize incidental casualties among protected noncombatants.

iv. Fight and conduct their military operations in accordance with the international laws and customs of armed conflict.[29] This fourth requirement is

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[28] *See* GPW, *supra* note 2, at 4A(2)(c)("that of carrying arms openly"). *Cf.* COMMENTARY, Protocol I, *supra* note 27, at 533 (1987):

> The purpose of this rule, of course, is to protect the civilian population by deterring combatants from concealing their arms and feigning civilian non-combatant status, for example, in order to gain advantageous positions for the attack. Such actions are to be deterred in this fashion, not simply because they are wrong (criminal punishment could deal with that), but because this failure of even minimal distinction from the civilian population, particularly if repeated, places that population at great risk.

Id. See also generally AUSTRALIAN MILITARY LAW, *supra* note 9, at 202:

> The third condition provides that irregular combatants shall carry arms openly. They may therefore be refused the rights of the armed forces if it is found that their sole arm is a pistol, hand-grenade, or dagger concealed about the person, or a sword stick, or similar weapon, or if it is found that they have hidden their arms on the approach of the enemy.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 240.

[29] *See* GPW, *supra* note 2, at 4A(2)(d)("that of conducting their operations in accordance with the laws and customs of war"); *see also* ICRC, COMMENTARY, *supra* note 23, at 61:

both the individual responsibility of every combatant and the collective responsibility of the entire armed force. It is collectively satisfied if the leadership and manifest majority of an armed force follows and observes customary and treaty-based LOAC during military combat operations. Generally, significant LOAC violations committed by individual members result in only the applicable members being in violation of the fourth condition, and, absent an institutional policy of an armed force *en masse* to violate LOAC, do not result in the entire force being in violation.

LOAC constrains significantly what actions an armed force or an individual combatant may take during an armed conflict. Such limits serve to protect noncombatants and to minimize unnecessary suffering and destruction. Specifically, all combat operations must follow the 1949 Geneva Conventions and other basic principles of LOAC such as: identifying and attacking only military objectives (military necessity); preventing unnecessary suffering and destruction (humanity/chivalry); ensuring that reasonably estimated incidental civilian casualties and collateral damage are not excessive in relation to the military advantage reasonably anticipated (proportionality); and identifying and discriminating between combatants and noncombatants in combat targeting, primarily in order to protect the civilian population (discrimination).

Additional LOAC principles, for example, prohibit the use of poisons, chemical weapons, biological agents, and other specific weaponries as well as certain types of ammunition. Other laws of armed conflict provide additional safeguards to noncombatants and cultural property. Most importantly, an armed force or individual combatant may not use any of these principles or any other requirement, prohibition or protection of LOAC, perfidiously in order to gain an unfair military advantage. Otherwise, such principles would, in the course of combat, lose relevance and, ultimately, become meaningless.

3. Non-Applicability of the Additional Protocol I, art. 44(3) Exception

When the Taliban were engaged and later captured during an international armed conflict, the Taliban had failed to meet any of the above Geneva Convention III criteria of lawful belligerency. This is despite any irrelevant assertion that some individual members of the Taliban forces on some occasions might have met lawful belligerency standards as supposedly lowered in 1977 by Protocol I, art. 44(3) (apparently nullifying the distinctive

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> [Lawful combatants must] respect the Geneva Conventions to the fullest extent possible . . . . In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launching attacks, they must not cause violence and suffering disproportionate to the military result they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do.

sign requirement when "owing to the nature of the hostilities an armed combatant cannot so distinguish himself"; in such a case, instead, requiring only the open carrying of arms while planning or engaging in an attack).

However, there is no evidence that the nature of coalition/Taliban hostilities in Afghanistan prevented the Taliban from adequately distinguishing themselves from the protected civilian population. The Taliban armed forces, well funded by al-Qaeda and being in a state of continued internal armed conflict from 1996 forward with the Northern Alliance, could have easily procured and certainly had ample time to affix some form of a distinctive mark by early 2002. The Taliban *en masse* simply tactically and illegally chose not to. Most notably, however, art. 44(3) does not apply because neither the U.S. nor Afghanistan is a party to Protocol I, and art. 44(3) does not rise to the level of customary international law.[30]

Id. See also generally AUSTRALIAN MILITARY LAW, *supra* note 9, at 203:

> The fourth condition requires that irregular corps shall conduct their operations in accordance with the laws and customs of war. It is especially necessary that they should be warned against employment of treachery, mal-treatment of prisoners, wounded, and dead, improper conduct towards flags of truce, pillage and unnecessary violence and destruction.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 240. This fourth criterion of lawful belligerency is essential as it fosters reciprocal compliance with LOAC by all parties to a conflict. Historically, reciprocal compliance with such laws by all parties to a conflict has only been successfully achieved through such a practical reciprocal enforcement framework. *See generally* Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict,* 50 A.F.LAW REV. 1, 43 (2001):

> The law of armed conflict is based on the principle of equality of application. A state or party to a conflict follows the law because it anticipates the other party will reciprocate, *non facio ne facias*. No examples exist where one state has bound itself to the law of armed conflict without asserting and expecting reciprocity. Without equal application and reciprocity among both parties to a conflict, the law of armed conflict could become meaningless. As Sir Hersch Lauterpacht succinctly explained, "it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them."(citations omitted).

Id.

[30] Protocol I provisions that do not rise to customary international law are not relevant to the U.S. lawful belligerency analysis of the Taliban because neither the U.S. nor Afghanistan is a signatory to Protocol I. Protocol I says in pertinent part:

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are

Although Protocol I, art. 44(7) says expressly that the article does not intend to "change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to a Conflict,"[31] Protocol I is far from clear regarding this customary international legal standard. The Protocol I, art. 44(3)

> situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
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> Acts which comply with the requirements of this paragraph shall not be considered as perfidious.

Protocol I, *supra* note 6, at art. 44(3). As a result of the above language in Protocol I, art. 44(3), some claim Protocol I removes the long-standing legal requirement for some combatants to display a fixed recognizable sign in certain circumstances, requiring instead that combatants need only to bear their arms openly during an attack. Protocol I, art. 44(3) also seemingly recognizes that some combatants have the discretion, apparently whenever convenient, to transient out of combatant status into protected noncombatant civilian status, and, then back into combatant status. These incremental dilutions and departures from customary LOAC are far from modest. They tear down walls without proper acknowledgement to the reasons why the walls were previously emplaced and then fortified over many centuries. Allowing civilian-dressed irregular combatants to legally engage in armed conflict would entirely "violate the implicit trust upon which the war convention rests: soldiers must feel safe among civilians if civilians are ever to be safe from soldiers." MICHAEL WALZER, JUST AND UNJUST WARS 179-82 (1979).

Delegates from Western countries drafted the four post-WWII Geneva Convention treaties. However, delegates from under-developed emerging countries with colonial histories drafted and proposed Protocol I art. 44(3). In their haste to grant lawful combatant status and combatant immunity to civilian-clothed insurgents and guerrillas in armed conflicts of "self-determination" against so-called "racist regimes" and "alien occupations," art. 44(3) drafters apparently had a higher toleration of civilian noncombatant armed conflict casualties. The unfortunate practical result has been that art. 44(3) is a failed provision that directly endangers protected noncombatant civilians who find themselves caught in the crossfire within an armed conflict.

The international recognition of such an experimental provision within LOAC should, in the compelling interest of the protection of noncombatant civilians in armed conflict, fade over time and eventually become a nullity. Of specific note, Protocol I, art. 44(3) would apparently accept the disastrous result that al-Qaeda and Taliban civilian-dressed combatants in Afghanistan were virtually indistinguishable from the protected civilian noncombatant population. Such a continued, ill-conceived and expansive construction of Protocol I would essentially legalize combatants fighting while dressed as protected noncombatant civilians. It would result in lawful combatants being reluctant to accept a protected civilian's noncombatant status at face value, instead viewing all civilians as potentially hostile. Primarily because of art. 44(3), the U.S. is not a signatory to Protocol I. The better rule is the continued prohibition of feigning protected noncombatant civilian status in armed conflict, i.e., GPW, *supra* note 2, at 4A(2)(b)(the requirement that lawful combatants in armed conflict display "a fixed distinctive sign recognizable at a distance").

[31] Protocol I, *supra* note 6, at art. 44 (7).

exception could have the operative effect of swallowing a rule essential to the protection of civilians in armed conflict.

The U.S. agrees with almost all of Protocol I to the extent it embodies existing customary international law. However, given that art. 44(3) is the most controversial provision within Protocol I, the U.S. view is that it does not reflect customary international law. Art. 44(3) is highly controversial internationally because it has been construed to overly broaden the category of lawful combatants to include un-uniformed guerrillas, insurgents and similar groups. This lowers dramatically the standard of a combatant's requirements of lawful belligerency and POW status, diminishes significantly combatant/noncombatant distinctions, and hence, endangers substantially protected noncombatant civilians.

In 1987 (ten years after the close of the Protocol I Diplomatic Conference), President Reagan rejected Protocol I, and specifically art. 44(3) because he was gravely concerned that it could be interpreted in a manner that would legitimize terrorists and other groups of unlawful combatants as lawful combatants. When one considers that captured al-Qaeda and Taliban enemy combatants failed to satisfy even the most basic and traditional requirements to distinguish themselves from the civilian population, and otherwise comply with LOAC, President Reagan's opposition is highly prophetic. It would appear that President Reagan's early doubts as to Protocol I, art. 44(3) have been completely vindicated.[32]

4. Unlawful Combatants: The Taliban and Their Violations En Masse of the Four Criteria of Lawful Belligerency

The level of compliance with the four Geneva Convention III, art. 4A fundamental criteria of lawful belligerency by parties to a conflict is inversely proportionate to the number of incidental civilian noncombatant casualties and the amount of other unintended collateral damage in warfare. This is a truism. More compliance in armed conflict with the four criteria leads to fewer incidental deaths of protected civilians. Less compliance leads to more protected civilian deaths. Accordingly, LOAC instructs that a willful egregious *en masse* failure by an armed force to follow the four objective

[32] Protocol I, art. 44 (3) has placed protected civilians into much greater risk of incidental death and suffering during armed conflicts. *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 12. *See also* Message from the President of the United States Transmitting the 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)(Then U.S. President Ronald Reagan rejected Protocol I in 1987 saying: "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* Matheson, *supra* note 7, at 420; 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. 910, 911 (1987).

Geneva Convention III requirements makes the members of that armed force unlawful combatants, and therefore declines POW status to those forces when captured.[33]

LOAC does not allow the Taliban, or any combatant force of belligerents, any exemption. The facts in the following paragraphs are not an attempt to disparage the Taliban, but rather the recitation is to show why captured Taliban members *en masse* were not accorded POW status. If the Taliban *en masse* had met the four specified obligations of lawful belligerency, they would have been lawful combatants with combatant's privilege, and, upon capture, accorded POW status. However, the U.S. has made an accurate determination that the Taliban as a whole did not meet any of the four compulsory requirements, based on LOAC and many of the following facts.

i. The Taliban armed forces *en masse* did not have a transparent, organized, identifiable, and accountable chain of command responsible for the conduct of its subordinates. Additionally, there is no evidence that Taliban leadership and subordinate armed forces subjected themselves to international law or that they observed LOAC. Regardless of the fact that Afghanistan was a state party to the 1949 Geneva Conventions, the Taliban outright rejected LOAC. Mullah Mohammed Omar, the Taliban Supreme Leader, decreeing that the laws were merely a manifestation of a false Judeo-Christian Western ideology, evidenced this contempt. The Taliban did not have a viable internal disciplinary system. It did not hold its members accountable for violations of international humanitarian law and the laws of armed conflict. Indeed, the Taliban's nebulous and clannish hierarchy approved and encouraged openly such international law breaches by Taliban members and al-Qaeda. Taliban members often operated independently of any organized command structure, autonomously committing egregious violations of international humanitarian law and LOAC. By design, the Taliban command structure was ambiguous, constantly changing among tribal and warlord alliances, with blurred lines between civilian and military authority.

ii. The Taliban armed forces *en masse* did not consistently wear any form of a fixed recognizable military uniform, sign, insignia, badge, or symbol identifiable from afar. As stated earlier, Taliban forces certainly had the capability and opportunity to distinguish themselves in some conspicuous

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[33] Dr. Jiri Toman of the International Committee of the Red Cross explains:

> These condition[s of Article 4 of Geneva Convention III] concern the movement as a whole and individual violations of these rules [do] not deprive its members of their protection . . . . On the contrary, if the movement itself does not respect these conditions, any member of the movement, even if he personally respects the rules, does not receive the benefits of privileged treatment.

Jiri Toman, *Terrorism and the Regulation of Armed Conflict*, INTERNATIONAL TERRORISM AND POLITICAL CRIMES 40-41 (M. Cherif Bassiouni, ed., 1973).

manner from protected civilian noncombatants. The Taliban were the *de facto* government of Afghanistan from 1996 to 2001, were well-funded by al-Qaeda, and were an experienced fighting force having been engaged in an internal armed conflict against the Northern Alliance during the Taliban's entire five-year *de facto* rule. In spite of such capability and opportunity, members of the Taliban armed forces calculatingly disguised themselves as protected civilians by wearing civilian clothes. For example, some male Taliban combatants were captured while hidden beneath traditional female burqas in mosques.

The Taliban purposely infiltrated and actively hid its members among the protected civilian population to achieve unfair surprise in armed conflict. When operating among the civilian population, Taliban combatants would illegally use noncombatant civilians as their shields. Additionally, Taliban leaders and armed forces almost exclusively used unmarked civilian vehicles such as white sports utility vehicles for transportation. When the Taliban's perfidious tactics directly brought about Afghani civilian deaths and injuries, the Taliban tried to capitalize on the tragedies they caused by distorting them to the rest of the world in their attempts to garner international sympathy and manipulate global opinion. It is noteworthy that the vast majority of noncombatant civilians who have died in the Afghanistan conflict died because the Taliban and al-Qaeda forces were camouflaged unlawfully as protected civilians while hiding and fighting among civilian populated areas.

iii. Generally, the Taliban armed forces *en masse* did not carry arms openly, choosing instead, at times, to conceal weapons and explosives inside common civilian clothing to unlawfully feign protected civilian status and blend into the noncombatant civilian population. In further violation of LOAC, the Taliban deliberately hid military armaments and equipment among the Afghanistan civilian population centers, settlements, and even within schools, historic cultural sites, hospitals, and mosques in an effort to prevent the targeting and destruction of such military equipment by coalition forces.

However, it must be noted that in Afghanistan, the LOAC requirement (that combatants in armed conflict must carry their arms openly to distinguish them from protected noncombatant civilians) was of significantly limited value. The frequent carrying of firearms and other weapons openly by civilians is an Afghani cultural/societal norm. As a result, the previously mentioned combatant requirement, of wearing a common distinctive mark or military uniform in order to distinguish combatants from protected noncombatant civilians, became even more paramount, and, concomitantly, the *en masse* failure of Taliban combatant forces to do so became even more egregious.

iv. The Taliban armed forces *en masse* ignored LOAC consistently and openly as exemplified by the above three paragraphs. To achieve its goal of a fundamentalist "pure Islamist state" and to maintain power, Taliban radicals ruled over the Afghani people in a repressive ultra-draconian fashion. The Taliban adopted and perpetuated an unrestrained, institutionally declared

policy and practice of total disregard for LOAC and international humanitarian law. During active hostilities against coalition forces, the Taliban oftentimes perfidiously feigned acts of surrender.

Before and during active hostilities, the Taliban showed its contempt for evolving perceptions of international humanitarian law by taking over Afghanistan by force, maintaining control with intimidation and force, denying the Afghani people the most basic of human rights, providing sanctuary to international terrorists, torturing and summarily executing dissidents, raping and subjugating girls and women, abducting and using women of defeated Afghani ethnic minorities as "sex slaves" for Taliban and al-Qaeda armed forces, and massacring thousands of civilians. In stark contrast to the U.S. treatment of enemy combatants detained in Cuba, evidence indicates that the Taliban and al-Qaeda severely beat and murdered the only U.S. service-member they captured during the Afghanistan armed conflict.

Furthermore, the Taliban failed to exercise any responsible measure of control over al-Qaeda, permitting al-Qaeda to operate freely within Afghanistan. The Taliban was highly sympathetic to, sanctioned, and supported the terrorist actions of al-Qaeda. The Taliban aided and abetted al-Qaeda terrorists by providing them safe harbor, combining supply lines, and sharing communication and intelligence networks. The Taliban allowed al-Qaeda to use Afghanistan as its headquarters and base from which al-Qaeda exported its scourge of terrorism.

The Taliban further colluded with al-Qaeda by allowing al-Qaeda under guise to make up portions of the Taliban's loose-knit cellular forces. In fact, a few elite Taliban military units were comprised mostly of al-Qaeda personnel. Such units provided personal security for professed Taliban leadership taking the form of a *praetorian guard*. The Taliban even placed some al-Qaeda members in senior positions within the Taliban's defense forces and *de facto* government. The Taliban acted in concert with foreign al-Qaeda terrorists, was financed by them, sheltered them, and trained with them in terrorist training camps.

Such allied Taliban and al-Qaeda interdependence, mingling, and entwining made it increasingly difficult to distinguish between them. Because of the Taliban's symbiotic association with and direct support of the al-Qaeda terrorist network, the Taliban surrendered any legitimate claim to *de jure* nation-state status within the larger international community. Finally, the Taliban knowingly protected al-Qaeda and did not seize and expel them from Afghanistan. In so doing, the Taliban ignored numerous resolutions adopted by the United Nations General Assembly. More significantly, the Taliban continually flouted the many explicit orders and willfully defied the strong condemnations of the United Nations Security Council, the body responsible for international peace and security. Through the Taliban's collusive actions and omissions related to al-Qaeda, the Taliban ratified the actions of al-Qaeda. In essence, the Taliban allowed al-Qaeda to act as an extension of the Taliban

and the *de facto* Taliban state of Afghanistan, resulting in the Taliban becoming vicariously responsible for the acts of al-Qaeda.[34]

As evidenced by the above facts, the Taliban *en masse* willfully and egregiously did not meet any of the four criteria of lawful belligerency under LOAC. As a result, the Taliban and al-Qaeda blurred into one, the atrocities of al-Qaeda became imputed to the Taliban,[35] the Taliban surrendered any

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[34] *See, e.g., generally* U.S. Department of State, *Fact Sheet: The Taliban's Betrayal of the Afghan People*, Oct. 17, 2001, *at* http://www.usembassyjakarta.org/press_rel/The-Talibans.html (last visited Jun. 16, 2004); Lee A. Casey, et al., *By the Laws of War, They Aren't POWs*, WASH. POST, Mar. 5, 2002, at B03, *at* http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A2659820 02Mar1&notFound=true (last visited Dec. 20, 2003); JENNIFER ELSEA, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 18-28 (2002); MICHAEL GRIFFIN, REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN 177-78 (2001); Sabrina Saccoccio, CBC NEWS ONLINE, *The Taliban Military*, Oct. 1, 2001, *at* http://www.cbc.ca/news/indepth/us_strikingback/backgrounders/taliban_military.html (last visited Dec. 20, 2003); Lee A. Casey, *et al*., *National Security White Papers, Unlawful Belligerency and its Implications Under International Law*, *at* http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm (last visited Jun. 16, 2004); NEAMOTOLLAH NOJUMI, THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION 229 (2002); Hook, *Detainees or Prisoners of War?: The Applicability of the Geneva Convention to the War on Terrorism* (2002), *at*http://www.mobar.org/journal/2002/novdec/hook.htm;*U.N. Report Details Taliban Mass Killings*, CNN, Nov. 6, 1998 *at* http://edition.cnn.com/WORLD/asiapcf/9811/06/un.taliban.01/ (last visited Jun. 16, 2004); Bob Woodward, *Bin Laden Said to "Own" the Taliban*, WASH. POST, Oct. 11, 2001, at A1; Greg Jaffe & Neil King, Jr., U.S. Says War is Working, but Taliban Remains, WALL ST.J., Oct. 26, 2001, at A3; Tim McGirk, et al., *Lifting the Veil on Sex Slavery: Of All the Ways the Taliban Abused Women,This May be the Worst*, TIME V159 N7, Feb. 18, 2002, at 8; Amnesty International, *Women in Afghanistan: Pawns in men's power struggles*, 1 Nov. 1999, *at* http://web.amnesty.org/library/index/ENGASA110111999 (last visited Apr. 20, 2004); Charles Krauthammer, *The Jackals are Wrong, Terrorists? Yes. Prisoners of War? No Way.*, WASH. POST, Jan. 25, 2002, at A25; KAMAL MATINUDDIN, THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1997 (1999); Joseph L. Falvey, Jr., *In Defense of Freedom – Operation Enduring Freedom*, NAT'L LAW. ASS'N REV., V6N4 (Spring 2003), at 3; Michael C. Dorf, *What is an "Unlawful Combatant," and Why it Matters: The Status of Detained Al-Qaeda and Taliban Fighters***,** Jan. 23, 2002, *at* http://writ.news.findlaw.com/dorf/20020123.html (last visited Dec. 20, 2003); Pamela Constable, *Many Witnesses Report Massacre by Taliban*, WASH. POST, Feb. 19, 2001, at A 25; United States v. Lindh, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002); *see e.g. also* G.A. Res. 54/189, U.N. GAOR, U.N. Doc. A/RES/54/189A-B (2000); S.C. Res. 1193, U.N. SCOR, U.N. Doc. S/RES/1193 (1998); S.C. Res. 1267, U.N. SCOR, U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, U.N. Doc. S/RES/1333 (2000); S.C. Res. 1368, U.N. SCOR, U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1378, U.N. SCOR, U.N. Doc. S/RES/1378 (2001).

[35] If a state provides significant support to a terrorist organization, the acts of the terrorist organization may be imputed to the supporting state. Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, *reprinted in* HENRY H. HAN, TERRORISM AND POLITICAL VIOLENCE 250 (1993). Professor Arthur Schacter explains that "[w]hen a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale, it is not unreasonable to conclude that an armed attack is imputable to the government."). *See also e.g.*, ROSALYN HIGGINS, PROBLEMS

legitimate claim to nation-state status as recognized by the wider international community, and Taliban armed forces *en masse* relinquished all rights to lawful combatant status, combatant's privilege, and upon capture, Geneva Convention III POW status.[36] Consistent with the above facts and LOAC, the U.S. has designated the Taliban as a class of unlawful combatants and captured Taliban as detainees rather than POWs.

C. Al-Qaeda: Classic (Stateless) Unlawful Combatants & Hostes Humani Generis

1. International Law Reserves Solely to States the Authority to Engage in International Armed Conflict

Members of al-Qaeda, as quintessential non-state actors, are classic unlawful combatants. Customary LOAC characterizes classic unlawful combatants as a subcategory within the grouping of unlawful combatants who do not possess combatant's privilege, and also, when captured, does not provide them POW status.[37] Classic unlawful combatants are combatants who,

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AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 250 (1994); Sage R. Knauft, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L & COMP. L. REV. 763, 765 (1996).

[36] White House Fact Sheet, *supra* note 18; *accord*, *N Korea in 'axis of evil'*, Jan. 30, 2002, *at* http://edition.cnn.com/2002/US/01/30/bush.nkorea/?related (last visited Jun. 16, 2004) (Hamid Karzai, head of the Afghani interim government, addressed the U.S. detention of al-Qaeda and Taliban unlawful combatants during his visit to the U.S. saying, "The people that are detained in Guantanamo, they are not prisoners of war, I see it in very clear terms…They're criminals, they brutalized Afghanistan, they killed our people, they destroyed our land."); *see also Afghan Agrees with Bush on Prisoners*, N.Y. TIMES, Jan. 29, 2002, at A 9.

[37] *See* AFP 110-31, *supra* note 4, at 3-3a. *See also* AFP 11-31, *supra* note 4, at 3-5 n. 7a ("[terrorist] groups do not meet the objective requirements required for PW status"); *see also* Prosper, *supra* note 19:

> [Al-Qaeda] aggressors initiated a war that under international law they have no legal right to wage. The right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization or the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. The members of al Qaida fail to meet the criteria to be lawful combatants under the law of war. In choosing to violate these laws and customs of war and engage in hostilities, they become unlawful combatants. And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes. As we have repeatedly stated, these were not ordinary domestic crimes, and the perpetrators cannot and should not be deemed to be ordinary "common criminals."

Id.

amongst other failings, are not authorized by a state or under international law to take a direct part in an international armed conflict, but do so anyway. Since the time of the Romans to the present, *jus gentium*, the customary "Law of Nations," has categorized illegitimate stateless piratical forces like al-Qaeda as *hostes humani generis*, "the common enemies of humankind."

Because the conduct in armed conflict of such stateless freelance forces is not regulated and controlled effectively by a sovereign country (given that no country is directly responsible for such forces), *hostes humani generis* are prohibited universally from participating in armed conflicts. Any such participation is unlawful as a matter of international law. Punishment for those captured while engaging in such illegal participation historically has been very severe, no quarter.[38] In short, these *per se* unlawful combatants (such as stateless pirates, bandits, and terrorists who act internationally) are under no sovereign with the power to grant them combatant's privilege, and, therefore, have no legal authority to engage in combat, to attack opposing combatants, or to destroy property in international armed conflict. As just stated, such stateless classic unlawful combatants are *hostes humani generis*, the "common enemies of humankind" (historically, also referred to as *latrunculi* meaning "robber-soldiers," brigands, bandits, *praedones* meaning "robbers," scalawags, buccaneers, outlaws, pillagers, and marauders among other diminutives).

The hostile international acts of such stateless combatant forces in international armed conflict are deemed to be "*bellum criminosum contra omnes gentes et terras*," "criminal acts of war against all peoples and all states." Simply put, international law does not allow private warfare.[39]

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[38] *See* Whitson, *supra* note 8, at 3. ("U]nconventional forces were generally accorded no legal status as combatants and no mercy when captured. Instead, they were summarily executed outright or were tried for their 'treacherous' acts and then executed."); *see also* Mackubin T. Owens, *Detainees or Prisoners of War? Ancient distinctions, at* http://www.nationalreview.com/comment/comment-owensprint012402.html (last visited Jun. 16, 2004) ("[P]unishment for *latrunculi* traditionally has been summary execution."); DETTER, *supra* note 4, at 148 ("[Unlawful combatants] are often summarily tried and enjoy no protection under international law."); EMMERICH DE VATTEL, THE LAW OF NATIONS, BOOK III, OF WAR, CHAP. IV. OF THE DECLARATION OF WAR – AND OF WAR IN DUE FORM, § 67 (1758)("The inhabitants of Geneva, after defeating the famous attempt to take their city by escalade, caused all the prisoners whom they took from the Savoyards on that occasion to be hanged up as robbers."); LIEBER, *supra* note 14; A.J. BARKER, PRISONERS OF WAR 20 (1975):

> A soldier, serving in the army of a country which is recognized as being at war with his captors' nation, who is taken prisoner in the course of a military operation is a clear case of a person entitled to POW status . . . [in contrast,] irregular combatants, fighting on their own initiative, are outside the shelter of the Geneva Convention's umbrella. And if they are caught they are likely to be dubbed war criminals and shot.

Id.

[39] Emmerich de Vattel, an 18th century international law scholar, explains:

> Such were the enterprises of the *grandes compagnies* which had assembled in France during the wars with the English, - armies of banditti, who ranged about Europe, purely for spoil and plunder: such were the cruises of the buccaneers, without commission, and in time of peace; and such in general are the depredations of pirates. To the same class belong almost all the expeditions of the Barbary corsairs: though authorized by a sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder. These two species of war, I say, - the lawful and the illegitimate, - are to be carefully distinguished, as the effects and the rights arising from each are very different . . . .Thus, when a nation, or a sovereign, has declared war against another sovereign on account of a difference arisen between them, their war is what among nations is called a lawful and formal war; and its effects are, by the voluntary law of nations, the same on both sides, independently of the justice of the cause, as we shall more fully show in the sequel. Nothing of this kind is the case in an informal and illegitimate war, which is more properly called depredation. Undertaken without any right, without even an apparent cause, it can be productive of no lawful effect, nor give any right to the author of it. *A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules prescribed in formal warfare. She may treat them as robbers.* (emphasis added)(citations omitted).

VATTEL, *supra* note 38, at § 67 ("It is to be distinguished from informal and unlawful war") & at § 68 ("Grounds of this distinction"), *at* http://www.constitution.org/vattel/vattel.htm#0 (last visited Jun. 16, 2004); *see also* VATTEL, *supra* note 38 ("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."), at § 4; WILLIAM WINTHROP, *Military Law and Precedents* 782 (2d ed. 1920)("It is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service."); *see also* DIETER FLECK (ED.), THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (commentary on Joint Services Regulation 15/2 of the German *BUNDESWEHR*), § 304, 71-72 (1995)("Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict … combatants are privileged solely by that entitlement…"); *see also generally* LIEBER, *supra* note 14, at art. 82:

> Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without 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*. (emphasis added).

Id. See also CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 127 (Peter DuPonceau, trans. & ed.)(Philadelphia 1810)("We call pirates and plunderers (praedones) those, who, without authorization from any sovereign, commit depredations by sea or land."); *See also* 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 254 (H. Lauterpacht ed., 7th ed.

International law deems an act of private international warfare as *malum in se*, a "wrong in itself." International law reserves solely to states the authority to engage in international armed conflict, and then, in certain limited circumstances only such as individual or collective self-defense, anticipatory self-defense, humanitarian intervention, under the express authority of the United Nations Security Council, or, as is oftentimes the case, any combination of these recognized legal justifications viewed in the totality of circumstances**.**

2. Al-Qaeda Hostes Humani Generis
Classic (Stateless) Unlawful Combatants:
Al-Qaeda Objectives, Islam, and Al-Qaeda Global Terrorism

In addition to failing to meet the four Geneva Convention III basic criteria required of lawful combatants, al-Qaeda *en masse* engaged in open hostilities in an international armed conflict without authorization from any legitimate sovereign authority or the laws of armed conflict. Because al-Qaeda *hostes humani generis* are not soldiers of any state, the Geneva Conventions do not provide to al-Qaeda all the protections accorded to the lawful combatant soldiers of Geneva Convention party states. International treaties may only be entered into by and between state parties. Al-Qaeda is not, and is ineligible to be, a signatory or party to the Geneva Conventions. Al-Qaeda leaders and followers do not pledge allegiance to any state, nor do they serve under any national flag. Therefore, al-Qaeda and its followers have no combatant immunity or right under international law to take up arms.

Al-Qaeda is not a state, and has no comparable state authority or international legal personality. This self-appointed transnational terrorist network operates absent defined borders. When individuals voluntarily join and support such an unlawful organization and then engage in international armed conflict, they are unlawful combatants and, when captured, are outside the POW status rampart of Geneva Convention III. As a clandestine lawless globally-dispersed band of international terrorists, al-Qaeda are unlawful combatants and are the common enemies of the civilized world. Nevertheless, an attacked state may respond with military force against the military threat of such a stateless organization, even though LOAC generally only applies to armed conflicts between states.

A fundamental threshold requirement of lawful belligerency is that combatants in an international armed conflict must act on behalf of, and be subordinate to a politically organized sovereign state or other authoritative entity that expressly subjects itself to LOAC. As with the Taliban, there is no evidence that al-Qaeda has ever declared that it is subject to international law.

1952)("Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces . . .").

Nor is there any evidence that al-Qaeda, by action, has ever subscribed to LOAC.

Al-Qaeda does not fight for a state or for any acceptable pursuit of self-determination, but rather for an ideology contrary to the principled and humanistic theology, tenets, and traditions of Islam. Al-Qaeda's dogma and *raison d'etre*, its "reason for existence," as a self-anointed "Army of *Allah* against all Jews and Crusaders" edify al-Qaeda operatives to murder non-Muslims to further al-Qaeda's militant global objectives and apparently, albeit secondarily, as a means to enter heaven. For instance, Usama Muhammad bin Awad Laden, al-Qaeda's titular *Emir* (prince or first-in-command), ordered a *fatwa* (an Islamic religious dictate) that it is the holy duty of all Muslims to kill all Americans and all their allies, military and civilian, wherever they can be found, especially Zionist Jews.[40]

"Al-Qaeda" literally translates to "The Base." Essentially, al-Qaeda is the inspiration and rallying point for most forms of militant Islamist terrorism. Al-Qaeda is an amorphous organization of global reach, composed of members from numerous nationalities, engaging in the intentional murders of protected noncombatants to achieve al-Qaeda's long-term hegemonic Islamist theocratic-political objectives. As far as can be determined, al-Qaeda demands that the state of Israel must be eliminated and replaced in its entirety by Palestine, that all "non-Muslim" countries must cease to exist, and all of their *infidel*, nonbeliever citizens be converted to Islam, that geographical borders separating Muslim countries be erased, and that all democratic governments in Muslim countries be replaced by a unified Islamist government similar to a Talibanesque theocracy.[41]

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[40] *See* YONAH ALEXANDER, ET AL., USAMA BIN LADEN'S AL-QAIDA: PROFILE OF A TERRORIST NETWORK, APP 1B 2 (2001); Bin Laden's Feb. 23, 1998 *fatwa* declaring a global *"Jihad Against Jews and Crusaders"* is also available *at* http://www.fas.org/irp/world/para/docs/980223-fatwa.htm (last visited Jun. 16, 2004).

[41] *See generally*, Walter Pincus, *Al Qaeda Aims To Destabilize Secular Nations*, WASH. POST, June 16, 2002, at A 21; *see also* Jim Garamone, *Bin Laden and the Al Qaeda Network at* http://www.defenselink.mil/cgi-bin/dlprint.cgi (last visited Jun. 16, 2004); *see also* http://www.defenselink.mil/news/Sep2001/n09212001_200109216.html (last visited Jun. 16, 2004):

> The avowed goal of Al Qaeda (often spelled Al-Qa'ida) is to "unite all Muslims and establish a government which follows the rule of the Caliphs," according to a U.S. government fact sheet on the organization. "Caliphate" refers to the immediate successors of Mohammed. Under the caliphs, Islam expanded from the Arabian Peninsula through Persia, the Middle East and North Africa. Al Qaeda seeks to overthrow nearly all Muslim governments, because bin Laden regards most of them as corrupted by Western influences.

Id.

Put another way, al-Qaeda and similar stateless aligned Islamist groups seek apparently to recreate the world and transform it into a borderless unified Islamic totalitarian nation, an *ummah*, under the law of the *shari'ah* (the canonical laws of Islam). Al-Qaeda views any government that does not fully implement *shari'ah* Islamic law as *jahiliyya*, paganism in the form of people governing and controlling people (rather than the people being governed by Islamist clerics who professedly follow the dictates of *Allah*). Al-Qaeda has shown that it is ready and willing to use all means necessary through *jihad*, an Islamic holy war, to achieve its stated theocratic-political Islamist vision. In addition, al-Qaeda views its ongoing *jihad* waged against all they view as *infidels* as an unwavering spiritual duty. Al-Qaeda followers view individual death in their self-declared *jihad* as *shahada*, glorious martyrdom. Al-Qaeda Islamists supposedly claim that such martyrdom in this *jihad* gains the deceased "martyred" al-Qaeda member, the *shahid*, immediate entry into heaven, with added status and avails. In reality, however, al-Qaeda's war is an unholy *hirabah*, an illegal furtive war of indiscriminate terrorism.

Al-Qaeda misrepresents the Muslim faith to justify its acts of terrorism, to incite its cohorts, and to further its intolerant expansionist Islamist theocratic-political goals. That al-Qaeda militants choose unilaterally to do so does not make this an armed conflict directed against Islam or its adherents. To the contrary, the majority of Muslim countries throughout the world have allied themselves with the U.S. in this ongoing conflict. It must be said however, because acts of terrorism are always antithetical to the tenets of any legitimate theology, Islam is unfortunately slandered because al-Qaeda exploits it as an impetus for al-Qaeda acts of terrorism. Moreover, when the leaders and believers of Islam do not strongly and universally condemn such exploitation by al-Qaeda, such lack of condemnation has the operative relative effects of the further tainting of Islam as well as the maligning of Islam followers.

For these reasons, all links between this armed conflict and Islam, and any related disparagement of Islam, result solely from the actions and statements of al-Qaeda, as well as from the overt and tacit supporters of al-Qaeda. The U.S. and its allies do not illegitimately make such links, nor do the U.S. and its allies disparage Islam. Simply put, the U.S. and its allies do not engage in armed conflict against religions or followers of religions. Despite al-Qaeda's calculated stratagem to professedly commit its acts of terrorism in the name, defense, and furtherance of the Islamic faith, the global armed conflict of the U.S. and the civilized world against al-Qaeda is not, and has never been, a conflict against Muslims or Islam. It is an armed conflict in collective self-defense directed against al-Qaeda *hostes humani generis* and any rogue state supporters of al-Qaeda as perpetrators of global terrorism. International terrorists are the military targets, not Muslims or Islam.

Al-Qaeda and aligned factions *en masse* have chosen to target, terrorize, and murder civilians unlawfully and deliberately. They have flown

hijacked civilian airliners into two of the world's largest civilian office buildings, kidnapped and then either shot or decapitated their civilian hostages, attacked and then murdered noncombatant United Nations peacekeeping forces in Somalia and Afghanistan, bombed a civilian oil tanker, and bombed the diplomatic embassies and consulates of numerous countries. They have also bombed, throughout the globe, numerous synagogues, churches, civilian airports, civilian oil-drilling, pipeline and storage tank infrastructure, civilian train stations, civilian residential areas, hotels, restaurants, office buildings, markets, and nightclubs.

Al-Qaeda has claimed responsibility for firing anti-aircraft missiles against large civilian passenger aircraft. Al-Qaeda terrorists, as unprivileged combatants with no legal authority to engage in international armed conflict, have also targeted U.S. military sites unlawfully. Al-Qaeda bombed a U.S. office building and a U.S. service-member housing complex in Saudi Arabia, bombed a U.S. naval vessel in Yemen, and used an illegal means, a hijacked civilian airliner, to attack the Pentagon. Additionally, al-Qaeda has unlawfully mounted, and continues to unlawfully launch, armed assaults against the U.S.-led coalition within Iraq, as well as the interim Iraqi government.[42]

Additionally, al-Qaeda terrorists have plotted unsuccessfully to assassinate world leaders such as the Pope, the U.S. President, and the President of Egypt. Over the past decade, al-Qaeda members have conspired to perpetuate a multitude of terrorist schemes. Some of these more recent plots have been successfully foiled through information gathered from detainees at

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[42] *See, e.g., generally*, ALEXANDER, *supra* note 40, at 33; U.S. Dep't of State, *Patterns of Global Terrorism 2000* (2000); *see also* Ruth Wedgwood, *Al-Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330 (2002):

> Al Qaeda's campaign throughout the 1990s against American targets amounted to a war. In recitation, this may seem more obvious now. The cumulative chain of events is quite striking -- the 1992 attempt to kill American troops in Aden on the way to Somalia; the 1993 ambush of American army rangers in Mogadishu; the 1993 truck bombing of the World Trade Center by conspirators who later announced that they had intended to topple the towers; the 1995 bombing of the Riyadh training center in Saudi Arabia; the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia (five weeks after bin Laden was permitted to leave Sudan); the 1998 destruction of two American embassies in East Africa; and the 2000 bombing of the U.S.S. *Cole*, in a Yemeni harbor. The innumerable other threats against American embassies and offices around the world; the plot to down ten American airliners over the Pacific and to bomb the Lincoln and Holland Tunnels in New York, as well as the United Nations; the smuggling of explosive materials across the Canadian border for a planned millennium attack at Los Angeles Airport; and finally, the attacks on the Pentagon and the World Trade Center -- were all taken to constitute a coherent campaign rather than isolated acts of individuals.

Guantanamo Bay.[43] Such thwarted designs include numerous attempted bombings and other acts of terrorism against protected civilians.

Id. For a partial recitation of the pre-Sep. 11, 2001 attacks and post-Sep. 11, 2001 attacks of al-Qaeda and Taliban militants against the U.S. and other countries throughout the world, *see* DoD News: Briefing on Detainee Operations at Guantanamo Bay, Presenter: Paul Butler, Principle Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, (Jun. 16, 2004) at 1-3, *at* http://www.dod.mil/cgi-bin/dlprint.cgi?http://www.dod.mil/transcripts/2004/tr20040213-0443.html (last visited Jun. 16, 2004).

[43] *See, e.g.*, P.R. Prosper, *United States Embassy Stockholm: U.S. in line with international law at Guantanamo*, Mar. 13, 2003, *at* http://www.usis.usemb.se/newsflash/prosper_eng_03_13_03.html (last visited Jan. 2, 2004); *See also* DoD News: Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce, Presenter: Donald H. Rumsfeld, Secretary of Defense, (Feb. 13, 2004), at 2-3, *at* http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html (last visited Jun. 19, 2004):

> Detaining enemy combatants … provides us with intelligence that can help us prevent future acts of terrorism. It can save lives and indeed I am convinced it can speed victory. For example, detainees currently being held at Guantanamo Bay have revealed al Qaida leadership structure, operatives, funding mechanisms, communication methods, training and selection programs, travel patterns, support infrastructures and plans for attacking the United States and other friendly countries. They've provided information on al Qaida front companies and on bank accounts, on surface to air missiles, improvised explosive devices, and tactics that are used by terrorist elements. And they have confirmed other reports regarding the roles and intentions of al Qaida and other terrorist organizations. This information is being used by coalition intelligence officials and by our forces on the battlefield and it's been important to our efforts in the war and in preventing further terrorist attacks.

Id. See also generally Butler, *supra* note 42, at 2-3 (comment by Major General Geoffrey D. Miller, Commander, Joint Force Guantanamo):

> There are … enemy combatants here at JTF Guantanamo -- some for almost two years, some for as little as two months. And so as we go about determining their intelligence value and their threat, we go through this very thorough process. There are three types of intelligence: technical intelligence -- that what the enemy combatant was doing when he was captured, if he had a weapon; and then there is operational and strategic intelligence, that allows us to better understand how terrorists are recruited, how terrorism is sustained, how the financial networks power terrorism. And so we developed this intelligence and are continuing to develop this intelligence. We continue to get extraordinarily valuable intelligence from the detainees who are at Guantanamo…It's my responsibility to make an assessment and recommendation on the detainee's intelligence value and their risk. We do that every day and that process is ongoing. Some are getting very close for us to make a recommendation; others, who are enormously dangerous and have enormous -- intelligence of enormous value, are still in this process.

Upon capture during international armed conflict of al-Qaeda stateless members responsible for these grave breaches of LOAC and international humanitarian law and al-Qaeda especially trained to inflict future unlawful carnage, the U.S. in accordance with LOAC classified them *en masse*. The U.S. classified al-Qaeda not only as common international criminals, but also as stateless unlawful combatants engaged in international armed conflict in the forms of international aggression and terrorism. Therefore, the U.S. considers captured members of al-Qaeda *en masse* as classic unlawful combatants, and subsequently, as battlefield detainees rather than as POWs.

3. Al-Qaeda Hostes Humani Generis, the Taliban, and Host-State Obligations

Customary international law grants universal jurisdiction over criminal acts of war and the *hostes humani generis* who commit them. Any state may capture and try *hostes humani generis*. Generally, however, states that are attacked by them have a more direct interest, and hence principal jurisdiction. Armed conflicts by states against *hostes humani generis* are exceptional, however not unprecedented.[44] Customary international law mandates that all states not harbor or otherwise support *hostes humani generis* and encourages

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Id.

[44] For example, during the first half of the 19th century, U.S. armed forces regularly engaged *hostes humani generis*, specifically pirates, privateers, smugglers, and slave traders. U.S. engagements against *hostes humani generis* took place in areas such as the Caribbean, Algiers, Tripoli, the Dominican Republic, Africa, Cuba, Puerto Rico, and Greece. *See* Richard F. Grimmett, *CRS Report for Congress: Instances of Use of United States Armed Forces Abroad, 1798-2001,* at 4-7 (Feb. 5, 2002), *at* http://www.fas.org/man/crs/RL30172.pdf (last visited Jun. 16, 2004). K.J. Riordan details further some historical examples of states taking military action against stateless organizations engaged in "private warfare":

> [During] the so-called Indian Wars of the 19th Century in North America. From 5 July – 19 July 1873 a United States Military Court at Fort Klamath tried Chief Kientpoos of the Modoc tribe – known to the whites as 'Captain Jack' – for 'killing of a civilian in violation of the rules of war.' He and three of his braves were found guilty and hanged. Captain Jack was neither a state nor the agent of a state, he was a war chief of a tribe in rebellion against the authority of the United States. Kientpoos would have undoubtedly been categorised as a terrorist in modern jargon. However his acts were classified as acts of war by the United States Government. Similarly the actions of the Viet Cong, and the innumerable warlords from Africa to the Balkans, and the scores of other non-state actors who have been the perpetrators of warfare through the ages, have been – albeit unevenly - classified as acts of war. (citations omitted).

K.J. Riordan, Asymmetric Warfare – Combating Transnational Terrorist Campaigns: The Emerging Legal Situation, 2-3 (May 15, 2002)(unpublished manuscript on file, with the *Air Force Law Review*).

all states to join and cooperate together in an alliance against their stateless common enemies whenever such common enemies commit such international crimes or engage in international armed conflict against a state.

Just as one state alone is incapable of combating effectively international piracy, one state alone cannot respond adequately to international terrorism. Just as the international community has a common enemy, that of the stateless international pirate, so the international community has a common enemy, that of the stateless international terrorist. Whenever *hostes humani generis* attack one state internationally from a rogue state safe-haven, it may be deemed to have attacked all states.

Because acts of terrorism are inherently indiscriminate, disproportionate, and beyond the boundaries of military necessity, such acts can never be lawful nor justified. No cause can ever justify terrorism. It is incumbent upon all states, therefore, as a matter of collective security and the international Rule of Law, to not provide any support to terrorist *hostes humani generis*, and to proactively seek out, fight, and capture those who engage in international crimes of violence or international armed conflict. When such *hostes humani generis* are captured, states have a universal customary legal obligation to detain *hostes humani generis*, and if applicable, prosecute or extradite them; and if convicted, to punish them appropriately.[45] No evidence exists that the Taliban ever attempted to meet these international obligations.

A state burdened with *hostes humani generis* has an international obligation to use all reasonable resources to contain and neutralize the threat. If such a state has carried out its best efforts and is genuinely incapable of containing such *hostes humani generis* within its borders and the *hostes humani generis* continue to attack or pose a threat to other sovereign states, the

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[45] *See* BLACK'S LAW DICTIONARY 742 (7th ed. 1999) (defining *hostes humani generis* as the "[e]nemies of the human race; specif., pirates."); *see generally Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 18 at 339, U.N. Doc. A/8018 (1970) ("Every State has a duty 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"); *see also* G.A. Resolution 2131, U.N. GOAR, 20th Sess., Supp. No. 14 at 107, U.N. Doc. A/6221 (1965)("No state shall organize, assist, forment, finance, incite, or tolerate subversive terrorist or armed activities directed toward the violent overthrow of another regime…"); G.A. Res. 40/61, U.N. Doc No A/RES/40/61 (1985)("Calls upon all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts"); and, S.C. Res. No 748, U.N. Doc No. S/RES/748 (1992)("Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain 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, when such acts involve a threat or use of force"). Pirates, terrorists, bandits, genocidalists, slave traders, and conceivably, illicit drug traffickers, acting internationally absent defined borders, are the most common and egregious examples of *hostes humani generis.*

state has an obligation to request and accept assistance from the community of nations. Failure of a state to do so could then make such a state a rogue state, complicit tacitly with the *hostes humani generis* within its territories. The Taliban was unwilling to do so and never made any such request. Instead, the Taliban willfully obstructed the international community by deliberately providing al-Qaeda safe haven.

Should an incapable state request such reasonable assistance and the community of nations does not act upon the request to excise *hostes humani generis*, an incapable state may not be deemed to be complicit with its *hostes humani generis.* In such a case, the failure of states within the international community to act upon the reasonable request of an incapable state and render necessary assistance within the capabilities of such states, would be repugnant to the collective cooperation essential to combating the common enemies of humankind. The Taliban never afforded the international community an opportunity to assist.

4. Al-Qaeda Hostes Humani Generis, "Armed Attack," and Global "Armed Conflict"

When *hostes humani generis* commit acts of international aggression from a rogue state safe haven against the territory of other states, their acts of criminal international aggression may become more then a mere matter of international law enforcement involving an organized international crime force. When such an international attack of *hostes humani generis* is of the scope that it amounts to an "armed attack,"[46] the attacked state may also

[46] UN Charter, art. 51 says:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. The international community regards al-Qaeda's Sep. 11, 2001 attack against the U.S. as an "armed attack." Gordon P. Hook, a New Zealand international lawyer, explains:

> [O]n 12 September 2001, the day after the New York and Washington attacks, the Security Council issued Resolution No. 1368 which stated that "such acts, like other acts of terrorism, are a threat to international peace and security" and affirmed the right of nations to individual and collective self-defence under the Article 51 of the UN Charter. Article 51 provides that individual and collective self-defence is inherent to nations when an "armed attack occurs against a Member of the United Nations." Moreover,

concurrently deem the aggression of such a stateless organization and non-state actor as an act of war and accordingly respond with military force in individual self-defense or in collective self-defense with allies. Similarly, if such *hostes humani generis* attackers continue to possess sufficient capabilities to mount further attacks, the attacked state and its allies may regard the *hostes humani generis* as a continuing military threat and accordingly respond with military force to neutralize that military threat.

> following the September 11 attacks, NATO invoked Article 5 of the NATO treaty (which establishes the alliance) recognizing that an "armed attack" on one of its members had occurred justifying a response to that attack by the collective force of the alliance. And Australia, with the US, invoked Article 4 of the ANZUS treaty on the basis that the attacks were an attack on the US from abroad.

Gordon P. Hook, *US Military Commissions and International Criminal Law*, N. ZEALAND L. J. 1, 4 (Nov. 2003); *see also Organization of American States, Meeting of Consultation of Ministers of Foreign Affairs*, 24th Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24, RC.24/RES.1/01, Sep. 21, 2001, *Terrorist Threat to the Americas* (unanimously invoking the 1948 Rio Mutual Defense Treaty), *at* http://www.oas.org/OASpage/crisis/RC.24e.htm (last visited Jan. 2, 2004):

> CONSIDERING the terrorist attacks perpetrated in the United States of America on September 11, 2001, against innocent people from many nations; RECALLING the inherent right of states to act in the exercise of the right of individual and collective self-defense in accordance with the Charter of the United Nations and with the Inter-American Treaty of Reciprocal Assistance (Rio Treaty); . . . RESOLVES: That these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.

Id. More importantly, in response to al-Qaeda's armed attack against the United States, over 20 nations deployed more than 16,000 troops against al-Qaeda and the Taliban. In June of 2002, countries other than the U.S. were contributing over 8,000 troops to military operations in Afghanistan. Numerous states, such as Great Britain, Canada, Australia, New Zealand, Belgium, Denmark, France, Germany, Norway, *inter alia*, have contributed troops to the Afghanistan operation. *See* Fact Sheet; U.S. Department of Defense, Office of Public Affairs, Washington, D.C., June 14, 2002, *International Contributions to the War Against Terrorism*, *at* http://usembassy.state.gov/posts/pk1/wwwh02062901.html (last visited Jun. 16, 2004). Because the only lawful basis for these states to have participated in the Afghanistan military operation would have been individual or collective self-defense in the absence of specific authority from the United Nations Security Council, such participation substantiates that the Afghanistan military operation was in response to the "armed attack" by al-Qaeda, a terrorist stateless organization. Within international law, state actions and practice speak much louder generally than do the words of international lawyers and scholars. This is especially so in the area of *ius ad bellum*, international law that establishes a state's right to engage in international armed conflict, an area absolutely vital to the survival of a state.

Additionally, if substantiated, the complicity of the rogue state would then also be actionable in individual self-defense by the attacked state or in collective self-defense by the attacked state and its allies.[47] When a rogue state knowingly and willfully harbors *hostes humani generis*, the sovereign borders of the rogue state are no longer inviolable. It follows that an attacked state and its allies may then breach the sovereign territorial integrity of the rogue state and attack the rogue state and the *hostes humani generis* within it.

The customary international law requirement that armed forces must fight under the authority of a sovereign state or other authority that expressly subjects itself to LOAC always applies. Moreover, when an armed attack against a state hosting *hostes humani generis* reaches sufficient magnitude, causing active military hostilities among the parties to cross the Geneva Conventions Common art. Two[48] threshold definition of an international

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[47] *See e.g.*, Solf, *International Terrorism in Armed Conflict* in HENRY H. HAN, TERRORISM AND POLITICAL VIOLENCE 317-331 (1993); *See also generally* Greg Travalio, et al., *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 114 n.51 (2003):

> The nature of the state from which the terrorists are operating should also impact the legitimacy of the use of military force. There should be less concern for the territorial integrity and political independence of a state whose government, while in de facto control, is not an accepted part of the international community. A state whose government is both undemocratic and which is also not recognized as legitimate by the international community of states should be accorded the least respect. The Taliban government, prior to September 11, was recognized by only one state. It was violent, repressive, and undemocratic, violating numerous international norms concerning the treatment of its own people. While the undemocratic nature of the regime, and its regular violation of international norms, should not alone make it subject to the use of military force, there should be less concern for the territorial integrity of a state or its political independence when the government that is making the decision to harbor or support terrorists does not represent the will of its people. Obviously, this argument should not be carried too far. There are many governments that do not neatly fit the Western definition of "democratic," and in most instances they must be accorded the same rights in international law as other states. Nonetheless, certainly in extreme cases, the lack of legitimacy in the world's eyes of a government that chooses to harbor or support terrorist groups should factor into whether or not the use of force is justified.

Id.

[48] Art. Two, common to all four Geneva Conventions, says:

> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said

"armed conflict,"[49] the Geneva Conventions apply and all parties to the conflict must adhere to them (most importantly, the four requirements of lawful belligerency).

> occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 2, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[49] The scope or level of intensity that is necessary to constitute an international armed conflict is less than clear. Nevertheless, if the violent attacks of *hostes humani generis* (with the tacit or overt complicity of a rogue state) cause an attacked state to respond with significant military force internationally against them, the likely result would be an international armed conflict. In short, however, an armed conflict exists when the Geneva Convention Common art. Two threshold is crossed. Armed Conflict has been defined as:

> A conflict involving hostilities of a certain intensity between armed forces of opposing Parties . . . There are, of course, obvious cases. Nobody will probably doubt for a moment that the Second World War, or the Vietnam War, were armed conflicts, nor that the Paris students' revolt of May 1968 did not qualify as such. For the less obvious cases, however, one will have to admit that thus far no exact, objective criterion has been found which would permit us to determine with mathematical precision that this or that situation does or does not amount to an armed conflict.

FRITS KALSHOVEN, THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT 10-11 (1973). *See also* Prosecutor v. Tadic, Case No. IT-94-AR72, 37 (App., Oct. 2, 1995) ("Armed conflict" is when "there is resort to armed force between states or protracted armed violence between government authorities and organized armed groups or between such groups within a State."); AFP 110-31, *supra* note 4, *at* para. 12(b) ("[A]rmed conflict--conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized resistance movements;" Sylvie Junod, *Additional Protocol I: History & Scope*, 33 AM. U.L. REV. 29, 30 (1983) ("[T]he concept of armed conflict is generally recognized as encompassing the idea of open, armed confrontation between relatively organized armed forces or armed groups."); 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1988-91 at 3457 (Marian Nash-Leich ed., 1989) ("Armed conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting..."); Director Air Force Legal Services, et al., DI (AF) AAP 1003 OPERATIONS LAW FOR RAAF COMMANDERS 2 (1994) ("International Armed Conflict. This term refers to conflict between nations in which at least one party has resorted to the use of armed force to achieve its aim. It may also include conflict between a nation and an organized and disciplined force such as an

Few would argue that the extensive, protracted campaign of al-Qaeda against the U.S. culminating with the Sep. 11, 2001 attacks of the Pentagon and World Trade Center and the U.S.-led coalition response in individual and collective self-defense against al-Qaeda and the Taliban, did not cross the Common art. Two threshold of international armed conflict. However, the veritable crossing of the Common art. Two threshold in this case does not provide legitimacy to stateless al-Qaeda *hostes humani generis* or accord them lawful belligerency status. The crossing means simply that the Geneva Conventions apply.

An armed conflict and the concomitant application of the Geneva Conventions result in the affording of combatant's privilege to lawful combatants and require the granting of POW status only to lawful combatants when captured. In regards to targeting, there is no distinction in customary LOAC between *hostes humani generis* and the armed forces of a rogue sovereign state that has been tacitly approving of the activities of *hostes humani generis* by purposeful and unlawful harboring.

Otherwise, a rogue state could support illegitimate stateless forces as its underground surrogates by extending sanctuary through omission, and also through indirectly and covertly providing funding, training, or intelligence. Then the rogue state could simply avoid international consequences that would otherwise result from the tacit permitting of *hostes humani generis* to operate from its territory by the simple plausible denial of any direct sponsorship or express approval. Illegitimate stateless forces who are provided safe harbor in a rogue state could continue to act with violence and impunity by emerging from their unlawful rogue state safe haven, committing acts of international aggression, and then retreating back to their unlawful rogue state safe haven. This would be intolerable.

In essence, the Taliban (a rogue *de facto* state) knowingly and willfully gave al-Qaeda (*hostes humani generis* terrorists) a permanent address. Accordingly, during Operations Noble Eagle and Enduring Freedom, the U.S. and its allies in the exercise of their inherent right of collective self-defense, attacked lawfully both al-Qaeda and Taliban military targets. Targets included al-Qaeda command and control infrastructure, lines of communication and logistics, training camps and facilities, and al-Qaeda members. In the case of

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armed resistance movement."). U.S. President George Bush has determined and declared that an armed conflict exists between the U.S. and al-Qaeda:

> International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

MILITARY ORDER OF NOV. 13, 2001: DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM, at 1(a).

the Taliban, targets included governing, command and control infrastructure, Taliban military forces and facilities, military and governmental communications, and other governmental facilities that were associated with support for al-Qaeda.

III. POST-CAPTURE: AL-QAEDA & TALIBAN UNLAWFUL COMBATANTS

A. Non-Applicability of Geneva Convention III, art. 5 POW Status Tribunals

1. Purpose of art. 5 POW Status Tribunals

A capturing party convenes a "competent tribunal" under Geneva Convention III art. 5[50] when it is necessary to resolve a material factual issue

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[50] GPW, *supra* note 2, at art. 5, says in pertinent part:

> Should any doubt arise as to whether *persons*, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such *persons* shall enjoy the protection of the present Convention until such time as *their status* has been determined by a competent tribunal. (emphasis added).

Id. See also generally Butler, *supra* note 42, at 3-4 (detailing the extensive screening process preceding a detainee's transfer from Afghanistan to Guantanamo Bay):

> [T]here is an elaborate screening process that takes place in the field in Afghanistan. Over 10,000 detainees were taken into some form of custody; less than 800 have been brought to Guantanamo Bay. First, in a hostile environment, soldiers detain those who are posing a threat to U.S. and coalition forces based on available information or direct combat. After an initial period of detention, the individual is sent to a centralized holding area. At that time, a military screening team at the central holding area reviews all available information, including interviews with the detainees. With assistance from other U.S. government officials on the ground, including military lawyers, intelligence officers and federal law enforcement officials, and considering all relevant information, including the facts from capture and detention, the threat posed by the individual and the intelligence and law enforcement value of the individual, the military screening team assesses whether the detainee should continue to be detained and whether transfer to Guantanamo is warranted. A general officer designated by the commander of Central Command then makes a third assessment of those enemy combatants who are recommended for transfer to Guantanamo Bay. The general officer reviews recommendations from the central holding area screening teams and determines whether enemy combatants should be transferred to Guantanamo. In determining whether a detainee should be transferred, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained

of doubt as to the legal status of captured combatants. Geneva Convention III art. 5 does not purport to dictate the nature of a POW status tribunal, deferring to the detaining power as to tribunal procedures and composition. Art. 5 does not specify how tribunals are to be structured or organized. Neither does art. 5 instruct whether the tribunals are executive or judicial in nature.[51] Art. 5 does not instruct that the detaining power establish a separate tribunal for each detainee who has "fallen into the hands of the enemy." Art. 5 merely directs that doubt as to a captured combatant's status should be considered and settled by a "competent tribunal."

Such individual art. 5 tribunals were designed to provide *ad hoc* on-the-scene minimal due process to rectify expediently the battleground front-line factual errors of combatant status. For example, individual art. 5 tribunals are meant to ensure that a few displaced civilians or other individual noncombatant captives rounded up by mistake and who are in the proximity of belligerent activity taking place in a combat zone, are then released promptly. Art. 5 tribunals are also meant to provide POW status to a deserter of an opposing armed force who has discarded his or her uniform, to confer timely POW status to a captured lawful combatant who lost an identification card or to a lawful combatant captured off-duty (or otherwise legitimately out-of-

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> from the detainee through questioning, and any other relevant factors. Once that determination is made, Department of Defense officials in Washington also review the proposed detainee for transfer to Guantanamo. An internal Department of Defense review panel, including legal advisors and individuals from policy and the Joint Staff, assess the information and ask questions about whether the detainee should be sent….Once the detainee is at Guantanamo, there is a very detailed and elaborate process for gauging the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released to the custody of a foreign government consistent with our security interests.

Id. Due to the comprehensive information obtained through this individualized screening process, along with other applicable information, the U.S., as the detaining power acting in good faith, had no doubt as to the individual and *en masse* unlawful combatant status of al-Qaeda and Taliban combatants. *See generally* Colonel G.I.A.D. Draper, *The Legal Classification of Belligerent Individuals* (Paper delivered at University of Brussels, 1970), *reprinted in* REFLECTIONS ON LAW AND ARMED CONFLICTS—SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, O.B.E. 1996, 220-21 n.23 (Michael A. Meyer and Hilaire McCoubrey, eds., 1998)("The Detaining Power seems to be the sole arbiter, in good faith, of whether a doubt occurs as the status of the individual concerned.").

[51] David B Rivkin, Jr., et al., *Enemy Combatant Determinations and Judicial Review*, n. 5 (2003), *at* http://www.fed-soc.org/Laws%20of%20war/enemycomb.pdf (last visited Jun. 16, 2004). A tribunal is defined as simply "one that has the power of determining, or judging." AMERICAN HERITAGE DICTIONARY 1293 (2nd ed. 1982). A tribunal may also be an "adjudicatory body." BLACK'S LAW DICTIONARY 1512 (7th ed. 1999).

uniform).[52] As stated earlier, art. 5 defers to the detaining power and does not indicate how individual competent tribunals should be organized or structured. Generally, however, an individual art. 5 tribunal would be non-adversarial and limited in scope.

2. Non-Applicability of Individual art. 5 POW Status Tribunals to Captured Al-Qaeda & Taliban Enemy Combatants

In regards to captured al-Qaeda and Taliban irregular combatants captured out-of-uniform in armed conflict, there is no question, doubt, or ambiguity that they failed *en masse* to meet any of the four criteria of lawful belligerency and, subsequently then, equally no doubt as to their status as unlawful combatants. Generally, both the al-Qaeda and Taliban detainees now in Cuba were captured without responsible chains of command, without uniforms, with concealed weapons, and without any commitment to or history of compliance with international humanitarian law and LOAC. As a result of the lack of doubt as to both al-Qaeda and the Taliban's unlawful combatant status, art. 5 tribunals, in regards to individual captured al-Qaeda and Taliban combatants, would not be applicable.

A party to a conflict has never been expected to provide a summary art. 5 hearing to determine lawful or unlawful combatant status for every combatant it captures and holds. It would not be realistic or reasonable to do so. Further, individual art. 5 tribunals were never intended to contemplate complex interpretations of, and render consequent overarching legal and

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[52] *See* The Federalist Society, *Treatment of Al Qaeda and Taliban Detainees under International Law*, Feb. 27, 2002 *at* http://www.fed- soc.org/Publications/Transcripts/Belligerents1.PDF (last visited Jan. 2, 2004):

> Article 5 was adopted to address situations where it's not a question of adjudicating whether your organization is one of lawful or unlawful belligerents, but who you are. You're a deserter. You lost your documents . . . Article 5 was never meant to give people an opportunity to adjudicate time and again whether or not an organization to which they belong is a bunch of lawful or unlawful combatants . . . [it is illogical to make] individual determinations of unlawful combatancy under Article 5 [because] . . . out of four criteria for lawful combatants, only one can be met on an individual basis. And that's a matter of bearing arms openly. The other three criteria cannot be met by an individual on his own. For example, one requirement is having a distinctive uniform. A distinctive uniform that identifies you as belonging to a particular group, not distinctive in the sense that it looks flashy or gaudy. Obviously, a uniform can only be distinctive if it is worn by all members of a given group or entity. Another key requirement is having a transparent chain of command and the last one is making an institutional commitment to comply with laws of war -- none of those things can be met by anyone on an individual basis.

Id.

national policy decisions regarding LOAC. Such broad and weighty presumptive determinations at the political and strategic levels are quite properly reserved to, and may only be promulgated competently and uniformly by, the highest levels of military and civilian authority.[53]

As stated earlier, particularized art. 5 tribunals are only convened in extraordinary legitimate battlefield cases that involve specific questions of fact. When there is no doubt as to unlawful combatant status, when a competent authority has further legitimately established the presumption of unlawful combatant status, and when there is no further factual uncertainty or ambiguity of combatant status existing, any individual tribunal then convened gratuitously would be a waste of time and resources. It would provide Taliban and al-Qaeda detainees unnecessary and noncompulsory due process in the face of overwhelming evidence of their unlawful belligerency.

As stated earlier, art. 5 tribunals are designed to resolve individual cases of factual doubt as to combatant status. Yet, there is no doubt as to the following facts: that that both al-Qaeda and the Taliban *en masse* systematically and willfully failed to meet the four criteria of lawful belligerency; and, that al-Qaeda members *en masse* are stateless. As a result, art. 5 tribunals are unnecessary. Such individualized art. 5 tribunals in the case of the detained Taliban and al-Qaeda enemy combatants would yield little if any additional probative or relevant evidence as to the detainees' lawful/unlawful combatant status.

Instead, art. 5 tribunals would only serve to provide the detainees and their advocates with opportunities to misuse art. 5. The detainees and their appointed advocates would likely use art. 5 tribunals, not for any appropriate purpose of providing relevant factual testimony or other direct evidence exonerating the detainees from unlawful combatant status, but rather for illegitimate political and self-rationalizing theological pageantry. The same detainee advocates would then criticize the pre-determined outcomes of the

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[53] *See* Rivkin, et al., *supra* note 51, at 9-10:

> The purpose of [Article 5] is not to require a judicial process through which a captive can challenge his or her status as an enemy combatant. In fact, Article 5 assumes that the individual is an enemy combatant, having "committed a belligerent act and having fallen into the hands of the enemy." Rather, it was adopted to ensure that captured enemy combatants were not summarily punished in the field (as unlawful combatants) in cases where it was not immediately obvious, based upon their uniforms and identifying papers, whether they were entitled to POW treatment. As explained by the International Committee of the Red Cross in its commentaries on the Geneva Convention, "[t]his would apply to deserters, and to persons who accompany the armed forces and have lost their identity card." *See* International Committee of the Red Cross, Commentary on the Geneva Convention III Relative to the Treatment of Prisoners of War 77 (1960).

Id.

tribunals, such pre-determined outcomes solidly based upon the manifest blatant misconduct of Taliban and al-Qaeda forces in armed conflict and al-Qaeda's classic unlawful combatant status. Ultimately, detainee advocates would describe the tribunals as gestures intended merely to allay the U.S.-perceived misdirected international concern surrounding the lawful preventive internment of Taliban and al-Qaeda detainees.

3. Executive Affirmation of Unlawful Combatant Status En Masse

In the circumstances in which an entire military organization as a matter of institutional policy and practice incessantly, egregiously, and openly fails *en masse* to comply with the four requirements of lawful belligerency, there is no requirement under LOAC to convene individual art. 5 tribunals. In such cases where there is no doubt or ambiguity as to the entire military organization's unlawful combatant status, LOAC does not prohibit a competent authority from also making a presumptive unlawful combatant status determination as a pertinent statement of fact that would be inclusive of all members of that military organization, thereby formally eliminating any need for individual art. 5 tribunals.[54] An informed, comprehensive, presumptive *en masse* determination as to the status of a group of captured, non-uniformed combatants, made by a competent authority who is the democratically elected and accountable civilian Chief Executive of the detaining power and the Commander-in-Chief of its armed forces, would be consistent with the principles and intent of customary LOAC.[55]

Notwithstanding the non-application of art. 5 to al-Qaeda and Taliban unlawful combatants, the President of the U.S., in orderly circumspection, exercised his discretion and personally reviewed *in toto* the evidence

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[54] *See generally* GPW, *supra* note 2, at art. 5, and note 50 *supra*. It must be noted that the plural language in art. 5 inclusive of "persons" and "their status" implies that an art. 5 tribunal may make a collective determination as to the lawful or unlawful status of a group of captured combatants; rather than prescribing that, when there is any doubt as to status, an art. 5 tribunal must make a separate status determination as to each individual captured combatant. *See also* W. Thomas Mallison, et al., *The Juridical Status of Irregular Combatants under the International Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 62 (1977)("According to the widely accepted view, if the group does not meet the . . . criteria . . . the individual member cannot qualify for privileged status as a POW.").

[55] *See* UK PARL., APP. 9 TO THE MINUTES OF EVIDENCE, SUPPLEMENTARY MEMORANDUM BY PROFESSOR SIR ADAM ROBERTS 41 (Dec. 2002) *at* http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm (last visited Jun. 17, 2004):

> [I]n a struggle involving an organization that plainly does not meet the [Geneva Convention treaty-defined criteria for POW status] (and especially where, as with al-Qaeda, it is not in any sense a state) it may be reasonable to proclaim that captured members are presumed not to have PoW status. In cases where it is determined that certain detainees are not PoWs, they may be considered to be "unlawful combatants."

surrounding the unlawful belligerency of al-Qaeda and the Taliban. The President, acting within his inherent authority as Commander-in-Chief, reviewed and weighed the wealth of relevant evidence including both classified and unclassified information, and considered the totality of circumstances surrounding the organizational stateless structure of al-Qaeda, the highly collusive relationship between al-Qaeda and the Taliban, and the Taliban and al-Qaeda's unlawful conduct in international armed conflict. After considerable review, the President made a pertinent statement of fact that the forces of al-Qaeda and the Taliban are presumptively unlawful combatants and, upon capture, are not entitled to POW status.[56]

It is important to note, however, that the President did not act as a "supreme art. 5 tribunal." As explained above, art. 5 tribunals were unnecessary. Rather, after examining the conclusive evidence of al-Qaeda and the Taliban's unlawful belligerency, the President simply confirmed that there existed no factual or legal doubt as to their presumptive unlawful combatant status. Concomitantly, the President decided that POW status would not be afforded to detained al-Qaeda and Taliban unlawful combatants. Because of the President's competent *en masse* determination and subsequent discretionary decision to not privilege captured Taliban and al-Qaeda members with combatant immunity and POW status, it was formally and uniformly affirmed that individual art. 5 tribunals were not applicable or necessary.

Some have claimed that these Presidential discretionary *en masse* determinations were improperly based upon al-Qaeda and the Taliban's amoral motives for attacking the U.S., and, hence, such determinations followed inappropriately a *ius ad bellum* (sovereign legal authority to use force in

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Id.

[56] John Mintz, et al., *Bush Shifts Position on Detainees. Geneva Conventions to Cover Taliban, but Not Al Qaeda,* WASH. POST, Feb. 8, 2002, at A 1 ("[T]he decision [that captured members of the Taliban and al-Qaeda are not entitled to POW status] was made after long discussions at two National Security Council meetings, chaired by Bush, which included the views of the Defense, State and Justice departments, as well as the opinions of other officials."); *see also* Christopher Greenwood, *International law and the 'war against terrorism',* 78 INT'L AFF. 301, 315-16 (2002):

> The initial US position was that these detainees were not entitled to prisoner of war status, because they were 'unlawful combatants' (a term which was not, as some journalists suggested, invented by the United States but which has long been used to describe combatants who are not entitled, for one reason or another, to take part in conflict but who have nevertheless done so). On 7 February 2002 the United States changed its position. The White House announced that captured members of the Taliban armed forces would be treated in accordance with the Third Convention but would nevertheless not be considered prisoners of war, because they did not meet the requirements of POW status laid down in the convention.

Id.

international armed conflict or more literally "just war") analysis. However, the factually-supported Presidential findings and conclusions were based not upon *ius ad bellum* or any other analogous international legal theory. The virulent motives of al-Qaeda and the Taliban as to ***why*** they waged armed conflict were not important when reaching the President's conclusions.

Instead, the President's finding that al-Qaeda and Taliban members are unlawful combatants and the decision not to grant them POW status followed a *ius in bello* (laws of conduct during international armed conflict) analysis. These executive military decisions were based upon al-Qaeda's stateless classic unlawful combatant status, the interdependent relationship between al-Qaeda and the Taliban; and, ultimately, the illegal belligerent conduct by al-Qaeda and the Taliban in international armed conflict; that is, ***how*** al-Qaeda and the Taliban waged armed conflict unlawfully.

Despite al-Qaeda and the Taliban's egregious unlawful conduct during armed conflict and al-Qaeda's classic unlawful combatant status, some have commented that the U.S. as the detaining power should have convened individual tribunals under Geneva Convention III, art. 5, to make case-by-case determinations as to "lawful combatant versus unlawful combatant" status and, subsequently, "POW versus battlefield detainee" status.[57] However, as a result of al-Qaeda and the Taliban's substantiated *en masse* unlawful belligerency, the President's formal presumptive factual affirmation and legal holding, and the absence of sufficient evidence to overcome the established presumption of unlawful belligerency, there is no legal requirement for the U.S. to convene any individualized administrative tribunals to reconsider *pro forma* what has already been determined accurately and lawfully.

B. Humane Treatment of al-Qaeda and Taliban Unlawful Combatant Detainees

Because al-Qaeda and Taliban members were acting as unlawful combatants when they were captured during international armed conflict, the

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[57] *See, e.g.,* Human Rights Watch Letter to Donald Rumsfeld, Mar. 6, 2003, *at* http://www.hrw.org/press/2003/03/us030603-ltr.htm (last visited Jun. 17, 2004); *see also* Ruth Wedgwood, *Prisoners of a Different War,* Jan. 30, 2002, *originally published in* Financial Times of London, *at* http://www.law.yale.edu/outside/html/Public_Affairs/190/yls_article.htm (last visited Jun. 17, 2004):

> Article 5 panels were designed to look at fact-specific cases, such as deserters or soldiers who have lost their identification cards, or persons who have committed a belligerent act but are of uncertain affiliation. They were not designed for resolving interpretive questions of treaty law and customary law in a new kind of war. This is the duty of nation states at the highest level of political responsibility.

Id.

U.S. classifies them as such and is then only required to provide them humane treatment in accordance with the minimum standards of customary international law.[58] Nevertheless, as a matter of policy, the U.S. has exercised its discretion by caring for captured al-Qaeda and Taliban detainees, *ex gratia*, "as a matter of grace," in a manner beyond the minimal standards of humane treatment required by customary international law.

The U.S. has granted captured Taliban and al-Qaeda unlawful combatants numerous POW protections, but not Geneva Convention III POW status. The U.S. has provided, and continues to provide, all detainees with humane treatment and protections exceeding that required by customary international law, to the extent appropriate to and consistent with military necessity, and in a manner that conforms to the spirit and principles of the Geneva Conventions.

More specifically, the detainees held in Guantanamo are provided *inter alia* with adequate shelter in a mild climate with the ability to communicate among themselves, metal bed frames/bunks with foam mattresses, sheets, blankets, hot showers, sinks, running water, and clean new clothes and shoes.

Dietary and religious privileges include three nutritious *halal* (culturally-appropriate and conforming to Islamic dietary laws) meals a day with assorted condiments (or, should a detainee elect, as a few have, a detainee may have the same food as the detention facility guards), special meals at special times during traditional Muslim holy periods such as *Ramadan* (a holy month in Islam, celebrating when the *Q'uran*, the holy scripture of Islam, was revealed to the prophet Muhammad in 610 A.D.), hot tea, unrestricted access to Muslim *Imam* military chaplains, a *Quibla* (a huge green and white sign that points toward Mecca, Saudi Arabia, the holiest city in Islam – the city revered by Islam as being the first place created on earth), an arrow in each cell

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[58] *See, e.g., generally* Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc A/810 at 71 (1948); *see also* Protocol I art. 75, *supra* note 6; Greenwood, *supra* note 56, at 316 ("[combatant] status, however, is only part of the story. Whether prisoners of war or not, [the al-Qaeda and Taliban] detainees are not held in legal limbo. Whatever their status, they have a right to humane treatment under customary international law…"); and, LEVIE, *supra* note 27, at 44-45:

> [M]ost Capturing Powers will deny the benefits and safeguards of the [Geneva] Convention to any such individual who is in any manner delinquent in compliance [of the four conditions of lawful belligerency]. It must also be emphasized that if an individual is found to have failed to meet the four conditions, this may make him an unprivileged combatant but it does not place him at the complete mercy of this captor, to do so with as the captor arbitrarily determines. He is still entitled to the general protection of the law of war, which means that he may not be subjected to inhumane treatment, such as torture, and he is entitled to be tried before penal sanctions are imposed.

Id.

pointing to Mecca, a recorded loudspeaker call to prayer five times a day, regular opportunities to worship, copies of the *Q'uran* in the detainees' native languages as well as other religious reading materials in numerous languages, prayer caps, prayer rugs, prayer beads, and holy oil (provided by Muslim military chaplains).

Personal hygiene products include toiletries, towels, washcloths, and toilets. Detainees are also provided letter writing materials, secular reading materials in numerous languages, the ability to send and receive mail and packages subject to security screening, regular exercise, initial medical examinations, continuing modern medical care to include rehabilitative surgery, dental care, eye examinations & glasses, medications (ultimately, the same medical care afforded to the detention facility guards), counseling, and access to Arabic translators as needed. Further, although POWs can lawfully be required to work for the detaining power (work that has no direct connection to armed conflict operations), the U.S. does not require al-Qaeda and Taliban detainees to work.

Additionally, since January 2002, the International Committee of the Red Cross (ICRC) has maintained a permanent mission at the Guantanamo Bay installation, and its delegates continually assess the confinement facilities and the treatment the U.S. provides the detainees. ICRC delegates also conduct regular private visits with the detainees, personally speaking with each detainee in the detainee's native language.[59]

Further, the U.S. has constructed a medium-security detention facility in Guantanamo Bay, consisting of several 20-member unit communal dormitories. A large number of select detainees who have exhibited acceptable

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[59] *See, e.g., generally* White House Fact Sheet, *supra* note 18; Warren Richey, *A Prisoner's Day at Guantanamo Bathing While Shackled, Praying on a Towel, and Eating Froot Loops*, Mar. 14, 2002, *at* http://www.csmonitor.com/2002/0314/p01s04-usmi.htm (last visited Jun. 17, 2004); Alphonso Van Marsh, *For Gitmo's Detainees, Spice is Nice*, Apr. 3, 2002, *at* http://edition.cnn.com/2002/WORLD/americas/04/02/marsh.otsc/ (last visited Jun. 17, 2004); Prosper, *supra* note 43; John Mintz, *Delegations Praise Detainees' Treatment, Diet, Medical Care Good, Legislators Say*, WASH. POST, Jan. 26, 2002, at A 15; John Mintz, *Media Given Tour of Tent Hospital U.S. Seeks to Show Detainees' Health, Dignity Respected*, WASH. POST, Feb. 4, 2002, at A 3; *ICRC Visits Afghan Detainees in Cuba*, Jan. 18, 2002, *at* http://www.redcross.org/news/in/intllaw/020118detainees.html (last visited Jun. 17, 2004); Nick P. Walsh, *Russian Mothers Plead for Sons to Stay in Guantanamo*, GUARDIAN, Aug. 9, 2003, *at* http://www.guardian.co.uk/russia/article/0,2763,1015309,00.html (last visited Jun. 17, 2004); Prosper, *supra* note 19; Jeffrey Toobin, *Inside the Wire, Can an Air Force colonel help the detainees in Guantanamo?*, THE NEW YORKER, Feb. 9, 2004, at 36; Pamela Constable, *Former Guantanamo Prisoners Say They Weren't Tortured*, WASH. POST, Oct. 29, 2002, at A 1:

> The men described their confinement at Guantanamo as boring but not inhumane. They said they were allowed to bathe and change clothes once a week and were given copies of the Koran to read. Faiz Mohammed said the food was good, but he complained that there was no okra or eggplant.

behavior, adhered to facility rules, and cooperated during interviews have been admitted to the new medium-security facility and are able to spend more time outdoors, have considerably more exercise time, and may participate in group recreation. Further, they are allowed to eat together at outdoor picnic tables, interact, sleep, pray, and worship together.[60] Detainees, whose intelligence

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Id. See also CDI Terrorism Project Q&A with Rear Adm. (Ret.) Stephen H. Baker, USN Senior Fellow, CDI, Jan. 25, 2002, *at* http://www.cdi.org/terrorism/bakerqa11102-pr.cfm (last visited Jun. 17, 2004):

> [T]he "outcry" [regarding the Taliban and al-Qaeda unlawful combatant detainees] is unfounded and primarily the result of the notorious British tabloids, Islamic groups in London, and political critics that have specific agendas to pursue. I think the majority of the American public, and the world, understands that inhumane treatment of prisoners is not the American way. The Navy and Marine Corps personnel assigned to Camp X-Ray are a highly trained, professional security police force and they are doing a good job. The terrorist captives are in an environment that appropriately demands maximum security. These people are as dangerous as any criminal we hold in other maximum-security prisons. They are receiving exercise periods, warm showers, toiletries, water, clean clothes, blankets, three meals a day, prayer mats, excellent medical care, writing materials and private visits from the Red Cross. A Navy Muslim chaplain is available to minister to their religious needs if requested, and calls to prayers are broadcast over the camp PA system, with a sign indicating the direction of Mecca. No one who has personally visited the camp, to include human-rights monitors from the International Committee of the Red Cross and a British team of investigators, has reported any complaints of inhumane treatment.

Id. See also Rajeev Syal, *I had a good time at Guantanamo, says inmate*, The Daily Telegraph (Feb. 8, 2004) *at* http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/08/wguan08.xml (last visited Apr. 19, 2004):

> Mohammed Ismail Agha, 15, … said that he was treated very well and particularly enjoyed learning to speak English … Mohammed said: "They gave me a good time in Cuba. They were very nice to me, giving me English lessons."… They gave me good food with fruit and water for ablutions and prayer," … He said that the American soldiers taught him and his fellow child captives - aged 15 and 13 - to write and speak a little English. They supplied them with books in their native Pashto language. When the three boys left last week for Afghanistan, the soldiers looking after them gave them a send-off dinner and urged them to continue their studies.

Id. In accordance with its domestic and international legal obligations, the U.S. immediately investigates any suspected abuse or other inappropriate treatment of detainees by detention facility guards or others, and, when substantiated, appropriately punishes the abusers. *See e.g.*, Paisley Dodds, *U.S. Disciplines 2 Guantanamo Bay Guards*, All Headline News (May. 5,

worth is exhausted, and who no longer pose a security risk to the U.S. or its allies, and are not facing criminal charges, will be released when it is appropriate to do so.

The U.S. has decided, for reasons of security and other legitimate concerns, that the detainees will not be accorded certain Geneva Convention III POW privileges. The detainees are not able to run their own camp, do not have the means to prepare meals, nor are they provided musical instruments, scientific equipment, or sports outfits. Additionally, the detainees do not have POW privileges to monthly pay advances, a personal financial account, or to be able to work for pay. Further, the detainees do not have access to a store to purchase such items as food, soap, or tobacco.[61] Most importantly, though, because al-Qaeda and Taliban detainees are unlawful combatants and do not possess POW status, they do not have combatant's privilege and, therefore, are not judicially immune for their pre-capture combat activities.[62]

C. Length of Taliban and Al-Qaeda Unlawful Combatant Preventive Detention

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2004) *at* http://www.allheadlinenews.com/articles/1083797499 (last visited Jun. 3, 2004) ("Promising a broader investigation, the U.S. military acknowledged Wednesday that two guards at the U.S. prison camp in Guantanamo Bay, Cuba, had been disciplined over allegations of prisoner abuse."); Marian Wilkinson, *Pentagon to report on Hicks, Habib treatment*, The Age (May 22, 2004) *at* http://www.theage.com.au/articles/2004/05/21/1085120117118.html (last visited Jun. 19, 2004) (regarding certain allegations of U.S. personnel abuse against two Australian detainees at Guantanamo):

> The Pentagon sent a letter to the [Australian] embassy saying that detainees at Guantanamo are treated humanely and the US "does not permit, tolerate or condone any abuse or torture by its personnel under any circumstances". It said "credible allegations of illegal conduct by US personnel are taken seriously and investigated promptly". The new pledge to investigate the Hicks' claims follows consistent reports by his lawyers and a witness that he was beaten during interrogation in Afghanistan.

Id.

[60] *See generally Guantanamo Bay-Camp Delta*, *at* http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm (last visited Jan. 3, 2004); *see also A Detainee Packs His Personal Belongings*, *at* http://www.defenselink.mil/photos/May2003/030228-N-4936C-016.html (last visited Jun. 17, 2004).

[61] *See* White House Fact Sheet, *supra* note 18.

[62] *See generally* quoted comments regarding unlawful belligerency, *supra* note 15; *but see* INSTRUCTION NO. 2, *infra* note 79, at 2 (U.S. military commission instructions require the prosecution, whenever charging an offence associated with unlawful belligerency, to affirmatively prove beyond a reasonable doubt that the defendant lacked combatant immunity).

According to well-settled LOAC, the historical practice among nations, and the spirit and principles contained within Geneva Convention III, art. 118,[63] the U.S. may continue to hold both lawful and unlawful combatant detainees for the entire duration of the present international armed conflict; that is, until the cessation of hostilities. Unless a captured combatant has been justly tried, convicted and sentenced to confinement, the lawful internment of any captured combatant in time of international armed conflict is not punitive, nor is it a form of pre-trial custody or confinement. It is mere preventive detainment that is fully authorized under LOAC.[64]

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[63] *See* GPW, *supra* note 2, at art. 118, saying in pertinent part:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation. . . .

Id. Although GPW, art. 118, only applies to POWs, detention of both lawful and unlawful combatants for the duration of hostilities has occurred throughout the history of armed conflict. ROSAS, *supra* note 4, at 44-45.

[64] *See* WINTHROP, *supra* note 39, at 788 (detention of combatants during time of armed conflict is "a simple war measure." It is not "a punishment" or "an act of vengeance."); *see also* ROSAS, *supra* note 4, at 44-45, 59-60 (explaining that customary LOAC through state practice over time has long recognized that a party to a conflict may hold prisoners of war while hostilities are continuing); *see also* AUSTRALIAN MILITARY LAW, *supra* note 9, at 208:

> Few of the customs of war have undergone greater changes than those relating to the treatment of prisoners. In antiquity war captives were killed, or at best enslaved; in the Middle Ages they were imprisoned or held to ransom; it was only in the seventeenth century that they began to be deemed prisoners of the state and not the property of individual captors. Even during the wars of the last 100 years they were often subject to cruel neglect, unnecessary suffering and unjustifiable indignities.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 244-45. Historically, Vattel explains:

> The right of making prisoners of war. But all those enemies thus subdued or disarmed, whom the principles of humanity oblige him to spare, — all those persons belonging to the opposite party, … he may lawfully secure and make prisoners, either with a view to prevent them from taking up arms again, or for the purpose of weakening the enemy.

VATTEL, *supra* note 38, at § 148*; see also* Rumsfeld, *supra* note 43, at 2:

> Today enemy combatants are being detained at the U.S. military facility at Guantanamo Bay, Cuba, as you know well. They include not only rank and file soldiers who took up arms against the coalition in Afghanistan but they include senior al Qaida and Taliban operatives, including some who may have been linked to past and potential attacks against the United States, and

LOAC is unambiguous in this regard, authorizing throughout history the long-term preventive detention of combatants in an international armed conflict by the capturing party until the cessation of hostilities. Al-Qaeda and Taliban detainees are being interned as enemy combatants in an ongoing international armed conflict. Such long-standing, clear international authority to detain subdued enemy combatants is provided to a capturing party because of the understandable and compelling rejection of the unpalatable alternatives.

While captured combatants are detained during active hostilities, there is no requirement under international law to charge such detainees with a crime or, before they are charged, to provide them legal counsel to challenge their detention.[65] No nation at war has ever done so. Nor, during ongoing hostilities, has any nation ever allowed captured and detained enemy combatants to access its civilian court system in order to challenge their detention. Mere detention of captured combatants during time of hostilities is not a criminal judicial process. It is a military action to disarm enemy combatants, as well as a means to facilitate the gathering of military intelligence. Most importantly, however, it supports the ongoing war effort and avoids prolonging the conflict by removing hostile combatants from the battlefield. Through the preventive quarantine of unlawful combatant

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> other who continue to express commitment to kill Americans if released. Very simply the reason for their detention is that they're dangerous. Were they not detained, they would return to the fight and continue to kill innocent men, women and children. Detention is not an arbitrary act of punishment. Indeed, it is a practice long established under the law of armed conflict for dealing with enemy combatants in a time of war and it was practiced, I am told, in every war we have fought. It is a security necessity, and I might add it is just plain common sense.

Id. See also generally In re Territo, 156 F.2d 142, 145 (9th Cir. 1946)("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated, or otherwise released.")(footnotes omitted).

[65] *See, e.g.,* GPW, supra note 2, art. 105 (allowing a POW, not an unlawful combatant detainee, a right to counsel or advocate, but only when criminal charges have been brought against the POW); Letter from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, Jr., President of the American Bar Association 3 (Sep. 23, 2002), *at* http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html (last visited Jun. 17, 2004):

> There is no due process or any other legal basis, under either domestic or international law, that entitles enemy combatants to legal counsel. And providing such counsel as matter of discretion at this time would threaten national security in at least two respects: It would interfere with ongoing efforts to gather and evaluate intelligence about the enemy. And it might enable detained enemy combatants to pass concealed messages to the enemy.

Id.

detainees in Guantanamo Bay, they are curtailed from again taking up arms illegally and fighting, or otherwise supporting the fight, against the U.S. and its coalition allies during the current ongoing global armed conflict.

Al-Qaeda and the Taliban are in a self-professed Islamist *jihad* - a nihilistic holy war without end against all people who do not believe as they do, including fellow Muslims who hold different views. It is therefore al-Qaeda and the Taliban, not the U.S., who have made the duration of the detention of captured al-Qaeda and Taliban unlawful combatant detainees seemingly open-ended. Releasing prematurely such detainees would have the operative effect of reinforcing the enemy's combat forces. The repatriated forces likely then would simply return to their *jihad* arena of battle, re-engage U.S. and allied forces, and perpetrate more acts of terrorism against protected civilians.[66]

As stated earlier, captured enemy combatants may be held for the duration of an armed conflict. Subsequent to the cessation of hostilities through defeat and surrender, or a mutually agreed armistice, captured combatants who are not facing criminal charges are then repatriated. However, an armed conflict against a terrorist organization of *hostes humani generis* like al-Qaeda, that is ideologically implacable, well funded, effectively structured, and globally-dispersed, requires a somewhat modified definition of the cessation of hostilities.

A fixed-date definition of what constitutes the cessation of hostilities in an armed conflict of a state against *hostes humani generis* akin to al-Qaeda

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[66] *See* Prosper, *supra* note 43 ("Many detainees in Guantanamo have stated that they would rejoin this war and commit terrorist acts if released."); *See* DoD News: Defense Department Operational Update Briefing - Secretary Rumsfeld and Gen. Pace, Mar. 9, 2004, *at* http://www.defenselink.mil/transcripts/2004/tr20040309-secdef0523.html (last visited Jun. 17, 2004) (*quoting* U.S. Secretary of Defense Donald H. Rumsfeld: "[O]f the [detainees] that have been released, we know of at least one who has gone back to being a terrorist. So life isn't perfect…In other words, you can make mistakes in evaluating these people."); *see also* Lee A. Casey, et al., *The Facts about Guantanamo,* WALL. ST. J., Feb. 16, 2004, at A 6 (The U.S. Department of Defense has confirmed that some released Guantanamo detainees have "returned to the fight"); *see also* Kathleen Knox, *Afghanistan, Are Taliban and Al-Qaeda 'Detainees' Actually POWs?*, Jan. 3, 2002, *at* http://www.rferl.org/nca/features/2002/01/03012002080615.asp (last visited Jun. 17, 2004) (*quoting* Adam Roberts, Oxford University Professor of International Relations):

> Normally the assumption of the whole prisoner-of-war regime is that a prisoner of war at the end of a conflict is repatriated to his country. And in this case it's not at all clear that it would make sense to repatriate prisoners because they would continue to represent a danger. [They] are a personal threat . . . . Both because of their training and their ideology, they are individually potentially dangerous. But also it's far from clear that their own countries in all cases would want to accept them as free, repatriated individuals. They might want to keep them in detention themselves.

Id.

is different from that of an armed conflict solely between states. Under the international laws of armed conflict, it is the state parties to the conflict who determine the end of hostilities, usually through a mutual armistice or an unconditional surrender. Al-Qaeda, on the other hand, is a stateless terrorist organization. There can never be a truce or an armistice with such an organization. Sound and prudent judgment combined with the international Rule of Law proscribe states from negotiating with and granting concessions to such *hostes humani generis*. To do so only would serve to embolden these *hostes humani generis* and beget more global terrorism. Instead, al-Qaeda *hostes humani generis* must be absolutely defeated. Such an unqualified defeat would mark the cessation of hostilities.

At this point in time, however, al-Qaeda has not yet been defeated. Consequently, this armed conflict is not over and there is not a future date-certain in which the conflict may be declared over. Given that neither the Taliban nor al-Qaeda as *hostes humani generis* could or would sign a peace treaty, or has given or would honor an order to demobilize and end hostilities, an appropriate definition of the end of this armed conflict is when there are no longer effective al-Qaeda, al-Qaeda affiliated, or al-Qaeda progeny terrorist networks functioning in the world which the detainees upon release reasonably would be likely to rejoin and then resume terrorist activities.[67]

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[67] *See* DoD News Briefing - Secretary Rumsfeld and Gen. Myers, Mar. 28, 2002, *at* http://www.defenselink.mil/news/Mar2002/t03282002_t0328sd.html (last visited Jun. 17, 2004) (*quoting* U.S. Secretary of Defense Donald H. Rumsfeld: "[T]he way I would characterize the end of the conflict is when we feel that there are not effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities."). Two years after the U.S. and its allies first engaged the Taliban in Afghanistan, the Taliban are still highly active. *See e.g.*, Taliban Resurgence Undermining UN Afghan Aid Work, Oct. 25, 2003, *at* http://www.abc.net.au/news/newsitems/s974961.htm (last visited Jan. 3, 2004):

> A Taliban resurgence has forced UN aid workers to suspend their work in most of southern Afghanistan during a crucial period, a top UN official told the Security Council. . . Due to soaring Taliban attacks on Afghan civilians as well as aid workers in the south, all UN aid missions have been temporarily halted in Nimruz, Helmand, Uruzgan and Zabul provinces while armed escorts are required for all aid work in four districts of adjacent Kandahar province, he said.

Id.; see also Butler, *supra* note 42, at 2-3:

> Between September 2003 and December 2003, Taliban militants stepped up the insurgency in southern and eastern provinces in Afghanistan, including attacks on innocent civilians and coalition forces. On November 15th, 2003, two suicide truck bombs exploded outside the Neve Shalom and Beth Israel Synagogues in Istanbul, killing 25 and wounding 300 more. An al Qaeda-related group claimed responsibility. On November 20th, 2003, two suicide truck bombs exploded near the British consulate and the HSBC Bank in Istanbul, killing 25, including the British consul general, and injuring more

The definitive military and national security objectives of this international armed conflict, the Global War against Terrorism, or more precisely the Global War against al-Qaeda, are the universal illegitimatization of state-sponsored international terrorism attacks, the dismantling of all al-Qaeda international terrorist networks and their infrastructures, and, in the end, the defeat and eradication of al-Qaeda international terrorism. Through their international aggression and terrorism, al-Qaeda and the Taliban initiated this global armed conflict. The U.S. and its allies remain committed to its victory.

An idealistic position is that this global armed conflict against al-Qaeda and the Taliban is all but over or that it will soon end. Additionally, there exists a position that international terrorism is only a matter of civilian law enforcement. Generally, those that hold such views follow such assertions with calls for the release of the al-Qaeda and Taliban detainees. However, credulous hope, unarmed idealism, and intellectual denial are not, and have never been, coherent geopolitical and military strategies. Al-Qaeda continues to exist as a significant international military threat against the U.S. and its allies. Continued military force is the primary means and, at present, in combination with all elements of national and international power, the most visible and capable instrumentality to neutralize this military threat. Unfortunately, it is quite clear that this global armed conflict against al-Qaeda will not soon end. An acceptable end-state is unlikely to be realized in the near future.

Rogue states continue to sponsor al-Qaeda international terrorism. Al-Qaeda as an international terrorist organization continues to operate and target civilians. Neither Mullah Omar nor Usama bin Laden has surrendered or been captured. Numerous other Taliban and al-Qaeda lieutenants and high-level operatives remain at large. Usama bin Laden and his senior lieutenants and followers continue to regularly release lengthy audiotape messages calling for further and more severe acts of violence against the U.S. and its allies. Repeated al-Qaeda and Taliban terrorist attacks and attempted attacks since September 11, 2001, against the U.S., its allies, and recurring declarations by al-Qaeda accepting responsibility for these attacks, and threats of future international terrorism demonstrate plainly the unfortunate, ongoing nature of this international armed conflict.

Irrespective of how long it may take to achieve total victory in the Global War against Terrorism, however, the U.S. has made it apparent that it

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> than 309. Al Qaeda claimed responsibility. In November 2003, Taliban bombings killed U.S. and Romanian soldiers and several Afghan civilians. In November 2003, al Qaeda also struck again in Riyadh, Saudi Arabia, killing 17 and injuring more than 100. In January 2004, Taliban bombings in Afghanistan killed soldiers from the United Kingdom and Canada. And since August of 2003, 11 U.S. soldiers have died in the war in Afghanistan.

Id.

has no desire to, and will not hold any detainee indefinitely.[68] The U.S. regularly reviews on a case-by-case basis whether continued detention is necessary.[69] The U.S. and Afghanistan have already screened and released

[68] Gerry J. Gilmore, *U.S. 'Has Every Right' to Hold Detainees, Says Rumsfeld,'* American Forces Information Service, Mar. 28, 2002, *at* http://www.defenselink.mil/news/Mar2002/n03282002_200203282.html (last visited Jun. 17, 2004) (*quoting* U.S. Secretary of Defense Donald H. Rumsfeld, "I can assure you, the United States does not want to keep any [al-Qaeda or Taliban detainee] any longer than we have to."); *See also* Butler, *supra* note 42, at 7-8:

> There is an elaborate [ongoing detainee screening] process. Detainees are not in a legal black hole. There is an enormous amount of time spent scrutinizing each individual case through various agencies of the government to help us determine who these people are. We are not interested in holding anyone for one more day than we have to. We want to evaluate them. If we can reach the conclusion that they're no longer a threat, we will release them. If we believe that we can reach transfer agreements with foreign governments who will take responsibility for them so that they're no longer a threat to us or to their populations, we want to do that.

Id.

[69] *See* Butler, *supra* note 42, at 6:

> There are three basic ways in which the enemy combatants are categorized in [Guantanomo Bay]: those who will be potentially be eligible for release, those who will be eligible for transfer to their foreign governments, and those who will remain in continued detention…[F]or those who will remain in continued detention, the Secretary announced some additional procedures that we are going to implement, and that is an Administrative Review Panel. And this will be a panel that will meet … more than annually. It will review each detainee's case annually to determine whether that detainee continues to pose a threat to the United States. The detainee will have the opportunity to appear in person before that panel. The detainee's foreign government will have the opportunity to submit information on the detainee's behalf. And the panel will consider all of the information, including intelligence information gained on the detainee and the information presented by the detainee and his government, and to make an independent recommendation about whether the detainee should be held.

Id.; see also Haynes, *supra* note 65, at 4:

> [D]isquiet about indefinite detention is misplaced for two reasons. First, the concern is premature. In prior wars combatants (including U.S. prisoners of war) have been detained for years. We have not yet approached that point in the current conflict. And second, the government has no interest in detaining enemy combatants any longer than necessary, and is reviewing the requirement for their continued detention on a case-by-case basis. But, as long as hostilities continue and the detainees retain intelligence value or present a threat, no law requires the detainees be released, and it would be imprudent to do so.

thousands of lower-ranking Taliban unlawful combatant battlefield detainees in Afghanistan.[70] Enemy unlawful combatants in Guantanamo Bay, in contrast, comprise Taliban and al-Qaeda senior leaders and their most zealous followers from over 40 countries, who were transported out of Afghanistan and away from the battlefield to assist in gaining military intelligence, and to assist in the pacification of Afghanistan and its democratization.

Even so, in a substantial departure from the common practice of previous armed conflicts, a significant number of Guantanamo Bay detainees has been vetted, paroled, and transferred back to their home countries prior to the cessation of hostilities. However, the gratuitous release of such individual enemy combatant detainees does not mean that such detainees were not lawfully captured and lawfully detained as enemy combatants under LOAC during time of armed conflict. Additional detainees eventually could be repatriated to their countries of citizenship for possible local prosecution, or transferred for continued detention by authorities of their own countries. Other detainees, who will not face criminal charges, have no further intelligence value, and who no longer present a significant security threat, in time also may be outright released and repatriated presuming their individual countries of origin are willing to accept them.[71] Except for tried and convicted unlawful

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Id.

[70] *See, e.g.*, Pamela Constable, *Another Chance At Freedom In Afghanistan, Hundreds of Taliban Fighters Released From Crowded Jail*, WASH. POST, Mar. 24, 2002, at A 24; *Afghans Release Pakistani Prisoners*, Apr. 25, 2002, *at* http://www.cbsnews.com/stories/2002/04/25/attack/main507196.shtml (last visited Jun. 17, 2004); *87 Pak Prisoners who Fought for Taleban Released*, Nov. 26, 2002, *at* http://news.indiainfo.com/2002/11/26/26taleban.html (last visited Jan. 3, 2004); *Afghanistan to release 1000 Pakistani Prisoners*, Mar. 17, 2003, *at* http://www.inq7.net/wnw/2003/mar/17/wnw_3-1.htm (last visited Jun. 17, 2004); and *Afghanistan Releases 66 Pak Taliban Prisoners*, May 6, 2003, *at* http://www.expressindia.com/fullstory.php?newsid=21667 (last visited Jun. 17, 2004)*; see also* Rumsfeld, *supra* note 43, at 4:

> Detainees at Guantanamo Bay represent only a small fraction of those scooped up in the global war on terror. Of the roughly 10,000 people that were originally detained in Afghanistan, fewer than ten percent were brought to Guantanamo Bay in the first place. The vast majority were processed in Afghanistan and released in Afghanistan. Of those sent to Guantanamo Bay, 87 have been transferred for release thus far and a few have already been returned to their home country for continued detention or prosecution.

Id.

[71] *See Terror Suspects Reportedly Offer Tips, Guantanamo General Says Prisoners More Forthcoming as Preparations Begin for Expected Military Tribunals*, July 24, 2003, *at* http://stacks.msnbc.com/news/943781.asp?0sl=-11&cp1=1 (last visited Jun. 17, 2004) ("About 70 detainees have been released, and about 120 have been rewarded with moves to a medium-security wing where they get more exercise, books and other liberties for cooperating in interrogations, [according to Major General Geoffrey D. Miller, Camp Commandant].");

combatants serving adjudged sentences of confinement, the U.S. will continue to hold Taliban and al-Qaeda detainees only as long as is necessary to prevent future threats and attacks against the U.S. and its allies.

Charles Lane, *Justices to Rule on Detainee's Rights Court Access for 660 Prisoners at Issue*, WASH. POST, Nov. 11, 2003, at A 1:

> Sixty-four inmates, mostly Afghans and Pakistanis, have been sent from the prison back to their home countries to be released, and four more have been flown to Saudi Arabia, where they are still jailed and may face trial. U.S. officials are privately negotiating the return of scores more Guantanamo detainees to their home nations.

Id. See also Transfer of Guantanamo Detainees Complete, U.S. DEPARTMENT OF DEFENSE NEWS RELEASES, Nov. 24, 2003, *at* http://www.defenselink.mil/releases/2003/nr20031124-0685.html (last visited Jan. 3, 2004):

> The Department of Defense announced today that it transferred 20 detainees for release from Guantanamo Bay, Cuba, to their home countries on Nov. 21. Additionally, approximately 20 detainees arrived at Guantanamo from the U.S. Central Command area of responsibility on Nov. 23, so that the number of detainees at GTMO is approximately 660. Senior leadership of the Department of Defense, in consultation with other senior U.S. government officials, determined that these detainees either no longer posed a threat to U.S. security or no longer required detention by the United States. Transfer or release of detainees can be based on many factors, including law enforcement and intelligence, as well as whether the individual would pose a threat to the United States. At the time of their detention, these enemy combatants posed a threat to U.S. security. In general terms, the reasons detainees may be released are based on the nature of the continuing threat they may pose to U.S. security. During the course of the War on Terrorism, we expect that there will be other transfers or releases of detainees. Because of operational security considerations, no further details will be available.

Id. See also Jim Noteboom, et al., *A Principled Approach, Doing Justice in the War on Terrorism*, Nov. 12, 2002, *at* http://www.osbar.org/2practice/bulletin/02nov/principled.html (last visited Jan. 3, 2004):

> The United States has no interest in detaining anyone longer than necessary, and has released approximately 40 people from Guantanamo who were no longer a threat to the United States in the war on terror, had no further intelligence information to prevent future terrorist attacks and were not appropriate for criminal proceedings.

Id. See also U.S. Releases 26 Guantanamo Detainees, WASH. POST, Mar. 16, 2004, at A02 ("The Pentagon … has released a total of 119 prisoners from Guantanamo Bay, and 12 others have been transferred for continued detention elsewhere."); *see also Detainee Transfer Complete*, U.S. DEPARTMENT OF DEFENSE NEWS RELEASE, Apr. 2, 2004, *at* http://www.dod.mil/releases/2004/nr20040402-0505.html (last visited Jun. 17, 2004)(DoD released 15 detainees from 6 countries, leaving 595 detainees remaining).

IV. UNLAWFUL BELLIGERENCY AND MILITARY COMMISSIONS: REASONABLE AND JUST CONSEQUENCES

A. Background

Regardless of how well or how long the U.S. treats and safeguards the detainees, the U.S. is highly unlikely to grant POW status and all its benefits to either al-Qaeda or Taliban detainees. In the past, the U.S. has prosecuted some al-Qaeda and other captured international terrorists in U.S. Federal courts. Given that the unlawful combatant detainees in Guantanamo Bay were captured in an international armed conflict, however, the U.S. may also, in the interests of U.S. national security and the pursuit of justice, try them before U.S. military commissions for unlawful belligerency, crimes against humanity, and other violations of LOAC and international humanitarian law.

There can never be a lasting peace without justice. Just as important, opposing forces are not deterred when LOAC is not enforced and violators held accountable during conflict and post-conflict. Accordingly, customary international law imposes on every country the universal resolute duties of preventing, investigating, and prosecuting LOAC violations. An unlawful combatant captured in an international armed conflict is subject to be tried for unlawful belligerency and other crimes of war by the unlawful combatant's own country (presuming the unlawful combatant's country of origin is willing to do so and adequate jurisdiction exists). An unlawful combatant may also be tried by the country whose nationals were victimized by the unlawful combatant's crimes of war; the International Criminal Court (if specific jurisdictional criteria are met); an *ad hoc* international war crimes court (because, in the Taliban/al-Qaeda detainee cases, no existing international tribunal has any form of jurisdiction over them); or within the criminal justice system of the country where the unlawful belligerency occurred.

However, this is not to say that an unlawful combatant is entitled access to such domestic civilian courts, foreign civilian courts, or international tribunals. The laws of armed conflict also recognize pragmatically that military necessity, the realities of combat, and the complexities of the battlefield during armed conflict and post-conflict do not usually allow for such comprehensive judicial due process.[72]

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[72] *See* Noteboom, et al., *supra* note 71 (explaining that armed conflict creates numerous prosecutorial challenges in trying war crimes):

> The scene of the crime is often a battlefield in an ongoing war, and battlefields, by definition, are chaotic places. Prosecutors will have to deal with such things as preservation of battlefield crime scenes, battlefield chain of custody, death of witnesses in combat, large numbers of relatively anonymous detainees, protection of national security interests, trying

The laws of armed conflict instruct that a captured unlawful combatant is not necessarily a mere common criminal suspect who always would be entitled to the entire breadth of peacetime domestic criminal legal rights and all the associated trappings of civilian judicial due process. An unlawful combatant captured in an international armed conflict does not have a right to choose a civilian forum over a military one. In particular, a violation of LOAC, such as a combatant wearing civilian attire in combat with perfidious intent, does not generate a right to a civilian criminal trial. It disentitles it.

B. Unlawful Combatants: Civilian Criminal Courts vs. U.S. Military Commissions

Strict comparisons between civilian criminal judicial courts and military commissions are misplaced. Military commissions are not in any way a usurpation of civilian criminal judicial courts. The former, generally, is for trying particular captured enemy combatants in time of war or immediately following a war, the latter is for trying alleged civilian criminals in time of peace for acts not related to war. Civilian judicial courts try alleged common criminals. Military commissions try certain alleged war criminals.

U.S. military commissions are not a form of *legal action* in time of peace within the U.S. domestic civilian criminal justice system by the U.S. federal courts, the Judiciary branch. Rather, U.S. military commissions are a lawful form of *military action* in a time of war within the U.S. Department of Defense by the U.S. President as the Commander-in-Chief of the U.S. armed forces, the Executive branch. In time of war, the powers of the unitary Executive as Commander-in-Chief necessarily are at their absolute peak. Military commissions are established via Executive military orders, exist only

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> members of an ongoing terrorist organization, and risks to ongoing military operations.

Id. See also generally Douglas W. Kmiec, *Infinite Justice: Military, Not Federal Trials, for the Terrorists*, Oct. 11, 2001, *at* http://www.nationalreview.com/comment/comment-kmiec101101.shtml (last visited Jun. 17, 2004):

> Terrorists are neither soldiers (justifying widespread military action against a given nation state) nor garden-variety criminals, meriting federal indictment, they are war criminals…By definition, terrorism is aimed at indiscriminately killing civilian innocents and destroying civilian property. Such actions are not crimes against a single state, but humanity. Terrorism is not some social or cultural dysfunction capable of rehabilitation or rectification by ordinary law enforcement. *If terrorism is a military threat, and it is, then the terrorists are more appropriately punished by the system of military tribunals that has a long history in our nation.* (emphasis added).

Id.

in time of armed conflict or subsequent to armed conflict, and are limited in subject-matter jurisdiction to crimes of war and crimes related to war.

Civilian law enforcement organizations and civilian criminal courts are ill-equipped generally to investigate, assume jurisdiction over, and adjudicate criminal acts of war alleged to have occurred abroad by enemy combatants during an international armed conflict. In extraordinary circumstances involving national security, this is also true in regard to war crimes occurring on domestic soil. Indeed, a domestic civilian criminal justice system simply is not designed to render justice adequately to captured enemy soldiers accused of violations of LOAC that are alleged to have occurred in a theater of war many thousands of miles away. It follows that crimes committed by unlawful combatants within the context of an international armed conflict may remove such combatants from a domestic civilian criminal justice system and place them into a military forum authorized under LOAC.

The jurisdiction of the United States Uniform Code of Military Justice (UCMJ), however, is limited in regards to captured enemy forces. A court-martial convened under the UCMJ has jurisdiction to try a captured enemy combatant only if the combatant has been granted POW status.[73] Accordingly, the U.S. military as a capturing party may only try an unlawful combatant who lacks POW status in a military commission, military tribunal, or other proper military venue it has established. If subsequently convicted, an unlawful combatant may be punished appropriately for unlawful acts as the U.S. military forum directs.

Combatants who are accused of committing crimes during armed conflict are usually best and most fairly judged in military forums by their peers, fellow combatants who are knowledgeable about the profession of arms, martial honor, military culture and ethos, educated in the science and art of war, who have command or other military leadership experience, and who have military acumen and practical experience regarding LOAC, battlefield conditions, operations, and customs. Given such specialized expertise, combatant peers can sensibly and more adequately evaluate and weigh armed conflict-related evidence of war crimes, defenses, aggravation, mitigation, and extenuation.

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[73] UCMJ art. 2(a)(9)(2002). This is in compliance with LOAC. POWs may only be tried and sentenced in a criminal judicial forum that is substantially equivalent to the proceedings and rights provided to members of the armed forces of the detaining power. *See generally* GPW, *supra* note 2, at arts. 84, 87, 88, 95, 100, 102, 103, 106, & 108. Although a substantially equivalent forum usually would be a court-martial, a military commission that provides similar rights and proceedings to a court-martial could also try a POW. *See* UCMJ art. 21 (providing concurrent jurisdiction to military commissions authorized under the laws of war); *see also* R.C.M. 201(g)(2002)(affirming that the U.S. Code and Manual for Courts-Martial "do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by military commissions . . . ."). Al-Qaeda and Taliban unlawful combatant detainees do not have POW status, however, and may therefore only be tried by a U.S. military commission or other U.S. military tribunal.

Because of this, state practice and custom over time has been to convene military commissions to try unlawful combatants captured during armed conflict. For example, the U.S. convened military commissions in its Revolutionary War, the War of 1812, the Spanish-American War, and during its Civil War. Also, during WW II and immediately after its conclusion, the U.S. and its allies used military judicial forums (primarily military commissions) regularly to assume criminal jurisdiction over and try captured foreign-national combatants accused of violations of LOAC and other international laws.[74] The armed conflict ongoing against al-Qaeda is the first

[74] *See* Quirin, *supra* note 10:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. (n. 5). By the Articles of War … Congress has explicitly provided . . . that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

Id. at 27-28, n. 5, (citations omitted). *See also* Ambassador William H. Taft IV, *Military Commissions: Fair Trials and Justice*, Mar. 26, 2002, *at* http://usinfo.state.gov/topical/pol/terror/02032603.htm (last visited Jun. 17, 2004)("Nations as diverse as the Philippines, Australia, China, The Netherlands, France, Poland, Canada, Norway, and the United Kingdom have prosecuted war criminals in military commissions, to name just a few . . . European States made similar use of military commissions in 19th-century conflicts and even more extensively in the 20th century"); Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41 (detailing military commissions to try crimes of war from the early 17th century to post-WWII); Spencer J. Crona, et al., *Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U.L.REV. 349, 367-70 (1996)(detailing use of U.S. military commissions during the U.S. Civil War, and both during and immediately after WWII); *See* U.S. Secretary of Defense Donald H. Rumsfeld & Deputy Secretary of Defense Paul Wolfowitz, *Prepared Statement: Senate Armed Services Committee "Military Commissions,"* Dec. 12, 2001, *at* http://www.dod.mil/speeches/2001/s20011212-secdef.html (last visited Jun. 17, 2004) ("During and following World War II [in Germany, the US] prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions - of which 856 were convicted."); *see also* Ambassador Pierre-Richard Prosper, *The Campaign Against Terrorism: Military Commissions and the Pursuit of Justice*, Dec. 4, 2001, *at* http://www.state.gov/s/wci/rm/8584.htm (last visited Jun. 17, 2004):

> Military commissions have been utilized and legally accepted throughout our history to prosecute persons who violate the laws of war. They were used by General Winfield Scott during his operations in Mexico, in the Civil War by President Lincoln, and in 1942 by President Roosevelt. They are an internationally accepted practice with deep historical roots. The

conflict since WW II that has necessitated the convening of U.S. military commissions.

Military commissions arise out of LOAC, are subject to these laws, and in full compliance with them. Military commissions recognize the concerns specific to trying unlawful combatants captured in international armed conflict. Military commissions have universal jurisdiction as to crimes occurring within an international armed conflict. The jurisdiction of a military commission is based upon the alleged criminal act and is not necessarily dependent upon where the act occurred or whether the defendant's status is military or civilian. Moreover, as stated earlier, military commissions possess highly specialized competence and institutional expertise regarding military operations and are thus uniquely suited to trying crimes alleged to have occurred during a time of war.

As a result, military commissions are essential to the enforcement of the Rule of Law within the construct of LOAC. Such military forums are designed to fairly balance the inherent individual liberties of those unlawful combatants who are alleged to have violated LOAC with the captor's bona fide ongoing war efforts and national security interests. Military commissions are convened in time of armed conflict or post-conflict, rather than civilian judicial forums, in order to more capably and expediently dispense justice abroad to unlawful combatants whose alleged crimes have occurred in the context of hostilities.

C. U.S. Military Commissions: Appropriate Security Measures and Evidence Procedures

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> international community has utilized military commissions and tribunals to achieve justice, most notably at Nuremberg and in the Far East. The tribunals which tried most of the leading perpetrators of Nazi and Japanese war crimes were military tribunals. These tribunals were followed by thousands of Allied prosecutions of the lower-level perpetrators under the Control Council Law No. 10. By the end of 1958, the Western Allies had used military tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before military tribunals convened by U.S., Australian, British, Chinese, Dutch, and French forces for the atrocities committed during the war.

Id. See also Wedgwood, *supra* note 42, at 332:

> [M]ilitary commissions have been the historic and traditional venue for the trial of war crimes. The Nuremberg trials of the Nazi leadership were organized by the Allies in 1945 to educate the German public and the world, and were held in a mixed military commission. Military commissions tried war crimes throughout Europe and the Far East at the conclusion of the world war, and considered the cases of approximately twenty-five hundred defendants.

Id.

A military commission convened in the course of ongoing hostilities can provide better security and protection to the accused, judges, prosecutors, juries, witnesses, defense counsel, court-room observers and other participants[75] than could a parallel civilian criminal justice forum. Given that any courtroom in which an unlawful combatant is tried could itself become a terrorist target, additional security may be provided and the risk to the physical safety of court participants minimized when a U.S. military commission is convened on a U.S. military installation with sophisticated security measures, limited access, and one that is isolated from major civilian population centers. Additionally, a U.S. military commission would be better able to protect the identities of court participants in order to reduce the potential of post-trial Taliban and al-Qaeda retaliation.

Similarly, when necessary, a U.S. military commission can more adequately protect classified evidence involving on-going military operations and investigations which involve continuing threats to U.S. national security, and can better protect classified U.S. intelligence communications, sources, identities, capabilities, and gathering methods. U.S. military personnel are well trained in protecting such sensitive operational information from compromise. Additionally, U.S. military commission members and other commission participants would already have undergone extensive background security investigations and, as a result, possess the applicable information security clearances, to include Secret, Top Secret, and, if necessary, higher clearances.

The safeguarding of sensitive information received gratuitously from foreign intelligence agencies of allied countries (including intelligence agencies of mideastern allied countries), as well as the protection of the

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[75] John Mintz, *Tribunal Rules Aim To Shield Witnesses. Judges, Prosecutors May Be Anonymous*, WASH. POST, Mar. 22, 2002, at A 1; *see also* Prosper, *supra* note 74:

> Should we be in a position to prosecute Bin Laden, his top henchmen, and other members of al Qaida, [the] option [of trying them in military commissions] should be available to protect our civilian justice system against this organization of terror. We should all ask ourselves whether we want to bring into the domestic system dozens of persons who have proved they are willing to murder thousands of Americans at a time and die in the process. We all must think about the safety of the jurors, who may have to be sequestered from their families for up to a year or more while a complex trial unfolds. We all ought to remember the employees in the civilian courts, such as the bailiff, court clerk, and court reporter and ask ourselves whether this was the type of service they signed up for – to be potential victims of terror while justice was pursued. And we all must think also about the injured city of New York and the security implications that would be associated with a trial of the al Qaida organization.

Id.

identities of foreign intelligence sources, is indispensable if the U.S. wishes to rely on their continued cooperation. The protection of such information from enemy espionage and other enemy strategic intelligence collection efforts would be extremely difficult, if not impossible, in an "open and public" civilian criminal trial.

Safeguarding and preserving such highly sensitive information from compromise, and ensuring that unlawful combatants cannot abuse the criminal justice system evidence discovery process for illicit purposes, are imperatives to U.S. national security. This is because al-Qaeda followers still at large could possibly exploit such classified information to adapt their methods, protect themselves from capture, attack the U.S. and its allies, retaliate against court/commission participants, or carry out additional acts of terrorism against protected civilians.[76]

The rules of evidence in a U.S. military commission also address the practicality that standard common law evidence procedures and principles cannot be applied strictly to crimes that are alleged to have occurred in a zone of active combat. Accordingly, U.S. military commission rules of evidence, in limited circumstances, are crafted with more flexibility and less procedural formality. They are somewhat similar to the models of European civil law jurisdictions, and UN-sponsored war crimes tribunals such as the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Cambodia, as well as the recently established International Criminal Court.[77]

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[76] Bryan G. Whitman, *Military Commissions will provide detainees fair trial*, July 14, 2003, ATLANTA J. CONST, *at* http://www.ajc.com/opinion/content/opinion/0703/14equal.htm (last visited Jan. 5, 2004). *See also* Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 ("There is . . . the problem of publishing information to the world, and to al-Qaeda, through an open trial record. As Churchill said, your enemy shouldn't know how you have penetrated his operations."). It is also necessary to protect U.S. classified intelligence information and U.S. intelligence gathering capabilities and methods from foreign intelligence agencies, and any other individual or group who could use such classified information against the U.S. and its allies.

[77] Gordon Hook elaborates on the many parallels regarding evidence procedures among U.S. military commissions and United Nations international war crimes tribunals:

> Rule 89 of the Rules of Procedure and Evidence for the [International Criminal Tribunal for Former Yugoslavia] ICTY provides that the tribunal is "not bound by national rules of evidence" and "may admit any relevant evidence which it deems to have probative value" which might also include un-sworn statements. The rules of evidence for the International Criminal Tribunal for Rwanda (ICTR) are the same (Rules 89A and 89C). The [International Criminal Court] ICC's rules of evidence pursuant to Article 69(4) of the Rome Statute and Rule 63(2) of the ICC's Rules of Procedure and Evidence (ISS-ASP/1/3) are also similar to a certain extent. Article 69 of the Rome Statute provides that the ICC "may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice . . . to a fair trial or fair evaluation

Hence, in reaching an informed and just verdict, members of a U.S. military commission may admit and consider a broader range of probative evidence and give such evidence whatever weight is appropriate.[78]

> of the testimony of a witness . . . ." (the latter part of this rule is explained in Article 69(7)). Moreover, like the ICTY, the ICTR and the ICC, U.S. military commission rules do not prohibit commission members from "weighing evidence" and determining which evidence is more reliable than other evidence. It will be for counsel to make any submissions in that regard in order to persuade the commission in respect of any evidence admitted.

Hook, *supra* note 46, at 7.

[78] The underlying rationales for formal rules regarding the admissibility of evidence are not necessarily applicable to the gathering of evidence as intelligence in time of armed conflict. Major General (retired) Michael Nardotti, former U.S. Army Judge Advocate General, explains:

> [T]here is a great difference between gathering *evidence* under the normal restrictions of law enforcement and gathering *information* in the context of a military operation. Obviously we have restrictions in place, and exclusionary rules that we apply in the courts throughout the country, in order to discourage the improper conduct of law enforcement officials -- because that has occurred in the past. And the way to do it, the courts have adjudged, is not simply to punish those who have erred – in some cases it's not necessarily intentional -- but they concluded that the greatest disincentive to that kind of conduct would be simply to exclude the evidence. Now, when you go into a military operation, which is what we are engaged in now, as part of the operations, *if they're gathering information, not gathering evidence for criminal prosecution purposes but gathering evidence for intelligence to conduct further operations,* it would be illogical to suggest that those collecting that *information* should or would conform their conduct to the rules that would be acceptable for the admission of *evidence* in the Federal courts. Some flexibility has to be accorded, because there can be probative evidence gathered in that way. And there are methods to examine evidence and consider the methods with which it was obtained to determine whether it has the indicators of reliability and trustworthiness and whether there is some probative value. (emphasis added).

CATO Institute Policy Forum, *Terrorists, Military Tribunals, and the Constitution,* 17-18, Dec. 6, 2001, *at* http://www.cato.org/events/transcripts/011206et.pdf (last visited Jun. 19, 2004); *see also* Ruth Wedgwood, *supra* note 76 ("U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al-Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case."); *see also* Colonel Frederic L. Borch III, *A Rebuttal to "Military Commissions: Trying American Justice,"* ARMY LAW., Nov. 2003, at 10, 13 ("[W]hat happens in a war setting is markedly different from traditional peacetime law enforcement practices in the United States. Soldiers cannot be expected to complete a chain-of-custody document when under fire from an enemy combatant in a cave."); *see also* Toobin, *supra* note 59, at 39:

A U.S. military commission's latitude to admit and consider a more comprehensive gamut of both prosecutorial and defense evidence, that being evidence that has probative value to a reasonable person, is in practical acknowledgement of the character of war. The U.S. military commission "probative to a reasonable person" standard of evidence applies equally to both the prosecution and to the defense. The military commission evidence standard and rules pragmatically take into consideration that acquiring evidence in the battlefield environment is completely different from traditional peacetime law enforcement evidence gathering.

More specifically, the military commission evidence standard and rules recognize the diaspora, deaths, or incapacitation of material witnesses, the destruction or loss of evidence buried under rubble on the field of battle, the distinction that military intelligence is gathered primarily to aid the current war effort rather than for any conjectural subsequent use as prosecutorial evidence, the availability of military-affiliated witnesses who are still engaged in

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> Major John Smith, a Pentagon attorney, says. "We don't fight a war the same way we conduct a police investigation. [Military commissions] are geared toward accepting evidence from the battlefield. It's not more or less fair – it's just different. [Military commissions] recognize the unique battlefield requirements. You are not getting search warrants. There are no Miranda warnings.

Id. See also Noteboom, s*upra* note 71; *Testimony, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, United States Senate Committee on the Judiciary* (2001), *at* http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=84 (last visited Jun. 19, 2004)(testimony of Victoria Toensign, former Deputy Assistant Attorney General):

> A federal trial in the United States would pose a security threat to the judge, prosecutors and witnesses, not to mention the jurors and the city in which the trial would be held. We do not have sufficient law enforcement personnel to provide these trial participants round-the-clock armed protection, the type of security still in place for the federal judge who tried Sheik Rahman in 1993. A federal trial in the United States may preclude reliable evidence of guilt. When the evidence against a defendant is collected outside the United States (the usual situation for international terrorism investigations) serious problems arise for using it in a domestic trial. The American criminal justice system excludes evidence of guilt if law enforcement does not comply with certain procedures, a complicated system of rules not taught to the Rangers and Marines who could be locked in hand-to-hand combat with the putative defendants. For sure, the intricate procedures of the American criminal justice system are not taught to the anti-Taliban fighters who may capture prisoners. Nor to the foreign intelligence agencies and police forces who will also collect evidence. At just what point is a soldier required to reach into his flak jacket and pull out a Miranda rights card? There are numerous evidentiary and procedural requirements of federal trials that demonstrate the folly of anyone thinking such trials should be used in wartime for belligerents.

Id.

ongoing combat operations, the high operational tempo and speed of maneuver in modern warfare, the constant flux and changing of battle lines and positions, and the location of relevant evidence in distant battlefields halfway around the globe. The difficulty in evidence retrieval, maintenance of a proper chain-of-custody, the continued safeguarding during ongoing military operations, and the general chaos and mayhem associated with international armed conflict and the battlefield amplify the problem.

D. U.S. Military Commissions: Executive Due Process Protections

The U.S. military commission system established by the U.S. President in his Military Order of November 13, 2001, and implemented by the U.S. Secretary of Defense in his Military Commission Order No. 1, March 21, 2002, provides an unlawful combatant defendant extensive due process protection in compliance with U.S. domestic law and with customary international law. Unlawful combatant detainees tried by U.S. military commissions under such executive orders will receive more favorable judicial proceedings and legal protections than historically have been provided in military commissions of unlawful combatants during previous conflicts. The U.S. President exercised his discretion to foster impartial, full, and fair trials, providing unlawful combatants tried in U.S. military commissions more procedural protections than what is required by international law.[79]

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[79] *See* Protocol I, art. 75 (3), (4), (6) & (7), *supra* note 6 (detailing minimum standards of due process afforded unlawful combatants); *see* MILITARY ORDER, *supra* note 49; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM, Mar. 21, 2002; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 2: DESIGNATION OF DEPUTY SECRETARY OF DEFENSE AS APPOINTING AUTHORITY, Jun. 21, 2003 (*revoked by* DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 5: DESIGNATION OF APPOINTING AUTHORITY, Mar. 15, 2004, para. 2); DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 3: SPECIAL ADMINISTRATIVE MEASURES FOR CERTAIN COMMUNICATIONS SUBJECT TO MONITORING, Feb. 5, 2004; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 4: DESIGNATION OF DEPUTY APPOINTING AUTHORITY, Jan. 30, 2004 (*revoked by* DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 6: REVOCATION OF MILITARY COMMISSION ORDER NO. 4, Mar. 26, 2004); DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 5: DESIGNATION OF APPOINTING AUTHORITY, Mar. 15, 2004; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 6: REVOCATION OF MILITARY COMMISSION ORDER NO. 4, Mar. 26, 2004; *see also* DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 1: MILITARY COMMISSION INSTRUCTIONS, Apr. 30, 2003; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 2: CRIMES AND ELEMENTS FOR TRIAL BY MILITARY COMMISSION, Apr. 30, 2003; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 3: RESPONSIBILITIES OF CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT PROSECUTORS, Apr. 30, 2003; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 4: RESPONSIBILITIES OF CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL, Apr. 15, 2004; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 5: QUALIFICATION OF CIVILIAN DEFENSE COUNSEL, Apr. 15, 2004, AS AMENDED BY ANNEX B TO DEPARTMENT OF DEFENSE

The defendant in a U.S. military commission is presumed innocent and the conviction standard is proof beyond a reasonable doubt. Furthermore, a defendant receives full notice of all charges in the defendant's native language in advance of trial, adequate time to prepare for trial, a military defense

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MILITARY COMMISSION INSTRUCTION NO. 5, "QUALIFICATION OF CIVILIAN DEFENSE COUNSEL, AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL, Feb. 5, 2004; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 6: REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL, Apr. 15, 2004; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 7: SENTENCING, Apr. 30, 2003; DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 8: ADMINISTRATIVE PROCEDURES, Apr. 30, 2003; and, DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 9: REVIEW OF MILITARY COMMISSION PROCEEDINGS, Dec. 26, 2003 (U.S. military commission news releases, orders, and instructions are available at "*U.S. Department of Defense Military Commissions" at* http://www.defenselink.mil/news/commissions.html) (last viewed on Jun. 19, 2004); *see also* Ruth Wedgwood, *Legal Expert Says "Justice Will Be Done at Guantanamo"*, Jul. 10, 2003, *at* http://usinfo.state.gov/dhr/Archive/2003/Oct/09-557094.html (last viewed on Jun. 17, 2004); *see also* Robert C. O'Brien, *Trying Circumstances: The Military Commissions That Will Try the Cases of the Detainees Have Been Established with Appropriate due process Detainees*, LOS ANGELES LAW., Sep. 2002, at 48-56; *see also* Taft IV, *supra* note 74, at 2:

> The military commission regulations just issued are consistent with this tradition and ensure that the conduct of U.S. military commissions will provide the fundamental protections found in international law. Indeed, in a number of respects the procedures represent improvements on past practice. In preparing the procedures, the Pentagon not only listened carefully but also took into account the constructive advice and concerns raised by other governments and the non-governmental community. The procedures offer essential guarantees of independence and impartiality and afford the accused the protections and means of defense recognized by international law. They provide, in particular, protections consistent with those set out in the 1949 Geneva Conventions, the customary principles found in Article 75 (Fundamental Guarantees) of Additional Protocol I to the Geneva Conventions, and the International Covenant on Civil and Political Rights. Even though many of these specific provisions may not be legally required under international law, the military commission procedures nevertheless comport with all of them.

Id. Of specific note is that, in cases involving charged acts of unlawful belligerency, military commission instructions require the prosecution to affirmatively prove beyond a reasonable doubt that the defendant lacked combatant immunity:

> *With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense.* Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the case of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. (emphasis added).

INSTRUCTION NO. 2, *supra*, note 79, at 2.

attorney at no cost, the ability to be represented by a civilian defense attorney at the defendant's expense, a public trial subject to security requirements (open to the media to the maximum extent practicable), the ability to be present throughout the entire trial subject to security concerns, interpreters, the ability to review all the evidence the prosecution will use during the trial subject to security concerns, the protection that the prosecution is required to provide the defense all exculpatory evidence, the protection against self-incrimination, the protection that the military commission may not draw an adverse inference from the defendant's silence, the protection that nothing said by a defendant to defense counsel, or anything derived from such statements, may be used against the defendant at trial; the ability to obtain witnesses, documents, and other reasonable resources for use in defense, the ability to call defense witnesses and cross-examine prosecution witnesses, the ability to enter into a plea agreement in order to limit the severity of punishment, and many additional procedural protections.[80]

A special independent review panel (composed of members serving fixed nonrenewable two-year terms) automatically will review every

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[80] *Id. See also generally* John Mintz, *Both Sides Say Tribunals Will Be Fair Trials*, WASH. POST, May 23, 2003, at A 3 ("The newly appointed chief prosecutor and head defense lawyer who will handle the trials of alleged terrorists before the planned military tribunals said they expect no-holds-barred legal combat between the two sides, and that fair trials will be the result."); John Mintz, *6 Could Be Facing Military Tribunals. U.S. Says Detainees Tied To Al Qaeda*, WASH. POST, July 4, 2003, at A 1 (*quoting* Ruth Wedgwood, a John Hopkins scholar of international law, "Pentagon lawyers took great care in drawing up a process that is fair and allows for zealous courtroom combat."); *see also* John Mintz, *Extended Detention In Cuba Mulled, Officials Indicate Guantanamo Bay Could Hold Tribunals, Carry Out Sentences*, WASH. POST, Feb. 13, 2002, at A 16:

> Insofar as JAG officers are involved, they'll bring a JAG sensibility to the proceedings, and they are very careful people," said Ruth Wedgwood, an expert on international law at Yale University who supports the Bush tribunal plan. "They're proud of having brought military justice to the point that it provides up to and sometimes beyond" the protections afforded in civil justice.

Id. See also U.S. and Australia Announce Agreements on Guantanamo Detainees, Nov. 25, 2003, *at* http://www.defenselink.mil/releases/2003/nr20031125-0702.htm (last visited Jan. 5, 2004):

> The United States and Australian governments announced today that they agree the military commission process provides for a full and fair trial for any charged Australian detainees held at Guantanamo Bay Naval Station. Following discussions between the two governments concerning the military commission process, and specifics of the Australian detainees' cases, the U.S. government provided significant assurances, clarifications and modifications that benefited the military commission process.

Id.

conviction and sentence for material errors of law (to include sufficiency of the evidence). Review panel decisions will be in writing and publicly released (subject to security concerns). A review panel decision to return the case to the Secretary of Defense or his delegate, a civilian Appointing Authority, for dismissal of charges is binding. If a U.S. military commission renders a not guilty verdict, the protection against double jeopardy does not allow the not guilty verdict to be overturned. A conviction with its corresponding sentence is only final if approved by the U.S. President or, if the U.S. President so delegates, the U.S. Secretary of Defense.[81] Upon receipt from the Appointing Authority, the U.S. President, or, if the U.S. President so delegates, the U.S. Secretary of Defense, may grant clemency and "disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense; or . . . mitigate, commute, defer, or suspend the sentence imposed or any portion thereof."[82]

The detainees interned at Guantanamo Bay, Cuba are not protected noncombatant civilians being held without charge. They are unlawful combatants, captured in time of armed conflict and interned during an ongoing armed conflict. Should the U.S. try a detainee by military commission for

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[81] *Id.* U.S. Secretary of Defense Donald H. Rumsfeld has appointed four distinguished senior civilian jurists to serve on the civilian independent review panel that will hear appeals of decisions made by military commissions. Griffin B. Bell is a former federal appellate judge and was the U.S. Attorney General during the Carter administration; William T. Coleman, Jr., is a civil rights lawyer, and was a U.S. Supreme Court law clerk, the U.S. Secretary of Transportation (which oversees the U.S. Coast Guard) during the Ford administration, as well as an advisor/consultant to six U.S. presidents; Frank J. Williams is the sitting chief justice of the Rhode Island Supreme Court. Additionally, Justice Williams is a decorated U.S. veteran, having served as an U.S. Army Infantry Captain during the Vietnam War; and, Edward G. Biester, Jr., a former Pennsylvania Attorney General and former member of the U.S. Congress, is a senior judge in a Pennsylvania Court of Common Pleas. *See e.g.*, *Tribunals' Review Panel Picked, Former Attorney General Bell Among 4 Named*,WASH. POST, Dec. 31, 2003, at A 06. *See also Appointing Authority Decision Made*, Dec. 30, 2003, *at* http://www.dod.mil/releases/2003/nr20031230-0820.html:

> Secretary of Defense Donald H. [delegated] the position of appointing authority for military commissions to John D. Altenburg, Jr. The appointing authority is responsible for overseeing many aspects of the military commission process, including approving charges against individuals the president has determined are subject to the Military Order of Nov. 13, 2001. Among other things, the appointing authority is also responsible for appointing military commission members, approving plea agreements and supervising the Office of the Appointing Authority. Altenburg will serve in this capacity as a civilian. Altenburg retired from the Army as a major general in 2002. His last military assignment was assistant judge advocate general for the Department of the Army.

Id. See also generally DEPARTMENT OF DEFENSE DIRECTIVE 5105.70: APPOINTING AUTHORITY FOR MILITARY COMMISSIONS, Feb. 10, 2004; *see* ORDER NO. 5, *supra*, note 79.

[82] INSTRUCTION NO. 9, *supra*, note 79, at 5.

crimes of war or crimes related to war, the detainee will be guaranteed full and fair due process in complete compliance with U.S. law. Such due process will meet or exceed international standards of justice. The military commission process, although different from a domestic civilian criminal court, will be fair. To uphold the international Rule of Law, the U.S. must remain stalwart in holding responsible those who would willfully violate international humanitarian law and the international laws of armed conflict. Convening U.S. military commissions in such cases is lawful, and is a pragmatic and just means to the furtherance of this very necessary end.

V. CONCLUSION

U.S. International Obligations & Responsibilities and the International Rule of Law

The U.S. is in compliance with its international obligations and responsibilities. Al-Qaeda and Taliban combatants willfully engaged in unlawful belligerency *en masse* in violation of LOAC. Taliban combatants *en masse* willfully failed to meet the four criteria of lawful belligerency. Al-Qaeda combatants are stateless *hostes humani generis*, and also *en masse* willfully failed to meet the four criteria. As a matter of international law, both the Taliban and al-Qaeda are unlawful combatants. The U.S. has no requirement under international law to bestow POW status to such enemy al-Qaeda and Taliban unlawful combatants upon capture. No requirement exists to hold individual Geneva Convention art. 5 POW status tribunals to reaffirm gratuitously the unlawful combatant status of either the Taliban or al-Qaeda, nor, upon capture, their lack of POW status.

The U.S. is treating humanely, beyond what is required by international standards, all al-Qaeda and Taliban unlawful combatant detainees interned at Guantanamo Bay. In accordance with customary international law, the U.S. is authorized to continue to hold these detainees until the end of armed conflict. At present, however, Taliban remnants and al-Qaeda remain a viable military threat against the national security interests of the U.S. and its allies. Unfortunately, the international armed conflict against al-Qaeda is highly likely to be long and sustained. The U.S. and its allies, through their militaries and other instruments of national power, in the exercise of their inherent right of collective self-defense, may continue to use armed force until the threat posed by al-Qaeda and its affiliates no longer exists.

Al-Qaeda should not be underestimated in the wake of continuing international progress in the Global War against Terrorism. Considering al-Qaeda's declared hegemonic theocratic-political ideology, and the proven terrorist capabilities it continues to possess, al-Qaeda remains a clear and present danger to the national security interests of the U.S. and its allies. Nevertheless, the U.S. has no desire to, and will not, hold any unlawful

combatant indefinitely. When individual detainees no longer pose a significant security threat to the international community, no longer possess any intelligence value, and are not facing criminal charges, the U.S. will release them. However, an unlawful combatant detainee accused of war crimes may be tried before a U.S. military commission.[83] Beginning in November 2001, the U.S. has spent over two and one half years updating its military commission procedures, and developing a military commission system that is just, in complete compliance with contemporary U.S. and international law, and one that is consistent with U.S. national security interests and its ongoing war efforts against al-Qaeda. If convicted in such a U.S. military commission, the detainee may be further confined to serve the term of imprisonment adjudged by the military commission.

However, adherence to the international Rule of Law is at the crux of this entire matter. As an influential member in the international community and full supporter of the international Rule of Law, U.S. actions in regards to al-Qaeda and Taliban detainees could not be anything less than what is noted above. The U.S. and every nation in the world have the cardinal international duty, indeed the moral imperative, to encourage compliance with, and to discourage violations of international humanitarian law and LOAC regardless of domestic or international political objections and criticisms, ensuing controversies, or the difficulties of doing so. Casually affording Geneva Convention III POW status with its greater privileges and attendant implicit legitimacy to either al-Qaeda or the Taliban would turn a blind eye to this foundational duty.[84] To grant POW status to al-Qaeda or Taliban detainees

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[83] In mid-2003, U.S. President Bush determined six Guantanamo detainees were subject to his Nov. 13, 2001 Military Commissions order. *See* DoD News Release: President Determines Enemy Combatants Subject to his Military Order (Jul. 3, 2003) at 1, *at* http://www.defenselink.mil/releases/2003/nr20030703-0173.html (last visited Jun. 17, 2004). On Feb. 24, 2004, the U.S. formally charged two of the six detainees. The two al-Qaeda detainees, Ibrahim Ahmed Mahmoud al Qosi of Sudan and Ali Hamza Ahmed Sulayman al Bahlul of Yemen, were charged to stand trial by U.S. Military Commissions for allegedly committing "a range of offenses including terrorism, attacking civilians, murder and destruction of property." *See* John Mintz, *U.S. Charges 2 as Bin Laden Aides*, WASH. POST, Feb. 25, 2004, at A 01. Additionally, David Hicks, an Australian detainee captured in Afghanistan and who had previously trained with al-Qaeda, is also one of the six named eligible for trial by military commission. *See Australian May Face U.S. Tribunal*, N.Y. Times, Jun. 2, 2004, *at* http://www.nytimes.com/2004/06/02/politics/02gitmo.html (last viewed on Jun. 3, 2004). The U.S. charged Mr. Hicks on Jun. 10, 2004 "with conspiracy to commit war crimes, attempted murder by an unprivileged belligerent, and aiding the enemy. Allied forces captured Hicks in Afghanistan as he fought with al Qaeda and the Taliban regime against U.S. forces who invaded to end the terror group's grip on the country." Rowen Scarborough, *U.S. charges Guantanamo Bay detainee*, WASH. TIMES, *at* http://washingtontimes.com/national/20040610-112608-3841r.htm (last viewed Jun. 15, 2004). All three charged detainees have been assigned military defense counsel and, unless delays are requested by defense counsel, the military commissions are expected to convene in the Aug. to Nov. 2004 timeframe.

[84] *See* Apostolou, et al., *supra* note 14:

would be to acknowledge that they are privileged combatants, and convey that they and these groups have a right to associate together and wage war in the manner that they do.

It would be incorrect, irresponsible, and unwise for the U.S. to afford POW status to captured members of al-Qaeda and the Taliban as they are not entitled to, and are undeserving of this status.[85] International terrorists, and civilian-dressed combatants of a collapsed state ruled by a *de facto* government that willfully provides the terrorists safe haven, have never before been granted POW status upon capture in an international armed conflict. For a permanent member of the United Nations Security Council, who also is the world's premier military superpower and its leading global economic power, to do so would set a highly injudicious international legal precedent inconsistent with the Rule of Law and the long-term interests of the international community. It would recklessly foster future abuses in armed conflict by undermining directly long-standing rules of war crafted carefully to protect noncombatants

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> It is precisely because the U.S. takes the Geneva Convention seriously, with both its protections for combatants and the line it draws between combatants and civilians, the U.S. is being so careful in the use of the POW label . . . restricting the Geneva Convention's protections to those who obey its rules is the only mechanism that can make the Geneva Convention enforceable.

Id.

[85] *See* Butler, *supra* note 42 at 3:

> [N]either al Qaeda nor the Taliban were state parties to the Geneva Conventions. Second of all, they did not fight in uniform or subject to a clear chain of command. But most importantly, the Geneva Conventions were designed in large part to protect civilian populations, and al Qaeda, the Taliban and its affiliates, as you can see by that litany of events, deliberately violates those rules. Not only do they attack civilian populations, but they blend in with civilian populations, thereby increasing the possibility of civilian casualties. If the Geneva Conventions are to be enforceable law, there need to be incentives built in. And what kind of incentives would we send if we allow the full treatment under the Geneva Conventions to be extended to enemy combatants who deliberately and purposely violate them?

Id. See also Apostolou, et al., *supra* note 14:

> What is clear is that to give the detainees a status they do not deserve, and protections that would both give aid and comfort to terrorists running free, would not only set a dangerous precedent. It would in the long run demolish the Geneva Conventions and undermine the safety of American soldiers and civilians alike.

Id.

by deterring combatants in armed conflicts from pretending to be protected civilians and hiding among them.

All nations and their armed forces are subject to LOAC. Combatants in armed conflict who blatantly disregard these laws are outside of them and do not, upon capture at the discretion of the capturing party, receive several of their benefits. LOAC is only effective, and civilians protected in armed conflict, when the parties to a conflict comport their belligerency to such laws, and enforce consistently strict compliance with all the provisions of such laws.

Parties to a conflict are significantly more likely to observe such laws if they have both affirmative incentives for complying with them and if appreciable negative consequences follow when such laws are disregarded or violated. Designating captured members of al-Qaeda or the Taliban as POWs would consequently place protected civilians and other noncombatants into much greater peril during future armed conflicts, because unlawful combatants would no longer experience sufficient negative consequences from endangering protected noncombatants by egregiously violating international law and customs. This eventuality is not attractive.

A *carte blanche* designation of Geneva Convention III POW status by the U.S. to Taliban and al-Qaeda unlawful combatants certainly would be politically expedient internationally. By letting captured Taliban and al-Qaeda reap and enjoy every benefit of POW status, the U.S. would mollify temporarily some U.S. detractors. But, such U.S. action would be wrong. Just as protected noncombatant civilians have borne the consequences of the Taliban and al-Qaeda's previous perfidies and patent violations of international law, protected noncombatant civilians would also then be relegated to shoulder and suffer all the concomitant burdens and costs of the Taliban and al-Qaeda being accorded POW status. Shortsighted action to placate U.S. critics and dissentients momentarily would lastingly reward, rather than penalize, all unlawful combatants who contravene international humanitarian law and LOAC intentionally, continually, and abhorrently. LOAC should never be utilized, construed, or developed in such a way that would benefit terrorists and rogue states that provide aegis to terrorists, or in such a way that would otherwise serve the ends of terrorism.

The negative prices that combatants who engage in armed conflict without meeting the requirements of lawful belligerency pay, that *hostes humani generis* pay, and that rogue states pay for unlawfully hosting or otherwise willfully supporting *hostes humani generis,* must remain high. Endorsing captured al-Qaeda, the Taliban, or other agents of global terror as POWs would be inapposite, as it may be viewed as symbolically elevating their international status. It would be tantamount to bestowing tacit international recognition and credibility to their reprehensible objectives, appalling atrocities, and insidious terrorist tactics.[86]

[86] *See* Prosper, *supra* note 19:

The U.S. does not take lightly its international role, influence, obligations, and responsibilities. Classifying al-Qaeda or the Taliban captured enemy combatants as POWs under Geneva Convention III would have broad, and most undesirable ramifications. It would erode significantly a combatant's considerable, at times primary, incentive to comply with LOAC and thereby would increase substantially and unnecessarily the risks to civilians and other protected noncombatants in future armed conflicts.[87] Ultimately, woefully undercutting customary LOAC and international humanitarian law by granting POW status arbitrarily to unworthy, unlawful combatants would simply lead to an added loss of international respect for, and future observance of, long-established international armed conflict norms, customs, and laws. This would be unacceptable.

> [There is an] important question of whether terrorists have rights. They do -- to be treated humanely. However, they do not deserve nor should they be given heightened status or benefits that are reserved for lawful belligerents. We should not seek to legitimize their conduct or organization by conferring upon them unearned status. Bestowing Prisoner of War status on detainees who do not meet the clear requirements of the law would undermine the rule of law by diminishing norms found in the plain language of the Geneva Convention itself. It would confer the status and privileges of a law-abiding soldier on those who purposefully target women and children. Unlawful combatants by their nature forfeit special benefits and privileges accorded by the Geneva Convention on the Treatment of Prisoners of War.

Id.

[87] *See* David B. Rivkin, Jr., et al., *The Laws of War*, WALL STREET J., Mar. 4, 2003, at A 14:

> [I]n the 21st century, unlawful combatants relentlessly seek access to weapons of mass destruction, and pose a life-and-death threat to democracies – the need to delegitimize them is particularly compelling. Thus, not according them a full set of POW privileges does not reflect a compassion deficit on our part. Rather, it is an important symbolic act which underscores their status as enemies of humanity. The failure by many of our allies and international humanitarian groups to appreciate this is particularly ironic. Blurring the distinction between lawful and unlawful belligerents, which lies at the very core of modern laws of war, is likely to erode this entire hard-won set of normative principles, disadvantaging both the interests of law-abiding states and making warfare even more destructive and barbarous.

Id.

THE USE OF CONVENTIONAL INTERNATIONAL LAW IN COMBATING TERRORISM: A MAGINOT LINE FOR MODERN CIVILIZATION EMPLOYING THE PRINCIPLES OF ANTICIPATORY SELF-DEFENSE & PREEMPTION

MAJOR JOSHUA E. KASTENBERG [1]

We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwa.
Osama bin Laden[2]

On 11 September 2001, 2,938 persons were killed in New York City and Washington, D.C., after members of an Islamic-based terrorist organization flew hijacked commercial airplanes into the New York World Trade Center towers and the Pentagon building.[3] Another forty-four persons were killed the same day in the Pennsylvania countryside after airplane passengers of United Airlines Flight 93 sought to abort a related terrorist hijacking whose apparent destination was Washington, D.C.[4] On 13 October 2002, over 200 people were killed in a Bali nightclub as a result of the terrorist actions.[5] In the Philippines, violent terrorist attacks against civilians have become so frequent as to seem routine.[6] And, in Kenya and Tanzania, civilians

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[2] John Miller, *Interview with Osama bin Laden*, at http://www.ABC.com (visited June 10, 1998).

[3] The attacks killed 189 at the Pentagon and 2,749 at the World Trade Center. USA TODAY, May 4, 2004, at 7D. *See generally* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 238-40 (2002). *See also, e.g.*, Ruth Wedgewood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 329 (2002).

[4] *See* http://special.scmp.com (last visited July 1, 2004).

[5] *See, e.g.* Headline, *Bali Bomb Suspect Admits Militant Ties*, http://www.CNN.com (last visited Nov. 8, 2002).

[6] There are two principal Islamic terrorist groups operating in the Philippines, namely the "Abu Sayyaf" ("Abu Sayyef" alt. spelling), and the Moro Islamic Liberation Front (MILF). The Abu Sayyaf is examined in this article because of its members' active support of terrorist

with no apparent relationship to U. S. foreign policy were killed by persons who specifically conducted attacks with the intentions of altering U. S. foreign policy and killing "non-believers."[7]

These instances of terrorism directed primarily against civilians have renewed popular, legal and other scholarly debate regarding the parameters of use of force in both the international and domestic contexts. For instance, in response to the 11 September 2001 attack on the World Trade Center, the United Nations (U.N.) Security Council adopted Resolution 1368, which recognizes the inherent right of individual or collective self-defense in accordance with the U.N. Charter.[8] Additionally, President George W. Bush has advanced a doctrine of enemy status and state responsibility.[9] This doctrine, apparently loosely based on a traditional law concept of "aiding and abetting", is summarized in President Bush's statement that the United States would consider as enemies "terrorists and those who harbor them."[10]

In addition to renewed debate on the limits of use of force generally, there has emerged one regarding use of force in the international context, focusing on both the notions preemption and anticipatory self-defense. In the face of mounting international religious-based terrorism and evolving plans to counter this threat, to a pressing question that has emerged on the world stage is whether anticipatory self-defense and preemption are legitimate international law concepts.

This article analyzes the existing concepts of the right of self-defense and preemption under international law. Part I quickly reviews both the evolution of warfare and the state of religious-based terrorism. The former presents a useful starting point for understanding customary international law

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activity, their commitment to literalist Quaranic scripture, and their affiliation with al Qaeda. *See, e.g.*, Headline: *Philippines Rebels Raid Towns, Two Civilians* Killed, REUTERS, April 24, 2003; *see also* Headline: *Bombs Kill up to 15 at Wharf in the South Philippines*, REUTERS, April 2, 2003. For commentary, *see, e.g.*,Charles V. Pena, *Blowback: The Unintended Consequences of Military Tribunals*, 16NOTRA DAME J. L. ETHICS & PUB POL'Y 119, 129 (2002), *citing* Lally Weymouth, *We Will Do The Fighting*, WASH. POST, Feb. 3, 2002, at B1.

[7] *See, e.g.*, S.C. Res. 1189, U.N. SCOR, 52d Sess., 3915th mtg. at 110, U.N. Doc. S/RES/1189 (2001). Suicide bombings of the U.S. embassies in Tanzania and Kenya killed more than 200 people, including twelve U.S. citizens, and were allegedly perpetrated by the al Qaeda terrorist network. In response, in 20 August 1998, the United States launched seventy-nine Tomahawk missiles against terrorist training camps in Afghanistan and a Sudanese pharmaceutical plant that the United States identified as a "chemical weapons facility" associated with Osama bin Laden. *See* Murphy, *supra* note 3, at 161. For an insightful statement on the goal of killing "non-believers," *see* James V. Schall, S.J., *On the Justice and Prudence of this War*, 51 CATH. U. L. REV. 1, 11-12 (2001).

[8] S/RES/1368, 12 Sept 2001.

[9] *See* The White House, National Security Strategy, Sept 17, 2002, available at http://www.whitehouse.gov/nsc/nssall.html.

[10] *See* Murphy, *supra* note 3, at 244, *citing* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

and its subset, generally referred to as "the laws and customs of war." Customary international law provides context to the application and shortcomings of contemporary codified international law, and, therefore, serves an important heuristic function in understanding the international legal limits on combating this increasingly frequent form of terrorism.

It is important to note that this article does not advocate a model of warfare that is either anti-Islamic or that would employ counter-terrorist measures that do not comply with international law. Indeed, it condemns any model that would do either.[11] There is no dispute, however, that members of religious-oriented terrorist groups, typically Islamic fundamentalist organizations, appear, in their rising prominence, to be ever more willing to rely on terrorist tactics, and to view their movement as a new religious war.[12] Because no international law doctrine exists in a vacuum, this section is important in understanding the limits to which the international nations may respond to the new terrorist threats.

In Part II, contemporary instruments of international law are examined. In particular, both Article 51 of the U.N. Charter[13] and the International Court of Justice (ICJ) decision, *Nicaragua v. United States*,[14] are reviewed for their respective definitions of the right to self-defense. The limitations expressed therein are of particular importance because over time, technical innovations and other societal shifts have changed how war is fought, in a manner beyond what was envisioned when the U.N. Charter was adopted. This is particularly true with respect to unconventional phenomena such as the type of terrorism analyzed in this article. Article 51 of the United Nations (UN) Charter provides state signatories an "inherent" right of self-defense in response to an "armed attack."[15] It allows member states a military-based self-defense in

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[11] Islamic terrorist groups are not, of course, the only religious-oriented terrorist organizations. For instance, the U.S. State Department has listed the Kach & Kahane Chai as an illegal terror organization. This Jewish group advances the doctrine of returning Israel to "a biblical state," by any means. Likewise, the State Department placed on this list the Ulster Volunteer Force (UVF), a Protestant group that professes to view Northern Ireland as an exclusive Protestant enclave. However, unlike the Islamic terrorist groups discussed in this article, neither the Kach & Kahane Chai nor the UVH seeks to create an authoritarian religious world.

[12] *See* Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 UCLA J. ISLAMIC & NEAR E.L. 33, 35 (2003); *see also, e.g.* Murphy, *supra* note 3, at 240, *quoting*, UK Press Release, 10 Downing Street Newsroom, *Responsibility for the Terrorist Atrocities in the United States*, ¶¶ 21-22 (Oct. 4, 2001). *Id.*

[13] U.N. CHARTER art. 51.

[14] Nicaragua v. United States, 1986 I.C.J. 14 (27 June).

[15] Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self defense 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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

either their respective individual or collective capacities.[16] Also, although not covered in detail, Article 2(4) of the U.N. Charter places limits on a state's ability to threaten the use of force against another state.[17]

While some prominent scholars of international law contend that Article 51, like all articles in the U.N. Charter, is to be read narrowly,[18] it appears that the current U.S. administration has departed from that view and has opted to adopt the doctrines of both anticipatory self-defense and preemption. For instance, it may be argued that the post-11 September invasion into Afghanistan constituted an act of anticipatory self-defense, while the decision to wage war in Iraq was more a matter of preemption. Examining the status or viability of these two doctrines under international law is the key focus of this article, as well as understanding the distinctions and uses of each within the context of grappling with international religious-based terrorism, the newest threat to international peace and security.

Part III will tie the two prior sections together by analyzing the potential use of preemption in the current context of dealing with terrorism. Part III also provides analyzes of terrorism as an "international crime," and state assistance to terrorist organizations. This section then assesses the legitimacy of the separate doctrines of anticipatory self-defense and preemption. In the end, this article concludes that both anticipatory self-defense and preemption are credible theories in limited circumstances, including those in which an organization employs a visible strategy of terror.[19] Where such strategy is employed, the group and its supporters may be permissibly subject to a response employing military force.

INTRODUCTION

A. The Evolution of Interstate Warfare, the Doctrine of First Attack, and the Emergence of Modern Terrorism

The evolution of warfare and the development of customary international law (and its subset, the law of war) are tightly interwoven. It is

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> Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

[16] *Id.*

[17] Article 2(4) reads:

> All members shall refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

U.N. CHARTER art. 2(4).

[18] *See, e.g.*, Eric Pedersen, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals For Multilateral Cooperation*, 8 TOLEDO L. REV. 209, 213 (1976).

[19] As evidenced by, *inter alia*, group membership, historical pattern of violence and stated goals.

not possible to understand international principles applicable to warfare without their being placed into some historical context. Consistent with this general observation, it is difficult to review and address the vitality of the concepts of self-defense, anticipatory self-defense, and preemption without having an understanding of the evolution of, and interrelationship between, warfare and customary international law. Because these concepts were first developed during a period that pre-dates the rise of modern technology, and during a period in which it was reasonably expected that large scale international violence would be restricted to conventional clashes between large nation states, it is challenging to understand the application of these concepts to modern forms of terrorism. Our discussion, therefore, next examines in some detail conventional customary international law and interstate warfare norms within the context of modern religious-based terrorism.

B. Conventional War Between States and the Interwoven Development of Customary International Law

Warfare has a long history that pre-dates recorded civilization. The fact that civilian populations are victims during warfare is nothing new to history. Indeed, ancient history is replete with instances of cities being sacked and peoples decimated as a norm.[20] For example, the Old Testament states conditions under which enemy cities may be destroyed and people enslaved.[21] And some of the earliest recorded instances of fighting show whole populations were considered as combatants.[22] This ancient view of warfare,

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[20] *See, e.g.*, DOYNE DAWSON, THE ORIGINS OF WESTERN WARFARE 1 (1996).

[21] For example, an ancient norm of war can be found in the Old Testament. The war code of DEUTERONOMY states:

> When you draw near a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it to your hand you shall put all its males to the sword, but the women, and the little ones, and the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the Lord your God has given you. Thus you shall do to all the cities which are very far from you . . . . you shall save nothing alive that breathes, but you shall utterly destroy them, the Hittites and the Amorites, the Canaanites and the Perizittes, the Hivites and the Jebusites, as the Lord your God has commanded; that they may not teach you to do according to all their abominable practices which they have done in the services of their gods, and so to sin against the Lord your God.

DEUTERONOMY 20:10.

[22] *See, e.g.*, BRIAN CAVEN, THE PUNIC WARS 273-295 (1980). After Carthage's second revival following the defeat of Hannibal, the Roman Republic's government concluded that the necessity of Carthage's destruction far outweighed any economic gain that Rome could accrue by a continued trade relationship. *Id. See also* DAWSON, *supra* note 20, at 1.

which was at one time widely accepted by sovereigns and scholars alike, in part contributed to the destruction of whole societies.[23] For instance, in the *Iliad*, Homer wrote that the sack of Troy included the slaughter of males of all ages.[24] It may also be noted that in the First Crusade (1099-1103), the Christian Crusaders sacked Jerusalem, along with several other cities, and slaughtered the inhabitants regardless of age, gender, or religion.[25]

While this article focuses on modern, international legal concepts of use of force, it is important to note that much of contemporary international laws, particularly "the law and customs of war," was designed to prevent the type of slaughter witnessed through much of history. Likewise, it is evident, as discussed below, that many modern religious-based terrorists continue to disregard any recognition of these legal concepts.

During the last 400 years, the concept of legitimate self-defense and other accepted practices of warfare have continued to slowly evolve. These norms have developed against the backdrop of the limitations of the technology of the day. Customarily, warfare occurred with ample warning, not only to the participants, but also to states located near the fighting.[26]

For instance, the Thirty Years War (1618-1648) began when ambassadors from the Holy Roman Emperor, Maximilian, notified the leaders of Bohemia that restrictions were being placed on their practice of the Protestant faith.[27] With this notification came a warning that should the restrictions be ignored, armed intervention would result.[28] The Bohemian leaders responded, in what has become known as the "Defenestration of Prague," by throwing the ambassadors out of a second story window.[29] Austrian Military forces allied to Maximilian then responded by invading

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[23] *See, e.g.*, THE BOOK OF WAR: 25 CENTURIES OF GREAT WAR WRITING xix (John Keegan ed., 1999).

[24] *See, e.g.*, Homer, THE ILLIAD (Alston H. Chase *et al.* eds., 1950).

[25] *See, e.g.*, MORRIS BISHOP, THE MIDDLE AGES 96-99 (1968), *citing* the Twelfth Century chronicler Raymond of Agiles:

> Some of our men cut off the heads of our enemies; others shot them with arrows, so that they fell from the towers; others tortured them longer by casting them into flames. Pikes of heads, hands, and feet were to be seen in the streets of the city. It was necessary to pick one's way over the bodies of men and horses. But these were small matters compared to what happened at the Temple of Solomon. If I tell the truth, it will exceed your powers of belief… men rode in blood… Indeed it was a just and splendid judgment of God, that this place should be filled with the blood of unbelievers who had suffered so long under their blasphemies.

Id.

[26] *See, e.g.*, J.V. POLISENSKY, THE THIRTY YEARS WAR 1 (Robert Evans trans. 1971); *see also* C. V. WEDGWOOD, THE THIRTY YEARS WAR, 77-80 (2d ed. 1949).

[27] Wedgewood, *supra* note 26, at 78.

[28] *Id.* at 79.

[29] *Id.*

Bohemia, eventually leading to a conflict that directly included all major European powers except England.[30]

The Thirty Years War marked a turning point in international warfare because of the size and scope of the conflict, as well as the impact of that war's conclusion on the borders of Europe.[31] It also marked a turning point in international law scholarship relating to the laws and customs of war. Notably, during this period of conflict, Hugo Grotius (1618-1648), wrote *De Jure Belli Ac Pacis Libiri Tres*, which has had a large impact on international law scholarship and what would be viewed as permissible acts of warfare.[32] Grotius observed that an important distinction should be made between combatants and non-combatants to a conflict, with combatants subject to the rigors of warfare, and non-combatants spared inasmuch as possible.[33] Additionally, Grotius believed that any resort to armed force should occur only for legitimate purposes and after diplomacy failed.[34] Other writers also developed notions to make warfare more humane by by insisting that warring nations seek to minimize inflicting suffering on non-combatant populations.[35]

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[30] *Id. See also* Polisensky, *supra* note 26, at 258. Polisensky writes, "The War was such a protracted and intensive undertaking that it demanded entirely new methods of military organization and the maintenance of armies." *Id.*

[31] *See, e.g.*, GEOFFREY SYMCOX, WAR DIPLOMACY AND IMPERIALISM 1618-1763 1 (1974), *citing* MARSHAL SAXE, REVERIES ON THE ART OF WAR.

[32] In 1625, appalled by the slaughter of the Thirty Years War**,** Hugo Grotius explained why he chose to write *De Jure Belli Ac Pacis Libiri Tres (Three Books on the Law of War and Peace)*, the work commonly acknowledged as inaugurating the modern law of nations:

> Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of. I observed that men rush to arms for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.

Id., *cited in* Mark W. Janis, *Law War and Human Rights, International Courts and the Legacy of Nuremberg*, 12 CONN. J. INT'L L. 161, 162 (1997), *quoting* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 20 (Kelsey trans. 1913). Grotius has been cited by federal courts on 198 occasions. *See, e.g.*, Herrera v. United States, 222 U.S. 558 (1912) (decision effecting the laws of war at sea). *See also, e.g.*, The London Packet, 18 U.S. 132, 5 Wheat. 132 (1820) (disposition of seized private property in wartime). *See also*, United States v. Yousef, 327 F.3d 56 (2d Cir 2003).

[33] *See* ROSALYN HIGGINS, GROTIUS AND THE DEVELOPMENT OF INTERNATIONAL LAW IN THE UNITED NATIONS PERIOD, IN INTERNATIONAL RELATIONS, 267, 275 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds. 1990).

[34] *See, e.g.*, Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 396 (1993); *see also* Michael T. Morley, *The Law of Nations and the Offenses Clause of the Constitution*, 112 YALE L. J. 109, 125 (2002).

[35] *See, e.g.*, EMERIC DE VATTEL, LES DROIT DES GENS, OU, PRINCIES DE LA LOI NATURELLE, APPLIQUE A LA CONDUITE ET AUX AFFAIRES DES NATIONS EY DES SOUVERAINES [The Law of Men or Principles of National Law Applied to the Conduct and Affairs of Nations and Sovereigns] (Charles G. Fenwick trans. pub'd. as THE LAW OF NATIONS, Wash. D.C. 1916) (1758). *See also* GEOFFREY BEST, HUMANITY IN WARFARE (1980)).

One means for enforcing humanitarian norms in warfare revolved around lessening the efficacy of the "surprise attack."[36] With the rise of the industrial age and the empires of European powers expanding around the world, it became recognized that successful war strategy must emphasize the timing and speed of transporting troops to the battlefield.[37] Moreover, as the population of Europe increased, as other industrialized nations rose to prominence and as economies expanded, the size of standing armed forces grew considerably.[38] By the Nineteenth Century, European wars were won, in large measure, by the military that was mobilized and transported to the front the fastest. For example, in 1870, a Prusso-German Army defeated a larger French Army in France while the latter was still under a state of mobilization.[39]

Also, while surprise attacks were nothing new to warfare, over time, with advances in technology, the ability to carry out such attacks became greater.[40] The Japanese surprise attacks on the Russian Fleet at Tsushima in 1905[41] and the U. S. Pacific Fleet at Pearl Harbor are examples in which such ability had significant military impacts, at least in the short-term. However, these examples are by no means the only ones.[42] Historically, the use of a "surprise attack" was justified on a claim of self-defense.[43] However, such

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[36] *Id.*

[37] Symcox, *supra* note 31, at 200. *See also*, MARC FERRO, THE GREAT WAR, 1914-1918, 28-31 (1960).

[38] NEIL M. HEYMAN, DAILY LIFE DURING WORLD WAR I, 12 (2002). In August 1914, the German Army fielded 800,000 men in uniform, and an additional 2,900,000 men were mobilized from the reserves. The French Army, in comparison, numbered 540,000 men, with an additional 1,400,000 being mobilized as reserves by the end of the month. During World War I, France fielded a military force of 7.8 million men. Roughly one-fifth of the total population wore a military uniform sometime during the war. Over one million of these men were killed in combat. *Id.* at 15.

[39] *See, e.g.*, MICHAEL HOWARD, THE FRANCO PRUSSIAN WAR: THE GERMAN INVASION OF FRANCE, (2001). The Franco-Prussian War of 1870 was a preview of World Wars I and II, in the sense that each war involved a mass mobilization of populations, and industrial advantages played a direct role in victory. *See also* FERDINAND FOCH (MARSHAL OF FRANCE), THE PRINCIPLES OF WAR (1918).

[40] *See, e.g.,* GORDON PRANGE, AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR (1981).

[41] *See also*, JOHN A. WAITE, THE DIPLOMACY OF THE RUSSO-JAPANESE WAR 125 (1964). Waite writes:

> The Japanese principle, stated by Foreign Minister Baron Jurato Komura, was that time was on the Russian's side, who were building up military strength in the region. Japan felt that Korea and Manchuria were rightly theirs. The Japanese could not prevail in a prolonged war and decided to strike first.

[42] *Id. See also* EDWIN A. FALK, FROM PERRY TO PEARL HARBOR, THE STRUGGLE FOR SUPREMACY IN THE PACIFIC (1974).

[43] *Id.* For example, Prime Minister Tojo's cabinet believed that war with the United States was a necessity as a result of the de facto economic blockade policy established by Franklin Roosevelt. While this belief was roundly considered meritless by the war's victors, it did supply the cabinet and emperor the basis for accepting the Pearl Harbor attack and subsequent invasion of the Philippines.

attacks were seldom in actuality a surprise to the warring nations, because often the attacks were preceded by failed diplomacy and national hostility.

Historically, armed conflict between nations was preceded by official warnings. For example, before World War I, Great Britain Prime Minister Herbert Asquith's government publicly claimed as the justification for Britain's entry into the war alliance obligations and German violation of Belgian neutrality.[44] On 4 August 1914, British Foreign Minister Lord Edward Grey warned the German Government "to evacuate Belgium or conflict would ensue."[45] In response, German Chancellor, Bethman-Holweg, called the neutrality agreement a "scrap of paper," and proclaimed that "necessity knows no law" to the Reichstag.[46]

While states rarely took into account the laws of war when formulating strategy, pre-World War I German strategy fundamentally ignored prevailing laws and customs of war.[47] For instance, the 1914 invasion of France and Belgium was based in large part on a plan by the then former Chief of the German General Staff Graf Alfred von Schlieffen, which called for an invasion of Luxembourg, Belgium and the Netherlands, regardless of the neutral status of those states.[48] Regardless of the conduct of German forces in the occupied portions of Belgium and France, the invasion of a neutral clearly violated an international agreement considered to have the force of law.

After the war, violations of the law of war against civilian populations received some attention in the trials of German officers.[49] However, in what has become known as the "Leipzig Trials," there was a general failure to successfully criminalize the conduct of brutalizing civilians.[50] More importantly, at the time, the German entry into war, was not *per se* viewed by the international community as an international crime, but rather as a question of responsibility.[51] The Treaty of Versailles required Germany to accept all

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[44] *See, e.g.,* BRIG. GEN. SIR JAMES EDWARDS, A SHORT HISTORY OF WORLD WAR I 9-24 (2d. ed. 1968); *see also* MARC FERRO, THE GREAT WAR 40 (1969); and *see also*, BARBARA TUCHMAN, THE GUNS OF AUGUST (1959).

[45] Ferro, *supra* note 44, at 45.

[46] *Id.*

[47] *Id.*

[48] *See, e.g.,* Gunther E. Rothenberg, *Moltke, Schleiffen, and the Doctrine of Strategic Envelopment, in* MAKERS OF MODERN STRATEGY (1986).

[49] *See, e.g.,* M. Cherif Bassiouini, *Current Development: The United Nations Commission of Experts Established Pursuant to Security Council Resolution* 88 AM. J. INT'L L. 784, 785 (1994).

[50] *See* Timothy L.H. McCormack, Conceptualizing Violence, 6 ALB. L. REV. 681, 698-99 (1997), *citing* JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 9-10 (1982).

[51] *See, e.g.*, Jonathon A. Bush, *The Supreme Crime and its Origins: the Lost Legislative History and the Crime of Aggressive War*, 102 COLUMB. L. REV. 2324, 2331 (2002). Professor Bush writes:

> The terrible war that began in August 1914 seemed to make a mockery of these legal rules from the previous half century, but it also fueled a demand on the Allied side for

war guilt and pay reparations.[52] While German political leaders were not specifically charged with aggression or prosecuted for violations of the law of war, the fact that Germany was required to accept all war guilt at Versailles indicated a reticence to permit a "first strike" doctrine in conventional international relations.[53]

The experience of World War II confirmed this reticence, with the adoption of Article 51 of the U. N. Charter. For instance, at the conclusion of World War II, the allies constructed two separate tribunal systems in Europe and Asia for prosecuting individuals who violated the laws and customs of war. These tribunals, called the International Military Tribunals (IMT), *de facto* criminalized armed aggression because several of the individuals prosecuted had taken part in the respective decisions to wage war.[54] For instance, one of the jurisdictional offenses was titled "crimes against the peace."[55] These crimes were defined as the "planning, preparation, initiation or waging of a war of aggression**,** or a war in violation of international treaties, agreements or assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing."[56]

Surprise attacks, then, were viewed as a move of armed aggression, but only insofar as these attacks occurred without provocation.[57] Consequently, the tribunal's decision to charge the crime of aggression could not be read so broadly as to prevent a state from defending itself, preemptively, in the face of armed invasion from another state.[58]

A debate over the meaning of self-defense under international law has continued since the IMT. In putting the debate in perspective, some post-

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> war crimes trials for culpable Germans. Most of the attention centered on specific, widely publicized atrocities such as the rape of Belgian women, the machine gunning by U-boat crews of lifeboat victims, the burning of the Louvain library and the destruction of the Soissons and Senlis cathedrals, the executions of British Captain Fryatt and Nurse Edith Cavell, the mistreatment of Allied POWs, and, for American audiences, the sinking of the Lusitania. But a few commentators included the demand that Kaiser Wilhelm II and his senior ministers be punished for planning and initiating a war of aggression . . . .

Id. citing Otto Erickson, *A Judicial Reckoning for William Hohenzollern*, 22 LAW NOTES 184, 186 (1919).

[52] *See generally* Treaty of Versailles, June 28, 1919, arts. 231-263, *reprinted in* BERNARD M. BARUCH, THE MAKING OF THE REPARATION AND ECONOMIC SECTIONS OF THE TREATY (1970).

[53] *See* Ferro, *supra* note 44, at 123.

[54] *See, e.g.*, Leila Nadya Sadat, *Symposium Issue: The International Court: The Establishment of the InternationalCourt: From the Hague to Rome and Back Again*, 8 MICHIGAN ST. U.-DETROIT C. L. INT'L L. J. 97, 106 (1999).

[55] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, Article 6(a).

[56] *Id.*

[57] *See, e.g.*, Theodore Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 6 (2001).

[58] *Id.*

Second World War examples are helpful. In particular, the Arab-Israeli conflict has been the source of several such examples.

Since World War II, there have been numerous instances in which one state threatens one or more other states with an armed buildup of forces, accompanied by official statements of impending war. The June 1967 so called "Six Day War " between Israel on the one side, and Egypt, Jordan and Syria on the other, is a clear example of this phenomena.[59] In the months prior to the Israeli air attack against Egyptian military targets, Egyptian president Gamel Nasser ordered United Nations peacekeepers out of the Gaza and Sinai regions bordering Israel.[60] The Egyptian leader ordered a massive military buildup in preparation of an armed invasion into Israel.[61] Also, Egyptian and other Arab government officials publicly enunciated their desire to "drive Israel into the sea."[62] In reaction, Israeli strategists were convinced that their best hope of victory was to strike Egyptian military forces first, and subsequently, in June 1967, the Israeli Air Force attacked targets in Egypt.[63] Within six days, Israel secured the Sinai peninsula, the West Bank and Golan Heights .[64] The Israeli decision to engage in a first strike against Egyptian, Syrian, and Jordanian military targets resulted in debate regarding the international law norms for self-defense.[65]

After the Six Day War, the Middle East has continued to be a region of dangerous conflict. There exists little resolution regarding acceptance of Israel by Arab states, and little resolve by Israel to accept a Palestinian state. In 1973, Egyptian and Syrian military forces attacked Israel without diplomatic warning.[66] This attack coincided with the Yom Kippur religious holiday,[67] the most important holiday in Judaism.[68] The Israeli political and military leadership

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[59] *See, e.g.,* MICHAEL OREN, SIX DAYS OF WAR, JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 63 (2002).

[60] *Id.* Israel shares a border with Egypt to its southwest, Jordan to its east, and Syria and Lebanon to its north. In 1967, its only non-hostile border was the Mediterranean Ocean to its west.

[61] *Id*. at 64.

[62] *Id.*

[63] *Id.* at 67. Oren notes that the U. S. government, occupied in Vietnam, made no promise of aiding Israel if Egypt attacked. Moreover, some evidence suggests that the Soviet government encouraged Nasser to strike first. The Israelis were aware of the Kremlin's interest in such an attack. *Id.*

[64] *Id.* In 1967, the Sinai Peninsula belonged to Egypt. It served as a "buffer region" between Egypt and Israel. Likewise, the Golan Heights, a series of escarpments forming a border between Syria and Israel, has served a similar function.

[65] *See, e.g.,* Quincy Wright, *The Middle East Crisis, and Amos Shapira, The Six Day War and the Right of Self Defense* in 2 THE ARAB ISRAELI CONFLICT 5-21, 107-32, 205-20 (John N. Moore ed., 1974).

[66] *See, e.g.,* MARTIN VAN CREVELD, MILITARY LESSONS OF THE YOM KIPPUR WAR, HISTORICAL PERSPECTIVES (1975). *See also, e.g.,* Louis Rene Beres, *Why Israel Should Abrogate the Oslo Accords*, 12 AM. U. J. INT'L L. REV. 267 (1997).

[67] *Id.*

[68] *Id.*

had believed that their opponents would respect a religious holiday, if nothing more, out of concern over potential international reaction. Israeli forces eventually recovered most lost positions with the assistance of U.S. airlift support.[69] After Israeli forces became poised to conquer Syria, they were thwarted, in part, by a Soviet threat of entry into the conflict.[70] Although this conflict ended by agreement between the parties, with the exception of Egypt and Jordan, most Arab states considered themselves to be in a *de facto* state of war with Israel.[71]

Another historical example worth examining for what it may reveal about the current state of the norm of self-defense in international law, is the Israeli attack on the Iraqi Osiraq nuclear facility in 1981. In the late 1970s, the Iraqi government had purchased the facility from France, where it had undergone construction at Osiraq.[72] Because the reactor was capable of both supplying energy as well as fissile material for nuclear weapons, and because the Iraqi government's continued strong anti-Israeli rhetoric, the Israeli government concluded that the reactor constituted a significant "downrange" threat to its existence.[73] In a climate of anti-Israeli terrorism, the possibility of a nuclear strike was viewed by Israeli officials as so likely as to pose a realistic threat to Israeli security.[74]

On June 7, 1981, Israeli aircraft destroyed the reactor in a raid that also resulted in the death of a French engineer.[75] While the Israeli government claimed a right of self-defense as its justification, its argument was not generally accepted within the international community.[76] Indeed, both the General Assembly and the Security Council condemned Israel's use of force against the reactor.[77] Just as in the case of Israel's first strike during the Six Day War, Israel's strike against the Iraqi reactor generated further debate over the parameters of self-defense.[78]

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See, e.g.,* Lt Col Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self Defense*, 109 MIL L. REV. 191 (1985). Israel's perception was reflected in a statement issued by its government after the attack: "We were therefore forced to defend ourselves against the construction of an atomic bomb in Iraq, which would not have hesitated to use it against Israel and its population centers." N.Y. TIMES, June 9, 1981, at A8, col. 2.
[73] Shoham, *supra* note 72, at 208.
[74] *Id.*
[75] *Id.*
[76] *Id*. at 191.
[77] *Id*.
[78] *Id. See also* Colonel Guy G. Roberts, *The Counter-Proliferation Self Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting Weapons of Mass Destruction*, 27 DEN. J. INT'L L. & POL'Y 483 (1999); *see also*, Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMPLE INT'L & COMP. L.J. 437 (1995); *see also* W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack*

This section has provided just a brief sampling of relevant examples from military history. The instances presented show that conventional international law norms are suited for application to traditional interstate armed-conflict. Nonetheless, this body of law, as conventionally construed by scholars, still presents, at best, a limited framework for defense against modern terrorism. Below, the reasons for this conclusion become clearer as modern terrorism is analyzed.

C. The Reemergence of Religious–based Terrorism (the Islamic Model)

The term "terrorism" is over two centuries old.[79] While the there have been different definitions of the term,[80] generally it is meant to refer to the threat or use of violence with the intent of causing fear among the public, in order to achieve political objectives.[81] A component of terrorism is to conduct military-like operations with a strategy of pursuing, at a minimum, political change.[82] However, the most distinguishing difference between terrorist operations and legitimate military operations is the general attention and willingness of the former on threatening to carry out, or carrying out, acts of violence against civilian targets.

It is problematic to consider all groups labeled as "terrorists" as conducting similar operations for like-minded goals. There are simply too many organizations, with many different goals in mind. However, the general philosophical aims and methods employed by such groups have existed for thousands of years,[83] they encompass a strategy seeking to create political, religious, or social change. How wide or encompassing the goal of such social change differs from organization to organization. For instance, the Irish Republican Army (IRA), discussed below, has never intended to create "an

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of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self Defense?, 75 VAND. J. TRANSNAT'L L. 417 (1982).

[79] Frank Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1, 6 N.20 (2002), *citing* MICHAEL CONNOR, TERRORISM: ITS GOALS, ITS TARGETS, ITS METHODS, THE SOLUTIONS 1 (1987).

[80] One author of a research guide to terrorism listed 109 different definitions of terrorism. A. Schmid, POLITICAL TERRORISM; A RESEARCH GUIDE (1984); *see also* WORLD BOOK DICTIONARY 135, 2148-49 (1973). Noting that there is not an internationally accepted definition of terrorism, military historian Caleb Carr recently wrote about what an acceptable definition should include: "Certainly terrorism must include the deliberate victimization of civilians for political purposes as a principal feature—anything else would be a logical absurdity." Professor Caleb Carr, *Wrong Definition of War*, WASH. POST, July 28, 2004, at A19.

[81] *See* W. THOMAS MALLISON AND SALLY MALLISON, THE CONCEPT OF PUBLIC PURPOSE TERROR IN INTERNATIONAL LAW, 67 (M.C. Bassiouni ed. 1975).

[82] *See, e.g.*, JAMES M. POLAND, UNDERSTANDING TERRORISM: GROUPS, STRATEGIES AND RESPONSES 11 (1988).

[83] Biggio, *supra* note 79, *citing* RICHARD CLUTTERBUCK, TERRORISM IN AN UNSTABLE WORLD 3 (1994).

Irish World."[84] In contrast, the fundamentalist Islamic movements discussed in this article desire to spread the word of "the Prophet" throughout the world through armed means.[85]

Towards the close of the Twentieth Century, Western nations began recognizing terrorism as the preeminent threat of the day and, accordingly, began defining it in precise legal terminology. The United States has recently called it "the biggest threat to our country and the world",[86] and the United States Code now defines terrorism as "premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents.[87] The Department of Defense (DOD) recently defined terrorism as "the calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.[88] British law now defines terrorism in a similar way. Part 20 of the British Prevention of Terrorism Act of 1989 states that: "terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."[89] Although reflecting the still underdeveloped municipal law of nations grappling with terrorism, both the United States and Britain have criminalized terrorism, but have not differentiated between types of terrorism within their respective criminal codes.

While terrorist groups are not necessarily dependent on state support, religious-based terrorist groups often receive support from states via

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[84] *See, e.g.*, U.S. Department of State, Appendix B: Background on Terrorist Groups for 2000. The State Department description of the IRA's goals is fairly benign. It reads as follows:

Terrorist group formed in 1969 as clandestine armed wing of Sinn Fein, a legal political

movement dedicated to removing British forces from Northern Ireland and unifying Ireland. Has

a Marxist orientation. Organized into small, tightly knit cells under the leadership of the Army

council.

Id. Yet, it should be noted that the IRA, according to the State Department, relied on state-sponsorship and has received funds and training from sympathizers in the United States.

[85] *See, e.g.*, Bassam Tibi, *The Fundamentalist Challenge to the Secular Order in the Middle East*, 23 FLETCHER F. WORLD AFF. 191, 192-93 (1999), *citing* ABDULRAHMAN A. KURDI, THE ISLAMIC STATE: A STUDY BASED ON THE ISLAMIC HOLY CONSTITUTION 39 (1984).

[86] *See* S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). *See also* Statement by the Secretary General of NATO Lord Robertson (Oct. 2, 2001) available at http://www.nato.int/docu/speech/2001/s011002a.htm.

[87] 22 U.S.C. § 2656(d)(1).

[88] Brig. Gen. Charles Dunlap Jr., *International Law and Terrorism: Some 'Qs and As' for Operators*, ARMY LAW. 23 (2002), *citing* Joint Chiefs of Staff, Joint Pub. 1-02, DOD Dictionary of Military and Associated Terms 443 (12 Aug. 2002).

[89] Emanuel Gross, *Terrorism and the Law: Democracy in the War Against Terrorism--the Israeli Experience*, 35 LOY. L. A. L. REV. 1161, 1165 (2002), *citing* British Prevention of Terrorism Act (Temporary Provisions), 1989, at 20.

governmental-sponsored support for fundamentalist Islamic movements.[90] The origins of some of these religious-based terrorist groups can be traced to the failed Pan-Arab and Pan-Islamic movements, which began in the Nineteenth Century.[91]

Each major world religion has a core constituency of possible terrorist groups. However, since World War II, fundamentalist Islamic movements have emerged in the forefront of those groups willing to engage in acts of terrorism with state backing. For instance, the organization al Qaeda, backed by the government of Afghanistan, was based in Afghanistan until being substantially defeated there by the U.S.-led war there.[92] Likewise, other groups have received sanctuary and backing from such states as Syria, Libya, Iran, and Iraq.[93] Moreover, Hizballah has received considerable aid from Syria and Iran.[94] Hamas, too, has received financial and weapons support from not only Syria and Iran, but also from Saudi Arabia.[95] And the Philippine-based

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[90] *See, e.g.*, Audrey K. Cronin, *Rethinking Sovereignty: American Strategy in the Age of Terrorism*, in 44 Survival # 2, 122 (2002). Cronin writes:

> Despite its nomenclature, religious terrorism actually mixes both political and religious motivations and is, as a result, probably the most dangerous - it has open-ended or less "rational" aims, is less predictable and, in recent years at least has tended to aspire to cause more casualties than other types. Religious terrorism represents a dangerous combination of political aims animated by the ideological fervour of a deeply spiritual commitment - either real or (depending on the group - or even the individual) contrived. In this type of terrorism, the "audience" may or may not have human form, and the aims may or may not reflect a rationality that is obvious to anyone but the "divinely inspired" perpetrator (or his followers).

Id.

[91] *See, e.g.*, Charles R. Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75, 88-92 (2000) (tracing the rise and activity of the Muslim Brotherhood organization). *See also, e.g.*, Bassam Tibi, *supra* note 85, at 191-92.

[92] *Id.* However, it had operated from the Sudan, Somalia, and Saudi Arabia, and it received considerable financial support from persons in several other areas. *Id.*

[93] *See, e.g.*, Professor Sompong Sucharitkul, *Jurisdiction, Terrorism and the Rule of International Law*, 32 GOLDEN GATE U. L. REV. 311, 316 (2002).

[94] *See, e.g.*, Global Security website at, http://www.globalsecurity.org. Hizballah is also known by different names, such as "Islamic Jihad," "Islamic Jihad for the Liberation of Palestine," "Organization of the Oppressed, Revolutionary Justice Organization," and "Ansarollah" (trans. "Partisans of God"). *See* Yonah Alexander, *Middle East Terrorism: Selected Group Profiles* 33-47 (JINSA 1994) (hereinafter Group Profiles). Hizballah is mainly dedicated to the creation of a wholly fundamentalist Shia Islamic state in Lebanon and the destruction of Israel. *See also* Terrorist Group Profiles, U. S. Navy, Naval Post-Graduate School, Dudley Knox Library (in possession of author); and Global Security website at http://www.globalsecurity.org, describing Hizballah's activities, ranging from the murder of Israeli citizens to hostage taking of European and American citizens. *Id.*

[95] *See, e.g.*, U.S. Dept. of State release, Patterns of Global Terrorism (2000), at Appendix B., (in possession of author). Formed in late 1987 as an outgrowth of the Palestinian branch of the Muslim Brotherhood, various Hamas elements have used politically motivated violent and non-violent means, including terrorism, to pursue the goal of establishing an Islamic Palestinian state in place of Israel. Hamas is a loosely structured organization, with some elements working clandestinely, and others working openly through mosques and social

Abu-Sayyef Group (ASG) has received aid from various Arab entities.[96] It should be noted that some scholars of terrorism believe that fundamentalist Islamic movements are increasingly evolving away from state sponsorship and toward complete independence, arguably making them freer to pursue even more dangerous acts.[97] At the philosophical and theological core of these movements is the concept of "Jihad," meaning "holy war."[98] The concept is generally premised on condoning warfare against perceived enemies of Islam,[99] employing a literalist reading of select verses of Islamic scripture.

Typically, the goals of religious-based terrorism include gross societal change, rather than national self-determination, which is often the goal of non-religious-based forms of terrorist organizations. Unlike state-centered warfare, terrorism employs secrecy as its core attack strategy.[100] Most terrorist groups, whether religious-based or not, strike without any warning.[101] And while the ultimate aim of such groups may be to affect policy change, unlike the conduct of the military forces of modern nations, their attacks generally focus on civilian non-military targets.[102] To militant fundamentalist Islamic terrorist groups, the conventional "laws of war" become an unused guideline, in part, because such laws are hardly divine.[103] Thus, international law has little or no influence on these non-state, terrorist actors.

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service institutions to recruit members, raise money, organize activities, and distribute propaganda. Hamas personnel have conducted many attacks--including large-scale suicide bombings--against Israeli civilian and military targets. In the early 1990s, they also targeted suspected Palestinian collaborators and Fatah rivals. They also have received funding from Palestinian expatriates, Iran, and private benefactors in Saudi Arabia and other Arab states. *Id.* Some fundraising and propaganda activities take place in Western Europe and North America. *Id.*

[96] *See id.* ASG engages in bombings, assassinations, kidnappings, and extortion to promote an independent Islamic state in western Mindanao and the Sulu Archipelago, areas in the southern Philippines heavily populated by Muslims. ASG raided the town of Ipil in Mindanao in April 1995--the group's first large-scale action--and kidnapped more than thirty foreigners, including a U.S. citizen in one year alone. *Id.*

[97] *See, e.g.*, Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J. L. & PUB. POL'Y 1, 21 (2000).

[98] *See, e.g., El Fadl, supra* note 12, at 60. El Fadl writes:

> In the age of post-colonialism, Muslims have become largely preoccupied with the attempt to remedy a collective feeling of powerlessness and a frustrating sense of political defeat, often by engaging in highly sensationalistic acts of power symbolism.

Id.

[99] *Id. See also infra* notes 116 and 117, and associated text.

[100] *See, e.g.*, Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L. J. 145 (2000).

[101] *Id.*

[102] *Id.*

[103] *See, e.g.*, El Fadl, *supra* note 12, at 67-68. El Fadl writes:

> With the deconstruction of the traditional institutions of religious authority emerged organizations such as the Jihad, al Qa'ida, and the Taliban, who were influenced by the resistance paradigms of national liberation and anti-colonialist ideologies, but also who anchored themselves in a religious orientation that is distinctively puritan,

Despite the denial by many terrorist groups that international applies to them, it has been more frequently argued by scholars and statesmen that a terrorist constitute a *hostis humani generis*, or "enemy of the human race."[104] While this term emerged in the Eighteenth Century as chiefly applicable to pirates, certain practices, universally condemned under international law, are now embraced within the ambit of the term as well.[105] Similarly, a growing body of law and scholarship considers terrorist acts as *jus cogens* violations,[106] making states that aid and abet such organizations also joining in the illegal terrorist acts.

Religious-based terrorists, such as al Qaeda, have shown a preference for terms normally associated with warfare. [107] The use of these terms evidences an aim of equating their actions of violence, such as crashing airlines into buildings, with that of battlefield actions taken by opposing armies.[108] However, unlike the conventional actions of opposing armies, religious-based terrorists have generally intentionally targeted civilians and civilian-related infrastructure. This new form of terrorism, often accompanied by the rhetoric of warfare and religious ideology, has become the newest threat to the international order in general, and the United States in particular. Professor Audrey Cronin states:

> [W]hile we have not seen the last of inter-state war, war between organizedstates will no longer be the driving force that it has been for

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> supremacist, and thoroughly opportunistic in nature. This theology is the by-product of the emergence and eventual primacy of a synchronistic orientation that unites Wahhabism and Salafism in modern Islam. Puritan orientations, such as the Wahhabis, imagine that God's perfection and immutability are fully attainable by human beings in this lifetime.

Id.

[104] Cronin, *supra* note 90, at 122. *See also, e.g.,* Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981).

[105] *Id.* For instance, torture, hostage taking, forced labor (a modern variant of slavery), and summary execution are now condemned as *jus cogens* violations. The targeting of civilians is proscribed under several treaties and is virtually universally condemned by the international community, thus constituting *jus cogens* actions. Any persons involved in any of these activities may be seen as "an enemy of mankind."

[106] *See, e.g.,* Smith v. Libya, 101 F.3d 239 (2nd Cir. 1996). The court in *Smith* defined *jus cogens* norms as follows:

> Jus cogens norms . . . do not depend on the consent of individual states, but are universally binding by their very nature. Therefore, no explicit consent is required for a state to accept them; the very fact that it is a state implies acceptance. Also implied is that when a state violates such a norm, it is not entitled to immunity.

Id. See also Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back*? 16 BERKELEY J. INT'L L. 71, 76 (1998).

[107] Cronin, *supra* note 90, at 124.

[108] *Id.*

> the last 400 years orso. Ideology will be; and the underlying legitimacy of the ideology will provide the centre of gravity for each side.[109]

This ideology is best observed in the statements of al Qaeda, which include the declaration that "to kill the Americans and their allies - civilians and military - is an individual duty for every Muslim who can do it in any country in which it is possible to do it';"[110] and, "every Muslim who believes in God and wishes to be rewarded [has a duty] to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it."[111] Likewise, the Hamas charter provides a commandment that constitutes a Quaranic interpretation to kill "non-believers" who govern over Muslims, whether under democratic institutions or otherwise.[112]

There is hardly a clearer example of the practices of terrorist organizations conflicting with conventional norms of war, than their efforts to directly target civilians. It has been long accepted that non-combatants must be afforded greater protections than combatants. In the 1949 Geneva Convention (IV) on the treatment of civilians in wartime, the signatory states adopted this premise.[113] Likewise, in 1978, the International Committee of the Red Cross, concerned that the four 1949 Geneva Conventions had become too complex as a guiding statement on the laws of armed conflict, condensed related principles into the "Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts."[114] One such rule, Principle 7, states:

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[109] *Id.*

[110] *See, e.g.*, Davis Brown, *Use of Force Against Terrorism After September 11: State Responsibility, Self Defense, and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 51 (2003) *citing* Osama bin Laden *et al*., Jihad Against Jews And Crusaders: World Islamic Front Statement (Feb. 23, 1998).

[111] *Id.*

[112] *See*, Hamas Charter (Aug. 18, 1988), *reported in* ARAB-ISRAELI CONFLICT AND CONCILIATION 203, 206-07 (Bernard Reich ed., 1995), *cited in* Beres, *supra*, note 66, at 275. The Charter reads, in part:

> There is no solution to the Palestinian problem except by Jihad .... In order to face the usurpation of Palestine by the Jews, we have no escape from raising the banner of Jihad .... We must imprint on the minds of generations of Muslims that the Palestinian problem is a religious one, to be dealt with on this premise .... I swear by that who holds in His Hands the Soul of Muhammad! I indeed wish to go to war for the sake of Allah! I will assault and kill; assault and kill, assault and kill.

Id. "Hamas" is the acronym for "Islamic Resistance Movement, Harakat Muqawama Islamiyaa", meaning "enthusiasm," "zeal," or "fanaticism." *Id.*

[113] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[114] International Committee of the Red Cross, *Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts*, in INT'L REV. OF THE RED CROSS (Sept.-Oct. 1978), at 248-49; *quoted in* Spencer Crona & Neal Richardson, *Justice for War Criminals of Invisible Armies*, 21 OKLA. CITY U. L. REV. 349, 363 (1996).

Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.[115]

In contrast, al Qaeda's core philosophy includes a literal reading of the Quaran, which states, "fight and slay the pagans wherever you find them, and seize them, beleaguer them, and lie in wait for them, in every stratagem."[116] Likewise, al Qaeda members are guided by the Quaranic phrase "Then nations, however mighty, must be fought until they embrace Islam."[117]

Thus, for a number of years the international community has embraced the principle that the direct targeting of civilians is a clear violation of the laws of war. Yet, this international standard is utterly rejected by key militant Islamic-based terrorist groups. Nevertheless, it is beyond dispute that the laws of war apply to them, as it does to other non-state actors.[118]

International law regarding the use of military force was designed to regulate conventional interstate warfare in the long-term interest of nations, and to protect civilian populations from the horror of war, to the extent possible. Terrorist acts, which are by design and execution carried out by those who abrogate this basic precept, and which may be supported by aiders and abettors who do the same, must not be tolerated when there already exists important international legal norms that may be readily brought to bear on them.[119]

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[115] *Id.*

[116] Schall, *supra* note 6, at 12, *citing* Paul Johnson, *Relentlessly and Thoroughly*, NAT'L REV. 20-21 (Oct. 15, 2001).

[117] *Id.*

[118] *See* Common Article 3 of the 1949 Geneva Conventions, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* The 1977 Protocols Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391. Although the United States has not ratified the 1977 Protocols, it recognizes that various parts of the protocols reflect customary law of war. *See, e.g.,* DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 230-31 (2001).

[119] In contrast, the case has been made that the codified contemporary international system appears prostrate in its ability to defend civilians. *See* Walter Gary Sharp, Sr., *American Hegemony and International Law: The Use of Armed Force Against Terrorism*, 1 CHI. J. INT'L L. 37, 38 (2000), *citing* Thomas and Hirsh, *The Future of Terror*, NEWSWEEK 35 (Jan. 10, 2000); Raymond Close, *Hard Target: We Can't Defeat Terrorism With Bombs and Bombast*, WASH. POST Aug. 30, 1998, at C1; Ralph Peters, *We Don't have the Stomach for This Kind of Fight, Id.* ; Gregory Vistica and Evan Thomas, *Hard of Hearing*, NEWSWEEK 78 (Dec. 13, 1999) ("Washington has had difficulty finding its most-wanted terrorist, Osama bin Laden, because Islamic extremists use European-made encrypted mobile phones."); Russell Watson and John Barry, *Our Target Was Terror*, NEWSWEEK 24 (Aug. 31, 1998).

II: International Legal Definitions, Origin, Sources and Debate on the Theories of Self-Defense, Anticipatory Self-Defense, and Preemption

A. Evolution and the Use of a Self-Defense Doctrine in International Law

The international community recognized the legitimacy of a self-defense doctrine long before the United Nations ever existed.[120] The concept of a right of self-defense is rooted both the belief that a state has the right to protect its interests and citizens where they reside, and in criminal law.[121] At common law, criminal law courts directed juries to consider whether claims of self-defense were justified by the surrounding circumstances, including whether a claimant had the opportunity to extricate himself or herself from the affray.[122] Recognizing that the actions of a state can involve far more complexities and intricacies than that of any single person, unlike in criminal law, in international law, to constitute self-defense in international law, an act need not be instantaneous, or even contemporaneous following an attack.[123] Also because of the complexities and intricacies of relations among states relative to individual human interaction, international law departs from the extrication principle.[124]

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[120] Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115,128 (1999), *citing* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5, (1963). *See also*, *e.g*, ANTHONY AREND AND ROBERT BECK, INTERNATIONAL LAW AND THE USE OF FORCE 72 (1993). Arend and Beck write:

> [T]he right of self-defense is one of the oldest legitimate reasons for states to resort to force. Aristotle, Aquinas, and even the framers of the restrictive Kellog-Briand Pact all acknowledged that it was permissible to take recourse to arms to defend oneself. Under pre-Charter customary international law, a state could take recourse to force to defend itself not only in response to an actual armed attack, but also in anticipation of an imminent armed attack.

Id. at 72.

[121] *See, e.g.*, D.P. CONNELL, INTERNATIONAL LAW 338 (1st ed. 1965). The right to self-defense is a right fundamental to every legal system and is circumscribed only to the extent to which formal law assumes the responsibility for defending the individual. *Id.*

[122] *See, e.g.*, Tucker v. Ahitow, 52 F.3d 653 (7th Cir. 1995).

[123] *See, e.g.*, Shoham, *supra* note 72, at 196, *citing* M. MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217 (1961).

[124] *See id., citing* D. BOWETT, SELF DEFENSE IN INTERNATIONAL LAW 191-92 (1958); *see also* Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 198-99 (1984). Polebaum opines:

> The sources of international law provide a fairly consistent interpretation of the requirement to exhaust alternative means. In most instances, satisfaction of the requirement has ultimately depended less on the vigor with which alternative means have been pursued than on the perception that the situation has become so desperate that no time for nonmilitary efforts remained. When the imminency requirement has been satisfied, the alternative means requirement has also been found to be satisfied,

These departures are well-rooted in customary international law. For instance, in the 1837 *Caroline Case*, which is generally accepted by international law scholars as the leading case on the customary international law of self-defense, U.S. Secretary of State Daniel Webster wrote that in order for an act to qualify as an exercise of self-defense, a state must be able to show a "necessity of self-defense, instant, overwhelming, leaving no moment for deliberation."[125] However, during the period between the *Caroline Case* and the formation of the United Nations, states also considered it acceptable to engage in military action where a state's neighbor state had massed forces along the border between the two.[126] The acceptability of a first strike was also gauged against the level of threat of invasion from the invaded state.[127] No doubt, the existence of traditional ethnically-rooted or nationalist-based hostilities explained why the first strike doctrine of self-defense possessed some credence:[128] the Nineteenth Century is replete with examples in which one state invaded a region to protect its nationals or for the protection of others.[129] Indeed, in World War I, Tsarist Russia declared war on Habsburg Austria as part of a policy of protecting Russia's "Slavic brethren."[130] However, following World War II, this concept of lawful military aggression has largely been limited to situations of specific self-defense.

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often without analysis of whether peaceful modes of resolution had been vigorously sought.

Id.

[125] 30 BRITISH & FOREIGN STATE PAPERS 193 (1843), *reprinted in* Jennings, *The Caroline and McLeod* Cases, 32 AM. J. INT'L L. 82, 89 (1938). The facts of the *Caroline Case* arose in the context of an insurrection in Canada in 1837, where insurgents moved supplies and gained recruits from the United States. The *Caroline* was a steamer employed by an insurgent group. On 29 December 1837, while the steamer was docked on the American side of the Niagara River, Canadian soldiers crossed to the American side of the river, destroyed the ship, and caused casualties among American citizens defending the vessel. British Foreign Minister Lord Palmerston claimed a right of self-defense. However, after negotiations, his government disagreed with this assessment and settled the case. *See also* note 176, *infra.*

[126] *See e.g.* JOHN CHILDS, ARMIES AND WARFARE IN EUROPE, 1648-1789 (1982); *see also* RICHARD C. HALL, THE BALKAN WARS, THE PRELUDE TO THE FIRST WORLD WAR (2000); *see also* GEOFFREY C. PARKER, THE CAMBRIDGE ILLUSTRATED HISTORY OF WARFARE, THE TRIUMPH OF THE WEST, (1995); *see also* LESLIE C. GREENE, THE CONTEMPORARY LAW OF ARMED CONFLICT 29-41 (2d ed. 2000).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See, e.g.*, Ferro, *supra* note 44, at 1-30. *See also generally*, JAMES STOKESBURY, WORLD WAR ONE (1985).

B. U. N. Charter Article 51

In 1949, Article 51 of the U.N. Charter was incorporated, enshrining states' inherent right of self-defense.[131] A brief discussion of its history is important for a contextual understanding of this provision.

Article 51 was not found in the initial proposals for a United Nations.[132] The concept of a right of self-defense was introduced by the United States at the urging of Central and South American governments, which desired recognition of a right of collective self-defense.[133] Additionally, the signatories to the Charter recognized that the right of armed self-defense could exist in situations before the Security Council could act.[134] Thus, a state would have to remain passive against an attack when the Security Council has not yet acted on its behalf. Further, it does not appear within the debates surrounding the implementation of Article 51 that any rejection of customary international law occurred.[135] Indeed, there are clear indications that Article 51 did not bar the use of force in self-defense even after the Security Council took action.[136]

No single international convention interprets or defines the threshold of Article 51.[137] Thus, academic analysis is required to determine what conditions are required under the general rubric of "defense," in order for a state to permissibly respond to acts of terrorism. The International Court of Justice (ICJ) has provided some guidance that is useful in this area, to which our discussion next turns.

1. Nicaragua v. United States

While the plain language of Article 51 provides an inherent right of self-defense, the concept of self-defense was not provided any definition within the U.N. Charter itself. However, in the 1984 ICJ decision, *Nicaragua v. United States*, some parameters were established as to what *fails* to

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[131] U. N. CHARTER art. 51. *See*, Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229, 241 (1996).

[132] *See id.* Halbertsam writes:

> Article 51 was not in the Dumbarton Oaks Proposals for an International Organization. It was added at the San Francisco Conference, by the United States at the urging of the American republics. Some of the American republics were concerned that the powers given to the Security Council might undermine the regional security arrangement provided for by the Act of Chapultepec.

Id., citing Minutes of the *Thirty Sixth Meeting of the United States Delegation, Held in San Francisco*, May 11, 1945, in 1 FOREIGN RELATIONS OF THE UNITED STATES 665, 665-70 (1945).

[133] Halberstam, *supra* note 131, at 241.

[134] *Id*. at 242.

[135] *Id.* at 247.

[136] Halberstam, *supra* note 131, at 248.

[137] *See, e.g.*, Sharp, *supra* note 119, at 41.

constitute self-defense.[138] Both the facts and the holding of *Nicaragua* have a bearing on the thesis of this article inasmuch as *Nicaragua* is distinguishable from issues relating to terrorism, as will be explained.

In *Nicaragua*, the country of Nicaragua brought a claim before the ICJ against the United States, specifically accusing the United States of attacking oil pipelines, mining ports and violating air space.[139] Nicaragua also charged the United States with training, arming, financing and supplying internal paramilitary activities against the Nicaraguan government.[140] In turn, the United States asserted a claim of collective self-defense as envisioned under Article 51.[141]

As a starting point in its ensuing decision, the ICJ enunciated that it was adhering to the principle of non-intervention, when measured against the claimed right of self-defense.[142] The ICJ acknowledged that states have a right of self-defense and conducted a lengthy customary international law analysis.[143] However, the ICJ also held "States do not have a right of "collective" armed response to acts which do not constitute an "armed attack."[144] Additionally, the ICJ stated, "the right of collective self-defense presupposes that an armed attack has occurred."[145] Additionally, it stated, in the case of collective self-defense, the third-party state does not possess a right to interpret the danger to the victim state without the latter's own assessment.[146]

While an interpretation of the right of collective self-defense was central to the *Nicaragua* decision, the parameters surrounding the concept of self-defense were also enunciated. Yet, the limitations as to attacks on the sovereignty of a state were not set within the plain language of Article 51.

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[138] While the United States asserted that the ICJ lacked jurisdiction to hear Nicaragua's claims, the ICJ disagreed and heard the case with the United States in absentia. *See* Nicaragua v. United States, 1986 I.C.J. 14, ¶¶ 24-26 (27 June)(*Nicaragua*).

[139] *Id.* ¶ 15(b). Nicaragua alleged that the mining of its harbors were carried out by persons in the direct pay of the U.S. Government and under the command of U. S. personnel, who also participated. *Id*. ¶ 20. Additionally, Nicaragua claimed that there was damage to two fishing vessels as a result of colliding with mines. During this time, Nicaragua attributed two deaths and fourteen injured people to the mining. *See id.* ¶ 76.

[140] *Id.* ¶ 15(a).

[141] *See id.* ¶ 165.

[142] *Id*.¶ 202. The Court held:

> [T]he United States of America, by training, arming, equipping, financing, and supplying the contra forces or otherwise, encouraging, supporting, and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua in breach of its obligation under customary international law not to intervene in the affairs of another state.

Id. ¶ 146.

[143] *Id*. ¶ 227.

[144] *Id*. ¶ 211.

[145] *Id*. ¶ 236.

[146] *Id*.¶ 205.

Despite its lengthy analysis, the ICJ never mentioned any of the several concepts pertinent to modern aspects of sovereignty, namely, aiding and abetting terrorist organizations, anticipatory self-defense, and preemption. Indeed, the ICJ's reliance on customary international law seems to indicate that Article 51 did not eviscerate its usage.[147]

C. Unresolved Definitions of Self-Defense

In part because of lack of clarity as to what constitutes a threat of force, the conditions under which the right of self-defense may be applied, continue to be debated.[148] Some scholars argue that the right of self-defense only may be invoked after a state seeking to use force presents the international community with credible evidence that it has suffered an attack, that a specific entity is guilty of the attack, and that use of force is necessary to protect the state from further injury.[149] Other scholars argue that the right of self-defense has no such requirement because warfare is a continuing action until conclusion by agreement, treaty or surrender.[150] However, a general consensus exists that before self-defense is invoked, a state must have exhausted all practicable means of forestalling the threatening attacks.[151] Additionally, a consensus exists as to the requirements of necessity and proportionality as elements to a response.[152]

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[147] *Id*.¶ 183. The Court held:

> It is of course axiomatic that the material of customary international law is to be looked primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

Id., *citing Continental Shelf*, ICJ reports 1985, at 29-30 ¶ 27. It is worth noting, however, that the ICJ could only rely on customary international law, and not the U. N. Charter in its decision because of the United States's multi-lateral treaty reservation to the jurisdiction of the ICJ.

[148] *See* Oscar Schacter, *The Right of States to Use Armed Force*, 82 U. MICH. L. REV. 1620, 1625 (1984). Schacter writes:

> What is meant by a "threat of force" has received rather less consideration. Clearly a threat to use military action to coerce a state to make concessions is forbidden. But, in many situations, the deployment of military forces or missiles has unstated aims and its effect is equivocal. The preponderance of military strength in some states and their political relations with potential target states may justifiably lead to an inference of a threat of force against the political independence of the target state.

Id.

[149] *See* Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 836 (2001).

[150] *See*, Dunlap, *supra* note 88, at 8.

[151] Polebaum, *supra* note 124, at 198 (1984), *citing* D. BOWETT, SELF DEFENCE IN INTERNATIONAL LAW 53 (1958).

[152] *Id.* Regarding the necessity requirement, traditionally in order for an action to be deemed a "necessity" of self-defense, the use of military coercion as a defensive measure must be in reaction to the presence of an imminent threat, and must be limited to circumstances in which

D. Anticipatory Self-Defense

The notions that the right of self-defense extends to circumstances in which an attack is anticipated – and that a nation need not wait until it experiences the consequences of an actual attack, date far back into history, at least to the Seventeenth Century, as reflected in the writings of Grotius.[153] A number of international law scholars, including Anthony d' Amato and Louis Rene Beres, define anticipatory self- defense along the lines of the *Caroline Case*, as "an entitlement to strike first when the danger posed is instant, overwhelming, leaving no choice of means, and no moment for deliberation."[154]

Differences between self-defense, as envisioned under Article 51, and anticipatory self-defense, may also be found in Professor Schachter's distinction between cases in which an armed attack is occurring, and, those in which an armed attack has already occurred but additional attacks are expected.[155] It may be the case that anticipatory self-defense applies to situations where the claimant state possesses intelligence of an imminent attack upon its territory or its nationals but no prior attack has occurred. In such a case, the use of force does not constitute an act of reprisal,[156] but rather should the facts reasonably show a continuing threat of armed attack, use of force would constitute permissible anticipatory self-defense. This scenario appears to address the realities of warfare, both historic and modern. Of course, justifications for anticipatory self-defense must still comply with necessity and proportionality requirements.

There is general agreement among international legal scholars that customary international law recognized a right to anticipatory self-defense long

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no effective peaceful alternative is available given the time constraints involved. *See* Capt. Samuel R. Maizel, *Intervention in Grenada*, 35 NAVAL L. REV. 47, 71-72 (1986). Regarding the "proportionality" requirement, the traditional formulation is as follows: Force used must be proportionate to the threat and cannot exceed measures strictly necessary to repel a threat. *Id.* at 73. The implication is that the threatening source is where a response should be directed. One U.N. Resolution expresses this sentiment: "In the conduct of military operations every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be made to avoid injury, loss or damage to civilian populations." G.A. Res. 2675 (XXV), Resolution On Protection of Civilians, *reprinted in* 1 THE LAW OF WAR 755 (Friedman, ed. 1972).

[153] Louis Rene Beres, *International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 31 (1994). *Id.*, *citing* GROTIUS, THE LAW OF WAR AND PEACE CH. 1 (1625).

[154] Anthony d'Amato, Open Forum: *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L. J., 259, 261 (1996), *citing* Louis Rene Beres & Yoash Tsiddon-Chatto, *supra* note 78, at 438.

[155] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152 (1991).

[156] *Id.*

before Article 51 existed.[157] The *Caroline Case* not only enunciated the standard of anticipatory self-defense, it also provided an example of when anticipatory self-defense measures were not justified.[158] From the facts of the case, it could hardly be argued that the threat of attack was so imminent as to allow Canadian forces to respond with military force against the vessel.

While the *Caroline Case* may be seen as a "negative" example in the sense of showing what did not constitute a right of self-defense, the 1967 Six Day War provides a positive example.[159] In the Six Day War example, described earlier in this article, Egyptian forces had not yet crossed into Israel when the Israeli government initiated an attack.[160] However, Israeli intelligence confirmed, and the Egyptian government later admitted, an Egyptian attack was imminent by the time the Israeli strike occurred.[161] Consequently, there has been little serious criticism by international law scholars of the involved Israeli military actions.

The Israeli strike on the Osiraq nuclear facility provides another example to explore the limits of anticipatory self-defense. The Iraqi government pursued the acquisition of fissile material to construct a nuclear weapon, and had made public anti-Israeli statements prior to the Israeli attack, calling for the destruction of Israel. Moreover, the Iraqi government supported other anti-Israeli entities. However, because there was no imminent threat to Israel[162] posed by the Iraqi nuclear facility, even though Israel viewed the reactor as a long-term threat, it is doubtful that the Israeli response qualifies as an act of anticipatory self-defense. Professors d'Amato and Beres differ over the legality of the Israeli use of force in the Osiraq incident. Beres views the Israeli destruction of the Osiraq nuclear facility as a justified act of anticipatory self-defense.[163] However, D'Amato disagrees, opining that the use of this doctrine is narrowly limited to situations involving an imminent threat to survival.[164] As discussed below, the Israeli strike was more likely an act of preemption than anticipatory self-defense.

Anticipatory self-defense is not codified anywhere in the U.N. Charter, including Article 51, which, as noted above, addresses permissible self-defense. As a result, some scholars and practitioners of international law argue that

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[157] Condron, *supra* note 120, at 130, *citing* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 5 (1993).
[158] *See, e.g.*, PHILIP JESSUP, THE USE OF INTERNATIONAL LAW 165 (1959).
[159] The Six Day War occurred after sustained threats by Arab governments, including Egypt, Jordan, and Syria, indicating their intentions to attack Israel, culminating with a large buildup of forces on Israeli borders. The Israeli government opted to strike first against its opposing forces.
[160] MICHAEL OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 63 (2002).
[161] *Id.*
[162] *See, e.g.*, Sucharitkul, *supra* note 93, at 318.
[163] *Id.*
[164] D'Amato, *supra* note 154, at 263.

because the charter does not provide such a right, usage of anticipatory self-defense is no longer recognized as valid under international law.[165] Moreover, "plain language" school adherents[166] have argued that Article 51 allows the right of self-defense "only if an armed attack occurs."[167] Their view is that since the adoption of the U.N. Charter, any position supporting anticipatory self-defense would render Article 51 superfluous.[168]

The "restrictionist" argument is based essentially on three premises. First, it assumes that it is solely the responsibility of the United Nations to ensure the maintenance of international peace and security.[169] Second, it assumes that the United Nations has sole authority over the lawful use of force, with the narrow exception of self-defense cases in which an armed attack has occurred on the territory of a state.[170] Third, it assumes that if any states were permitted to use force for any reason beyond clear individual or collective self-defense, they would inevitably broaden this narrow mandate, using it as a pretext for desired policy ends. [171]

Those taking a much broader view of permissible use of force, sometimes referred to as "counter-restrictionists," argue that customary international law pre-dating Article 51 remains viable so long as it is not prohibited by codified law or newer custom.[172] The fact that Israel was never

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[165] *See* AREND & BECK, INTERNATIONAL LAW AND THE USE OF FORCE 131(1993) (discussing the "restrictionist" viewpoint, which the authors ultimately reject).

[166] Sometimes known as "restrictionists." *See, e.g.*, John-Alex Romano, *Note: Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L. J. 1023, 1035 (1999), *quoting* AREND & BECK, INTERNATIONAL LAW AND THE USE OF FORCE, 154-55 (1993).

[167] Jessup, *supra* note 158, at 165. Jessup used as an example the British seizure of the Danish fleet in 1807. *Id.* At the time of the seizure, Denmark was a neutral country. However, Napoleon had clear designs on the occupation of Denmark as a strategic move to block British commerce into Russia, as evidenced by his military strategy of isolating Britain from commerce, and his building of alliances against Britain. *Id.* In anticipation of Napoleon's invasion of Denmark, the Royal Navy seized the Danish fleet. According to Jessup, such a move would have been in violation of Article 51 of the U.N. Charter. *Id.* at 166.

In contrast, Jessup indicated that the U. S. pursuit of Pancho Villa's forces into Mexico in 1916 would have been permitted if it were judged under an Article 51 standard. *Id.* Likewise, Jessup also believed the movement of British, French, German, Russian, Italian, and Japanese forces into Peking in 1900 during the Boxer Rebellion was also justified because their purpose was to protect nationals at the legations in that city. *Id.* at 170.

[168] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 72-74 (1963).

[169] Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 461 (2000), *citing* Ronald R. Riggs, *The Grenada Intervention: A Legal Analysis*, 109 MIL. L. REV. 1, 22 (1985). *See also* Charney, *supra* note 149, at 836. Charney writes, "To limit the use of force in international relations, which is the primary goal of the U.N. Charter, there must be checks on its use of self defense… It is limited to situations where the state is truly required to defend itself from serious attack." *Id.*

[170] Wingfield, *supra* note 169, at 461, *citing* AREND & BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 94 (1993).

[171] Wingfield, *supra* note 169, at 462.

[172] *Id*. at 462.

universally condemned by the international community for its use of anticipatory self-defense measures in the Six Day War would have significance to them in evaluating the international permissibility of the Israeli measure.[173]

Counter-restictionists have argued that this lack of condemnation shows the continued viability of anticipatory self-defense as a principle of customary international law. Indeed, the U.N. General Assembly did not condemn the Israeli strike.[174] Of course, restrictionists could argue that in the post-Cold War era, the Six Day War example is less significant than counter-restrictionists might claim, because the threat to Israel consisted of significantly numerically superior opposing forces that were Soviet-backed and equipped, a situation no longer existing. However, the reality remains that even in recent years, there has been authoritative reliance on the existence of anticipatory self-defense as formulated and sustained by customary international law. In this respect, the discussion of anticipatory self-defense in the *Nicaragua* decision is particularly important. As noted above, the ICJ held that the U.N. Charter did not supersede custom, but exists alongside it.[175]

The U. S. position is that anticipatory self-defense is inherent in the basic right of self-defense.[176] The current U.S. administration has incorporated the doctrine as part of its overall national security policy, claiming the right to

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[173] *See, e.g.,* Robert F. Turner, *Its Not Really Assassination: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 U. RICH. L. REV. 787, 803 (2003). *See also, e.g.,* S. Malawer, Studies in International Law 192-94 (1977); *see also,* Beth M. Polebaum, *supra* note 124, at 191.

[174] Polebaum, *supra* note 124, at 193.

[175] *See*, Nicaragua v. United States 1986 I.C.J. 14 ¶ 183 (27 June). *See, also,* Maureen F. Brennan, *Avoiding Anarchy: Bin Ladin Terrorism, The U.S. Response and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1200 (1999). It must be noted that the ICJ expressly held that it was not addressing the legality of anticipatory self-defense because the issue had not been raised.

[176] Dunlap, *supra* note 80, at 26, *citing* Int'l and Operational Law Dep't, The Judge Advocate General's School, U.S. Army, JA 422, OPERATIONAL LAW HANDBOOK 4-5 (2003). Dunlap writes:

> The accepted customary international law rule of anticipatory self-defense has its origin in an 1842 Incident in which the British navy caught the American steamship, *the Caroline* ferrying rebel forces and supplies into Canada…. They ultimately agreed that customary international law allows for the use of force against an imminent threat if such force constitutes, "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."
>
> This restrictive definition of anticipatory self-defense is still widely accepted as customary international law, despite its obvious limitations in a modern era of intercontinental ballistic missiles, long-range supersonic aircraft, nuclear submarines, cruise missiles, and biological weapons.

Id.

attack terrorists and their supporters before they strike first.[177] This claim has been extended to protection of allies and national interests.[178]

E. Definition of Preemption

As noted above, the concept of anticipatory self-defense dates back to at least Grotius, who thought that nations are entitled to the same principle enjoyed by persons, who may lawfully kill whomever is attempting to kill them.[179] The concept of preemption in customary international law also has a long history, first articulated in rudimentary form by de Vattel, who wrote:

> The safest plan is to prevent evil where that is possible. A nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming the aggressor.[180]

Given the current U.S. administration's widely publicized justification for its military operations against Iraq, preemption may be viewed by some as a new doctrine. It may be argued that it is indeed a new, and not widely accepted, term to international law. In reality, however, preemption has been a long-standing international legal doctrine, which differs from anticipatory self-defense primarily in its timing. More specifically, the former doctrine allows states greater leeway, in the presence of hostile intentions and capabilities, to mount an attack to avert an opposing attack, rather than require a nation to wait until shortly before, or even after, an attack is absorbed, as the latter doctrine contemplates.[181] The preemption doctrine presupposes that in situations in which a state believes an attack on itself is likely, given available intelligence emanating from another state, the concerned state may respond militarily to protect itself.

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[177] The White House National Security Strategy of the United States of America 12 (2002). This Strategy Statement reads, in pertinent part:

> We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends… It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

Id., in Dunlap, *supra* note 88, at 27.

[178] *Id.*

[179] Beres, *supra* note 153, at 31, *citing* Grotius.

[180] Beres, *supra* note 153, at 31, *citing* EMERICH DE VATTEL, THE LAW OF NATIONS, Book II (1758).

[181] *Id.*

As referenced above, an example of preemptive military action may be found in the Israeli strike on the Osiraq nuclear facility. In that situation, Iraq had not engaged in a military strike on Israel or made specific threats regarding the possibility of a nuclear or other attack on Israel, nevertheless the Israeli government became convinced that the primary purpose of the facility was to enable a future strike against Israel, given prior threatening statements and actions of the Iraqi regime.

Other examples of preemption include certain U.S. responses to prior acts of terrorism. For instance, on April 14, 1986, in response to a bombing of a West German discotheque in which an American serviceman and a Turkish woman were killed, and more than 230 other persons injured, the United States launched air strikes against five terrorist-related targets in Libya.[182] Based on intercepted and decoded exchanges between Tripoli and the Libyan embassy in East Berlin, the United States claimed that this attack was one of a continuing series of Libyan state-ordered terrorist attacks.[183]

This argument had some appeal since Libyan leader Colonel Momar Qadhafi had made frequent public statements announcing Libya's right to export terrorism.[184] Moreover, it was estimated that Libya spent an estimated 100 million dollars annually operating over a dozen camps where over 1,000 terrorists were trained in guerrilla warfare, explosives, and arms for use in sabotage.[185]

In the aftermath of its attack on Libya, the United States argued to the U.N. Security Counsel that it had acted in self-defense, in response to a continuing series of attacks.[186] However, the actions of the United States comport more with preemption than anticipatory self-defense. As the United States did not have intelligence indicating a specific attack was likely at a certain point in the near future, it cannot be reasonably argued that the United States faced a situation in which it was facing a danger that was instant, overwhelming, leaving no choice of means, and no moment for deliberation. In short, while the likelihood of Libyan state-sponsored terrorism continued, the United States could not assess with particularity when a terrorist strike would occur.

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[182] *See, e.g.*, Jack M. Beard, *Military Action Against Terrorists Under International Law: America's New War on Terror and the Case for Self-Defense Under International Law*, 25 HARV. J. L. PUB. POL'Y 559, 561 (2002).

[183] *Id., citing* Bob Woodward & Patrick E. Tyler, *Libyan Cables Intercepted and Decoded*, WASH. POST, Apr. 15, 1986, at A1. Libya disclaimed responsibility for the discotheque bombing. Eleven years later, the United States permitted decoded interception transcripts to be made public in the Berlin Chamber Court. Consequently, persons affiliated with the Libyan embassy in East Berlin were indicted in the court for the bombing. *Id.*

[184] *See* Gregory F. Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L., 177, 180-82 (1987).

[185] *Id.*

[186] *Id.*

III. VIABILITY OF PREEMPTION UNDER INTERNATIONAL CRIMINAL LAW

Historically, the United States and the international community have viewed acts of terrorism as crimes, rather than acts of war.[187] In part, this may be due in part because of the constrained resources of terrorists, who historically have conducted mainly limited attacks with high symbolism, such as political assassinations. Whatever the reason, the United States generally pursued a theory that it has "long-arm" jurisdiction to prosecute airplane hijackers in the Middle East and elsewhere, in circumstances where U.S. citizens or its nationals were victimized.[188] Further, U.S. courts also have allowed trials of terrorists to be held notwithstanding protests by the defendants that their actions constituted acts of war. Individuals implicated in the 1993 attempted destruction of the World Trade Center, for instance, were prosecuted before a U.S. District Court, despite the individuals' contention of being engaged in a holy war.[189] Further, the international community has permitted the prosecution of crimes before civilian tribunals. In both the International Tribunal for the former Yugoslavia (ICTY), and the International Tribunal for Rwanda (ICTR), civilians, government officials, and military officers and enlisted men, have been prosecuted for *jus cogens* crimes.[190]

While international law regarding the use of force by states sheds important light on how nations may fight to defend their citizens against non-state actors such as terrorists, international criminal law provides less guidance on how a nation may take legal action against terrorists abroad.[191] In part, this lack of clarity is due to the jeolous manner in which each state has protected its

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[187] *See, e.g., Responding to Terrorism, Crime, Punishment, and War* 115 HARV. L. REV. 1217 (2002). *See also* Dunlap, *supra* note 88, at 24.

[188] *See, e.g.*, United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989); *see also* 101 F.3d 239 (2d Cir. 1996).

[189] *See* Benjamin Weiser, *"Mastermind' and Driver Found Guilty in 1993 Plot to Blow Up Trade Center*, N.Y. TIMES, Nov. 13, 1997, at A1.

[190] *See generally*, Anthony Sammons, *The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111 (2003); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003).

[191] *See, e.g,.* Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 730-31 (1997). McCormack argues that state interest is likely to hamper prosecuting certain classes of offenses before the International Court. *Id. See also, e.g.*, Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75 (2001). Ross writes that prior to 11 September 2001, the Clinton administration attempts to curb terrorism through criminal law were sometimes criticized as gifts to Israel. *Id.* at 78. That is, several of the individuals prosecuted for terrorist acts during the Clinton administration were primarily interested in the destruction of Israel. Opponents of Israel felt that the United States court system should not be utilized to remove these individuals from the opportunity to attack Israeli interests.

own jurisdiction to prosecute domestic crimes that occur within their own borders.

It is, however, well accepted that states possess a right to prosecute individuals for *jus cogens* offenses such as "crimes against humanity."[192] For example, it has been widely accepted that Israel possessed the right to prosecute Adolf Eichmann, who oversaw the massacres of Jews and other target groups during the period of Nazi Germany.[193] Eichmann was ultimately prosecuted before a public Israeli tribunal, and Argentina received nothing more than an explanation from the Israeli government[194] after his abduction from Argentina to Israel. The abduction nevertheless generated both diplomatic and scholarly debate.[195] Indeed, the Argentine Government, which had earlier disavowed knowledge of Eichmann's whereabouts, complained to the Security Council, which indicated that Israel should make reparations to Argentina.[196] Thus, the means of obtaining jurisdiction over the person remains problematic given the current state of international law.

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[192] *See, e.g.*, Regina v. Finta, 1 S.C.R. 701, Supreme Court of Canada, March 24, 1994 (*Finta).* In *Finta*, Canada asserted domestic jurisdiction over a Lithuanian for Nazi era war crimes. *See also, e.g.*, Bruce Broomhall, *Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399 (2001). *See also* Prosecutor v. Niyonteze, Tribunal militaire de division 2, Lausanne, Apr. 30, 1999, in which a Swiss military court agreed it possessed jurisdiction over a Rwandan mayor accused of war crimes originating in Rwandan genocide.

[193] Attorney Gen. of Israel v. Eichmann, 36 Int'l L. Rep. 5 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962). *See also, e.g.* Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should be Permitted*, 31 COLUM. J. L. & SOC. PROBS. 1, 18 (1997) Izes writes:

> Other authorities justify Israel's action under the international legal principle of "extradite or prosecute." This principle holds that no state should offer a safe haven to individuals who are accused of serious crimes under international law. Applying this theory to the Eichmann abduction, because Argentina had made no attempt to prosecute Eichmann in the ten years he had been living in Argentina, Israel had an international right to abduct Eichmann and adjudicate his case. Many commentators have suggested that Eichmann's abduction may have been justified due to the "nature and extent of the crimes charged" and "the impossibility of extradition of Nazis from Argentina;" in some situations, they argued, "positive law must yield to the natural and moral law."

Id. citing Zad Leavy, *The Eichmann Trial and the Role of Law*, 48 A.B.A. J. 820, 822 (1962).

[194] *Id.*

[195] *See, e.g.*, Michael J. Glennon, *International Kidnapping: State-Sponsored Abduction, A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 748 n.8 (1992).

[196] *See Id*. In response, the Security Council adopted a resolution that read:

> Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations . . . [and n]oting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace . . . the Government of Israel [is] to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.

In recent years, states have successfully prosecuted *jus cogens* offenses after obtaining personal jurisdiction over individuals. For instance, Switzerland prosecuted and convicted before a military court, a former Rwandan mayor, who initially entered Switzerland under a grant of asylum.[197] Before trial, the Swiss government refused to allow him to leave Switzerland.[198]

Prosecuting terrorists under the approach used by the Swiss is problematic for several reasons. First, the state must have possession of the individual, which is particularly problematic for countries, such as the United States, which would like to pursue many known terrorist enemies located abroad. Second, there is no accountability for states that may have harbored, or otherwise supported, terrorists. Otherwise stated, the Swiss approach focuses on the individuals who directly perpetrate terrorist acts, as opposed to the states that may indirectly support such acts. This may be as a result of limited Swiss law enforcement and military capabilities. In any event, the Swiss approach, which is limited to situations in which a terrorist is found within the jurisdiction of the state willing to prosecute, does not address the reality and global scope of modern terrorism.

In addition to reviewing the doctrines of preemption and anticipatory self-defense with a view toward how they may be useful in taking action against terrorism, the international community must more fully acknowledge the criminality of terrorism. U.N. action over the past thirty-five years provides evidence that this recognition is taking hold. In 1970, General Assembly Resolution 2625 affirmed that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[199]

Additionally, on December 9, 1985, the U.N. General Assembly unanimously approved Resolution 40/61, which not only unequivocally condemned all acts of terrorism as criminal, but also called upon states "to fulfill their obligations under international law to refrain from organizing, instigating, assisting, or participating in terrorist acts against other states, or acquiescing in activities within their territory directed towards the commission of such acts."[200] Moreover, in March of 1992, the U.N. Security Council

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Id., citing U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960).

[197] *See e.g.* Broomhall, *supra* note 192, at 405.

[198] *Id.*

[199] G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8010 (1970).

[200] Beard, *supra* note 182, at 580. G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 302, U.N. Doc. A/40/53 (1985).

explicitly linked a state's involvement with terrorism to its obligations under U.N. Charter Article 2, Paragraph 4.[201]

Fortunately, an increased willingness exists in the international community to take action against those who would support terrorists. For example, in Resolution 748, the Security Council imposed economic sanctions on Libya for its continuing involvement with terrorist activities and its refusal to extradite two Libyan nationals alleged to have been involved in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland. In Resolution 748, the Council reaffirmed a principle reflected in General Assembly Resolution 2625, stating:

In accordance with Article 2, paragraph 4 of the Charter of the United Nations, every State has a duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.[202]

Thus, in recent years, there has been greater international recognition that terrorism is not merely a phenomenon that can be considered to an alternative to conventional use of force by states; rather, it is a crime that must be addressed by the world community as a crime.[203] The specific goals of Islamic-based terrorist movements, such as al Qaeda include the forced subjugation of religious and other freedoms to a theocracy.[204] This demonstrates an open willingness to defy basic rights recognized as belonging to all humanity. Furthermore, the methods used to achieve their aims, particularly the targeting of civilians, as noted above, stand clearly contrary to international law.[205] Thus, this contemporary form of religious-based terrorism cannot be equated with traditional state use of force; rather it constitutes a crime under international law.

Beyond attaching criminal liability to those individuals who engage in terrorist acts, international law also assigns analogous responsibility to states that support such individuals.[206] The Security Council reaffirmed this principle

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[201] Beard, *supra* note 182, at 580.

[202] *Id., citing* S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 52, U.N. Doc. S/RES/748 (1992).

[203] *See e.g.*, President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001). *See also, e.g.*, State Department, Fact Sheet: Usama bin Ladin (Aug. 21, 1998), at http://www.state.gov/www/regions/africa/fs<uscore>bin<uscore>ladin.html.

[204] *Id.*

[205] *Id.*

[206] *See, e.g.*, John A. Cohen, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77, 89 (2002), *citing* Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 221 (1976); *see also, e.g.*, Gregory F. Intoccia, *supra* note 184, at 178.

in response to Libyan sponsorship of terrorist groups, stating that state support of terrorism constituted an inherently illegal activity.[207]

Despite these "gains" in the effort to counter terrorism, international law has yet to fully wed a standard of "aiding and abetting" to the doctrine of state responsibility. Nevertheless, the Security Council, after the 11 September 2001 attacks, may have indirectly reflected a preemptive right against states that support terrorism under certain conditions, through its adoption of Resolution 1373.[208] In this ground-breaking resolution, the Security Council ordered states to refrain from various actions likely to aid terrorism.[209] These actions include state financing of terrorist activities as well as prohibiting nationals, or other persons within state borders from financing terrorist activities.[210] Additionally, the Security Council resolution requires states to refrain from providing active or passive support for persons involved in terrorist acts.[211] Most importantly, the resolution proscribes states from providing safe haven to not only terrorist organizations, but also to individuals who actively aid them.[212] While the Security Council cannot create binding international law, the Council's ability to authorize enforcement of resolutions through U.N. Charter, Chapter VII authority, should give states pause.[213] Moreover, Resolution suggests that if preemption against a criminal organization is warranted, the concept of "aiding and abetting" could possibly be used to justify preemptive use of force against states that aid and abet terrorist organizations and refuse to remove them from their respective territories.

A. Aiding and Abetting: a Key to the Viability of Preemption Doctrine

Both anticipatory self-defense and preemption appear to have gained greater vitality as usable doctrines in the fight against terrorism in light of the Security Council's relatively new Resolution 1373 "aiding and abetting" standard. States may forfeit their traditional international law protections when they aid and abet a religious-based terrorist organization that plans to commit *jus cogens* offenses.

Although each state has a different criminal code, it may be helpful to understand the potential vitality of "aiding and abetting" in light of U.S. domestic law, which treats "aiding and abetting" as a recognized offense.

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[207] *See, e.g.*, U.N. SCOR, Res. 731 (1992).
[208] *See* S.C. Res 1373 (28 Sept., 2001), at 40 I.L.M. 1278 (2001).
[209] *Id. See also, e.g.*, Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902 (2002).
[210] S.C. Res/1373 at 1(a),(d).
[211] S.C. Res/1373 at 2(a).
[212] S.C. Res/1373 at 2(c).
[213] *See* U.N. CHARTER Chap. VII; *see* Szasz, *supra* note 209, at 902-904.

"Aiding and abetting" does not constitute any element of a particular crime because the concept provides a means for convicting a person for an offense caused by a principal.[214] In the domestic context, there are usually two components to criminal offenses: *actus reus* and *mens rea*. *Actus reus* refers to the actual physical act or behavior, while *mens rea* denotes the actor's mental state.[215]

In U.S. municipal criminal law, to constitute "aiding and abetting," (1) the principal must commit a substantive offense; and (2) the defendant charged with the aiding and abetting must have consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal.[216] The *actus reus* element of aiding and abetting is generally easy to discern because under a theory of accomplice liability, to be guilty, the defendant must commit an act in furtherance of the principal's offense.[217]

For example, where a defendant supplied the principle with a weapon later used in a bank robbery, the *actus reus* requirement is satisfied.[218] On the other hand, the defendant's mental state is important in assessing whether the *mens rea* was present to prove guilt. Indeed, the defendant's beforehand knowledge of the principal's offense is central in determining applicable *mens rea* for accomplice liability. However, a classic formulation of aider and abettor liability does not make the knowledge requirement facially clear because some courts have construed this requirement to mean less than full knowledge of an intended act.[219] That is, the quantum of knowledge required to constitute criminality is often a matter for the trier of fact to decide. For example, in *United States v. Hill*, a case involving an illegal gambling enterprise, the Sixth Circuit defined knowledge as "the general scope and nature... and awareness of the general facts concerning the venture."[220] Thus, the knowledge requirement is less than a full knowing of the intricacies of a perpetrated crime, but rather, knowledge of the general purpose of the related action.

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[214] *See* 18 U.S.C. § 2. The statute does not define a separate crime, but rather provides another means of convicting someone of assisting another in committing the underlying offense. *See, e.g.*, United States v. Sorrells, 145 F.3d 744, 751 (5th Cir. 1998). In that case, the Fifth Circuit listed three elements of proof to establish guilt of "aiding and abetting" under 18 U.S.C. § 2. First, the defendant must have been associated with the criminal venture. Second, the defendant must have participated in the venture. Third, the defendant must have sought by action to make the venture succeed. *Id.*

[215] Blacks Law Dictionary defines *actus reus* as the "physical aspect of a crime", whereas *mens rea* involves the intent factor, or the "subjective mindset". BLACKS LAW DICTIONARY 36 (6th ed. 1990).

[216] *See, e.g.*, 18 U.S.C. § 2(a); *see also*, Nye & Nissan v. United States, 336 U.S. 613 (1949); *see also* United States v. Spinney, 65 F.3d 231 (1st Cir 1995).

[217] *See, e.g.*, United States v. Pipola, 83 F.3d 556, 562 (2d Cir. 1995).

[218] *Id.*

[219] *See, e.g*., United States v. Hill, 55 F.3d 1197, 1201 (6th Cir. 1995) *quoting* United States v. Peoni, 100 F.2d 401, 402 (2d Cir 1938).

[220] *Id.*

Similar concepts are applicable in the international law context. For instance, in the ICTY case, *Prosecutor v. Furundzija*,[221] the trial and appellate chamber recognized the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.[222] Moreover, such assistance "need not constitute an indispensable element, that is a *conditio sine qua non*, for the acts of the principle."[223] In this case, Furundzija was found to have aided and abetted several crimes against humanity by encouraging others to commit those crimes.[224] And in another case, in *Prosecutor v. Musema*,[225] the ICTR defined the *actus reus* element as "all acts of assistance in the form of either physical or moral support that substantially contribute to the commission of the crime."[226] As reflected in these cases, it is not necessary for an accomplice to share the *mens rea* of the perpetrator, in the sense of a positive intention to commit the crime; instead, the threshold requirement is merely that the accomplice have knowledge that his actions will assist the perpetrator in the commission of the crime.[227] In *Musema*, the tribunal defined *mens rea* as, "[knowledge] of the assistance he was providing in the commission of the actual offense."[228] Illustrating an application of these standards in another ICTR case, in *Prosecutor v. George Ruggio*[229] the tribunal found a journalist guilty as a *de facto* aider and abettor by the journalist's making several broadcasts encouraging Hutu to kill Tutsi.[230]

It follows logically from the above discussion that where states knowingly harbor international terrorist organizations, they are "aiding and abetting" those organizations. It was widely reported that the Taliban government in Afghanistan did so with respect to al Qaeda. Likewise, the Libyan government's sponsorship of individuals implicated in the Lockerbie aircraft bombing would also constitute aiding and abetting under international law.

When a state is harboring or otherwise supporting a terrorist organization planning attacks in contravention of the laws of war, such as is the case in which a terrorist group intentionally targets civilian and clearly

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[221] Prosecutor v. Furundzija, IT-95-17/1-T (ICTY, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999) (*Furundzija*).
[222] *Id.* at 45.
[223] *Id.*
[224] Sean D. Murphy, *Developments in Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, 93 AM. J. INT'L L. 57, 71 (1999).
[225] Prosecutor v. Musema, IT-96-13-A (ICTR, Jan. 27, 2000) (*Musema*).
[226] *Id.*¶ 126.
[227] *Furundzija*, IT-95-17/1-T, ¶ 245 (ICTY, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).
[228] *Id*. at 181.
[229] Prosecutor v. George Ruggio, ICTR-97-32-I.
[230] *Id.*

non-military structures,[231] the potentially impacted state must be allowed to respond to avert the attacks. There is sufficient existing doctrine and precedence under international law to allow a state to exercise preemptive force against such terrorist organizations. This is an important principle because of the unpredictability and lawlessness of the terrorist organizations acts, magnified by the potentially huge damage that they could cause, given technological advances. This right of preemption should be narrowly construed, however, in recognition of its potential for abuse, with applicability only to organizations espousing and practicing activities that clearly violate the laws and customs of war.

IV. CONCLUSION

With the end of the Cold War, terrorism has emerged as the gravest threat facing national and international security. A new wave of terrorism driven by an extremist theology presents a particular ongoing threat. For instance, the several terrorist organizations discussed in this article, eschew contemporary well-settled international understandings of human rights as well as the laws and customs of war. While there is an international law consensus against the direct targeting of civilians, these groups and others simply do not subscribe to this prohibition.

Not all terrorist organizations use the same means for achieving their desired goals. Particularly dangerous, however, are some militant Islamic groups whose stated views are Islamicizing regions of the world by waging a "holy war" and who have no compunction against murdering the innocent in pursuant of this quest. Their literal interpretation of Quaranic scripture coupled with their conduct in resorting to violent acts of terrorism, certainly provides evidence as to this goal.

International law regarding the use of force has developed in response to centuries of interstate warfare. U.N. Charter Article 51 reflect this history. However, reliance on the protections of Article 51 alone would leave governments prostrate in defeating the threat of terrorism. States not only have a duty to ensure basic human rights are enforced, they also have an obligation to protect their citizens and residents from crime. Terrorism is not only a

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[231] *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 51(4)(a), 1125 U.N.T.S. 3, 26, 16 I.L.M. 1391, 1413 (prohibiting attacks not directed at military objectives); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137, 168, 19 I.L.M 1523, 1529, Protocol II, art. 3(2),1342 U.N.T.S. at 169, 19 I.L.M. at 1530 (prohibiting direction of landmines against civilians).

threat to national security; it constitutes a *jus cogens* crime. Within the context of areas of the law in which criminal law and international law have merged the protections of both anticipatory self-defense and preemption must be asserted. Given modern advances in destructive capability and the growing willingness of groups to take the lives of the innocent to further religious their own beliefs, there is no reasonable alternative. Because of the dangers of abuse and military adventurism, each doctrine must be used sparingly, and applications carefully scrutinized. Where one state threatens another directly or indirectly by granting terrorist groups safe haven or other support, the anticipatory self-defense doctrine may prove to be an acceptable response, provided the response meets the proportionality and necessity tests. Likewise, where a state grants terrorist groups safe haven or offers other support, the state may be subject to military attack through the preemption doctrine. Finally, where a non-state actor is able to conduct its operations without state assistance, even though these operations are clandestinely effected without state knowledge, the situs of terrorist activity should be considered a legitimate target under either doctrine. However, the particular acts of terrorism in either case must be the key to an assessment of the permissible use of either doctrine under the circumstances. The terrorist organization must, through evidence of past actions and stated doctrine (*e.g.*, disavowal of international law) pose a threat to the freedoms, health, and safety, of the citizens and residents of the state. In these circumstances, the use of military force should be justifiable.

CONTRACTORS ACCOMPANYING THE FORCE: EMPOWERING COMMANDERS WITH EMERGENCY CHANGE AUTHORITY

MAJOR KAREN L. DOUGLAS*

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.[1]

Nothing is more important in war than unity of command.[2]

I. INTRODUCTION

Letters home from the front lines of battle aren't just from soldiers, airmen, seamen or marines anymore. About half the time, they're from employees of Brown and Root, DynCorp and Kroll. Since the close of the Cold War, the United States military has downsized to a fraction of its former manpower. The Department of Defense began to outsource duties formerly performed by military personnel to civilian corporations in the hope of saving money. This, in turn, leaves military battlefield commanders with a military workforce that is sometimes half of their former numbers.

When everything goes according to plan, the intended result of such outsourcing is more military tooth, with less expensive logistical tail. However, in times of emergency, versatile use of every man counts. Now, military commanders are left with about half of what they need most: command over men.

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1 Dwight D. Eisenhower, Public Papers of the Presidents 1035-1040 (1960).

2 Napoleon Bonaparte, 1831, as cited in LOGCAP Battle Book 26 (2000).

Under existing procurement regulations, the only person empowered to direct contract activities is the duly appointed Contracting Officer. Under a new proposed Defense Federal Acquisition Regulation clause, military commanders would be empowered to direct contracting activities during times of dire emergency. This authority would be limited only by the Law of Armed Conflict's (LOAC) constraints on use of civilians in combat. This proposed amendment would "solve the problem of a perceived lack of direct communications between battlefield commanders and civilian contractors,"[3] and return to battlefield commanders some of the versatility lost by replacing military positions with civilian contractors.

This article is intended to explore the proposed emergency battlefield commander contract change authority amendment, and discuss lawful mechanisms of empowering military commanders with contracting control. Further, this article will consider some of the positive and problematic aspects of providing contract change authority to military commanders.

II. PROPOSED DFARS AMENDMENT: EMERGENCY BATTLEFIELD COMMANDER AUTHORITY

The Defense Federal Acquisition Regulation (DFARS)[4] is currently under review to update its provisions regarding contractors accompanying a deployed force. Among the many proposals being considered are provisions which would require contractors to follow the ranking military commander's orders in times of dire emergency.

A. The Proposed Emergency Authority Clause--*Changes in Emergencies.*

Normally, the Contracting Officer or the Contracting Officer's representative provides direction to the Contractor, and the Contractor provides direction to its employees. However, when the Contractor is accompanying the force outside the United States, if the Contracting Officer or Contracting Officer Representative is not available and emergency action is required because of enemy or terrorist activity or natural disaster that causes an immediate possibility of death or serious injury to contractor personnel or military personnel, the ranking military commander in the immediate area of operations may direct the Contractor or contractor employee to undertake any

[3] Interview with Ms. Marcia Bachman, U.S. Air Force Associate General Counsel (Acquisition), and member of the Defense Acquisition Regulation Counsel (21 Mar. 2004) [hereinafter Bachman Interview]. Ms. Bachman has received numerous calls from battlefield commanders with questions about what use, if any, can be made of civilian contractors.

[4] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (Jan. 2004) [hereinafter DFARS].

action so long as those actions do not require the contractor employee to engage in armed conflict with an enemy force.

The Contractor may submit a request for equitable adjustment for any additional effort required or any loss of contractor-owned equipment occasioned by such direction.[5]

B. A Brief History of Battlefield Commander Emergency Contract Authority.

Providing battlefield commanders with contract authority is hardly a new idea, though it hasn't been used since the American Civil War.[6] During the Civil War, Army ordnance regulations allowed "any officer, in circumstances of 'urgent necessity,' to purchase items normally procured by the Ordnance Bureau, and to submit a report explaining the necessity to obtain government reimbursement."[7] These emergency procurement actions were upheld by the United States Court of Claims[8] as a lawful exercise of command authority. At the close of the Civil War, battlefield commander contract authority was completely withdrawn due to limited, but notable, dishonesty amongst a small group of commanders, and the desire to trade the expediency of commander procurements for a more centralized procurement system in order to promote competition.[9]

This proposed DFARS clause would mark a limited return to emergency battlefield commander authority. The purpose would not be expedient procurement as in the 1860's, but promoting mission accomplishment during emergency conditions. This emergency authority would provide military commanders the opportunity to direct all of their human assets, including contractors, in a life-or-death emergency. So, for example, during circumstances of a natural disaster involving a flood or mudslide, or in circumstances of an armed attack on a military base, food service civilian contractors could be directed to quit making lunch and fill sandbags to fortify the base facilities. Since civilian contractors have been steadily replacing military members for non-combat support positions, the proposed increase in military commanders' authority is quite timely.

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[5] Proposed DFARS change (on file with author).
[6] *See* Lt Col Douglas P. DeMoss, *Procurement During the Civil War and Its Legacy for the Modern Commander*, ARMY LAW., Mar. 1997, at 9.
[7] *Id*. at 11.
[8] The Stevens Case, 2 Cl. Ct. 95 (1866).
[9] DeMoss, *supra* note 6, at 11-13.

III. CONTRACTORS ARE INVADING THE BATTLEFIELD!

In some form or another, contractors have been on the American battlefield since the American Revolution.[10] General George Washington used civilian wagon drivers to haul military supplies.[11] By the Korean War, contractors were hired by the Department of Defense to stevedore, perform road and rail maintenance, and transport troops and supplies.[12] In Vietnam, contractors moved into providing logistics by providing base construction and operations, water, and ground transportation, fuel, and high-tech system maintenance and support.[13] During the first Gulf War, 9,200 contractors deployed in support of the United States forces, and provided maintenance of high-tech equipment, water, food, construction, and other services.[14] In the Bosnia operation, the ratio of contractors to uniformed United States Army members was almost equal, with 6,000 Army personnel supported by 5,900 civilian contractors.[15] In 1999, during the Kosovo operations, Kellogg, Brown & Root Co. provided $1 billion dollars worth of logistics support for the military. Their contract activities included engineering, construction, base camp operations and maintenance, structure maintenance, transportation services, road repair, vehicle maintenance, equipment maintenance, cargo handling, railhead operation, water production and distribution, food services, laundry operations, power generation, refueling, hazardous materials and environmental services, staging and onward movement operations, fire fighting and mail delivery.[16] By contracting with Kellogg, Brown and Root for these logistical services, the U.S. troop commitment to the Balkan deployments were reduced by an estimated 8,900 troops,[17] at a total cost of $2.2 billion.[18] During the recent military operations in Afghanistan and Iraq, an estimated $8 billion dollars worth of contracts have already been awarded to civilian contractors.[19]

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10 Gordon L. Campbell, Presentation to Joint Services Conference on Professional Ethics 2000 (January 27-28, 2000), available at http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html (last visited 19 Mar 2004) [hereinafter Campbell Presentation].

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 144 (2003).

17 *Id.* at 146.

18 The Center for Public Integrity, *Windfalls of War: Kellogg, Brown & Root (Halliburton)*, available at http://www.publicintegrity.org/wow/bio.aspx?act=pro&ddlC=31, (last visited 7 Jul. 2004).

19 The Center for Public Integrity, *Windfalls of War: Winning Contractors*, available at http://www.publicintegrity.org/wow/report.aspx?aid=65 (last visited 7 Jul. 2004).

A. As the Numbers of Contractors and Deployments Go Up, the Number of Soldiers Goes Down.

The markedly increasing numbers of civilian contractors on the battlefield are the result of the United States military's outsourcing of formerly governmental functions. Outsourcing became a global phenomenon after the election of Margaret Thatcher as Prime Minister of Great Britain.[20] The Thatcher government's program of denationalization and privatization of state industries was considered a resounding success in turning around the British economy. The idea of outsourcing traditional government functions soon spread to other countries.[21] The United States has followed Britain's example, and reduced its military to one third of the soldiers that it maintained during the Cold War peak.[22] Further, since 1989, total U.S. Forces and budgets are down 40% from their levels in 1989.[23] As of January 2000, that 40% translates to a reduction from 111 Combat Brigades into sixty-three.

America's need for the military did not disappear. In fact, the operations tempo has significantly increased since the Cold War: even prior to the 11 September 2001 War on Terrorism, United States troops were sent on 36 different deployments as compared to ten during the Cold War.[24] The outsourcing and downsizing occurred not because the military was no longer necessary, but as an attempt to economize. The idea behind these massive military personnel cuts was to save money while concentrating the remaining assets on efficiency:

> "[T]he scale and scope of what we're seeing today is unprecedented. Even as, in the nineties, the size of the armed force shrank precipitously, the number of outside contract workers kept growing. By some accounts, half of all defense-related jobs are now done by private employees. Why the change? First, the notion that government is fundamentally inefficient and unproductive has become conventional wisdom. It had always had a certain hold on the American imagination, but it gained strength with the ascendancy of conservatism in the eighties and nineties. Second, Washington fell for the era's biggest business fad: outsourcing. For most of the twentieth century, successful corporations were supposed to look like General Motors: versatile, vertically, huge. But by the nineties, vertical integration had given way to 'core competency': do only what you do best, and pay someone else to do the rest. The Pentagon decided that it should concentrate on its core competency--- 'warfighting'. It's a tidy

[20] SINGER, *supra* note 16, at 66.
[21] *Id.* at 66, 67.
[22] *Id.* at 53.
[23] Campbell Presentation, *supra* note 10.
[24] *Id.*

picture: the Army becomes a lean, mean killing machine, while civilians peel the potatoes and clean the latrines."[25]

B. The United States Military Has Become Fully Dependent on Contractors.

The original goal of outsourcing was to save money. The practical effect was to make the military dependent on contractor support at all stages of operations. Because of outsourcing and force reductions, "[t]he use of contractors to support military operations is no longer a 'nice to have'. Their support is no longer an adjunct, ad hoc add-on to supplement a capability. Contractor support is an essential, vital part of our force projection capability—and increasing in importance."[26]

Replacing military members with contractors has also become a force retention tool. By using contractors to perform maintenance contracts, commanders can conserve their high-demand but low manning density units for future operations.[27] In Southwest Asia, Air Force officials were concerned about retention of high demand generator maintenance troops with a frequent deployment schedule.[28] By substituting contractors for the active duty troops, Air Force officials reduced the military members' TDY schedule and found a solution to the retention problem.[29]

"The DOD relies on contractors as part of the total force."[30] In fact, Joint Publication 4-05[31] provides, "The total force policy is one fundamental premise upon which our military force structure is built . . . as policy matured . . . contractor personnel . . . were brought under its umbrella."[32] United States military dependence on contractors necessitates placing contractors everywhere throughout operations.

> "[Never before] has there been such a reliance on non-military members to accomplish tasks directly affecting the tactical successes of an engagement. As a result, government employees and contractors are in closer physical proximity to the battlespace than ever before, and in roles functionally close

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[25] James Surowiecki, NEW YORKER (FINANCIAL PAGE), *Army, Inc.*, 12 Jan. 2004 at 27.
[26] Campbell Presentation, *supra* note 10.
[27] GEN. ACCT. OFF. REP. NO. GAO-03-695, *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans*, page 6 (June 2003) [hereinafter GAO-03-695].
[28] *Id*. at 9.
[29] *Id*. at 9.
[30] *Id*. at 18.
[31] Joint Publication (JP) 4-05, *Joint Doctrine for Mobilization Planning*, 22 June 1995, ch. I, para. 2(b) [hereinafter Joint Pub. 4-05].
[32] GAO-03-695, *supra* note 27, at 18 (citing Joint Pub. 4-05).

to combatants; many of these roles formerly exclusively held by uniformed members of the armed forces."[33]

In fact, contractors are physically co-located alongside military combatants on the battlefield.

"Given an asymmetric threat on a nonlinear battlefield, there is no 'safe' zone within the area of operation. Army doctrine does not establish a 'Forward line of Contractors". Contractor personnel will be positioned anywhere in the theater by the Commander—METT-TC dependent and in accordance with the terms and conditions of their contract."[34]

C. The Army's Overview of Battlefield Contract Types.

The Army perceives contractors as more than just logistics support, indicating "it spans the spectrum of combat support (CS) and combat service support (CSS) functions."[35] CS and CSS contracts "ha[ve] applicability to the full range of Army operations, to include offense, defense, stability, and support within all types of military actions from small-scale contingencies to major theater wars."[36]

Battlefield contractors are generally categorized into three types: theater support, external support, and system contractors.[37] Theater support contracts are usually associated with contingency contracting, and are most frequently hired from local area commercial sources to provide support to operational forces.[38] Such theater support contracts are responsible for the immediate needs of operational commanders, such as goods, services and minor construction.[39] External support contracts, such as the Logistics Civil Augmentation Program (LOGCAP) contract, are awarded and administered by contracting officers assigned to supporting headquarters located outside of the theater.[40] The services provided under external support contracts are usually building roads, airfields, dredging, stevedoring, transportation services, mortuary services, billeting and food services, prison facilities, utilities and decontamination.[41] The third type of battlefield contract is a system contract for the support and maintenance of equipment throughout the system's

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[33] Col Steven J. Zamparelli, *Competitive Sourcing and Privitization: Contractors on the Battlefield, What Have We Signed Up For?,* A.F. J. LOG. 9 (Fall 1999).
[34] Campbell Presentation, *supra* note 10.
[35] U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, *Contractors on the Battlefield*, ch. 1, at 1-1 (3 January 2003) [hereinafter FM 3-100.21].
[36] *Id.* at 1-1, para. 1-2.
[37] *Id.* at 1-2, para. 1-7.
[38] *Id.* at 1-3, para. 1-8.
[39] *Id.* para. 1-8.
[40] *Id*. para. 1-9.
[41] Maj Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?,* 51 A.F. L. Rev. 111, 124 (2001) [hereinafter Guillory].

lifecycle.[42] Such systems include vehicles, weapon systems, and aircraft and communications systems deployed with the military.[43] System contract support may be either for the life of the system, or for the initial fielding stages, and contract personnel are usually United States citizens.[44]

D. Contractors Must Not Participate in Armed Hostilities.

"The citizen must be a citizen and not a soldier . . . war law has a short shrift for the non-combatant who violates its principles by taking up arms."[45]

The Law of Armed Conflict (LOAC) protects non-combatant civilians from being targeted as objects of attack (though they can be lawfully killed as "collateral damage"). Those civilians who do become unlawful combatants by taking direct part in hostilities lose the protections afforded to non-combatants.[46] Contractors, as civilians, are not lawful combatants in international armed conflict, and the military is strictly forbidden from using contractors as combatants.

To qualify as a lawful combatant, the individual must: (1) be under the command of a person responsible for his subordinates and subject to an internal disciplinary system; (2) have a fixed and distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war. Combatants "have the right to participate directly in hostilities" and, when captured, are afforded POW status. They are immune under a state's internal national law for their combatant acts as long as they comply with LOAC. Non-combatants are, by negative definition, those who are not members of an armed force, as well as a few specific members of an armed force such as medical personnel and chaplains.[47]

Those civilians who do participate directly in hostilities are considered illegal belligerents, and forfeit their protection from being made the object of attack and are subject to trial for their actions.[48] The United States military uniformly prohibits contractors from engaging in purely military acts or jeopardizing their non-combatant status. "In all instances, contractor

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[42] *Id.* at 123.
[43] FM 3-100.21, *supra* note 36 at 1-3, para. 1-10.
[44] *Id.* para. 1-10.
[45] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV.1, 75, 118 (1990), *quoting* JAMES MALONEY SPAIGHT, WAR RIGHTS ON LAND 38 (London, 1911).
[46] Maj Lisa L. Turner, *Civilians at the Tip of the Spear*, 51 A.F. L. Rev.1, at 27 (2001) [hereinafter Turner].
[47] *Id.* at 25, *citing* Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art.3, 36 Stat. 2277, 205 Consol.T.S. 277, Geneva Convention Relative to the Treatment of Prisoners of War, arts. 36, 37, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts, Dec. 12, 1977, arts. 43, 44, 1125 U.N.T.S. 3.
[48] *Id.* at 28, 70.

employees can not lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."[49]

External and Theater support contractors perform traditional civilian support roles, and seldom pose a problem as unlawful combatants.[50] However, systems contracts require close contractor support due to their technical sophistication, and place these contractors in greater risk of direct involvement with the conflict.[51]

E. Commanders Have No Legal Authority Over Contractors.

Current government procurement regulations leave control over contractors solely in the hands of Contracting Officers. Commanders cannot order contractors to do anything, even the services they contracted for.[52] As the law now stands, the commander's only link to the contractor is through the contracting officer or the contracting officer's representative.[53]

> "The commander has no "Command & Control" authority over contractor personnel. While the contract can require contractor personnel to abide by all guidance and obey all instructions and general orders applicable to U.S. Armed Forces and Department of Defense Civilians, they cannot be "commanded." Their relationship with the government is governed by the Terms and Conditions of their contract. Only the Contracting Officer has the authority to direct the Contractor (not contractor employees--that would be personal services: a real "no, no" in government contract law) through the contract. In short, the Commander must "manage" contractor personnel through the contracting process. He has no authority to command . . . them."[54]

With the enactment of the Military Extraterritorial Jurisdiction Act of 2000,[55] DoD contractors may be federally prosecuted for felony-equivalent crimes committed outside of the jurisdiction of United States. However, neither this Act nor its proposed implementing regulation[56] provides commanders with criminal jurisdiction over contractors: that power rests with

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[49] U.S. Joint Publication (JP) 4-0, DOCTRINE FOR LOGISTICS SUPPORT OF JOINT OPERATIONS, CONTRACTORS IN THE THEATER (Apr. 2000), ch, V., para. 1.d.
[50] Guillory, *supra* note 42, at 124.
[51] *Id.*
[52] Turner, *supra* note 47, at 36.
[53] *Id.*
[54] Campbell Presentation, *supra* note 10.
[55] The Military Extraterritorial Jurisdiction Act, 18 USC 3261 (22 Nov. 2000) (proposed rule to be codified at 32 C.F.R. pt. 153).
[56] *Id.*

federal civilian authorities.[57] Further, commanders don't even have UCMJ authority over contractors unless it's a time of declared war.[58] Since the vast majority of military operations do not stem from congressionally declared wars, the UCMJ is rarely imposed on contractors.[59]

Army Field Manual 3-100.21 suggests that the military commander can indirectly influence contractor employee discipline by withholding privileges or removing contractors from the theater.[60] This manual lists "revocation or suspension of clearances, restriction from installations or facilities, or revocation of exchange privileges . . . and removing contractor from the AO"[61] as possible solutions to dealing with undisciplined contractors. This utter lack of actual military discipline over the contractors only compounds the issue of the commander's lack of contract authority. Both the military commanders and the contractors know that the worst a commander can do is ask the contracting officer to direct the contractor to remove the offending contractor employee from the theater.

F. Commanders are Obligated to Protect Contractors.

Commanders who are augmented with civilian contractors face the added responsibility of providing force protection for these contractors. "[T]he government's responsibility for providing force protection derives from three factors: a legal responsibility to provide a safe workplace, a contractual responsibility which is stipulated in most contracts, and third, to enable the contractors to continue to do their job."[62] "When contractors perform direct support of Army forces in potentially hostile areas, the supported military force must assure the protection of the contractor's operations and personnel."[63] For example, in Somalia and Bosnia, contractors frequently required armed military escorts.[64]

How, then, is a commander to protect civilian contractors in time of dire emergency if the contractors have no obligation to obey their orders?

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[57] FM 3-100.21, *supra* note 36, at 4-12, para 4-45.
[58] *Id.*
[59] United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970).
[60] FM 3-100.21, *supra* note 36, at 4-12, para 4-47.
[61] *Id.*
[62] Maj Maria J. Dowling & Maj Vincent J. Feck, *A Joint Logistics and Engineering Contract, Issues and Strategy 2000 Selected Readings: Contractors on the Battlefield,* A.F. LOGISTICS MGMT. AGENCY ED., at 61-67 (Dec. 1999).
[63] FM 3-100.21, *supra* note 36, at 2-10.
[64] LTC Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield,* 29 PUB. CONT. L.J. 233 at 267 (2000).

G. Replacing Military Personnel with Contractors Reduces Commanders' Versatility in Times of Emergency.

Given the LOAC prohibitions on civilians directly participating in hostilities, replacing former military positions with contractors forecloses battlefield commanders' options on the versatile use of his force in time of life or death emergency. Even military members whose primary mission does not include direct combat, such as the logistics branch of Combat Support Services, are at least pistol trained and qualified.[65] All Army Military Occupation Specialties (except Chaplains and Medical Providers) contain the requirement to fight as infantry if necessary.[66]

Combat weapons training of Combat Support Services soldiers give battlefield commanders options in circumstances of dire emergency. For example, in the World War II Battle of the Bulge, "U.S. Army support personnel (such as cooks, drivers, mechanics, and secretaries) were armed and sent to the front lines to bolster weakened infantry units."[67] Such innovative use of support personnel wasn't limited to World War II either, as shown by 1993's Mogadishu, Somalia Black Hawk Down incident. Support troops were called upon to drop their spatulas and pens, pick up rifles, and help save surrounded U.S. troops from hostile fire.[68]

The use of Combat Support Services troops to support combat is anticipated to continue, and in fact become more prevalent, thus making a strong argument for the Army's adoption of the Marine Corps foundational metaphor, "Every Marine a Rifleman" into "Every Soldier a Rifleman."[69] As support positions are contracted to civilian corporations, commanders will lose the option to use support personnel as riflemen to augment combat units in dire emergencies.[70] Commanders can not use these contractors to substitute as combatants for fallen soldiers in life or death situations such as the Battle of the Bulge or the Black Hawk Down[71] incident from Somalia's Operation Restore Hope. These support contractors don't even have a legal or contractual obligation to follow field commanders' orders to fulfill non-combatant roles. "The loss of a potential pool of combatants may prove a significant disadvantage to a hard-pressed commander fighting a casualty-intensive operation."[72]

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[65] MAJ David Scott Mann, *Every Soldier a Rifleman*, ARMY LOGISTICIAN, at 47 (Jan. 2004).
[66] Campbell Presentation, *supra* note 10.
[67] SINGER, *supra* note 16, at 163.
[68] *Id.*
[69] Mann, *supra* note 66, at 45.
[70] SINGER *supra* note 16, at 163.
[71] MARK BOWDEN, BLACK HAWK DOWN (1999).
[72] Davidson, *supra* note 65, at 267.

IV. CONTRACT CHANGES REQUIRE PROPER AUTHORITY

Can battlefield commanders lawfully exercise contract authority under the limited circumstances of overseas location, contract officer unavailability, and dire exigency? According to the FAR,[73] contract change authority is reserved for duly appointed contract officers. FAR Part 43.102 provides:

> (a) Only *contracting officers acting within the scope of their authority are empowered to execute contract modifications* on behalf of the Government. Other Government personnel shall not
>
> (1) Execute contract modifications;
> (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or
> (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification.[74] (emphasis added).

Thus, a strong question arises as to the validity of the proposed DFARS clause. Can a change to only the DFARS provide ranking military commanders with emergency contract change authority in light of FAR 43.102's unambiguous prohibition against contract changes made by anyone other than the contact officer? Or, will amendment of FAR 43.102 also be required before the proposed DFARS clause is valid?

A. Limiting Contract Change Authority is a Sound Business Practice.

The FAR tightly limits government contract authority in order to avoid the fiscal disaster that would result if all federal employees were empowered to obligate the government's funds. If each government employee whose work involved interaction with a government contractor were authorized to direct the performance of the contract or the contractor employee, contracts would be in serious jeopardy of misdirection away from the original intended purpose of the contract. Huge cost increases could be incurred with every changing whim of a government employee.

> [T]he Government practice of specifically designating only one person, the CO, as having exclusive actual authority for dealing with the administration of a contract avoids the chaos and lack of protection for those Government interests which would result if a contractor were allowed to rely on the authority of any one of dozens or potentially hundreds of Government "agents" who might have some relationship with the contract.[75]

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[73] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 43.102(a) (hereinafter FAR).
[74] *Id.*
[75] Inter-Tribal Council of Nev., Inc., IBCA 1234-12-78, 83-1 BCA ¶ 16,433, at 81,745-746, *as cited in* JOHN CIBINIC, JR., FORMATION OF GOVERNMENT CONTRACTS 82 (3d ed. 1998).

This practice of requiring valid actual contract authority of government agents was upheld by the United States Supreme Court in *Federal Crop Ins. Corp. v. Merrill*.[76]

Limited exceptions on the requirement of actual authority exist for implied authority, estoppel, and imputed knowledge. Implied contract authority exists when some actual contract authority has been delegated to a government employee, and the acts undertaken by the employee are an integral part of their assigned duties.[77] A contractor's reasonable reliance on a government employee's representations may estop the government from denying liability for that employee's actions.[78] Imputed knowledge exists when a government employee making the unauthorized commitment has a duty to inform the contracting officer of the questioned event, and the court presumes the government employee did so inform the contracting officer.[79] In addition, contracting officers may ratify unauthorized commitments by approving them in accordance with FAR 1.602-3.[80]

B. Military Commanders Do Not Have Contract Warrant Authority.

Contracting Officers and Military Commanders are usually mutually exclusive occupations.[81] "The vast majority of contracting officers are civilians, not soldiers who will be deploying with the force they support."[82] The legal capacity to contract is regulated by the FAR, and in the Department of Defense is limited to heads of government agencies (i.e.: service secretaries).[83] This authority can be delegated to Heads of Contracting Agencies.[84] In the Army, the MACOM Commanders, as Heads of Contracting Activities, are the lowest military position to hold contracting authority by virtue of their command position.[85] Heads of Contracting Agencies[86] and Heads of Contracting Activities[87] rarely exercise their contracting authority, opting instead to contract through a Principal Assistant Responsible for Contracting.[88] Further, Heads of Contracting Agencies delegate contracting

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[76] Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).
[77] CIBNIC, *supra* note 76, at 96.
[78] Burnside-Ott Aviation Training Ctr., Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993).
[79] CIBINIC, *supra* note 76, at 107.
[80] FAR, *supra* note 74, at 1.602-3.
[81] Elyce K.D. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL. L. REV. 111 (1989).
[82] *Id.* at 111.
[83] FAR, *supra* note 74, at 1.601.
[84] *Id.*
[85] Santerre, *supra* note 82, at 125.
[86] *See* FAR, *supra* note 74, at 2.101. The Head of the Contracting Agency is the Agency Secretary or their deputy.
[87] *See id.* A Head of the Contracting Activity is the official who has overall responsibility for managing the contracting activity.
[88] Santerre, *supra* note 83, at 125.

authority to individual Contracting Officers by issuance of a warrant.[89] Contacting Officers are selected based on contracts related experience and education.[90] Thus, some high ranking agency officials who are untrained in the field of contracting and are not qualified in accordance with the FAR[91] to contract on behalf of the government, have the authority to enter into government contracts simply by virtue of their politically appointed position as the head of the agency. However, it's important to note that the FAR and DFARS are drafted so that these untrained individuals do not have to do any contracting themselves. Instead, these officials are tasked with the management of the trained contracting professionals that work for them. As currently drafted, the FAR and DFARS do not create any exceptions to the contracting officer experience and education requirements, and do not authorize delegation of contract authority to battlefield commanders by virtue of their position as commander.[92]

C. Despite Lack of Contract Authority, Military Commanders Have Directed Contract Changes.

Many battlefield commanders are unaware of the FAR limitations on contract change authority, or that they lack authority to direct or change contract work.[93] Indeed, such a limitation on authority runs counter-intuitively to the military culture of command.[94] During contingency operations, this issue becomes even more problematic because military members may assume the role of Contracting Officer Representative (COR),[95] and receive minimal training regarding the responsibilities and limitations on their COR duties.[96]

In the Bosnia operation, a commander unintentionally directed a constructive contract change to a LOGCAP construction project.[97] The commander decided to accelerate the camp construction project, which in turn required the contractor to obtain plywood at a substantial increase in cost from $27.31 per sheet to $85.98 per sheet.[98]

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[89] FAR, *supra* note 74, at 1.603-3.
[90] *Id.* at 1.603-2.
[91] *Id.*
[92] DFARS, *supra* note 4, at 201.603-2.
[93] Davidson, *supra* note 65, at 266.
[94] *Id.* at 267.
95 *See* DFARS, *supra* note 4, at 202.101, *Definitions of Words and Terms* (defining a Contracting Officer's Representative as an individual designated and authorized in writing by the contracting officer to perform specific technical or administrative functions).
[96] Maj Rafael Lara, Jr., *A Practical Guide to Contingency Contracting*, ARMY LAW.16, at 22 (Aug. 1995).
[97] GEN. ACCT. OFF. REP. NO. GAO/NSIAD-97-63, *Contingency Operations: Opportunities to Improve the Logistics Civil Augmentation Program*, at 18 (Feb. 1997) [hereinafter GAO/NSIAD-97-63].
[98] *Id.*

D. The Contract Officer May Delegate Change Authority.

Despite FAR 43.102's prohibition against anyone but the Contracting Officer changing a contract, the FAR does envision circumstances when other government employees may lawfully direct changes in a contract.

1. Administrative Contracting Officers under the FAR.

FAR 43.202 provides for delegation of contract change authority to Administrative Contracting Officers: "[c]hange orders shall be issued by the contracting officer except when authority is delegated to an administrative contracting officer."[99] Such delegations of contracting authority should be formally made in writing by use of the Standard Form 1402 warrant.[100] Administrative Contracting Officers are duly appointed Contracting Officers, with duties that are limited by their warrants to contract administration. [101]

FAR 42.202(a) largely leaves the boundaries of the contract administration delegation up to the agencies involved, "[a]s provided in agency procedures, contracting officers may delegate contract administration or specialized support services, either through interagency agreements or by direct request to the cognizant CAO . . ."[102] Further, FAR 42.302(a) authorizes the Contracting Officer to delegate any contract administration function, except for negotiating forward pricing rate agreements and establishing final indirect cost rates and billing rates.[103] The option of delegating contract change authority is further provided for in FAR 42.302(c), which states, "[a]ny additional contract administration functions not listed in 42.302(a) and (b), or not otherwise delegated, remain the responsibility of the contracting office. Contract change authority is not listed in FAR 42.302(a) or (b), thus a specific delegation of this authority is required. Though the FAR does envision the Contracting Officer's delegation of contract change authority to Administrative Contracting Officers, the prescribed delegation must still be to a trained contracting professional with a valid, but limited, contracting officer warrant.

2. Contracting Officer Representatives under the DFARS.

The current DFARS provides for delegation of some contract supervision duties, but prohibits contract officers from delegating contract change authority to their representatives. DFARS 201.602-2 Responsibilities provides:

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[99] FAR, *supra* note 74, at 43.202
[100] *Id.* at 1.603-3. A copy of the SF 1402 is at Appendix 2.
[101] *Id.* at 2.201.
[102] *Id.* at 42.202(a).
[103] *Id.* at 42.302(a).

> Contracting officers may designate qualified personnel as their authorized representatives to assist in the technical monitoring or administration of a contract. A contracting officer's representative (COR)-
>
> > *(1) Must be a Government employee, unless otherwise authorized in agency regulations.*
> > *(2) Must be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with department/agency guidelines.*
> > *(3) May not be delegated responsibility to perform functions at a contractor's location that have been delegated under FAR 42.202(a) to a contract administration office.*
> > *(4)May not be delegated authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract* (emphasis added).

As currently drafted, DFARS 201.602-2 is incompatible with battlefield commander change authority. Combat commanders are government employees as required by DFARS 201.602-2(1), but they are not typically well qualified and trained in contracting as required by DFARS 201.602(2), and the whole point of the proposed emergency change authority is so that they can make the decisions that are normally prohibited by DFARS 201.602(4) which would affect price, quality, delivery or other terms of the contract.

If emergency contract change authority is to be delegated under FAR 43.202, then DFARS 201.602-2 must be revised to make it inapplicable to combat commanders, and a second delegation of authority clause that is applicable solely to combat commanders must be promulgated.

E. Centralized Delegation of Emergency Battlefield Contract Change Authority.

The FAR provides another option for delegation of contract change authority without action from the individual contracting officers: centralized delegation from the Agency Head or the Head of the Contracting Activity. Such delegations may be directly made from the Agency Head or the HCA to the combat commanders under FAR 1.603-1, which provides, "Agency heads or their designees, such as the HCA, may select and appoint contracting officers and terminate their appointments."[104] Such high-level control over the proposed delegation of limited emergency contract change authority may be more attractive to Agency Heads who are charged with all responsibility for

[104] *Id.* at 1.603-1.

their agency's contracting activities.[105] In this manner, the decision to delegate emergency contract change authority to battlefield commanders would be retained at the highest levels of authority and oversight.

Per FAR 1.601, this Agency Head or HCA delegation would envision providing the combat commander with contracting officer appointments via FAR 1.603, rather than delegation of contract administrative duties via administrative contracting officer assignment under FAR 42.202.[106] This is problematic, in that selection of contracting officers is made based on the contracting officer candidate's "experience, training, education, business acumen, judgment, character and reputation."[107] While combat commanders may possess excellent judgment, character and reputations, the majority will not have any experience in government contracting, training in business administration, law or accounting, or specialized knowledge in the field of government acquisitions.[108] Thus, as written in FAR 1.603, military commanders are not lawful candidates for direct contract officer appointments.

F. A FAR 1.400 Deviation Authorization Would Remedy the Training, Education and Experience Barrier to Battlefield Commander Contract Officer Appointments.

FAR clauses are not forever set in stone to act as impediments to accomplishing agency objectives. FAR clauses are subject to review for deviation on an individual or class deviation basis via FAR 1.400. FAR deviations include changing policy, procedure, contract clauses and any practice of acquisition procedure at any stage of the acquisition process.[109] It is FAR policy to grant FAR deviations that do not violate law, executive order or regulation when necessary to meet the specific needs of each agency.[110] The fact that a deviation is necessary to accomplish a new acquisition technique should not deter an agency from pursuing new acquisition methods.[111] FAR deviations are accomplished on either an individual[112] or class basis.[113] The appropriate method for changing the FAR rules and bestowing limited contract officer status on otherwise ineligible combat commanders would be a class deviation, since it would affect more than one contract action.[114] Within the DOD, the Under Secretary of Defense has the authority to grant such class

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[105] *Id.* at 1.601.
[106] *See id.* at 1.601, "Contracting officers below the level of head of a contracting activity shall be selected and appointed under 1.603."
[107] *Id.* at 1.603-2.
[108] *Id.*
[109] *Id.* at 1.401(a).
[110] *Id.* at 1.402.
[111] *Id.*
[112] *Id.* at 1.403.
[113] *Id.* at 1.404.
[114] *Id.*

deviations.[115] If the delegation of limited emergency contract change authority is a successful tool for commanders on the battlefield, then a permanent revision to the FAR should be considered.[116]

G. Delegation of Emergency Battlefield Contract Change Authority Can be Made by Position, Not by Individual.

The proposed DFARS amendment envisions giving emergency change authority to the ranking military commander in the immediate area of operations.[117] This poses the question of whether the delegation of contracting authority or administrative contract authority must be made to a specific individual, or whether the delegation could be made to the position.

Normally, delegations of CO or ACO are made to individuals, and not to whomever is holding a particular position.[118] However, not all FAR contract authority is vested in individuals. "In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions."[119]

The DFARS could also be amended to include by position delegation of emergency contract change authority. Instead of selecting individuals for contracting officer appointment or administrative contracting officer delegation, the delegating authority would select the command positions. Instead of inserting the name of the individual on the SF 1402, the delegating authority would insert the military commander billet. The emergency contract change authority would go to whoever is in command of the position. This would eliminate the necessity of re-accomplishing an SF 1402 every time the position changes command. In such dire emergency situations as envisioned by the emergency contract change authority, it is possible that the ranking military commander would become disabled or be killed. With delegation of authority by position, whoever is next in rank would gain the emergency contract change authority at the same time as assuming military command. This continuity of authority through command position also makes sense in light of regular rotations of military personnel in and out of the theater or even the commander taking ordinary leave and putting his deputy in charge while he's gone.

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[115] DFARS, *supra* note 4, at 201.404(b)(i).
[116] FAR, *supra* note 74, at 1.404.
[117] Proposed DFARS change (on file with author).
[118] FAR, *supra* note 74, at 1.603-2, DFARS 201.603-2.
[119] *Id.*

H. The Ranking Military Commander May Make Emergency Contract Changes Without a Delegation of Contract Authority.

Legal theories have been successfully used in the past to bring binding legal significance to contractual dealings with government personnel who do not possess contractual authority.[120]

1. Unauthorized Contracts may be Ratified by Proper Contract Authority.

Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized.[121] In government contracts, ratification of an unauthorized commitment may be made by one who has authority to bind the government.[122] When a government official has actual or constructive knowledge of an unauthorized act and expressly or impliedly adopts the act, then ratification has occurred.[123]

The FAR expressly provides for ratification of unauthorized commitments in FAR 1.602-3, which allows ratification of unauthorized commitments which were not binding upon the government solely because the government representative who made the agreement lacked the full authority to do so.[124]

The FAR policy regarding ratification is:

> (1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. *Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel* (emphasis added).
> (2) Subject to the limitations in paragraph (c) of this subsection, the head of the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.
> (3) The ratification authority in subparagraph (b)(2) of this subsection may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.

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[120] CIBINIC, *supra* note 76, at 95.
[121] RESTATEMENT, SECOND, AGENCY § 85 (1981).
[122] CIBNIC, *supra* note 76, at 98.
[123] *Id.*
[124] FAR, *supra* note 74, at 1.602-3(a).

> (4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the General Accounting Office for resolution. (See 1.602-3(d)).
> (5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1978 should be processed in accordance with Subpart 33.2, Disputes and Appeals.[125]

This ratification policy is further supplemented by specific limitations found in FAR 1.602-3(c). Ratification authority may only be exercised under the FAR when:

> (1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
> (2) The ratifying official has the authority to enter into a contractual commitment;
> (3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;
> (4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
> (5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
> (6) *Funds are available and were available at the time the unauthorized commitment was made* (emphasis added); and
> (7) The ratification is in accordance with any other limitations prescribed under agency procedures.

Thus, a contracting official may ratify an unauthorized commitment if it is proper in every other respect, including availability of contract funds to cover the unauthorized commitment at the time the unauthorized commitment was made.[126]

By using the ratification method of authorizing battlefield commander emergency change authority, the DFARS may be running afoul of FAR 1.602-3(b)(1)'s prohibition against relying on ratification as a method of doing business. Further, under the proposed DFARS clause, if corresponding changes to the FAR and DFARS were made to provide for contract change authority in the ranking military commander, ratification would not be required

[125] *Id.* at 1.602-3(b).
[126] *Id.* at 1.602-3(c)(6).

to pay the performing contractor. However, if the FAR and DFARS are not amended to provide ranking military commanders with contract authority, then emergency battlefield changes may be compensated by ratification. Systematically authorizing a battlefield commander's contract change authority through the ratification process would create the appearance that ratification procedures are being "used in a manner that encourages such commitments being made by Government personnel."[127] The FAR explicitly prohibits this method.[128] Thus, either a class deviation for DOD battlefield commander ratification actions must be obtained, or FAR 1.602-3 must be amended to exclude emergency battlefield commander changes.

2. Courts Have Enforced Unauthorized Commitments Under an Implied Authority Theory.

The implied authority theory of enforcing unauthorized government commitments may also be useful regarding battlefield commander emergency contract change authority. Under this implied authority theory, courts will frequently grant contractors relief when the government representative who entered into the unauthorized commitment had an actual delegation of some authority, and it was reasonable for the contractor to assume that the change authorized was part of that delegated authority.[129] However, before any court will apply the theory of implied authority, there must have first been an actual delegation of some authority.[130] Implied emergency authority was found by the Armed Services Board of Contract Appeals in circumstances where the board found the government inspector, who had only been delegated authority to inspect the technical requirements of the contract, had implied emergency authority when a decision had to be made about what to do with wet concrete that had already been poured, and there wasn't time to call the contracting officer before the decision had to be made.[131] In reaching their decision, the ASBCA specifically relied on the government inspector's actual presence at the job site, the lack of time available to call the contracting officer before the concrete dried, and the fact that the inspector informed the contracting officer shortly after the event occurred.[132] If the ASBCA could find implied contract authority in an "emergency" of drying concrete, then the ASBCA could find implied contract authority in an actual life or death emergency as envisioned by the proposed DFARS clause.

This implied authority mechanism is a risky method to implement the proposed DFARS amendment, since much of the United States Court of

[127] *Id.* at 1.602-3(b)(1)
[128] *Id.* at 1.602-3(b)(1).
[129] CIBINIC, *supra* note 76, at 95.
[130] *Id*.
[131] Sigma Constr. Co., Inc. 91-2 BCA, 23,926, ASBCA No. 37040 (1991).
[132] *Id.*

Claims and the Armed Services Board of Contract Appeals cases indicate that when contracts are explicit in the delegation or withholding of power, the contractor is bound by the terms of that delegation.[133]

V. DOCUMENTING EMERGENCY CONTRACT CHANGES

The FAR requires all change orders issued under a government contract to be accomplished in writing.[134] The prescribed form for issuing a written change order is the Standard Form 30 (SF 30).[135] In cases of urgent circumstances, the FAR authorizes use of telegraphic change orders in lieu of the SF 30,[136] but it does not specifically authorize the use of oral change orders.

A. Documenting Oral Changes: Put the Burden on the Contractor.

The FAR includes a contract clause which allows for oral contract changes and provides for compensation for these changes by equitable adjustment.[137] Both Courts and Boards have validated the use oral changes as a basis for equitable adjustments.[138] FAR 52.243-4(b) provides for a notification requirement which places the burden on the contractor to notify the government if an oral change order has been issued.[139] This clause requires that the contractor provide the contracting officer with the date, circumstances and source of the change order, together with a notice that the contractor considers this a change.[140] Further, FAR 52.243-7, which is normally only used with research and development contracts, also places the burden of change notification on the contractor, and includes a list of information that the contractor must provide to make a change claim. FAR 52.243-7 requires that within a negotiated period of time after an oral contract change has been issued, the contractor must submit the following to the Contracting Officer in order to receive an equitable adjustment:

> (1) The date, nature, and circumstances of the conduct regarded as a change;

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[133] *See* L.S. Samford, Inc. v. The United States, 187 Ct. Cl. 714, 410 F.2d 178 (1969), and Adventure Group, Inc. 97-2 BCA 29, 081, ASBCA 50188 (1997).
[134] FAR, *supra* note 74, at 43.201(a).
[135] *Id.* at 43.201(a).
[136] *Id.* at 43.201(c).
[137] *Id.* at 52.243-4(b) and (c).
[138] Holt Hauling & Warehousing Sys., Inc., 76-2 BCA, 12,185 (1976), and W.H. Armstrong & Co. v. United States, 98 Ct. Cl. 519 (1943)
[139] FAR, *supra* note 74, at 52.243-4(b).
[140] *Id.*

(2) The name, function, and activity of each Government individual and Contractor official or employee involved in or knowledgeable about such conduct;

(3) The identification of any documents and the substance of any oral communication involved in such conduct;

(4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose;

(5) The particular elements of contract performance for which the Contractor may seek an equitable adjustment under this clause, including -

(i) What contract line items have been or may be affected by the alleged change;
(ii) What labor or materials or both have been or may be added, deleted, or wasted by the alleged change;
(iii) To the extent practicable, what delay and disruption in the manner and sequence of performance and effect on continued performance have been or may be caused by the alleged change;
(iv) What adjustments to contract price, delivery schedule, and other provisions affected by the alleged change are estimated; and

(6) The Contractor's estimate of the time by which the Government must respond to the Contractor's notice to minimize cost, delay or disruption of performance.[141]

FAR Clause 53.243-7 was originally not intended for contracts under $1,000,000.[142] However, the terms of this clause also provide for its inclusion in a contract when "the contracting officer anticipates that situations will arise that may result in a contractor alleging that the Government has effected changes other than those identified as such in writing and signed by the contracting officer."[143] Since a contracting officer should reasonably anticipate that the emergency battlefield commander change authority may result in oral contract changes, and because clause 52.243-7 has such specific contractor notice requirements, clause 52.243-7 should be inserted in all contingency contracts.

[141] *Id.* at 52.243-7(b).
[142] *Id.* at 52.243-7.
[143] *Id.*

B. The Contracting Officer and COTR Should Gather Data Immediately After the Emergency Ceases.

Immediately after the emergency that gave rise to the commander's exercise of emergency battlefield change authority ceases, the COTR and CO should immediately begin to collect and preserve information regarding any possible contract changes and potential future requests for equitable adjustment. Quick action should be taken immediately upon the cessation of the emergency, and not delayed pending a submission of a FAR 52.243-7 contractor notification of a change. By acting quickly to discover changes and gather data to account for the costs in advance of the contractor's notification, the government may ensure accurate and fair equitable adjustments are made.

VI. ANALYSIS OF THE PROPOSED EMERGENCY CHANGE AUTHORITY

As with any new idea, the proposed DFARS amendment providing battlefield commanders with emergency change authority is going to be severely criticized. Regardless of the issues involved in implementing such a novel idea, it's important to take a positive and aggressive approach. As stated by the Air Force Assistant Secretary of Acquisition, "Air Force contracting officers need to become a community of innovative, even daring risk takers—especially so, now. We must create solutions that provide our customers with the rapid agile, combat support needed to help ensure victory."[144]

The contracting community has become accustomed to vesting all contracting authority in the Contracting Officer. The cultural change necessary in empowering battlefield commanders with emergency contract change authority is likely to be met with the same amount of resistance as the advent of the government purchase card.[145] "A 1997 Study found that cultural resistance has been the biggest barrier to the implementation of acquisition reform initiatives."[146] Lack of understanding of the change's benefits causes the resistance.[147] The intended benefit of the proposed DFARS amendment is to clearly define roles and share the power of the Contracting Officers with battlefield commanders during the times that battlefield commanders really need such power.[148]

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[144] Enduring Freedom Memo EF-01-01, Secretary of the Air Force Deputy Assistant Secretary of Contracting, to All Major Commands Contracting, subject: Rapid Agile Contracting Support During Operation ENDURING FREEDOM (5 Oct. 2001).
[145] *See generally* Lt Col Neil S. Whiteman, *Charging Ahead: Has the Government Purchase Card Exceed Its Limit?*, 30 PUB. CONT. L.J. 403 (2001).
[146] Nancy K. Sumption, *Other Transactions: Meeting the Department of Defense's Objectives*, 28 PUB. CONT. L.J. 365, at 409 (1999).
[147] *Id.* at 410.
[148] Bachman Interview, *supra* note 3.

A. Changes Made Under Emergency Battlefield Authority Would Be "In-Scope".

Changes may be made to contracts as long as the contemplated change is within the original scope of the contract.[149] The standard used in determining whether a change is in scope is, "if potential bidders would have expected it to fall within the contract's changes clause."[150] Under the proposed DFARS clause, all potential bidders to the contract would have been aware that under the limited circumstances detailed in the emergency battlefield change clause, the contract may be modified. Thus, any changes ordered by the ranking military commander in circumstances of dire emergency would have been anticipated by the contract and are therefore in-scope. The only in-scope limitation on the ranking military commander's contract change authority would be ordering civilian contractors to perform combat duties. Any orders requiring direct contractor participation in armed conflict would be clearly out of scope.

B. The DFARS and Service Supplements Do Not Currently Address Issues Arising from the Military's Reliance on Contractor Support.

Presently, there are no DFARS clauses specifically dealing with contractors on the battlefield. However, the DOD has promulgated instructions regarding the use of contractors during times of crisis.[151] Likewise, military services have implemented instructions[152] and guidance[153] regarding contracting support on the battlefield. Recently, the Army issued an interim final rule amendment to the Army FAR supplement which contains solicitation provisions and contract clauses specifically pertaining to contractors accompanying the force.[154] Though the new Army FAR supplement amendments do add provisions for contractors' compliance with Combatant Command Orders regarding force protection, health and safety,[155] neither the

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[149] FAR, *supra* note 74, at 52.243-4(a).
[150] AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir., 1993), *citing* Amer. Air Filter Co., 57 Comp. Gen. 567, 572-73 (1978).
[151] U.S. DEP'T OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISIS (26 Jan. 1996).
[152] U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE (29 October 1999), U.S. ARMY FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 August 1999).
[153] U.S. ARMY CONTRACTORS ACCOMPANYING THE FORCE GUIDEBOOK (8 September 2003), and U.S. AIR FORCE GENERAL COUNSEL GUIDANCE DOCUMENT, DEPLOYING WITH CONTRACTORS: CONTRACTING CONSIDERATIONS (2003).
[154] Solicitation Provisions and Contract Clauses, 68 Fed. Reg. 66,740 (Nov. 28, 2003) (interim final rule to be codified at 48 C.F.R. pt. 5152).
[155] *Id.* at 66,741.

DOD nor the military services have yet to approach the scope of the proposed DFARS amendment in giving battlefield commanders actual change authority over contractors that accompany them.

C. The Limitations Imposed by the Terms of the Proposed Clause Require More Definition.

1. Is the limitation "accompanying the force outside the United States" too constrictive?

The proposed clause limits the emergency change authority to circumstances occurring only outside of the United States.[156] The proposal does not recognize the threat of a massive emergency occurring in the United States, such as a terrorist detonation of a weapon of mass destruction, and the possible failure of communications systems as a result of the catastrophe The wisdom of limiting this clause to non-United States locations must be carefully examined. As the clause is currently written, in an emergency circumstance so dire that martial law has been declared by the President of the United States, military commanders would still have to go through contracting officers to direct the activities of contractors. Given am emergency on United States soil, it is possible that contracting officers would be more immediately available than at overseas locations. However, an examination of this clause's geographical limitation should be made to determine if such military commander authority is truly not necessary, or if the limitation arose from an overly-optimistic "it couldn't happen here" mindframe.

2. What is "not available"?

The emergency commander authority proposed DFARS amendment would only take effect "if the Contracting Officer or Contracting Officer representative is not available and emergency action is required…"[157] Thus, the commander must first make a determination of whether the Contracting Officer or COR is unavailable. However, the issue is not resolved by the proposed amendment. What circumstances constitute "unavailability" must therefore depend on the situation. The more dire the emergency, the more lenient the effort required to contact the Contracting Officer. If the commander is to exhaust all methods of contacting the CO and COR first, then this definition of "unavailable" should be included in the amendment. If no effort to contract the Contracting Officer is required in circumstances where taking the time to contact the Contracting Officer would further jeopardize lives, then this approach should be incorporated in the proposed amendment.

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[156] Proposed DFARS change (on file with author).
[157] *Id.*

3. Who is the ranking military commander in the immediate area of operations?

The proposed clause provides "the ranking military commander in the immediate area of operations" may direct contractors in emergency situations.[158] This term "ranking military commander", as modified by "the immediate area of operations" can cause confusion among both military and contractors alike, with the possible result being contractors receiving conflicting orders from more than one military commander.

Does the ranking military commander mean someone with the duty title of commander? Or, does it mean whoever is the highest ranking military individual within communication capability? If a small group of soldiers under the control of an E-5 goes into an Iraqi city with a civilian contractor interpreter and is subjected to a deadly ambush, does the proposed clause give the E-5 authority to issue orders to the contractor (as long as those orders are consistent with LOAC)? Or is the proposed authority limited to those billeted in commander's positions at brigade level?

Regardless of what level the emergency change authority reaches, it should be the responsibility of the Contracting Officer or the COR to familiarize the ranking military commander and the contractors with each other's identities so that if crisis were to arise, the identity of the individual authorized to issue emergency contract changes would not be part of the fog of war.

4. How Dire Must the Situation be Before it's an Emergency?

The proposed clause only grants commanders contract change authority in times when "emergency action is required because of enemy or terrorist activity or natural disaster that causes an immediate possibility of death or serious injury to *contractor personnel or military personnel*."[159] (emphasis added). Thus the question is: when is emergency action required?

By the terms of the proposed clause, the only threat that would trigger a commander's use of this clause is the risk of imminent death to contractors or military personnel. Any deadly risk to civilians who are not DOD employees or contractors is by definition excluded from this clause, and not a valid reason for commanders to exercise emergency contract change authority over their contractors.

Regarding the question of how dire the circumstances must be before commanders may exercise contract authority, it appears that the clause is intentionally open-ended to allow for a commander's individual assessment of

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[158] *Id.*
[159] *Id.*

each circumstance. As happened back in the American Civil War, the law can "leave[] the question of whether the emergency does or does not exist with the commanding officer of the army or detachment for which the services or supplies are required."[160] If the question of emergency should be decided at a certain level of command, then the DFARS proposed amendment should so state.

The proposed DFARS amendment would accelerate the process of directing contractors, and would also return to military commanders a fraction of the emergency operational flexibility lost by replacing completely versatile military members with civilian contractors. Properly utilized, the commander's emergency contract change authority would cut out three steps in the process of directing contract changes: (1) one from the military commander to contracting officer requesting a change be issued, (2) the next step eliminated would be issuing of a contract change from the contracting officer to the contractor, and (3) the communication from the contractor to the contractor's employees. When implemented, the commander could give orders to the contractor's employees directly, without time consuming routing through other managers.

C. Commanders Do Not Have Sufficient Understanding of Contractor Support.

Commanders have limited visibility and oversight of contractors providing support in their locations.[161] This problem extends to all levels, from combatant commands, component commands, and deployed locations.[162] And, to make matters worse, the GAO found that commanders "frequently have no easy way to get answers to questions about contractor support."[163] The GAO found this fundamental information gap "[i]nhibits the ability of commanders to resolve issues associated with contractor support such as force protection issues and the provision of support to the contractor personnel."[164] Logically, if commanders don't know which contractors are assigned to them, what those contractors' capabilities or strengths are, and don't know who to call to find out, then commanders aren't going to be able to make use of them, even if they did have emergency contract authority.

VII. CONCLUSION

The United States military has downsized to a fraction of its prior manpower, and outsourced duties to civilian contractors that were previously

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[160] *Stevens*, supra *note 8.*
[161] GAO-03-695, *supra* note 28, at 3.
[162] *Id.*
[163] *Id.*
[164] *Id.*

performed by military members. Contractors are accompanying the force onto the battlefield in numbers that sometimes equal military strength. Commanders are faced with a serious dilemma: performing their mission with less people to do it and more civilians to protect. With the proposed DFARS clause granting battlefield commanders emergency contract change authority over civilian contractors, commanders will have some versatility in making use of contractors during dire emergency. The methods by which this contract change authority can be granted to commanders, and their responsibilities in executing it, will determine the success of this proposed DFARS amendment. Regardless of what implementation options are chosen, as long as the Law of Armed Conflict is observed, this article recommends providing as much power over contractors to military commanders as they need in times of emergency.

INTEGRATION OF MILITARY AND CIVILIAN SPACE ASSETS: LEGAL AND NATIONAL SECURITY IMPLICATIONS

MAJOR ELIZABETH SEEBODE WALDROP*

I. INTRODUCTION

Statesmen and soldiers must consider the legal and moral ramifications of using civilian systems for military purposes. Such military use may turn them, as well as their supporting infrastructure, into a bona fide target for future opponents.

- Brigadier General Charles J. Dunlap, Jr., U.S. Air Force[1]

While maintaining its own space assets and capabilities, in the past few years the U.S. military has increasingly relied on commercial and civilian space assets, owned and operated by foreign, domestic, and even international entities. As part of a larger general trend toward military "outsourcing," such non-military organizations may provide cheap, technologically advanced space commodities in a number of areas, *e.g*. launch, communications, remote sensing, and weather. Even in situations in which the military relies on its own space assets (such as navigation, launch, and surveillance), partnerships with and investment in non-military (and even non-domestic) entities are common and openly encouraged. This work will briefly look at the nature of these partnerships, and then examine the national security and legal implications of such "dual use" of space technology, including the effect on technology transfer and the law of war.

This article will first explore the depths of the military, civilian, and commercial "marriage" in space, looking at the "actors" and the "partnerships" in various settings. The use of space by each of these entities has evolved, and an examination of their current roles in space activities will be discussed, by

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1 Brigadier General Charles J. Dunlap, Jr. Technology: Recomplicating Moral Life for the Nation's Defenders, Parameters, Autumn 1999, at 30.

survey of the various space services provided by these sectors: communications, remote sensing, launch, and navigation.

The next section of the article will examine national security and legal implications of military investment, use, and reliance on space systems that are not exclusive military assets. States have made efforts to protect their interests in space by protecting access to *space*, space *technology*, and space *services* in a number of ways. From a military perspective, national security in large part depends on predictable, guaranteed access to space, which in turn depends on a strong domestic space industry. Therefore, the tension between competition and technology transfer to foreign companies and States (proliferation) is important to consider. The Cox Report and Boeing (Sea Launch) affairs, with their allegations of improper technology transfer to China and Russia respectively, will serve as case studies for this section, both to illustrate these tensions and to pinpoint sources of additional legal restrictions. This section will also explore the suggestion that the interdependence of military and commercial systems in space has caused national security and competition to become mutually reinforcing, rather than competing, goals.

Additionally, as armed forces increasingly rely on space services (often the same services used by civilians), States will develop means to guarantee continued access to those services. This article will examine contractual guarantees and licensing restrictions, using military leasing of communications satellites and governmental "shutter control" clauses for remote earth sensing satellites as examples of such efforts. States must be careful how they seek to protect their national security interests in space, since the methods they choose may be subject to legal challenge. In this context, the impact of the World Trade Organization (WTO) on the space industry will be discussed. Next, the article will survey limits on "dual use" technologies imposed by policy and politics, specifically examining the Presidential restriction on the use of Selective Availability (SA) in the Global Positioning System (GPS), the division of the radio frequency spectrum, and the issue of space debris.

The implications of relying on non-exclusively military space assets in time of peace and war will also be examined, by surveying legal rules and restrictions on such use. A brief survey of relevant international law, including the UN Charter, treaties, customary law, and the Law of Armed Conflict (LOAC), follows. In more detail, the right of self-defense (including so-called "anticipatory self-defense") will be discussed. While most analyses stop at this level, it is important to look at the operational context of military commanders applying these concepts through Rules of Engagement (ROE). The implications of space law and policy on ROE will be canvassed.

Finally, widespread military use of civilian systems in time of war also brings with it other, perhaps unintended, consequences and issues. This section will consider the true status of "neutral" nations knowingly providing space services in support of armed conflict, and whether civilian control of

militarily-used space systems renders the civilians unlawful combatants under the law of war.

II. THE MILITARY AND CIVILIAN "MARRIAGE" IN SPACE (A SURVEY)

A. Space Actors

1. The Military

The original "space powers" were the Soviet Union and the United States (U.S.). As early as 1945 both nations had considered the potential use of satellites for military purposes, but it wasn't until 1954 that the U.S. Air Force was first authorized to develop a reconnaissance satellite.[2] However, the Soviet Union preempted the early, rather lethargic, U.S. satellite-development effort when, in October 1957, it successfully launched Sputnik I. The Soviet Union's placement of the first satellite into orbit around the earth sparked a sense of urgency in the U.S. to prove *its* mastery of the space dominion, arguably initially for prestige purposes.[3] However, satellites soon became important to the U.S. from a practical perspective as well, when in 1960 the era of U.S. aerial reconnaissance flights over the Soviet Union ended, and the U.S. was forced to depend on reconnaissance satellites to obtain strategic information about its adversaries.[4] Thus began the U.S.' consistent reliance on space systems that has only deepened in the ensuing four decades.

During the Cold War, the Soviet Union and the U.S. governments developed and operated many military satellites and dominated the world's space activities. According to one account, in the 1970s an estimated 60% of Soviet payloads served direct military missions; by the early 1980s, 75% were

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[2] Paul B. Stares, *Space and U.S. National Security*, *in* NATIONAL INTERESTS AND THE USE OF SPACE 35 (William Durch, ed., 1984). [hereinafter Stares, "U.S. National Security"]; PAUL B. STARES, THE MILITARIZATION OF SPACE: U.S. POLICY 1945-1984U.S. 13 (Cornell University Press 1985) [hereinafter STARES, MILITARIZATION].

[3] Although the U.S. launched its first satellite in 1958, this sense of urgency is still evident in President John F. Kennedy's address to the U.S. Congress in 1961:

> *This is not merely a race. Space is open to us now; and our eagerness to share its meaning is not governed by the efforts of others. We go into space because whatever mankind must undertake, free men must fully share.*

Statement of the President, Special Message to Congress on Urgent National Needs (May 25, 1961).

[4] Stares, *U.S. National Security*, *supra* note 2, at 37. The shoot-down of Gary Powers' U-2 over the Soviet Union on 1 May 1960 ended the era of U.S. aerial reconnaissance over the Soviet Union. The National Reconnaissance Office (NRO) was created in September 1961 to consolidate U.S. reconnaissance efforts.

of the same nature.[5] Space was also of growing importance to the U.S. military, as evidenced by the 1982 creation of a separate Space Command within the U.S. Air Force.[6] By 1985, reportedly the U.S. and the Soviet Union together had put over 2,000 military payloads into orbit.[7]

In the earliest years of the "Space Age", satellites were mainly useful in maintaining peace and stability through reconnaissance, intelligence-gathering, early warning, and as the National Technical Means (NTM) of verification for monitoring arms control compliance. Thus, for example, the 1972 Anti-Ballistic Missile (ABM) Treaty provided for the use of NTMs (with satellite observation as a critical component) to verify compliance with strategic arms limitations. The ABM Treaty recognized the importance of the role played by NTMs and therefore prohibited interference with them.[8] However, recent years have seen increasing military reliance on satellites as "force multipliers" or "force enablers" improving the performance, lethality, and effectiveness of ground, air, and naval forces and weapons, both during peace and war.[9]

> *Space systems and capabilities enhance the precision, lethality, survivability, and agility of all operations – air, land, sea, and special operations. [. . .] Space assets contribute significantly to overall aerospace superiority and support the full spectrum of military actions in theaters of operations.*[10]

In fact, space systems have become so important to the U.S. that the government has declared:

> *[p]urposeful interference with U.S. space systems will be viewed as an infringement on our sovereign rights. The U.S. may take all appropriate self-defense measures, including, if directed by the National Command Authorities*

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[5] Stephen M. Meyer, *Space and Soviet Military Planning*, *in* NATIONAL INTERESTS AND MILITARY USE OF SPACE 61 (William Durch, ed., 1984).
[6] COLIN S. GRAY, AMERICAN MILITARY SPACE POLICY: INFORMATION SYSTEMS, WEAPONS SYSTEMS, AND ARMS CONTROL ix (Cambridge, Mass., Abt Books: 1982).
[7] STARES, MILITARIZATION, *supra* note 2, at 13.
[8] *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems*, Oct 3, 1972, 23 U.S.T. 3435 (no longer in effect as of Jun. 13, 2002 due to U.S. withdrawal), Art. XII [hereinafter ABM Treaty]; U.S. White House, Press Release, "Statement by the Press Secretary Announcement of Withdrawal from the ABM Treaty" (Dec. 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/20011213-2.html.
[9] Stares, *U.S. National Security*, *supra* note 2, at 4 and 72.
[10] U.S. AIR FORCE DOCTRINE DOCUMENT 2-2, U.S., *Space Operations* (Aug. 23, 1998).

(NCA), the use of force, to respond to such an infringement on U.S. rights.[11]

Several U.S. government publications have similarly called space a "vital national interest," a traditional governmental term of art for objectives of such importance that armed force would be used to protect them.[12]

2. The Military-Civilian "Marriage"

a. Civilian Governmental Programs

From the outset, U.S. civilian governmental space programs were largely kept separate from military efforts -- to avoid any public questioning of the stated U.S. commitment to the peaceful use of space and to avoid international, political opposition to military programs.[13] However, even at the earliest stages of development, it was obvious that military-civilian governmental cooperation in space programs was necessary to capitalize on technical expertise and to avoid wasteful duplication of effort.[14] In fact, in the 1960s the civilian governmental National Aeronautics and Space Administration (NASA) was very dependent on U.S. Air Force personnel and facilities.[15] The covert National Reconnaissance Office (NRO), the DOD agency primarily responsible for space intelligence programs whose very existence was kept secret until 1992, interacted with the military and with NASA, transferring selected technologies and sharing launch facilities and command and control ground stations.[16]

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[11] U.S. DEP'T OF DEFENSE, DIR. 3100.10, SPACE POLICY page 6 (Jul. 9, 1999)[hereinafter SPACE POLICY]. The NCA are "the President and the Secretary of Defense or their duly deputized alternates or successors." U.S. DEP'T OF DEFENSE, JOINT PUB. 3-0, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS page 253 (Mar. 23, 1994).

[12] JOHN M. LOGSDON, GEORGE WASHINGTON UNIVERSITY'S SPACE POLICY INSTITUTE, REFLECTIONS ON SPACE AS A VITAL NATIONAL INTEREST, *available at* http://www.gwu.edu/~spi/ (expressing skepticism whether space has actually been recognized and funded as such an interest), citing The White House, *A National Security Strategy for a New Century* (Dec. 1999) and U.S. DOD, *Quadrennial Defense Review Report* (Sep. 30 2001) at 45 [hereinafter LOGSDON, REFLECTIONS].

[13] Stares, *U.S. National Security*, *supra* note 2, at 38 and 41; *The NASA Act of 1958*, 42 U.S.C. §2451 *et seq* (1988) (creating a civilian governmental space agency and maintaining DOD control over military programs).

[14] *See id.* at 41.

[15] STARES, MILITARIZATION, *supra* note 2, at 62, quoting Secretary of Defense Robert McNamara's 1962 policy directive giving the Air Force responsibility for "the research, development, test, and engineering of satellites, boosters, space probes, and associated systems necessary to support specific NASA projects and programs."

[16] Thomas S. Moorman, Jr., GEORGE WASHINGTON UNIVERSITY SPACE POLICY INSTITUTE, *The Explosion of Commercial Space and the Implications for National Security* (Paper presented to the National Convention of the American Institute of Aeronautics and Astronautics, Reno, Nevada, Jan. 13, 1998) *available at* http://www.gwu/ ~spi.

This "separate but intertwined" nature of military and civilian governmental space programs is still evident today, and cooperation between the two sectors has been increasing in recent years. One need only look at the sheer number of governmental agencies (the Department of Defense (DOD), Department of Transportation (DOT), Department of Commerce (DOC), and National Aeronautics and Space Administration (NASA), to name but a few) involved in the U.S. space program to see the immense overlap.[17] Civilian governmental space programs have been largely carried out by NASA since the inception of the U.S. space program.[18] Responsible for civilian research and development, NASA has focused on manned spaceflight (through the Space Shuttle program and the International Space Station), reusable launch technology, space science and technology. An indication of ever-closer cooperation between NASA and the U.S. Air Force (the DOD's executive agent for space) can be seen in recent discussions to assess the feasibility of developing a single launch vehicle to meet civilian, commercial, *and* military launch requirements.[19] Furthermore, the current NASA Administrator, Sean O'Keefe, is a former Secretary of the Navy.[20] The NRO has also been restructured to improve its support for direct military uses -- its Director is now the Under Secretary of the Air Force for Space and its acquisition program is aligned under an Air Force office.[21] Growing nationwide civilian reliance on space systems has also expanded the involvement of other civilian governmental agencies in the past few years. For example, the Department of Commerce (DOC) now has management and regulatory responsibility over meteorological earth observation satellite systems in a joint project with DOD and NASA, over commercial remote sensing, and has a large role in trade and export policy.[22] The DOT, through the Federal Aviation Administration (FAA), has a growing role in regulating commercial launch activities, many of which are currently performed at governmental launch facilities

In addition to the more obvious increasing organizational and programmatic alignment, military and civilian governmental space programs are "married" in other ways. Technology is part of the reason for the blurred

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[17] Office of the Secretary of Defense, *Space Technology Guide* (FY 2000-2001), available at http://www.c3i.osd.mil/org/c3is/spacesys/ at 1-5, listing 42 such agencies and organizations.
[18] BOB PRESTON AND JOHN BAKER, RAND, SPACE CHALLENGES at 144 (14 May 2002), *available at* http://www.rand.org/publications/MR/MR1314 at 144 [hereinafter PRESTON AND BAKER].
[19] Marcia S. Smith, "Space Launch Vehicles: Government Activities, Commercial Competition, and Satelllite Exports" (Issue Brief for Congress by the Congressional Research Service (CRS), 3 February 2003, Doc. No. IB93062) [hereinafter Smith, *Space Launch Vehicles*].
[20] Marcia S. Smith, *U.S. Space Programs: Civilian, Military, and Commercial* (Issue Brief for Congress by the Congressional Research Service (CRS), Apr. 22, 2003, doc. no. IB92011) at 7 [hereinafter Smith, *U.S. Space Programs*].
[21] PRESTON AND BAKER, *supra* note 18, at 158; see also online: NRO http://www.nro.gov.
[22] *Supra* at 146.

line between the two – there is an inherent overlap, given that applications useful for one side may be directly or at least indirectly useful to the other.[23] Civilian governmental programs use military space systems like the Global Positioning System (GPS); the military uses civilian assets, such as the Space Shuttle. Additionally, the sheer expense of placing space systems in orbit means that civilian and military missions may share a launch pad, a launch vehicle, and perhaps even the same space platform, requiring a degree of technological and practical compatibility.[24] Finally, the physical limitation of available orbits and radio frequencies for military and civilian systems demands a detailed technological awareness of many attributes of one system while designing and operating the other, to avoid harmful interference.

b. Private Entities and the Commercial Sector

The past two decades have seen a tremendous increase in commercial space activity. The commercialization of space has caused further blurring of lines between military and non-military systems. Again, technology is the main reason for the blurred line between the two – with a few exceptions,[25] applications useful for one side (*e.g.*, meteorology, navigation, remote sensing, and communications) are generally useful to the other. In addition, military, civilian governmental, and commercial space systems all rely on the same space industry (which means the identical pool of experts, and therefore the same pool of knowledge) to develop, service, and often even maintain space systems. Furthermore, economic benefits result if all sectors procure space technology from the same industry.

Since 1982 the U.S. government has actively pursued the goals of "expand[ing] United States private sector involvement and involvement in civil space and space related activities."[26] For example, the U.S. Congress passed several laws specifically aimed at commercializing launch services (in 1984, 1988, 1990, and 1998),[27] and Congress, in an attempt to encourage the private sector's involvement in earth imaging by satellite, tried to privatize the government's Landsat remote sensing satellite program in 1984, although the effort ultimately failed.[28] Notably, the U.S. government still does not dominate the commercial satellite market. According to one report, in 2001 the federal

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[23] GRAY, *supra* note 6, at 78.

[24] For example, the U.S. space shuttle has been used for both military and civilian missions.

[25] Space technologies for which there is likely no commercial demand include missile warning, signals intelligence, weapon systems with integrated surveillance systems, assured communications, and space weapons. Moorman, *supra* note 16.

[26] U.S. White House, "Fact Sheet on National Space Policy" (4 July 1982).

[27] Smith, *supra* note 20, at 4 (referring to the 1984 Commercial Space Launch Act; 1988 Commercial Space Launch Act Amendments; 1990 Launch Services Purchase Act; and 1998 Commercial Space Act).

[28] *Id*. (citing the 1984 Land Remote Sensing Commercialization Act, 15 U.S.C. §4200 and the Land Remote Sensing Policy Act of 1992, 15 U.S.C. §5601).

government provided only about 10 percent of commercial satellite industry revenue.[29]

Recently a U.S. Congressionally-mandated government commission assessing space issues recognized that the U.S. is "increasingly dependent on the commercial space sector to provide essential services for national security operations," and that it will continue to rely on the commercial sector for the same reason.[30] This reliance is not limited to a single type of space service; instead, examples of such services provided by commercial entities include satellite earth imagery, communications, and launch services. However, U.S. policy goes further than mere recognition of the interdependence of the commercial and the government sectors *and openly encourages it*. Current DOD guidance, for instance, describes a "Preference for Commercial Acquisition," prohibiting development of systems for national security "unless suitable and adaptable commercial alternatives are not available . . . Commercial systems and technologies shall be leveraged and exploited whenever possible."[31] DOD policy also encourages military-industrial partnerships, outsourcing and privatization of DOD space-related functions and tasks. The government even extends a promise of "[s]table and predictable U.S. private sector access" to DOD space-related hardware, facilities, and data.[32] The goal of the U.S. government to promote commercial-governmental interdependence is furthered by requiring that government space systems be based on widely accepted commercial standards to ensure future interoperability of space services.[33]

Despite the quick maturation of the U.S. commercial space sector, it has not achieved independence from military and civilian governmental programs.[34] In particular the commercial sector has been criticized for failing to capitalize on potential markets before ground-based systems filled a niche.[35] The trend of deregulation that contributed to the initial growth of commercial space services also appears to have slowed, stopped, and even reversed for

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[29] Defense Daily, U.S. General Accounting Office (GAO), Report to the Ranking Minority Member, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate, *Critical Infrastructure Protection: Commercial Satellite Security Should Be More Fully Addressed* (Aug. 2002), GAO-02-781 at 29,*available at* http://www.defensedaily.com/reports/101102fully.pdf [hereinafter GAO Report on Satellite Security].

[30] U.S. Commission to Assess U.S. National Security Space Management and Organization, *Report of the Commission to Assess U.S. National Security Space Management and Organization, pursuant to P.L. 106-65* (Jan. 11, 2001), *available at* http://www.space.gov/doc/fullreport.pdf [hereinafter Space Commission]. This Commission was headed by now-Secretary of Defense Donald Rumsfeld.

[31] SPACE POLICY, *supra* note 11.

[32] *Id.*

[33] *Id.*

[34] PRESTON AND BAKER, *supra* note 18, at 148.

[35] *Id.* The most obvious example is mobile telecommunications.

some space applications, stunting further rapid growth.[36] As a result, many commercial companies rely heavily on military and civilian governmental customers. In addition, the space industry depends on governmental funding for technology at the research and development level.[37]

c. International Entities

Up to now, this survey has mainly focused on the U.S. experience. However, the 1960s saw the entrance of other States and international entities into space activities. This is an important development for two reasons: first, foreign governments and entities also rely on civilian, commercial, and international space activities (although not to the extent that the U.S. and Russia do), hence an analysis of the implications of the interdependent U.S. space program is equally relevant for such a space-active State; second, it will be instructive to examine how different countries address the seemingly contradictory demands of national security and competition in the global market for space technology.

Foreign governments began to enter the satellite market in the 1960s. In 1964, eleven States formed a type of international, intergovernmental cooperative (the International Telecommunications Satellite Consortium - later changed to Organization - or Intelsat) to provide universal telecommunications services on a non-discriminatory basis. [38] Other similar intergovernmental entities followed over the next few years.[39]

Twenty years into the so-called Space Age finally saw the beginning of commercial sector involvement in space activities, adding both competition and opportunities for cooperation. *International* commercial sector joint ventures, such as Sea Launch (formed by companies of the U.S., Ukraine, Russia, and Norway), Starsem (formed by companies of Russia and France), and International Launch Services (ILS) (formed by companies of the U.S. and

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[36] *Id*; Joanne I. Gabrynowicz, *Expanding Global Remote Sensing Services: Three Fundamental Considerations* (Paper presented to the International Institute of Space Law at the Third United Nations Conference on the Peaceful Uses of Outer Space (UNISPACE III), Vienna, Austria, Jul. 21, 1999). Remote sensing and export controls are two examples where regulation has increased in recent years.

[37] PRESTON AND BAKER, *supra* note 18.

[38] Christian Roisse, *The Roles of International Organizations in Privatization and Commercial Use of Outer Space* (Discussion paper presented to the Third ECSL Colloquium, Perugia, Italy, May 6-7, 1999). Intelsat was "the first international organization created to serve the needs of public telecommunications by satellite." FRANCIS LYALL, LAW & SPACE TELECOMMUNICATIONS 74 (Dartmouth Publishing, 1989)[hereinafter LYALL].

[39] Among others, Intersputnik (the 1972 creation of the former Soviet Union and the communist bloc), International Maritime Satellite Organization (Inmarsat, a smaller system created in 1976 to meet the needs of maritime traffic), and the European Telecommunication Satellite Organization (Eutelsat, a regional organization to serve Europe). LYALL, *supra* note 38. (providing detailed descriptions of these and other international satellite communication organizations).

Russia), entered the space market in the 1990s.[40] Thus, the 2003 space market is a multinational industry made of governmental and commercial entities.

Recognizing the opportunities made possible by such a global market, U.S. policy is to pursue international cooperation and partnerships "to the maximum extent feasible."[41] The U.S. DOD in its *Space Policy* has declared that

> *[m]ultinational alliances can increase U.S. space capabilities and reduce costs, as well as give the U.S. access to foreign investment, technology and expertise . . . Civil multinational alliances provide opportunities for the United States to promote international cooperation and build support among other countries, especially emerging space-faring nations and developing countries, for U.S. positions on international policy or regulatory concerns.*[42]

Therefore, it is clear that the interdependence of military and non-military space systems is a *global* and *intentional* phenomenon, based on advances in technology, proliferation of technology, market forces, and political linkage of space technology with other issues. To illustrate, here are some examples of recent U.S. military reliance on non-U.S., commercial sector space services:

> • *In 1991, the U.S. military procured commercial remote sensing imagery from a non-U.S. company during Desert Storm [The French SPOT Image satellite system]. Commercial satellite communications services were critical to U.S. Army missions.*
> • *In 1995, the U.S. Navy bought more than two million minutes of service on an intergovernmental satellite system constellation [Inmarsat], and many Navy ships communicate through the system today.*
> • *The U.S. Government has leveraged commercially-developed direct broadcast satellite technology for its Global Broadcast Service.*[43]

Possibly the strongest example of the growing international military dependence on civilian space systems is the use of the same Arabsat satellite

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[40] Smith, *supra* note 19.
[41] *Id*. *See also* U.S. White House, "Fact Sheet on National Space Policy" (4 July 1982), *supra* note 26.
[42] SPACE POLICY, *supra* note 11.
[43] Space Commission, *supra* note 30.

by both Iraqi and Coalition forces for military communications during the first Gulf War.[44]

3. The "Space-faring" States

The usual yardstick for whether a State is "space-faring" or a "space power" is whether it can *build and launch* satellites. [45] Thus, the "space-faring" States currently are the U.S., Russia, France, the Ukraine, members of the European Space Agency (ESA), China, Japan, India, and Israel.

The former Soviet Union and the U.S. dominated the space launch market through the 1970s, but the 1980s and 1990s saw a steady increase in foreign competition for cheaper, reliable launches. In 1982, the European Space Agency (ESA) conducted its first operational launch; by 1999 it had grown to the point that it captured 80% of the launches to Geostationary Orbit (GSO) that year.[46] (The ESA conducts its launches through Arianespace, a private company partially owned by the French Space Agency, *Centre National d'Etudes Spatiales* (CNES).)[47] In 1988, a Chinese company for the first time signed a contract with Asia Satellite Telecommunications Co., Ltd (AsiaSat) to launch a U.S.-built satellite.[48] In 1994, Japan launched its first all-Japanese rocket capable of placing satellites in GSO; it has contracts with two U.S. satellite manufacturers for commercial launches and has also developed imagery intelligence satellites for its national defense.[49] In 1999 India performed its first commercial launch, launching German and South Korean satellites.[50] Both China and India have, in addition to their proven launch abilities, achieved great success in earth-sensing and space communications technology.[51] Launch vehicles and technology continue to be an important source of hard currency for the depressed Russian economy. Israel and Canada are emerging as leaders in the international commercial remote sensing market.[52] Thus, it is clear that the U.S. and Russia no longer dominate the space industry.

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[44] Phillip J. Baines, *A Variant of a Mandate for an Ad Hoc Committee on Outer Space within the Conference of Disarmament: A Convention for the Non-Weaponization of Outer Space*, in ARMS CONTROL AND THE RULE OF LAW: A FRAMEWORK FOR PEACE AND SECURITY IN OUTER SPACE (PROCEEDINGS OF THE FIFTEENTH ANNUAL OTTAWA NACD VERIFICATION SYMPOSIUM) 71 (J. Marshall Beier and Steven Mataija, eds., 1998)
[45] Smith, *U.S. Space Programs*, *supra* note 20.
[46] Smith, *Space Launch Vehicles*, *supra* note 19.
[47] I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCATION TO SPACE LAW 113, 2d. ed., (Kluwer Law, 1999).
[48] Patrick A. Salin, *An Overview of U.S. Commercial Space Legislation and Policies – Present and Future*, 27:3 Ann. Air & Sp. L. 209 (2002) [hereinafter Salin].
[49] PRESTON AND BAKER, *supra* note 18, at 160.
[50] Smith, *Space Launch Vehicles*, *supra* note 19.
[51] PRESTON AND BAKER, *supra* note 18, at 160.
[52] *Id*.

> *While world satellite manufacturing revenues increased by 9% in 2000, the U.S. satellite manufacturing revenues actually declined by 11%. Similarly, world launch industry revenues grew by 29% in 2000 while the U.S. launch industry revenues grew by only 17%.*[53]

In light of this competitive, international market for space services, the key issue is how States can compete for business and at the same time protect their national security interests, especially given the high probability that their militaries, like the U.S. armed forces, are dependent on the commercial sector and on commercially provided services.

B. Relevant Technologies and Partnerships

To further illustrate the depths of the interdependence between the civilian, commercial, and military sectors in space, the article will now review some major "partnerships" and cooperative efforts between these sectors in several relevant technologies. Subsequent sections will discuss the various ways governments protect their national security interests despite this interdependence.

1. Launching Facilities and Services

Commercial space launch, more than other space applications, depends heavily on government sponsorship, through both military and civilian investment.[54] Even in the U.S. , federal launch facilities (operated by either the Air Force or NASA) support both governmental and commercial launches although, notably, the number of commercial launches from these facilities is almost half of the total launches.[55] While there are some commercially owned launch facilities internationally,[56] it is difficult for commercial entities to overcome the economic benefits of government-sponsored launches.[57] For example, since 1997 the FAA has licensed four commercial spaceports in the U.S. , all of which have successfully launched small satellites; however, three

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[53] Satellite Industry Association (SIA)/Futron, *Satellite Industry Indicators Survey: 2000/2001 Survey Results*, *available at* http:/www.futron.com.
[54] PRESTON AND BAKER, *supra* note 18, at 151.
[55] Space Commission, *supra* note 30.
[56] Sea Launch, for example, launches from a commercially-owned, converted ocean oil-drilling platform towed into the Pacific Ocean. *Available at* http://www.sea-launch.com/.
[57] PRESTON AND BAKER, *supra* note 18, at 151.

of these spaceports are co-located with federal launch facilities and cooperate extensively with federal agencies.[58]

The launch *service providers,* even at these government facilities, are often commercial companies such as Boeing and Lockheed Martin. These same commercial entities support commercial launches, civilian governmental launches, and military launches. Boeing and Lockheed Martin, for example, provide launch vehicles and services for commercial launches, provide services for shuttle launches through their joint venture as United Space Alliance (USA) and have received billions of dollars from DOD to develop the next generation of Evolved Expendable Launch Vehicles (EELVs).[59] In short, the military, NASA, and the commercial sector have all expended great efforts and investment, often in direct partnership, in an attempt to reach the common goal of reducing the expense of delivering satellites to orbit.

2. Communications

Satellite communications systems have long been the backbone of the commercial space industry. Although the military has its own dedicated satellite communication systems,[60] these systems cannot alone handle the military's increasing demand for communications services – a demand which has risen sharply as the military moves real-time data and video from headquarters to military commanders deployed to foreign areas of operation. Furthermore, the military needs compact, mobile communications systems, which is the very technology gaining in popularity in civilian and commercial sectors. Accordingly, the military has leased and plans to continue leasing commercial satellite communications capacity.[61] For example, the DOD uses leased Intelsat circuits to supplement its capabilities; in fact, some DOD satellite command and control facilities routinely use Intelsat to relay data from its satellites.[62] During the first Gulf War, Intelsat provided about 25% of the military communications to and from the theater of operations. Through a program called Gapfiller, the Navy leased Inmarsat transponders to meet communications requirements in Somalia and Kuwait in the 1990s. As recently as March 2003, prior to the recent war in Iraq, military officials were hurriedly leasing commercial satellite communications capacity to meet

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[58] Virginia Space Flight Center, Kodiak Launch Complex (Alaska), Spaceport Florida, and California Spaceport. U.S. DOC, *Trends in Space Commerce* at 2-14 (2000). The Kodiak site is the only one of these not co-located with a federal facility. U.S. FAA, *2003 2nd Quarter Report*, at 43, *available at* http://ast.faa.gov.

[59] Smith, *Space Launch Vehicles*, *supra* note 19, at 8.

[60] For example, among others the military maintains and uses the Milstar and Defense Satellite Communications System (DSCS) systems.

[61] Space Commission, *supra* note 30.

[62] *Id.*

wartime military requirements.[63] Military reliance on civilian communications systems is expected to continue, despite a planned, next-generation, joint U.S. military and intelligence communication system.[64]

> *The Department of Defense and the Intelligence Community are not likely to own and operate enough on-orbit [communications] assets to meet their requirements. According to RAND Corporation, "in the near term, there are not enough military systems to satisfy projected communications demand and commercial systems will have to be used." The Department of Defense uses commercial services on a daily basis.*[65]

3. Remote Sensing/Earth Observation by Satellite

Remote sensing is the collection of data which is processed into images of the surface features of the earth. Once confined to national security objectives benefiting the military and intelligence sectors, remote sensing is now being developed and used for civilian and commercial ends such as environmental monitoring, pollution tracking, natural disaster prediction and response, agriculture planning, and mapping.[66] Though the imagery available from commercial systems is reportedly not yet as precise as that available from military systems, commercial high-resolution systems (which in fact are often modified versions of military systems and are often developed by the same companies) can now produce imagery of a quality formerly only available from military systems.[67] In fact, since 1994 the policy of the U.S. has been to encourage the development of commercial satellite imaging systems with a resolution of less than one meter or less and to promote the sales of such images internationally.[68] The National Oceanic and Atmospheric

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[63] Loring Wirbel, Electrical Engineering Times, *Space Net Would Shift Military to Packet Communications* (Apr. 9, 2003), *available at* http://www.commsdesign.com.

[64] *Id*. The Transformational Communications Architecture (TCA) is the planned system.

[65] Space Commission, *supra* note 30.

[66] Michael R. Hoversten, *U.S. National Security and Government Regulation Of Commercial Remote Sensing From Outer Space*, 50 A.F. L. Rev. 253 (2001).

[67] Smith, *U.S. Space Programs*, *supra* note 27 at 4; Wulf von Kries, International Network of Engineers and Scientists Against Proliferation, *Dual Use of Satellite Remote Sensing* , *available at* http://www.inesap.org/bulletin17/bul17art21.htm [hereinafter von Kries].

[68] Peter L. Hays, *Transparency, Stability, and Deception: Military Implications of Commercial High Resolution Imaging Satellites in Theory and Practice* (Paper presented at the International Studies Association Annual Convention, Chicago, Feb. 21-24, 2001) (unpublished). This policy initially was the result of the combination of the Land Remote Sensing Act of 1992 (allowing licensing of private remote sensing systems) and the March 1994 Presidential Decision Directive (PDD)-23 *U.S. Policy on Foreign Access to Remote Sensing Space Capabilities* (Mar. 9, 1994) (allowing international sale of resulting data).

Administration (NOAA), the U.S. agency responsible for licensing commercial remote sensing systems, has already licensed a commercial system with a resolution of 0.6 meters,[69] a resolution that allows differentiation between objects as small as a bicycle and of such quality that "[i]nformed estimates suggest . . . would satisfy approximately half of the National Imaging and Mapping Agency's (NIMA's) requirements for information on the location of objects on the earth."[70] Systems fielded by France, Russia, India, and Israel already offer imagery ranging from 10-meter to 1-meter resolution.[71]

The easy access to such high-resolution data, while a national security concern, also offers great benefit to the military and intelligence sectors. Indeed, the U.S. government has been one of the international commercial remote sensing industry's main customers.[72] In recent years it has become a habit of the U.S. military to use open commercial sources like the French *Systeme Probatoire d'Observation de la Terre* (SPOT) or the U.S. Landsat system for military purposes such as reconnaissance, missile launch warning, targeting, strategic and tactical planning, arms treaty compliance, and damage assessment. The U.S. Air Force was the largest customer of commercial imagery in the world in 2001.[73] In April 2003 the White House announced a new remote sensing policy *requiring* Government agencies to utilize U.S. commercial remote sensing space capabilities to the maximum extent practicable to meet imagery and geospatial needs, with the goal of protecting national security and foreign policy interests by enhancing the U.S. civilian remote sensing industry.[74] Military and intelligence agencies worldwide are now considering entering into firm agreements with commercial remote sensing data suppliers. For example, NIMA (which has the statutory duty to purchase all commercial imagery products for the U.S. DOD) recently announced its plan to award more than $1 billion in contracts over a five-year

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PDD-23 has been superceded by the new White House remote sensing policy of Apr. 25, 2003, *infra* note 74.

[69] DigitalGlobe's Quickbird. Space Commission, *supra* note 30

[70] NIMA has the statutory duty to provide imagery intelligence and geospatial information to the DOD; Kristin Lewotsky, Optical Engineering Magazine, *Remote Sensing Grows Up: A Maturing Application Base and Gradual Commercialization Mark the Future of the Remote-Sensing Market*, (April 2001), *available at* http://www.oemagazine.com/fromTheMagazine/archives.html; *see also* U.S. Chamber of Commerce, *available at* http://www.uschamber.org/space/policy/remotesensing.htm.

[71] Smith, *U.S. Space Programs*, *supra* note 20 at 4.

[72] Hoversten, *supra* note 66.

[73] Linda L. Haller and Melvin S. Sakazaki, *Commercial Space and United States National Security* 44 (Paper prepared for the Commission to Assess U.S. National Security Space Management and Organization (2000))(unpublished)[hereinafter Haller and Sakazaki].

[74] U.S. White House, Press Release, *Fact Sheet: Commercial Remote Sensing Policy*" (Apr. 25, 2003), White House, *available at* http://www.whitehouse.gov/news/releases/2003/05/20030513-8.html.

period to American companies able to provide 1-meter resolution imagery.[75] In January 2003, NIMA awarded multi-year contracts to buy high-resolution satellite imagery from U.S. -based companies Space Imaging and DigitalGlobe.[76]

Already, the pointed marketing policies of commercial remote sensing entities, which are specifically directed at national security customers, indicate the growing interdependence of the military, intelligence, and commercial sectors in remote sensing activities.[77] The convergence of traditionally separate military and civilian remote sensing is particularly visible in non-Western States (*e.g.*, India) who establish a single, multipurpose remote sensing system rather than the traditional Western parallel military and commercial systems.[78] Even the Japanese Advanced Land Observation Satellite (ALOS), a civilian governmental mapping and environmental research satellite with about 2.5-meter resolution, has been referred to as "nothing more than a Japan Defense Agency mission in disguise."[79]

Notably, military and civilian *meteorological* satellites have merged into single systems at the national and international level,[80] which may portend similar mergers of other types of space-based earth observation platforms in the future. After many unsuccessful attempts to merge operation of civilian and military meteorological satellite systems, the U.S. National Polar-Orbiting Operational Environmental Satellite System (NPOESS) was created in 1998 to provide meteorological information to both civilian and military customers.[81]

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[75] PRESTON AND BAKER, *supra* note 18, at 151.

[76] U.S. DOD, NIMA Press Release, *NIMA Partners with Remote Sensing Industry* (Jan. 17, 2003), *available at* http://www.directionsmag.com/press.releases/index.php?duty=Show&id=6280. These agreements are together referred to as "Clearview." Space Imaging is guaranteed a minimum of $120 million over the next three years, and DigitalGlobe $72 million. Scottie Barnes, Geospatial Solutions, *NIMA lets long-awaited Remote Sensing Contract* (Jan. 22, 2003), *available at* http://www.geospatial-online.com/geospatialsolutions/article/articleDetail.jsp?id=44033; Frank Morring, Jr., *Industry Could Gain $1 billion from NIMA,* Aviation Week & Space Technology 31, Jan. 27, 2003.

[77] von Kries, *supra* note 67, stating "Thus, the Orbimage company, under the rubric of "National Security," advertises the following applications for its one meter imagery: "resource deployment, mission planning, targeting, battle damage assessment, intelligence gathering, and trend analysis." Another U.S. consortium, Space Imaging, in one trade publication was described as "virtually an NRO (National Reconnaissance Office) outlet store."

[78] *Id*.

[79] Kyle T. Umezu, Space Daily, *EarlyBird Tweaks the Law*, Japan Space Net (1997), Space Daily, *available at* http://www.spacedaily.com (quoted in Haller and Sakazaki, *supra* note 73).

[80] Haller and Sakazaki, *supra* note 73. In the U.S., the civil Polar-Orbiting Operational Environmental Satellite (POES) program and the military Defense Meteorological Satellite Program (DMSP) have been merged. In France, discussions have discussed the potential merger of the civilian Spot and military Helios remote sensing systems.

[81] Federation of American Scientists (FAS), *Air Force Turns over Weather Satellite Control to NOAA*, Air Force News Service (Jun. 2, 1998), *available at*

NPOESS is an integrated national meteorological system, resulting from a Presidentially-directed 1994 joint NASA, DOD, and NOAA enterprise, which merged the former civilian governmental Polar-Orbiting Operational Environmental Satellite (POES) program and the former military Defense Meteorological Satellite Program (DMSP). In the merger, the military ceded operational control over its system to NOAA. At the same time, the U.S. system is being merged with European meteorology systems, creating the *international* Joint Polar System (JPS).[82]

> During the 20 years of operating separate meteorological systems, the Air Force and NOAA used similar satellites, similar launch vehicles, and increasingly "shared products derived from the data, provided complementary environmental data to the nation, and worked together on research and development for their separate programs."[83] This national and international merger is instructive because it reflects a practical approach to effective use of resources after a period of increased convergence of military and civilian systems, a pattern other space systems are currently following, as outlined in this article.

4. Navigational Aids

The Global Positioning System (GPS) is the current preeminent international space-based navigation system.[84] It provides another example of the convergence between military, commercial, and civilian space sectors. However, unlike the other examples in which the military relies on civilian systems, GPS is a U.S. military-operated system relied on by civilians. As one former FAA administrator noted:

> *I guarantee you that the U.S. DOD did not foresee that its GPS would be hijacked by the civilian economy. But it happened, and the world's politicians and diplomats need to solve this problem now.*[85]

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http://www.fas.org/spp/military/program/met/n19980602_980767.html. It is estimated that the DOD and DOC will save a $1.3 billion by combining the two programs into one.

[82] Joanne I. Gabrynowicz, *Expanding Global Remote Sensing Services: Three Fundamental Considerations* at 112 (Paper presented to the International Institute of Space Law at the Third United Nations Conference on the Peaceful Uses of Outer Space (UNISPACE III), Vienna, Austria, Jul. 21, 1999) [hereinafter Gabrynowicz, *Considerations*].

[83] *Id*. *See also* PRESTON AND BAKER, *supra* note 18, at 146.

[84] Paul B. Larsen, "Issues Relating to Civilian and Military Uses of GNSS" (2001) Space Policy 111. The Global Navigation Satellite System (GLONASS) is the Russian counterpart to the U.S. GPS, but it does not have a full satellite constellation and is not adequately funded. The European Union (EU) and the European Space Agency (ESA) are developing a European satellite navigation system, Galileo, which is scheduled to be operational in 2008.

[85] Langhorne Bond, *The GNSS Safety and Sovereignty Convention of 2000 AD*, 65 J. Air L. & Com. 445., 446 (2000).

The Global Positioning System (GPS) offers precise, all-weather, 24-hour-a-day, three-dimensional positioning and timing information worldwide. The U.S. military (as well as armed forces of other nations) depends greatly on GPS; for example, in the first six days of Operation Iraqi Freedom in 2003, more than 80 percent of all munitions used by Coalition forces were precision-guided, with the majority of these being guided by GPS.[86] Initially developed in the 1970s solely as a military navigation system, GPS now also has literally millions of civilian users who rely on it for aviation, marine, and road navigation, emergency response, mining, surveying, and oil exploration. The commercial market for GPS receivers and applications reached $6.2 billion in 2000 and, according to one estimate, is anticipated to reach $16.1 billion by 2005.[87]

The GPS system is *operated* by DOD but since 1996 has been *managed* by the Interagency GPS Executive Board (IGEB), chaired jointly by DOD and DOT with membership including the Departments of State, Commerce, Interior, Agriculture, and Justice, as well as NASA and the Joint Chiefs of Staff.[88] The creation of the IGEB reflects national recognition that GPS is a system serving globally both military and non-military users. Further evidence that the U.S. government recognizes the importance of GPS to civilian users worldwide is the 1 May 2000 termination of Selective Availability (SA), *i.e.*, the degradation of the accuracy of the signal provided to civilian users of the system.[89] The original intent of SA was to deny the maximum accuracy of the GPS signal to hostile military forces; until 1 May 2000, SA created inaccuracies of up to 100 meters in the signal provided to all civilian users worldwide.

III. NATIONAL SECURITY IMPLICATIONS OF "DUAL USE" TECHNOLOGIES

"Dual use" technology is traditionally defined as technology that is commercial or civilian in nature, but that can be used either directly or indirectly to produce sophisticated weaponry (*e.g.*, computer hardware and software, encryption software, and ceramics).[90] However, the current

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[86] *Delta Rocket Takes GPS Satellite into Orbit*, Air Force Print News (Apr. 1, 2003).
[87] Haller and Sakazaki, *supra* note 73; Justin Ray, *Delta Doesn't Disappoint in Successful GPS Launch*, Spaceflight Now (Mar. 31, 2003).
[88] For more information, *see* http://www.igeb.gov.
[89] U.S. Coast Guard Navigation Center, U.S. White House, Press Release, "Statement by the President Regarding the United States Decision to Stop Degrading Global Positioning System Accuracy" (May 1, 2000), *available at* http://www.navcen.uscg.gov/gps/selective_availability.htm.
[90] R. Aylan Broadbent, *U. S. Export Controls on Dual-Use Goods and Technologies: Is the High Tech Industry Suffering?*, 8 Currents Int'l Trade L.J. 49 (1999), *citing* Vago Muradian,

interdependence of military and non-military space services has implications beyond this traditional definition, since the identical space *services*, not just the underlying technology, are used by both civilians and military simultaneously. This gives rise to very delicate policy considerations. On the one hand, cooperation with foreign nations promotes political and economic ties with those nations, enhances mutual and collective defense capabilities through technological interoperability, and gives a State access to foreign technology (lowering costs, increasing business for domestic companies, and thereby strengthening overall domestic economy). On the other hand, since so much space technology is potentially or actually "dually used," the providing of such technology and services must not be done in such a way as to jeopardize national security. Therefore, the requirements of arms control, nonproliferation, export control, and foreign policy must be considered before sharing such technologies and services internationally.[91]

In fact, the very concept that any technology may be called "dual use" based on its inherent characteristics has been criticized – experts state that the dual use nature of any technology depends on its *actual use*, acknowledging that this judgment is made based on prevailing policy.[92] Under this reasoning, proliferation control regulations should focus on the *use* rather than on the nature of the technology itself. Furthermore, not only must States be concerned about the risk of giving militarily useful technology to the *direct* recipient, but they should also be concerned about the proliferation of that same technology *from* the recipient nation to others. Another important consideration for a space-dependent State is the fact that the more it relies on space services, especially for military and national security purposes, the more it needs guaranteed access to those services and to space itself.

A. A Special Concern: Implications of Dual Use Launch Technology

Because of the "dual use" nature of space technology, States must be concerned about who receives this technology. In this regard, space launch technologies are a special concern for two reasons. First, new launch technology may be used directly for military purposes -- the identical launch pad and launch vehicle may be used by the recipient nation to launch military, as well as civilian, payloads. Even in the U.S. , military launch facilities support both government and commercial launches.[93]

Better Export Controls Needed to Check Dual-Use Technologies. 198 Def. Daily 8 at 8 (1998) [hereinafter Broadbent].

[91] SPACE POLICY, *supra* note 11.

[92] von Kries, *supra* note 67 (stating "The dual-use notion, therefore, is not relatable to the nature of a specific technology but to circumstantial employment and prevailing policy assessment, especially under proliferation policy aspects. It follows that the concept of dual-use technologies is spurious, and thus of no systematic utility.").

[93] Space Commission, *supra* note 30.

The greatest concern, however, is that space launch vehicles essentially are ballistic missiles, capable of delivering nuclear, chemical, and biological weapons of mass destruction rather than "peaceful" payloads. In fact, many of today's space launchers are slightly modified intercontinental ballistic missiles (ICBMs).[94] The Chinese *Long March* space launch vehicles, for example, are manufactured by the same company that makes its nuclear ICBMs and "have the same staging mechanism, air frames, engines and propellants and employ similar payload separation and guidance system hardware."[95] As such, the issue of which States have access to space launch technology is of great concern. A State possessing launch technology must address its proliferation concerns and, at the same time, ensure its domestic space launch industry is strong enough to guarantee its State access to space.

B. Governments' Need for Unimpeded Access to Space

The U.S. believes "[t]he ability to access and utilize space is a vital national interest because many of the activities conducted in the medium are critical to U.S. national security and economic well-being."[96] Many experts hold that the guaranteed ability to access space is only achieved by maintaining a healthy domestic industrial base, including commercial launch services, and government policies that support international competitiveness.[97]

> *As the line between military and civilian technology becomes increasingly blurred, what remains clear is that a second class commercial satellite industry means a second class military satellite industry as well--the same companies make both products, and they depend on exports for their health and for revenues that allow them to develop the next generation of products*.[98]

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[94] Victor Zaborsky, *Evolving U.S. Satellite Export Policy: Implications for Missile Nonproliferation and U.S. National Interests*, Comparative Strategy 57 (Jan-Mar 2000). [hereinafter Zaborsky, *Export Policy*].

[95] Daniel R. Kempton and Susan Balc, ISA'S 2001 Convention of International Studies, *High Seas Satellite Launches: Paragon of Post Cold War Cooperation or Unregulated Danger*? (Paper presented to the International Studies Association (ISA) Convention of International Studies, Hong Kong, July 26-28, 2001) (unpublished), *available at* http://www.isanet.org/paperarchive.html, quoting Guy Gubliotta, Walter Pincus and John Mintz, *Classified Report at Heart of Accusation of Technology Loss to China*, Washington Post, May 31, 1998.

[96] SPACE POLICY, *supra* note 11, at 6.

[97] Space Commission, *supra* note 30; *see also* U.S. Chamber of Commerce, *Promote a Strong Domestic Space Launch Capability*, *available at* http://www.uschamber.com/space/policy/launchcapability.htm.

[98] Broadbent, *supra* note 90 (quoting congressional testimony of William A. Reinsch).

As mentioned previously, the U.S. has adopted specific legislation designed to encourage commercial space sector growth, especially in launch services, after learning a difficult lesson about the importance of having strong commercial launch alternatives. In 1972 development of the space shuttle began with President Nixon's declaration, "The general reliability and versatility which the Shuttle system offers seems likely to establish it quickly as the workhorse of our whole space effort, taking the place of all present launch vehicles except the very smallest and very largest."[99] Soon after the first shuttle launch in 1981, production lines for the Delta and Atlas launchers began to shut down, since the U.S. government planned to rely exclusively on the shuttle, the Titan IV, and the Scout launchers.[100] Thus, through the mid-1980s the U.S. relied heavily on the space shuttle for both military and civilian launches.[101] During that time, the infant U.S. commercial launch industry argued that it simply could not compete against the artificially low costs of government-subsidized shuttle launches.

The importance of maintaining a strong commercial space launch alternative to the shuttle was vividly demonstrated in 1986, when the explosion of the space shuttle *Challenger* grounded the shuttle fleet, resulting in a shortage of alternative U.S. launch vehicles.[102] This launch vehicle shortage directly contributed to the growth of Arianespace and other foreign launch providers, since satellite manufacturers and operators looked overseas for launch services. Prompted by a desire to avoid a repeat dependence on foreign providers, U.S. policy now recognizes the importance of domestic spacelift to military operations, noting that it gives the military the "ability to project power by delivering satellites, payloads, and material into or through space . . . us[ing] a combination of military, DOD civilian, and civilian contractor personnel to process, integrate, assemble, check out, and launch space vehicles."[103] Accordingly, States must balance proliferation concerns, international relations, and domestic space industry issues through legal regulations and policy.

IV. Legal Regulations Designed to Address National Security Concerns

Because of concerns about the dual use nature of space technology, States have made efforts to protect their access to *space*, protect access to

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[99] NASA, U.S. White House, Press Release, *Statement by President Nixon Announcing Final Approval of the Space Shuttle Program*, Jan. 5, 1972, *available at* http://history.nasa.gov/stsnixon.htm.

[100] *Id*.

[101] Smith, *Space Launch Vehicles*, *supra* note 19 at 2.

[102] *Id*. To this day, commercial payloads may not be flown on the shuttle unless they are "shuttle-unique" (able to be launched only on the Shuttle) or foreign policy requires shuttle launch of a specific payload.

[103] AIR FORCE DOCTRINE DOCUMENT (AFDD) 2-2, *Space Operations* (Aug 23, 1998), *supra* note 10 at 20.

space *technology*, and protect access to space *services*. Protecting access to space consists of two strategies: limiting access to space by others and ensuring a State's own access to space, mainly by maintaining viable domestic space industries.[104]

A. Protecting Access to Space

1. National Security Exceptions in Domestic Licensing Procedures

The first level of "defense" States employ to protect themselves from the misuse of dual use space technology is to limit access to space, through licensing restrictions in domestic legislation. States control the use of space for many reasons, but only a few shall be briefly mentioned here. First, States bear international responsibility and liability for national activities, including activities by private entities, in space.[105] Therefore, domestic legislation and licensing restrictions are one way States can accept this obligation *and* apportion the risks of such activities. Second, States have an interest in assuring the efficient use of space without harmful interference. Licensing restrictions can help meet this goal, as can management of radio frequencies and the geostationary orbit (GSO) through domestic implementation of the international regime under the International Telecommunications Union (ITU).[106] Third, States also have an interest in ensuring that the use of space

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[104] A detailed discussion of the technical means to deny access to space assets by others is beyond the scope of this article, although potential space weapons are briefly discussed below, section IV (C).

[105] These concepts are summarized by one scholar in the following way:

> *Two closely connected terms have been used: "liability" and "responsibility." Neither of these terms has been defined in space law but the term "liability" has been used to set the launching state's liability for damage caused by space objects, whereas the word "responsibility" has been used to mandate international responsibility by the appropriate state party for national activities in outer space. [. . .] [I]n connection with "liabilities" we are dealing with legal consequences (mostly in terms of damages) arising from a particular behavior. In contrast, it seems that when we speak of responsibilities, we are dealing primarily with obligations imposed on people and institutions who are supposed to carry out certain activities or are accountable in given situations though not necessarily in the form of compensation for damages.*

Stephen Gorove, *Liability in Space Law: An Overview*, 8 Ann. Air & Sp. L. 373 at 373 (1983)(discussing the two terms under domestic law and international law through two treaties: (1) *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies*, Jan. 27, 1967, T.I.A.S. 6347, 610 U.N.T.S. 205, Articles VI and VII [hereinafter *Outer Space Treaty*] and (2) *Convention on International Liability for Damage Caused by Space Objects*, Mar. 29, 1972, 961 UNTS 187 [hereinafter Liability Convention]).

[106] The ITU, the oldest "specialized agency" within the United Nations system, regulates international use of the radio frequency spectrum. Headquartered in Geneva, Switzerland, the

does not threaten their national security. Licenses are a powerful way to address this concern.

In addition to the standard licenses required to conduct business in a State, special licenses are required to engage in certain space activities. For example, licenses are required to launch a space launch vehicle and to operate a launch site in the U.S.[107] Licenses are also required to operate a remote sensing space system.[108] Therefore, a U.S. remote sensing operator, for example, may need three or even four different licenses:

(1) a remote sensing operating license,
(2) a radio frequency license for satellite uplink and downlink,
(3) a launch license, and
(4) an export license (if required in a specific case).[109]

While it might not appear at first blush that such domestic laws could have a great effect in the international space market, in practice these U.S. laws have a broad (even "extraterritorial") reach, since they apply to actions taking place on or off U.S. soil if the persons or entities involved have sufficient ties to the U.S. (*e.g.*, a U.S. citizen with a "controlling interest" in a launch company, or a mere 5% U.S. equity interest in a foreign remote sensing firm).[110] Thus, as a practical matter, these licensing restrictions may have wide international implications.

That national security is a major factor in the decision to grant each of the above types of license is obvious when one considers the purposefully broad applicability of the laws. In addition, most States openly include national security or national interest as a factor in deciding whether or not to grant a license to engage in space activities. For example:

(1) Australia

ITU is the organization through which governments and the private sector coordinate global telecommunications networks and services, including satellite communications. The ITU serves three major functions: (1) regulating the radio frequency spectrum, (2) establishing rate and equipment standards for telecommunications, and (3) coordinating use of the highly desired geostationary orbit. FRANCIS LYALL, LAW & SPACE TELECOMMUNICATIONS 311, 387 (1989). For more information on the ITU, *see* http://itu.org; J. Wilson, *The International Telecommunication Union and the Geostationary Satellite Orbit: An Overview*, 23 Ann. Air & Sp. L. 249 (1998); *Constitution and Convention of the International Telecommunication Union*, Dec. 22, 1992 (Geneva: ITU, 1992). In the U.S., the international regime is implemented through the Federal Communications Commission (FCC). *See* 47 C.F.R. 25.

[107] 49 U.S.C. §701; 14 C.F.R. 400-450.

[108] *Id*.; Land Remote Sensing Policy Act of 1992, *supra* note 28.

[109] Michael R. Hoversten, *U.S. National Security and Government Regulation of Commercial Remote Sensing from Outer Space*, 50 A.F. L. Rev. 253 at 267 (2001).

[110] *Id*. 14 C.F.R. 401.5(n) creates a rebuttable presumption that a U.S. controlling interest exists if 51% of the equity is held by U.S. citizens or a U.S. entity.

(Australia's *Space Activities Act of 1998* – can refuse a license "for reasons relevant to Australia's national security, foreign policy, or international obligations." The Act applies to domestic launches and overseas launches by domestic entities.)[111]

(2) South Africa

(*Space Affairs Act* – takes into account the minimum safety standards, the national interest of South Africa, as well as international obligations and responsibilities.)[112]

(3) United States

(*Commercial Space Act 1998* – can prevent a launch if it "would jeopardize the public health and safety, [. . .] or any national security interest or foreign policy interest" of the U.S.)[113]

(*Land Remote Sensing Policy Act* – licensee shall "operate the system in such manner as to preserve the national security of the United States and to observe the international obligations of the UnitedStates.")[114]

Finally, even when States grant licenses to engage in space activities, the license itself may impose additional conditions and restrictions. For example, remote sensing operators frequently have additional restrictions imposed on them (see below, section IV(D)(3)).

2. Government Efforts to Keep a Healthy Space Industry

As already mentioned briefly, many experts believe that the goals of national security are only achieved by maintaining a healthy domestic industrial base in space technology and government policies that support international competitiveness.[115] However, the appropriate role of the government in assuring a healthy space industry has been a recurring subject of great debate.[116] Even within the "space industry" there are often opposing

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[111] *Space Activities Act of 1998, Acts of Parliament of the Commonwealth of Australia* No. 23, s. 18(e)(assented to Dec. 21, 1998).

[112] *Space Affairs Act, Statutes of the Republic of South Africa* No. 84 of 1993, § 11(2) (assented to Jun. 23, 1993)(commenced Sep. 6, 1993).

[113] Commercial Space Launch Act of 1984, 49 U.S.C. § 701 (1994)(as amended in 1998).

[114] 15 U.S.C. § 5622(b)(1).

[115] U.S. Commission to Assess U.S. National Security Space Management and Organization, *Report of the Commission to Assess U.S. National Security Space Management and Organization, pursuant to P.L. 106-65* (Jan. 11, 2001), *available at* http://www.space.gov/doc/fullreport.pdf [hereinafter Space Commission]; *See also* U.S. Chamber of Commerce, *Promote a Strong Domestic Space Launch Capability*, available at http://www.uschamber.com/space/policy/launchcapability.htm.

[116] Smith, *U.S. Space Programs, supra* note 20, summary.

views about how to maintain this strong technological base. For example, satellite manufacturers and space launch providers do not always share the same views -- satellite manufacturers are interested in getting their products launched as cheaply as possible, which may mean exporting satellites and components for foreign launches, while domestic satellite launch providers themselves want to offer these services.[117]

The U.S. reaction to the threat to its role in the space launch industry in the late 1980s is particularly noteworthy in this regard. Due to the relatively late entry of U.S. *commercial* entities to the launch industry, in large part because of early U.S. focus on the space shuttle, the U.S. commercial space launch sector was still in its infancy in the mid-1980s.[118] At that time the U.S. made the "pioneering decision to apply free market principles to the space launch industry" so that U.S. satellite manufacturers could launch their satellites on foreign rockets, allowing them flexibility in launch scheduling and ending their dependence on the space shuttle.[119] As a result, over the next decade foreign entities began to take an increased percentage of the total worldwide launches. In the late 1980s and the early 1990s the greatest threat perceived by U.S. launch service providers was competition from the non-market economies of China, Russia, and the Ukraine.[120] The U.S. reacted by negotiating bilateral agreements with these three States to set the "rules of the road" in order to ensure fair competition.[121] A specific fear of the U.S. was that these States, which had relatively advanced missile and space industries, could provide high-quality launch services at extremely low prices due to their non-market economies and inexpensive labor costs.[122] The U.S. also feared that the excess ballistic missiles in the former Soviet republics and China would further lower production costs in these economies, since it was easier and cheaper to convert existing ballistic missiles to launchers than to start creating them from scratch.

All along the U.S. claimed that these bilaterals were intended to be "transitional measures allowing for the non-disruptive entry" of economies in

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[117] *See* Victor Zaborsky, *Economics vs. Nonproliferation: U.S. Launch Quota Policy Toward Russia, Ukraine, and China*, The Nonproliferation Review 152 at 154 (Fall-Winter 2000) [hereinafter Zaborsky, *Economics*].
[118] Smith, *Space Launch Vehicles*, *supra* note 19.
[119] Zaborsky, *Economics*, *supra* note 117, at 153.
[120] *Id*.
[121] 1989 Bilateral Agreement on International Trade in Commercial Space Launch Services [hereinafter Chinese Launch Agreement], reproduced at 28 I.L.M. 596 (1989); *Guidelines for U.S. Implementation of the Agreement between the U.S. and Russian Federation Government regarding International Trade in Commercial Launch Services*, USTR, 59 Fed. Reg. 47 (Mar. 10, 1994) [hereinafter Russian Launch Agreement]; Agreement Between the Government of the United States of America and the Government of Ukraine Regarding International Trade in Commercial Space Launch Services, *available at* http://www.ustr.gov/releases/1995/12/95-91.html [hereinafter Ukrainian Launch Agreement].
[122] *Id*.

transition into the commercial launch market.[123] Even with this language indicating the temporal nature of the bilaterals, they were harshly criticized as "protectionist, parochial, and paranoid" and were openly opposed by U.S. satellite manufacturers.[124] America was even described by one commentator as "using national security concerns to cloak protectionist tendencies."[125]

In general the bilaterals set conditions over how the three States (China, Russia, and the Ukraine) could participate in the satellite launch market, by imposing these general terms on the non-market economy State:

> (1) **pricing** (had to be "on par" with, or "comparable to" Western-provided launches);[126] and
> (2) **quotas** (limited the number of commercial launches the State could perform per year).[127]

The U.S. was able to insist on such regulatory terms because most satellites and components had (and have) components manufactured in the U.S. that could not be exported for launch without the U.S. granting an export license.[128] In fact, in 1988 the decision whether or not to allow export gave the U.S. such leverage over the first Chinese commercial launch that, in addition to the pricing and quota restrictions, the U.S. was also able to insist that China accept both liability in case of damage and restrictive technology transfer safeguards to prevent the transfer of militarily useful technology during the launch operations (*e.g.*, by requiring storage of the satellite in locked facilities and prohibiting the transfer of equipment and technical data).[129]

The six-year U.S.-Chinese Launch Trade Agreement was signed in January 1989, along with the above-described Technology Safeguards and Liability Agreements. Only six months after the agreements were signed, however, the Tiananmen Square incident occurred and the granting of satellite export control licenses became linked to human rights reform. Ever since this

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[123] U.S. Trade Representative (USTR), Press Release, United States Reaches Agreement with Ukraine on a Commercial Space Launch Agreement (Dec. 14, 1995), *available at* http://www.ustr.gov/releases/1995/12/95-91.html.

[124] Frank Sietzen, Jr., *Europeans Deride U.S. Launch Industry as 'Xenophobic'*, Space.com News (Jul. 18, 2000), *available at* http://www.space.com/businesstechnology/business/angry_eurolaunchers_000718.html [hereinafter Sietzen] (quoting Peter van Fenema); *see also* Zaborsky, *supra* note 117, at 153.

[125] *Id.*

[126] The most recent Chinese agreement assumed pricing was consistent if the price bid was within 15% of Western bids. The Russian agreement called for consultations if the bid price was 7.5% below the market bid. The Ukraine agreement called for consultations if the bid price was 15% below market standards. Chinese Launch Agreement, Russian Launch Agreement, Ukrainian Launch Agreement, *supra* note 121.

[127] PETER VAN FENEMA, THE INTERNATIONAL TRADE IN LAUNCH SERVICES: THE EFFECT OF U.S. LAWS, POLICIES AND PRACTICES ON ITS DEVELOPMENT (1999) [hereinafter van Fenema].

[128] *Id*. at 185.

[129] *Id*. at 205 and 208; Chinese Launch Agreement, *supra* note 121.

incident, a specific Presidential waiver has been required to export satellites for launch in China.[130] In the years since 1989, exports of satellites to China have been on-again-off-again, as the granting of these exports licenses has also been linked to alleged Chinese ballistic missile transfers to Iran, Syria, and Pakistan.[131] The complex U.S.-Chinese relationship over commercial launches perfectly underscores how space technology is intertwined with and linked to broader national security and political issues. It appears that the more the military relies on space assets and systems, the more likely these external linkages are to continue.

In addition to linkages with foreign policy and human rights, the very terms of the Chinese agreement itself became the source of pricing controversies based on the unclear wording of the agreement. As one expert noted,

> *The launch trade agreement, instead of creating a stable and predictable regulatory environment for the U.S. and Chinese industries concerned, became itself subject to the political uncertainties caused by the multifaceted U.S.-Chinese relationship, which involved human rights, trade and non-proliferation issues [. . .]*[132]

A new agreement, clarifying several disputed terms, was signed in 1995. Ultimately, the Chinese launch agreement (with its quotas and pricing restrictions) ended in December 2001.[133]

Similar agreements were signed between the U.S. and Russia and between the U.S. and the Ukraine after the breakup of the former Soviet Union.[134] As with the Chinese agreement, both bilaterals exhibited similar "links" to U.S. national security and political concerns. In fact, part of the U.S. motivation for encouraging the entry of Russia and Ukraine into the commercial launch market was to promote conversion of the former Soviet military industry to peaceful uses in the interests of U.S. national security. Specifically, the 1993 Russian agreement was part of a "package deal" in which Russia and the U.S. merged space stations and Russia agreed to adhere to the Missile Technology Control Regime (MTCR), requiring Russia to renege on a $400M contract with India for cryogenic rocket engine technology.[135] Similarly, the 1996 Ukrainian launch agreement was linked to

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[130] Smith, *Space Launch Vehicles*, *supra* note 19 at 10 (referring to Pub. L. No. 101-162 and Pub. L. No. 101-246 §902).
[131] *Id*.
[132] van Fenema, *supra* note 127, at 215.
[133] Smith, *Space Launch Vehicles*, *supra* note 19.
[134] van Fenema, *supra* note 127; Russian Launch Agreement and Ukrainian Launch Agreement, *supra* note 121.
[135] *Id*. For a detailed discussion of the MTCR, *see below*, section IV(B)(1).

two other separate but related agreements that were signed in 1998, one on the peaceful use of nuclear energy (giving Ukrainian companies compensation for broken business deals with Iran for nuclear turbines) and the other on non-proliferation of missile technology.[136]

Although there were disagreements over the next few years between Russia and the U.S. about some terms in the launch agreement,[137] the disagreements were not as controversial as those with the Chinese. This is likely due, at least in large part, to the fact that Russian, Ukraine, and U.S. companies were partners in joint ventures. Thus, U.S. satellite manufacturers and launch companies were benefiting from Russian and Ukrainian launches.[138] The Ukrainian agreement explicitly encouraged such joint ventures (recognizing Sea Launch specifically) by increasing quota limits for launches performed by U.S.-Ukrainian joint ventures.[139] Both the Russian and Ukrainian launch agreements expired in 2000, along with the quotas and pricing restrictions. Notably, the Ukrainian agreement was terminated early in recognition of the Ukraine's "steadfast commitment to international non-proliferation norms."[140]

The late 1990s anticipated a very large market for Low Earth Orbit (LEO) mobile satellite telecommunications services.[141] However, with the bankruptcy of several of the companies and the uncertainty of the future profitability of others, the demand for satellite launches since 1999 has been lower than anticipated, with an associated oversupply of launch vehicles, making the current global commercial launch market intensely competitive.[142] Accordingly, States are once again keenly aware of foreign competition for launch services and, as a result, have adopted protective measures for their ailing domestic space industries. These measures have been very controversial, as States have accused each other of implementing unfair governmental subsidies in the space industry.[143]

Potentially, there are a number of ways in which States could subsidize their space industries, directly or indirectly. For example, governments could pay the commercial sector for government projects and launches, give tax incentives or tax breaks to space companies, issue loan guarantees to help up-front financing, provide government liability insurance, allow the commercial

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[136] *Id*.
[137] For example, in 1994, the U.S. accused Russia of cheating to get around the quotas through "on-orbit leasing" -- by launching a domestic Russian payload (that wouldn't count as a foreign launch for quota purposes) but immediately leasing the satellite to a foreign nation. Also, in 1997 the U.S. accused Russia of selling ballistic missile technology to Iran. *Id*.
[138] *Id*.
[139] Ukraine Launch Agreement, *supra* note 121.
[140] Smith, *Space Launch Vehicles*, *supra* note 20, at 16.
[141] *Id*.
[142] U.S. Chamber of Commerce, *Promote a Strong Domestic Space Launch Capability*, *available at* http://www.uschamber.com/space/policy/launchcapability.htm.
[143] Smith, *Space Launch Vehicles*, *supra* note 20.

sector to use military or government launch sites, and require domestic payloads to be launched from domestic launch vehicles. In the bilateral agreements with the non-market economies discussed above, "government inducements" (described as "no bribes, no threats, no trade-offs, no special 'deals'")[144] were prohibited. However, it is clear that governments do help promote their space industries in several of the ways outlined above. For example, the U.S. has complained about the European Union's $8.3 billion and $2.1 billion investments into the development and performance upgrades, respectively, of the *Ariane* 5 rocket.[145] Interestingly though, the U.S. government (through the DOD) has invested $3 billion in the development of the U.S.' next generation Evolved Expendable Launch Vehicle (EELV) by two U.S. commercial companies.[146] The European Union has also complained about the U.S. policy requiring that U.S. government payloads be launched on U.S.-manufactured launch vehicles.[147]

In the current, depressed space launch industry, continuing government financial support will no doubt be advocated and criticized. In fact, the U.S. Congress has recently debated further industry subsidies, but no action has yet been taken. The European Space Agency is now considering minimum guaranteed purchases of *Ariane* launches by European Union member states to keep Arianespace from going bankrupt.[148] As armed forces rely increasingly on commercial space systems and insist on guaranteed access to space, debates about the proper role of government in space trade will no doubt continue, since domestic subsidies may be seen as necessary for national security. On the other hand, the military's reliance on *foreign* space systems and *international* service providers may encourage a more open, *global* free trade market.

3. World Trade Organization (WTO) Influence on the Industry

Although the WTO regime has the potential to affect the space industry in many ways, this article will only briefly address national security implications of the WTO as regards space services. The stated goal of the WTO is to encourage smooth, predictable, fair, and free trade. This is accomplished through international negotiations aimed at lowering trade barriers.[149] From the perspective of the space industry, the impact of the WTO may be seen either in a positive light (as international promotion of a healthy global space industry through free trade and open competition) or in a negative

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[144] van Fenema, *supra* note 126, at 201.
[145] U.S. Chamber of Commerce, *supra* note 142.
[146] *Id*.
[147] Smith, *Space Launch Vehicles*, *supra* note 20, at 9.
[148] *Id*. at 10.
[149] *See* http://www.wto.org; *Agreement Establishing the World Trade Organization*, 33-5 I.L.M. 1125 (Apr. 15, 1994).

light (placing limitations on a government's ability to protect an industry vital to its national security).

The WTO "umbrella" covers trade both in goods and services. Since commercial telecommunications (including those provided by satellite), remote sensing, space-based navigational aids, and space launch services are "services", they fall under the General Agreement on Trade in Services (GATS).[150] Trade in "goods", on the other hand, is addressed by the General Agreement on Tariffs and Trade (GATT). Therefore, government subsidies for the development of launch vehicles and satellites are covered by the GATT.[151] Accordingly, the role of the WTO, which up to now has been limited in the space market, is expected to grow in the coming years as these commercial sectors expand.[152] In fact, a recent U.S. Government commission stated that the U.S. must develop a coherent policy to consider WTO negotiations about market access for commercial satellite systems.[153]

The GATS provides for three important liberalization principles potentially relevant to space services: most-favored nation (MFN), market access, and national treatment. The MFN principle is a "general obligation," which means the principle applies unconditionally to all services -- as soon as a service is offered in a national market, the MFN principle applies to it. For general obligations such as MFN, a State must affirmatively make an exemption for a specific service if it doesn't want the principle to apply to it. In essence, a State must "opt out" of a specific service for a general obligation such as MFN to not apply. The MFN principle requires States to offer the same "deal" given to one State to all other States on a non-discriminatory basis.[154] Thus, under the MFN principle bilateral agreements limiting launch pricing and instituting quotas would no longer be an option. Recognizing this, the U.S. specifically exempted space launch services from the application of

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[150] *General Agreement on Trade in Services*, 20 1991, GATT Doc. MTN TNC/W/FA [hereinafter GATS]; Domenico Giorgi, WTO and Space Activities (Paper presented to the Third ECSL Colloquium, Perugia, Italy, May 1999). On Feb. 5, 1998, the WTO's Fourth Protocol to the GATS for Basic Telecommunications Services took effect, requiring signatories to open their telecommunications markets to foreign competition. *Infra*, note 156.

[151] Anders Hansson and Steven McGuire, *Commercial Space and International Trade Rules: An Assessment of the WTO's Influence on the Sector*, 15 Space Policy 199 at 201 (1999); *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 U.N.T.S. 187, T.I.A.S. 1700 [hereinafter GATT].

[152] Howard J. Barr, Womble Carlyle, *FCC's New Foreign Access and Satellite Licensing Rules*, *available at* http://www.wcsr.com/.

[153] U.S. Commission to Assess U.S. National Security Space Management and Organization, *Report of the Commission to Assess U.S. National Security Space Management and Organization, pursuant to P.L. 106-65* at 64 (Jan. 11, 2001), *available at* http://www.space.gov/doc/fullreport.pdf [hereinafter Space Commission].

[154] Peter Malanczuk, *The Relevance of International Economic Law and the World Trade Organization (WTO) for Commercial Outer Space Activities* (Discussion paper presented to the Third ECSL Colloquium, Perugia, Italy, May 6-7, 1999) [hereinafter Malanczuk].

the MFN principle to its previous bilateral launch agreements.[155] Similar bilateral agreements for other space services might violate the MFN principle unless the service is exempted by the concerned State.

Market access (guaranteeing access to a domestic market regardless of the mode through which a service is supplied) and national treatment (under which States agree to treat foreign service providers no differently from domestic providers) are, unlike the MFN principle, not general obligations. Therefore, market access and national treatment do not automatically apply to all services. Instead, these two principles require "specific commitments" by a State (on a "schedule") that the principles will apply to a specified service. Essentially this means Parties must explicitly "opt in" specific services to have the two principles apply to those services. In 1997 sixty-nine WTO Member States, including the U.S., representing over 90% of the world's basic telecommunications revenues, signed the Fourth Protocol to the GATS and made specific commitments relating to basic telecommunications, including satellite telecommunications.[156] Significantly, no State has made a specific commitment for any of the other space services mentioned herein.[157]

The GATT may also provide challenges to space industries. Under the GATT States will need to be careful about the type and amount of subsidies they provide to space launch vehicle and satellite manufacturing firms. To this point, much State investment in the space industry has been in the form of research and development funding.[158] As such, it may be relatively easy to avoid violating the GATT in the future, since the GATT allows 75% of basic research costs and 50% of applied work costs to be "non-actionable subsidies." However, even in the research-intensive space industry, States must be cognizant of WTO subsidy restrictions or risk potential WTO complaints.

Therefore, in the near term the WTO may not directly impact the commercial space industry, since, in the service sector States may choose to exempt their space services from general obligations and may not make specific commitments, whereas in the trade of goods government subsidies for research and development may be allowed. However, there is another issue raised by the WTO that may become a great source of controversy in the near future, namely the potential use of the national security exception by States to avoid GATT and GATS application to the space industry and space services.

When the GATT was first negotiated in 1947, participating States insisted that a "national security exception" be included to allow them latitude to spend on their armed forces to protect the nation from foreign threats. Not uncommon in multilateral treaties, such exceptions free States of restrictions

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[155] For lists of exemptions and commitments, *see* http://www.wto.org.
[156] Fourth Protocol to the General Agreement on Trade in Services (WTO 1997), 36 I.L.M. 354 at 366 (1997); Haller and Sakazaki, *supra* note 73.
[157] KEVIN MADDERS, A NEW FORCE AT A NEW FRONTIER: EUROPE'S DEVELOPMENT IN THE SPACE FIELD IN THE LIGHT OF ITS MAIN ACTORS 560 (Cambridge University Press 1997).
[158] U.S. Chamber of Commmerce, *supra* note 142.

otherwise imposed by agreements.[159] This national security exception still exists in Article XXI of the GATT, and a similarly worded exception appears in Article XIV *bis* of the GATS.[160] The terms "essential security interests" and "security" have since been subject to broad interpretation. For example, the U.S. has invoked this exception two times -- once to defend the boycott against Cuba and once to defend selective purchasing against Burma -- in part claiming that unilateral sanctions served U.S. security interests by responding to human rights violations committed by the two regimes (*e.g.*, resulting in a heavy influx of refugees from Cuba).[161]

In addition to the lack of clarity in the terms themselves, most industrialized nations take the position that a State's determination of the existence of a national security interest is "self-judging," based exclusively on the discretion of the party invoking the exception, and therefore inherently non-justiciable.[162] Under this view, "[W]ithout a mechanism for a review of such actions, each nation has the sovereign right to define its own national

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[159] Ryan Goodman, *International Human Rights Law in Practice: Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 Chi. J. Int'l L. 101 (2001) [hereinafter Goodman].

[160] Wesley A. Cann, Jr, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int'l L. 413 (2001). Article XXI of the GATT says:

> *Nothing in this Agreement shall be construed*
> *(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
> *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
> *(i) relating to fissionable materials or the materials from which they are derived;*
> *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
> *(iii) taken in time of war or other emergency in international relations; or*
> *(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

The GATS (15 Apr. 15, 1994) has a very similar provision in Article XIV.

[161] Goodman, *supra* note 159, at 102.

[162] *Id* at 415. States base this argument on the fact that the national security exception is not listed with other general exceptions (*see* Article XX of the GATT) that are subject to a limiting introductory clause, and that the use of the term "it considers necessary" gives States more latitude than the "necessary" terminology used elsewhere in the Agreements. The WTO dispute resolution procedure has not yet resolved this issue.

security interests without foreign interference. In effect, it is impossible for a nation to violate article XXI."[163]

Governmental subsidies to, and preferential treatment of, domestic and "friendly" space industries will no doubt become trade issues in the current competitive market. In such disputes, States will probably invoke the national security exception to escape potential application of WTO principles to their domestic commercial space industries. The growing interdependence between the commercial and military space sectors increases the likelihood that States will invoke this exception. The blurring of lines between national security, economic health, and foreign policy interests cannot but strengthen the resolve of States to avoid the intervention of the WTO. Yet the WTO, perhaps through its dispute resolution process, will almost certainly be involved in these matters.

The pro-competitive, market-opening effects of the WTO telecommunications protocol have sparked increased demands for use of the radio frequency spectrum, with potential impact on national security.[164] As a result of the increased demand, the availability of this limited natural resource may be at risk. At a minimum, the process of allocation, assignment, and coordination of the radio-frequency spectrum may become so complex and time-consuming, resulting in adverse effects on national security, particularly as the military increasingly relies on civilian systems that must comply with this process.[165] Disagreement may also arise over military use of "civilian" frequencies. To summarize, armed forces which invest in and rely on commercial services or products that fall under the umbrella of the WTO need to be aware of the WTO "rules" or risk breaking them.

B. Protecting Access to Sensitive Space Technology

1. Export Controls

Another common response of States in defending their space-oriented national security interests is through the imposition of technology transfer restrictions, export controls, and non-proliferation efforts on both multinational and national levels. In this regard, the U.S. export control regime is singularly comprehensive and is discussed below, following a brief overview of the multinational regime.[166]

On the multinational level, there are two primary technology control regimes relevant to space systems: the Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement on Export Controls for Conventional

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[163] *Id*.
[164] Space Commission, *supra* note 153.
[165] *Id*.
[166] A brief summary of the export control regime with the greatest impact on commercial space technologies follows; a *detailed* description is beyond the scope of this paper.

Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement).[167] There are currently 33 Partner States in the MTCR and several other States (including China and Israel) have pledged to adhere to the MCTR without formally joining the Regime. The goal of the MTCR, which was established in 1987, is to restrict the proliferation of missiles capable of carrying weapons of mass destruction (WMD). Space launch vehicles are considered "missiles" and are therefore covered by the MTCR. The MTCR is a voluntary arrangement – it is not a formal international agreement. Accordingly, each Partner State implements the Regime on a national level through its own national export control regulations.[168] In an attempt to more effectively enforce the Regime, the U.S. Congress passed a law in 1990 mandating the imposition of economic sanctions against countries which export covered technologies to non-MTCR nations.[169] Since this law went into effect, the U.S. has at various times imposed such sanctions against China, India, Iran, North Korea, Pakistan, Russia, South Africa, and Syria. To further strengthen compliance with the Regime, in 1994 the Partner States agreed to a "no undercut" policy for denied export licenses. Under this policy, if one Partner State denies export of a covered technology to a specific country, the other MTCR Partners are also expected to deny the export.[170]

The MTCR is not designed to impede national space programs or international cooperation in space. Hence, space launch vehicles may be transferred to other MTCR Partner States if sufficient assurances are given about the proper use of the launch vehicle by the recipient State. However, in the past such transfers have been the source of great controversy, with some Partner States criticizing others for transferring technology despite suspicion that the recipient country is trying to get launch vehicle technology to use for ballistic missile development.[171]

The other major international export control regime affecting space technology is the Wassenaar Arrangement, designed to complement the MTCR by controlling conventional arms transfers and dual use technologies. As is the

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[167] The Wassenaar Arrangement, named after the suburb of The Hague, Netherlands where the initial agreement was reached, was approved by its 33 founding countries in July 1996 and currently operates through a permanent secretariat in Vienna, Austria. *See* http://www.bxa.doc.gov/Wassenaar/ and Wassenaar homepage, www.wassenaar.org; Canada-France-Federal Republic of Germany-Italy-Japan-United Kingdom-United States: Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, 26 I.L.M. 599 (1987) [hereinafter *The Missile Technology Control Regime (MTCR)*].

[168] Lora Lumpe, Federation of American Scientists, *The Missile Technology Control Regime, available at* http://www.fas.org/nuke/control/mtcr.

[169] Missile Technology Controls, National Defense Authorization Act for FY 1991, Title XVII, Pub. L. No. 101-510 (1990).

[170] *Id*.

[171] Wyn Q. Bowen, *U.S. Policy on Ballistic Missile Proliferation: The MTCR's First Decade (1987-1997),* 51 The Nonproliferation Review 21 at 45 (1997). The U.S. and France had conflict over France's proposed transfers of technology to Brazil and India, for example. *Id*.

case with the MTCR, enforcement of the Wassenaar Arrangement is left to Participating States through national laws.[172] The Wassenaar Arrangement is the successor to the 1949 Coordinating Committee on Multilateral Export Controls (COCOM), which was a joint organization of the NATO countries, Japan, and Australia formed to prevent the sale of weapons and technology to the Soviet Union and communist bloc nations. COCOM was disbanded in 1994 following the dissolution of the Soviet Union, the opening of Eastern European markets, and the end of the Cold War.[173] One of the key differences between COCOM and Wassenaar is that Russia is a participant in, rather than a target of, the regime.[174]

The Wassenaar Arrangement was created in 1996 to deny trade of conventional arms and sensitive technologies to States that pose security risks (based on location in an unstable region or threatening behavior) and to increase transparency in the global market for these goods.[175] However, it has been criticized as being weak, mainly for its lack of a veto mechanism to prohibit the transfer of technology to a non-member State. Incredibly, the combination of the Arrangement's "no undercut" provisions means that members who deny export are essentially forced to notify all other members that there may be an export opportunity available to them. The other members may therefore undercut the earlier denial because they do not have to report their undercut to the denying State until *after* they have already granted the export license.[176] As such, the Arrangement has been criticized as being little more than an *ex post facto* reporting system that creates a dilemma for policy makers.[177]

Often criticized for its complexity, the current U.S. export control regime reflects the climate in which it has evolved – the climate of conflict between "pro-business" and "pro-national security" advocates.[178] At the national level in the U.S., the Department of Commerce (DOC) and the Department of State (DOS) are primarily responsible for licensing the export of strategic goods, including space technologies. The DOS deals with those

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[172] Ram Jakhu and Joseph Wilson, *The New United States Export Control Regime: Its Impact on the Communications Satellite Industry*, 25 Ann. Air & Sp. L. 157 at 163 (2000). [hereinafter Jakhu and Wilson].

[173] Ronald J. Sievert, *Urgent Message to Congress - Nuclear Triggers to Libya, Missile Guidance to China, Air Defense to Iraq, Arms Supplier to the World: Has the Time Finally Arrived to Overhaul the U.S. Export Control Regime? The Case for Immediate Reform of Our Outdated, Ineffective, and Self-Defeating Export Control System*, 37 Tex. Int'l L.J. 89 (2002). [hereinafter Sievert].

[174] Jakhu and Wilson, *supra* note 172.

[175] Sievert, *supra* note 173.

[176] Jamil Jaffer, *Strengthening the Wassenaar Export Control Regime*, 3 Chi. J. Int'l L. 519 at 522 (2002).

[177] Sievert, *supra* note 173.

[178] Jere W. Morehead and David A. Dismuke, *Export Control Policies and National Security: Protecting U.S. Interests in the New Millennium*, 34 Tex. Int'l L.J. 173 (1999).

technologies which are inherently military, while the DOC is concerned with dual use items.[179] The Export Administration Act (EAA) and the Arms Export Control Act (AECA) are the main statutes in the U.S. export control regime.[180]

Through the AECA, the DOS licenses the commercial export of exclusively military items and related technical data. Promulgated by the DOS, the International Traffic in Arms Regulations (ITARs) are the implementing regulations for the AECA. Items such as weapons, ammunition, and civilian articles designed, adapted, or modified for military or intelligence uses are monitored and controlled if they are included on the United States Munitions List (USML).[181] Effective 15 March 1999, commercial satellites were placed on the USML (under the AECA) and therefore require DOS approval for export. The 1999 law also requires the DOD to approve any satellite export.[182]

The EAA is the statute through which the DOC licenses exports of non-military, dual use technology.[183] The technologies covered under the EAA include many difficult-to-classify, dual use items (which may or may not also be regulated under the AECA), listed on a lengthy, very technical Commerce Control List (CCL) that covers such items as high-speed computers, navigation devices, and other items which have potential military and civilian application with little or no modification.[184] A result of continued disagreement over export controls, the EAA lapsed again in August 2001 but, as has been the case on many occasions in the recent past, the export control system is being kept alive by Presidential invocation of emergency powers.[185] A proposed 2001 EAA would have included stiffer penalties for EAA violations, while at the same time including a mass-market exemption for technologies:

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[179] *Id*.

[180] Export Administration Act of 1979, 50 U.S.C. § 2410 (1979); Arms Export Control Act, 22 U.S.C.§ 2778.

[181] Sievert, *supra* note 173. Within the DOS, the Office of Defense Trade Controls (DTC) monitors and control the shipment of items on the United States Munitions List (USML). The USML contains twenty-one categories ranging "from those unambiguously confined to military use, like Category II-'Artillery Projectors', to some that can encompass items with civil application, like Category XV-Spacecraft Systems and Associated Equipment."

[182] Jakhu and Wilson, *supra* note 172.

[183] *Id*. The EAA is implemented by the Export Administration Regulations (EAR), through the DOC's Bureau of Industry and Security (BIS). Until April 2002, the BIS was called the Bureau of Export Administration (BXA).

[184] Sievert, *supra* note 173 (also noting there are many other U.S. statutes and implementing regulations that directly or indirectly impact exports and, notably, may conflict with the EAR and the AECA. For example, the Trading with the Enemy Act (TWEA), International Emergency Economic Powers Act (IEEPA), Anti-Terrorism and Effective Death Penalty Act (AEDPA), Nuclear Non-Proliferation Act (NNPA), and various U.S. Treasury directives (e.g., the Office of Foreign Assets Control (OFAC))).

[185] U.S. Department of Commerce Bureau of Industry and Security, *Streamlining and Strengthening Export Controls*, *available at* http://207.96.48.13/eaa.html. The Presidential emergency powers were declared under the International Emergency Economic Powers Act.

> *"that you may be able to buy . . . at Radio Shack that may have defense implications. If you can buy it at Radio Shack, so can anybody else. If something is mass-marketed -- as much as you might want to keep that technology from falling into the wrong hands -- the bottom line is, once it is sold on a mass-marketed basis, you're wasting your time in trying to protect that technology."*[186]

2. Tensions between Competition and National Security

As discussed previously, export licenses afford the U.S. great control over the transfer of potentially militarily useful technology (even if transferred for the sole purpose of being launched overseas), since many satellites and satellite components are manufactured in the U.S.[187] Ironically, although the U.S. is the world's greatest importer and exporter, the U.S. still has some of the strictest unilateral export controls in the world.[188] Despite this, many politicians and members of the DOD have expressed fear that U.S. national security "is being sacrificed at the altar of commerce."[189]

Two situations in particular contributed to the view that U.S. companies transfer too much militarily useful technology to foreign countries: the Cox Committee,[190] which investigated allegations of technology transfer to China, and the Boeing (Sea Launch) investigation with its allegations of technology transfer to Russia and the Ukraine. The repercussions from these incidents are still being felt by U.S. companies today, in the form of expensive sanctions and more restrictive export control laws.[191]

In 1995 and 1996 two Chinese launches of satellites built by U.S. manufacturers (Hughes and Loral) failed, destroying the satellites and injuring and killing many people on the ground.[192] The companies inquired into the launch failures at the request of their insurance companies, who wanted to be certain about the causes of the failures. The companies participated in the investigations despite having failed to get an approved export license to do so. As a result, the Justice Department investigated the alleged transfer of technical data during the course of the insurance investigation. Subsequently in 1998 the House of Representatives formed the Cox Committee[193] to address the alleged export violations. The investigations found that both companies

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[186] Statement of U.S. Senator Phil Gramm, chairman of the Senate Committee on Banking, Housing and Urban Affairs, announcing the introduction of the proposed EAA of 2001 (23 January 2001), *available at* http://banking.senate.gov/docs/eaa/statmnts.htm.
[187] van Fenema, *supra* note 127.
[188] Broadbent, *supra* note 90.
[189] *Id*.
[190] H.R. REP. NO. 105-851 (1999) [hereinafter Cox Committee].
[191] *Id*.
[192] Kempton and Balc, *supra* note 95.
[193] *Cox Committee*, *supra* note 190.

deliberately and improperly transferred technology to China. Ultimately, the companies paid vast settlements to the U.S. government.[194]

In 1997 Boeing officials became concerned that they too had violated procedures relating to the handling of missile technology through their involvement in the Sea Launch joint venture. [195] They were concerned the mishandled technical information could potentially be used by their Russian and Ukrainian partners. After an investigation by the U.S. Department of State, Boeing was fined $10 million.[196]

These two incidents resulted in stricter export control laws, which U.S. companies have since argued hurt their competitiveness in the global market.[197] The private sector often complains that these export control laws only delay the inevitability that States will receive the denied technology, and therefore that they merely hurt the private sector's market competitiveness in the meantime. They argue that, if the relevant technology is "readily available" overseas, U.S. companies should also be able to make the sale.[198] However, the loudest complaint is that the export approval process for satellites now takes too long. Between 1992 and 1996, the supposedly market-oriented Commerce Department was responsible for satellite export decisions. However, after the technology transfer scares in the China and Sea Launch incidents, Congress transferred export control authority back to the presumably more security-minded State Department.[199] U.S. satellite manufacturers relate horror stories about the resulting loss of business, citing examples of foreign companies avoiding business with U.S. firms due to the notorious, lengthy export approval process.[200] The issue of agency jurisdiction over these export decisions is still controversial.

The Cox Report sparked other changes to export control legislation, as well. For example, DOD now must monitor every single contact between foreign launch services and U.S. satellite manufacturers.[201] The intelligence

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[194] On Jan. 9, 2002, Loral settled for $20 million. On Mar. 5, 2003, Hughes (and Boeing, who purchased Hughes Space and Communications Company from Hughes Electronics) settled for $32 million. *Supra*, note 192; Sam Silverstein, Boeing, Hughes Agree to Pay $32 Million for China Export Violations, *Space News* (Mar. 5, 2003); Smith, *Space Launch Vehicles*, *supra* note 19 at 12.

[195] Kempton and Balc, *supra* note 95.

[196] *Id*.

[197] Smith, *Space Launch Vehicles*, *supra* note 19 at 13 (citing FY2000 DOD Authorization Act (Pub. L. No. 106-65)).

[198] Sievert, *supra* note 173.

[199] Zaborsky, *Export Policy*, *supra* note 94 at 57; FY1999 DOD Authorization Bill, Pub. L. No. 105-261.

[200] Patrick A. Salin, *An Overview of U.S. Commercial Space Legislation and Policies – Present and Future*, 27:3 Ann. Air & Sp. L. 209 at 217 (2002). One example is Canada's RADARSAT II.

[201] Zaborsky, *Export Policy*, *supra* note 94, at 57.

community also plays a larger role in export decisions. Also, Congress must be notified about ongoing investigations.[202]

Some of the controversy surrounding the post-Cox Report legislation has to do with the belief that the new regulations are being enforced too strictly against non-Chinese exports and hurting business with allies, as well. Even DOD officials have expressed concern about long-term irrecoverable harm to the U.S. space industry as a result of stifled exports.[203] Some of these concerns have been addressed -- for example, exports to France, NATO allies, and (ironically) Russia, Ukraine, and Kazakhstan now receive expedited export control consideration.[204] These incidents perfectly illustrate the delicate balance a State must maintain to, on the one hand, strengthen domestic industry through global cooperation and on the other, to protect sensitive technology.

C. Protecting Space Assets: The Potential Use of Force in Space

Thus far the discussion has centered on States ensuring they have reliable access to space, primarily by maintaining their own healthy domestic space industries, or nations denying access to space to others through non-proliferation and export controls. At the same time, States have developed various means to protect the space assets on which they rely. For example, satellites are hardened or shielded to protect them from naturally occurring radiation and from electromagnetic pulses. Satellites are often maneuverable, mainly for accurate positioning but potentially also to avoid collisions with space debris and other satellites and to protect them in the future from space weapons. Satellites also have redundant components in case of failure. Further, signals sent to and from satellites may be encrypted to lessen the likelihood of spoofing,[205] interception, or jamming.[206] In addition, the ground segment, including launch platforms and communications links, is protected by physical barriers and armed forces.[207]

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[202] Smith, *Space Launch Vehicles*, *supra* note 19, at 13.
[203] *Id*.
[204] *Id*.
[205] Spoofing means transmitting false commands to a satellite. Paul B. Stares, *The Problem of Non-Dedicated Space Weapon Systems*, in PEACEFUL AND NON-PEACEFUL USES OF SPACE: PROBLEMS OF DEFINITION FOR THE PREVENTION OF AN ARMS RACE (Bhupendra Jasani, ed., 1991).
[206] Jamming is the emission of noise-like signals to mask or prevent reception of signals. GAO Report on Satellite Security, *supra* note 29.
[207] Robert McDougall and Phillip J. Baines, *Military Approaches to Space Vulnerabilities: Seven Questions*, in FUTURE SECURITY IN SPACE: COMMERCIAL, MILITARY, AND ARMS CONTROL TRADE-OFFS (Moltz, James Clay, ed., 2002)

Assuring a nation's access to space while simultaneously denying adversaries the use of space has in recent years been called "space control."[208] In the past, anti-satellite (ASAT) weapons were seen as the key to denying adversaries the use of space, since the very purpose of an ASAT is to destroy or incapacitate other satellites in orbit. However, recent years have seen the U.S. DOD developing other means to deny the use of space to adversaries, such as jamming, spoofing, and making ground communications links, control centers, and launch pads inoperable. As recently as 2001 the head of the U.S. Space Command expressed concern about using kinetic energy ASATs, since the debris left in orbit from the use of these weapons could damage friendly satellites, civilian and military, belonging to the U.S. and its allies.[209] Accordingly, instead of concentrating on ASAT technology as the centerpiece of its space control effort, recently the U.S. has been funding alternative space control technologies.[210]

While both the U.S. and the former Soviet Union have occasionally tested anti-satellite (ASAT) weapons and in the past have also developed and tested anti-ballistic missile (ABM) defenses,[211] for forty-five years the major powers have, for the most part, refrained from deploying capabilities for armed conflict in space. However, that may change in the not too distant future, as the U.S. for one is actively pursuing a ballistic missile defense system capable of intercepting missiles of different ranges in all phases of flight. According to a White House press release of May 2003,[212] systems planned for operational use in 2004 and 2005 include ground- and sea-based missile interceptors using land-, sea-, and space-based early warning sensors and radars. Potential future system upgrades include a planned airborne laser. Development of hit-to-kill

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[208] Smith, *U.S. Space Program*, *supra* note 20 at 12; *Space Policy*, *supra* note 11 (defining "space control" as "ensur[ing] freedom of action in space for the United States and its allies and, when directed, deny[ing] an adversary freedom of action in space." This mission includes surveillance, protection, prevention, negation, and direct support.

[209] *Id*. A kinetic energy ASAT would physically hit a target to destroy it.

[210] *Id*. The 2003 budget includes $13.8 million for these space control technologies and $40 million for "counterspace systems," a program which effectively moves some space control programs into the engineering and manufacturing development phase. DOD has requested $14.7 million for space control and $82.6 million for counterspace systems in the 2004 budget.

[211]. BHUPENDRA JASANI, PEACEFUL AND NON-PEACEFUL USES OF SPACE: PROBLEMS OF DEFINITION FOR THE PREVENTION OF AN ARMS RACE (Bhupendra Jasani, ed New York: Taylor & Francis, 1991); John M. Logsdon, *What Path to Space Power* Joint Forces Quarterly at 2 (2003), *available at* http://www.gwu.edu/ [hereinafter Logsdon, What Path].

[212] U.S. White House, Press Release, National Policy on Ballistic Missile Defense Fact Sheet (May 20, 2003) available at http://www.whitehouse.gov/news/releases/2003/05/20030520-15.html. The boost phase is the time from launch of a missile until burnout, which is still prior to the deployment of warheads or defensive countermeasures. Depending on the range of the missile, boost phase may stop in or continue out of the earth's atmosphere. The midcourse phase, during which the missile is no longer firing its propulsion system and is coasting toward its target, is the longest portion of a missile's flight. For an ICBM, this phase can last up to 30 minutes. For longer-range missiles this phase occurs outside the earth's atmosphere. For more details see the Raytheon website available at http://raytheonmissiledefense.com/phases/#boost.

(kinetic energy) interceptors based on the ground, sea, and air to destroy missiles in the boost and midcourse phases of flight continues. The U.S. is also attempting to develop, as part of its missile defense program, space-based weapons capable of destroying missiles in the boost phase of flight.[213] One such project is a space-based laser (SBL), and another a kinetic energy weapon designed to physically hit a targeted ballistic missile in its boost phase and destroy it.[214]

Despite the recent shift in focus from ASATs to alternative space control methods and ballistic missile defense, it is possible that the future will see States protecting their own space assets or attacking enemy assets from, in, or through space using force. The debate about whether space should be weaponized has been extremely controversial. U.S. ballistic missile defense efforts have prompted many States and international non-governmental organizations to urge a ban on an arms race in outer space. This issue has been on the agenda of the United Nations (UN) Conference on Disarmament since the mid-1980s without agreement, because the Conference requires the consent of all participants to take action and the U.S., supported by the United Kingdom and Germany, opposes the effort. In addition, since 1994 the UN General Assembly has passed a total of ten resolutions calling on States to prevent an arms race in outer space. No State has ever voted against these resolutions and very few nations (e.g., the United States and Israel) abstain from voting.[215]

Essentially, there are two primary views concerning space weaponization[216] -- there are those who believe that space is merely another theater of military operations, offering strategic advantages in which weapons should be deployed; opposing this view are those who believe that only stabilizing military uses of space (such as monitoring compliance with arms control agreements and early warning) should be allowed.[217] The advocates of weaponization of space believe that States will develop either defensive systems to defend their valuable space assets or offensive systems to deny an enemy's access to their valuable space assets. They further note that, once developed and deployed, space weapons could be used for either purpose,

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[213] Smith, *U.S. Space Program*, *supra* note 20.
[214] *Id*.
[215] Logsdon, What Path, *supra* note 211 at 8. For a list of these resolutions and the votes, *see* http://www.oosa.unvienna.org/SpaceLaw/gares/index_pf.html.
[216] PETER L. HAYS, MILITARY SPACE COOPERATION: OPPORTUNITIES AND CHALLENGES IN MOLTZ, James Clay, ed., *Future Security in Space: Commercial, Military, and Arms Control Trade-Offs* 32 (Center for Nonproliferation Studies, Monterey, California, 2002) [hereinafter Hays].
[217] George and Meredith Friedman, *The Future of War* 333 (St. Martin's Press: 1996) [hereinafter Friedman]; U.S. Commission to Assess U.S. National Security Space Management and Organization, *Report of the Commission to Assess U.S. National Security Space Management and Organization, pursuant to P.L. 106-65*, (Jan. 11, 2001), *available at* http://www.space.gov/doc/fullreport.pdf at 64 [hereinafter Space Commission].

whether designed to be defensive or offensive. These experts cite the evolution of the use of space assets from indirect military support (such as reconnaissance) to direct support of ground-based weapons systems (such as GPS-guided bombs) as proof that the use of space assets as weapons platforms is the next natural step.[218] On the other hand, there are also those who argue that space powers should refrain from developing space weapons, since militarily those States have the most to lose by weapons in space.[219] A recent analysis stresses the growing importance of commercial space assets (both to national economies and to armed forces) as the strongest argument against weaponization of space, arguing that a stable, weapon-free space environment is in best interests of those nations who heavily rely on commercial satellites.[220] The same source points out that private investors may hesitate to invest in space ventures given weapons-related risks on top of inherent technical hurdles. Perhaps surprisingly, the policy advocating the placing of weapons in outer space does not enjoy unanimous support among the U.S. military. Some U.S. officers on active duty believe space should not be weaponized, both for practical and moral reasons.[221] The legal implications of and restrictions on the use of weapons in space will be discussed *infra* at Section V.

D. Protecting Access to Space Services

States protect access to the services they rely on for national security, even when those services are provided by commercial entities. However, it is important to realize that imposing military and national security requirements (and therefore costs) on commercial entities struggling for survival in a competitive market has been criticized: "It is also important that military requirements should not be imposed on shared nonmilitary satellites . . . Neither commercial satellite operators nor the other users of commercial satellites should shoulder any cost burdens imposed by the military . . ."[222]

1. Launching Facilities and Services

The strongest control governments currently maintain over military and commercial launches is ownership of launch facilities. In the U.S., for example, federal launch ranges support both government and commercial

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[218] Friedman, *id*. at 331.
[219] Hays, *supra* note 216 at 33.
[220] Charles V. Pena, *U.S. Commercial Space Programs: Future Priorities and Implications for National Security* and Alain Dupas, *Commercial-Led Options* in Moltz, James Clay, ed., *Future Security in Space: Commercial, Military, and Arms Control Trade-Offs* (Monterey, California: Center for Nonproliferation Studies, 2002) [hereinafter Pena].
[221] *See e.g.*, note 1.
[222] Pena, *supra* note 220 at 10.

launches.[223] The importance of commercial launches to U.S. government launch facilities is evident in the ongoing effort to upgrade and modernize these facilities. These upgrades are a combined commercial, federal, and state government effort, and commercial sector requirements are specifically being considered in the modernization process.[224] While commercial entities have been granted permission to use U.S. government launch facilities on a reimbursable basis, the U.S. government retains the right to use the facilities on a priority basis to meet national security demands.[225]

In addition, it is U.S. policy that U.S. government satellites be launched on U.S. launch vehicles unless the President grants a waiver.[226] For example, Pratt and Whitney, a division of United Technologies Corporation, had to obtain a waiver to use a Russian-built engine on the new Atlas 5 EELV for planned government launches.[227] Since the French Arianespace does not have a similar written policy requiring European States to use *Ariane* for their governmental satellites, it wants the U.S. restriction lifted. Even though the European Space Agency (ESA) does give a preference to Arianespace for its own launches, there are no legal obstacles to the ESA using other launch vehicles.[228]

Of the ELVs available in the U.S., three are restricted to government payloads.[229] The Russian and Ukraine-built Zenit 3SL launcher, although used by Sea Launch and available in the U.S., is restricted to civilian payload launches. The remaining five of the ELVs available in the U.S. may be used for either governmental or civilian payloads.[230] In the future, the DOD reportedly plans to use as many private sector launch service providers as possible to save money.[231]

Although the number of private and state "spaceports" is growing, States may ensure the ability to address national security concerns at these non-federal facilities through the licensing process. In the U.S., for example, the Federal Aviation Administration's Associate Administrator for Commercial Space Transportation (FAA/AST) regulates commercial space launch activities and has the explicit mission "to ensure public health and safety and the safety

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[223] U.S. FAA, *2003 2nd Quarter Report, available at* http://ast.faa.gov at 42 [hereinafter FAA 2nd Quarter Report].
[224] *Id*. In January 2002, the Air Force, DOC, and FAA established the means to collect and incorporate commercial sector requirements into launch infrastructure modernization efforts. *See* http://ast.faa.gov.
[225] *Space Policy*, *supra* note 11.
[226] Smith, *U.S. Space Programs*, *supra* note 20 at 13.
[227] FAA 2nd Quarter Report, *supra* note 223.
[228] Smith, *Space Launch Vehicles*, *supra* note 19 at 8.
[229] The Minotaur, Titan 2, and Titan 4B launchers. FAA 2nd Quarter Report, *supra* note 223 at 14.
[230] Athena, the Atlas family, the Delta family, Pegasus, and Taurus. *Id*.
[231] Nick Mitsis, *The Military's Increased Interest in Commercial Launchers*, Defense Daily (2003), *available at* http://www.defensedaily.com/reports/satcom_3.htm.

of property while protecting the national security and foreign policy interests of the United States during commercial launch and reentry operations."[232] Any non-federal entity must get a license from FAA/AST to operate a launch site in the U.S. The first such non-federal launch was 6 January 1998, when NASA's Lunar Prospector was launched from the Florida Spaceport on a Lockheed Martin Athena launcher. Notably, this launch illustrates that in the U.S. non-federal facilities and launchers are also used for governmental payloads.[233] For commercial FAA-licensed launch operations, a Memorandum of Agreement (MOA) sets out the terms of governmental involvement, including provisions that the government will "not preclude or deter commercial space sector activities, except for public safety or national security reasons." The MOA (which governs the behavior of the DOD, the FAA, and NASA) also requires the agencies to first consider the availability of domestic, non-federal launch facilities for commercial launches before making federal launch property or services available.[234] Thus, the MOA itself evidences the goal of protecting national security interests both through licensing and by promoting the domestic space industry.

2. Communications

About 60 percent of the satellite communications used by the U.S. military are provided by commercial entities.[235] These services are leased by the Defense Information Systems Agency's (DISA) Commercial Satellite Communications Branch. In addition, other U.S. government agencies lease commercial satellite communications services (e.g., the Secret Service, the FAA, NOAA, and the National Weather Service). Governmental agencies which rely on commercial satellites attempt to lessen the risks of relying on satellites they do not control by specifying availability and reliability requirements in the lease contracts.[236]

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[232] *See* FAA 2003 2nd quarter report, *supra* note 223 (citing Exec. Order No. 12,465, 49 U.S.C. Subtitle IX, Chapter 701 (formerly the *Commercial Space Launch Act*)).
[233] *Id.* at 48.
[234] Memorandum of Agreement (MOA) between the Department of Defense, Federal Aviation Administration and National Aeronautics and Space Administration: on Federal Interaction with Launch Site Operators (September 1997), *available at* http://ast.faa.gov/files/pdf/moa-1997.pdf. Other MOAs, licensing information, reports, and regulations are available on the listed site as well.
[235] Katie McConnell, *Military Satellite Communications: The March Toward Commercialization*, DEFENSE DAILY (2003).
[236] U.S. General Accounting Office (GAO), Report to the Ranking Minority Member, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate, *Critical Infrastructure Protection: Commercial Satellite Security Should Be More Fully Addressed* (August 2002), GAO-02-781 at 29, *available at* http://www.defensedaily.com/reports/101102fully.pdf [hereinafter GAO Report on Satellite Security].

The most visible example of such a lease for U.S. military communications is the DOD's wireless global communications agreement with Iridium Satellite, Limited Liability Company. Salvaging the bankrupt company, the DOD signed an initial two-year unlimited access agreement in 2000. General Dynamics created a special encryption service and built a gateway in Hawaii to connect calls. The annual $36 million contract was renewed in 2002.[237]

In order to assure contractually-mandated reliability and availability levels, commercial service providers usually must maintain at least minimal security controls. Common types of security controls are: encryption of data links (uplinks to, downlinks from, and crosslinks between satellites), high-power radio frequency uplinks,[238] and spread spectrum communication.[239] However, in general federal officials cannot mandate that commercial providers use a specific security technique, and U.S. government policy addressing commercial satellite communication security is not well developed.

Current U.S. policy is established by National Security Telecommunications and Information Systems Security Policy (NSTISSP) 12, *National Information Assurance (IA) Policy for U.S. Space Systems.*[240] NSTISSP 12 requires encryption approved by the National Security Agency (NSA) for certain satellite systems. However, the policy is limited in application since: it only applies to U.S. government or U.S. commercial space systems that are used for "national security" purposes; it addresses only security techniques over communications links to, from, and between satellites; and it has no enforcement mechanism to ensure compliance.[241] In addition, "national security" systems are narrowly defined as those that either contain classified information, or:

(1) involve intelligence activities (including imagery systems that are or could be used for national security),

(2) involve cryptographic activities related to national security,

(3) involve command and control of military forces,

(4) involve equipment integral to weapons, or

(5) are critical to the direct fulfillment of military or intelligence missions.

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[237] Simon Romero, *Military Now Often Enlists Commercial Technology*, N.Y. TIMES, Mar. 10, 2003 at C1.

[238] High-power uplinks use a large antenna to send a high-power signal from the ground station to the satellite so that an attacker would have to have a powerful radio transmitter and sophisticated technical knowledge to intentionally interfere with the link. *Id.*

[239] Spread spectrum technologies are most often used by military but not commercial systems. Because the frequency of the transmitted signal is spread over a wide band, jamming attempts require higher power, assuming the signal is detected at all. *Id*.

[240] National Security Telecommunications and Information Systems Security Policy (NSTISSP) 12, *National Information Assurance (IA) Policy for U.S. Space Systems* (2001), *available at* http://www.nstissc.gov/html/overview.html.

[241] GAO Report on Satellite Security, *supra* note 236.

Hence, routine administrative uses and even sensitive information that does not fit the "national security" definition are not covered.[242] Despite consistent resistance of the commercial satellite industry to voluntarily comply with NSTISSP 12 requirements for business reasons (namely associated cost and complexity of satellites and ground systems), DOD officials have drafted a policy that would require all satellite systems used by DOD to meet these requirements and would require a waiver prior to DOD use of a non-compliant system.[243]

States also address satellite communication national security concerns through foreign ownership limitations for entities engaged in telecommunications. In the U.S. for example, the *Communications Act of 1934* and recent U.S. WTO commitments contain foreign ownership limitations for telecommunications providers.[244] In addition, foreign entities, during the licensing process, have been required to submit to certain conditions governing their telecommunications operations in the U.S. Examples of such conditions have included: construction of a gateway in the U.S. so that wiretaps can be carried out, limitations on foreign access to certain information, citizenship requirements, reporting requirements, and disclosure requirements for personal data about personnel occupying sensitive positions. In May 2000, the President's National Security Telecommunications Advisory Committee stated the "current regulatory structure effectively accommodated increasing levels of

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[242] *See* http://www.nstissc.gov/html/overview.html.

[243] GAO Report on Satellite Security, *supra* note 236.

[244] Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 310. Section §310(b) states that no licenses for broadcast stations or carriers will be granted to:

> *(1) any alien or the representative of any alien;*
> *(2) any corporation organized under the laws of any foreign government;*
> *(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a*
> *foreign government or representative thereof or by any corporation*
> *organized under the laws of a foreign country;*
> *(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of*
> *record or voted by aliens, their representatives, or by a foreign government*
> *or representative thereof, or by any corporation organized under the laws*
> *of a foreign country, if the Commission finds that the public interest will be*
> *served by the refusal or revocation of such license.*

For lists of WTO commitments, see online: WTO http://www.wto.org.

foreign ownership of United States telecommunications facilities, while allowing the Federal Government to retain authority to prevent any such foreign ownership that might compromise national security interests."[245]

3. Remote Sensing/Earth Observation by Satellite

Due to the military usefulness of high-resolution imaging of the earth, States protect their national security interests in remote sensing from space through regulations aimed both at the operation of the satellites and at the collection and distribution of the data. At the international level, the UN General Assembly Resolution on the Principles of Remote Sensing[246] does not directly address national security concerns. The Resolution is silent with regard to military remote sensing, the end result of controversy during its drafting in the UN Committee for the Peaceful Uses of Outer Space (COPUOS).[247] The final text of the Resolution was a compromise between, on the one hand, developing and socialist countries arguing that a sensed State should have the right to approve the distribution of data concerning it and, on the other hand, the U.S. and most other western States contending that there should be no restrictions on the collection and dissemination of data.[248] Because of these and other irreconcilable differences, the compromise principles were eventually adopted in the form of a non-binding General Assembly resolution rather than as a treaty. As a result, the resolution merely establishes the principle of "openness" for many civilian uses of remote sensing by satellite: freedom of collection and dissemination of data without the prior consent of sensed States, but balanced by a principle that sensed States may have access to certain types of data on a priority basis if they pay for it.[249] In essence, the Resolution may be viewed as a weak expression of

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[245] Haller and Sakazaki, *supra* note 73.

[246] GA Res. 41/65 (XLII), UNGAOR, 29 Sess., 95th Plen. Mtg., UN Doc A/RES/41/65 (1987)(adopted without vote on 3 December 1986) [hereinafter Remote Sensing Principles].

[247] Gabriella Catalano Sgrosso, *International Legal Framework of Remote Sensing* (2001); Wulf von Kries, *Towards a New Remote Sensing Order?* 16 Space Policy (2000), *available at* http://www.elsevier/com/locate/spacepol at 164; Stephen Gorove, *The UN Principles on Remote Sensing: Focus on Possible Controversial Issues* (Paper presented at McGill Symposium)(published in Legal Implications of Remote Sensing from Outer Space at 106 (N.M. Matte and H. DeSaussure, eds, 1976)). The COPUOS has no authority to deal with military issues.

[248] Nandasiri Jasentuliyana, *International Space Law and the United Nations*, THE HAGUE, KLUWER LAW 314 (1999).

[249] M. Lucy Stojak, *Recent Developments in Space Law* in Arms Control and the Rule of Law: A Framework for Peace and Security in Outer Space (Proceedings of the Fifteenth Annual Ottawa NACD Verification Symposium) (J. Marshall Beier and Steven Mataija, eds., York University, 1998).

unenforceable platitudes;[250] hence, it does not place any meaningful restraints on the use of remote sensing technology by the military.

As armed forces increasingly rely on civilian commercial remote sensing systems, nationally enacted rules affecting those commercial systems cannot but have an impact on national security interests. The failure of Member States of COPUOS to adopt, instead of a resolution, a set of binding international regulations governing remote sensing from space, coupled with commercialization of the satellite remote sensing sector, has led States to regulate the use of this technology in accordance with their national interests. Some critics complain that domestic regulation, enacted by States in part to address national security concerns, weakens the overall "openness" principle.[251] Such national efforts include additional licensing restrictions, so-called "shutter control," and specific collection and dissemination restrictions.

As mentioned previously, licensing restrictions and conditions are a powerful tool for States to address national security concerns, and U.S. remote sensing operators may need three or even four different licenses due to the sensitivity of their operations.[252] Before being granted a remote sensing license, the Secretary of Defense must determine that, among other things, the applicant will comply with any national security concerns of the U.S. Further, all remote sensing operators are required to keep a record of all satellite taskings in the previous year and give the U.S. Government access to these records.[253] In addition, other national security-based licensing restrictions include a requirement that operational control of the system be maintained within the U.S. and that the operator notify the U.S. Government of any significant agreements with foreign entities. Other licensing restrictions may be imposed for national security reasons as well. For example, Space Imaging Company's 0.5-meter resolution system has been subject to a licensing restriction that requires a 24-hour delay between image acquisition and release.[254] As the ultimate control mechanism, the remote sensing license may be terminated, modified, or suspended for failure to comply with national

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[250] For a contrary view that the Resolution codifies customary legal principles that are binding on States and as a practical matter have been implemented in domestic regulations, *see* Gabrynowicz, *infra* note 251.

[251] Joanne I. Gabrynowicz, *Expanding Global Remote Sensing Services: Three Fundamental Considerations* (Paper presented to the International Institute of Space Law at the Third United Nations Conference on the Peaceful Uses of Outer Space (UNISPACE III) at 98, Vienna, Austria, Jul 21, 1999) [hereinafter Gabrynowicz, *Expanding Remote Sensing*].

[252] Michael R. Hoversten, *U.S. National Security and Government Regulation of Commercial Remote Sensing from Outer Space*, 50 A.F. L. Rev. 253 at 267 (2001).

[253] *Id*.

[254] Kristin Lewotsky, *Remote Sensing Grows Up: A Maturing Application Base and Gradual Commercialization Mark the Future of the Remote-Sensing Market* (April 2001), *available at* http://www.oemagazine.com/fromTheMagazine/archives.html (reporting that this restriction doesn't really affect operation of the system due to technological limits on how quickly data can be received from the satellite and formatted).

security concerns.[255] However, despite these restrictions, since 1994 about one dozen remote sensing companies have applied for and been granted licenses.[256]

One of the most controversial restrictions on remote sensing operators is so-called "shutter control." Implemented as a licensing condition, shutter control requires remote sensing operators to agree to limit data collection and/or distribution if the U.S. government deems it necessary to meet national security or foreign policy concerns or to comply with international obligations. During times when data collection or distribution is restricted, the remote sensing operator must also guarantee government access to the data using U.S. government-approved encryption devices capable of denying access to unauthorized users.[257] Defended as necessary (to deny the general public access to high-resolution imagery of military significance), at the same time shutter control is criticized as being counterproductive and even illegal. The U.S. Chamber of Commerce points out that the policy encourages reliance on foreign systems which do not practice shutter control.[258] In the long term the U.S. policy has the potential to harm national security by hurting the domestic remote sensing industry and increasing military reliance on foreign remote sensing systems. It has been pointed out that shutter control might not survive a First Amendment challenge.[259] Also, since high-resolution imagery is increasingly available from foreign competitors, shutter control may simply not work. Recognizing the controversy behind shutter control policy, the U.S. government departments involved in remote sensing licensing issued a Memorandum of Understanding in February 2000 stating that shutter control "should be imposed for the smallest area and for the shortest period of time necessary" and that alternatives to shutter control should be considered, such as delaying data release.[260] From 7 November 2001 until 5 January 2002, rather than use its shutter control option, the U.S. government bought exclusive rights to imagery of Afghanistan from Space Imaging Company's IKONOS system. Dubbed "checkbook shutter control" by the press, this alternative was also criticized for denying data to the media and humanitarian organizations.[261] Another controversial limitation on U.S. commercial remote sensing systems

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[255] *Id*.

[256] Preston and Baker, *supra* note 18 at 147.

[257] PUB. PAPERS 1358 (1994)(Presidential Decision Directive (PDD)-23, *Fact Sheet: Foreign Access To Remote Sensing Space Capabilities* (Mar. 10, 1994), *available at* http://www.fas.org/irp/offdocs/pdd23-2.htm); Hoversten, *supra* note 252 at 269-270.

258 U.S. Chamber of Commerce, National Space Policy Review: Remote Sensing, available at http://www.uschamber.org/space/policy/remotesensing2.htm.

259 Gabrynowicz, Expanding Remote Sensing, supra note 251 at 120.

260 U.S. White House, Office of Science and Technology Policy and National Security Council, Fact Sheet Regarding the Memorandum of Understanding Concerning the Licensing of Private Remote Sensing Satellite Systems (Feb. 2, 2000), available at http://www.licensing.noaa.gov/moufactsheet.htm. The memo is between the Departments of State, Commerce, Defense, Interior and the Intelligence Community.

261 Id; See also Smith, U.S. Space Programs, supra note 20 at 5.

has been the limitation on collection or release of remote sensing data covering Israel having a resolution less than that routinely available from commercial sources, which has been interpreted to limit resolutions of less than 2 meters.[262]

In the past licensing restrictions were imposed only for certain times or places when necessary. However, more recently restrictions have been imposed through a so-called two-tiered licensing structure, with specific systems being approved to only operate at prescribed levels. If that level is to be exceeded or if certain states request data, the remote sensing operator must get additional approval.[263]

> *In issuing licenses for new and advanced technologies that have not previously been licensed by NOAA, NOAA may apply new license conditions to address the unique characteristics and attributes of these systems. For example, NOAA may grant a "two-tiered" license, allowing the licensee to operate its system at one level, available to all users, while reserving the full operational capability of that system for [U.S. Government] USG or USG-approved customers only. In some cases, the system may have a USG partnership client.*[264]

Doubts have been raised about the legality of such a two-tiered licensing scheme, in terms of whether such an additional approval requirement seems unauthorized and/or discriminatory.[265] Limitations imposed on specific systems as a result of the two-tiered licensing process further complicate the domestic regulatory scheme.

Some experts predict that bilateral and multilateral agreements may be adopted in the future to mutually "blind" remote sensing systems upon request or establish dissemination criteria for collective benefit.[266] In the words of one observer,

> *Bilateral and multilateral agreements are very important in formulating customary law at the international level. The [Commercial Remote Sensing] legal regime is evolving on a satellite-by-satellite basis and will have an impact on the international space*

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262 The Kyl-Bingaman Amendment to the National Defense Authorization Act for Fiscal Year 1997, 15 USCS § 5621 ("[a] department or agency of the United States may issue a license for the collection or dissemination by a non-Federal entity of satellite imagery with respect to Israel only if such imagery is no more detailed or precise than satellite imagery of Israel that is available from commercial sources"). The Department of Commerce makes an annual determination of the resolution limit. See 15 CFR § 960 (2000).

263 Gabrynowicz, *supra* note 251 at 119.

264 15 C.F.R. § 960, *supra* note 262.

265 *Id.* (citing, among others, restrictions placed on RADARSAT 2 data distribution restrictions for 0.5-meter or less resolution).

266 Hays, *supra* note 216 at 38.

law environment because of the hybrid nature of the regime.[267]

The recently concluded agreement governing the international meteorological system[268] is an example of such a multilateral arrangement. Notably, this agreement addresses national U.S. security concerns by guaranteeing data access and the ability for "selective denial of critical data" to adversaries in time of war.[269]

Legal regimes vary widely internationally, as countries adopt unique regulations to deal with their perceived national security and foreign policy objectives.[270] For example, systems in Europe are different from that adopted by the U.S. In France, remote sensing is governed by a contractual and administrative system, whereas Russia relies on broad federal legislation and, like the U.S., has experienced conflicts between intelligence-gathering and commercial use of data. In India, distribution of data is strictly controlled and militarily sensitive information is removed from commercial images.[271] Canada's remote sensing legislation is very similar to U.S. law.[272] In sum, as States continue to rely on domestic and foreign remote sensing sources for military and national security purposes, they will need to be aware of other national remote sensing regimes.

4. Navigational Aids

Due to heavy reliance on satellite-based navigation systems (especially the U.S. GPS) by military and civilian users, such systems are specifically designed to address national security concerns. The American GPS, for example, was designed with two technical capabilities to protect signal integrity for authorized users (including the military): selective availability (SA) and anti-spoofing (AS). In addition, the system is controlled by the U.S. military and consists of hardened satellite vehicles and ground stations that are physically protected from attack.

GPS provides two levels of service: a Standard Positioning Service (SPS) and a Precise Positioning Service (PPS) for authorized users, primarily

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[267] Joanne I. Gabrynowicz, *Foreign Commercial Remote Sensing Laws and Regulations: Current Legal Regimes: A Brief Survey of Remote Sensing Law Around the World,* (Presentation made to the Advisory Committee on Commercial Remote Sensing, Jan. 14, 2003).

[268] *See* section I(B)(3) above.

[269] Gabrynowicz, "Expanding Remote Sensing," *supra* note 251 at 112, citing the *Agreement Between the United States National Oceanic and Atmospheric Administration and the European Organization for the Exploitation of Meteorological Satellites in an Initial Joint Polar-Orbiting Operational Satellite System* (Nov. 19, 1998), *available at* http://discovery.osd.noaa.gov/IJPS/documents.htm.

[270] *Id*.

[271] *Id*.

[272] Hays, *supra* note 216.

the DOD. Selective availability (SA), as discussed previously, is the ability of the DOD to degrade the SPS signal for civilian users; however, SA was turned off 1 May 2000 by Presidential decision.[273] The U.S. Government, recognizing GPS' "key role around the world as part of the global information infrastructure," recently reaffirmed its commitment to provide the best possible service to civil and commercial users worldwide both in times of conflict and in peace.[274] Anti-spoofing (AS), another way military use of GPS is protected, consists of encryption of the precision code so that users must have a cryptographic "key" to receive it, thus denying its use to unauthorized users. AS, therefore, protects military access to the PPS but does not affect the SPS signal at all.[275] Galileo, the planned European satellite navigation system, will protect States' national security interests by providing different levels of service to users with differing levels of reliability at varying costs.[276]

Despite efforts to protect navigation signals, however, they are still low-power signals susceptible to intentional jamming. An August 2001 DOT report warned that the U.S. transportation sector should not rely on GPS exclusively for navigation, since loss of the signal could have severe consequences for safety and the U.S. economy.[277] The planned new generations of GPS satellites will have the ability to manage signal power levels for users in specified areas to increase jamming resistance.[278] National security interests in the reliability of satellite-based navigation systems are therefore addressed through a combination of technical and policy measures.

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[273] *See* White House Press Release, *supra* note 89. SA is the potential to degrade the accuracy of the SPS signal by "dithering" (inducing errors in) the satellite clocks and adding "ephemeris" (position) errors.

[274] U.S. Coast Guard, *U.S. Policy Statement Regarding GPS Availability*, (Mar. 21, 2003), *available at* http://www.navcen.uscg.gov/gps/default.htm.

275 See https://gps.losangeles.af.mil/gpsarchives/1000-public/1300-lib/html/faq.html.

276 Galileo, with launches planned for 2006 and operational capability in 2008, will have: 1) a free Open Service (OS) comparable to the GPS SPS, 2) a Safety of Life Service (SoL) with improved service and timely warnings of guaranteed accuracy failures, 3) a Commercial Service (CS) for improved accuracy and a service guarantee, 4) a Search and Rescue Service (SAR) which will broadcast distress messages, and 5) a Public Regulated Service (PRS) with controlled access and encrypted data reserved principally for public authorities responsible for civil protection, national security and law enforcement. Available at http://europa.eu.int/comm/dgs/energy_transport/galileo/programme/needs_en.htm.

277 U.S. DOT John A. Volpe National Transportation Systems Center, Vulnerability Assessment of the Transportation Infrastructure Relying on the Global Positioning System: Final Report (Aug. 29, 2001), available at http://www.navcen.uscg.gov/gps/geninfo/pressrelease.htm.

278 Preston and Baker, supra note 18 at 156.

V. LEGAL RESTRICTIONS ON MILITARY USE OF SPACE ASSETS

The previous chapters of the article have surveyed the numerous uses of space assets to further national security interests of States. Particularly considering the fact that civilians and armed forces are frequently relying on the same space systems, it is important to consider limitations on the use of these assets by States. Potential sources of such limitations may include international law, policy, contractual obligations, liability concerns, and government-imposed rules of engagement.

A. Contractual and Policy Restrictions

Since States must purchase or lease various civilian space services, such as remote sensing and communications, the contracts through which these transactions occur may be the source of limitations on military use. For example, remote sensing purchases might be made on an exclusive basis, prohibiting further dissemination of the information, or might prohibit use of the information for specified purposes. A lease of communications transponders could similarly contain restrictions on their use. A possible future scenario might see a foreign-owned remote sensing company or satellite communications company refusing access to and use by U.S. military forces based either on opposition to U.S. policy in a particular engagement or a desire to remain neutral.[279]

Although not contractually based, there were similar attempts to restrict use of the Intelsat and Inmarsat communications satellites prior to the privatization of the two organizations. (Intelsat went even further, *encouraging* use of its satellites in some situations by promising free satellite capacity to UN peacekeeping forces.[280]) The Inmarsat Convention of September 1976 provided in Article 3 that "[t]he Organization shall act exclusively for peaceful purposes."[281] Some experts have opined that this imposed no greater a limitation than that provided under international law for any satellite service provider.[282] The interpretation of the ubiquitous term

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[279] Daniel Gonzales, *The Changing Role of the U.S. Military in Space*, (Study of the Rand Corporation, 1999), *available at* http://www.rand.org/publications/MR/MR895 at 21.

[280] Richard A. Morgan, Military Use of Commercial Communications Satellites: A New Look at the Outer Space Treaty and "Peaceful Purposes, 60 J. Air L. & Com. 237 at 269 (1994) [hereinafter Morgan].

[281] *Final Act of International Conference on the Establishment of an International Maritime Satellite System* 285 (1976), reproduced in part in Nicholas Mateesco Matte, *Aerospace Law: Telecommunications Satellites* (Butterworths 1982) [hereinafter Inmarsat Convention].

[282] Morgan, *supra* note 280 at 282. A discussion of international law and "peaceful purposes" follows below, section V(C)(2)(b).

"peaceful" under international space law, however, has been extremely controversial and will be discussed in a later section. Some commentators believed the use of Inmarsat for U.S. naval communications in support of the first Gulf War violated this clause, while others believed the uses were acceptable under the definition.[283] In any event, the uses occurred and were tolerated.

Article III of the Intelsat Definitive Agreement specifically attempted to restrict certain military uses of the system:

> *(d) The INTELSAT space segment may also, on request, and under appropriate terms and conditions, be utilized for the purposes of specialized telecommunications services, either international or domestic, other than for military purposes [. . .]*
> *(e) INTELSAT may, on request and under appropriate conditions, provide satellites or associated facilities separate from the INTELSAT space segment for:*
> *[. . .] (iii) specialized telecommunications services, other than for military purposes;*[284]

Thus, Intelsat explicitly prohibited the use of certain "specialized telecommunications services" for military purposes. It should be noted that since privatization of these organizations, both Intelsat and Inmarsat advertise the military as a valuable customer,[285] perhaps an indication that future restrictions are more likely to be profit-driven rather than policy-related. Another such indication may be the absence of restrictions on use of French SPOT Image data by the U.S.-led coalition during the recent hostilities in Iraq, despite strong French opposition to the war.

Restriction on military uses of satellites may be policy-related. Thus, the U.S. Government decision in 2000 not to degrade the civilian GPS navigation signal through use of the selective availability capability, instead relying on local denial and anti-jamming efforts, is a prime example of such a policy restriction. As a practical matter, military uses of space systems may

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[283] *Id.* at 287. The Inmarsat lead counsel opined that: "'Peaceful' suggests 'something which does not relate to armed conflict.'" The General Counsel for the U.S. signatory to the Convention, COMSAT, took a broader view that "neither installation of INMARSAT terminals on military vehicles nor their use in peacetime is restricted. They conclude that permissible uses during actual hostilities include use in support of actions pursuant to U.N. resolutions and use in support of other humanitarian purposes." *Id.*

[284] *Id.* at 294.

[285] See the Intelsat website, *available at* http://www.intelsat.com and the Inmarsat website, *available at* http://www.inmarsat.com/maritimesafety/inmc.htm ("Inmarsat-C is used in the land-mobile (road transport, railways), maritime (yachts, fishing boats, commercial shipping) and aeronautical (business and military aircraft, helicopters) arenas; by newsgatherers, international business travellers and aid workers; and for remote monitoring and data collection").

also be restricted by domestic allocations of the radio frequency spectrum. The ITU has no jurisdiction over the use of the spectrum for military purposes;[286] however, demands for equitable access to certain frequencies and orbits by developing States may decrease available spectrum ranges at the national level for governmental use.[287] In the U.S., for example, recent spectrum "battles" have occurred between the Federal Communications Commission (FCC), which assigns and manages the radio spectrum for private users and state- and local- governments, and the Department of Commerce's National Telecommunication and Information Administration (NTIA), which assigns and manages the radio spectrum for the federal government. Forty percent of the federal government spectrum is assigned to the military exclusively, and the DOD has continuously resisted civilian incursions into its designated spectrum, citing the importance of assured access to its operations, including those in space.[288] As the ITU's Secretary-General noted, "Telecommunications provide the only link between space and the earth, and whatever happens in space or whatever use is made of space, telecommunications are required to make it possible."[289] Recognizing the necessity for efficient spectrum management that protects governmental interests, on 5 June 2003 the White House announced a Spectrum Policy Initiative "to develop recommendations for improving spectrum management policies and procedures for the Federal Government and to address State, local, and private spectrum use."[290] Such reallocation will certainly affect the military, through its examination of both military-designated frequencies and government use of the commercial spectrum through leasing.

Another aspect of space use (and abuse) of growing importance to all users is space debris. Space debris can be simply described as space litter. Often manmade, debris can consist of dead satellites, satellite components,

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[286] Constitution and Convention of the International Telecommunications Union, Dec. 22, 1992, (Geneva: ITU, 1992), Art. 48(1) ("Members retain their entire freedom with regard to military radio installations."). Although the ITU regulations do not, therefore, apply to the military, armed forces must avoid harmful interference with other users as a practical matter. Further, Article 48(2) requires military radio installations to observe, *to the extent possible*, measures designed to avoid harmful interference.

[287] Stephen Gorove, *Developments in Space Law: Issues and Policies* 56 (Martinus Nijhoff, 1991)(noting that the term "equitable access" appears in several ITU instruments and reflects the attempts of developing States guarantee themselves equal rights to desirable orbits and frequencies).

[288] *Id*; Michael Green, *EyeforWireless 802.11 Spectrum and Regulatory Update* (May 30, 2002), *available at* http://www.musenki.com/~jim/EyeForWireless/michael green2.ppt.

[289] R.E. Butler, *Satellite Communications: Regulatory Framework and Applications for Development* 3 SPACE COMMUNICATIONS AND BROADCASTING 103 (1985), *quoted in* I.H.Ph. Diederiks-Verschoor, AN INTRODUCTION TO SPACE LAW, 2nd ed 57 (Kluwer Law, 1999).

[290] U.S. White House, Press Release, *Presidential Memo on Spectrum Policy* (Jun.5, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/06/20030605-5.html.

paint chips, or abandoned rocket engines.[291] Since the debris stays in orbit travelling at high speeds, there is the possibility that it will collide with active satellites, causing serious damage.[292] While there are currently no binding international agreements specifically addressing the issue of space debris,[293] this is another area that has the potential to affect military operations. Recognizing this, the U.S. was the first State to begin to address the problem at the national level. Beginning in 1984 with the Commercial Space Launch Act and continuing through the present with NASA and DOD efforts to reduce debris and move inoperative satellites out of high-demand orbits, the U.S. has made debris reduction an important objective of its space policy.[294] Other States have since adopted debris-reduction regulations, and several space-faring nations have formed an Inter-Agency Space Debris Coordination Committee (IADC) to exchange information on space debris research and identify debris mitigation options.[295] The UN has also performed numerous studies through COPUOS,[296] and the UN General Assembly Resolution 57/116 of 11 December 2002 recommended to Member States to devote more attention to debris-related issues.[297]

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[291] The ESA reports that "Only 6% of the catalogued orbit population are operational spacecraft, while 50% can be attributed to decommissioned satellites, spent upper stages, and mission related objects (launch adapters, lens covers, etc.). The remainder of 44% is originating from 129 on-orbit fragmentations which have been recorded since 1961 [. . .] Only near sizes of 0.1 mm the sporadic flux from meteoroids prevails over man-made debris." *See* http://www.esoc.esa.de/external/mso/debris.html.

[292] Andrew C. Revkin, *Wanted: Traffic Cops for Space: As Debris and Satellites Multiply, UN Steps In* N.Y. TIMES (Feb. 18, 2003) at D1.

[293] *But see* Gorove, *supra* note 287 at 166-167 for the proposition that, although the term "space debris" is not specifically mentioned in any space treaty, it may be covered under existing treaty provisions. For example, he believes all provisions relating to "space objects" would apply to space debris if space debris is properly considered a "space object" (a recurring subject of legal debate), including those mandating State responsibility and liability for damage done by "space objects" under the Liability Convention and Outer Space Treaty. In addition, he argues that space debris would violate treaty provisions protecting freedom of exploration and use of outer space (Article I of the Outer Space Treaty) and those requiring States to avoid harmful contamination of outer space (*e.g.*, Article IX of the Outer Space Treaty).

[294] *See e.g.*, NASA Policy Directive 8710, *Policy to Limit Orbital Debris Generation*; U.S. Space Command (USSPACECOM) Regulation 57-2, *Minimization and Mitigation of Space Debris* (Jun. 6, 1991).

[295] *Available at* http://www.iadc-online.org/. The members represent Italy, the United Kingdom, France, China, Germany, the ESA, India, Japan, the U.S., and the Ukraine.

[296] *See e.g., National Research in Space Debris, Safety of Space Objects with Nuclear Power Sources on Board and Problems Related to Their Collision with Space Debris*, UN COPUOUS, UN Doc. A/AC.105/789 (Dec. 4, 2002), *available at* http://www.oosa.unvienna.org/Reports/AC105_789E.pdf.

[297] *International Cooperation in the Peaceful Uses of Outer Space*, UN GAOR, UNGA Res. 57/116 (December 11, 2002), *available at* http://www.oosa.unvienna.org/spacelaw/gares/index.html.

B. Liability

Fears over governmental liability for services provided to civilians may also limit military control and use of its space systems, such as GPS. Because of heavy civilian reliance on GPS satellite navigation signals, the U.S. has created a governmental interagency board to manage the system and address civilian user concerns, while discontinuing selective availability (SA). Currently international pressure is being applied on the U.S. to allow establishment of an international legal framework to address liability, reliability and availability of the GPS signals, and international control of the system prior to its acceptance as an important element of the Global Navigation Satellite System (GNSS).[298] The International Civil Aviation Organization (ICAO) [299] envisions GNSS to be an essential component in an advanced air navigation system that will allow pilots *en route* to accurately determine their positions and allow air traffic controllers to more safely and efficiently manage airspace.[300]

Addressing the concerns of many States, ICAO adopted a resolution recognizing "the urgent need for the elaboration [. . .] of the basic legal principles" and "the need for an appropriate long-term legal framework" to govern GNSS, "especially those [principles] concerning institutional issues and questions of liability."[301] The resolution also recognized the predominant view that an international convention may be needed to address these concerns, and ICAO's Legal Committee is in the process of drafting such a convention.[302]

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[298] Jiefang Huang, *Development of the Long-term Legal Framework for the Global Navigation Satellite System* 22:1 Ann. Air & Sp. L. 585 at 586 (1997) [hereinafter Huang]. The Russian Global Navigation Satellite System (GLONASS) and the planned European Galileo satellite navigation system are the other GNSS components.

[299] ICAO is a body of the UN with the responsibility to set common principles and standards for safe, efficient, economical global civil aviation. *See* ICAO website, *available at* http://www.icao.org.

[300] Huang, *supra* note 298. In 1981, the *Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space* endorsed the idea that:

> *ICAO is responsible for developing the position of international civil aviation on all matters related to the study of the questions involving the use of space technology for air navigation purposes, including the determination of international civil aviation's particular requests in respect of space technology.*

Report on the Civil Aviation Interests in the Use of Outer Space (Background paper presented for the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space, ICAO Doc. A/CONF.101/BP.IGO/1 (1981), quoted in R.I.R. Abeyratne, *Legal and Regulatory Issues in International Aviation* (1996).

[301] Development and Elaboration of an Appropriate Long-Term Legal Framework to Govern the Implementation of GNSS, ICAO Assembly Resolution, ICAO Doc. A32-20 (1998).

[302] *See* ICAO website, *available at* http://www.icao.org; Paul B. Larsen, *GNSS International Aviation Issues* IISL3.02 at 187 (1998)[hereinafter Larsen, GNSS].

In general many States are concerned that U.S. and Russian military control of GPS and GLONASS may not ensure global reliability. They are also concerned that current liability rules may not adequately protect victims of aviation accidents based on faulty or unavailable satellite navigation signals, arguing that liability is not assured under either international law or domestic law.[303] Article VII of the Outer Space Treaty states that launching States are internationally liable to other contracting States for damage caused by its space object on the Earth, in air space or in outer space.[304] Article VI of the Outer Space Treaty places upon States international responsibility for their activities in space (and those of their private entities) and requires continuing State supervision. Experts[305] disagree whether the Liability Convention would apply to aviation accidents resulting from a faulty satellite navigation signal.[306] Those who believe the Liability Convention would *not* apply take the view that only physical collisions with a space object are covered. In addition, they point out that economic damage and consequential loss would not be covered by the Convention in any event.[307]

The Legal Committee is also considering no-fault or limited liability schemes,[308] since experts warn that resort to domestic law of the signal provider would give unpredictable results. For example, one expert opines that the Good Samaritan principle, as applied to U.S. provision of a free navigation signal, would impose a duty of care on the U.S. government for voluntarily

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[303] Huang, *supra* note 298 at 594.
[304] Outer Space Treaty, *supra* note 105.
[305] *E.g.*, Stephen Gorove, "Some Comments on the Convention on International Liability for Damage Caused by Space Objects" (Proceedings of the Sixteenth Colloquium on the Law of Outer Space, 1973) (indirect damages were intentionally omitted from the recovery scheme and are therefore not covered); *see also* Huang, *supra* note 298. For the opposing view, that such a claim would be valid under the Convention, *see e.g.*, Paul B. Larsen, "Legal Liability for Global Navigation Satellite Systems" (Proceedings of the Thirty-Sixth Colloquium on the Law of Outer Space, 1993)(agreeing with Bin Cheng that a claimant who could show causation would state a valid claim under the Convention). In any event, the U.S. would almost certainly refuse to recognize the validity of a claim filed under the Liability Convention for damages resulting from incorrect GPS data. Jonathan M. Epstein, "Comment: Global Positioning System (GPS): Defining the Legal Issues of its Expanding Civil Use" 61 J. Air L. & Com. 243 at 269 (1995)[hereinafter Epstein].
[306] *Convention on International Liability for Damage Caused by Space Objects*, 961 UNTS 187 (Mar 29, 1972)[hereinafter Liability Convention]. One observer notes:

> *While essentially establishing strict liability for the launching state, neither the convention language, deliberations on the treaty, or commentators indicate that this convention was meant to cover anything other than direct physical damage at the earth's surface caused by a malfunctioning launch vehicle or a space vehicle/satellite that did not burn up on reentry.*

Epstein, *id*.
[307] Huang, *supra* note 298 at 595.
[308] *Id*.

providing the signal.[309] Others point out that under the U.S. Federal Tort Claims Act (FTCA), sovereign immunity may be waived when negligence of a government employee acting within the scope of his duties causes monetary damage, but they express concern that the FTCA does not apply to discretionary conduct by the employee and does not apply to claims for monetary damage arising in a foreign country.[310] Significantly, the U.S. believes that current law governing air navigation systems and air traffic control adequately addresses any liability concerns.[311] Although an international treaty governing GNSS issues would not be effective without the support of the signal providers, it is possible that U.S. economic interests in making its GPS the key component of GNSS would lead to U.S. compromise on these issues.

As civilians rely increasingly on military satellite systems and launch facilities, liability concerns will become even more important to States. As an example, for civilian launches the U.S. government addresses liability concerns during the licensing process, requiring launch operators to prove financial ability to compensate the Government for any liability finding (whether based on national or international law), most often through insurance.[312] Future liability issues may be addressed through contracts, bilateral or multilateral agreements, or treaties and may limit the States' willingness to allow civilian reliance on governmental systems.

C. Rules of Engagement as the Implementation of Law and Policy

Rules of engagement (ROE) "provide guidance governing the use of force" by U.S. armed forces.[313] A pre-defined set of ROE, called the Standing ROE (SROE), applies to military attacks against the U.S. and to all "military

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[309] B.D.K. Henaku, *The Law on Global Air Navigation by Satellite: A Legal Analysis of the ICAO CNS/ATM System* (Leiden, AST Law 1998).

[310] Larsen, GNSS, *supra* note 302 at 185; Kim Murray, *The Law Relating to Satellite Navigation and Air Traffic Management Systems – A View from the South Pacific* (2000) 31 VUWLR 383 [hereinafter Murray]. Thus, under the FTCA it would appear that the initial decision to supply a GPS signal to civilian users and any decision to provide only a specified level of service (i.e., a degraded signal) might be considered discretionary and therefore not covered under the FTCA. Likewise, claims arising in a foreign country would not be covered. However, the interpretation of the term "arises" may be broad enough to cover a foreign accident caused by a negligent act in the U.S. in providing the signal. Bill Elder, *Comment: Free Flight: The Future of Air Transportation Entering the Twenty-First Century* 62 J. Air L. & Com. 871 at 901 (1997).

[311] Assad Kotaite, *ICAO's Role with Respect to the Institutional Arrangements and Legal Framework of Global Navigation Satellite Systems (GNSS) Planning and Implementation* 21 Ann. Air & Sp. L. 195 at 203 (1996), quoted in Murray, *supra* note 310 at 397.

[312] I.H.PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO SPACE LAW, 2ND ED. 117 (The Hague: Kluwer Law, 1999).

[313] Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01A, *Standing Rules of Engagement (SROE) for U.S. Forces* (2000) [hereinafter SROE].

operations, contingencies, and terrorist attacks occurring outside the territorial jurisdiction of the U.S.." Peacetime operations within the U.S. are not governed by the SROE, but are covered by rules on the use of force.[314] The purposes of the SROE are threefold:

(1) provide guidance for the use of force to accomplish a mission,
(2) implement the inherent right of self-defense, and
(3) provide rules to apply in peace, armed conflict, and transition periods between peace and conflict.

The SROE are issued by the Chairman of the Joint Chiefs of Staff (CJCS) and are approved by the National Command Authorities (NCA), who are "the President and the Secretary of Defense or their duly deputized alternates or successors."[315] Combatant commanders of specific theaters of operations may augment the SROE based on changing political and military policies, threats, and missions in their assigned areas.[316] These theater-specific ROE must be approved by the NCA through the CJCS. Commanders at every level of command establish ROE to accomplish their assigned missions. These supplemental ROE must comply with both ROE of senior commanders and the SROE. Importantly, these supplemental ROE may only issue guidance for using force for mission accomplishment – they may *never* limit a commander's right and obligation to use force in self-defense. Accordingly, supplemental ROE either authorize a certain action or place limits on the use of force. Notably, some types of actions and the use of certain weapons require combatant commander or even NCA authorization.[317]

The SROE, ROE, and the rules for the use of force are *not* law – they are military directives. However, the ROE are "the principal mechanism of ensuring that U.S. military forces are at all times in full compliance with [U.S.] obligations under domestic as well as international law."[318] Examination of the U.S. SROE is instructive, since they are based on what one expert calls the

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[314] *Id*, para. 3.a; DOD Directive 5210.56, *Use of Deadly Force and the Carrying of Firearms by DOD Personnel Engaged in Law Enforcement and Security Duties* (25 Feb 1992)[hereinafter Rules for the use of force].

[315] Joint Pub 3-0 page II-5; *Department of Defense Dictionary of Military and Associated Terms* at 253 (Mar. 23, 1994).

[316] SROE, *supra* note 313, para. 6.a. The term "CINC" (commander in chief) is used in the SROE to describe commanders of combatant commands; however more recent guidance (October 2002) restricts use of the term CINC to the President only. "Rumsfeld Declares 'CINC' is Sunk: Reminds Military only Bush is 'Commander in Chief'" *U.S. Gov Info/Resources* (Oct. 29, 2002), *available at* http://usgovinfo.about.com/library/weekly/aacincsunk.htm.

[317] SROE, *id*, para. 6.c.

[318] Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer* 42 A.F. L. Rev. 245 at 246 (1997)[hereinafter Grunawalt]. *See also* W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE, and the Rules of Deadly Force* 2000 Army Law 1 (2000) [hereinafter Stafford].

"three pillars – national policy, operational requirements, and law."[319] The ROE are evidence, therefore, of U.S. interpretation and implementation of law and policy. It is noteworthy that the office responsible for the ROE is the operations division (representing the warfighter), with the advice of the military lawyer.

In response to an increasing number of multinational coalitions and joint operations, the basic SROE are now unclassified to ease coordination with U.S. allies for the development of multinational ROE consistent with the SROE.[320] Classified attachments to the SROE (called "Enclosures") contain details about and guidance for using force in specific types of operations (including Space Operations and Information Operations), but will not be addressed in this article beyond the unclassified level. The discussion that follows will examine international law principles as applied to U.S. and allied forces through the SROE.

1. Self-defense

In addition to issuing guidance for using force to accomplish a mission, the SROE contain detailed provisions on self-defense. The basis for the self-defense guidelines in the SROE is the Charter of the United Nations and customary international law.[321] Article 51 of the UN Charter states in part: "nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs* against a member of the United Nations [. . .] [emphasis added]." Most States interpret this article to be much more limited in its coverage than the right granted States under customary international law – the right of preemptive self-defense. The U.S., however, has long maintained that so-called "anticipatory" self-defense is authorized under both customary international law and the UN Charter.[322]

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[319] Grunawalt, *id* at 247.
[320] SROE, *supra* note 313, para 7.
[321] Grunawalt, *id* at 251; U.N. CHARTER, (1945), 59 Stat. 1031, 145 U.K.T.S. 805, 24 U.S.T. 2225, T.I.A.S. No. 7739 [hereinafter *UN Charter*].
[322] National Security Strategy of the United States of America, September 2002, *available at* http://www.whitehouse.gov/nsc/nss.html at 15.

> *The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.*
>
> *The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and*

This view is highly controversial and not accepted by many UN Member States.[323] The U.S. position as embodied in the SROE is based largely on a liberal reading of the famous dispute between the U.S. and the United Kingdom in the *Caroline* case.[324] In this incident, probably the first recognition internationally of the concept of anticipatory self-defense, the parties agreed that such action, to be lawful, must not only rise from necessity, but it must also be proportional to anticipated harm.[325] Likewise, the SROE require necessity and proportionality for the application of force in self-defense.[326] According to the SROE, necessity "exists when a hostile act occurs *or when a force or terrorist(s) exhibits hostile intent."* [emphasis added][327] "Hostile intent" is further defined in the SROE as

> The *threat of imminent use of force against* the United States, U.S. forces, and in certain circumstances, *U.S. nationals, their property, U.S. commercial assets*, and/or other designated non-U.S. forces, foreign nationals and their property. *Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces*, including the recovery of U.S. personnel or vital U.S. property. [emphasis added]

While there is some historical and scholarly justification for anticipatory self-defense,[328] the U.S. position as reflected in the SROE is

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actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.

[323] Stafford, *supra* note 318 at 5.

[324] 2 Moore 409 (1837). In 1837 British subjects destroyed an American ship, the *Caroline*, in a U.S. port, since the *Caroline* had been used for American raids into Canadian territory. The British justified the attack as self-defense. The dispute was resolved in favor of the Americans through the exchange of diplomatic notes. Daniel Webster, the U.S. Secretary of State, proposed this definition of self-defense which the British accepted:
There must be a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. [The force justified in the application of self-defense must consist of] nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.
See MYRES S. MCDOUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM PUBLIC WORLD ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 217(Yale University Press 1961) [hereinafter McDougal and Feliciano].

[325] McDougal and Feliciano, *id*.

[326] SROE, *supra* note 313, Enclosure A at A-4.

[327] *Id*.

[328] McDougal and Feliciano, *supra* note 325 at 210, 231-241 (noting, *e.g.*, that the preparatory record of the Charter indicates Article 51 was not drafted to intentionally narrow customary law requirements for self-defense by raising the required degree of necessity, but rather was drafted to accommodate regional security organizations within the Charter's scheme of collective security).

certainly more expansive than the interpretation of that term is given by many States.

Under customary law, lawful anticipatory defense was limited by the requirement that the expected attack exhibit such a high degree of imminence that effective resort to non-violent response was precluded.[329] Many scholars argue that Article 51 of the UN Charter demands an even higher standard of necessity, since it recognizes the right to self-defense "if an armed attack" (as distinguished from an *expected* attack of any degree of imminence) occurs.[330] Other experts opine that anticipatory self-defense is not precluded by Article 51 of the UN Charter, arguing that: the drafting history of Article 51 does not indicate an intent to narrow the customary law definition; the language of Article 51 does not say "if *and only if* an armed attack occurs"[331] and therefore does not narrow customary law's recognized inherent right to self-defense; also, newer weapons systems and contemporary nonmilitary coercion techniques must be considered in the definition of "armed attack."[332]

In any event, the broad view on anticipatory self-defense is clearly reflected in the unclassified SROE. On its face the language of the unclassified SROE would appear to cover, in certain circumstances, anticipatory self-defense against threatened attacks on U.S. telecommunications or remote sensing satellites. Accordingly, such defensive measures could be justified either as threats to U.S. commercial assets or, in light of the military's reliance on such commercial systems, as threats that would impede the mission of U.S. forces.

The requirement of proportionality in the application of self-defense has been defined as requiring the quantum of responding force to be "limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible purposes of self-defense."[333] Similarly, the SROE define proportionality as force "reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time."[334] Implementing these requirements, the SROE set out the following guidelines for self-defense:

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[329] *Id*. at 231.
[330] *Id*. at 233.
[331] Thus Judge Schwebel dissenting in *Military and Paramilitary Activities in and against Nicaragua* I.C.J. Rep. 14 at 259 (1986) [hereinafter *Nicaragua v. U.S.*]. In this case, the Court decided against the U.S. claim that its use of force against Nicaragua was a lawful act of collective self-defense of El Salvador. The U.S. had argued that Nicaraguan support (in the form of weapons and supplies) to rebels in El Salvador was an armed attack justifying self-defense. *See also*, Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L. J. 145 at 158 (2000).
[332] McDougal and Feliciano, *supra* note 325 at 235, n. 261, and 238.
[333] *Id*. at 242.
[334] SROE, *supra* note 313, Enclosure A at A-5.

(1) De-escalation: warning and giving the hostile force an opportunity to withdraw or cease, when time and circumstances permit;
(2) Using proportional force which may include nonlethal weapons; and
(3) Only attacking to "disable or destroy" when that is the "only prudent means" to terminate a hostile act or intent.[335]

The SROE also distinguish between national, collective, unit and individual self-defense. In defending oneself or one's unit (military force element), SROE requires that one be defending against an observed hostile act or demonstrated hostile intent. Notably, the SROE defines the role of the commander in exercising unit self-defense as a right *and an obligation*.[336] The invocation of national self-defense, which means defending U.S. forces (and in some circumstances U.S. nationals, property and commercial assets), will most often result from a designated authority declaring a foreign force or terrorist(s) hostile; hence, individual units need not observe a hostile act or hostile intent. Collective self-defense, which according to the SROE involves defending non-U.S. forces and property, must be based on an observed hostile act or intent and can only be authorized by the National Command Authorities (NCA, *i.e.*, the President and the Secretary of Defense or their designated alternates).[337]

2. The Use of Force for Mission Accomplishment

Although most of the unclassified portions of the SROE focus on self-defense, ROE also provide guidance for the application of force to accomplish specific missions. Accordingly, the development of rules of engagement mandates consideration of political, military, and legal limitations that affect ROE such as: international law (including the UN Charter), U.S. domestic law and policy, host nation law and bilateral agreements with the U.S., ROE of coalition forces, and UN Security Council resolutions.[338] Many of these constraints have already been addressed in other sections of this article, so this section will focus on those limitations that have not yet been discussed.

a. The Law of Armed Conflict

Under the SROE, "U.S. forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law."[339] The law of armed conflict (LOAC, also called the "law of war") is the branch of international law

[335] *Id*, at A-6.
[336] *Id*, at A-3.
[337] *Id* at A-4. The term NCA is defined in Joint Pub 3-0 page II-5; *Department of Defense Dictionary of Military and Associated Terms* at 253 (1994).
[338] *Id*., Enclosure L at L-2.
[339] *Id*., Enclosure A, para 1.g.

regulating armed hostilities.[340] Although a detailed discussion of LOAC is beyond the scope of the article, it is important to briefly outline its sources and general principles.

LOAC is derived from two main sources: customary international law and treaty law. The treaties regulating the use of force were concluded at conferences held at The Hague, The Netherlands and Geneva, Switzerland and can be divided into two main areas: the "law of The Hague" and the "law of Geneva."[341] In general terms, the Hague treaties deal with the behavior of belligerents and the methods and means of war (for example, lawful and unlawful weapons and targets), while the Geneva agreements address the protection of personnel involved in conflicts (*e.g.*, Prisoners of War, civilians, the wounded). LOAC sets boundaries on the use of force during armed conflicts through application of several principles:

(1) **Necessity**: only that degree of force required to defeat the enemy is permitted. In addition, attacks must be limited to military objectives whose "nature, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization at the time offers a definite military advantage";
(2) **Distinction** or Discrimination: requires distinguishing military objectives from protected civilian objects such as places of worship and schools, hospitals, and dwellings;
(3) **Proportionality**: requires that military action not cause collateral damage which is excessive in light of the expected military advantage;
(4) **Humanity**: prohibits the use of any kind or degree of force that causes unnecessary suffering; and
(5) **Chivalry**: requires war to be waged in accordance with widely accepted formalities, such as those defining lawful "ruses" (*e.g.*, camouflage and mock troop movements) and unlawful treachery (for

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[340] James C. Duncan, *Employing Non-lethal Weapons* 45 Naval L. Rev. 1 at 43 (1998); JCS Pub 1-02. *Department of Defense Dictionary of Military and Associated Terms* (1994); *see also* McDougal and Feliciano, *supra* note 325 at 521.

[341] INGRID DETTER, THE LAW OF WAR, 2ND ED. 158 (2000). E.g., Geneva Convention (I) 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, Article 13 [hereinafter Geneva I]; Convention (II) 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; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949; 75 U.N.T.S. 135; Convention (IV) 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 Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 16 I.L.M. 1391; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, U.S.T. 540 [hereinafter Hague V]. For a complete list, *see* ROBERTS, ADAM & GUELFF, RICHARD, EDS., DOCUMENTS ON THE LAWS OF WAR, 3RD ED. (Oxford University Press, 2000) [hereinafter Roberts and Guelff].

example, misusing internationally accepted symbols in false surrenders).[342]

An examination of these principles highlights the difficulties in their application as military and civilian systems become more and more intertwined. As one active duty military officer recently stated,

> *Dispersing combatants and military objects into the civilian community is offensive to international law because it violates the principle that defenders have an obligation to separate military targets from civilians and their property [. . .] But as societies become technologically integrated and, more important, dependent upon technology, separating military and civilian facilities becomes immensely more complicated.*[343]

b. "Peaceful Purposes"

Recent years have seen a continuous escalation of the uses of space for military purposes. Although the space powers reiterate their commitment to the use of space for "peaceful purposes,"[344] satellites and space systems are now overtly being used in direct support of military operations. This article has described use of satellites for: communications between forces engaged in armed combat; intelligence-gathering for development of targets; precision-guidance systems to accurately steer weapons to their targets; and data-collection by remote sensing for battle damage assessment. These uses, coupled with a lack of formal protests regarding them, led one expert to conclude:

> *Given the ambiguity of the term "peaceful" as used in the [Outer Space Treaty] OST, as well as the overt and covert practice of the two state actors in outer space, the conclusion is inescapable that all military uses of space other than those prohibited by treaty were – since the beginning of space exploration and still today – lawful as*

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[342] Roberts & Guelff, *id*. at 10 (noting that proportionality and discrimination are generally incorporated into the other principles); Duncan, *supra* note 340 at 50; *see also* McDougal and Feliciano, *supra* note 325 at 521.

[343] Dunlap, *supra* note 1.

[344] *See e.g.*, the U.S. White House National Science and Technology Council, *National Space Policy* (Sep. 19, 1996), *available at* http://www.ostp.gov/NSTC/html/pdd8.html (stating "The United States is committed to the exploration and use of outer space by all nations for peaceful purposes and for the benefit of all humanity. 'Peaceful purposes' allow defense and intelligence-related activities in pursuit of national security and other goals.").

> *long as they do not violate any of the principles and rules of international law (e.g., uses that represent the threat or employment of force).*[345]

Article IV of the Outer Space Treaty provides two arms control provisions limiting military uses of space: (1) nuclear or other weapons of mass destruction will not be placed in orbit around the Earth, on the moon or any other celestial body, or in outer space, and (2) the moon and other celestial bodies will be used exclusively for peaceful purposes; establishing military bases, testing weapons of any kind, or conducting military maneuvers on the moon and other celestial bodies is forbidden.[346] However, the term "peaceful" remains undefined in the context of international space law and has been the source of continuing and frustrating debate. It has been argued that the plain meaning and "[t]he widely accepted interpretation given this key term of space law prior to and immediately after the advent of the space age, namely that 'peaceful' means 'non-military,' was soon contradicted by the practice of States, primarily the United States and the Soviet Union."[347]

Thus, the definition of "peaceful" seems to be expanding according to State practice. For example, for over forty years the U.S. defended the position that "peaceful" means "non-aggressive," so that any military use is lawful so long as it does not violate either Article 2(4) of the UN Charter, which prohibits "the threat or use of force," or Article IV of the Outer Space Treaty.[348] In 1991, while examining the legality of using Inmarsat communications satellites in support of armed conflict in the first Gulf War, The Judge Advocate General (TJAG) of the U.S. Navy concluded that the use of Inmarsat to support the U.S.-led coalition was legal since it was performed

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[345] Ivan A. Vlasic, *The Legal Aspects of Peaceful and Non-Peaceful Uses of Outer Space*, in B. Jasani, ed., PEACEFUL AND NON-PEACEFUL USES OF SPACE: PROBLEMS OF DEFINITION FOR THE PREVENTION OF AN ARMS RACE 45 (1991).

[346] Outer Space Treaty, *supra* note 105, Art IV, which states:

> *States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.*
>
> The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden.

[347] Vlasic, *supra* note 345 at 37.

[348] *Id*. at 40.

under the auspices of UN resolutions.[349] The U.S. Department of State, in its support of the Navy opinion, stated:

> *The Convention does not define "peaceful purposes," and its negotiating history does not suggest a specific meaning. Under such circumstances, the term ... should be given the meaning that it has been accorded under the law relating to space activities. Under such a reading, "peaceful purposes" does not exclude military activities so long as those activities are consistent with the United Nations Charter.*[350]

One U.S. official has expressed the view that "non-aggressive" is itself too restrictive a description, that "[t]here are times when 'aggression' is permissible (e.g., for the common interest, peace-keeping or enforcement or individual or collective self-defense)."[351] He further argues that there is an important distinction between peaceful "purposes" and peaceful "uses." Thus, satellites may be "used" to support armed military operations, as long as the "purpose" of the use is to restore a "climate of peace."[352] Under this interpretation even weapons in space, as long as they are not weapons of mass destruction prohibited under Article IV, if used for "peaceful purposes" would not violate the Outer Space Treaty. Arguments could be made that Article IX of the Outer Space Treaty, which allows each State Party to request consultation if it believes the space activities of another State might cause harmful interference to the peaceful use of space, could be used to challenge and constrain a particular military activity.[353] However, various unopposed military uses of space may as a practical matter enlarge the unofficial definition of "peaceful purposes" to the point that specific arms control agreement may be the only effective limitation on the military use of space, with few corresponding limits on the development and implementation of space ROE.

c. Arms Control Limitations

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[349] Richard A Morgan, *Military Use of Commercial Communications Satellites: A New Look at the Outer Space Treaty and "Peaceful Purposes"* 60 J. Air L. & Com. 237 at 294 (1994).
[350] *Id.* at 295 (quoting the Memorandum for the Chief of Naval Operations by the Deputy Assistant Judge Advocate General (Jan. 14, 1991) and the Attachment to the Memorandum for the Chief of Naval Operations by the Deputy Assistant Judge Advocate General (Jan. 14, 1991).
[351] *Id*.
[352] *Id*.
[353] Outer Space Treaty, *supra* note 105, Article IX.

Military uses of outer space may also be limited by disarmament and arms control agreements. In addition to the Outer Space Treaty, already discussed, the following merit mention:[354]

(1) The 1963 Limited Test Ban Treaty prohibits "any nuclear weapon test explosion, or any other nuclear explosion" in the atmosphere, underwater, or in outer space.[355]

(2) The Biological and Toxins Convention of 1972 and the Chemical Weapons Convention of 1992 prohibit development, production, stockpiling, and acquisition of biological agents, weapons containing toxins, and chemical weapons for hostile purposes.[356]

(3) The 1980 Environmental Modification Convention prohibits all military or hostile environmental modification techniques that might cause long-lasting, severe or widespread environmental changes in Earth's atmosphere or outer space.[357]

(4) A series of bilateral agreements between the U.S. and the former Soviet Union (now binding on Russia) prohibit interference with early warning systems and technical means of verification (reconnaissance and communications satellites) to reduce the risk of nuclear war and monitor treaty compliance.[358]

It has been noted that the series of U.S./Russia bilateral agreements establish a limited regime that protects certain types of satellites. It has further been suggested that "[t]hese bilateral agreements may set precedents in codifying the norm of non-interference with Earth-orbiting objects," opening the

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[354] M. Lucy Stoyak, *Excerpt from a Report Prepared for the Canadian Department of Foreign Affairs and International Trade Entitled 'The Non-Weaponization of Space'* (2001) (copy on file with the author).

[355] The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Oct. 10, 1963, 480 U.N.T.S. 43.

[356] Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Mar. 26, 1975, no. 11 U.K.T.S., Cmd 6397, Chemical Weapons Convention 1992, 32 ILM 800 (entered into force 29 April 1997).

[357] Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, Oct. 5, 1978, 31 U.S.T. 333.

[358] Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, Sep. 30, 1971, 807 U.N.T.S. 57; Agreement on Measures to Improve the USA-USSR Direct Communications Link, Sep. 30, 1971, 806 U.N.T.S. 402; Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, Oct. 5, 1978, U.S.T. 1478; Agreement Between the United States of America and the Government of the Union of Soviet Socialist Republics on Notifications of Launches of Intercontinental Ballistic Missiles and Sub-Marine Launched Ballistic Missiles, May 31, 1988; Agreement Between the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Activities, Jan. 1, 1990; Memorandum of Agreement Between the Government of the United States and the Government of the Russian Federation on the Establishment of a Joint Center for the Exchange of Data from Early Warning Systems and Notifications from Missile Launches. See Stoyak, *supra* note 354.

possibility of widening the scope of satellite protection beyond the bilateral level.[359] Perhaps heeding this observation, a recent U.S. Congressionally-mandated commission to assess space issues warned, "The U.S. must be cautious of agreements intended for one purpose that, when added to a larger web of treaties or regulations, may have the unintended consequence of restricting future activities in space."[360] It is safe to conclude, therefore, that space powers will at least in the foreseeable future preserve the *status quo* of relatively permissive space law to keep their military options open.

d. ROE Relating to Outer Space

The SROE contain a new regulation (called an "Enclosure") specifying rules of engagement for U.S. military space operations. Although its exact contents are classified, the unclassified description indicates the Enclosure defines indicators of hostile acts and hostile intent directed against U.S. space forces and space assets, and defines the circumstances and authority required for actions to protect DOD and designated space assets.[361] Current SROE reflects restraint in targeting "military or civilian space systems such as communications satellites or commercial earth-imaging systems" used to support hostile action, noting that "[a]ttacking third party or civilian space assets can have significant political and economic repercussions." Accordingly, "commanders may not conduct operations against [foreign] space-based systems or ground and link segments of space systems" without specific NCA authorization.[362] These restrictions on targeting third party military and civilian space systems clearly reflect the fact of the military and civilians relying on the same systems for critical services.

D. Legal Implications of Military Reliance on Civilian Systems

As armed forces and civilian users increasingly depend on the same commercial space systems, the application of LOAC principles is becoming more complicated. Moreover, the fact that civilians now control systems vital to militaries during times of armed conflict raises certain ethical and practical issues that cannot be ignored.

1. Neutrality Implications of "Dual Use" Technologies

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[359] Stoyak, *supra* note 354.
[360] U.S. Commission to Assess U.S. National Security Space Management and Organization, *Report of the Commission to Assess U.S. National Security Space Management and Organization, pursuant to P.L. 106-65* (Jan. 11, 2001), *available at* http://www.space.gov/doc/fullreport.pdf [hereinafter Space Commission].
[361] SROE Information Paper (Nov. 29, 1999); SROE, *supra* note 313, Enclosure A at A-7.
[362] *Id*.

Under LOAC principles, legitimate military targets must be distinguished from protected civilian objects. Anticipated collateral damage must be weighed against expected military advantage, and excessive civilian damage avoided. However, force may lawfully be used against objects which an adversary is using for a military purpose, if neutralization of the object would offer a definite military advantage.[363] The analysis becomes more complex, however, when the object being used by the adversary belongs to a "neutral" third party.

Nonparticipants in a conflict may declare themselves to be neutral.[364] As long as the neutral State does not assist either belligerent party, it is immune from attack by the belligerents. However, if one of the belligerents uses the territory of a neutral nation in a manner that gives it a military advantage and the neutral nation is unable or unwilling to terminate this use, the disadvantaged belligerent has the right to attack its enemy in the neutral's territory.

Traditionally, the laws of neutrality did not require a neutral State to prevent its private entities from trading with belligerents.[365] However, increasing governmental control and involvement in trade led to the practical erosion of the distinction between private and governmental actors, and it is now commonly accepted that neutral States have an obligation to prevent acts of supply to belligerents by their private entities.[366] Since space law accords States responsibility over their private entities involved in space operations, an even stronger argument can be made to hold a neutral State responsible for the actions of its private entities.[367] In addition, when a State issues a license authorizing a private entity to provide certain services, there can be little argument that the State should be held responsible for subsequent conduct of the private entity. Accordingly, if a neutral State permits its space systems to be used by a belligerent military, the opposing belligerent would have the right to demand that the neutral State stop doing so. If the neutral State is unwilling or unable to prevent such use by one belligerent, it would seem reasonable to authorize the other belligerent to prevent the offending use. In the context of space systems used in time of conflict, before resorting to force a belligerent could (or should) demand a neutral nation not provide satellite imagery, navigation services, or weather information to its adversary.[368]

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[363] Duncan, *supra* note 340 at 50.
[364] Hague Convention V *Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, Oct. 18, 1907, 36 Stat. 2310, U.S.T. 540 [hereinafter Hague V].
[365] McDougal and Feliciano, *supra* note 325 at 438, citing Hague Convention V, Article 7.
[366] *Id* at 443.
[367] Willson, David L., *An Army View of Neutrality in Space: Legal Options for Space Negation* 50 A.F. L. Rev. 175 (2001)(referring to the Outer Space Treaty and the Liability Convention).
[368] DOD General Counsel, *An Assessment of International Legal Issues in Information Operations* (May 1999).

However, belligerents may have no similar right to limited self-defense in neutral territory when the use of satellite *communications* systems is involved. Articles 8 and 9 of the Hague Convention V provide that a neutral State is not required to restrict a belligerent's use of "telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to Companies or private individuals" as long as these facilities are provided impartially to both belligerents.[369] Scholars point out, however, that the law of neutrality is heavily influenced by pragmatic factors such as power differentials between the parties to a conflict and nonparticipants; the intensity, time duration, and geographical scope of a conflict; and other available coercion techniques, including economic pressure.[370] There is no reason to believe that the application of the law of neutrality to space uses will be any different.

2. Civilians Controlling Space Systems: Unlawful Combatants?

A corollary to the problem of armed forces and civilian users relying on the same space systems is the increasing use of civilians in formerly military jobs. As traditional military functions are "outsourced" to civilians in an effort to save money, civilians often perform traditional military duties. In addition, civilian systems are providing certain information and services formerly provided by military systems. In space, this trend is especially noticeable in high-tech fields such as satellite control, ground systems maintenance, and satellite data-collection and interpretation.

The LOAC requires a distinction to be made between combatants and noncombatants.[371] Only combatants, who are members of a State's armed forces, have the right to participate directly in armed conflict. Under international law, to be a member of an armed force, a person must:

(a) Be commanded by a person responsible for his subordinates;

(b) Have a fixed distinctive emblem recognizable at a distance;

(c) Carry arms openly; and

(d) Conduct operations in accordance with the laws and customs of war.[372]

Combatants must be distinguishable from noncombatants, and they must not use noncombatants or civilian property to shield themselves from attack. The status of "combatant" provides protection against punishment for combatant

[369] *Id*.; Hague V, *supra* note 364.

[370] McDougal and Feliciano, *supra* note 325 at 435.

[371] *See above*, section V(2)(a) for a discussion of LOAC principles.

[372] Geneva Convention (I) 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, Article 13 [hereinafter Geneva I]; Convention (II) 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; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949; 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

acts in case of capture by the enemy, as long as those acts complied with the LOAC. Combatants are subject to punishment for violations of the LOAC since they are "subject to an internal disciplinary system which [. . .] enforce[s] compliance with the rules of international law applicable in armed conflict."[373]

The term noncombatant is generally synonymous with civilian.[374] Civilians are not authorized to take a "direct part in the hostilities."[375] The International Committee of the Red Cross has defined direct participation as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[376] Persons who commit combatant acts without authorization are unlawful combatants and are subject to criminal prosecution.[377] If combatant acts are conducted by unauthorized persons, their national government may be in violation of the LOAC. In the context of space operations supporting armed conflict, the concepts of prohibited "hostile acts" and "direct participation" by civilians present difficult and complex issues.

The law of war has traditionally recognized that civilians may participate in a war effort without being declared unlawful combatants. However, acts *intended* or *likely* ("hostile acts" and "direct participation", respectively) to cause actual harm to enemy armed forces are prohibited by noncombatants.[378] It is therefore generally agreed that noncombatant participation in activities such as weapons production, military engineering, and military troop transport is not prohibited, even though these acts ultimately harm an enemy. There is not such general agreement about whether the gathering and dissemination of intelligence and the transportation of weapons is direct participation. While the ICRC does not consider such acts to satisfy the definition of direct participation, the U.S. military and several commentators assert they do.[379] Accordingly, civilians involved in space activities such as intelligence-gathering, interpretation, and dissemination for purposes of targeting, controlling unmanned weapons or surveillance vehicles,

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[373] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 16 I.L.M. 1391, Article 43.

[374] However, there are also certain members of the armed forces who are considered noncombatants, such as medical personnel and chaplains. George H. Aldrich, *The Laws of War on Land* 94 A.J.I.L. 42 (2001) [hereinafter Aldrich].

[375] Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 Yale H.R. & Dev. L.J. 143 at 149 (1999), citing *Protocol I* at Article 51.3.

[376] *Id*.

[377] Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon* 51 A.F. L. Rev. 111 at 114 (2001)[hereinafter Guillory].

[378] *Id*. *See also* Aldrich, *supra* note 374.

[379] Y. Sandoz, C. Swinarski, and B. Zimmerman, eds., *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1957); Hays Parks, *Air War and the Law of War*) 32 A.F.L. Rev. 1 (1990); A.P.V. Rogers, *Law on the Battlefield* (1996), all cited in Guillory, *id*. at 117.

and engineering computerized information attacks are arguably participating directly in the hostilities.

> *Clearly, if the trend towards militarizing civilian activities and civilianizing military ones continues, the consequences for the principle of discrimination are grave. [. . .] As a practical matter the difficulty of determining who and what is, in fact, supporting the military effort will complicate discrimination. [. . .] Yet, as integration expands it will prove ever more difficult to determine with any precision the relationship of a potential target to the military effort.*[380]

In sum, the intermingling of civilians in traditional military space activities may in times of armed conflict lead to moral, ethical, and legal dilemmas, especially with regard to application of force. The increasing interdependence of the military and civilians in space activities may also have unintended consequences in time of armed conflict; (1) civilians risk being characterized as unlawful combatants directly participating in hostilities and therefore being unprotected under LOAC; and (2) military reliance on civilian space systems may turn those systems into legitimate targets.

VI. CONCLUSION

Against a background of relatively permissive international space law, domestic law and policy should play an important role in regulating this novel area of potential discord and conflict. Because of concern about the dual use of space technology, some States[381] have made efforts to protect uncontrolled access to it in various ways, such as limiting access to space activities, as well as protecting access to space technology and space services. However, States must be careful seeking to protect their security interests, since the methods they employ may be counterproductive by causing political and legal controversy.

Today, it is widely believed that national security is best protected by maintaining a healthy domestic industrial base in space technology and that policies supporting international competitiveness are necessary to achieve this end.[382] Some experts even assert that hurting the competitiveness of space companies in the global market could be more harmful to national security

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[380] Guillory, *id*. at 160-161.

[381] *E.g*., the U.S., Canada, Japan, the United Kingdom, Russia, South Africa, Australia, and Sweden.

[382] *Space Commission*, *supra* note 360; *see also* U.S. Chamber of Commerce, *Promote a Strong Domestic Space Launch Capability*, online: U.S. Chamber of Commerce, *available at* http://www.uschamber.com/space/policy/launchcapability.htm.

than letting cutting edge technology slip into the wrong hands.[383] Former U.S. Defense Secretary William Perry once said that the criterion for export controls should be whether or not a country is the sole possessor of a given technology. "When technology being controlled is unique to the country trying to contain it, unilateral export controls work; however, they fail miserably when the technology is ubiquitous and only one country is trying to control it."[384] Arguably, the interdependence of military and commercial space systems has caused national security and competition to become mutually reinforcing, not competing goals.

At the same time, the increasing militarization of civilian space activities and "civilianization" of military space uses can have serious, and perhaps unintended, consequences. Policy decisions leading to an increase in civilian-military space interdependence must consider their potential impact on global trade, international relations, and the conduct of armed hostilities under the law of armed conflict. Thus, while "dual use" technologies and military reliance on civilian space systems raise legal and national security issues that require urgent consideration, they can also bring considerable benefits to all users when their respective concerns and interests are fairly addressed.

[383] Broadbent, *supra* note 90.
[384] *Id*.

ANALYZING THE CONSTITUTIONAL TENSIONS AND APPLICABILITY OF MILITARY RULE OF EVIDENCE 505 IN COURTS-MARTIAL OVER UNITED STATES SERVICE MEMBERS: SECRECY IN THE SHADOW OF *LONETREE*

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The advent of the cold war brought concerns over classified national security information becoming public in criminal trials. The federal government, in response, enacted the Classified Information Procedures Act (CIPA)[2] in 1980. During the same time the CIPA was being finalized in Congressional conference, President James Carter provided the United States Military with a similar mandate to protect evidence. Rather than a creating a specific act, the executive branch provided the military a "privilege" mechanism to prevent disclosure in the Military Rules of Evidence (MRE), under rule 505.[3] From its inception until 1990, military prosecutors made little use of MRE 505. However, in *United States v. Lonetree,*[4] a court-martial was tasked with protecting sensitive information regarding Soviet-directed espionage. The trial court had to balance the inherently broader discovery rights of an accused against the need to protect information crucial to national security.[5] Since *Lonetree*, little analysis has occurred regarding the use of

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[2] 18 U.S.C. app. 3 § 1-16 (1982).

[3] UNIFORM CODE OF MILITARY JUSTICE (UCMJ) MRE 505. *See, e.g,,* Captain Mark G. Jackson, *The Court-Martial is Closed: The Clash Between the Constitution and National Security*, 30 A.F. L. REV. 1 (1989). Jackson noted that President James Carter amended the Manual for Courts-Martial (MCM) to include the Military Rules of Evidence in order to mirror the federal rules. *Id.* (citing 16 Weekly Comp. Pres. Doc. 493 (Mar. 14, 1980); Exec. Order 12,198, 45 Fed. Reg. 16,932 (1980)).

[4] 31 M.J. 849 (NMCMR 1990) [hereinafter *Lonetree*], *aff'd* 35 M.J. 396 (CMA 1992) *cert. denied,*.507 U.S. 1017 (1993) [hereinafter Lonetree III].

[5] Under military law, a person accused of offenses is entitled to broader discovery rights than found in federal law. *See, e.g., United States v. Adens*, 56 M.J. 724 (ACCA 2002) [stating that broad discovery rights prevents gamesmanship]; *United States v. Eshalomi*, 23 M.J. 12 (CMA

MRE 505. Yet, MRE 505 remains an important feature of military justice, just as CIPA does to federal law. Because military members may be prosecuted for the failure to control or maintain sensitive information, the future likelihood of MRE 505 being invoked by the government is almost certain. Indeed, in the past two years, military prosecutors in two high-profile cases, *United States v. Yee*,[6] and *United States v. al-Halabi*,[7] have invoked MRE 505's protections. Currently, with trials stemming from the *abu-Gharib* prisoner of war abuse investigation, and the overall "Global War on terrorism," knowledge of the parameters of MRE 505 will be important to all sides in the court-martial process.

This article analyzes MRE 505 in both a comparative and Constitutional context. Part I provides a procedural overview of both MRE 505, and its federal counterpart, CIPA, for protecting evidence vital to national security in the criminal court context. Both mechanisms for protecting sensitive information are analyzed for their efficiency from a prosecutorial perspective. A study of CIPA is also provided because of the lack of military case law and current analysis of MRE 505. CIPA and federal case law remain important in providing guidance on the parameters of protecting classified information in courts-martial.

Part II analyzes the defendant's twin Constitutionally-based rights to present a complete defense and to a public trial. MRE 505, impacts to some degree, these twin rights. The right to a public trial also bears importance as, on occasion, third parties assert this right.

Part III then reviews the legal framework of MRE 505 within the salient *Lonetree* case. Within the context of that case, particular attention is focused on two issues: the right of public access and the responsibility to protect classified evidence.

Part IV analyzes likely legal areas of future review. Continued analysis on the right of public access is important because there has been a trend toward increased media interest for military cases.[8] The responsibility to protect

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1986) [holding that while Supreme Court decisions create mimimal thresholds for discovery compliance, the president promulgated rules for military courts requiring full disclosure.]

[6] For a discussion of the background and ultimate decision to drop charges against Yee, see Neil A. Lewis, "*Charges Dropped Against Chaplain*," N.Y. Times, Mar. 20, 2004, at A1; and Neil A. Lewis & Thom Shanker, "*As Chaplain's Spy Case Nears, Some Ask Why It Went So Far*," N.Y. Times, Jan. 4, 2004, at A1.

[7] For a discussion of the background and current status of United States v. al Halabi, see Denny Walsh, "*Judge Denies Bid to Drop Spy Case*,"Sacramento Bee, June 17, 2004, at A1.

[8] *See, e.g.*, Lieutenant Colonel Denise R, Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1, 2 (2000). Lind writes, "Military cases are attracting local and national media interest. As the armed forces grow smaller, fewer people have experienced military life. Thus, the military justice system is foreign to more and more Americans. People are interested in learning about how military justice works. The media sells its product by generating news that is interesting to the public." Id.

classified evidence is of importance, but for reasons that include an increased role of the military in combating terrorism in both overseas and potentially domestic operations, as well as other traditional reasons. Second, the issue of an accused's right to a present a complete defense will continue to affect the application of MRE 505 in trials. Finally, the right of an accused to choose defense counsel may be impacted by the application of MRE 505. While this article concludes the reasonable application of MRE 505 is constitutional, judge advocates and agency attorneys should analyze the possible impact both in the charging process and in the pursuit of justice. Likewise, potential defense counsel should be fully aware of the law, its impact on the accused's rights, and potential arguments for disclosure prior to trial.

Before proceeding however, a brief mention of the courts-martial process bears importance as persons familiar with federal criminal law may be unfamiliar with terminology used in the Uniform Code of Military Justice (UCMJ).[9] Courts-martial may be divided into three types: general, special, and summary. This breakdown is, in part, based on sentencing limitations. Because the military does not have mandated sentencing guidelines, sentencing occurs in a two dimensional context. Each offense possesses a jurisdictional ceiling on punishment.[10] However, the special and summary courts-martial forum further set a maximum ceiling.[11]

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[9] *See*, 10 U.S.C. §816. There are three types of courts-martial in each of the service branches. These are:

(1) general courts-martial, consisting of

(a) a military judge and not less than five members; or

(b) only a military judge, if before the court is assembled the accused, knowing the identity of the

military judge and after consultation with defense counsel, requests orally on the record or in

writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of

(a) not less than three members; or

(b) a military judge and not less than three members; or

(c)) only a military judge, if before the court is assembled the accused, knowing the identity of the

military judge and after consultation with defense counsel, requests orally on the record or in

writing a court composed only of a military judge and the military judge approves;

(3) summary courts-martial, consisting of one commissioned officer.

Id.

[10] UCMJ Articles 80 through 134 each proscribe maximum punishments for offenses.

[11] The maximum jurisdictional limit of a Special Court-Martial consists of discharge from active duty with a bad conduct discharge, confinement for one year, reduction to the lowest enlisted grade, two-thirds forfeiture of pay and allowance, and the possibility of a fine. *See*, 10 U.S.C. sec 819, Art 19, as amended by Pub. L 106-65 S. 1059 (HR 1401), 5 October 1999.

The maximum sentence which may be imposed by summary courts-martial are: one month's confinement at hard labor; 45 days' hard labor without confinement; two months' restriction to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month. Art. 20, UCMJ, 10 U.S.C. § 820. Not all these sentence elements

In military law, the terms indictment and defendant are not used. Instead of indictment, the term preferral is utilized.[12] However, these terms are not strictly synonymous. Likewise, instead of 'defendant,' the term 'accused' is used.[13] These terms are roughly synonymous in regard to the legal rights of charged persons.[14]

The charging process begins with preferral of charges against an accused. Any person subject to the UCMJ may prefer charges against an accused.[15] Where an enlisted general court-martial is contemplated, a preliminary investigation known as a UCMJ Article 32 investigation is held.[16] For all officers charged, an article 32 hearing is accomplished, as officers may on be tried in general courts-martial.[17] Although roughly akin to the grand jury process, there are substantial differences, not pertinent to this article. Should the charges be recommended either for a general court-martial or special court martial, the charges must be referred by a convening authority.[18] Once the charges are referred to a court-martial, an independent military judiciary becomes involved with discovery matters, scheduling, evidentiary rulings, and oversight of the case.[19]

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may be imposed in one sentence, and enlisted persons above the fourth enlisted pay grade may not be sentenced to confinement or hard labor by summary courts-martial, or reduced except to the next inferior grade. MCM pp 16b and 127c. See also, Middendorf, Sec of Navy v. Henry, 425 U.S. 25, 33, 96 S. Ct. 1281, 1287, 47 L. Ed. 2d 556 (1976)

[12] *See,* RCM 307 Preferral of charges. It is important to note that any person subject to the UCMJ may prefer charges. However, an accuser who prefers charges must sign the charges and specifications under oath before a commissioned officer authorized to administer oaths, and state that he or she has personal knowledge of the charges or has investigated the matters in them. Additionally the accuser must believe the charges to be true under a unique standard which reads "true in fact to the best of that person's knowledge and belief." Id., see also United States v. Miller, 31 M.J. 798 (AFCMR 1990)

[13] *See,* RCM 308

[14] Over time, the court-martial has come to substantively mirror the federal criminal court system. *See, e.g.*, United States v. Smith, 27 M.J. 242 (CMA 1988). There are, however, specific rights of military members not found in state and federal courts, such as the legal protection against unlawful command influence. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) Curry v. Secretary of the Army, 595 F.2d 873, 879 (1979); United States v. Stoneyman, 57 M.J. 35 (2002) (each reaffirming unlawful command influence as "the mortal enemy of military justice".

[15] See R.C.M. 307. The individual preferring charges must be sworn and believe, to their best knowledge, the substance of the charges to be true.

[16] See UCMJ, Article 32. For a discussion regarding the differences between an Article 32 hearing and a grand jury proceeding, see Lieutenant Colonel Theodore Essex and Major Leslea Pickle, *A Reply to the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F.L. Rev 233, 250-51 (2002)

[17] See UCMJ, Article 32

[18] See R.C.M. 601

[19] *See, e.g., Weiss v. United States*, 510 U.S., at 180-81, (holding that the military justice system possesses inherent safeguards to insure judicial impartiality)

I: Classified Information Procedure Act and MRE 505: Overview

A. CIPA

The Supreme Court has both carved exceptions and recognized limits to a defendant's Constitutional rights.[20] Some of these rights might be viewed as impacting the traditional view of the right to a fair trial.[21] For instance, the right of individual liberty may become secondary in wartime where the government believes the individual to be dangerous to national security.[22] In criminal cases involving sexual abuse against children, there is no absolute Sixth Amendment confrontation clause right to confront the child witness in the presence of the defendant.[23] Likewise, in rape and sexual assault cases, mechanisms exist to protect the identity of the victim from the public.[24] In terms of national security related evidence, the importance of protecting such information against public view is balanced through CIPA.

Passed by Congress in 1980, CIPA was designed to address a growing problem of graymail.[25] Graymail is a term describing a defendant's threat to expose classified intelligence through otherwise lawful procedural means

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[20] See e.g., Powell v. Alabama, 287 U.S. 45, 53 (1932) [holding the right to secure defense counsel of choice is not absolute]

[21] *But see*, BLACKS LAW DICTIONARY (defining a fair and impartial trial as "a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration or evidence and facts as a whole"). The dictionary cites *Raney v. Commonwealth* for the proposition that a fair trial is "one where the accuser's legal rights are safeguarded and respected. BLACKS LAW DICTIONARY, 596 6th ed. 1990. *See*, *Irwin v. Dowd*, 366 U.S. 717, 728 (1961), holding:

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair trial.

Id., at 729 (Frankfurter J. concurring).

[22] *See e.g. ,Ludecke v. Watkins*, 335 U.S. 160, (1948) [permitting the internments of foreign nationals of an enemy state during time of war]

[23] *See, e.g., Maryland v. Craig* 497 U.S. 836 (1990) [permitting a child victim to testify outside of the presence of a defendant in specified circumstances]

[24] *See, e.g.,* MRE 412 [limiting the admissibility of a victim's sexual conduct that is unrelated to an accused's charged offense]; Federal Rule of Evidence (FRE) 412 [limiting the admissibility of a victim's sexual conduct that is unrelated to an defendant's charged offense]; and, *United States v. Yazzie*, 59 F.3d 807 (9th Cir 1998)

[25] *See, e.g.,* David I. Greeenberger, *An Overview of the Ethical Implications of the Classified Information Procedures Act*, 12 GEO. J. LEG. ETHICS 151 (1998) (citing, S. Rep. No. 96-456, at 2 (1980)) (defining Graymail as a tactic of threatening to disclose classified information during the course of the prosecution in order to influence prosecutorial discretion). *also*, Sandra Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUMB. L. REV. 1651 (1991).

during trial.[26] Graymail use in cases involving classified information is problematic for the government because it has dissuaded prosecution in some cases.[27] CIPA was not designed to provide prosecutors otherwise repugnant advantages over defendants.[28] Federal courts are obligated to watch for overzealous use of CIPA and do not always accept government proffers of necessity to protect classified evidence. For instance, in *United States v. Fernandez*,[29] the government appealed a trial judge's order to release classified information, or in the alternative, to dismiss charges against a defendant.[30] On prosecution appeal, the Fourth Circuit held the trial judge did not abuse his discretion in executing this order.[31] The trial judge reviewed the contested evidence and based his order on this review as well as the arguments of both parties.[32] He concluded that requirements of a fair trial, including the right to present a complete defense necessitated the release of evidence.[33]

CIPA defines classified information as "any information or material that has been determined by the United States government pursuant to an Executive Order, statute, or regulation, to require protection against authorized disclosure for reasons of national security."[34] Likewise, national security is defined as "the national defense and foreign relations of the United States."[35] Neither of these terms have been found to be unconstitutionally vague.[36] CIPA permits any party, after an issue of indictment, to move the court for a pretrial conference "to consider matters relating to classified information that may arise in connection with the prosecution."[37] In this conference, the court must consider timing of discovery requests, the provision of notice requirements, and the procedure to determine the use, relevance, and admissibility, of classified information.[38]

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[26] Greenberger, supra note 22 at 152.
[27] *See, e.g.*, Richard Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427, 429-91 (1988).
[28] *United States v. La Rouche Campaign*, 695 F. Supp 1282, 1285 (D. Mass 1988).
[29] 913 F.2d 148 (4th Cir. 1990).
[30] *Id.* at 149. Joseph Fernandez had been interviewed by officers from the inspector general concerning his tenure as CIA station chief in San Jose, Costa Rica. He specifically was questioned about paramilitary support activities, his association with Col Oliver North, and the construction of an airstrip with CIA funds. *Id.* He was later charged with making false statements to the investigators as well as obstruction of justice. *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] 18 U.S.C. app 3 §1.
[35] 18 U.S.C. app 3. §1
[36] *See United States v. Wilson*, 571 F. Supp. 1422 (D.C. NY 1983) *United States v. Joliff*, 548 F. Supp 229 (D.C. Md 1981)
[37] 18 U.S.C. app 3, § 2 (2000)
[38] *Id.*

CIPA permits the prosecution to seek a protective order from the court.[39] This protective order is designed to prevent any classified information disclosed by the United States to a party in the criminal case.[40] The order is also intended to establish adequate procedures to protect classified information at all stages of the trial.[41] CIPA requires the appointment of a court security officer (CSO) to oversee the order.[42] The CSO is charged to insure classified information is properly handled while assisting both parties and the court in obtaining security clearances.[43]

As noted above, CIPA was not designed to provide an advantage for the prosecution by limiting discovery. Indeed, Section 4 of CIPA balances the discovery rights of a defendant against the government's national security considerations. It permits the court to redact or delete classified items not relevant to an element of a specific defense.[44] It also permits the government to provide a summary substitute of information.[45] However, the government appears required to provide the court, *in camera*, with a complete copy of the evidence to insure the defendant's discovery rights are intact.[46] Section 4 does not abrogate discovery requirements under the Federal Rules of Criminal Procedure, nor is the *in camera* process unconstitutionally constraining on the right to mount a defense.[47] Finally, during the discovery process, classified

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[39] 18 U.S.C. app 3, § 3. *See also United States v. Pappas*, 94 F.3d 795 (2nd Cir. 1996). In Pappas, the government argued a judge's protective order was not a proper subject for an interlocutory appeal. Id. In determining when a protective order is appealable, the Second Circuit held:

> the scope of CIPA prohibitions on a defendant's disclosure of classified information may be summarized as follows: information conveyed by the Government to the defendant in the course of pretrial discovery or the presentation of the Government's case may be prohibited from disclosure, including public disclosure outside the courtroom, but information acquired by the defendant prior to the criminal prosecution may be prohibited from disclosure only "in connection with the trial" and not outside the trial.

Id. at 801. Thus, where a judge provides a broad protective order for matters outside the pending litigation, a defendant may seek an interlocutory appeal. However, in the military context, it may be the case that public dissemination of classified materials may cause further charges for dereliction of duty, or disbarment of civilian defense counsel.

[40] 18 U.S.C. app 3, §3.

[41] *Id.*

[42] *Id.* The CSO is an employee of the Department of Justice's Management Division. *Id.*

[43] *Id.*

[44] 18 U.S.C. app. 3, § 3.

[45] *Id.*

[46] *Id.* For understanding the court's procedural requirements, see 18 U.S.C. app 6(d). Under this provision, the courts are required to seal all materials it determines, during an *in camera* proceeding, as non-discoverable. Because either party may seek appellate relief, the sealed information is available for consideration to the appellate court.

[47] *See, e.g.*, *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir. 1983), *cert. denied.*, 479 U.S. 839 (1986) [holding in camera review by trial judge comported with due process requirements]; *United States v. Joliff*, 548 F. Supp. 229, 232 [holding the use of in camera proceedings are "particularly appropriate" prior to the release of classified evidence]; *United States v. Wen Ho*

information is not discoverable on a mere showing of theoretical relevance in face of the government's classified information privilege.[48]

Once the defense is provided with classified information, they are required to inform the government of their intent to disclose the information at trial.[49] This includes instances where the defendant has been privy to classified information prior to trial, by virtue of employment.[50] The notice must adequately specify the classified information, including, hard-copy materials, statements intended for open court, testimony envisioned as elicited from witnesses on cross or direct examination, or any attempt at making information public.[51] The remedy for an incomplete or late notice includes a further order for specificity, or even suppression.[52] For instance, in *United States v. Collins,*[53] a retired United States Air Force general was prosecuted in federal court for misuse of government monies while he was on active duty.[54] Collins notified the government of his intent to use classified information in his defense.[55] The prosecution objected to Collins' notice arguing it lacked specificity.[56] The trial judge concluded the notice lacked specificity and

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Lee, 90 F. Supp.2d 1324, 1326 (D.C. NM 2000). [holding in camera proceedings appropriate in cases where classified evidence may be divulged.]

[48] *See, United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

[49] 18 U.S.C. app. 3, § 5. *See also, United States v. Miller*, 874 F.2d 1255, 1276 (9th Cir. 1989), *rehearing denied* 884 F.2d 1149 (9th Cir. 1990), *cert. denied* 510 U.S. 894 (1991). [holding that a generalized description of classified evidence satisfied the CIPA notice requirement].

[50] *See., United States v. Collins*, 720 F.2d 1195 (11th Cir 1983).

[51] *Id.*

[52] *Id.*

[53] 720 F.2d 1195 (11th Cir 1983).

[54] *Id.,* at 1196. Interestingly, the Secretary of the Air Force did not recall him to active duty for prosecution before court-martial. A recall to active duty would have been lawful. *See, e.g.*, UCMJ Article 2(a); *United States v. Overton*, 24 M.J.309 (CMA 1984) *cert. denied* 428 U.S. 976 (1987); *Sands v. Colby*, 35 M.J. 620 (ACMR 1992). However, a finding of guilt before a court-martial could have resulted in loss of all retirement benefits. See e.g., United States v. Reed, 54 M.J. 37 (CAAF 2000). [holding that although dismissal of an officer usually results in a loss of retirement benefits, such a loss is seen as a collateral consequence to the court martial sentence.]

[55] *720* F.2d, at 1197. Collins notification read as follows:

> Said classified information concerns activities of the U.S. Government with respect to joint Intelligence/Military operations and the utilization of secret overseas bank accounts to finance said operations. Moreover, said classified information includes the developing of secret government bank accounts and the transfer of funds surreptitiously into the United States Treasury. In addition the defendant intends to disclose or cause the disclosure of all matters coming within the defendant's administration as Director of (his job description) for the United States Air Force, and, as such, his operation of a unit of said department called "(named)" which coordinated many operations in Southeast Asia and elsewhere.

Id., at 1197-98.

[56] *Id.*

ordered Collins' to supplement the notice.[57] Collins failed to comply, and the court, despite prosecution objections, permitted Collins to generally admit classified information.[58] However, because the government remained unaware of specific evidence, the prosecution directly appealed to the circuit court.[59] The Eleventh Circuit held that Collins' notification lacked specificity and remanded the case to the district court for further proceedings.[60] Had Collins refused to comply with the Eleventh Circuit's ruling, it is conceivable the trial court could have suppressed his classified evidence from the trier of fact.

Once the defense provides notice, the prosecution is afforded the opportunity to object to the use, relevance, and admissibility of the evidence as per section (c).[61] Additionally, the prosecution may motion the court to permit summaries or redacted copies in lieu of the original classified information.[62] Likewise, limitations on testimony may be sought and granted.[63] For instance, in *United States v. Collins,*[64] on remand, the defense argued section 6(c) was unconstitutional because it precluded the right to a complete defense.[65] The district court held that through its gatekeeper duties it insured the right remained intact.[66] Although the court felt *Collins* presented a case of "first impression," it alluded to its power to alter evidence presentation through FRE 401 and 403, was the basis for its ability to limit evidence under CIPA.[67] *Collins*, is an important benchmark case for an additional reason. The District Court's articulated that the historic basis underlying the right to obtain discovery and present a complete defense is not eroded under CIPA.[68] Second, the court found its gatekeeper duties in CIPA cases

Should the court fail to grant relief, CIPA affords the prosecution the right, via interlocutory appeal, to seek relief though the appellate process.[69] The attorney general may also file an affidavit objecting to disclosure.[70] If this

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[57] *Id.* The district court ordered General Collins to make a "good faith effort" to supplement the notice, but no new or supplemental notice was filed or required. *Id.* The court ordered the government to furnish defendant with information to assist defendant in identifying and describing classified information, and the government furnished various documents. *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*, at 1119-1200. stating, The court must not countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise at what may be revealed in the defense. To do so would merely require the defendant to reduce "graymail" to writing. *Id.*
[61] 18 U.S.C. app.3 § 6 (2000)
[62] *Id.*
[63] *Id.*
[64] 603 F. Supp. 301 (S.D. Fla 1985) [hereinafter Collins II]
[65] *Id.*
[66] *Id.*
[67] *See id*, at 304.
[68] Id., at 303
[69] 18 U.S.C. app. 3 § 6(e)(1) (2000).
[70] 18 U.S.C. app.3 § 7.

occurs, the court may require the prosecution to dismiss charges.[71] Forcible dismissal is unlikely for two reasons. First, Congress designed CIPA to prevent a forcible dismissal of charges. Second, Federal courts have recognized CIPA's design to prevent "graymail," as the government possesses a strong interest in bringing suspected criminal offenders to trial as part of its police power.

B. Military Rule of Evidence 505

In a court-martial, government information may be privileged under two different rules of evidence. Military Rule of Evidence (MRE) 505 provides protection for classified information. MRE 506 provides protection for unclassified, but important government information.[72] This article does not address MRE 506.

MRE 505 permits a privilege against evidentiary disclosure where the disclosure would be detrimental to national security.[73] It also encompasses all stages of a criminal proceeding.[74] The rule defines the term classified information as "any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. 2014."[75] Additionally, MRE 505 defines "national security" as "the national defense and foreign relations of the United States."[76] These terms, although not considered in a military context, as noted above, have been upheld as valid terms and not unconstitutionally vague.

The privilege may be asserted by the head of the executive or military department or government agency.[77] The condition for asserting the privilege is twofold. First, the information must be properly classified.[78] Second, a release of the information must be detrimental to the national security.[79] An assertion of the privilege does not require the agency head to appear at court.[80] Instead, the agency head may delegate the assertion to trial counsel, or a

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[71] *Id.*
[72] *See* MRE 506; *United States v. Rivers*, 44 M.J. 839 (ACCA 1998). This rule is also known as the public interest privilege. While this rule is not analyzed in this Article, mention of it is required for the remaining analysis.
[73] MRE 505(a).
[74] *Id.* MRE 505 states:(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings.
[75] MRE 505(b)(1); 42 U.S.C. 2014.
[76] MRE 505(b)(2).
[77] MRE 505(c).
[78] *Id.*
[79] *Id.*
[80] *Id.*

witness.[81] The authority of either is assumed in the absence of contrary evidence.[82] Only one published decision analyzes the delegation of power issue. In *United States v. Flannigan*,[83] the Air Force Court determined that the commander of the Air Force Office of Special Investigations (AFOSI) did not have the authority to, *sua sponte*, declare material classified.[84] The Air Force Court of Criminal Appeals concluded the plain language of MRE 505 mandates only the "head of the military department concerned" possessed that authority.[85] The court recognized the Secretary of the Air Force could have properly delegated authority to the AFOSI commander, but had not done so.[86] Interestingly, both the prosecution and AFOSI would have been better served in arguing the public policy exceptions under MRE 506.

Additionally, the quantum of evidence (or burden on the accused) required to dispute proper classification, proper delegation of authority, or impact on national security has not been fully established. Given the traditional deference of courts to executive determinations, the quantum of required evidence would be greater than the preponderance standard typical in other pretrial motion determinations, making the burden of the defendant very high.[87] For instance, in *United States v. Pruner*,[88] an agency's decision to not declassify information was discussed by the Court of Military Appeals. Pruner was prosecuted under the UCMJ for desertion on the eve of the first Persian Gulf War.[89] He was assigned as an intelligence analyst with the 1st Infantry Division.[90] Pruner motioned the court to order evidence declassified, not for findings, but for extenuation and mitigation in sentencing.[91] In the alternative, he motioned the court to force the prosecution to dismiss charges.[92] Neither

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[81] *Id.*
[82] *Id.*
[83] 28 M.J. 988 (AFCMR 1989) *rev.d* 31 M.J. 240 (1990) (reversing in part on other grounds) Flannigan, an AFOSI agent was convicted of dereliction of duty (UCMJ, Article 92), wrongful use of marijuana (UCMJ, Article 112a), and adultery (UCMJ, Article 134). Id., He was sentenced to a bad conduct discharge, reduction to E-2 and seven months confinement. *Id.,* at 988. However, on appeal, the Air Force court reassessed the sentence a bad conduct discharge, reduction to E-3 and a seven months confinement. *Id.* at 991.
[84] *Id.* at 989-90. AFOSI sought to declare specific regulations titled "OSI Regulation 124-68, Undercover Guide," and "OSI Pamphlet 124-51" as vital to national security. *Id.*
[85] *Id.* at 990.
[86] *Id.*
[87] *See, e.g.*, MRE 311; *United States v. Beckett*, 49 M.J. 354 (CAAF 1998).
[88] 31 M.J. 272 (CMA 1991).
[89] *Id.* Specifically, Pruner was charged with desertion with intent to avoid hazardous duty (UCMJ, Article 85), absence without leave with intent to avoid maneuvers (UCMJ, Article 86), and missing a movement (UCMJ, Article 80). He also unsuccessfully sought to enjoin the Army from prosecution in the federal courts. *See Pruner v. Department of the Army*, 755 F. Supp 362 (D. Kan. 1991).
[90] Pruner,19 M.J. at 273. Pruner also asked to court for permission to release classified information to his military and civilian defense counsel.
[91] *Id.*
[92] *Id.*

the military judge at trial, nor the Army Court of Criminal Appeals found disclosure was required, in part, because Pruner failed to comply with procedural disclosure requirements.[93] Thus, the Army Court of Criminal Appeals did not fashion a burden of proof for an accused to overcome.

As noted above, referral of charges constitutes the convening authority's decision to try charges before courts-martial. Referral of charges also imposes discovery requirements on the government. However, where classified evidence is in question an additional burden is placed on the government. Prior to referral of charges, the convening authority must notify an accused that evidence of a classified nature exists, but that such evidence will not be provided to the defense.[94] The convening authority may delete classified specified items of documentary evidence prior to providing a copy to the defense.[95] A summary of evidence may also be provided.[96] Substitute statements in lieu of original statements are also possible.[97] Finally, the convening authority may decide against any disclosure if no means to protect the national security may be accomplished during disclosure.[98] However, in each of these possibilities, the original items must be provided to the military judge for *in camera* review.[99] The military judge then becomes the arbiter of sealed evidence, insuring a fair trial. The convening authority may also permit the defense to review the entire original evidence but place limits on the location of viewing and disclosure.[100]

After referral of charges but prior to trial, either the prosecution or defense can seek a pretrial session to consider and resolve matters relating to the discovery or presentation of classified matters.[101] Moreover, the military judge is required to hold a pretrial session when classified matters arise.[102] He or she must determine the timing of requests for discovery; whether the accused has stated an intention to disclose classified information and, the initiation of *in camera* proceedings to determine disclosure.[103] It is possible that where an accused, holding a security clearance or other pertinent classified information, is charged with an offense such as dereliction of duty, the accused may seek to testify as to classified material as part of a recognized defense.[104]

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[93] *Id.* Pruner's arguments are highly suspicious of "graymail" because the classified information he claimed to possess.
[94] *See e.g.*, *M*RE 505(d)(1).
[95] *Id.*
[96] MRE 505(d)(2).
[97] MRE 505(d)(3).
[98] MRE 505(d)(5).
[99] MRE 707(g)(2) provides for *in camera* review. A party motions the judge for in camera review if it seeks to have discovery denied, restricted, or deferred. Id.
[100] MRE 505(d)(4).
[101] MRE 505(e). This section arguably exists to ensure a steady flow of trial.
[102] *Id.*
[103] *Id.*
[104] MRE 505(f).

Where the accused claims privilege under MRE 505 and the defense intends to introduce classified evidence, the defense is required to notify the prosecution and convening authority.[105] This notification enables the convening authority to seek a judicial *in camera* determination as to release of evidence,[106] dismiss the all charges, dismiss the specifications and charges to which the evidence relates,[107] or, take other action to ensure the interest of justice are served.[108] It is essential to note that, nothing in the rule prevents the prosecution from seeking suppression under other rules of evidence, namely MRE's 401-402[109] and MRE 403.[110] However, the prosecution must be careful not to argue that the fact some evidence is classified, the military judge should weigh this in a standard admissibility determination.[111]

Within MRE 505, there are different means of protecting or preventing the disclosure of evidence. The prosecution can seek a protective order from the military judge.[112] The nature of the protection may take several forms such

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[105] *Id.*

[106] MRE 505(f)(1).

[107] MRE 505(f)(2).

[108] MRE 505(f)(3).

[109] MRE 401 reads:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id. MRE 402 reads in pertinent part, "Evidence which is not relevant is not admissible." MRE 402. MRE 401 is an exact copy of FRE 401. Likewise MRE 402 closely follows FRE 402.

[110] MRE 403 reads:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by the consideration of undue delay, waste of time, or needless presentation of the evidence." *Id.* MRE 403 is an exact copy of FRE 403.

[111] Although no military case law is on point as to this issue, see, e.g., *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994) [In this case, the Eleventh Circuit held, "the district court may not take into account the fact that evidence is classified when determining its "use, relevance, or admissibility.]

[112] MRE 505(g)(1) reads:

(1) Protective order. If the Government agrees to disclose classified information to the accused, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

> (A) Prohibiting the disclosure of the information except as authorized by the military judge; (B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (D) All persons requiring security clearances shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance; (E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense; (F) Regulating the making and handling of notes taken from material containing classified information; or (G)

as an order to store documents at a single protected location, or regulate the taking and handling of notes. The prosecution can also motion the judge to prevent disclosure of evidence to the defense altogether, with possible substitute evidence such as summaries or redactions from reports.[113] As part of the judicial determination, procedures are set for *in camera* review.[114] In terms

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> Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

MRE 505(g)(1).

[113] MRE 505(g)(2) reads:

> (2) Limited disclosure. The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

[114] MRE 505(i) In camera proceedings for cases involving classified information.

> (1) Definition. For purposes of this subdivision, an "in camera proceeding" is a session under Article 39(a) from which the public is excluded.
>
> (2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an in camera proceeding concerning the use of additional classified information.
>
> (3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information and an affidavit ex parse for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.
>
> (4) In camera proceeding.
>
> (A) Procedure. Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

of defense counsel and witnesses being able to view classified information, the onus is placed on all parties to facilitate the background clearance process.[115]

Where an accused indicates his intention to disclose classified information, a notice requirement is placed on the defense. The accused is required to provide both the prosecution and military judge notice, at a minimum time prior to arraignment.[116] This requirement is a continuing duty and there must be adequate specificity as to the contents of the testimony or evidence.[117] Under MRE 505, an accused is prohibited from disclosing classified information without first providing notice.[118] This is so the government has the opportunity to seek protection of the classified information.[119] The rule provides sanctions for failing to provide adequate notice. These sanctions include suppression of evidence or prohibiting examination of witnesses with respect to the classified information.[120]

Likewise, where the prosecution fails to disclose evidence, or if the military judge determines the accused is entitled access to classified evidence, the rule provides possible sanctions against the government. These sanctions include limiting witness testimony,[121] declaring a mistrial,[122] findings against the government in issues where the classified information is relevant;[123] and dismissing charges.[124] The latter action may occur with or without prejudice to the government.[125]

While in trial, the military judge serves as a "gatekeeper" for classified evidence. He or she is empowered to prevent unnecessary disclosure of classified information.[126] Additionally, the military judge may permit admission of only part of a writing or recording, or photograph that contains

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[115] MRE 506, *supra* note 106. *See, e.g.,* Lieutenant Colonel Eugene R. Milhizer and Lieutenant Colonel Thomas W. McShane, *Analysis of Change 6 to the 1984 Manual for Courts-Martial,* 1994 ARMY LAW. 40, 43. MRE 505(g)(1)(D) was amended to require the cooperation of all persons requiring security clearances, including defense counsel, in investigations necessary to obtain such clearances. Id. The amendment recognizes that the military judge has authority to require such cooperation from those involved in both the preparation and the conduct of the trial. Id.

[116] MRE 505(h)(1). The accused is required to notify prior to arraignment. However, the rule envisions earlier notification so that the military judge may fashion procedures during trial to protect information. *Id.*

[117] MRE 505(h)(2)-(3). The notice required must be more than a mere general statement of areas about which evidence may be introduced. The statement must particularize items of classified information. *Id.*

[118] MRE 505(h)(4).

[119] *Id.*

[120] MRE 505(h)(5).

[121] MRE 505(i)(4)(E)(I).

[122] MRE 505(i)(4)(E)(II).

[123] MRE 505(i)(4)(E)(III).

[124] MRE 505(i)(4)(E)(IV).

[125] Id

[126] MRE 505(j)(2).

classified information.[127] The military judge may also prohibit a witness from testifying as to classified matters.[128] Finally, the military judge may close the trial to the public.[129] Wherever classified information is protected, this protection extends to a portion, or all, of the record of trial.[130]

II. Federal and Military Law: Public Access and the Right to a "Complete Defense," in light of balancing concerns:

In the context of trials concerning national security information, perhaps the two greatest issues are disclosure of information to the public and discovery rights. Within the issue of disclosure come three separate concerns. The first concern involves the defendant's right to a public trial. Additionally, the rights of third parties, such as media, have a "qualified First Amendment right" to attend and report on trials. In cases involving espionage, there is a trend toward media interest.[131] A third concern involves the presentation of evidence via the evidentiary rules under the Military Rules of Evidence. The basis of this right begins in the pretrial discovery requirements on the government. In terms of discovery rights, as noted above, in military courts-martial, an accused is afforded broader discovery rights than found in either federal or most state law. MRE 505 serves as a mechanism for limiting these rights through the military judge's role as a gatekeeper. Secondarily, the defense may be precluded from presentation of evidence for non-compliance with MRE 505.

A. Right to Public trial under United States and Military Law and the Qualified First Amendment Rights of Third Parties; in the National Security Context

A defendant has a right to a public trial.[132] This right is rooted in the common law concept of public transparency to ensure due process and a fair

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[127] Id.
[128] *Id.*
[129] MRE 505(j)(5).
[130] MRE 505(k).
[131] *See, e.g.,* Major Christopher M. Maher, *The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information*, 120 MIL. L. REV. 83 (1988).
[132] *See, e.g., Press Enterprise Co., v. Superior Court of California* (*Press Enterprise I*), 464 U.S. 501 (1984). Holding that the right of public access includes jury voire dire processes. Likewise, in *Gannett Co., v. Di Pasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), the Court held the public enjoyed a qualified right to attend pretrial hearings. *Id.* at 397, Additionally, in *Globe Newspaper Co,. v. Superior Court for Norfolk County*, 457 U.S. 596, (1982), the Court found that both the press and public had a "qualified First Amendment right " to attend a criminal trial. Id.

trial.[133] The right to a public trial also applies to third parties in a First Amendment context.[134] The burden on the government to prohibit the press from reporting an essentially public function is exceedingly high.[135] Almost all aspects of the judiciary are considered subject to public scrutiny.

The right to public trial is guaranteed as a basic right in the Sixth Amendment's public trial clause, which provides that "in all criminal prosecutions, the accused shall enjoy the right to a . . . public trial."[136] For instance, in *Waller v. Georgia,*[137] the Court held that a prosecution sought court closure was unjustified. The prosecution motioned the trial court to close a pretrial hearing involving wiretap evidence because of a fear that public disclosure could harm the ability to investigate and prosecute persons other than the defendants.[138] In reversing a lower court's acceptance of this argument, the Court reasoned that public access enhances the goals of the criminal process. These goals include ensuring the prosecutor and judge carry out their duties openly and responsibly,[139] encouraging witnesses to testify truthfully while discouraging perjury,[140] and keeping all parties to the trial "keenly alive to a sense of their responsibility and to the importance of their functions."[141]

As in the case of several Sixth Amendment issues, the right to an open trial is not absolute. *In Press-Enterprise Co. v. Superior Court of California*, (hereafter, *Press-Enterprise II*)[142] the Court developed a test for determining when a trial may be closed to the public. The case issue originated in the context of a criminal trial. The state brought a twelve-count murder charge against a nurse and sought the death penalty.[143] The defendant successfully motioned the local magistrate to exclude the public from all proceedings. The

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[133] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 570, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980). In *Richmond Newspapers*, the court held: "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether the system of criminal justice is fair and right." Id., at 573., citing *Maryland v. Baltimore Radio Show, Inc*., 338 U.S. 912, 920 (1950). In Richmond Newspapers, however, one of the court's primary concerns dealt with the trial court's failure to make specific findings of fact where the defendant would be prejudiced by having his trial open to the public. Id., at 581.

[134] U.S. CONST. AMEND. I The First Amendment provides that "Congress shall make no law… abridging the freedom of speech or the press." U.S. CONST. AMEND. I

[135] *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 715-17 (1971) (Black J. concurring).

[136] U.S. CONST. AMEND. VI.

[137] 467 U.S. 39 (1984)

[138] *Id. at* 42, On appeal, the Georgia supreme court held the trial judge properly balanced the prosecutors request with the defendant's right to a public trial. *Id.*

[139] *Id.* at 46.

[140] *Id.*

[141] *Id.*, (citing *In re Oliver*, 333 U.S. 257, 270 n. 25, (1948) (quoting Thomas Cooley, Constitutional Limitations 647 (8th ed. 1927))

[142] 478 U.S. 1, (1986).

[143] *Id.* at 2.

motion was granted under the California penal code.[144] A news consortium unsuccessfully challenged the magistrate's decision at both the state appellate and state supreme-court.[145] However, their challenge resulted in only the preliminary trial hearing being conducted. On review, the Court recognized this was a novel issue as prior decisions involved closed hearings at the behest of the prosecution.[146] The Court also acknowledged a tension between a defendant's Sixth Amendment right to a fair trial and the First Amendment rights of third parties.[147] The Court held that "while open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity."[148] Moreover, the term "qualified First Amendment right of access" was maintained throughout the case.[149]

Two other cases directly bear on the media's right to attend and report on trials. In *Nebraska Press Ass'n v. Stuart*,[150] the Court considered a trial judge's ruling prohibiting the press from reporting on specific evidentiary facts prior to the empanelment of a jury.[151] The judge's order was premised on the issue of the right to an impartial and unbiased jury.[152] The Court acknowledged a possibility that excessive media coverage could make empanelling an unbiased jury difficult.[153] The Court also recognized a tension

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[144] *Id.* at 3. California Penal Code section 868 (1985) required criminal proceedings to be open, "unless exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial." *Id.*

[145] *Id.*

[146] *Id.*, at 7, Two years prior to *Press-Enterprise*, the Court, in *Waller v. Georgia*, 469 U.S. 39, 104 S.Ct 2210, 81 L.Ed.2d 31 (1984), held where a defendant objects to the closure of a suppression hearing, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. *Id.* at 47.

[147] *In Press Enterprise Co.*, 478 U.S. at 8, the court acknowledged the history of public access to trials predated the Norman conquest of England. Id. However, the Court also concluded there are some government operations that would "totally be frustrated if conducted openly. *Id.*

[148] *Id.*

[149] *Id.*

[150] 427 U.S. 539 (1976).

[151] *Id.*, at 550.

[152] *Id.*

[153] *Id.*, at 548The Court acknowledged the tension existed for much of United States history in writing:

> The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching voir dire of the two panels eventually called, and rendered a substantial opinion on the purposes of voir dire and the standards to be applied.

Id., citing, 1 Causes Celebres, Trial of Aaron Burr for Treason 404-427, 473-481 (1879); (No. 14, 692g)(CC Va. 1807)). Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Mr. Chief Justice Marshall's careful voir dire inquiry into the matter of possible bias makes clear that the problem is not a new one. *Id.*

between the First and Sixth Amendments, but held that while there may be instances the right to public access may be overcome by other matters of greater importance, even in the face of pervasive media, a defendant's Sixth Amendment right to an unbiased jury is not among them.[154] This ruling is premised on the belief that voire dire and other procedural mechanisms may be used to obtain an unbiased jury. However, issues of *bona fide* national security concerns may overcome the First Amendment where the Sixth Amendment does not. Thus, the term "qualified First Amendment Right" has been a subject of debate in the context of national security considerations.

In 2002, the Third Circuit, held that where bona fide national security considerations are at risk, the media - and public - may be barred from view.[155] However, the Third Circuit acknowledged its decision was limited to deportation proceedings.[156] Additionally, it recognized its decision was counter to a similar case decided by the Sixth Circuit.[157] The government sought the court to distinguish between Article III courts and Article I proceedings such as deportation hearings.[158] One of the important features of *New Jersey Media Group* is that while the Third Circuit declined to distinguish Article III courts from other proceedings, it did distinguish access to political branch proceedings.[159]

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[154] *Id.* at 570, 96 S.Ct., at 2808. The Court specifically held:

> Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.

Id.

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[156] *Id.* at 201

[157] *Id.* (citing, *Detroit Free Press v. Ashcroft*, 303 F.2d 681 (6th Cir. 2002)).

[158] *Id.*, at 207. The Court specifically held:

> The Government contends that while Richmond Newspapers properly applies to civil and criminal proceedings under Article III, the Constitution's text militates against extending First Amendment rights to non-Article III proceedings such as deportation. Its premise is one of *expressio unius est exclusio alterius*: Article III is silent on the question of public access to judicial trials, but the Sixth Amendment expressly incorporates the common law tradition of public trials, thus supporting the notion that the First Amendment likewise incorporates that tradition for Article III purposes. Citing, (Gov't Brief at 21-22.) Articles I and II, conversely, do address the question of access, and they do not provide for Executive or Legislative proceedings to be open to the public.

Id. (emphasis added).

[159] *Id.* at 210. The Court recognized that Social Security administrative proceedings, federal energy regulation hearings, and administrative hearings related to national security matters may be closed to the public. *Id.*,(citing 5 C.F.R. 2638.505(e)(2) (hearings on ethics charges against government employees may be closed "in the best interests of national security, the respondent employee, a witness, the public or other affected persons")

The Third Circuit acknowledged six concerns in upholding the government's closure of the deportation proceedings. First, public hearings would reveal the investigation techniques.[160] Second, patterns of unlawful entry into the United States might provide terrorist organizations with information to construct a means for entry.[161] Third, information on specific individuals may provide terrorist cells the ability to evolve their operations.[162] Fourth, and additionally, terrorist cells may alter the time of their attacks.[163] Fifth, open proceedings might enable terrorist organizations to alter evidence in the hopes of interfering with the proceedings.[164] Finally, the Immigration and Naturalization Service (INS) has an interest in protecting the privacy of detainees who have no connection to terrorist organizations.[165] Ultimately, the Third Circuit decided that these national security considerations outweighed the right to an open deportation hearing.[166]

Courts-marital are similar to Article III courts, but their authority rests in the Executive branch under Article I. However, in the courts-martial context, an emerging body of law suggests that the public also has a strong, but qualified right to all stages in the court martial process.[167] This right possibly extends to the pretrial confinement determination process;[168] and definitely in Article 32 hearings,[169] courts-martial,[170] and appellate proceedings.[171]

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[160] *Id.*, at 218.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*, at 218-19
[166] *Id.*, at 219. The Court acknowledged the executive branch's duty to prevent another September 11, where it feared that such a failure could lead to even greater demands for restriction on liberty. Additionally, this decision in not without its detractors. *See, e.g., RECENT CASE: First Amendment - Public Access to Deportation Hearings - Third Circuit Holds That the Government Can Close "Special Interest" Deportation Hearings*, 116 HARV. L. REV. 1193 (2003).
[167] *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363 (CAAF 1997). [holding that an Article 32 investigation is an open process]
[168] *See*, MANUAL FOR COURTS-MARTIAL Rule 305 (2002). Pretrial confinement determinations are essentially administrative in that the reviewing authority (magistrate) need not be a military judge. The accused is not afforded the right to counsel in such proceedings. However, as in the case of Summary courts-martial, it has become common practice to provide defense counsel for pretrial confinement determinations.
[169] The pretrial investigation of charges under Article 32, UCMJ, although not a court-martial, is a judicial proceeding. *See, e.g., MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184, 185 (1970). [holding an Article 32 should be open to the public] *But see, e.g., San Antonio Express News v. Morrow*, 44 M.J. 706 (AFCCA 1996). In Morrow, the Air Force court upheld an Article 32 investigating officer's determination to close the Article 32 to media. However, the court acknowledged that the law favors a public proceeding:

> We also believe the American public is best served by pretrial investigations that, like courts-martial, are open to public scrutiny. As was said of courts-martial, such

However, the right is not absolute. For instance MRE 412 provides the court a mechanism to protect alleged victims of sexual assault from public trial on potentially embarrassing matters relating to sexual conduct.[172] Additionally, child witnesses appear to be afforded some protections against public scrutiny.[173] And finally, where national security considerations exist, the right to public trial may give way to those concerns.[174]

B. The Right to a Complete Defense: Potential CIPA and MRE 505 Limits on Cross-Examination and Credibility Evidence

1. Generally

The Sixth Amendment affords a defendant the right to a complete defense.[175] One aspect of a complete defense is the defendant's ability to obtain the background and identity of prosecution witnesses for possible impeachment and bias purposes. As noted further below, in cases involving undercover agents or national security matters, courts have recognized a balancing test between the defendant's constitutional right and the needs of protecting persons or evidence from public knowledge. Difficulties exist in circumventing an accused's right to fully probe witnesses and present a complete defense. While these cases involve public security concerns, none present national security considerations.

> scrutiny 'is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.' We believe the accused, the press, and the public have a recognizable interest in being informed of the workings of our entire court-martial process, and that no public interest is served by a blanket rule closing pretrial hearings.

Id., citing *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986) (citations omitted).

[170] *See e.g. United States v. Fiske*, 28 M.J. 1013 (AFCMR 1993); *United States v. Travers*, 25 M.J. 61 (CMA 1991); In *Fiske*, the defense counsel sought a closed hearing to which the military judge granted without placing a reason on the record of trial. This caused the court to comment:

> "This is the second case we are aware of in this decade that a military judge has closed an Air Force court-martial trial without a reason therefore being articulated on the record. That's two too many."

Id.

[171] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, Rule 1203.

[172] *See* MRE 412; *United States v. Graham*, 54 M.J. 605, 607 (NMCCA 2000).

[173] *See, e.g.*, *United States v. McCollum*, 56 M.J. 837 (AFCCA 2002).

[174] This later issue is analyzed in greater detail below

[175] See e.g., *California v. Trombetta*, 467 U.S. 479, 485 (1984) [holding that the Constitutional guarantee of due process requires that criminal defendants be afforded a meaningful opportunity to present a complete defense.]

In *Alford v. United States*,[176] the Court reversed a conviction where the trial judge prohibited the defense from cross-examining a witness as to that individual's place of residence.[177] The witness had been placed in federal protective custody and the defense argued that such matters were proper for bias.[178] The Court reasoned that cross-examination of a witness is a "matter of right."[179] Short of self-incrimination concerns, a judge should normally not prohibit cross-examination testimony where the identity of a witness is concerned.[180]

In *United States v. Rovario*[181] the Court recognized a privilege against informant identities that permits the government to withhold disclosure of either the identity or contents of a communication that would endanger the secrecy of that information.[182] The privilege exists to "further the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials, and, by preserving their anonymity, encourages them to perform that obligation.[183] However, this privilege must give way when disclosure of the information "is relevant and helpful to the defense of an accused."[184]

In *Smith v. Illinois*,[185] the Court reviewed the use of pseudonym testimony by a government informant. A prosecution witness, "James Jordan" was not required to testify as to his real name or residence.[186] In reversing the lower court, the Court recognized the defendant was not *per se* denied cross-examination, but that the denial affected the ability to probe the witness' credibility.[187] The Court appeared to place concern on the denial of full cross examination, in part, because the witness was a government informant.[188]

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[176] 282 U.S. 687 (1930).
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] 353 U.S. 53 (1957).
[182] *Id* at 59
[183] *Id.*
[184] *Id.*, at 60-61
[185] 390 U.S. 131 (1968).
[186] *Id.*
[187] *Id.*
[188] *Id.* The Court noted:

> At trial, the principal witness against the petitioner was a man who identified himself on direct examination as James Jordan. This witness testified he had purchased a bag of heroin from the petitioner in a restaurant with marked money provided by two Chicago police officers. The officers corroborated part of his testimony but only this witness and the petitioner testified to the crucial events inside the restaurant and the petitioner's version of those events was entirely different. The only real question at trial, therefore, was the relative credibility of the petitioner and this prosecution witness.

Id.

Alford, *Rovario*, and *Smith*, provide limited guidance regarding the issue of witness identity protection. Although witness identity protection, and public trials are interrelated issues, these cases, however, are of only limited value since none involved national security evidence and do not remotely touch on hard evidence such as methodologies, reports, or a list of other possibilities.

2. National Security Considerations in Federal Court: United States v. Yunis

Cases involving classified evidence that impact national security are problematic for courts. Unlike the *Alford* progeny of cases, issues of national security are viewed as having a greater secrecy interest by courts. Therefore, courts must perform a delicate balance between the defendant's right to present a "complete defense," and the United States' ability and right to protect evidence where disclosure might harm the national security.

In *United States v. Yunis*, [189]the D.C. Circuit Court was confronted with the issue of classified information which the defense claimed was important to their case. Yunis was a Lebanese citizen on trial for various aircraft hijacking charges on 11 June 1985.[190] In order to capture Yunis, the FBI recruited an individual named Jamal Hamdan into a government informant program.[191] The two met on several occasions where their conversation was intercepted by an undisclosed law enforcement gathering source or method.[192] Most of the conversation had little to do with the hijacking and instead centered on personal items.[193] Still, the FBI collected enough evidence to obtain a warrant for his arrest.[194] In September 1987, Hamdan and Yunis arrived in Cyprus under the ruse of conducting a narcotics deal.[195] On 13 September 1987, Yunis was captured by the FBI after boarding a yacht manned by agents.[196] From there, he was transported back to the United States where he was arraigned for trial.[197] In preparing for trial, his defense counsel sought discovery of several classified documents and recordings.[198] The prosecution refused to provide the

[189] 867 F.2d 617 (D.C. Cir. 1989).
[190] *Id.* at 618. Yunis, along with several other men, hijacked a Royal Jordanian Airlines aircraft with a full crew complement and sixty passengers, including six Americans. *Id.* After attempting and failing to fly to Tunis and Syria, Yunis and his compatriots evacuated the crew and passengers and blew up the aircraft. *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* The District Court characterized the transcripts of these conversations as something "interesting for an Ann Landers column or Dorothy Dixon, or someone of that sort." *Id.*
[194] *Id.*, at 619.
[195] *Id.*
[196] *Id.*
[197] *Id.* From the yacht, Yunis was transferred to a United States Navy munitions ship, the Butte, and then to the U.S.S. Saratoga, an aircraft carrier. Id. From that point, Yunis was flown on a naval aircraft to Andrews Air Force Base, Washington D.C. *Id.*
[198] *Id.* In a motion to compel discovery, the defense sought the following:

evidence requested, claiming the defense failed to state provisions of law entitling them to the evidence as well as the relevance of the specific items sought.[199] Additionally, the prosecution sought to keep some of the requested evidence as non-discoverable classified information.[200] In a series of pretrial motions, the district court ordered the prosecution to provide indexed lists of classified evidence, and the summary of all recordings between Yunis and Hamdan.[201] The prosecution complied, in part, but withheld some recoding evidence on the basis of national security. The district court, in response conducted a three-part inquiry as to the sought evidence. The first step of this inquiry was to determine relevance. The second step was a determination of materiality. Finally, as the third step, the court balanced the rights of the accused against the perceived harm to national security. The district court then ordered the prosecution to fully comply with its earlier discovery ruling.[202] In response, the prosecution filed an interlocutory appeal with the circuit court.[203]

The circuit court began its analysis with a discussion of Section 4 of CIPA. The court concluded that Section 4 created no rights of discovery or abridgement, but rather contemplated an "application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of the classified information."[204] The court acknowledged relevancy constitutes a very low threshold of proof.[205]

> 1. Documents generated by other federal agencies, to include military and intelligence organizations in connection with this case… this is to include any foreign governments who assisted…
> 12. Copies of all tapes or documentation of conversations between Jamal Hamdan and Mr. Yunis…
> 22. Any and all information concerning any tapes or wiretaps used in this case. The request includes, but is not limited, to any intercepted wire, oral or electronic communications, mobile tracking devices, pen registers, and trap and trace devices. The breadth of the request covers past or present operations whether domestic (warrant required) or *national security in nature andauthorization.*

Id.

[199] *Id.*

[200] *Id*. In a pretrial motion, the prosecution relied on section 2 of CIPA which provides:

> At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion… the court shall promptly hold a pretrial conference to establish the timing of requests for discovery.

Id.

[201] *Id*.

[202] *Id.,* at 621. In response, the prosecution notified the court of their intention to not call Hamdan as a witness and argued the sought evidence was no longer material. Id. However, the district court appeared unmoved by this argument. *Id.*

[203] *Id.*

[204] *Id.* at 621. Section 4 reads:

> The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure…"

[205] *Id.*

This is particularly the case where the defendant's own statements are at issue.[206] The circuit court concluded the lower court's determination of relevancy to be correct.[207] However, after an *in camera* review of the classified information, the circuit court found "two, or at most three, sentence fragments in the transcribed conversations possessed "even the remotest relevance to any issue."[208]

The circuit court further acknowledged a government privilege for national security concerns. This privilege is not written into CIPA, but rather the latter law establishes procedures to protect classified information. In part, the circuit court confined their analysis in the shadow of *Rovario*.[209] However, the circuit court took exception to the district court's analysis of the privilege test's third prong of balancing the national security considerations against the materiality of the evidence.[210] The circuit court appeared to give deference to the government's position, recognizing its "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[211] As a result of this defense, the circuit court concluded that "a mere showing of theoretical relevance" is not enough to overcome the privilege, but rather an entitlement only to information that is helpful to the defense of the accused, is the proper threshold.[212] The circuit court then concluded that the sought evidence was not sufficiently helpful to the defense to warrant disclosure.[213]

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[206] *Id.* at 621-22. The court held, generally speaking, the production of a defendant's own statements has become, "practically a matter of right even without a showing of materiality." *Id.* citing *United States v. Haldeman*, 559 F.2d 31, 74 n. 80 (D.C. Cir 1976) (*en banc*), *cert denied*431 U.S. 933 (1977).

[207] *Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989).

[208] *Id.* at 622.

[209] *Id.* at 623. The court held, CIPA's procedures protect classified information similar to the informants privilege identified in *Rovario*. *Id.*

[210] *Id.* The court concluded:

> [T]he District Judge, in his review… apparently misapprehended, at least in part, the nature of the sensitive information the government sought to protect. Our own view of the government's affidavits and transcripts reveals that much of the government's security interest in the conversation lies not so much in the contents of the conversations, as in the time, place, and nature of the government's ability to intercept the conversation at all. Things that did make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about the nation's intelligence gathering capabilities from what these documents revealed about sources and methods.

Id.

[211] *Id.*

[212] *Id.* (citing *Rovario*, 353 U.S. at 60-61)

[213] *Id.* at 62-65 The court acknowledged the possibility of depriving a defendant of potential evidence. *Id.* However, in the case of Yunis, the defendant was readily available to assist his counsel in his defense, particularly as to the conversations he engaged in with Hamdan. *Id.* Additionally, the Circuit Court did not employ the three part test used by the trial court. *Id.*

Yunis provides additional guidance for both sides in a federal trial. On the one hand, the decision forces the defense to show relevance where it intends to disclose or demands access to classified material. The prosecution, likewise must be prepared to divulge all potential evidence to the judge for an *in camera* review. Such evidence may be voluminous, but any determination for release or relevance is within the discretion of the judge and not the prosecution.

III: CASE ANALYSIS: *UNITED STATES V. LONETREE* (I & II)

In *United States v. Lonetree*[214] the then Court of Military Appeals upheld the efficacy of conducting part of a court martial outside of public view. The court also upheld the protection of witness identity for national security reasons. Of important note, the Supreme Court did not grant the case *certiorari*. *Lonetree* involved espionage allegations against a Marine Corps embassy guard in Moscow. Essentially, Sergeant Clayton Lonetree, became involved in a romantic involvement with a Soviet agent named Violetta Seina. During their relationship, he passed confidential information to another Soviet agent named Yefimov (aka Uncle Sasha). This information included the names and locations of covert United States intelligence agents, as well as, personnel information regarding the United States embassies in Vienna and Moscow.[215] At trial, he was charged, and ultimately convicted of violating thirteen specifications of the UCMJ.[216] Because of the sensitive national security nature of the court-martial, the prosecution motioned the court, pursuant to MRE 505(j)(5), to seal the public from certain witness testimony.[217] Over defense objection, the military judge ordered the public excluded from part of the court-martial.[218] However, the judge did not make

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However, the circuit court did not repudiate the test's usage either. *Id.* Merely, the Circuit Court held the defendant failed the second prong of the test and did not conduct a balancing as required by the third prong. *Id.* at 625.

[214] 31 M.J. 849 (NMCMA 1990), *cert. denied* 507 U.S. 1017 (1993).

[215] *Id.*, at 852.

[216] *Id.*, at 852. Sgt Lonetree was convicted of three specifications under Article 81, UCMJ (Conspiracy to commit espionage); four specifications under Article 92, UCMJ (Failure to obey order or regulation); five specifications under Article 134, UCMJ (General Article Violation); and one specification under Article 106a (Espionage). He was sentenced to thirty years, but this sentence was reduced by the Convening authority to twenty-five years. Lonetree served only nine of these years before his release. *See, e.g.*, CNN News release, 28 February 1996. [describing Lonetree's release from confinement]

[217] Lonetree, 31 M.J. at 853.

[218] *Id.* The Navy Marine Court noted that some intelligence agents testified in closed sessions, while other agent testimony occurred in a divided setting between closed hearings and public view. *Id.* Sgt Lonetree was defended by both military and civilian defense counsel. Sergeant Lonetree's military defense counsel was provided to him at no personal expense. However, he retained Mr. William Kunstler and Mr. Michael Stuhff , who later became the focus for a claim of ineffective assistance of counsel. *Lonetree,* 35 M.J. 396, 412.

individual findings of fact for each witness. Rather the judge ruled, after *in camera* review, generally as to subject matter.

On appeal, Lonetree argued each closure required a separate judicial finding. The Navy-marine court decided otherwise, holding that MRE 505 does not require separate judicial findings for each closed section.[219] Rather MRE 505 is directed toward the information sought to be exempted from disclosure at a public trial.[220] Thus, any number of witnesses testifying to the protected evidence will not require separate findings.[221] Lonetree also objected to the method of closing the court-martial and lack of accompanying judicial instructions for each closure.[222] The Navy Marine Court held that the trial judge erred in not providing oral instructions to the trier of fact for each disclosure.[223] However, the appellate court also found this omission constituted harmless error.[224]

The second national security issue at trial and on appeal dealt with the protection of witness identity and information. At the prosecution's urging, the court prevented the defense from learning the identity of a government witness and obtaining classified information.[225] As a result of this ruling, a witness was permitted to testify under a pseudonym and the defense was prohibited from obtaining certain classified evidence.[226] On appeal, the Navy-Marine court analyzed this unique issue in light of both the Sixth Amendment-based right to cross examine witnesses, as well as the broad right of discovery.[227] The court then analyzed the background and purpose of MRE 505, finding its

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[219] *Id.*, at 853

[220] *Id.*,(citing MRE 505(i)(4)(A) and (C)).

[221] *Id.* The court specifically held:

> To require a military judge to make specific findings each time a series of questions is to be asked of a witness, after the judge had already determined the responses were classified, would be to create unnecessary and disruptive bifurcation of the trial and constitute an exercise in redundancy. The confusion would make a difficult trial an incomprehensible one and would be the antithesis of a fair and orderly proceeding within the context of the facts of this case.

Id.

[222] *Id.*, at 854.

[223] *Id.*, at 854-55

[224] *Id.* The court appeared concerned along the same lines as the Supreme Court's reasoning in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that jurors cannot differentiate between the importance of a court protected disclosure and the credibility of the testimony. However, the court also held, "While error, there was not prejudice, because the weight of the evidence against Sergeant Lonetree was so overwhelming that the failure to give the instructions had no effect upon the findings." *Lonetree*, 31 M.J. at 855.

[225] *Id.*, at 856. The military judge reviewed the prosecution's evidence *in camera*, along with an accompanying top-secret affidavit to support invoking MRE 505's classified information privilege. *Id.*

[226] *Id.* The court held MRE 505(g)(2) applied when the government needs to limit or prevent disclosure. *Id.*

[227] *Id.*

roots in both the House version of the CIPA,[228] and the Supreme Court's review of executive privilege in several cases.[229] The Navy-Marine court concluded that CIPA was intended to counter the problem of "graymail" then seeping into United States criminal courts.[230] The court then analyzed MRE 505 in a balancing context between an accused's rights and the need to protect national security information.[231] The court also distinguished the use of MRE 505 in *Lonetree* from *Alford* and *Smith.* As noted earlier, in *Smith*, a prosecution witness testified under alias without enunciating a good reason, while in *Alford,* the prosecution had a government agent testify under a pseudonym. The Navy-Marine court distinguished the cases holding neither *Alford* nor *Smith* created a *per se* rule against pseudonym testimony.[232] Even though the court ruled against a per se rule, the use of a pseudonym may deprive the defense from impeachment evidence. The court recognized the Sixth Amendment might be violated when an accused is prohibited from "placing an adverse witness in his proper setting."[233] Nonetheless, the court found the right of impeachment is not absolute.[234] Indeed, the court placed reliance on the two prong test set in *Rovario,* as well as the Court's statement that it is necessary to balance, "the public interest in protecting the flow of information against the individual's right to prepare his defense."[235] The Navy-Marine court then required this two-part test for the accused to show prejudice. Relying on *Yunis,* the court held the accused must prove the requested material is relevant and material. The court recognized that while the first threshold is satisfied by "a mere showing of theoretical" relevance, the term "material" denotes a higher standard of proof.[236] Also, the Navy-marine court relied on *Yunis,* for the efficacy of *in camera* review procedures.[237]

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[228] 18 U.S.C.App. § 1-16

[229] *Lonetree*, 31 M.J. at 857 (citing *United States v. Reynolds*, 345 U.S. 1(1953)); *United States v. Nixon*, 418 U.S. 683 (1974).

[230] *Lonetree*, 31 M.J. at 857. The court defined "graymail" as occurring "when an accused seeks discovery or disclosure of sensitive national security information for the purpose of forcing the Government to discontinue prosecution to safeguard the information." Id., citing United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985).

[231] *Lonetree* 31 M.J., at 858.

[232] *Id.* The court also analyzed *United States v. Alston*, 460 F.2d 48, 51 (5th Cir 1972) in reaching a conclusion that no per se rule existed against pseudonym testimony. *Id.*

[233] *Id.*, at 859.

[234] *Id.*, (citing *McGrath v. Vinzant*, 528 F.2d 681, 684 (1st Cir. 1976)).

[235] *Lonetree*, 31 M.J. at 859. Holding: First, the privilege must be applicable to the circumstances of the case and not be limited by its underlying purpose. *Id.* Thus, if the information to be protected is known to the accused and can no longer be protected, then the privilege cannot be invoked. Id. Second, based on notions of fundamental fairness, when the information is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id*.

[236] *Lonetree*, 31 M.J. at 860.

[237] *Id.*.

In reviewing the facts of *Lonetree*, the Navy-Marine court placed weight on the fact that John Doe, had repeated contacts with the KGB.[238] The only significant substantive issue regarding his testimony was a single prior inconsistent statement. His trial testimony was corroborated in part by the testimony of other witnesses, and it sufficiently corroborated Sergeant Lonetree's confession. Finally, the court appeared pleased with the military judge's instruction to the trier of fact that the defense was restricted from cross examination into John Doe's credibility.[239]

In *Lonetree II*, the then Court of Military Appeals upheld the Navy-Marine Court's decision and adopted its Sixth Amendment analysis. The Court of Military Appeals held that the evidence relating to John Doe's background provided the defense with sufficient information for cross-examination.[240] The Court of Military Appeals first recognized that an accused's "right to know a witness's background is not without limit."[241] The Court then analyzed prior federal court holdings, in particular, *Rovario* and *Yunis*. The Court found particularly relevant, the District of Columbia Circuit Court's application of a two-part structure in *Yunis*, where a balancing test was not required because the evidence of John Doe was cumulative.[242]

As with the case of the Navy-Marine Court, the Court of Military Appeals possessed the contested *in camera* evidence relating to John Doe's testimony. The Court found the *in camera* evidence was not so essential as to deprive Lonetree of due process.[243] The Court's reasoning for not finding a denial of due process was based, in part, on the fact that John Doe did not provide a central piece of evidence to the prosecution's case because Lonetree had confessed.[244] Moreover, the Court of Military Appeals found the trial

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[238] *Id.* The court found as corroborating facts to both Doe's testimony and Lonetree's confession the following: Lonetree had expressed admiration for the KGB, *Id*. He purchased expensive clothing items for Violetta. Id. He possessed pictures and letters from her. *Id*. He received gifts from "Uncle Sasha" including a jewelry case. *Id*. He later expressed fear of the KGB. *Id*. At one point he sought leave during a period the KGB wanted him to surreptitiously visit Moscow. *Id.*

[239] *Id.* at 864. The judge at trial instructed the court as follows:

> Under normal circumstances the defense has full opportunity to cross-examine a witness concerning his or her true name, background and/or circumstances surrounding his or her testimony. In one respect, cross-examination into these matters assists you, the finders of fact, in determining the credibility of the witness. Therefore, you may consider the restriction I have placed on John Doe's testimony as well as the restriction of the defense's cross-examination in evaluating his credibility. If, after hearing John Doe's testimony and observing his demeanor, you have enough information to determine his credibility, then you may give such weight to his testimony that is commensurate with that determination.

Id. at 864-65.

[240] 35 M.J. at 405.

[241] *Id.* at 408.

[242] *Id* at 409-10.

[243] *Id.* at 410.

[244] *Id.*

judge had properly exercised the "safety of persons" in maintaining John Doe's identity as secret.[245]

An issue of first instance also arose in *Lonetree II*. The government motioned the Navy-Marine Court to close the court for oral argument. That court directed a closed session for all arguments pertaining to classified information.[246] Lonetree appealed this issue to the Court of Military Appeals. That court found the Navy-Marine Court's action proper.[247]

IV: *LONETREE'S* AFTERMATH AND FUTURE CONSIDERATIONS

Since *Lonetree*, there have been few espionage courts-martial, and of these none has challenged the constitutionality of MRE 505.[248] However, there have been cases involving a compromise of national security based on dereliction of duty, or failing to obey a lawful regulation. For instance, in *United States v. Brown,*[249] an active duty member was sentenced to two years confinement and a bad conduct discharge for sending classified information to an unauthorized person.[250] On appeal, Brown did not challenge the MRE 505 procedures which closed his court-martial to the public during certain testimony. Instead, he appealed the jurisdiction of the convening authority to try the case.[251] Likewise, in *United States v. Fleming,*[252] the accused was convicted of mishandling and failing to safeguard classified information.[253] During the trial, the military judge failed to instruct the trier of fact that his order to seal the courtroom to the public did not constitute a statement of guilt.[254] The Court of Military Appeals did not consider the failure to constitute reversible error.[255] In *United States v. Roller,*[256] the accused was

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[245] *Id.* at 411.
[246] *Id.*
[247] *Id.* While rare, *in camera* oral arguments are not unheard of in federal courts. *See, e.g., Application of the United States*, 427 F.2d 639, 641 (9th Cir 1970)[recognizing the rarity of in camera evidentiary reviews]; *Central National Bank v. U.S. Department of Treasury*, 912 F.2d 897, 900 (7th Cir. 1990) [recognizing the need for in camera evidentiary reviews]
[248] *Se, e.g., United States v. Anzalone*, 40 M.J. 658 (NMCCA 1994). Anzalone was prosecuted and convicted of attempted espionage. Although the court utilized the MRE 505 procedure to protect classified evidence, the accused did not appeal, the court's grant of a closed hearing during part of the trial. The main issue in Anzalone's appeal was one of factual sufficiency.
[249] 39 M.J. 114 (CMA 1994).
[250] *Id.* at 115.
[251] *Id.* This argument was found to be without merit.
[252] 38 M.J. 126 (CMA 1993).
[253] *Id.* Fleming was a mixed pleas case. He was sentenced to a bad conduct discharge and four years confinement. *Id.* However, the convening authority reduced his sentence to twenty-four months. *Id.* Fleming collected, for his personal use, hundreds of photographs taken from a submarine periscope. *Id.* These photographs constituted classified material. *Id.*
[254] *Id.*
[255] *Id.* However, the court pointed out that in *United States v. Grunden*, 2 M.J. 116 (CMA 1977), the court mandated such an instruction because the failure to do so might cause the trier

convicted of "permitting" classified material to be removed from its place of storage.[257] As in these other cases, Roller did not challenge the use of MRE 505 on appeal. Instead, he argued a "factual sufficiency" basis for challenging his conviction.[258] However, the fact that *Lonetree* remains "good law," and that federal CIPA law strengthens the case for both courtroom closure and limiting discovery rights as to classified material, does not mean analysis on MRE 505 should cease. Three salient areas ought to continue as a focus for concern: the *defacto* limitation on right to counsel because of security clearance concerns; the discovery limitation tensions inherent with the right to have counsel fully investigate the offenses and present a complete defense, and the right of public access. As seen from the analysis below, these issues are interrelated in the context of a trial involving MRE 505.

A. Right to Counsel:

Because most military defense counsel will possess some type of clearance, it is likely that most will be entitled to review classified documents. This does not remain true of civilian defense counsel. An accused has the right to contract a civilian defense counsel in most courts-martial cases,[259] however, this right is not absolute.[260] The right to a specific counsel may give way to docketing considerations, status and availability of defense counsel, and, perhaps, the lack of a security clearance.[261] Should the accused seek a security clearance for a civilian defense counsel, he will likely abrogate his right to a speedy trial.[262] This appeared a concern even prior to the existence of MRE

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of fact to infer guilt. *United States v. Grunden*, 2 M.J. 116 (CMA 1977). In *Fleming*, the judge tailored a separate presumption of innocence instruction that was lacking in *Grunden*.

[256] 37 M.J. 1093 (CMA 1993).

[257] *Id.* Roller accidentally removed classified material from his place of work and then took it home. *Id.* When he discovered the material, he stored it at home, with the intention of destroying it. *Id.* However, a contracted mover began to pack the contents of his garage and discovered the information. *Id.* Roller was convicted on this basis. He received ten months and a bad conduct discharge. *Id.*

[258] *Id.*

[259] *See, e.g., United States v. Miller*, 47 M.J. 352, 358 (CMA 1997) In Miller, the military judge refused to grant a continuance so that the accused's newly contracted civilian defense counsel could have time to prepare for trial. *Id.* The Court of Appeals determined Miller was prejudiced by the denial of a continuance. *Id.*

The right to counsel is rooted in the Sixth Amendment. For a comprehensive analysis of this right in military courts, see, e.g., Lt Col. Norman K. Thompson and Capt Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1 (2000)

[260] *See e.g. United States v. Beckley*, 55 M.J. 15 (CAAF 2001); *United States v. Thomas*, 22 M.J. 57, 59 (CMA 1986) (citing *Morris v. Slappy*, 461 U.S. 1 (1983)).

[261] *See, e.g., United States v. Bin Laden*, 58 F. Supp. 113, 118-19 (S.D.N.Y 1999).

[262] *See, e.g.*, RCM 707.

505. In *United States v. Nichols*,[263] an intelligence officer retained a civilian counsel in a court-martial involving classified materials. Because the civilian counsel did not possess a security clearance, he was unable to attend the Article 32 hearing.[264] The court recognized the potential problem with cases involving civilian counsel but concluded the possibility of inordinate delay rests with the accused's choice of counsel, assuming that the counsel can even obtain clearance.[265]

A secondary issue arises in the context of an "uncleared counsel." Should the civilian counsel be unable, or unwilling, to obtain a clearance, the accused will likely need to find other counsel or be content with his appointed counsel. If the accused seeks to continue representation by an uncleared counsel, and the court permits this representation, the counsel will ultimately be precluded from a full representation of his client.[266] A less than full representation is an anathema to military practice. Because counsel are expected to be competent to practice before a court, any limitations on the right to counsel in the national security context, are probably found in the rules related to competency to practice.[267] One case provides military courts with guidance on this issue. In *United States v. Bin Laden*,[268] the District Court for the Southern District of New York held the right to select counsel is not an absolute right.[269] In that case, the prosecution moved the court to compel clearance of defense counsel.[270] The prospective defense counsel objected against a compelled background inquiry.[271] The District Court, in response

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[263] 8 U.S.C.M.A. 119, 23 C.M.R. 343, 350-53 (CMA 1957). The Court, in Nichols recognized the government had three choices in dealing with an accused represented by civilian counsel:

> "It can permit the accused to be defended by his own lawyer, or it can defer further proceedings against him, or it can, for proper cause, disbar the lawyer presented by the accused from practice before courts-martial."

Id. at 349.

[264] *Id.*

[265] *Id.* (holding: It is arguable that if exclusion of counsel is not permitted, except as a result of a disbarment proceeding, an accused's choice of questionable counsel can inordinately delay the proceedings
against him)

[266] See e.g. *United States v. Schmidt,* 59 M.J. 841 (AFCCA 2004) rev. 60 M.J. 1 (CAAF 2002). In Schmidt, the Air Force initially denied the accused's counsel access to classified material by virtue of counsel no possessing a proper clearance. Ultimately, counsel obtained a proper clearance, but the government refused to permit the accused to "discuss classified material," with the civilian counsel. The Air Force Court upheld the trial judge's ruling. However, CAAF reversed, finding the lower court erroneously relied on MRE 505(h)(1). This section only applies to public disclosure and not communication between attorney and client. 60 M.J. 1, 2.

[267] *See, e.g., Beckley*, 55 M.J. 15, 17 (CAAF 2001). *In re application of Skewes*, 52 M.J. 562 (AFCCA 1999); *United States v. Calhoun*, 47 M.J. 520, 526-27 (AFCCA 1997).

[268] 58 F. Supp 113 (SDNY 1999).

[269] *Id.*

[270] *Id.* at 115.

[271] *Id.* at 118-19.

held that because of the national security risks involved in the case, a background inquiry was appropriate.[272] Thus, under *bin Laden* the onus of a "cleared counsel" falls on the accused.

B. Discovery Limitations and the Right to a Complete Defense

Every case involving the use of *in camera* proceedings and evidentiary substitutions such as summaries and redactions, undoubtedly raises appeals issues. As noted throughout this Article, the concepts of due process and the right to a fair trial frown on discovery limits. Possibilities for limitations arise, such as in the case of witness identities, statements against interest, and a lack of access to all prior inconsistent statements of witnesses. For instance, a scenario where an undercover operative provides several inconsistent statements, the defense normally would utilize these for impeachment purposes. However, the prior inconsistent statements may become unavailable (and unknown) to the defense through the redaction and summary process. In part, the defense is stymied because they may, at best, be only able to argue theoretical relevance, at the outset of trial and the military judge would be within his or her discretion to deny discovery.

As a result, an accused is faced with two choices: sealing the courtroom from the public and accept a non-disclosure "gag" order from the judge, or limiting the defense in both discovery and presentation of evidence. While this may seem as an unfortunate choice, the law currently recognizes a balance between a public trial and national security concerns. This choice becomes important to the accused for an additional reason. While the service appellate courts enjoy fact-finding responsibilities, they are also at liberty to apply the harmless error test to otherwise erroneous rulings by the military judge. It may also be incumbent upon the accused to limit his counsel choices to service members (and perhaps the few civilians) who already possess a high-level security clearance.

C. Continuing Media Interest

As long as criminal trials occur involving national security, the media will maintain an interest. For instance, in *United States v. King*,[273] a naval cryptologist was charged with espionage. Ultimately his charges were dropped, it appears in some part, due to high media exposure.[274] Guidance for determining when a court-martial should be closed to public view has existed

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[272] *Id.*

[273] *See, e.g.*, King v. Ramos, NMCCA (unpub. 26 Jan. 2001); also King v. United States NMCCA (unpub.7 Dec. 2000).

[274] *See, e.g.*, "*Navy Espionage Case Expected to be Dropped*," ABC News television broadcast, Mar. 9 2001).

for some time.[275] Prior to the existence of MRE 505, the then Court of Military Review, observed, "The right to a public trial is not absolute and under exceptional circumstances, limited portions of a criminal trial may be partially closed over defense objection. In each instance, the exclusion must be used sparingly with the emphasis always toward a public trial."[276] In *Grunden*, the Court of Military Appeals fashioned a two-part test to determine which portions of a trial involving matters of national security could be closed to the public. The two part test was enunciated as "the trial judge or (Article 32) investigating officer must first determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh the danger of miscarriage of justice."[277] The second part of the test was premised on where the "need outweighs the danger of a miscarriage of justice, he must then determine the scope of the exclusion." The language in *Gruden* suggests a very high burden of necessity for the government to overcome.[278] *Gruden* remains controlling law for judicial determinations in courtroom closure issues. Yet, the term "national security," itself, implies the "heavy burden" standard is overcome by proper classification.

While third party assertions to a public trial are troubling to the prosecution, in the national security context, they may also present difficulties for the defense. There may be instances such as where a pretrial agreement is conditioned on a closed hearing. Additionally, a closed court may afford an accused a stronger argument to obtain classified evidence and present it to the trier of fact. This argument has merit, in part, because most military members have some type of clearance. As a result, the military judge may find it less likely the chance for classified evidence to be disseminated to the public.

Finally, because of the nature of military justice and the involvement of a convening authority, in cases where disclosure of classified information is possible, nothing prevents a convening authority from moving the case to a remote location. In essence, there is no lawful prohibition against moving a court-martial to Diego Garcia, Guantanamo, or Adak. Administratively moving a court-martial to a remote site may be problematic in other ways, and it should only occur where no other alternative is possible. Such a move might prove monetarily costly and present additional public policy considerations. At the same time, an accused has no constitutional right to choose the place of his court-martial.

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[275] *Jackson*, *supra* note 2 at 16-20.
[276] *Id.* at 118.
[277] *Id.* at 122.
[278] *See id.* at 120. To fulfill the requirements of this two-part test, the government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on the right to an open trial. *Id.* The Government must do this by demonstrating the classification of the materials in question and delineating the portions of the case that will involve those materials. *Id.*

V. CONCLUSION

Trials involving matters of national security are complex because of the necessary balance between an accused's Constitutional rights to present a complete defense and a public trial, as well as third-party rights to attend and report on trials, versus the recognized need to maintain secrecy over information vital to national security. The absence of a formal cold war does not mitigate the importance of protecting classified information. Indeed, a number of entities, state and non-state actors alike, may be interested in learning how the United States creates, processes, and safeguards classified information, as much as what is contained in the information itself. However, it is possible to ensure a fair trial within the constraints of MRE 505. Because trials involving MRE 505 are rare, a valuable corpus of persuasive law can be found in the federal CIPA cases. This article has provided analysis as to the workings and potential pitfalls of both CIPA and MRE 505. While each service branch will approach trials involving classified information in an administratively different manner, the legal basis for continuing the reasonable use of MRE 505 is sound.

HUMILIATING AND DEGRADING TREATMENT UNDER INTERNATIONAL HUMANITARIAN LAW: CRIMINAL ACCOUNTABILITY, STATE RESPONSIBILITY, AND CULTURAL CONSIDERATIONS

CAPTAIN STEPHEN ERIKKSON*

> *The enemy pursues me, he crushes me to the ground; he makes me dwell in darkness like those long dead. So my spirit grows faint within me; my heart within me is dismayed.*[1]

I. INTRODUCTION

At some point in their military career, judge advocates serving in the United States Armed Forces can expect to hear the question: "What does the ban on humiliating and degrading treatment actually mean?" In the interests of self-preservation, forward-thinking soldiers, sailors, airmen, and marines want to know the limits of what they can do to enemy prisoners of war and unfriendly civilians—as well as the limits of what can be done to them if seized by opposing forces. Article 3 common to all four 1949 Geneva Conventions, hereinafter referred to as common article 3, states,

> …Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* [out of combat] by sickness, wounds, detention, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. *To this end, the*

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[1] *Psalm* 143: 3, 4 (New International).

following acts are and shall remain prohibited at any time and at any place whatsoever with respect to the above cited persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court...[2]

For military members acting as captors, the morally-correct, short answer to the question posed, expressed as a positive obligation, is as follows: treat all persons not participating in hostilities with the same respect that *you* would *hope* to be treated if *you* were captured or detained under the same

[2] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 Aug 1949, entered into force 21 Oct. 1950, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces, adopted 12 Aug. 1949, entered into force 21 Oct. 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention III Relative to the Treatment of Prisoners of War, adopted 12 Aug. 1949, entered into force 21 Oct. 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, adopted 12 Aug. 1949, entered into force 21 Oct. 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (emphasis mine). Although common article 3 opens with a reference to armed conflicts not of an international character (excluded from the quoted passage above), the reference merely stresses the imposition of minimum standards of conduct on warring parties involved in civil conflict. States involved in international conflict are also obligated to observe common article 3. As Dr. Jean Pictet argues, the greater obligations accepted by states in the 1949 Geneva Conventions include the lesser obligations of common article 3. *See* JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, 52 (International Committee of the Red Cross Vol I 1960). The International Court of Justice and the International Criminal Tribunal for the former Yugoslavia have also recognized the applicability of common article 3 protections to both types of armed conflict. *See* Nicaragua v. United States of America, Judgment, I.C.J. (June 27, 1986); Prosecutor v. Dusko Tadic A/K/A "Dule," International Tribunal for the former Yugoslavia, Case No. IT-94-1-AR72 (October 2, 1995). *See also* Department of Defense Directive 5100.77, DOD Law of War Program, ¶ 5.3.1. (December 9, 1998). The United States has adopted the policy of complying with the law of war "during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."

circumstances. This advice is based on the widely accepted, moral principle: "Do to others as you would have them do to you."[3]

Unfortunately, at this time, providing an equally succinct legal response is problematic, as even application of this great moral principle may not provide protection against legal liability in all cases. The line between legitimate and illegitimate acts causing humiliation is not clearly fixed—as feelings of helplessness and humiliation may arise in *any* human being subjected to private residence searches, seizure at gunpoint, stark detention conditions and/or intense questioning in unfamiliar settings. Cultural expectations and levels of tolerance can also vary dramatically between individuals, groups, and nations. Certain practices unlikely to humiliate U.S. forces—such as being shaved or having to shave[4]—may, in fact, be considered humiliating to U.S. enemies or others of questionable status who find themselves under U.S. control.[5] How, therefore, are sincere men and women of conscience to understand the *absolute* ban on humiliating and degrading treatment in a multicultural world thick with clashing personalities, beliefs, and values?

In an era marked by ethnic warfare, international conflict, and state-sponsored terrorism,[6] this issue must be squarely addressed. The ban, first of all, cannot possibly be absolute. International humanitarian law explicitly permits warring parties to engage in certain acts regardless of whether they happen to cause *hors de combat* enemy personnel to experience feelings of humiliation. During periods of captivity, enemy combatants can be deprived of deeply cherished items "for reasons of security."[7] U.S. forces, for example, could surely confiscate a *Jambiya*, a curved, double-edged dagger worn openly

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[3] *Luke* 6:31 (New International).

[4] *See, e.g.*, Air Force Instruction 36-2903, Table 1.4, Note 2, Line 1 (1 November 2001). "Commanders do not have the authority to waive appearance and grooming standards except as identified in Table 1.4, line 1. …Beards will not be worn except for health reasons when authorized by a commander on the advice of a medical officer."

[5] *See* Kathy Gannon, *Ex-Guantanamo Captive Blasts Captors*, ASSOCIATED PRESS, November 8, 2002, at http://www.muslimuzbekistan.com/eng/ennews/2002/11/ennews08112002_3.html. According to the news article, "[formerly detained Pakistani Mohammad Sanghir] espouses the same strict interpretation of Islam as the Taliban… In Kandahar, he was questioned about bin Laden and al-Qaida. After 18 days, he was taken away and his head and beard were shaved. 'I physically tried to stop them. This is my Islamic belief I told them. But they wouldn't listen. I was humiliated.'"

[6] *See Guantanamo Bay: The Work Continues*, INTERNATIONAL COMMITTEE OF THE RED CROSS, May 9, 2003, at http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/5C867C1D85AA2BE541256C94006000EE. The intricate linking of state Taliban fighters and terrorist Al-Qaeda fighters has led to "much public debate about whether the internees in Guantanamo Bay are prisoners of war or not. The ICRC thinks that the legal status of each internee needs to be clarified on an individual basis…"

[7] Geneva Convention III, art. 18, *supra* note 2.

by some Arab men, notwithstanding the latter's lack of consent or angry complaints of humiliation.

U.S. forces could also serve religiously-forbidden meats to captured combatants "to prevent loss of weight or prevent nutritional deficiencies" *provided* U.S. forces "account" in advance for "the habitual diet of the prisoners" and had no other suitable protein sources available at the moment when the prisoners needed to eat.[8] If U.S. forces served such meat to prisoners under these circumstances, some proportion of prisoners would undoubtedly complain of humiliation, and public outrage would likely be voiced by co-religionists worldwide. The primary obligation of U.S. forces, however, is to keep prisoners "in good health,"[9] and no amount of humiliation should result in a breach of international law if U.S. forces are, *in fact*, protecting the good health of prisoners while pressing daily for delivery of culturally-acceptable substitute foods. "Account shall . . . be taken of the habitual diet of . . . prisoners" requires U.S. forces to consider cultural dietary concerns in the midst of competing concerns.[10] It is a requirement not callously to ignore cultural dietary concerns as opposed to an unyielding requirement to satisfy cultural dietary concerns at all times without any possible delay or excuse.[11]

Consequently, the ban against humiliating and degrading treatment may appear to be absolute, but it clearly is not. In all internal and international conflicts, some degree of humiliation will normally be experienced by persons *hors de combat*, deprived of liberty or otherwise restricted in their freedom of movement or choice. Where then are the lines of legal liability? When should an individual be held criminally accountable, or a state be held civilly responsible, for violating the terms of this core provision of international humanitarian law? This article takes the position that in heated cases involving charges of humiliating treatment, criminal accountability and state responsibility should both be determined based on the specific intent of the official or officials engaged in the suspect conduct. Detractors may find this approach insufficiently protective of human dignity, but overall, it offers the greatest protection without sacrificing fundamental fairness. This approach allows for serious consideration of legitimate state concerns and individual cultural influences while remaining ever faithful to the spirit of common article 3 and essential human interests.

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[8] *Id.*, art. 26.
[9] *Id.*
[10] *Id.*
[11] *International Committee of the Red Cross Commentary on Article 26, Geneva Convention III*, INTERNATIONAL COMMITTEE OF THE RED CROSS, *available at* http://www.icrc.org/ihl [hereinafter *ICRC Commentary*]. When basic daily rations are established, "climate, altitude, and the requirements of work must all be taken into consideration" along with "corresponding...taste and habits [of prisoners]. …The Detaining power must…ascertain the habitual diet of prisoners of war and the Protecting Power must check the manner in which account is taken of it."

This article is divided into two parts. Part I of the article examines approaches to the humiliating treatment prohibition taken by the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia and critiques them as good faith efforts that raise significant fairness concerns. Part I proposes two different offenses for future use in criminal prosecutions, justifies the elements as more consistent with Geneva Convention values, and discusses the offenses in relation to state responsibility. Part I will not resolve all ambiguity inherent in the international humanitarian law prohibition, but it should make the provision more intelligible for those required to comply with it. Part II will then examine two reported incidents of culture clash involving heated claims of humiliating treatment: the contested shaving of Taliban and Al Qaeda detainees sent to Guantanamo Bay and the postwar frisking of female Iraqi civilians by male American soldiers in occupied Iraq. For each incident, the article will delineate circumstances under which legal violations can reasonably be found to occur and not occur.

II. WHAT IS HUMILIATING AND DEGRADING TREATMENT?

A. Scope and Meaning of the Minimum Standard

The International Committee of the Red Cross (hereinafter ICRC) stresses that "[c]are [was] taken to state, in [common] article 3, that the applicable provisions represent a compulsory minimum."[12] To protect human dignity, neither governments nor rebel factions may legally derogate from this minimum standard. In examining the types of nefarious acts prohibited by common article 3—all kinds of murder, mutilation, torture, cruel treatment, taking of hostages, and extrajudicial punishment—humiliating and degrading treatment is the only misdeed conspicuously absent from the list of Convention grave breaches.[13] Among the proscribed practices, it is comparatively the least severe, or so it would appear. The humanitarian prohibition against humiliating and degrading treatment, in this way, apparently mirrors the human rights prohibition against degrading treatment as "perhaps the lowest level of [dignity] violation possible . . . ."[14]

Interestingly, in deciding degrading treatment cases arising under the European Convention for the Protection of Human Rights and Fundamental

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[12] *ICRC Commentary on Article 3, Geneva Convention III, available at* http://www.icrc.org/ihl.

[13] Geneva Convention I, art. 50, *supra* note 2; Geneva Convention II, art. 51, *supra* note 2; Geneva Convention III, art. 130, *supra* note 2; Geneva Convention IV, art. 147, *supra* note 2.

[14] Raymond J. Toney & Shazia N. Anwar, *International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls*, 14 AM. U. INT'L L. REV. 519 (1998), at 534, Citing Egocheaga v. Peru, case no. 10.970, Inter-Am C.H.R. 157, 185 Report No. 5. (1996), defining the prerequisites for a judicial finding of torture.

Freedoms,[15] the European Court of Human Rights has indicated that such treatment "must [have] attain[ed] a minimum level of severity."[16] The Court, however, has yet to articulate a method for predictably determining this minimum level of severity. In the words of the Court,

> The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects, and in some cases, the sex, age, and state of health of the victim, etc.[17]

States and victims continue to wonder what minimum threshold must be reached to trigger a violation that mandates relief.

The Court provided some insight into the level of this threshold in its landmark *Ireland v. United Kingdom* decision.[18] To combat the violent terrorist campaign in Northern Ireland in the early 1970s, the United Kingdom government began using five particular techniques as an aid during interrogations. The techniques included:

> [(1)] wall standing: forcing the detainees to remain for periods of some hours in a 'stress position,' described by those who underwent it as being 'spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on their fingers;'
>
> [(2)] hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
>
> [(3)] subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
>
> [(4)] deprivation of sleep: pending their interrogations, depriving the detainees of sleep; [and]

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[15] European Convention for the Prevention of Human Rights and Fundamental Freedoms, signed 4 Nov. 1950, entered into force 3 Sep. 1953, 213 U.N.T.S. 221 [hereinafter European Human Rights Convention].
[16] Republic of Ireland v. United Kingdom, 2 E.H.R.R. 25 (ser. A) (1978) at ¶ 162.
[17] *Id.*
[18] *Id.*

> [(5)] deprivation of food and drink: subjecting the detainees to a reduced diet during their [detainment facility] stay . . . and pending interrogations.[19]

In reviewing these techniques, four judges believed they actually constituted torture, sixteen judges held they constituted degrading treatment, and one judge vigorously dissented to the degrading treatment finding.[20] Notwithstanding the Court's general consensus as to the degrading nature of the techniques, the Court was clearly divided as to how far above or below these techniques were in relation to the minimum severity threshold.

How might the same case have been decided if the techniques were slightly modified in terms of duration, frequency, or character? What if the techniques had been used sporadically and not in combination? What if "wall standing" was required repeatedly for minutes at a time but not hours? What if "hooding" was used solely during interrogation but not during detention? What if the "subjection to noise" was not continuous? What if the "sleep deprivation" periods were shortened? What if the detainees were still subject to a "reduced diet" during periods of interrogation but received an increased diet during periods of detention? What if caloric intake was increased fifty percent but twenty-five percent with apparent "junk food"? Establishing a reasonably predictable minimum severity threshold with respect to a low-level dignity violation is a legal quagmire for even the best judges and legislators.[21]

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[19] *Id.* at ¶ 96.

[20] *Id.* at ¶ 246. The majority reasoned that the "techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating or debasing them and possibly breaking their physical or moral resistance." *Id.* at ¶ 167.

[21] In *Ireland v. United Kingdom*, dissenting judge, Sir Gerald Fitzmaurice, argues that "there is little practical utility in speaking of torture or inhuman treatment, etc. 'according to,' or 'within the meaning (or 'scope' or 'intention') of', article 3 [of the European Human Rights Convention] …for that article ascribes no meaning to the terms concerned, and gives no guidance to their intended scope." *See supra* note 16 at ¶ 12 (Fitzmaurice dissent). article 3 of the European Human Rights Convention merely reads without any elaboration of any kind: "No one shall be subjected to torture, or to inhuman or degrading treatment or punishment." European Human Rights Convention, *supra* note 15. Judge Fitzmaurice then delves into the quagmire from which there is no principled escape. "…[A]lmost anything that is personally unpleasant or disagreeable can be regarded as degrading by those affected. In the present context, it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of state, or dress up in a way calculated to provoke ridicule or contempt—although here one may pause to wonder whether Christ was really degraded by being made to don a purple robe and crown of thorns and to carry his own cross. Be that as it may, the examples I have given justify asking where exactly the degradation lies in being deprived of sleep and nourishment for limited

For the sake of worldwide sanity and human dignity, this quagmire ought to be avoided, if not under international human rights law, then at least under international humanitarian law.

A cursory examination of common article 3 coupled with article 75 of the Geneva Protocol I[22] and article 4 of Geneva Protocol II[23] appears to suggest, as a matter of black letter law, that the prohibition against humiliating and degrading treatment under international humanitarian law has a minimum severity threshold requirement that is as high—if not significantly higher—than international (European) human rights law. In international armed conflict, article 75 prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."[24] In non-international armed conflict, article 4 prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."[25] One may argue that humiliating and degrading treatment is essentially a subcategory of outrages against personal dignity equal, more or less, in harshness to the *malem in se* crimes of rape, indecent assault, and enforced prostitution.[26] Under this line of reasoning, all humiliating acts falling below this minimum severity threshold are legally inconsequential.

As reasonable as this conclusion may seem textually, it fails to account for the historic lessons of World War II that inspired the 1949 Geneva Conventions and their subsequent development through the Protocols. During that horrific conflict, indignities took many forms, and none were trivial. Individuals and groups representing a wide spectrum of ethnic backgrounds and religious beliefs were targeted for "special treatment"—with Poles, Jews, Gypsies, Russians, and Ukrainians bearing disproportionately the brunt of Nazi cultural prejudice and cruelty.[27]

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periods, in being placed for a time in a room where a continuous noise is going on, or even in being 'hooded'…" *See supra* note 16 at ¶ 27 (Fitzmaurice dissent).

[22] Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 Jun. 1977, entered into force 7 Dec. 1978, U.N. Doc. A/32/144 Annex I, 1125 U.N.T.S. no. 17512 [hereinafter Geneva Protocol I].

[23] Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 Jun. 1977, entered into force 7 Dec. 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. no. 17513 [hereinafter Geneva Protocol II].

[24] Geneva Protocol I, art. 75, *supra* note 22.

[25] Geneva Protocol II, art. 4, *supra* note 23.

[26] Although the United States has not ratified Geneva Protocols I and II, approximately 150 nations have ratified the Protocols, and the United States considers many of the Protocol provisions to be applicable as customary international law. OPERATIONAL LAW HANDBOOK, 11 (U.S. Army Judge Advocate's School 2002).

[27] TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, 594-773 (U.S. Government Printing Office Vol III 1949).

On March 6, 1941 the Baden Ministry of Finance and Economics issued a series of directives regarding the treatment of Polish farm workers.[28] The directives prohibited Polish workers from visiting any theaters, motion pictures, cultural entertainment, or churches (regardless of faith).[29] They were to remain in the local area and refrain from using bicycles or public conveyances.[30] Socializing and sexual intercourse were strictly forbidden (incidents of sexual activity were to be reported).[31] No limits were to be set for working hours; every employer had the right to give corporal punishment; and, wherever possible, Polish farm workers were to be quartered in stables.[32] The directives made clear that "[f]undamentally, farm workers of Polish nationality no longer [had] the right to complain, and . . . complaints [would no longer be accepted] by any official agency."[33] As humiliating and degrading as these actions were, worse was yet to come.

Jews, likewise, suffered every imaginable humiliation. What began as a clothing measure to induce public humiliation ultimately became a symbol marking wearers for death.

> "Jews were ordered to wear a Star of David in public, and were forbidden to take part in public gatherings, to make use of public places for amusement, recreation or information, to visit public parks, cafes, and restaurants, to use dining and sleeping cars, to visit theaters, cabarets, variety shows, cinemas, sports clubs, including swimming baths, to remain in or make use of public libraries, reading rooms, and museums. A special curfew was introduced for all Jews between the hours of 8 p.m. and 6 a.m. Later orders banned them from railway yards and the use of any public or private means of transport. These measures were followed by the erection of concentration camps in various places. They culminated in systematic round-up of Jews, who were sent to the concentration camps in order to be deported to Poland or Germany, where they were to be used for slave labor or exterminated."[34]

To speak of lower and upper limits of humiliation is not particularly meaningful.

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[28] TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, 389-391 (U.S. Government Printing Office Vol II 1949).
[29] *Id.* at 390.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 391.
[33] *Id.* at 390.
[34] UNITED NATIONS WAR CRIMES COMMISSION: LAW REPORTS OF TRIALS OF WAR CRIMINALS, 93 (His Majesty's Stationary Office Vol XIV 1949) [hereinafter UNWCC LAW REPORTS].

Dr. Eugen Kogon, a German survivor of Buchenwald concentration camp, which contained both enemy prisoners of war and other "social undesirables," described in a 1945 manuscript the process of humiliation and degradation that many Buchenwald newcomers were compelled to endure.[35] Dr. Kogon relates that officials would question newcomers as to why they had been delivered to the camp, and when they failed to explain why—for indeed many newcomers did not know why—they received blows from a stick.[36] Jews almost without exception received blows as punishment for being Jewish.[37] Camp intake officers also made newcomers stand and respond to questions while five other officials, purposely pounding typewriters, shouted in the room.[38] In this tense atmosphere, intake officers asked, "What whore shit you into this world?"[39]

These steps were only the beginning of initiation into Buchenwald camp. After threatening prisoners twenty to thirty times with the death penalty for an endless number of so-called crimes, officials made prisoners strip.[40] They were shaved from top to bottom and front to back with poor quality clippers and led to a bathing area.[41] After bathing in hot or cold water according to their whim, prisoners were escorted naked—and in freezing temperatures during winter—over camp streets and parade grounds to the wardrobe office.[42] There, they were disinfected with a liquid that burned the injured parts of the skin and made to bend over for a body cavity inspection from which officials derived a perverse sense of pleasure, especially with respect to prominent persons.[43] Officials ended by throwing raggedly clothes at prisoners with "no consideration as to [their] size, durability, or particularities . . . ."[44]

This initiation ritual for Buchenwald prisoners obviously cannot be characterized as a good faith effort on the part of Nazi officials to balance state interests with prisoner dignity. The larger point to grasp, however, is that international humanitarian law ought not to distinguish between "major" and "minor" acts of humiliation for the purpose of eliminating the latter from consideration as a legal violation. Although humiliation appears to be a

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[35] Dr. Eugene Kogon, SYSTEM OF THE GERMAN CONCENTRATION CAMPS: NUERNBERG U.S. MILITARY TRIBUNAL III, 61-63 (University of Texas Tarlton Law Library KZ1179 J89 A3 1947). The manuscript was prepared by Dr. Kogon from 15 June 1945 to 15 December 1945 and was presented to the University of Texas in 1947 by Mallory B. Blair, Judge, Military Tribunal III, Nuernberg.
[36] *Id.* at 61.
[37] *Id.*
[38] *Id.* at 61, 62
[39] *Id.*
[40] *Id.* at 62, 63.
[41] *Id.*
[42] *Id.* at 63.
[43] *Id.*
[44] *Id.*

universal experience, any theory of human dignity must take into account that, as unique individuals, we are not all likely to experience humiliation at the same time in the same way in response to the same stimuli. The law ought not to invalidate a man, woman, or child's personal experience with humiliation with dismissive terms like "unduly delayed reaction," "unconvincing," or "insufficiently severe." As a general rule during periods of armed conflict, international humanitarian law should accept victim expressions of humiliation at face value.

In Buchenwald concentration camp, some prisoners may have felt overwhelmed with humiliation at the mere sight of the depressing camp. Others may not have felt humiliated until they were threatened or struck. Still others may not have felt humiliated until they were stripping, bathing, or dressing. And some may have never manifested any effects of humiliation due to an apparent indomitable sense of dignity. With respect to this last group, reasonable persons worldwide may legitimately ask: were such prisoners degraded—brought down to such a level that similarly situated prisoners (lacking this indomitable sense of dignity) would likely have been humiliated by such treatment?

This article takes the position that international humanitarian law must sweep broadly into its ambit all humiliating, and potentially humiliating, acts and words. Several challenges, however, may be leveled at this position. First, how can a minimum standard be so far-reaching? Necessity fashions the rule. What the world needs in the twenty-first century with respect to humiliating and degrading treatments is not a minimum standard for internal conflicts or a maximum standard for international conflicts but rather an intelligible standard for both types of conflict. States and state agents need to understand that all humiliating, and potentially humiliating, acts and words are suspect under international humanitarian law. Second, assuming this position is necessary, is it practicable? International law is already replete with vague, grandiose affirmations, and "a legal instrument that means everything . . . also means nothing."[45] The standard does indeed require additional, meaningful parameters. Third, is it fair to condemn states and state agents for every humiliating, or potentially humiliating, act or word they happen to perform or utter? The answer to this third question depends entirely on the degree and quality of advance notice given to states and state agents.[46]

B. Crucial Parameters and Fundamental Fairness

If reliance on *ex post facto* legislation was one of the greatest threats to the legitimacy of international criminal justice practice in the twentieth

[45] Michael J. Glennon, *Why the Security Council Failed,* FOREIGN AFFAIRS, May/June 2003, at 27.

[46] Lambert v. California, 355 U.S. 225, 228 (1957) (stating unequivocally that "[e]ngrained in our concept of due process is the requirement of notice").

century—violating the maxim *nullum crimen sine lege* (no crime without law) and blighting the legacies of the Nuremberg and Tokyo trials[47]—reliance on vague pronouncements of law is one of today's greatest threats to such practice. In November 2000, the Preparatory Commission for the International Criminal Court (hereinafter ICCPC) issued its finalized draft text specifying elements to be proved in cases involving alleged offenses during times of armed conflict.[48] To the ICCPC's credit, some of the offenses contain the requisite level of detail to provide satisfactory notice to potential wrongdoers. Consider the following two war crimes: ". . . [I]mproper [U]se of a [F]lag, [I]nsignia or [U]niform of the United Nations" and ". . . [E]mploying [P]rohibited [B]ullets."[49]

> Improper Use has seven elements.
> 1. The perpetrator used a flag, insignia or uniform of the United Nations.
> 2. The perpetrator made such use in a manner prohibited under the international law of armed conflict.
> 3. The perpetrator knew of the prohibited nature (illegality) of such use.
> 4. The conduct resulted in death or serious personal injury.
> 5. The perpetrator knew that the conduct could result in death or serious personal injury.
> 6. The conduct took place in the context and was associated with an international armed conflict.
> 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[50]

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[47] *See* THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM, 43 (Chihiro Hosoya et al. eds., 1986). *See also* HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 112-126 (Oxford University Press 2d ed. 2000). Steiner and Alston include the famous remark from former U.S. Chief Justice Harlan Fiske Stone: "The best that can be said [about the Nuremberg trial] is that it is a political act of the victorious States which may be morally right . . . . It would not disturb me greatly . . . if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime. [Justice Robert] Jackson is away conducting his high-grade lynching party in Nuremberg . . . . I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law." INTERNATIONAL HUMAN RIGHTS at 124.

[48] Report of the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 [hereinafter ICC Preparatory Commission Report]. The report is also available online at http://www.un.org/law/icc/prepcomm/report/reportdocuments.htm.

[49] *Id.* at 27, 33 (articles 8(2)(b)(vii)-3 & 8(2)(b)(xix)).

[50] *Id.* at 27.

Prohibited Bullets has five elements.

1. The Perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
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.[51]

These two war crimes cover a fairly narrow range of specific practices, and the *mens rea* requirements ("knowledge" and "awareness") necessary for conviction have been precisely identified with respect to several notable individual elements. Although these war crimes could still be better drafted—along with the rest of the offenses in the draft text[52]—they at least provide potential wrongdoers with clear notice of unlawful conduct. They are, by contrast, far easier to decipher than the ICCPC's approach to humiliating and degrading treatments.

The ICCPC has drafted two offenses entitled "[W]ar [C]rime of [O]utrages upon [P]erson [D]ignity."[53] The first, article 8(2)(b)(xxi), applies to international conflicts, and the second, article 8(2)(c)(ii), applies to civil conflicts. article 8(2)(b)(xxi) has four elements.

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[51] *Id.* at 33.

[52] When criminal offenses are drafted, each individual element should explicitly state within itself what, if any, *mens rea* applies. If any particular element is silent on this issue, then only one conclusion should be permissible: no *mens rea* applies. This level of clarity and attention to detail allows parties to know exactly where they stand prior to actual wrongdoing—should they be concerned to know—as well as prior to court. In introducing the draft text, the ICCPC explains, "As stated in article 30 [of the 1988 Rome Statute of the International Criminal Court] a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crime to a mental element for any particular conduct, consequence, or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies" (emphasis mine). ICC Preparatory Commission Report at 5, *supra* note 47. First, this formula of "one, the other, or both" is simply an invitation to costly litigation. Second, the ICCPC needs to be more judicious in its use of the word "material." All elements of a criminal offense are material in the sense that they all must be proved for a conviction to occur. At the same time, the word "material" can be used to suggest that some elements (conduct-related elements? consequence-related elements?) are more central to an offence than others.

[53] *Id.* at 33, 39 (articles 8(2)(b)(xxi) & 8(2)(c)(ii)).

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[54]

article 8(2)(c)(ii) has six elements.

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[55]

For both of these offenses, the ICCPC adds,

> 'Persons' can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account the relevant aspects of the cultural background of the victim.[56]

While the good intentions of the ICCPC are not in doubt, these two offenses do not provide the level of protection, fairness, and notice necessary for armed forces operating under trying circumstances. Does the perpetrator have to act with the intent to humiliate the victim or does the perpetrator merely have to act with knowledge that the victim is being humiliated (or

[54] *Id.* at 33.
[55] *Id.* at 39.
[56] *Id.* at 33, 39.

both)?[57] How severe does the humiliation have to be to qualify as "generally recognized as an outrage"? Though the cultural background of the victim should indeed be taken into account, what about the cultural background of the perpetrator? And is it prudent, legally, to lump together the treatment of deceased persons with the treatment of living persons?

1. Specific Intent: Convicting the Right People for the Right Reasons in a Multicultural World

If states together take the *extraordinary step* of identifying *specific acts* believed to cause humiliation, then general intent, even strict liability in some cases, ought to be enough to sustain individual criminal convictions and result in state responsibility. Rape, for example, a patently humiliating specific act expressly named and prohibited by international humanitarian law,[58] has traditionally been understood as a general intent crime in domestic law, though some jurisdictions, including New Jersey, have rendered it a strict liability crime when the unlawful conduct occurs between a correctional officer and an inmate.[59] Individuals contemplating rape, and states responsible for preventing rape, while all representing diverse cultural heritages, are effectively on notice that commission of rape exposes them to serious consequences. If criminal condemnation or civil sanctions follow from incidents of rape, they have no one to blame but themselves. They have not been denied fundamental fairness.

States, however, have tended to be reluctant, if not loath, to identify humiliating and degrading treatments with any high degree of precision. One reason may be that, except for rape, enforced prostitution, and indecent assault, no other humiliating acts exist.[60] This explanation is wholly unconvincing. Another response, which is more convincing but not compelling, is that creative states and individuals can devise new ways of causing humiliation faster than new law can be formed and announced.[61] Although this statement

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[57] *See supra* note 52.

[58] Geneva Protocol II, art. 4, *supra* note 23.

[59] Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, International Criminal Tribunal for the former Yugoslavia, Case No. IT-96-23-1 (June 12, 2002), at ¶ 131.

[60] *See supra* notes 24 and 25.

[61] *ICRC Commentary on Article 3, Geneva Convention III, supra* note 12. The ICRC stresses with respect to common article 3, "However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes." The author disagrees with ICRC that the list automatically becomes more restrictive through insertion of specific acts. It depends how the agreement is drafted. It is not unusual in contract law to include specific acts coupled with a general principle when referring to conditions that constitute a breach of the agreement. This practice reduces litigation risk and narrows, not the principle, but potential areas of future disagreement. The same intelligent practice could be used in addressing humiliating and degrading treatments: "Humiliating and degrading treatments include, but are not limited to, [insert specific acts] . . . ."

resonates with truth, it does not justify failure to expressly outlaw abhorrent past practices that states and individuals may be sorely tempted to repeat. A third response may be that international courts are best suited to develop the vague principles that characterize most of international law. For those who believe that too much judicial activism (oligarchic rulemaking) involving contested human values is already taking place internationally, states may be faulted for abdicating leadership and failing themselves to make hard policy choices. A final response, probably the most accurate, is that states *have* made a conscious policy decision in this instance, and they are adamant about reserving flexibility for themselves in a conflict-laden world.

States have therefore prohibited—and criminalized—humiliating and degrading treatment in the most generic of terms. In response to this occurrence, this article takes the position that—in fairness to potential wrongdoers and in the absence of precisely identified, expressly prohibited, specific acts—violations should be determined based on the specific intent of the actor. Specific intent dramatically increases the probability that only morally blameworthy persons will be prosecuted, convicted, and punished for this indistinct offense. During periods of armed conflict, culpability in these sensitive cases should turn, not on general knowledge that one may be violating the law, but rather on a conscious objective or desire to engage in the prohibited conduct.

In *Prosecutor v. Kunarac, Kovac and Vukovic*,[62] a case that came to the right result for the wrong reasons, the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected Kovac's defense that he (Kovac) could not be found guilty of an outrage against personal dignity unless it was proved beyond a reasonable doubt that he had a specific intent to humiliate or degrade his victims. Kovac had argued forcefully that his objective was of an "exclusively sexual nature" and that he never had any actual intent to humiliate his victims.[63] The Appeals Chamber agreed with the Trial Chamber that Kovac satisfied the culpability test for outrages against personal dignity, articulated as follows:

> i) . . . the accused intentionally committed or participated in an act or an omission which would generally be considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and ii) . . . the accused knew that the act or omission could have that effect.[64]

[62] *See supra* note 59.
[63] *Id.* at ¶ 158.
[64] *Id.* at ¶ 161.

The Appeals Chamber upheld Kovac's conviction on the ground that his actions could "generally" be considered to cause serious humiliation and he knew at least of the "possib[ility]" that his actions could have that effect.[65]

Kovac, who was ultimately convicted of the dual war crimes, rape and outrages against personal dignity, and of the dual crimes against humanity, rape and enslavement, deserved to be punished for his wrongdoing.[66] A member of a Bosnian Serb military unit at the time of his crimes, Kovac imprisoned four girls in his apartment where they were repeatedly raped by Kovac and other soldiers with Kovac's consent.[67] For four months, Kovac exercised *de facto* ownership rights over the girls, compelling them to cook, clean, attend to apartment chores, and submit to sex, all the while neglecting their diet and hygiene.[68] Adding insult to injury, shortly after imprisoning the girls in his apartment, Kovac forced three of the girls "to dance naked on a table while he watched them. The Trial Chamber found that Kovac knew that this was a painful and humiliating experience for the three girls, particularly because of their young age."[69] At the end of the four months, Kovac did not release the girls but rather sold them. The Trial Chamber also found that the sales of the girls, the youngest of whom was 12, constituted a particularly degrading attack on their dignity.[70]

Although the punishment of Kovac is not troubling, the reasoning used by ICTY to arrive at Kovac's conviction requires tightening and a modified approach. First, the lines as to what can "generally be considered to cause serious humiliation"[71] are far too unclear. The statement represents only a minor improvement over a criminal standard designed to punish what can "generally be considered to constitute a serious wrong." Second, under a strict application of the ICTY test, a body cavity search *under any circumstances* would appear be a violation of international humanitarian law. Even if legitimately based on corroborated information of smuggled contraband, a body cavity inspection can "generally be considered to cause serious humiliation," and any inspector of ordinary intelligence will know that such an intrusive measure "could have that effect."[72] If international humanitarian law is to ban body cavity inspections credibly under every conceivable circumstance, then it needs to make that ban explicit.

A specific intent approach to the prohibition against humiliating and degrading treatments is fairer to potential wrongdoers—confronted with an indistinct offense—and more protective of certain potential victims, whose

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[65] *Id.* at ¶¶ 163, 165.
[66] Id. at ¶ 11.
[67] *Id.* at ¶¶ 11-15.
[68] *Id.*
[69] *Id.* at ¶ 16.
[70] *Id.*
[71] *See supra* note 64.
[72] *Id.*

legitimate cries for justice might otherwise be dismissed as falling short of "serious humiliation."[73] A specific intent approach is also more consistent with Geneva Convention values. Within the vast expanse of humiliating, and potentially humiliating, acts and words, some reasonably intelligible parameters can be placed on the common article 3 prohibition through acceptance of the following offense:

> Whosoever, with intent to act maliciously, intent to gratify sexual lust or desires, or intent to obtain an unofficial benefit, humiliates or attempts to humiliate, during a period of occupation or armed conflict, an individual taking no active part in hostilities, commits an offense.

A conviction under this offense would require proof beyond a reasonable doubt that…

1. The perpetrator intentionally committed an act or omission.
2. The act or omission humiliated one or more individuals or would have likely humiliated similarly situated individuals.
3. The perpetrator was aware that those subjected to the act or omission were noncombatant civilians, religious personnel, medical personnel, or disarmed *hors de combat* military members, taking no active part in hostilities.
4. The perpetrator committed the act or omission with the intent to act maliciously, to gratify sexual lust or desires, or to obtain an unofficial benefit.
5. The act or omission occurred during a period of occupation or armed conflict and was associated with the occupation or armed conflict.[74]

Like the black letter law human rights prohibition against degrading treatment, the black letter law humanitarian prohibition against humiliating and degrading treatment is susceptible to two doctrinaire interpretations:[75] one sweeps too broadly, the other too narrowly. The first, which would establish criminal accountability based solely on the presence of humiliation, sweeps too broadly. The second, which would always make criminal accountability

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[73] *See supra* notes 54, 55, 64.

[74] This proposed offense obviously overlaps in places with other criminal offenses. When conduct can be charged under one or more offenses, prosecutors should charge the offense that most closely corresponds to the conduct. Under the right facts, certain incidents of assault, rape, and robbery of protected persons could satisfy the elements of this "residual" humiliation offense, but more often than not, these types of incidents would be best disposed of via the statutory schemes enacted especially for them.

[75] *See supra* note 14.

dependent on an intent to humiliate, sweeps too narrowly. Prudence dictates instead that "protective categories" be recognized, and that persons be punished who, adequately forewarned about acting on a set of impermissible intents, choose to so act anyway.

For the sake of human dignity worldwide, persons of integrity should everywhere be able to agree that warriors must not (1) act maliciously to cause humiliation; (2) cause humiliation by exploiting another human being sexually; or (3) traffic in, or otherwise personally profit from, the humiliation of others. Outside these protective categories, sensitive, contested cases of humiliation—if and when they arise—are matters for political discussion between concerned governments, non-governmental organizations, and private citizens, each voicing their thoughts in appropriate diplomatic and domestic fora. Inside these protective categories, the legal protection is absolute, and compelling cases can move forward for prosecution *regardless* of the severity of the humiliation.

If, after all, in the interests of good order and discipline, an armed service retains the option to lawfully prosecute a military member for depriving a fellow member of a minor amount of money,[76] which is here today and gone tomorrow, why ought not a similar option, in the interests of suppressing conflict-related morally blameworthy abuses, be retained by domestic and international prosecutors to stigmatize any perpetrator who deprives a man, woman, or child of their coveted dignity through a single caustic insult such as, "What whore shit you into this world?"[77] Granted, such a case finding is unlikely to result in a severe sentence or heavy victim compensation, and scarce judicial resources may not allow for such a prosecution, but as a matter of principle, the law should certainly not foreclose the option of prosecution.

The noun "humiliation" and the verb "to humiliate" both testify to the seriousness of the human condition they seek to define and describe. The noun "humiliation" "stems from the Latin word *humus*, earth, suggesting that to be humiliated means to be made small, reduced to ground level, perhaps even to have your face forced into the ground."[78] The verb "to humiliate" comes from the Latin verb *humiliare*, to humble, which is close in meaning to the verb "to

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[76] 10 U.S.C. § 921 (2003) (article 121, Larceny and Wrongful Appropriation, Uniform Code of Military Justice [hereinafter UCMJ]).

[77] *See supra* note 39. *See also* Geneva Convention III, art. 18, and Geneva Convention IV, art. 27, *supra* note 2. Article 13 of Geneva Convention III and article 27 of Geneva Convention IV require, respectively, that protected prisoners of war and civilians not be subjected to "insults." These articles, however, only apply to international armed conflicts, and a crafty lawyer would argue, even there, that plural use of the word "insults" allows for at least one free (non-actionable) insult.

[78] Dr. Evelin Lindner, *Love, Holocaust, and Humiliation*, TRANSNATIONAL FOUNDATION FOR PEACE AND FUTURE RESEARCH, at http://www.transnational.org/forum/meet/2000/love.html (unfinished article).

mortify," derived from the Latin *mortificare*, to kill.[79] Humiliation is not a form of mild embarrassment, which, marked by momentary awkwardness, fades into humorous memories with the passage of time. Humiliation is a piercing arrow that wounds the heart[80] and, in the worst of cases, kills healthy esteem. Although eliminating all humiliation from war is utopian, prosecuting those who consciously decide to violate the protective categories is not.

In considering in a court of law whether a criminal violation of humiliating and degrading treatment has occurred, fact finders must carefully scrutinize all evidence reflecting on the specific intent of perpetrators, along with, when relevant, cultural influences affecting perpetrators and victims. The ICRC's commentary on article 75 of Geneva Protocol I refers to prohibited acts as those that "*are aimed at* humiliating and ridiculing [protected persons] . . . ."[81] Such acts are quintessentially malicious. Tomoya Kawakita, a Japanese-American dual national found guilty of treason, evidenced such malicious intent when, among other acts of treachery committed as an interpreter in a Japanese prison camp during World War II, he approached an American prisoner of war who had been repeatedly kicked into a cesspool by a guard, hit the prisoner over the head with a long wooden object, and tried to force the prisoner to sit in the freezing, filthy water.[82] German Lieutenant General Kurt Maelzer, found guilty of exposing prisoners of war in his custody to acts of violence, insults, and public curiosity, showed similar malicious intent when, under armed escort, he led 200 American prisoners of war through the streets of Rome in a triumphal march reminiscent of those following ancient Roman conquests.[83] The prisoners endured sticks and stones during the march and were filmed and photographed.[84]

Although most people today would probably consider the acts described above to be universally malicious, Geneva Convention III seems to stand alone in recognizing that states and state agents worldwide will not always share the same attitude toward particular treatments. The reason, of course, is culture, loosely defined as an unstable, constantly in flux "congeries of ways of thinking, believing, and acting."[85] For the most part, the Geneva

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[79] THE AMERICAN HERITAGE DICTIONARY, 627, 815 (Houghton Mifflin Company 1982).

[80] "Heart" in this context refers to that place in every human being where mind and emotion meet.

[81] *See supra* note 22 (emphasis mine).

[82] Tomoya Kawakita v. United States, 343 U.S. 717 (1952).

[83] UNWCC LAW REPORTS (Vol XI) at 53, *supra* note 34.

[84] *Id.*

[85] Linda S. Bell, Andrew J. Nathan, and Ilan Peleg, NEGOTIATING CULTURE AND HUMAN RIGHTS, 11 (Columbia University Press 2001). This publication points out that cultural theorists used to conceive of culture as "a core set of values, psychological dispositions, and behaviors (both individual and social) that [give] a group of people a common identity and way of life." More modern theorists approach culture, however, not as a relatively static set of characteristics that can be readily identified, analyzed, and understood to predict individual and social behavior, but rather a contested, discursive process in constant flux. ". . . [C]ulture is

Conventions "paper over" this troubling source of instability with the simple message that, if only men and women are honored, all will be well. "Prisoners of war are entitled in all circumstances to respect for their persons and their honour," reads article 14 of Geneva Convention III.[86] "Protected [civilians] are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs," reads article 27 of Geneva Convention IV.[87] How, though, is a court to recognize when a state agent is acting *maliciously* to deny honor? The clearest indicator of intent, as revealed by article 52 of Geneva Convention III, is to scrutinize the offending actor operating within his own cultural milieu.

Under article 52 of Geneva Convention III, "No prisoner of war shall be assigned to labour which would be looked upon *as humiliating* for a member of the *Detaining Power's own forces*."[88] ICRC speaks favorably of the provision as "establishing a bold analogy with the customary rules of the Detaining Power's own forces and [being] clear and easy to apply . . . [as it relates to] objective rules."[89] The purpose of the provision, of course, is that "no prisoner concerned [will] be the laughing-stock of those around him."[90] State agents cannot control every possible reason a prisoner might be ridiculed, but they certainly merit criminal accountability if, *by their own cultural standards*, they maliciously transform a prisoner into an object of ridicule or, once aware of such ridicule, fail to take immediate steps to stop it.

In a court of law, justice cannot be done unless all factual matters relevant to the charges are heard. Whenever culture explains, in whole or in part, the humiliation experienced by victims, or has a direct bearing on the specific intent of perpetrators, that evidence should certainly be admitted. In domestic courts, valid grounds sometimes exist to exclude cultural expert witnesses.[91] However, international humanitarian law must be more mindful of cultural variances, especially when a particular offense still contains within

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not a given, but rather a congeries of ways of thinking, believing and acting that are constantly being produced; it is contingent and unstable, especially as the forces of 'modernity' have barreled down on most people throughout the world over he course of the twentieth century . . . It allow[s] us to see that even within a single culture, values and their meaning are subject to different interpretations."

[86] Geneva Convention II, art. 14, *supra* note 2.

[87] Geneva Convention III, art. 27, *supra* note 2.

[88] *Id.*, art 52 (emphasis mine).

[89] *ICRC Commentary on article 52, Geneva Convention III, supra* note 12.

[90] *Id.*

[91] United States v. Thongsangoune Sayakhom, 186 F.3d 928 (9th Cir. 1999) (exclusion of testimony by expert on Laotian culture not an abuse of discretion on charges of mail fraud and money laundering); United States v. Hien Hai Hoac & Hgai Choy Chan, 990 F.2d 1099 (9th Cir. 1993) (exclusion of testimony by expert on Chinese culture on charges of conspiracy to import and distribute heroin and importation of heroin); United States v. Juan Rubio-Villareal, 927 F.2d 1495 (9th Cir. 1991) (exclusion of testimony by expert on Mexican culture not an abuse of discretion on charges of possession and importation of cocaine), *amended on other grounds* by 967 F.2d 294 (9th Cir. 1992).

itself some—*albeit less*—ambiguity. International humanitarian law can permit itself to be bent by culture, but not broken. Perpetrators especially, but even victims, must understand that the moral corollary to the principle of "treating others like yourself" is a warning and powerful statement of truth: "For judgment is without mercy to one who has shown no mercy."[92] Fact finders need to know what amount of *mercy*, if any, under time-honored traditional cultural norms or international humanitarian norms was actually shown under the circumstances causing the humiliation. Did the perpetrator have the requisite intent to engage in the prohibited categories of conduct?

Three clarifying comments are imperative here. First, international humanitarian law itself bends to cultural pressures. No provisions make this point more poignantly, perhaps, than those in Geneva Protocols I and II concerning children in armed conflict. Article 77 of Geneva Protocol I permits states, for purposes of international armed conflict, to recruit and use children as young as fifteen in direct hostilities.[93] Article 4 of Geneva Protocol II permits governments and rebel commanders, for purposes of civil conflict, to do the same.[94] From a modern western perspective, it may appear shameful that persons less than eighteen are elsewhere actively recruited and used for combat. In bending to the cultural pressures, however, the two Geneva Protocols are unwilling to concede "special protection" for such children once *hors de combat*.[95] Consistent with that special protection, no perpetrator should escape criminal accountability who, with the intent to gratify sexual lust or desires, humiliates or attempts to humiliate captured children.[96]

Second, perpetrators who seek to hide their genuine culpability behind an illusory allegiance to traditional culture should, without mercy, feel the full weight of the law. As Jack Donnelly correctly asserts,

> "Arguments of cultural relativism are far too often made by (or on behalf of) economic and political elites that have long since left traditional culture behind . . . Government officials denounce . . . corrosive . . . . Western values—while they line their pockets with the proceeds of massive corruption, drive imported luxury automobiles, and plan European and American vacations."[97]

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[92] *James* 2: 8, 13 (Revised Standard).
[93] Geneva Protocol I, art. 77, *supra* note 22.
[94] Geneva Protocol II, art. 4, *supra* note 23.
[95] *See supra* notes 93 and 94.
[96] Consistent with that special protection, no perpetrator should likewise escape criminal accountability who, with the intent to act maliciously or to obtain an unofficial benefit, humiliates or attempts to humiliate captured children.
[97] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE, 102-103 (Cornell University Press, 2d ed. 2003).

For economic and political elites funding war efforts, captured prisoners are a tempting source of "free" labor. An argument might be made on the basis of traditional culture that prisoners must earn their keep. If prisoners are introduced into humiliating working conditions by such elites as a matter of official government policy, the elites risk prosecution on account of malicious intent. If such elites, or soldiers seeking to emulate the elites, devise their own personal strategies for profiting from the prisoners—taking valuables from them, contracting them out, selling them, mistreating them for money or other favors—they risk prosecution for having humiliated prisoners with the intent to obtain an unofficial benefit.[98] In both cases, whether during the findings or sentencing stage of trial, a "traditional culture" defense or "culture of bribery" justification is not a convincing basis on which to extend mercy to a perpetrator.

Lastly, a margin of cultural appreciation is available to those persons who have struggled internally to determine how best to demonstrate mercy under trying conflict circumstances—not those who reject mercy outright for others. Any perpetrator who categorically dismisses the health and well-being of victims from other cultures should experience the full weight of the law. When, during the findings stage of trial, fact finders have *compelling evidence of criminal wrongdoing* and may, but need not, *infer* malicious intent from such evidence, fact finders should not shrink from finding the requisite malicious intent. When, during the sentencing stage of trial, the court examines the full range of punishment available for such a perpetrator, the court should impose a stiff punishment that expresses the genuine moral outrage felt by the global community in relation to blatantly intolerant acts.

Perpetrators motivated by Wahhabi Fundamentalism,[99] for example, which created the Taliban,[100] fuels Al Qaeda violence,[101] and dates back to the mid-1700s,[102] must come to understand that, in the context of any armed conflict, their intentional acts to humiliate non-Wahhabis *cannot*, and will not, be tolerated. Wahhabis have a long-standing disdain of Shiite Muslims as

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[98] Sadly, this is an age-old problem. Luke records that John the Baptist, responding to Roman soldiers inquiring as to what they should do to bear fruits befitting repentance, declared: "Rob no one by violence or by false accusation, *and be content with your wages*." *Luke* 3:14 (Revised Standard) (emphasis added).

[99] For insight into historic and contemporary Wahabbism, *see* DORE GOLD, HATRED'S KINGDOM: HOW SAUDI ARABIA SUPPORTS THE NEW GLOBAL TERRORISM (Regnery Publishing, Inc. 2003) [hereinafter HATRED'S KINGDOM].

[100] *Id.* at 5. Readers should recall, that in addition to destroying two pre-Islamic Buddhist Statutes, the Taliban decreed on May 23, 2001, in a manner reminiscent of times past, that "*Hindus and Sikhs would be required to wear a piece of yellow cloth attached to their clothing to identify their religious affiliation*… The requirement was later suspended and an identity card was to be issued instead." U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001, Afghanistan, *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8222.htm.

[101] HATRED'S KINGDOM at 1-2, 4, 6, 13-15, 129, 151-152, 181-186, 215-228, *supra* note 99.

[102] *Id.* at 17-21.

polytheists (*mushrikun*) and, in southern Iraq in 1802, "slaughtered thousands [of them] . . . . Sunni Muslims not subscribing to Wahhabism frequently did not fare much better."[103] Jews and Christians, once protected "people of the book" in Islam, are detested infidels (*kufar*), or worse, polytheists.[104] A conscious decision has been made by some at the center of the Wahhabi movement, not merely to hate those with whom they disagree, but to act on the depth of that hate and to threaten more violence to come.

> …[V]eterans of Osama bid Laden's Afghanistan units provided one of the building blocks of the brutal Groupe Islamique Armé (GIA), which massacred civilians during an Algerian civil war that claimed 100,000 lives between 1992 and 1997 . . . . [With respect to the United States, one Al Queda] spokesman, Sulaiman Abu Ghaith asserted, 'We have a right to kill 4 million Americans—2 million of them children—and to exile twice as many and wound and cripple hundreds of thousands.[105]

Although people are free to hate—and in some countries, free even to voice that hate—the law need not be merciful to those who act with malicious intent on that hate.

1. Separating Treatment of the Living from Treatment of the Dead

As stated earlier, the ICCPC has drafted two offenses entitled "[W]ar [C]rime of [O]utrages upon [P]erson [D]ignity,"[106] both of which serve as a basis for prosecution in cases of living and deceased protected person mistreatment. The common element in both of these offenses is that a "perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons,"[107] with the explicit understanding that persons can include dead persons.[108] The actual level of intent necessary for a conviction under these offenses remains questionable given the ICCPC's statement that, when not expressly articulated, "relevant mental element[s include] intent, knowledge or both . . . ."[109]

By way of contrast, in its recent release of Draft Crimes to be used in Military Commission prosecutions, the Office of the General Counsel of the United States Department of Defense (hereinafter DOD GC) listed no

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[103] *Id.* at 13.
[104] *Id.* at 12-13, 22-26, 184.
[105] *Id.* at 13.
[106] *See supra*, notes 48 and 53.
[107] *Id.*
[108] *See supra*, notes 48 and 56.
[109] *See supra* note 51.

substantive humiliation offense in relation to living persons but did provide for a substantive degradation offense in relation to deceased persons.[110] The four elements of the latter offense are as follows.

1. The accused degraded or otherwise violated the dignity of the body of a dead person.
2. The accused intended to degrade or otherwise violate the dignity of such body.
3. The severity of the degradation or other violation was of such a degree as to be generally recognized as an outrage upon personal dignity, and
4. The conduct took place in the context of and was associated with armed conflict.[111]

The comments to the "Degrading Treatment of a Dead Body" offense indicate that the "second element precludes prosecution for actions justified by military necessity."[112] Lastly, though the DOD GC did not articulate a "residual" humiliation offense in relation to living persons, the Draft Crimes do include a number of significant, specific crimes known to be humiliating such as "Attacking Civilians," "Pillaging," "Taking Hostages," "Using Protected Persons as Shields," "Mutilation or Maiming," and "Rape."[113]

Focusing on treatments accorded living persons, this article has argued that a specific intent approach is the best means of maximizing protection against humiliating, and potentially humiliating, acts and words without sacrificing fundamental fairness to potential wrongdoers. With respect to the treatment of deceased persons, however, a specific intent approach need not—and ought not—be adopted. General intent should be sufficient for conviction. Delicate security considerations likely to arise in humiliation cases and reflect on the issue of malicious intent are essentially absent in deceased-person degradation cases. Unlike *hors de combat* military members who may try to escape and re-enter combat, or noncombatant civilians who may decide quite suddenly to become unlawful combatants, dead men, women, and children pose no risks in terms of safety, only a possible risk in terms of health and hygiene.

Victims in humiliation cases, moreover, are subject to a much broader range of harm than victims in degradation cases. In light of the unwillingness or inability of states to identify in advance all acts and omissions that fall under the prohibition on humiliating treatments, a specific intent approach is the

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[110] *See* Department of Defense Release of the Military Commission Draft Crimes and Elements Instruction, February 28, 2003, *available at* http://www.fas.org/irp/news/2003/02/dod022803b.html.
[111] *Id.*
[112] *Id.*
[113] *Id.*

fairest means of trying to ensure a reasonably meaningful broad sweep. Deceased persons, however, can only suffer bodily harm. They cannot suffer psychological harm. The most vile insults, threats, or attempts at mental coercion no longer have effect. Fact finders, too, are forever spared in such cases from having to wrestle with the question as to whether deceased individuals, *while dead*, displayed an indomitable sense of dignity under a particular treatment that would have humiliated similarly situated persons? Although one should certainly not characterize deceased-person degradation cases as simple, they are less complex comparatively than humiliation cases.

A general intent approach is both fair and possible for a new "Degrading Treatment of a Dead Body" offense: one that provides the kind of notice that potential wrongdoers worldwide are entitled to have (as opposed to the overly vague formulation "generally recognized as an outrage"). Such an offense might read:

> Whosoever, except for reasons of military necessity or the protection of human health, knowingly cuts, burns, drags, fires upon, decapitates, or otherwise mutilates the body of a deceased military member or civilian during a period of occupation or armed conflict, commits an offense.

A conviction under this offense would require proof beyond a reasonable doubt that…

1. The perpetrator cut, burned, dragged, fired upon, decapitated, or mutilated the body of a deceased military member or civilian.
2. The perpetrator knowingly committed such act.
3. The act occurred during a period of occupation or armed conflict and was associated with the occupation or armed conflict.
4. The act was not justified by military necessity or the protection of human health.

For each element, of course, prosecutors would bear the burden of proof and persuasion.

Military members worldwide should not face prosecution for shrapnel cuts, heat blast burns, or explosion-related mutilations, incurred inadvertently by deceased persons during attacks executed against legitimate military targets. Deceased persons, like living persons, will suffer some degree of collateral damage in times of war. Geneva Conventions III and IV also recognize that bodies may occasionally need to be burned to protect local populations from ill-health.

> Deceased [prisoners of war and civilian internees] shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene . . . [and that] fact shall be stated [with] the reasons . . . in the death certificate of the deceased.[114]

What the world cannot accept, however, in African conflicts or conflicts elsewhere, are protected persons deliberately being left "headless, with genitals cut off, and pregnant women [with] their abdomens cut open."[115] For crimes of this nature, a general intent approach is fair, workable, and preferable.

C. State Responsibility

Under general principles of international law, states are responsible for the conduct of their agents whether their agents are acting within the scope of their official duties or outside the scope of their official duties. These established principles are reflected in the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (hereinafter *Draft Articles on State Responsibility*),[116] an ongoing work to codify the law on state responsibility. Under article 4, states are responsible for the conduct of all their governmental organs regardless of the form of power they are exercising: legislative, executive, or judicial.[117] Governmental organs include "any person or entity" exercising lawful authority on account of their status under domestic law.[118] Article 7 adds that states are responsible for the acts of such persons or entities that either exceed or contravene governmental instructions.[119]

Under the *Draft Articles on State Responsibility*, states remain strictly liable for the wrongful acts of their agents and must make full reparation, in the form of restitution, compensation, and/or satisfaction, for any injuries their agents cause.[120] Restitution—reestablishment of the status quo prior to occurrence of the wrongful act—is obligatory when, and to the extent, it is "not

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[114] Geneva Convention III, art. 120, *supra* note 2; Geneva Convention IV, art. 130, *supra* note 2.
[115] DENYING "THE HONOR OF LIVING": SUDAN—A HUMAN RIGHTS DISASTER, 75 (Human Rights Wathc Africa 1989).
[116] 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) [hereinafter ILC Draft Articles on State Responsibility]. The 59 articles comprising the provisional text are also available online at http://www.un.org/law/ilc/texts/State_responsibility/responsibility.htm.
[117] *Id.*, art. 4.
[118] *Id.*
[119] *Id.*, art. 7.
[120] *Id.*, arts. 34-39.

materially impossible" or "does not involve a burden [to the responsible state] out of all proportion to the benefit" to be gained by the injured state.[121] According to the Commentaries to the *Draft Articles on State Responsibility*, restitution "[i]n its simplest form . . . involves . . . the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act."[122] In grave cases of disproportionate burden where restitution jeopardizes the responsible state's political independence or economic stability, restitution as a civil remedy is, in effect, unavailable.[123]

Financial compensation is necessary to the extent any damages resulting from the wrongful act are "not made good by restitution."[124] To the degree any damages resulting from the wrongful act cannot be made good by restitution or compensation, satisfaction is required in the form of "an acknowledgment of the breach, an expression of regret, a formal apology, or other appropriate modality."[125] Notwithstanding this default scheme, injured states may often choose compensation over restitution, should they wish to do so.[126] In contested humiliation and degradation cases caused by official policy, injured states are likely to demand restitution in the form of removal of the offending treatment. Injured states are also likely to demand compensation and/or an apology in most cases, whether caused by official act or state agent misconduct. No state, of course, should be obliged to make reparation unless it is, in fact, responsible for having acted wrongfully.

This article has proposed two offenses for use in domestic or international prosecutions.

> Whosoever, with intent to act maliciously, intent to gratify sexual lust or desires, or intent to obtain an unofficial benefit, humiliates or attempts to humiliate, during a period of occupation or armed conflict, an individual taking no active part in hostilities, commits an offense.
>
> Whosoever, except for reasons of military necessity or the protection of human health, knowingly cuts, burns, drags, fires upon, decapitates, or otherwise mutilates the body of a deceased

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[121] *Id.*, art. 35.
[122] Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at 238 [hereinafter Commentaries to the ILC Draft Articles], *available at* http://www.un.org/law/ilc/texts/State_responsibility/responsibility.htm.
[123] *Id.* at 243.
[124] See Supra, item 116, Art 36.
[125] *Id.*, arts. 34-39.
[126] ILC Draft Articles on State Responsibility, art. 4, *supra* note 116; Commentaries to the ILC Draft Articles on State Responsibility at 236, *supra* note 122.

> military member or civilian during a period of occupation or armed conflict, commits an offense.

If a state agent were to be found guilty beyond a reasonable doubt of either of these offenses by an impartial court in his or her own land or, using the same standard of proof, by an impartial, multicultural, international tribunal consisting of military and civilian panel members of integrity,[127] then the state responsible for the offending agent should make reparation as required by law. If based on official policy, the offending treatment should be modified or removed and, in all cases, reasonable compensation and/or some form of satisfaction, appropriate to the circumstances, should be provided.

States should also be held responsible for injuries suffered by innocents under special conditions. In tragic cases of humiliating treatment to living persons where *acquittal* of a state agent occurs through a successful voluntary intoxication defense, unreasonable mistake of fact defense, or insanity defense—effectively negating the requisite specific intent—a state should be deemed to have adopted the conduct of its agent under article 11 of the Draft Articles of State Responsibility and make reparation accordingly. In cases of degrading treatment to a dead body where acquittal of a state agent occurs through a successful insanity defense—effectively negating the requisite general intent—a state should again be deemed to have adopted the conduct of its agent under article 11. The basis for acknowledging and adopting this errant agent misconduct is article 26 of the 1969 Vienna Convention that requires states to act in "good faith" in their treaty relations with other states. States must not be able to defeat the intelligible parameters of common article 3 of the Geneva Conventions by employing agents *grossly* lacking in discipline, common sense, or sanity.[128]

III. UNITED STATES: HUMANE OR HEATHEN? SORTING THROUGH CULTURE-CLASH HUMILIATION CLAIMS

In December 2001, Mullah Muhammad Omar and his senior Afghan leaders fled the city of Kandahar, ending Taliban rule in Afghanistan.[129] In April 2003, Iraq came under nationwide occupation as U.S. marines rolled into

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[127] As a minimal requirement, panel members must never have faced accusations of human rights abuses and should have no criminal record. The purpose of a having a *mixed panel* is to ensure the fullest possible discussion over guilt and the greatest degree of legitimacy within *military and civilian* circles worldwide.

[128] Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 Jan. 1980, U.N. Doc. A/CONF. 39/26, 63 A.J.I.L. 875, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. See: http://heinonline.org/hol/page?handle=heinjournals/AJIL63&size=2&collection=FIJournals&ID=885

[129] Stephen Biddle, *What Really Happened in Afghanistan*, FOREIGN AFFAIRS, March/April 2003, at 34.

the last of Saddam Hussein's strongholds, his hometown of Tikrit.[130] To Americans long disgusted with the levels of cold-blooded butchery in both countries and legitimately intent on preventing a second September 11th—equal to or greater in destructive power than the first—those two months were cause for celebration. Celebration in this world, however, is always short-lived, as the price of freedom and security remains high. We mourn the loss of innocents on both sides knowing that every innocent was the possessor of an infinitely precious life. We remember fallen comrades and their families whose lives will forever be marked by painful sacrifice. And we ask ourselves, regardless of the conduct of our adversaries, did we act, and are we acting now, honorably, within the limits of the law?

This article proposes to examine two reported incidents of culture clash involving heated claims of humiliating treatment. Neither of these incidents constitutes a defining moment in the immediate aftermath of the Afghan or Iraqi conflicts, but they have been forcefully offered by angry observers as examples of dubious legal treatment by the United States to persons subject to its authority and control. Part II of this article looks first at the contested shaving of Taliban and Al Qaeda detainees sent to Guantanamo Bay and second at the postwar frisking of female Iraqi civilians by male American soldiers in occupied Iraq.

Readers, of course, should understand that in a court of law, notwithstanding the number of objective facts appearing adverse to a perpetrator, a perpetrator may still, purely on the strength of his or her own testimony, raise sufficient doubt as to guilt under a particular set of circumstances. Every adverse fact not countered by a perpetrator, however, does leave the perpetrator increasingly exposed to a finding of guilt. Victim testimony in a court of law should also be accepted at face value unless victims repeatedly contradict themselves or are effectively impeached. With the understanding that humiliation cases must all be judged on their own merits, and reasonable minds differ within cultures as well as between cultures, this article will analyze the humiliation claims made against the U.S. along with U.S. responses and options. Readers, lastly, like panel members, are reminded that to condemn any persons of wrongdoing (and nations, possibly, by implication in the process) is a solemn judgment requiring careful reflection. This article ultimately finds no compelling grounds for condemning U.S. agents for their general handling of these incidents.

A. Shaving of Taliban and Al Qaeda Detainees

The Afghanistan conflict was fought in a rugged land against hardened fighters, especially those comprising foreign Taliban and Al Qaeda forces.[131]

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[130] Max Boot, *The New American Way of War*, FOREIGN AFFAIRS, July/August 2003, at 50.
[131] *See generally supra* note 129.

"Gaunt, dirty, and anxious," are the words used by the New York Times to describe, Ishtaq Ahmad, one of the many foreign fighters captured by the Northern Alliance and confined in crowded makeshift prisons and jails across Afghanistan.[132] By mid-December 2001, two months after initiation of its air campaign, the United States was responding "by getting ready to house large numbers of prisoners at a base near Kandahar."[133]

By early January 2002, however, conditions on the ground were still fairly poor and tense.

> People who have had access to the [overcrowded Shibarghan] prisoners say that aside from the rigorous daily interrogations, they are receiving adequate care. Several are suffering from frostbite after fleeing across wintery mountains near Tora Bora, in eastern Afghanistan. Others are inflicted with gastrointestinal illnesses . . . . 'They are not torturing the prisoners,' said one person who has been inside the jail in recent days. 'But they are asking tough questions, which is irritating them.'[134]

Prisoner movements had also not been trouble-free. In addition to the November prisoner uprising at Qala-e-Gangi fortress near Mazar-i-Shariff, which was only suppressed after small underground chambers were flooded with cold water, Al Qaeda prisoners had daringly overpowered Pakistani guards in December, resulting in the escape of forty-one prisoners and a gun battle that left six prisoners and nine guards dead.[135]

In mid-January 2001, the story then broke. *The Guardian* reported, "Chained, manacled, hooded, even sedated, their beards shorn off against their will, [hundreds of captured Taliban and Al Qaeda fighters] are being flown around the world to Guantanamo Bay . . . . Forcefully shaving off their beards constitutes a violation of the right to human dignity under the 1966 [I]nternational [C]ovenant on [C]ivil and [P]olitical [R]ights."[136] No further

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[132] Michael R. Gordon, *One Certainty So Far for Captured Fighters: Conditions Are Awful*, N.Y. TIMES, December 18, 2001, at B7.
[133] *Id.*
[134] Carlotta Gall and Mark Landler, *Prison Packed with Taliban Raises Concern*, N.Y. TIMES, January 5, 2002, at A1.
[135] *Id. See also*, *What Really Happened in Afghanistan* at 39, *supra* note 129.
[136] Michael Byers, *U.S. Doesn't Have the Right to Decide Who Is or Isn't a POW*, THE GUARDIAN, January 14, 2002, at http://vredessite.nl/andernieuws/2002/guantanamo-andernieuws/01-14_prisoners.html. The Independent added that "the forcible shaving of the Muslim prisoners, before their flight to the Cuban naval base at Guantanamo Bay, could…be a breach of the [Geneva] convention, which stipulates that religious tenets of prisoners should be respected…[and the] majority of those being taken to Cuba are foreign fighters for Al Qaeda or the Taliban, rather than the Afghans. The camp at Guantanamo Bay is designed to hold 2,000 people and all of those at Kandahar air base are expected to end up there." Kim

explanation or discussion of this "violation" was offered. *CNN* turned to James Ross, senior legal adviser to Human Rights Watch, who objected to the shaving of the detainees: "'Shaving prisoners, whose beards may be for important religious purposes, [Ross stated], raises a concern because that would be an affront to their dignity.'"[137] Amnesty International (hereinafter AI) weighed in shortly thereafter.

> Prisoners had their hair and beards shaved off—something which would have particular impact on prisoners who seem to have strict rules about hair . . . . The reduction of prisoners' awareness of the environment and the shaving of heads are common techniques used to disorient detainees and soften them up to interrogation . . . . Practices such as hair and beard cutting, and ear cuffing and blindfolding appear excessive to security requirements while at the same time conforming to traditional measures to dehumanize prisoners prior to interrogation."[138]

While welcoming the presence of the ICRC at the base, AI expressed a need for U.S. authorities "to more adequately account publicly for the current conditions and practices at Guantanamo . . . ."[139]

The Pentagon, for its part, indicated that the shaving was warranted to combat head lice.[140] The ICRC reportedly was to assess whether conditions warranted the actual shaving,[141] but no such assessment, if performed, was ever made public. Standard ICRC policy is, of course, "in no circumstances . . . to publicly comment on the treatment of detainees or on conditions of detention."[142] As no one has even remotely suggested that the shaving

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Sengupta, *Red Cross: American Forces 'May Be Breaking POW Convention,'* INDEPENDENT, January 1, 2002, at http://www.globalpolicy.org/wtc/analysis/2002/0114redcross.htm.

[137] *Compare*, *Pentagon Defends Treatment of Detainees*, CNN.com, January 15, 2002, *available at* http://www.cnn.com/2002/World/americas/01/14/cuba.detainees (where Ross insists as well that "[o]nce [the captives] are in Gitmo Bay, there is no reason whatsoever that should be shackled) and Katharine Q. Seelye, "*First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba*," N.Y. TIMES, January 12, 2002, at A7, which indicated: "According to reports from a Pentagon pool of reporters at the United States Naval Station at Guantanamo Bay, the prisoners were escorted under heavy military guard and met by a swarm of marines in helmets with masks, some carrying riot shields and all armed with rifles. *Some of the prisoners resisted their captors and were pushed to their knees on the tarmac before rising and being taken to individual wire cages*" (emphasis mine).

[138] James Welsh, *Conditions in Guantanamo*, AMNESTY INTERNATIONAL, January 22, 2002, *available at* http://www.amnesty.org.au/airesources/report-02-01-24.html.

[139] *Id.*

[140] *Pentagon Defends Treatment of Detainees*, *supra* note 137.

[141] *Id.*

[142] *First ICRC Visit to Guantanamo Bay Prison Camp*, INTERNATIONAL COMMITTEE OF THE RED CROSS, January 18, 2002 (Press Release 02/03), at

occurred with the intent to gratify sexual lust or desires or to obtain an unofficial benefit, the question must be asked: to the degree humiliation was experienced by captured Muslim foreign fighters, did the shaving occur with malicious intent?

Actions characterized by malicious intent are those that either serve no legitimate purpose whatsoever or whose apparently legitimate basis can be shown to have been intentionally fabricated to inflict injury.[143] Malicious actions are those that fall naturally into the categories of "senseless" (intentionally executed without just cause or excuse) and/or "baseless" (resulting, regardless of social duty, from a mind fatally bent on mischief).[144] These actions, universally unreasonable in a multicultural world, are the truest affront to human dignity across the globe, and responsible states will both suppress them internally and abstain from them externally. Imperfect efforts to prevent or minimize injury, however, especially under circumstances that try the souls of fighting men and women and defy easy, or agreed upon means of, quantitative or qualitative analysis, will rarely, if ever, fit naturally into the category of a malicious action.

To those bound by religious faith or moral code to love their enemies, Taliban and Al Qaeda foreign fighters, like hardened Nazis of yesteryear, represent a significant spiritual and moral challenge. Persons bound by such faith or code confront two weighty obligations in direct tension with one another: that of loving enemies and that of loving friends. In the midst of this tension, they must find ways to love their enemies that will NOT be at the expense of friends. To those not bound by religious faith or moral code to love their enemies at all, Taliban and Al Qaeda foreign fighters are remarkably easy to hate. As long as these foreign fighters remain alive, deeply committed to militant holy war (*jihad*), and willing to travel abroad to engage enemy "infidels" and "polytheists" worldwide, they remain a veritable scourge on the earth. In the years ahead, how many unsuspecting civilians and military members will die at the hands of uncaptured—or even captured—foreign Taliban and Al Qaeda fighters "blessed" with an opportunity to strike? And how will they die?

> A gruesome video showing Islamic extremists murdering and mutilating 'infidels' is being circulated in Britain's mosques as part of a recruiting drive for Osama bin Laden's worldwide terror network. The video, which was smuggled into the U.K. only days before the 11 September attacks, shows [young conscripts] having their throats cut and the wholesale slaughter of secular forces by a group linked to the world's most wanted

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http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/EC7425EE761B6330C1256B660060E8C9.

[143] *See generally*, BLACK'S LAW DICTIONARY, 492-494 (West Publishing Co., 5th ed. 1983).

[144] *Id.*

> terrorist . . . . A second video shows graphic footage of Taliban soldiers decapitating Northern Alliance opposition troops following a gunfight in Afghanistan.[145]

We are living in troubling and trying times, and no one understands that more intimately than those personally charged with dealing with, and caring for, Taliban and Al Qaeda foreign fighters. In the face of searing, irrational hate, American military personnel have remained amazingly focused on doing what is right, safe, and appropriate.

For such foreign fighters to be properly handled, they must pose no risk to the well-being of themselves or their guards while in captivity, and they must be readily identifiable upon escape or eventual release. In pursuit of these ends, the shaving of detainee hair was prudent, legitimate, and necessary within the bounds of reason. The customary principle under international law to respect "convictions and religious practices"[146] must be read in concert with the explicit humanitarian requirement binding on all Detaining Powers "to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps to prevent epidemics."[147] Head lice are less dangerous than body lice[148] but nasty nonetheless and no respecters of religion. Islamists recognize "[l]ice and scabies (caused by mites [that] burrow under the skin and cause intense itching) spread rapidly among refugees who suffer poor personal hygiene and overcrowding."[149] Given conditions in Afghanistan in the field and in captivity, it is not a stretch to believe that head lice were present on many—if not all—of the captured foreign fighters awaiting transport to Guantanamo Bay. Even if few or no foreign fighters showed signs of infection, or the U.S. opted not to rummage through the facial hair of opposing forces, the U.S. can

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[145] Jason Burke, *Terror Video Used To Lure U.K. Muslims*, THE OBSERVER, January 27, 2002, *available at* http://observer.guardian.co.uk./islam/story/0,1442,640079,00.html.

[146] Geneva Protocol I, art. 75, *supra* note 22; Geneva Protocol II, art. 4, *supra* note 23.

[147] Geneva Convention III, art. 29, *supra* note 2. The U.S. has adopted the position that, while Taliban prisoners alone are covered by the express terms of Geneva Convention III, both Taliban and Al Qaeda prisoners will be treated humanely. *See Bush Says Geneva Convention Applies to Taliban, Not al-Qaida*, February 8, 2002, at http://usembassy.state.gov/posts/pk1/wwwh02020803.html.

[148] The range of danger remains a topic of discussion. Whereas many medical officers and scientists view head lice as not "directly" harmful, others respond the subject is understudied. A group of scientists within the Department of Microbiology and Parasitology and Institute for Molecular Biosciences at the University of Queensland in Australia argue that while medical workers and scientists consider the body louse to be the only vector (transmitter) of Rickettsia prowazekii, known to infect patients with the debilitating illness "Louse-Borne Epidemic Typhus" or "LBET," there is strong experimental evidence that head lice can also be competent vectors of Rickettsia prowazekii. *See generally* D. Robinson et al., *Potential role of head lice, Pediculus umanus capitis, as vectors of Rickettsia prowazekii*, Janauary 9, 2003, *at* http://brightminds.uq.edu.au/thesource/resources/resources/products/frontiers/RobinsonEtA|Paper.pdf.

[149] Aisha El-Awady, *Refugees: Trapped in Misery*, ISLAM ONLINE, January 2, 2003, at http://www.islamonline.net/english/science/2003/01/article02.shtml.

hardly be faulted for providing all captives and its own troops with an effective insurance policy against infestation.

Harvard University in the United States advises parents, teachers, and healthcare professionals that "[h]ead lice rarely (if ever) cause direct harm . . . ."[150]

> [The presence of these lice] may cause itching and loss of sleep. The louse's saliva and feces may sensitize people to their bites, thereby exacerbating the irritation and increasing the chance of secondary infection from excessive scratching. The greatest harm associated with head lice results from the well-intentioned but misguided use of caustic or toxic substances to eliminate the lice.[151]

U.S. personnel dealt with the head lice risk by *shaving* their foreign fighter captives. An approach not aesthetically appealing (by the standards of some), it was relatively rapid, safe, and effective. Head lice, after all, "derive nutrient by blood-feeding once or more often each day, and cannot survive more than a day at room temperature without ready access to a person's blood."[152] And they "will find little to grasp on a bald or shaved head."[153]

A second valid, and independent, basis for shaving the foreign fighter detainees was to photograph their unique facial features. Presumably, and hopefully, American military personnel photographed all the prisoners at least once: with their beards and without their beards. Although escape of detainees at Guantanamo Bay is extremely unlikely due to control measures in place, it cannot be ruled out. Accurate photos would be crucial in any recapture effort. Foreign fighter prisoners must also be readily identifiable if, upon release, they reject peaceful struggle against the U.S. in favor of continued violent struggle. The U.S. cannot predict with perfect accuracy which detainees, if any, will pose the greatest "terrorist" or "military" threat in the future. For purposes of its own national security, it must be able to reliably identify those fighters believed responsible for attacks against American persons or property.

In future cases of potential humiliation involving strict Muslims objecting to hair removal where head lice is not an issue, the Department of Defense may wish to procure one or more photo-retouching machines.[154] Although international humanitarian law does not expressly require the use of such machines, and the overwhelming majority of poor states can be expected

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[150] *Head Lice: Information and Frequently Asked Questions*, HARVARD SCHOOL OF PUBLIC HEALTH, at http://www.hsph.harvard.edu/headlice/liceNO.pdf (quoting from "Do head lice cause harm?").
[151] *Id.*
[152] *Id.* (quoting from "What are head lice, and how do they differ from other lice?")
[153] *Id.* (quoting from "Haircuts").
[154] I am indebted to Professor Ratner for this creative idea.

to argue as a matter of law that they are not required, as they themselves can ill afford such machines, it remains a policy option for the U.S. One problem with this approach may be that retouched images will fail to reveal distinguishing marks on prisoners' lower faces. A second factor to consider, aside from cost, may be the limited suitability of this option: workable solely in small conflicts. Admittedly, this approach would likely prove to be a logistical nightmare—with thousands of photos shuffling back and forth for retouching—in a major conflict.

In any event, with respect to the one-time shaving of Taliban and Al Qaeda detainees, neither the "cleanliness" objective nor the "security" objective can be assailed as senseless or baseless. To the degree humiliation was incidentally experienced by foreign fighter detainees as a result of strict pursuance of these objectives, the humiliation was regrettable but lawful. Only if a U.S. military member acted outside the bounds of professionalism—deriding detainee convictions, employing dull, rusty clippers against detainee hair, tying detainee facial hair in knots, yanking detainee chins to the ground by their beards, or throwing detainees to the ground to be sheared like sheep—would a prosecution for malicious intent be justified.

U.S. forces, of course, need not agree with detainee reasons for wanting to maintain hair or beard lengths. Strict Muslims can be expected to offer a wide range of explanations for their religious grooming practice: from the sublime—Allah demands the such lengths as distinguishing features of maleness—to the absurd—a man is not a man without a beard—to the culturally bigoted—the beard is to be lengthened in opposition to the western man and Hindu.[155] Interestingly, some Muslims believe "physical cleansing" is the rationale for the religious rule "to trim [the] moustache . . . ."[156] Whatever the reasons for particular practices, U.S. forces need to avoid antagonizing detainees or engaging them in contentious arguments. If imprisoned in a foreign country and likewise subjected to a legitimate treatment perceived to be humiliating, U.S. forces too would wish, at a minimum, not to be hounded on the basis of their beliefs. In the end, the Divine Creator for believers, or history for nonbelievers, will judge the validity of established beliefs that divide humanity as a whole.

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[155] *See generally* Abu`Abdillah Muhammad al-Jibaly, *Shaving the Beard: A Modern Effeminacy*, THE QUR'AN AND SUNNAH SOCIETY, at http://www.qss.org/articles/beard.html; Masehul-Ummat, *Beard: A Symbol of Muslim*, at http://www.iabds.org/archives/beard.htm; Mufti Afzal Elias, *What Islam Says about the Beard*, at http://www.islam.tc/beard/beard.html.

[156] Moiz Amjad, *General Muslim Customs and Traditions*, UNDERSTANDING ISLAM, December 18, 2000, at http://www.understanding-islam.com/related/text.asp?type=article&aid=35 (quoting from "6-Trimming Moustaches . . . .").

B. Frisking of Female Iraqi Civilians

The fall of Baghdad and Tikrit, while both positive developments on the road to a new democratic Iraq, have in no way led to an easing of responsibilities and dangers for battle-weary U.S. ground forces working in Iraq.[157] Psychologically, winning the peace is proving even more taxing, as unknown numbers of nondescript enemies remain hidden within the movements of a bustling Iraqi population. Sergeant Jaime Betancourt, whose Third Infantry Division company lost four soldiers to a suicide bomber in March, remarked in June: "I think that was the most scary thing—trusting civilians, especially after the car bomb."[158] Captain James Lockridge, a combat engineer from the same division speaking in a crowded hospital corridor, put his fears in perspective this way: "You have to trust them. There are 40 to 50 Iraqis around us right now. There could be a suicide bomber. At some point you have to let go. You have to let go of that fear or you won't get anything done."[159]

U.S. military personnel in Iraq cannot, of course, rule out adult women as couriers of death and destruction. Although a pregnant woman used in a suicide attack in Iraq in April may, or may not, have been a willing participant in an act of Baathist desperation, threats of violence and suicide activity are an ever-present security concern.[160] Following the April suicide attack, "Al-Jazeera broadcast separate videotapes of two Iraqi women, each of whom stood in front of the Iraqi flag, right hand on the Quran placed on a table in front of her and left hand brandishing an automatic rifle."[161]

In response to insurgent attacks and related security concerns, male American soldiers have, on occasion, frisked female Iraqi civilians. The Associated Press reported this past June:

> The practice is not widespread, and the Americans say they use it only as a last resort. But tales of such incidents—and television footage of a male American soldier patting down a chador-clad Iraqi woman—have sparked outrage in Iraq. The issue is being talked about throughout the country—in homes and cafes and during sermons by religious leaders at Friday prayers.[162]

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[157] Edmund L. Andrews, *In Day of Violence in Iraq, Attacks from All Directions*, N.Y. TIMES, July 2, 2003, at A16.
[158] Steven Lee Myers, *Anxious and Weary of War, G.I.'s Face a New Iraq Mission*, N.Y. TIMES, June 15, 2003, at sec. 1, p. 1.
[159] *Id.*
[160] *Suicide Bombers Kill 3 Coalition Soldiers*, CBS NEWS.com, April 4, 2003, at http://www.cbsnews.com/stories/2003/04/04/iraq/main547681.shtml.
[161] *Id.*
[162] Borzou Daragahi, *Soldiers Frisking Women Alarms Iraqis*, ASSOCIATED PRESS, June 18, 2003, at http://www.sanluisobispo.com/mld/sanluisobispo/nes/photos/6112908.htm.

U.S. Central Command responded to the alarm with the following statement:

> When female civilians must be searched, U.S. forces make every effort to have female service members conduct these searches. Although there are times when male service members are required to search female civilians, every effort is made to ensure these searches are conducted in a professional manner with dignity and respect for the individual being searched.[163]

Sergeant First Class James Williams, outside Baghdad's convention center, explained that "male soldiers use the back of their hands in the rare event that they have to frisk female employees."[164]

Statements condemning the frisking have been voiced both in Iraq and the United States. Sheikh Muhammad Mahmoud al-Samarayee, a cleric at Baghdad's Imam al-Adhan seminary, asserted, "'There's no doubt that unrelated men even touching Muslim women is not allowed in our religion.'"[165] William Beeman, an anthropologist who heads Middle Eastern studies at Brown University, termed the practice "'extraordinarily ignorant and offensive'" to Muslims, who may consider such searches to violate their honor.[166] Juan Cole, a history professor and Middle East specialist at the University of Michigan, warned in turn: "'The matter is so serious that for some very conservative people it is the equivalent of being raped, and may render the women, if they are not married, unmarriageable.'"[167]

These cultural positions are curious. In Afghanistan, female patients died because unrelated male surgeons were forbidden to touch them—a farce if ever the world saw one.[168] Male soldiers, like male doctors, must be permitted to protect human life, consistent with their training and professional ethics, when circumstances so warrant their intervention. Consider also the current cultural hypocrisy in Iraq. Male American soldiers may not frisk female Iraqi civilians under any circumstances for their own protection or the protection of innocents nearby—as such actions are categorically ignorant, offensive, and outrageous—but civilian Iraqi females can push themselves into male American soldiers to vent their desires, anger, or frustration.[169] Lastly, frisking

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] Paul Watson, *Doctors Cast Off Taliban Edicts*, LOS ANGELES TIMES, November 21, 2003, at http://www.latimes.com/news/nationworld/world/la-112101doctor.story.
[169] *World Photo: U.S Forces Restraining Angry Woman After She Lost Her Temper*, ASSOCIATED PRESS, June 19, 2003, at http://story.news.yahoo.com/news?tmpl=story&u=/030619/168/4g0no.html.

is not rape: not morally, not legally, and for a daughter or potential spouse to be adversely treated on account of either shows an incredible blindness and lack of love on the part of the person(s) responsible for such treatment. Apparently, the blind are still leading the blind.

Ideally, in the face of intractable cultural differences, both parties would heed the wisdom of Captain Lockridge that "[a]t some point you have to let go."[170] U.S. forces should make some allowances when solely male soldiers are available to frisk and security concerns are manageable, and refrain from frisking female Iraqi civilians, and the Iraqi populace, led by local leaders, should be more understanding about an infrequent practice aimed at making their troubled land more secure. International humanitarian law, after all, in asserting generically that "protected persons are entitled, in all circumstances, to respect for their . . . honor," adds further that "[p]arties to [a] conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."[171] U.S. forces, of course, should not expect the depth of Iraqi sentiment to change over this sensitive issue anytime soon. At the same time, U.S. forces should not be deterred from acting to make Iraq far safer than it currently is. In securing the peace, the U.S. military must tread a careful path: remaining, at a minimum, true to its own cultural standards and the limits of the law.

The U.S. military is clearly sensitive to opposite-sex searches. In March 2003, the U.S. Court of Appeals for the Armed Forces upheld the "maltreatment"[172] conviction and sentence of Air Force Staff Sergeant James Springer for physical body searches performed on two clothed female trainees.[173] Sergeant Springer, a male combat skills course instructor, chose female trainees for the purpose of demonstrating proper enemy prisoner of war (EPW) search technique.

> As described by [Field Supervisor Master Sergeant] Lebouef, the EPW search is a fast, aggressive full-body search used to check a person for weapons and booby traps and to determine if

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[170] *See supra* note 159.

[171] Geneva Protocol I, art. 27, *supra* note 22.

[172] 10 U.S.C. § 893 (2003) (article 93, Cruelty and Maltreatment, UCMJ). By way of comparison with the criminal offense proposed in Part I of this article regarding humiliating treatment, article 93 is a general intent offense used to prosecute primarily, but not exclusively, sexual harassment cases reaching a level of objective severity that U.S. military superiors know is unacceptable treatment from them given briefings and trainings within the U.S. military environment. The offense proposed in Part I of this article, by contrast, can be applied to all world military cultures, has no minimum severity requirement, covers a wider range of conduct, is not confined to military superiors, but requires compelling proof of wrongful specific intent to secure a conviction.

[173] United States v. SSgt James E. Springer, Appellant No. 02-0237 (CAAF 2003). See: http://www.arfor.uscourts.gov/opinion/2003term/02-0237.htm .

> an individual is dead or alive in combat situations. An EPW search is substantially more invasive than a protective police 'frisk.' A proper EPW search involves sitting astride a body laying facedown, grabbing and squeezing skin and checking under clothing, rolling the body over, and performing the same search on the front of the body, including cavity searches between the legs and the bra area for females.[174]

On neither female trainee did Sergeant Springer remove any clothing articles.[175] On one trainee, however, he brushed his hand across her breasts and vaginal area, and on the other trainee, he did a "knife sweep" of her vaginal area and grabbed her breasts and buttocks.[176]

The court rejected Sergeant Springer's claim that the searches were necessary or proper under the circumstances.[177] The court explained,

> The EPW search is a legitimate subject of instruction, which necessarily is demonstrated in an aggressive and violating manner. In a deployed context EPW searches might well be performed as a matter of military necessity on persons of the opposite sex. But for the purposes of training at Camp Bullis[,] . . . four witnesses testified that same sex EPW searches were inappropriate or prohibited.[178]

From this case, some "cultural" conclusions might be drawn. First, the U.S. military is quite prepared to hold male military members criminally accountable for violating the dignity of women. Second, EPW searches are aggressive searches. U.S. forces should not be conducting opposite-sex searches against non-hostile female Iraqi civilians who are not enemy prisoners of war. Such invasive searches could reasonably be viewed as malicious—without just cause—under the circumstances. Third, at the same time, just as threat-neutralizing opposite-sex EPW searches are justifiable under conditions of military necessity, so too protective opposite-sex frisking, which is clearly less invasive, ought to be justifiable under conditions of military necessity. Given the statement from Central Command, the U.S. would appear to be proceeding in a manner consistent with its own cultural standards.

International humanitarian law, of course, contains requirements of its own. As interpreted in this article, common article 3 is violated if the frisking of female Iraqi civilians by male American soldiers is committed with the intent to act maliciously, intent to gratify sexual lust or desires, or intent to

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[174] *Id.* at II.A.
[175] *Id.* at II.A.1. and II.A.3.
[176] *Id.*
[177] *Id.*
[178] *Id.* at II.B.

obtain an unofficial benefit. Clearly, any member of U.S. forces who dares to search Iraqi civilians—male or female—in return for money, favors, or the promise of money or favors, merits discipline. Most alleged violations, though, can be expected to center around the first two impermissible intents.

Whether a frisk is executed with malicious intent—such that it qualifies as senseless and/or baseless—depends upon the legitimate objects being searched for and how the search is handled. If the purpose of the frisk is to recover hidden AK-47 arms or detect lengthy explosives for use in a suicide attack, the frisk can be executed without approaching female private areas. If a female Iraqi civilian is known to possess no arms or explosives because she was just frisked, but then she is subjected to a second frisk moments later, the second frisk can reasonably be viewed as malicious. If a male American soldier frisks a female Iraqi civilian, but a female American soldier was present at the time and could have conducted the frisk, the frisk can reasonably be viewed as malicious. If a male American soldier frisks a female Iraqi civilian for hidden arms, and no female American soldier is present at the time but the male American soldier has been issued an electronic detection wand for use in the recovery of such weapons, that frisk, too, can reasonably be viewed as malicious. This delineation of objective circumstances is illustrative, not exhaustive.

Whether a frisk is executed with the intent to gratify sexual lust or desires depends on the professionalism, or lack thereof, with which the frisk is carried out. If a male American soldier, under orders to use the back of his hands while frisking female Iraqi civilians, turns his hands inward, an inference may be drawn that the frisk was conducted with sexual intent. If any frisk lingers over female body parts or results in the grabbing of female body parts, the frisk can reasonably be viewed as tainted by sexual intent. Moreover, comments made by male American soldiers before, during, or after a frisk may reveal wrongful sexual purpose underlying the frisk. Again, this delineation of circumstances is illustrative, not exhaustive, as every case must be judged on its own merits.

Some individuals in Iraq and/or the U.S. may argue any frisk of a female Iraqi civilian not performed by a female American solider or via electronic detection methods is *per se* a violation of the prohibition against humiliating treatment. This article cannot accept such a sweeping interpretation. If international humanitarian law applies fairly to all nations across the globe, and many nations of the world lack female military personnel and cannot begin to match levels of detection technology currently deployed in Iraq, the U.S. is already exceeding a standard that other nations cannot even meet. If a separate body of international humanitarian law for the U.S. is to be established, replete with more burdensome standards, then that body of law ought to be made explicit, and the U.S. ought to be able to assent or dissent. So long as individual male American soldiers are properly disciplined for overstepping bounds of professionalism when interacting with female Iraqi

civilians, and the U.S. accepts state responsibility in rare cases of troop misconduct, the U.S. is meeting its common article 3 obligation. At this point in time, quite frankly, the greatest threat to the dignity of female Iraqis is not from male military members from abroad, but rather male Iraqis from within.[179]

IV. CONCLUSION

Wars and rumors of war are unlikely to cease in the twenty-first century. The ICRC perhaps best summarized world mood when it stated in 2001: "Since the attacks of 11 September in the United States which negated the most basic principles of humanity, people all around the world share a sense of uncertainty, a feeling that what is most precious to us all—life and dignity—is under threat."[180] The struggle for dignity, however, will go forward. Indeed, it must. It will go forward, first and foremost, by abandoning the squishy language of lower limits to humiliation as a basis for denying international humanitarian law violations. The severity of humiliation suffered by victims should only be considered relevant to the issue of appropriate redress. Whether persons are slurred once, spit upon twice, drug through the mud, spray-painted green, subjected to offensive poses, used for private gain, slapped in the face, kicked in the shin, or culturally belittled for amusing effect, it is not the objective severity of the humiliation that must drive international legal analysis, but the egregiousness of intent and act under the totality of circumstances. Into the mushy mouth of the law, this article has sought to graft three pointed teeth to fashion a law with discernible bite.

The struggle for dignity also requires that men and women participating in armed conflicts worldwide receive the most meaningful advance notice possible with respect to categories of conduct for which they risk criminal judgment. Fundamental fairness in law must not be reduced to an empty catchphrase. Qualifying words like "generally recognized" or "generally considered," for example, while permissible descriptive terms within relatively homogeneous national military cultures, must be rejected as too vague for

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[179] *See, e.g.*, Neela Banerjee, *Rape (and Silence About It) Haunts Baghdad*, N.Y. TIMES, July 16, 2003, at http://www.nytimes.com/2003/07/16/international/worldspecial/16RAPE.html. "[The family of nine-year-old Sanariya] took her to a doctor three days after her attack only because the bleeding had not stopped. She had been sitting on the stairs at about 4 p.m. on May 22 when an armed man dragged her into an abandoned building next door. He shot at neighbors who tried to help the girl. He fled when she began screaming during the assault. Her mother refuses to let her outside now to play. [Sanariya's sister] Fatin lied to her family and said an operation had been done to restore Sanariya's hymen. But when her oldest brother, Ahmed, found out otherwise, he wanted to kill Sanariya, Fatin said."

[180] *A Time for Humanity to Prevail*, INTERNATIONAL COMMITTEE OF THE RED CROSS, September 21, 2001 (Press Release 01/33), *at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/59D9CBDA1AE4FAFDC1256B66006057D7.

insertion into criminal elements of any international military code seeking legitimacy and universal respect. If consensus is lacking as to the ambit or meaning of the law, then greater dialogue and scrutiny are necessary. "The . . . task of any lawgiver," after all, "is to speak intelligibly, to lay down clear rules in words that all can understand and that have the same meaning for everyone."[181]

This article, of course, cannot pretend that it has resolved all the ambiguity inherent in the international humanitarian prohibition against humiliating and degrading treatment. It has hopefully narrowed the provision, though, so that future discussions can further refine its essential core. It is critical that states, state agents, and victims all know where they stand vis-à-vis this provision and that judge advocates, consistent with their ethical responsibilities, be prepared to assist in this task. In the end, throughout our multicultural world, may fairness prevail, and justice be done.

> *Be sure of this: The wicked will not go unpunished,*
> *but those who are righteous will go free.*[182]

[181] *Why the Security Council Failed* at 27, *supra* note 45.
[182] *Proverbs* 11:21 (New International).

PSYCHIATRIC DISABILITIES IN THE FEDERAL WORKPLACE: EMPLOYMENT LAW CONSIDERATIONS

CAPTAIN MIRANDA W. TURNER*

I. INTRODUCTION

According to the National Institute of Mental Health ("NIMH"), in any given year, approximately 22.1% of adult Americans suffer from a mental disorder that would be diagnosable according to DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION ("DSM-IV") criteria sets..[1] Approximately 9.5% of the U.S. population aged eighteen and over suffers from a depressive disorder (defined by the NIMH as including major depressive disorder, dysthymic disorder, and bipolar disorder) during any given year.[2] An estimated 13.3% of Americans aged 18-54 suffer from an anxiety disorder (defined by NIMH as including panic disorder, obsessive compulsive disorder, post-traumatic stress disorder, generalized anxiety disorder, and phobias) during any year.[3] Approximately 1.1% of American adults suffer with schizophrenia.[4] The effect of mental illness on the American worker is significant: four of the ten leading causes of disability in developed countries are psychiatric illnesses, specifically major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder.[5] This article discusses the issues employment lawyers may encounter dealing with mental illness in the work place. Specifically, this article examines the Rehabilitation Act as it applies to psychiatric disabilities or disorders. In the event the Rehabilitation Act does not apply to the mental illness, employment lawyers should examine whether the Family Medical Leave Act applies to the facts and circumstances. Finally, this article addresses the Workers Compensation law and points out that another remedy for the employee, as well as an area for research for the attorney.

Given the prevalence of mental disorders in modern society, it seems likely that employment law attorneys, including those working for the federal government, will encounter employment law issues related to psychiatric

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[1] National Institute of Mental Health, *The Numbers Count* (visited April 28, 2003) <http://www.nimh.gov/publicat/numbers/cfm>.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

conditions suffered by an employee or employees in their organizations. Statistics bear this presumption out, at least with regard to claims of discrimination. According to the Equal Employment Opportunity Commission ("EEOC"), approximately 12.7% of Americans with Disabilities Act ("ADA") charges filed with that agency between June 1992 and September 30, 1996 involved mental or psychiatric impairments.[6] With respect to the federal government, in 1999, 1,990 formal complaints filed with the EEOC involved claims of discrimination due to mental disability; that amounts to 3.2% of the total complaints filed, and approximately 12% of the Rehabilitation Act claims filed for that year.[7] While the number of on the job psychiatric illnesses and injuries reported by private industry to the Department of Labor was quite low, days lost because of these illnesses were in some cases quite high. For instance, although the reported rate of "neurotic reaction to stress" ranged from .3 to .7 per 10,000 over the ten-year period from 1992-2001, the median days lost due to such condition ranged from 10-33 over the same period. Anxiety, stress, and neurotic disorders were reported at a rate ranging from .5 to 1 per 10,000 over that same time period, and median days lost as a result ranged from 15-48. Median days lost for posttraumatic anxiety ranged from zero (no reported cases), to 120.[8] A possible explanation for the low rate of reported occupational disease or illness with regard to psychiatric conditions could be due to a failure of the employee or employer to link the condition with the occupational environment. Another possible explanation is failure to report psychological injury suffered at work due to fear of stigma, or because the employee does not want the additional stress of a contested worker's compensation claim.[9] It has been estimated that the economic costs of lost productivity at work, home, and school due to mental illness was approximately $78.6 billion in 1990; approximately 80% of these costs stemmed from disability.[10]

Determining whether an individual is disabled, and, if so, to what extent performance and conduct deficiencies must be accommodated, or what

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[6] Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: the Americans with Disabilities Act and Psychiatric Disabilities* (March 25, 1997) [hereinafter *EEOC Enforcement Guidance*].

[7] Equal Employment Opportunity Commission, *Federal Sector Report in Complaints Processing and Appeals Fiscal Year 1999* (visited April 28, 2003) <http://www.eeoc.gov/federal/eeorep99/index.html>.

[8] Department of Labor, Bureau *of Labor Statistics get detailed statistics database, nonfatal cases involving days away from work* (data retrieved April 28 & 29, 2003) <http://data.bls.gov/servlet/SurveyOutputServlet?jrunsessionid=1051631247818317224 & 1050564038901211490>.

[9] *See, e.g.*, Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 949-950 (1997) (discussing the stigma attached to mental illness).

[10] Surgeon General, *Mental Health: A Report of the Surgeon General Chapter 2*, (visited April 29, 2003) <http://www.surgeongeneral.gov/Library/MentalHealth/chapter2/sec2_1.html>.

accommodations are reasonable and necessary, can be difficult in cases where the alleged disability is psychiatric in nature. Particular difficulties have arisen in addressing what is reasonable accommodation with regard to stress reduction, interpersonal difficulties, and scheduling.[11] A major component of many mental illnesses is that they can be triggered or worsened due to environmental stressors.[12] Additionally, the issue of accommodation is further complicated because a failure to accommodate a psychiatric condition, either due to undue hardship or because the condition does not meet the definition of disability under the Rehabilitation Act, may aggravate the condition in such a manner as to entitle the employee to compensation under federal worker's compensation and/or disability statutes.[13] Therefore, it would be wise for the employment lawyer to take into account the costs of a potential worker's compensation or disability claim, when considering possible accommodations for an employee with a psychiatric disorder. While a requested accommodation may not be mandated by the Rehabilitation Act, it may be advisable to consider it anyway to reduce the costs to the government if the result of failure to accommodate the mental condition would be that the employee would receive worker's compensation or disability pay. It is also important to ensure that the requirements of the Family and Medical Leave Act[14] have been followed with regard to requested leave from work due to psychiatric difficulties.

II. THE REHABILITATION ACT AND PSYCHIATRIC DISABILITES

The Rehabilitation Act of 1973, as amended,[15] governs disability discrimination in the federal sector.[16] In order to be covered by the Rehabilitation Act, an individual must be a qualified individual with a disability. A "disability" is defined as:

> (1) A physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;

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[11] Rothstein, supra n. 9 at 956.

[12] Stefan, Susan, *Symposium in Mental Disability Law: "You'd Have to be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA,* 31 LOY. L.A. L. REV. 795, 818 (1998).

[13] *See id.* at 820 ("Interestingly, although the definition of disability for the purpose of receiving disability benefits is considerably more stringent than the definition of disability for the purposes of the ADA - and requires an inability to work in almost any job- many plaintiffs who lose psychiatric disability claims on the grounds they are not disabled nevertheless receive disability benefits for the very disability at issue in the discrimination case. Not only do employers not fight the disability benefits claim as vigorously as the ADA claim, they often encourage and facilitate the disability benefits claim….").

[14] 5 USC§ 6381 et seq. (2002).

[15] 29 USC §§ 701-797(b).

[16] *Id.*

(2) A record of such an impairment; or
(3) Being regarded as having such an impairment.[17]

A qualified individual with a disability is "an individual with a disability who satisfies the requisite skill, experience, and education and other job-related requirements of the employment position…and who, with or without reasonable accommodation, can perform the essential functions of the job."[18] Although the Rehabilitation Act predated the Americans with Disabilities Act of 1990,[19] in 1992 the Rehabilitation Act was amended to provide that, "the standards used to determine whether [this section] has been violated in a complaint alleging…employment discrimination under this part shall be the standards applied under Titles I and V…of the Americans with Disabilities Act of 1990… as such sections relate to employment."[20]

A. Is the Employee a Qualified Individual With a Disability?

To determine whether the Rehabilitation Act covers an employee, you must determine 1) whether the individual has an impairment, 2) what (if any) major life activity is substantially limited by the impairment, and 3) whether the individual is capable of performing the essential functions of the job, with or without accommodation. It should be noted that the Rehabilitation Act and ADA both exclude certain conditions from the definition of "disability," so that persons suffering from these conditions are not protected against discrimination on the basis of those conditions. The excepted conditions are transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs.[21] Note that past use of illegal drugs is not excepted from the definition of disability, nor is current or past alcoholism.[22] While the Rehabilitation Act initially would seem to be a useful tool for mentally ill employees to gain accommodation within the workplace, a review of the applicable case law illustrates that the mentally ill employee has to overcome significant obstacles to successfully prove discrimination.[23]

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[17] 29 C.F.R §1614.1630.2(g) (2002).
[18] 29 C.F.R §1630.2(m) (2002).
[19] 42 USC § 12111 et seq. (2002).
[20] 29 CFR §1614.203(b) (2002). *See also,* Robert Belton and Dianne Avery, EMPLOYMENT DISCRIMINATION LAW 663-665 (1999) (discussing the relationship between the ADA and the Rehabilitation Act).
[21] 29 C.F.R § 1630.3 (2002).
[22] However, alcoholic employees may be held to the same work standards as other employees and employers may prohibit employees from working under the influence of alcohol. *See* Rothstein, *supra* n.9 at 936-937.
[23] "Plaintiffs with psychiatric disabilities almost always lose ADA discrimination cases, despite EEOC regulations and guidance…." Stefan, *supra* n. 12 at 802. *See also, Ernest* C.

1. Is There an Impairment?

The EEOC has addressed the question of what constitutes a mental or psychological impairment in its Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities. Personality traits and behaviors alone are not considered mental impairments, although they may be symptoms of an impairment.[24] The EEOC Enforcement Guidance specifically lists irritability, chronic lateness, and poor judgment as examples of traits that are not disabilities.[25] Neither are irresponsible behavior, poor impulse control,[26] or inability to tolerate stress[27] considered disabilities. Examples of conditions the EEOC regards as mental impairments are "major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders."[28] While the EEOC Enforcement Guidance makes reference to the DSM-IV as a guide to assist in identifying mental impairments, the commission cautions that not all of the conditions listed therein are mental impairments or disabilities under the ADA and Rehabilitation Act.[29]

2. Does the Impairment Substantially Limit a Major Life Activity?

One law review article noted that "[t]he first and most common rationale used by courts in dismissing employment discrimination claims brought by employees claiming to have a psychiatric disability is that the employee is not in fact disabled under the ADA."[30] A review of the case law shows that a major hurdle for the mentally ill employee occurs with respect to proving that he or she suffers a condition that substantially limits a major life activity.

Hadley, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW AND PRACTICE, 1026 (14th ed. 2001) (stating that "Mental disabilities pose special problems in proving that the employee suffers from a disabling condition and that the employee is a qualified individual with a disability under the Act. Not every mental condition rises to the level of substantially limiting a major life function, and many that do…are…so severe as to prevent the employee from performing the essential functions of his or her position even with reasonable accommodation).

[24] EEOC Enforcement Guidance, *supra* n. 6, at 4.

[25] *Id.*

[26] Janet Goldberg, *Employees with Mental and Emotional Problems -- Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, Worker's Compensation, and Related Issues*, 24 STETSON L. REV 201, 203 (1994).

[27] Stefan, *supra* n. 12, at 817.

[28] EEOC Enforcement Guidance, *supra* n.6, at 2-3.

[29] *Id.* at 3. For instance, some of the conditions listed therein are specifically excluded from the definition of disability by CFR regulation, while other listings (such as V Codes) do not describe any disorder, but rather describe personal problems individuals may be having that may cause them to seek counseling or other psychological assistance.

[30] Stefan, *supra* n. 12, at 806.

In its Enforcement Guidance on the ADA and Psychiatric Disabilities, the EEOC lists major life activities potentially limited by mental illness as including learning, thinking, concentrating, interacting with others, self care, speaking, performing manual tasks, working, and sleeping.[31] An impairment is considered so severe as to substantially limit one of these major life activities "if it prevents an individual from performing a major life activity or significantly restricts the condition, manner, or duration under which an individual can perform a major life activity, as compared to the average person in the general population."[32] Although EEOC guidance indicates that the condition should be assessed without regards to the effect of psychotropic medication,[33] the Supreme Court has since ruled that the effects of mitigation measures should in fact be considered in determining whether an individual is disabled under the ADA or Rehabilitation Act.[34]

Although it would seem obvious that many psychiatric illnesses would substantially limit one or more major life activities,[35] courts have not applied the standard to individual cases with any degree of consistency, because "[t]he determination of whether an individual is severely limited in a major life activity must be made on a case by case basis."[36] Furthermore, "[t]he determination… is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[37]Among the severe disorders that have been found by courts not to substantially limit any of the plaintiff's major life activities are major depression,[38] bipolar disorder,[39] obsessive- compulsive disorder,[40] post

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[31] EEOC Enforcement Guidance, *supra* n. 6, at 5.
[32] *Id.* at 6.
[33] *Id.* at 6-7.
[34] Sutton v. United Airlines, 527 U.S. 471, 119 S. Ct. 2139, 2146-2147 (1999), stating ("a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently substantially limits a major life activity.").
[35] It is ironic to note that, in order for an individual to be diagnosed with a mood or anxiety disorder, the symptoms presented must "cause [] clinically significant distress or impairment in social, occupational, or other important areas of functioning." *See generally* American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, American Psychiatric Association (1994). However, as the cases that follow will illustrate, the legal standard for significant impairment is apparently much higher than the medical standards recognized in the psychiatric field.
[36] Jacques v. Dinarzio, Inc, 2002 NDLR (LRP) LEXIS 50, 14 (E.D.N.Y. 2002) (quoting *Toyota Motor Mfg. Kentucky, Inc. v. Williams,* 534 U.S. 184, 122 S. Ct. 681, 685 (2002)).
[37] *Id.* (citing Toyota, 122 S. Ct. 681, 692).
[38] *See, e.g.*, Swanson v. University of Cincinnati, 2001 NDLR (LRP) LEXIS 414 (6th Cir. 2001) (major depression did not substantially limit any major life activities because it was treated successfully with medication, and even when plaintiff was not medicated his impairments in sleeping and communicating were not substantially limiting. Plaintiff likewise was not substantially impaired in his ability to work because he did not miss workdays, reviewers noted he worked hard, and his impairment was short term due to the corrective effects of medication); Lottinger v. Shell Oil Co., 2001 NDLR (LRP) LEXIS 236 (S.D. Tex. 2001) (difficulty sleeping and eating resulting in 40 lb weight loss and low self esteem was

traumatic stress disorder,[41] and unspecified anxiety disorder combined with personality disorder not otherwise specified.[42] A review of cases prior to 1997 undertaken by one researcher found that paranoid schizophrenia controlled by medication, fear of heights, bipolar disorder, stress requiring medical intervention, and depression were all found by various courts not to be covered disabilities.[43] The commentator noted that, in relation to mental disorders, "what is problematic with the ADA and Rehabilitation Act claims is the requirement that the condition be a substantial impairment. Many of the conditions have been held not to qualify because the courts do not view them as substantially impairing a major life activity. Ironically, however, it is the

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insufficient to show plaintiff's depression significantly limited a major life activity); Cooper v. Olin Corp., Winchester Div., 2001 NDLR (LRP) LEXIS (8th Cir. 2001) (plaintiff's depression did not limit a major life activity because she could care for herself, her animals, and her home, and she did have some social interaction); Schnieker v. Fortis Ins. Co., 2000 NDLR (LRP) LEXIS 5, 14-15 (depression not disabling despite plaintiff's history of repeated psychiatric hospitalizations; inability to tolerate stressful situations insufficient to substantially limit major life activity of working).

[39] *See, e.g.,* Jaques, 2000 NDLR (LRP) LEXIS at 12-21 (court found bipolar disorder did not substantially limit a major life activity because plaintiff was able to care for herself and have a normal social life outside of work, although she had substantial difficulties interacting with coworkers); Doebele v. Sprint et al., 2001 NDLR (LRP) LEXIS 326 (D. Kan. 2001) (bipolar disorder, attention deficit hyperactivity disorder, and hypothyroidism did not substantially limit any major life activities because inability to get along with coworkers or work overtime were not significant impairments); Whalley v. Reliance Group Holdings, Inc., 2001 NDLR (LRP) LEXIS 17 (S.D.N.Y. 2001) (bipolar disorder requiring hospitalization did not substantially limit a major life activity); McConnell v. Pioneer Hi-Bred Int'l, 2000 NDLR (LRP) (LEXIS) 143, 20-22 (D.S.D. 2000) (plaintiff's bipolar disorder was successfully controlled by lithium carbonate and therefore was not disabling). *But see* Taylor v. Pheonixville School Dist., 1999 NDLR (LRP) LEXIS 721 (3rd Cir. 1999) (plaintiff continued to suffer paranoia, had a continuing need for mental health treatment, and suffered side effects while taking lithium carbonate; leads to a genuine issue of fact concerning whether plaintiff was limited in the major life activity of thinking).

[40] *See, e.g.,* Steele v. Thiokol et al., 2001 NDLR (LRP) LEXIS 40 (10th Cir 2001) (difficulty sleeping, inconvenient patterns of walking, and difficulty getting along with coworkers is insufficient to show obsessive-compulsive disorder substantially limits a major life activity). *But see* Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (OCD was disabling because it substantially affected plaintiff's ability to eat and drink without vomiting), and Humphrey v. Memorial Hosp. Ass'n, 2001 NDLR (LRP) LEXIS 16 (9th Cir. 2001) (OCD substantially limited plaintiff's ability to care for herself because it took significantly longer than normal for her to complete self care tasks; plaintiff would wash her hair up to three hours a day in addition to other rituals).

[41] *See, e.g.,* Duegan v. City of Council Grove, 1999 NDLR (LRP) LEXIS 773 (D. Kan. 1999) (advances by supervisor involving aggressive unwanted touching provoked post traumatic stress reaction; condition was not disabling because the only limitation on plaintiff's functioning was that she was unable to work with the alleged harasser).

[42] Huizenga v. Elkay Mfg, 2001 NDLR (LRP) LEXIS 206 (N.D. Ill. 2001) (plaintiff failed to show how panic attacks limited any major life activity; plaintiff failed to explain how personality disorder NOS substantially limited a major life activity).

[43] Rothstein, *supra* n. 9 at 962. These cases all occurred prior to the Supreme Court's decision in *Sutton.*

condition that prevents [the mentally ill individuals] from keeping a job, which should therefore be viewed as a substantial impairment."[44]

Many employees alleging they are disabled due to a psychiatric condition rely on allegations that they are limited either in their ability to interact with others, or their ability to work.[45] This can be difficult, because the plaintiff may have been successful at work or in other aspects of his or her life[46] prior to the exacerbation of his or her illness by some aspect of the working environment.[47]

"[C]ourts conclude as a matter of law that disabilities plaintiffs allege are caused by workplace abuse, interpersonal conflicts, and job stress simply are not disabilities for purposes of the ADA."[48] Therefore, courts are loathe to recognize even extreme interpersonal difficulties or intolerance to the working environment as disabling conditions, absent a showing that the difficulties existed outside of the current employment context; this is true even if the plaintiff has a history of a chronic mental condition.[49]

However, due to the individualized inquiry in each case, an employment lawyer must keep in mind that although the potential plaintiffs face hurdles in establishing that they are disabled under the ADA and Rehabilitation Act, they are by no means categorically excluded from doing so. Courts have, in the past, found conditions including panic disorder, depression, anxiety disorder, personality disorders, schizophrenia, bipolar disorder, and PTSD to be covered conditions, based upon the individualized sets of circumstances before them.[50]

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[44] *Id.* at 966.
[45] *See* notes 38-42, *supra.*
[46] Stefan, *supra* n. 12. at 796.
[47] *Id.* at 811 (stating that, "One of the fundamental canons of psychiatry and the medical profession is that high levels of stress can cause, trigger, or exacerbate both physical illness and psychiatric disabilities. These disabilities and illnesses, however, can diminish or even vanish if the stress is reduced.").
[48] *Id.* at 806.
[49] *See, e.g., Doebele,* 2001 NDLR (LRP) LEXIS 326, 45-48 (plaintiff could not show she was substantially limited in interacting with others because she presented no evidence of difficulties interacting with people outside her workplace. Plaintiff was not substantially limited from working due to her inability to work overtime); *Steele,* 2001 NDLR (LRP) LEXIS 40, 19-20 (plaintiff failed to show he had difficulty in interactions with others outside of his workplace, so was not substantially limited in interactions with others); *Schnieker,* 2000 NDLR (LRP) LEXIS 5, 8, 14-16 (evidence showed only that plaintiff was unable to work for a particular supervisor, even though stress from the job necessitated plaintiff's psychiatric hospitalization); *Dunegan,*1999 NDLR (LRP) LEXIS 773 at 26-27 (PTSD did not substantially limit plaintiff's ability to work because plaintiff was only unable to work for her alleged harasser).
[50] Rothstein, *supra n.* 9, at 963-965.

3. Is the Individual "Otherwise Qualified"?

In her article, *Symposium on Mental Disability Law: "You'd Have to be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA,* Professor Susan Stefan noted that, although courts tend to dismiss the ability to get along with others at the workplace as a potential major life activity when analyzing whether an individual is disabled by a psychiatric impairment, the ability to get along with bosses and coworkers is nevertheless deemed to be an essential function of essentially all jobs.[51] Therefore, courts have found disabled individuals with psychological impairments to be "not otherwise qualified" upon occasion, on the basis of their inability to work appropriately with others.[52] Likewise, some courts have found that tolerating stress is an essential function of a job or class of jobs, and an inability to tolerate workplace stressors means that the mentally impaired individual is not otherwise qualified.[53]

Another issue to consider when determining whether an individual is otherwise qualified is whether the individual poses a significant safety risk within the workplace. An employer may refuse to hire, or terminate, an individual if the individual poses a direct threat in the workplace.[54] Employers are directed by regulation to consider the duration of the risk, nature and severity of potential harm, likelihood the harm will occur, and imminence of the potential harm.[55] The EEOC has offered guidance in determining whether an individual poses a direct threat. The commission cautions that, "[a] significant risk is a high, and not just a slightly increased, risk. The determination that an individual poses a direct threat must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence."[56] The EEOC cautions that a history of mental illness[57] or suicidal behavior[58] alone does not create a direct threat, although a past history of violent behavior may, if the totality of the circumstances indicates that

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[51] Stefan, *supra* n. 12, at 821.
[52] *Id.* at 821-823. *See also* Janet Goldberg, *Employees With Mental and Emotional Problems -- Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, the Rehabilitations Act, Worker's Compensation, and Related Issues,* 24 STETSON L. REV. 201, 208 (1994) (employee was not otherwise qualified because difficulty accepting supervision and tendency toward explosive outbursts directly impaired his ability to perform the essential functions of the job).
[53] *Id.* at 825.
[54] 29 CFR § 1630.2 (2002).
[55] *Id.*
[56] EEOC Enforcement Guidance, *supra n*. 6, at 33.
[57] *Id.*
[58] *Id.* at 35.

violence is likely to recur in the workplace.[59] Determining whether a direct threat exists is a troubling area of law, due to the potential for adverse action against the employer if it ultimately makes the wrong decision concerning the existence of a threat. On one hand, if the government employer erroneously determines an employee is a threat, it may be liable under the Rehabilitation Act; on the other hand, if the employee is incorrectly determined not to a be a threat there may be liability (either under the FTCA or Workman's Compensation) if the employee later injures another.[60]

B. Are Reasonable Accommodations Available to Assist the Individual to Perform the Essential Functions of the Job, Absent Undue Hardship to the Agency?

A qualified individual with a known disability is entitled to reasonable accommodation, unless the employer can show that accommodation of the disability would cause it undue hardship.[61] Note that the disability must be a known disability; the employer has no duty to provide an accommodation for a disability that it does not know exists. [62]

While the duty to request reasonable accommodation generally rests with the employee, the EEOC has taken the position that an employer should seek out the interactive accommodation process when it has knowledge the individual is disabled, knows or should know the individual is experiencing problems with his or her work because of the disability, and knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[63] This may be especially significant when considering cases of mental impairments. "Denial is a common aspect of many mental impairments. Similarly, an individual may be aware of the condition, but be in denial about the need for an accommodation."[64] Since the government is supposed to be a model employer with respect to the employment of disabled individuals,[65] it may have a higher duty to attempt to

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[59] *Id.* at 34-35. *See also, e.g.*, Adams v. Alderson, 723 F. Supp 1531, 1532 (D.D.C. 1989) (person who cannot refrain from violence in the workplace is not otherwise qualified), New v. Postmaster General, EEOC App. No. 01943836 (1996) (a disabled person who poses a threat of physical danger to coworkers due to his or her disability is not a qualified person with a disability).

[60] Rothstein, *supra n*. 9, at 950.

[61] 29 CFR § 1630.2 (2002). *See also* EEOC Enforcement Guidance, *supra* n. 6, at 19.

[62] *See, e.g.*, Andrews v. United Way of Alabama, Southern Div., 2000 NDLR (LRP) LEXIS 97, 16-17 (S. D. Ala. 2000).

[63] Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 28 (1999) [hereinafter EEOC Reasonable Accommodation].

[64] Rothstein, *supra n*. 9, at 948.

[65] 29 CFR § 1614.203 (2002).

ascertain when reasonable accommodation would be necessary than would a private employer.

In the case of psychiatric disabilities, it is often difficult for the employer to determine what type of accommodation would benefit the employee, since the employee's limitations are not necessarily readily apparent. Therefore, medical documentation concerning the suggested accommodation will be especially important in evaluating employees' requests for accommodation of mental disabilities. The employer may require the employee to provide medical documentation supporting the existence of a disability and the need for accommodation, when these factors are not readily apparent.[66] The employer may not require this, however, if both the disability and the need for accommodation are obvious, or if the employee has already provided adequate medical documentation about his or her condition and functional limitations.[67] Furthermore, if the employer asks for medical documentation concerning a non-obvious disability, and the employee fails to provide it, he or she may lose the entitlement to be reasonably accommodated.[68] The employer is not required to grant the employee the precise accommodation requested, if another accommodation would be effective.[69] The employer is also not required to provide an accommodation that would cause undue hardship on the employer.[70]

The EEOC defines undue hardship as a significant difficulty or expense that focuses on the resources and circumstances of the particular employer in relation to the difficulty of providing a particular accommodation.[71] Specific considerations include the costs of accommodation, the financial resources of the employer, the size of the employer, the type of business being conducted, and the impact of a proposed accommodation on the employer's business.[72] Given the resources of the federal government and its role as a model employer, it may be difficult to show undue hardship based on factors such as economic cost.

Reasonable accommodations that may arise with respect to psychiatrically disabled employees include the need for time off to attend therapy, moving the employee to a different work location to avoid distraction, allowing a modified work schedule, or altering supervisory methods of communication. However, an employer is never required to reallocate essential functions of the position,[73] nor does an employer have to change a

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[66] *EEOC Reasonable Accommodation*, *supra* n. 63 at 7.
[67] *Id.* at 8.
[68] *Id.*
[69] *Id.* at 9-10.
[70] 42 USC §§ 12111-12112 (2002).
[71] *EEOC Reasonable Accommodation*, *supra* n. 63 at 4.
[72] Rothstien, *supra* n 9, at 956.
[73] *EEOC Reasonable Accommodation*, *supra* n. 63, at 14.

person's supervisor as an accommodation.[74] However, the employer may provide these options as accommodations if it chooses to do so. It is important to keep in mind that just because a particular action is not required, does not mean that it should not be considered, if circumstances suggest it may be a workable solution to a workplace dilemma.

C. Alternate Bases for Recovery Under the Rehabilitation Act: Having a Record of a Disability or Being Regarded as Having a Disability.

An employee may argue that his or her employer relied on a record of a past disability, or upon its erroneous belief that the employee was disabled, to intentionally discriminate against the employee. In a "regarded as" case, a plaintiff must not only show that he or she was regarded as impaired; the plaintiff must also show he or she was regarded as disabled within the meaning of the applicable statute (ADA or Rehabilitation Act).[75] The Supreme Court has indicated two ways an employee may show he or she was regarded in this manner. The employee may show that the employer had an erroneous belief that he or she suffered an impairment that significantly limited a major life activity, or may show that the employer believed that an actual impairment did substantially limit a major life activity when in actuality there was no such limitation.[76] There are some instances where Courts found that individuals were not regarded as disabled, despite the fact that their employers clearly viewed them as impaired.[77] In at least two cases, courts came to this

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[74] *Id.* at 25. *See also* Rothstien, supra n. 9, at 152 (noting most courts have not required employers to switch plaintiffs' supervisors as a reasonable accommodation); Snyder v. Med. Serv. Corp. of Eastern Washington, 2001 NDLR (LRP) LEXIS at 11 (Wash. 2001) (noting that several of the U.S. courts of appeals have found there is no duty under the ADA to accommodate employee by changing supervisors).

[75] *See, e.g.*, Jaques v. Dimarzio, 2002 NDLR (LRP) LEXIS 50, 21 (2002).

[76] Sutton v United Airlines, 527 U.S. 471, 489 (1999).

[77] *See, e.g.*, Swanson v. Univ. Cincinnati, 2001 NDLR (LRP) LEXIS 414, 27-28 (6th Cir. 2001) (supervisor viewed plaintiff's depression as an impairment, but did not view it as substantially limiting him from working in a broad class of jobs); Doebele v. Sprint Co., 2001 NDLR (LRP) LEXIS 326, 53-55 (D. Kan 2001) (employer did not regard plaintiff as disabled, although it knew of her past suicidal ideations, regarded her as confrontational and abrasive with significant interpersonal deficits, referred her to Employee Assistance Program, knew she received psychiatric treatment, and observed mood swings); Lottinger v. Shell Oil Co., 2001 NDLR (LRP) LEXIS 236, 73 (S.D. Tex 2001) (although employer perceived plaintiff to be an alcoholic, it did not regard him as disabled even though his duties were changed as a result); Whalley v. Reliance Group holdings, Inc., 2001 NDLR (LRP) LEXIS 17, 22 (S.D.N.Y. 2001) (although employer may have known plaintiff had been hospitalized for bipolar disorder and therefore perceived him as unable to perform the job of flight attendant, there was no evidence employer viewed him as limited in performing a class or broad range of jobs); McConnell v. Pioneer Hi-Bred Int'l, Inc., 2000 NDLR (LRP) LEXIS 143, 24 (employer sought medical opinion concerning whether plaintiff's performance problems were caused by his bipolar

conclusion despite evidence coworkers harassed the plaintiffs as a result of their perceived mental impairments.[78] However, at least one court has held that a supervisor's knowledge of complainant's mental disorders, combined with statements that she was irrational, extremely emotional, and should see a psychiatrist, created a question of fact regarding whether she was regarded as substantially limited in the major life activity of interacting with others.[79]

Similarly, with respect to a past record of impairment, the past impairment must have substantially limited a major life activity in order for the plaintiff to receive the protections of the statute. It is insufficient that the past record of impairment indicates that the employee received psychiatric treatment, psychotropic medication, or even inpatient psychiatric or addictions treatment. [80]

III. FAMILY AND MEDICAL LEAVE ACT

Even if a psychological condition is not considered a disability under the Rehabilitation Act, and therefore does not require reasonable accommodation, an agency may be required to allow the employee to use Family and Medical Leave Act[81] leave to obtain treatment for his or her mental condition.[82] Title II of the Family and Medical Leave Act ("FMLA") covers federal civil service and non-appropriated fund employees.[83] It provides that non-temporary employees who have completed more than twelve months of continuous federal employment are entitled to up to twelve administrative

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disorder; the medical opinion attributed them to plaintiff's basic personality traits rather than to his mental disorder. Therefore, employer did not regard plaintiff as disabled).

[78] Steele v. Thiokol Corp., 2001 NDLR (LRP) LEXIS 40, 3 (10th Cir. 2001) (coworkers referred to plaintiff as "Psycho Bob," made cuckoo sounds at him, stated plaintiff was "crazy as hell" and "a psychopath"; no evidence employer viewed plaintiff as substantially limited in a major life activity), and Davidson v. United Technologies, 2000 NDLR (LRP) LEXIS 322 (S.D. Ind. 2000) (coworkers referred to plaintiff as "Crazy Willie" and "Prozac Willie" after he returned to work following psychiatric hospitalization for depression; no evidence that employer regarded plaintiff was substantially limited in his ability to work. Furthermore, at least one responsible management official was unaware of plaintiff's hospitalization).

[79] Jacques v. Dimarzio, Inc., 2002 NDLR (LRP) LEXIS 50, 25-26 (E.D.N.Y. 2002).

[80] *See, e.g.*, Davidson v. United Technologies, 2000 NDLR (LRP) LEXIS 322, 20 (S.D. Ind. 2000) (plaintiff has a record of depression, but failed to show it had been disabling; evidence of several weeks of psychiatric hospitalization was insufficient to show past disability); Lottinger v. Shell Oil Co., 2001 NDLR (LRP) LEXIS 236, 68 (S.D. Tex. 2001) (inpatient addictions treatment, diagnosis of alcoholism, and prescription of antidepressant medication did not establish a record of a disability).

[81] 5 USC § 6381 *et seq.* (2002) applies to federal employees. The remained of the FMLA is codified at 29 USC § 2601 *et seq.*).

[82] The reverse is also true. An individual may be entitled to additional leave beyond what is provided for by FMLA as a reasonable accommodation for a disability, if he or she is disabled and the circumstances so warrant.

[83] *See generally* 5 USC § 6381 *et seq*. (2002).

workweeks per year of unpaid leave per year to care for a newborn or recently adopted (or foster) child, to care for a seriously ill family member, or because of a serious health condition that makes the employee unable to perform the duties of his or her position.[84] This leave is in addition to the paid leave that has been accumulated by the employee, although the employee has the option to substitute paid sick or annual leave for FMLA leave.[85]

Office of Personnel Management guidelines, published in the Code of Federal Regulations, specifically detail the type of documentation that can be required of an employee seeking FMLA leave, and other procedures regarding the application of Title II. In order to determine an employee's entitlement to FMLA leave due to a psychiatric disorder, it is first necessary to determine if the employee has a serious health condition within the meaning of the statute. A serious health condition is defined in the regulation as an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider.[86] Health care provider is defined very broadly, and includes not only treatment by a psychiatrist, but also treatment by psychologists, licensed clinical social workers, mental health counselors (where licensed), and practitioners of certain types of alternative medicine.[87] Continuing treatment is defined very broadly, and "condition requiring continued treatment" appears to include nearly all potentially incapacitating medical conditions requiring the repeated intervention of a health care provider, with the exception of certain minor physical ailments such as colds and earaches.[88] The only type of mental illness specifically excluded from coverage by the FMLA is "mental illness resulting from stress," unless it requires either "inpatient care or continuing treatment by a health care provider."[89]

The employee may be required to provide medical documentation from a health care provider, stating the date the serious health condition began; the probable duration of the condition, or, if the condition is chronic, the probable duration of the present period of incapacity; appropriate medical facts including a general statement concerning the incapacitation, examination, or treatment that may be required; and either a statement that the employee is unable to perform one or more essential job functions, or that he or she requires medical treatment for a serious health condition.[90] If intermittent leave is requested, the employer may request estimated or actual dates of planned treatment, duration of treatment and recovery period or, in the case of

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[84] 5 USC § 6382 (2002).
[85] 5 USC § 6382 (d) (2002).
[86] 5 CFR § 630.1202 (2002).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] 5 CFR § 630.1207 (2002).

a chronic condition, the duration and projected frequency of periods of incapacitation.[91] The employer may not require additional medical information, nor may it make requests for information it already possesses. However, if the information provided by the employee's health care provider is unclear, a government health care provider may request clarification from the employee's health care provider (with the consent of the employee).[92] Furthermore, if the government disputes the validity of the medical certification, it may request that the employee obtain a second opinion, at government expense. However, the employee may not be required to see a provider regularly employed by the employee's employing agency to obtain this second opinion. For instance, a civilian Air Force employee may not be required to see an active duty Air Force doctor, or a civilian doctor employed by the Air Force as a civilian employee or contractor. If the opinion provided by the second health care professional is contrary to the information contained in the first medical certification, a third opinion, from a health care professional that is mutually acceptable to both the agency and the employee, may be required, and that opinion shall be binding on both parties.[93] If the employee, however, refuses or fails to provide medical certification, signed by a health care provider, including all of the information mentioned above, the employee is not entitled to FMLA leave.[94]

An employee must request FMLA leave in order to be entitled to it. If practicable, he or she is required to notify the employing agency thirty days in advance. If not, he or she must notify the agency as soon as possible. However, if the employee and his or her personal representative are physically or mentally incapacitated for the entirety of the FMLA period, the employee may retroactively request FMLA leave within two days of returning to duty.[95] The employee may be required to provide medical documentation of his or her incapacity, and must explain why his or her personal representative could not contact the agency to request FMLA leave on behalf of the employee.[96] If an employee fails to return to work after his or her FMLA leave is completed, he or she may be separated from federal employment in accordance with applicable personnel rules, without any violation of the FMLA. However, the employee may not be retaliated against simply for taking FMLA leave that he or she was entitled to.

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[91] *Id.*
[92] *Id.*
[93] *Id.* An exception to the rule that the employee cannot be required to see an agency doctor is when there is extremely limited access to health care in the local area. *Id.*
[94] 5 CFR 630.1208(l) (2002).
[95] 5 CFR 630.1203 (b) (2002).
[96] *Id.*

Finally, it should be noted that employees do not have a private right of action to address alleged violation of Title II of the FMLA.[97] While employees of private entities were given such a right under Title I of the FMLA, federal employees were not, although the substantive rights to leave granted under the statute are essentially the same for both federal and private employees.[98] However, if a civil service employee is subject to an adverse action under Merit Systems Protection Board ("MSPB") jurisdiction, and an FMLA violation is implicated (e.g. employee is terminated in violation of the FMLA), the MSPB may consider the FMLA violation in reaching its decision on the adverse action.[99] If an agency bases an adverse action on a violation of the FMLA, the MSPB will not sustain the action.[100] Therefore, it is important for employment law attorneys to consider the requirements of the FMLA when an employee requests leave to deal with a serious psychiatric problem, although that problem may not qualify as disabling under the Rehabilitation Act. Note also that while non-appropriated fund employees do not have recourse to the MSPB, a violation of the FMLA may be an unfair labor practice, if the applicable collective bargaining agreement contains provisions concerning FMLA leave.

IV. WORKER'S COMPENSATION

Worker's compensation laws provide a mechanism by which employees may recover for illness or injuries caused arising out of the course of their employment.[101] Many state worker's compensation laws provide for compensation for mental or emotional injuries arising out of the workplace.[102] Both the Federal Employees Compensation Act (FECA),[103] which covers appropriated fund employees, and the Longshoremen and Harbor Workers Compensation Act (LHWCA),[104] which covers non-appropriated fund (NAF) employees, allow federal government employees to recover for on the job

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[97] Mann v. Haigh et al., 120 F.3d 34, 37 (9th Cir 1997). *See also* Russell et al. v. Dep't of the Army et al., 191 F.3d 1016, 1018-1019 (9th Cir. 1999); Bogumill v. Office of Personnel Mgmt, 1998 U.S. App. LEXIS 18750, 3-4 (Fed. Cir. 1998); Scott-Brown v, Cohen, 2001 U.S. Dist LEXIS 24940, 28 (D. Md. 2001) *See also* Mann v. Haigh, 120 F.3d 34 (4th Cir 1997) (holding that the FMLA does not create an express or implied right of judicial review for employees of a non-appropriated fund instrumentality).

[98] *Id.*

[99] Gross v. Dep't of Justice, 77 M.S.P.R. 83. *See also* Bogumill, 1998 U.S. App LEXIS at 4.

[100] Gross, 77 M.S.P.R. at 14.

[101] *See, e.g.*, Janet E. Goldberg, *Employees with Mental and Emotional Problems -- Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, Worker's Compensation, and Related Issues.* 24 STETSON L. REV. 201, 228 (1994).

[102] *Id.*

[103] 5 USC § 8101*et seq.*

[104] 33 USC § 901 *et seq.*

mental or emotional injuries.[105] This presents the federal employer with difficulties, because causation is very difficult to evaluate in examining the validity of a claim for mental injury caused by the workplace environment.[106] Additionally, the risk of successful claims for mental injury suggests that in some circumstances it might be warranted to make accommodations for a vulnerable employee, although those accommodations are not required by the Rehabilitation Act (e.g., changing an employee's supervisor).

A. The LHWCA - Non-Appropriated Fund Employees

The LHWCA provides that, "it shall be presumed, in the absence of substantial evidence to the contrary -- (a) that a claim comes within the provisions of the Act… inherent in this provision is the presumption that an injury is causally related to a worker's employment…."[107] In order to invoke this presumption, a covered worker must merely show that he suffered harm and that either workplace conditions or an on the job accident could have caused, aggravated, or accelerated the harm.[108] The employer then bears the burden of rebutting this presumption, with evidence that the work environment or accident did not cause the injury complained of.[109] In cases involving a mental or emotional disorder, the problems surrounding proof of causation make this a difficult burden to meet.[110] Complicating things further is the rule that the job related stress, discrimination, or harassment that the injured worker claims caused or aggravated his psychological condition need not be objectively significant, or even have actually occurred. Rather, it is the worker's perception of the events and their significance that is controlling; the work-related stress may be mild, but the relevant question is not the severity of the stressor but instead the effect on the worker.[111] Only if the presumption of

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[105] *See, e.g.,* Marinelli v. American Stevedoring, Ltd, 34 BRBS 112, 2000 DOLBRB LEXIS 36, *18 (BRB 2000).

[106] Goldberg, *supra* n. 101 at 441,444 (noting that determining the causation and extent of a mental disability are the most difficult questions facing worker's compensation, psychiatrists are often biased towards diagnosing an impairment, and some people cannot differentiate between stress caused by work and stress coming from other sources).

[107] American Stevedoring Ltd v. Marinelli, 248 F.3d 54,64 (2nd Cir. 2001).

[108] *Id.* at 64-65.

[109] *Id*. at 65.

[110] One law review article noted that, "Mental diagnoses are more questionable than physical diagnoses. Psychiatrists are more likely to assume a mental disorder, even with minimal or indefinite data. In causation assessment, an overabundance of variables exist. Mental disorders are brought on by an interaction of several variables over the course of a lifetime." David A. Pfeifle, *Lather v. Huron College: South Dakota Rejects an Award of Workers' Compensation for Mental Injury Allegedly Caused by On the Job Stress,* 38 S.D. L. REV. 424, 444 (1993).

[111] Army and Air Force Exchange Service v. Drake, 1998 U.S. App. LEXIS 31020 at *8 (6th Cir. 1998) (Ronald Lee Gilman, dissenting opinion (citing Konno v. Young Bros., Ltd., 28 BRBS 57 (BRB 1994)).

job-relatedness is overcome, does the burden shift back to the claimant worker to persuade the administrative law judge that a causal relationship exists.[112]

Furthermore, it is not necessary that the cumulative stress alleged by the employee be unusual; rather, claimants may recover even if the workplace stress alleged is merely the normal stress associated with working.[113] The only workplace-stress related injuries that are not payable under LHWCA are mental conditions caused by legitimate personnel actions, such as termination of employment.[114] Combined with the aggravation rule, which creates employer liability for the aggravation of preexisting conditions,[115] this creates a substantial risk of liability for the non-appropriated fund employer.

Cases in which psychological injuries were deemed compensable under the LHWCA include *Marinelli v. American Stevedoring Co., Ltd.,*[116] in which the Department of Labor's Benefits Review Board ("BRB") found the employer liable for claimant union steward's Adjustment Disorder with Mixed Anxiety and Depression, allegedly developed because of the stress caused by continual conflict between the union and management; and *Konno v. Young Brothers, Ltd.,*[117] in which the employer was found liable for a worker's suicide, deemed in part caused by distress over a poor work relationship with a new boss and an investigation into workplace theft.[118]

Given that the Rehabilitation Act prohibits refusing to hire an otherwise qualified individual with a psychiatric disability, the federal non appropriated fund employer is faced with a quandary because, by hiring such an individual, the employer increases its chances it may be held liable for the aggravation of a pre-existing psychiatric condition simply on account of the normal stresses of

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[112] Marinelli, 2000 DOLBRB LEXIS at *19 (BRB 2000) at *19.

[113] *See, e.g.*, Sewell v. Open Mess, McChord AFB and Air Force Central Welfare Fund, 32 BRBS LEXIS 134, 1998 DOLBRB LEXIS 29 (BRB 1998). In *Sewell*, the BRB held that an employee may recover for mental injuries caused by work stress brought on by supervisory treatment the worker viewed as unfair, even if the supervisor's "stressful" actions were justified. Day to day working conditions deemed stressful by the employee may support a worker's compensation claim. *Id.* at *12, *19. In this case, the allegedly stressful actions included increased supervision, being counseled on cash handling procedures and appearance at work, being referred to alcohol rehabilitation as a result of poor work performance, the supervisor placing a hand on the claimant's shoulder, and speaking in an angry tone of voice towards her in front of customers. *Id.* at *14-*17.

[114] *Drake*, 1998 U.S. App LEXIS at *7; *Sewell*, 32 BRBS LEXIS at *18.

[115] *See, e.g.*, Morehead Marine Svs. and C.N.A Ins. Co. v. Washnock, 135 F.3d 366, 371 (6th Cir. 1998).

[116] 2000 DOLBRB LEXIS (BRB 2000).

[117] 28 BRBS 57, 1994 DOLBRB LEXIS 655 (BRB 1994).

[118] The evidence of causation included that decedent became upset when his boss yelled at him for being late, refused to help him locate cargo, questioned him concerning missing cargo, attempted to verify whether decedent was actually ill on a day he took sick leave, and he was assigned what he believed to be an excessive amount of work. Additionally, decedent was distressed he might have to testify against coworkers in a criminal investigation involving workplace theft. *Id.* at *3.

day to day operations. No clear solution to this problem is apparent, under the current state of the law. However, it is clear that the burden of avoiding liability for psychiatric injury may be quite high under the LHWCA; as a result, NAF employers may want to accommodate psychiatric vulnerabilities or conditions although such accommodation is not required under the Rehabilitation Act. This would be most appropriate where medical evidence suggests that the individual will likely become partially or totally disabled as a result of some workplace stressor, and the NAF organization is able to remove the stressor (or move the employee out of the presence of the stressor) at a relatively low cost.

B. ECA- Appropriated Fund Employees

Appropriated fund employees are compensated for work related injuries under the Federal Employee Compensation Act. The Act establishes a system of compensation for workers injured in the course of their federal employment, and is the exclusive remedy for injuries that fall within its scope.[119] Psychological injury is compensable under FECA; however, the burden of proof is significantly different than it is under LHWCA. Thus, a federal agency has a far better chance of defending against a claim for job related psychological injury under FECA than it does under LHWCA.

Unlike the LHWCA, FECA places the burden of proof of establishing the condition for which compensation is claimed was caused or aggravated by the federal employment on the employee/claimant.[120] In order to meet this burden, the claimant must submit factual evidence of employment factors or incidents alleged to have caused of aggravated the psychiatric condition, medical evidence establishing the existence of a mental disorder or emotional condition, and "rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors."[121] Therefore, while LHWCA places the burden on the employer to *disprove* employment-relatedness once a prima facie case is established, under FECA the employee retains the burden of proof of employment related injury throughout the initial claim adjudication process. This is significant, in that the precise etiology of psychiatric disorders and psychological/emotional conditions can be very hard to pinpoint.

The specificity and certainty of the evidence required to prove employment relatedness has sometimes been held to be quite high. This is further complicated by the fact that, under FECA, not all injuries and illnesses

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[119] *See, e.g.*, Cardwell v. U.S., 1992 U.S. Dist. LEXIS 18571 (E. D. Pa. 1992).
[120] *See, e.g.*, In the Matter of Beverly Dark and U.S. Postal Service, 2003 ECAB LEXIS 201, *3 (2003).
[121] *Id.* at *2. *See also* In the Matter of Pamela T. Gano and Defense Commissary Agency, 2002 ECAB LEXIS 1794, *6 (2002).

that are job related in nature are covered.[122] The Employees Compensation Appeals Board has stated that,

> When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out these duties, and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work. [123]

Conditions of this nature are called compensable employment factors, and claims resulting from such conditions are payable under FECA, as are conditions such as high workload or the imposition of deadlines.[124] However, in contrast to the LHWCA, under FECA the claimant must prove the alleged conditions actually existed; his perceptions are insufficient if not supported by factual evidence.[125]

Administrative and personnel matters are not covered under FECA.[126] Thus, an employee will not be compensated for emotional injury resulting from fear of a reduction-in-force, frustration about not being able to work in a particular position or location, or stress resulting from an investigation of wrongdoing.[127] Matters involving emotional reactions to training and discipline are not covered,[128] nor is stress related to changes in assigned work times, supervisors observing or checking an employee's performance, or being instructed not to use overtime.[129] Other non-covered matters include performance evaluations, supervisory criticism of performance, and placement on a performance improvement plan.[130]

Employees may recover for emotional injury related to administrative and personnel matters only when error or abuse by the employer is established

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[122] *See, e.g., Gano*, 2002 ECAB at *6-*7.
[123] *Gano,* 2002 ECAB at *7.
[124] *See, e.g.,* In the Matter of Mohammed A. Hussain, M.D. and Dep't of Veterans Affiars, 2003 ECAB LEXIS at *2-*4 (2003).
[125] *Id. a*t *2.
[126] *See Gano,* 2002 ECAB at *7.
[127] In the Matter of Ellen A. Goode and U.S. Postal Service, 2003 ECAB LEXIS 303, *3-*5 (2003).
[128] *Gano,* 2002 ECAB at *8.
[129] In the Matter of Paul H. Comer and U.S. Postal Service, 2001 ECAB LEXIS 2422 at *11-*12 (2001).
[130] In the Matter of Billie L. Young and Dep't of the Interior, 2001 ECAB LEXIS 1861 at *6.

by factual evidence.[131] Employees may recover for emotional injury constituting harassment, but the employee/claimant must prove the harassment actually occurred.[132] Unlike the situation under LHWCA, perceptions of harassment are insufficient to entitle the employee to compensation.[133]

If a compensable employment factor is established, the claimant must submit "rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor."[134] This can be difficult for a claimant to do. Medical evidence may be discounted or given little weight if the physician rendering the opinion does not have a specialty in psychiatry,[135] or fails to provide a "medical rationale for opinion on causal relationship."[136] The "mere fact that a disease manifests itself during a period of employment" has been held insufficient to establish a causal relationship between the disorder and the compensable employment factor, and opinions based on such reasoning may be devalued.[137] Opinions deemed speculative in nature will be given little weight,[138] as will opinions based in part on incorrect information provided to the doctor by the claimant.[139] Therefore, the FECA claimant faces a much higher burden in establishing entitlement to compensation for an allegedly work related emotional injury than does the LHWCA claimant.

Under FECA and the LHWCA, under certain circumstances the employer may be held liable for the death of an employee through suicide although the language of the statute appears to preclude such liability.[140] However, in order to find a suicide was caused by employment factors, the claimant must show that, "the job related injury (or disease) and its consequences directly resulted in the employee's domination by a disturbance of the mind and loss of normal judgment which, in an unbroken chain, resulted in suicide."[141] This test is explained thus: "if the injury and its consequences directly resulted in a mental disturbance, or physical condition which produced

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[131] In the Matter of Paul H. Comer and U.S. Postal Service, 2001 ECAB LEXIS at *11 (2001).
[132] *Id.* at *8-*9.
[133] *Id.* at *9. Also, *see generally* In the Matter of Beverly Dark and U.S. Postal Service, 2003 ECAB 201 (2003) (discussing that employee must prove harassment/abuse actually occurred; her perception of harassment by supervisors and coworkers, absent evidence harassment actually took place, is not sufficient to establish a compensable work factor).
[134] *Goode,* 2003 ECAB at *8-*9.
[135] In the Matter of Priscilla Smith Lutcher and U.S. Postal Service, 2002 ECAB LEXIS 2191, *15 (2002).
[136] *Id.*
[137] *Id.*
[138] *Goode,* 2003 ECAB at *11.
[139] *Id.*
[140] *See, e.g.,* In the Matter of Janet L. Moore and Dep't of the Treasury, 2002 ECAB LEXIS 1379, *4 (2002). *See also* In the Matter of Rosita Mahana and Dep't of Energy, 2002 ECAB LEXIS 685, *4-*5 (2002).
[141] *Moore* at *5 (citing Larson, The Law of Worker's Compensation, Vol. 2, Chapter 38.03 (Matthew Bender 2001)).

a compulsion to commit suicide, and disabled the employee from exercising sound discretion or judgment to control that compulsion, then the test is satisfied."[142] It is insufficient to merely show that the employee was receiving worker's compensation payments for depression at the time of the suicide, [143] or that the suicide occurred during the period of employment.[144]

V. CONCLUSION

The issues concerning how to appropriately deal with the psychiatrically impaired federal worker are many and varied, and include a number that are beyond the scope of this article (such as issues involving security clearances, disability retirements, and fitness for duty exams). However it is clear that supervisors and the employment lawyers that advise them must be aware of the impact of disability laws, such as the Rehabilitation Act, the Family and Medical Leave Act, and the applicable Worker's Compensation statute when considering issues involving the federal employee with a mental or emotional condition. While disability laws may not appear to provide the employee with a psychiatric disorder much protection, the law in this area is continually evolving, and fact specific. Furthermore, the implications of FMLA requirements and Worker's Compensation statutes must be considered. Consideration of these factors may in some circumstances suggest providing accommodations, such as changing an employee's supervisor, that are not required by the Rehabilitation Act. Likewise, in some cases it may be beneficial to reasonably accommodate an employee who likely would not be protected by disability discrimination laws, in order to avoid potentially a costly successful worker's compensation claim for partial or total disability.

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[142] *Id.* at *6 (citing Federal (FECA) Procedure Manual, Claims -- Performance of Duty, Chapter 2.804.15.b.(2) (Sept. 1995)).
[143] *Id.* at *14-*15.
[144] *See generally*, *Mahana* 2002 ECAB LEXIS (2002).

UNITED STATES V. MASON AND *UNITED STATES V. IRVIN:* IMPACTING MILITARY JUSTICE PRACTICE IN CHILD PORNOGRAPHY CASES

MAJOR DANIEL A. OLSON*

I. INTRODUCTION

As your installation's Chief of Military Justice, you've just been briefed that an active duty officer has been downloading child pornography from the Internet.[1] You're tasked to draft charges, but haven't kept abreast of recent developments pertinent to child pornography prosecutions.[2] This note will provide guidance to military justice practitioners charging and prosecuting child pornography cases by examining two recent decisions from the Court of Appeals for the Armed Forces: *United States v. Mason*[3] and *United States v. Irvin*.[4]

II. LANDSCAPE

Federal law has long criminalized the production and distribution of child pornography.[5] Historically, however, these prohibitions have applied only to pornographic images involving actual children.[6] By 1996, however, developments in computer technology had enabled child pornographers to

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[1] *See* Todd Carville, *The Constitutionality of Criminalizing Virtual Child Pornography*, 2002 SYR. J. L. & TECH. 5 (2002) (discussing the Internet's influence on the proliferation of child pornography).

[2] *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (hereinafter referred to as "Free Speech Coalition"); United States v. O'Connor 58 M.J. 450 (C.A.A.F. 2003).

[3] United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004).

[4] United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004).

[5] *See, e.g.*, The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253); The Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2253).

[6] *See* Free Speech Coalition, 535 U.S. at 240-42; New York v. Ferber, 458 U.S. 747 (1982). *See also* John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205 (2003) ("For at least 25 years, it has been generally understood that the term 'child pornography' applies only to sexually explicit material that depicts actual children , *i.e.*, persons below 18 years of age.").

circumvent federal anti-child pornography legislation by creating sexually explicit visual depictions of children without using any actual children in the production process.[7] For example, child pornographers learned to create computer-generated images of children that were essentially indistinguishable from pictures of actual children.[8] Child pornographers also learned to use inexpensive computer software to manipulate ("morph") innocent pictures of children into sexually explicit images.[9] To combat child pornographers' newly developed abilities to produce computer-generated ("virtual") child pornography, Congress passed the Child Pornography Prevention Act of 1996 (hereinafter referred to as the "CPPA"), criminalizing the receipt or distribution of such images by re-defining "child pornography" in the broadest possible terms.[10] Specifically, to achieve its purpose of proscribing virtual child pornography, Congress defined "child pornography" as follows:

> "Child pornography" means any visual depiction, including any photograph, film, video picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where: (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or, (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[11]

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[7] Free Speech Coalition, 535 U.S. at 241-42.

[8] *See* Kelley Bergelt, Comment, *Stimulation by Simulation: Is There Really Any Difference Between Actual and Virtual Child Pornography? The Supreme Court Gives Child Pornographers a New Vehicle for Satisfaction*, 31 CAP. U. L. REV. 565, 566 (2003).

[9] Free Speech Coalition, 535 U.S. at 242.

[10] 18 U.S.C. § 2256(8)(A)-(D) (2000). Although children are not directly harmed by the production of virtual child pornography, Congress concluded that virtual child pornography posed an indirect threat because pedophiles could use such images to entice children to participate in improper sexual activities. Free Speech Coalition, 535 U.S. at 241. Congress further reasoned that proliferation of virtual child pornography might stimulate pedophiles to abuse actual children. *Id.* Finally, Congress sought to ease the burden on prosecutors who were faced with the challenge of rebutting defendants' assertions that the images involved in their respective cases were virtual images not involving actual children. *Id.* at 242. *See also* Feldmeier, *supra* note 6, at 205-06.

[11] 18 U.S.C. § 2256(8)(A)-(D) (2000).

Congress' statutory definition of child pornography, however, was soon challenged by a trade association for the adult entertainment industry.[12] In particular, the trade association argued that the statutory definition of "child pornography" was unconstitutionally overbroad because it proscribed images that merely "appear[ed]" to involve children and merely "convey[ed] the impression" of involving children.[13] In its landmark decision in *Free Speech Coalition*, the United States Supreme Court agreed.[14] While acknowledging the horrors of child sexual abuse, the Court concluded that Congress had improperly abridged a "substantial amount of lawful speech."[15] Thus, the Court found the definitions of "child pornography" at 18 U.S.C. § 2256(8)(B) and (D) to be overbroad and unconstitutional.[16]

The Supreme Court's decision in *Free Speech Coalition* was not without impact on the military services.[17] Indeed, general courts-martial had convicted and sentenced service members for violating the CPPA before the Supreme Court's decision in *Free Speech Coalition* rendered some of the CPPA's definitions invalid.[18] Accordingly, military courts have had to consider the impact of *Free Speech Coalition* on these convictions.[19] This note seeks to examine two such cases recently decided by the Court of Appeals for the Armed Forces.[20]

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[12] Free Speech Coalition, 535 U.S. at 243.

[13] *Id.* Of note, the trade association maintained that its members did not use minors in their sexually explicit productions, but expressed concern that "some of these [productions] might fall within the CPPA's expanded definition of child pornography." *Id.*

[14] *Id.* at 258.

[15] *Id.* at 244, 256. The Court noted, for example, that "[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie." *Id.* at 257.

[16] *Id.* at 258. That is, the Court found the "appears to be" and "conveys the impression that" language at 18 U.S.C. § 2256(8)(B) and (D) to be improper. *Id.* Of note, following Free Speech Coalition, Congress attempted to correct the constitutional deficiencies identified by the Supreme Court; President Bush signed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT) into law on April 30, 2003. 18 U.S.C. § 2252(A)(c) (2000 & Supp. III 2003). In PROTECT, Congress again sought to extinguish the evils of virtual child pornography, this time by proscribing sexually explicit images that are "indistinguishable" from images of actual minors. *Id.* Congress attempted to alleviate the overbreadth problem inherent in the CPPA by creating the affirmative defense "that the alleged child pornography was not produced using any actual minor or minors. *Id.* Critics, however, have argued that PROTECT is "largely deficient and will likely be subject to the same fate as the CPPA." *See* Feldmeier, *supra* note 6, at 216-27. Thus, as PROTECT is likely to be challenged, military justice practitioners will need to keep abreast of new developments in this area of law.

[17] *See, e.g.*, United States v. O'Connor, 58 M.J. 450 (C.A.A.F. 2003).

[18] *See, e.g.*, United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004).

[19] *See id.*

[20] *Id.*; United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004).

III. *UNITED STATES. V. MASON*

In 1998, investigation revealed that the accused, a contracting officer assigned to the Defense Supply Center Columbus, had visited inappropriate websites on government computers.[21] More specifically, the accused had used government computers to view pornographic images on the Internet, engage in suggestive discussions in teen chat rooms, and receive images of child pornography.[22]

The accused was subsequently charged under Article 92 of the Uniform Code of Military Justice (hereinafter referred to as the "UCMJ") with three specifications of violating a general regulation pertaining to use of government computers.[23] He was also charged under Article 133 with one specification of conduct unbecoming an officer and a gentleman.[24] Finally, he was charged under clause 3 of Article 134.[25] More specifically, he was charged with one specification of violating the CPPA.[26] Notably, the third charge and specification involved a set of images specifically characterized as "child pornography," as distinct from the images referred to in the Article 133 charge.[27] The accused entered pleas of guilty and was convicted by a general court-martial.[28] That is, he was convicted of violating a lawful general order in violation of Article 92, of engaging in conduct unbecoming an officer and a gentleman in violation of Article 133, and of knowingly receiving child pornography in violation of Article 134.[29]

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[21] Mason, 60 M.J. at 16.

[22] *Id.*

[23] *Id.* at 17. Article 92 of the UCMJ makes punishable a service member's failure to obey lawful orders and regulations.

[24] *Id.* This specification focused on the accused's participation in the teen chat rooms and his viewing of other materials of a sexual nature. *Id.* at 17 n.1.

[25] *Id.* at 17. Article 134 of the UCMJ prohibits certain improprieties not made punishable by other provisions of the UCMJ. Article 134 contains three clauses that address three categories of offenses: clause 1 proscribes "all disorders and neglects to the prejudice of good order and discipline in the armed forces;" clause 2 proscribes "all conduct of a nature to bring discredit upon the armed forces;" and clause 3 proscribes other "crimes and offenses not capital."

[26] *Id.* The military judge explained to the accused that this charge involved child pornography and that the CPPA had been "assimilated" into the UCMJ as "another crime or offense not capital" under Article 134. *Id.* The military judge also advised the accused of the definitions of "child pornography" contained in the CPPA. *Id.* Finally, the military judge, in addition to advising the accused of the elements of the CPPA offense, advised the accused of an additional element, stating that "if it is determined that your plea is improvident on the charged offense, since the crime has been charged as an other crime or offense not capital – such conduct was of a nature to bring discredit upon the armed forces or was to the [prejudice] of good order and discipline in the armed forces." *Id.*

[27] *Id.* at n.2.

[28] *Id.* at 15.

[29] *Id.* Of note, in the providence inquiry, regarding the Article 134 offense, the accused admitted that he had viewed several pictures of "minors doing lascivious poses" on government computers. *Id.* at 18. He also admitted in his discussion with the military judge

Subsequent to the accused's conviction, however, the United States Supreme Court decided *Free Speech Coalition*.[30] Thus, the accused argued on appeal that his guilty plea to the Article 134 offense was improvident because the military judge had relied on definitions of "child pornography" that were later found to be unconstitutional.[31] The Air Force Court of Criminal Appeals, however, rejected the accused's argument and affirmed his conviction, finding it "clear from the record" that the images in question involved actual children, not virtual images.[32] The Court of Appeals for the Armed Forces, however, reversed the lower court's decision as to the clause 3, Article 134 offense.[33]

The court first noted that the military judge had explained to the accused that his conduct (receipt of child pornography) was charged as a clause 3 offense under Article 134, with the "crime or offense not capital" being a violation of the CPPA.[34] The court then applied the rule it had previously established in *United States v. O'Connor*, 58 M.J. 450 (2003), in which it held that a provident guilty plea to a violation of the CPPA must reflect that the accused violated those portions of the statute that were *not* affected by the Supreme Court's decision in *Free Speech Coalition*.[35] The *Mason* court highlighted the fact that the military judge's explanation of "child pornography" referenced materials that "appear[ed] to" involve children and were marketed in such a manner as to "convey[] the impression" that they included images of children – precisely the language the Supreme Court had struck down as overbroad in *Free Speech Coalition*.[36] The court also highlighted the fact that the record contained "no clear focus or discussion" on those portions of the CPPA that were *not* affected by *Free Speech Coalition*.[37]

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and in his stipulation of fact that the images at issue were "child pornography." *Id.* Finally, the accused admitted during his discussion with the military judge that his conduct was of a nature to bring discredit upon the armed forces or was to the prejudice of good order and discipline. *Id.*

[30] Free Speech Coalition, 535 U.S. 234 (2002).

[31] Mason, 60 M.J. at 15.

[32] United States v. Mason, A.C.M. 34394, 2002 Af. Ct. Crim App. LEXIS 244, at *29-30 (Jun. 11, 2002) ("While the military judge may have instructed on alternative definitions of child pornography that were later determined to be unconstitutional, those definitions did not play a part in this case."), *aff'd in part and amended in part*, Mason, 60 M.J. at 20.

[33] Mason, 60 M.J. at 18.

[34] *Id.*

[35] *Id.;* O'Connor, 58 M.J. at 454.

[36] Mason, 60 M.J. at 18.

[37] *Id.* In this respect, the facts in *Mason* were indistinguishable from the facts in *O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In *O'Connor*, the accused was convicted of violating the CPPA under Article 134, clause 3. *Id.* at 452. After the Supreme Court's decision in Free Speech Coalition, the Court of Appeals for the Armed Forces revisited the case, noting that, in his providence inquiry, the accused, when asked why the materials at issue constituted "child pornography," explained that the materials "appeared" to involve children. *Id.* at 453. The military judge inquired no further into the "actual" versus "real" distinction, which the appellate court deemed "perfectly understandable – it had no factual significance to the offenses under the law as it stood at that time." *Id.* The court applied the long-standing rule

Because the record contained no discussion of, or focus on, actual child pornography, the court could not view the accused's plea as provident in *Mason*.[38]

Having concluded, under a straightforward application of *O'Connor*, that the accused's plea to the clause 3, Article 134 offense was improvident, the court next considered whether the accused's plea could be properly viewed as provident to a lesser-included offense under clauses 1 or 2 of Article 134.[39] Citing its decision in *O'Connor,* the court first acknowledged that it had "recognized in the past that an improvident plea to a clause 3 offense based on a federal child pornography statute may be upheld as a provident plea to a lesser-included offense under clause 2 of Article 134."[40] Of note, the court in *O'Connor*, after determining that the accused's plea to violating the CPPA under clause 3 of Article 134 was improvident, concluded that the accused's guilty plea wasn't even provident as to a lesser-included offense under clause 1 or 2 because, even though the accused had stipulated to the service-discrediting character of his conduct, there was no discussion of that element by the military judge during the plea inquiry.[41] Rather, in *O'Connor*, the plea colloquy focused only on the CPPA, "without any discussion or acknowledgement of the criminal nature of the conduct deriving alternatively (and independently) from its character as service-discrediting or prejudicial to

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that for a guilty plea to be provident, the accused must be able to articulate all of the facts necessary to establish guilt. *Id.* Because *Free Speech Coalition* had made the "actual" character of the pornographic images a necessary element for conviction under the CPPA, and because the record did not sufficiently establish this "actual" character, the court found the accused's plea improvident. *Id.* at 454-55. However, the court then inquired into whether the accused's plea was nonetheless provident to a lesser-included offense under Article 134, clause 2. *Id.* This issue will be further explored in this note *infra.*

[38] Mason, 60 M.J. at 18.

[39] *Id.* As discussed *supra* at note 25, clause 1 of Article 134 proscribes conduct that is prejudicial to good order and discipline, while clause 2 proscribes service-discrediting conduct.

[40] Mason, 60 M.J. at 18-19; O'Connor; 58 M.J. at 454.

[41] Mason, 60 M.J. at 19; O'Connor, 58. M.J. at 454 ("It is the absence of any discussion of the service-discrediting character of Appellant's conduct during the providence inquiry coupled with the impact of the Supreme Court's decision in *Free Speech Coalition* that gives us pause."). Notably, the court in *O'Connor* contrasted the facts in *O'Connor* with the facts in two similar cases. First, in *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000), the Air Force Court of Criminal Appeals had found an accused's plea to violating the CPPA improvident because the military judge failed to adequately advised the accused of the required elements, but had found his pleas provident to the lesser-included offense of service-discrediting misconduct. Sapp, 53 M.J. at 90. The Court of Appeals for the Armed Forces subsequently upheld the conviction, highlighting the fact that the accused had, during the providence inquiry, "admitted that possession of such depictions of sexually explicit conduct by minors constituted service-discrediting misconduct." *Id.* at 91. The court reached a similar conclusion in *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000), where the accused had admitted during the providence inquiry that his conduct was both service-discrediting and prejudicial to good order and discipline. Augustine, 53 M.J. at 96.

good order and discipline."[42] Because the military judge didn't discuss "how his conduct might be criminal under clause 1 or 2 as distinct from criminal under clause 3, [the court in *O'Connor*] could not view [the accused's] guilty plea as provident to a lesser-included offense under clause 2."[43] The court in *Mason*, however, found the record "clearly distinguishable" from that in *O'Connor* "in terms of the discussion between [the accused] and the military judge concerning the character of his conduct as service-discrediting and prejudicial to good order and discipline."[44] Indeed, in *Mason*, the military judge had explained that the service-discrediting nature of the accused's conduct and the prejudicial effect of his conduct on good order and discipline were not elements of the "crime or offense not capital" the accused had been charged with under clause 3, Article 134.[45] The military judge also explained why he was discussing these additional elements.[46] Moreover, the accused admitted to the military judge that his conduct was both service-discrediting and prejudicial to good order and discipline in the armed forces.[47] The court concluded that:

> The record here thus contains what was missing in *O'Connor* and was present in both *Sapp* and *Augustine*. The plea colloquy between the military judge and [the accused] demonstrates that he "clearly understood the nature of the prohibited conduct" in terms of that conduct being service-discrediting and prejudicial to good order and discipline.[48]

The court's analysis did not end there, however.[49] Rather, it acknowledged *O'Connor* had not addressed the impact of *Free Speech Coalition* on the propriety of charging service members for child pornography (whether virtual or actual) offenses under clause 1 or 2 of Article 134.[50] The court in *O'Connor* had acknowledged the question, but did not answer it because it found that the accused hadn't been properly advised of the "service-discrediting" and/or "prejudicial to good order and discipline" elements of these clauses in the first place.[51] The *Mason* court, however, tackled the issue.[52] That is, the court addressed the issue of whether possession of child

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[42] Mason, 60 M.J. at 19 (citing O'Connor, 58 M.J. at 455).
[43] Mason, 60 M.J. at 19.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at *12-13.
[48] *Id.*; O'Connor, 58 M.J. at 454-55; Sapp, 53 M.J. at 91; Augustine, 53 M.J. at 95.
[49] Mason, 60 M.J. at 19.
[50] *Id.*
[51] *Id.* (citing O'Connor, 58 M.J. at 455).
[52] Mason, 60 M.J. at 19-20.

pornography (whether virtual or actual) by service members could constitute service-discrediting conduct (or conduct prejudicial to good order and discipline) under Article 134, clauses 1 and 2, in light of the Supreme Court's decision in *Free Speech Coalition*.[53]

The *Mason* court concluded receipt or possession of even virtual child pornography by service members can be service-discrediting and/or prejudicial to good order and discipline, therefore prosecutable under clauses 1 and 2 of Article 134.[54] The court acknowledged that the issue of "virtual versus actual" imagery "may have a potentially dispositive effect under the CPPA in both civilian and military settings," but it concluded that the issue "is not inherently dispositive of their impact on the esteem of the armed forces or good order and discipline."[55] The determination as to whether an accused's conduct in receiving or possessing child pornography is indeed service-discrediting or prejudicial to good order and discipline, the court emphasized, must be made on a case-by-case basis.[56] The court concluded the accused's conduct in *Mason* was indeed service-discrediting and prejudicial to good order and discipline because he was a commissioned Air Force officer and had viewed the images on a government computer in the workplace.[57] Accordingly, the court affirmed the accused's conviction under clauses 1 and 2 of Article 134.[58]

IV. *UNITED STATES V. IRVIN*

In 2000, the accused, while stationed at Geilenkirchen Air Base, Germany, used his personal computer in his off-base residence to download at least 80 pictures of young girls engaging in sexually explicit conduct.[59] The accused's computer was subsequently seized from his off-base residence by agents of Air Force Office of Special Investigations.[60] Pursuant to his guilty

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[53] *Id.*
[54] *Id.*
[55] *Id.* The court acknowledged that service members, like civilians, are entitled to First Amendment protections, but it noted that "the different character of the military community and of the military mission requires a different application of those protections." *Id.* (quoting Parker v. Levy, 417 U.S. 733, 758 (1947)). Thus, a service member's conduct in receiving even virtual images of child pornography "can constitutionally be subjected to criminal sanction under the uniquely military offenses embodied in clauses 1 and 2 of Article 134." Mason, 60 M.J. at 20.
[56] *Id.* at 19.
[57] *Id.* at 20.
[58] *Id.* (finding no "substantial basis in law or fact for questioning the providence of the accused's plea to a lesser-included offense under clause 1 and 2 of Article 134").
[59] United States v. Irvin, A.C.M. 34756, 2002 C.C.A. LEXIS 322, at *2 (Af. Ct. Crim. App. Dec. 13, 2002), *aff'd*, United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004).
[60] Irvin, 60 M.J. at 24.

plea, the accused was later convicted by a general court-martial of possessing child pornography in violation of clauses 1 and 2 of Article 134.[61]

Although the accused didn't raise the issue on appeal, the Air Force Court of Criminal Appeals subsequently assessed the providence of his guilty plea in light of the Supreme Court's decision in *Free Speech Coalition*.[62] That court concluded that the Supreme Court's decision did not affect the accused's guilty plea, and it affirmed the conviction and sentence.[63] The Court of Appeals for the Armed Forces subsequently addressed the issue of whether the accused's guilty plea to violating the CPPA should be set aside in light of *Free Speech Coalition* and whether possession of virtual child pornography can properly serve as a basis for a conviction under clause 1 or 2 of Article 134.[64]

The court ultimately concluded that there was no substantial basis for questioning the accused's guilty plea.[65] The court first highlighted the "critical distinction" between the facts in *Irvin* and the facts in *O'Connor*.[66] In *O'Connor*, the court noted, the issue concerned the providence of the accused's plea to violating clause 3 of Article 134 ("crime or offense not capital"), while in *Irvin*, the accused was charged with violating clauses 1 and 2 of Article 134 ("conduct prejudicial to good order and discipline" or of a "nature to bring discredit upon the armed forces," respectively).[67] The court then explained that in *O'Connor*, the accused's plea was not provident to the clause 3 offense because the Supreme Court had struck down key portions of the definition of "child pornography" that the military judge had used during the plea

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[61] *Id.* at 23. The underlying facts were elicited through a stipulation of fact and an "extensive colloquy" with the military judge. *Id.* at 25. The accused specifically admitted to the military judge that he knew it was "wrong for an older person to look at minors either nude or partially clothed" and that there was "no doubt" in his mind that the individuals in the images at issue were minors engaged in sexually explicit conduct. *Id.* Finally, the accused admitted in his stipulation of fact that his possession of the images was prejudicial to good order and discipline and service-discrediting. *Id.* When the military judge asked the accused why his conduct was prejudicial to good order and discipline and service-discrediting, the ensuing discussion "directly focused on the impact of his conduct on good order and discipline and on community perception of the military." *Id.* Of note, prior to accepting the accused's guilty plea, the military judge also advised him of the elements of the Article 134 offense with which he was charged: first, that he "wrongfully and knowingly possessed visual depictions of minors engaging in sexually explicit conduct;" and, second, that "under the circumstances, [his] conduct was to the prejudice of good order and discipline, or of a nature to bring discredit upon the Armed Forces." *Id.* 24. The military judge further advised the accused that "only those acts where the prejudicial effect is reasonably direct and palpable are punishable under Article 134." *Id.* The military judge provided a similar explanation with respect to "service-discrediting" conduct. *Id.*

[62] *Id.* at 23-24.

[63] *Id.* at 24.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 25.

[67] *Id.*

colloquy.[68] That is, in *O'Connor*, the court "did not view [the accused's] plea to violating [the CPPA] as provident where the unconstitutional definition had been used during the plea colloquy and the record contained no discussion or focus on those aspects of the statute that had been upheld by the Supreme Court."[69] In contrast, the court explained, the criminal conduct in *Irvin* did not derive from a clause 3, Article 134 charge alleging a violation of the CPPA.[70] Rather, in *Irvin*, the accused was charged under clauses 1 and 2 of Article 134.[71] More specifically, he was charged with engaging in conduct prejudicial to good order and discipline or of a nature to bring discredit to the armed forces by possessing "visual depictions of minors engaging in sexually explicit conduct."[72] Thus, the court reasoned, the providence of the accused's plea should be assessed against the elements of clauses 1 and 2, not the elements of the CPPA offense at issue in *Free Speech Coalition* and *O'Connor*.[73]

Specifically addressing any possible impact of *Free Speech Coalition* on the accused's plea, the court noted that the military judge, in advising the accused of the elements of the clauses 1 and 2 of Article 134, "did not make any reference to the terms struck down as constitutionally overbroad in *Free Speech Coalition*."[74] Rather, the military judge explained the accused's offense in terms of "visual depictions of minors engaging in sexually explicit conduct."[75] The court also noted that the accused admitted to the military judge that he knew the images at issue involved actual minors engaging in sexually explicit conduct.[76] The court concluded that these "critical aspects" of how the accused's case was charged and pleaded served to avoid any impact from *Free Speech Coalition* or *O'Connor*.[77]

Having concluded that *Free Speech Coalition* and *O'Connor* didn't impact the accused's plea, the court addressed the issue of whether "a substantial basis exists for questioning [the accused's] plea to either the prejudicial to good order and discipline or service-discrediting elements of clauses 1 and 2."[78] Citing *Sapp* and *Augustine*, the court emphasized that the accused had admitted to the military judge that his conduct was service-

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 25-26.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 26. More specifically, the military judge defined "visual depiction" using a "blend" of the definition of "visual depiction" contained at 18 U.S.C. § 2256(5) and the "opening language" from the definition of "child pornography" at 18 U.S.C. § 2256(8). *Id.* Similarly, the court noted, the military judge's definition of "sexually explicit conduct" was "drawn from the definition of that term as contained at § 2256(2)." The court highlighted that neither of these definitions had been struck down by *Free Speech Coalition. Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

discrediting and prejudicial to good order and discipline.[79] Thus, the court found no substantial basis for questioning the providence of the accused's guilty plea.[80]

VI. PRACTICALITIES

The *Mason* and *Irvin* decisions undoubtedly have practical implications for military justice practitioners charging child pornography cases. The impact may not be as pronounced in cases where the evidence clearly establishes the "actual" character of the images at issue, as the Supreme Court's decision in *Free Speech Coalition* didn't impact Congress' ban on actual child pornography.[81] However, in cases where the government can reasonably anticipate that defense counsel will contend that the images at issue aren't real, military justice practitioners would be wise to consider charging the accused's conduct under clauses 1 and/or 2 of Article 134.[82] Charging the accused's offense in this manner would eliminate the burden of proving that the images at issue involve actual children.[83] In many cases, the difficulty inherent in proving the "actual" nature of the images at issue may warrant charging the accused's conduct under clause 1 and/or 2 rather than clause 3, Article 134.[84]

Mason and *Irvin* also provide practical guidance for trial counsel in guilty plea cases. In cases involving actual child pornography, trial counsel should ensure that the military judge, during the providence inquiry, adequately establishes the "actual" nature of the images at issue, avoiding reference to unconstitutional (or potentially unconstitutional) definitions

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[79] *Id.*
[80] *Id.*
[81] Free Speech Coalition, 535 U.S. 234 (2002); O'Connor, 58 M.J. 450 (2003). Thus, in cases where an accused has, for example, admitted to investigators that the children in the images at issue are actual minors, the military justice practitioner could reasonably charge the offense under clause 3, Article 134, with the "crime or offense not capital" being a violation of current federal anti-child pornography legislation. Interview with Christopher M. Schumann, Instructor, Military Justice Division, Air Force Judge Advocate General School, Maxwell AFB (Jun. 29, 2004). Alternately, in cases involving images of a readily identifiable minor (the accused's neighbor or niece, for example), charging the offense under clause 3 would be reasonable. *Id.* Of note, even in these cases, the military justice practitioner may reasonably consider charging the offense under clause 1 and/or 2 of Article 134, realizing that trial counsel will have to establish that the accused's conduct was service-discrediting or prejudicial to good order and discipline (likely not a difficult hurdle in cases involving actual children). *Id.*
[82] Interview with Christopher M. Schumann, Instructor, Military Justice Division, Air Force Judge Advocate General School, Maxwell AFB (Jun. 29, 2004).
[83] United States v. O'Connor, 58 M.J. 450, 452 (C.A.A.F. 2003) (citing United States v. Sapp, 53 M.J. 90, 92 (C.A.A.F. 2002)) ("The three clauses [of Article 134] do not create separate offenses, but rather provide alternative ways of proving the criminal nature of the charged misconduct.").
[84] Interview with Christopher M. Schumann, Instructor, Military Justice Division, Air Force Judge Advocate General School, Maxwell AFB (Jun. 29, 2004).

pertaining to virtual child pornography.[85] Perhaps more importantly, in cases involving virtual pornography, where the offense has been charged under Article 134, clause 1 and/or 2, trial counsel should ensure that the military judge makes the accused aware that his misconduct is being charged under clauses 1 and 2, as conduct that is prejudicial to good order and discipline and/or service-discrediting, rather than as a violation of federal anti-child pornography statutes.[86] Trial counsel should also ensure that the military judge establishes, through the providence inquiry, that the record reflects such facts as are necessary to establish that the accused's conduct in viewing or possessing the images at issue was indeed prejudicial to good order and discipline and/or service discrediting.[87] Circumstances establishing that an accused's possession of virtual child pornography was in fact prejudicial to good order and discipline would include, for example, the facts that the accused's conduct took place while on duty, in uniform, on a government computer, in the workplace, in a foreign county, or in government housing.[88] The accused's status as an officer (or non-commissioned officer) also appears to be important.[89] Circumstances tending to establish that the accused's conduct in possessing child pornography was in fact service-discrediting would include, for example, a discussion of the impact on community perception of the military.[90]

VII. CONCLUSION

Like the improvements in computer technology that allowed for the production of virtual child pornography in the first place, the statutory and case law pertinent to child pornography prosecutions are still evolving.[91] Nonetheless, *Mason* and *Irvin* provide guidance for military justice practitioners charging or prosecuting these cases.[92] Thus, the astute Chief of Military Justice will, when briefed that an active duty officer has been

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[85] *See* O'Connor, 58. M.J. at 454-55.
[86] *See* United States v. Mason, 60 M.J. 15, 19 (C.A.A.F. 2004).
[87] *Id.* A stipulation of fact as to these elements is not sufficient. O'Connor, 450 M.J. at 454 (holding the accused's plea improvident to a lesser-included offense under clause 1 or 2, Article 134, even though the accused had stipulated to the service-discrediting nature of his misconduct, because the judge didn't inquire into this element).
[88] *See* Mason, 60 M.J. at 20.
[89] *See Id.*
[90] *See* Irvin, 60 M.J. at 25. *See also* United States v. Anderson, __ M.J. __ (Af. Ct. Crim. App. 2004) (accused admitting, regarding his child pornography offenses, that "what I did, it would make the military look bad" and that the "general public people . . . view the military partly in light of my actions").
[91] *See* Feldmeier, *supra* note 6, at 216-27.
[92] United States v. Mason, 60 M.J. 15 (C.A.A.F. 2004); United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004).

downloading child pornography from the Internet, turn to *Mason* and *Irvin* for guidance in handling the case.

BRING IT ON: THE SUPREME COURT OPENS THE FLOODGATES WITH *RASUL V. BUSH*

CAPTAIN CHRISTOPHER M. SCHUMANN*

The issue of whether aliens detained outside United States sovereign territory may invoke habeas relief and challenge the basis of their detention seemed to be settled law with the decision of the United States Supreme Court in *Johnson v. Eisentrager*[1] -- at least until the 28th of June 2004. The *Eisentrager* Court had answered the question in the negative, and in recognizing how a decision to the contrary would affect the prosecution of war noted as part of its justification for this decision the following:

> *To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.*[2]

The decision of *Rasul v. Bush* has reversed 54 years of precedence, opening the federal court system to detainees currently being held at Guantanamo Bay, Cuba, and likely beyond.[3] The Court's decision in *Rasul*

[1] Johnson v. Eisentrager, 339 U.S. 763 (1950).
[2] *Id*. at 779-80.
[3] Rasul v. Bush, President of the United States, 159 L. Ed. 2d 548 (2004).

will allow access to federal district courts to all detainees held at Guantanamo Bay, giving them the right to petition for *habeas corpus* and challenge the basis for their detention. This will deprive the President of one of his most necessary wartime powers, the ability to effectively prosecute the War on Terror unimpeded by litigation from our enemies, and the consequences of that litigation.

I. JOHNSON V. EISENTRAGER: A BRIEF BACKGROUND

In an effort to understand the logic behind the majority's opinion in *Rasul*, it is important to first understand the underpinnings of the *Eisentrager* case. *Eisentrager* involved twenty-one German nationals who had petitioned the District Court of the District of Columbia for writs of *habeas corpus*.[4] The Germans had been a part of the German military and were serving in China. They were all convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after the unconditional surrender of Germany on May 8, 1945.[5] Their crimes included the collecting of intelligence concerning American forces and their movements and providing that information to the Japanese armed forces, which at that time had not yet surrendered to the United States. The Germans were tried and convicted by a Military Commission in China, with the express consent of the Chinese Government, and were subsequently repatriated to Germany to serve their sentences.[6]

Their petition for *habeas corpus* alleged that the prisoners' trial, conviction, and imprisonment violated Articles I and III as well as the Fifth Amendment of the U.S. Constitution. The district court denied writ. The court of appeals reversed, holding that "any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he could show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal[.]"[7]

The court of appeals, in supporting its conclusion that the German prisoners had the right, found that although it could cite no statutory jurisdiction for such cases where an enemy alien is entitled to the writ, "courts must be held to possess it as part of the judicial power of the United States[, and] that where an individual is deprived of liberty by an official act occur[ing] outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer."[8]

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[4] Eisentrage*r*, 339 U.S. at 765-66.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 767. (citing Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949)).
[8] *Id.* at 767 (citing Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961).

The Supreme Court reversed and held that the Constitution did not "confer a right of personal security or immunity from military trial and punishment upon an alien enemy engaged in hostile service of a government at war with the United States."[9] The Court noted that they could discover no instances where a court in the United States or any other country that employs the writ had issued it on behalf of an alien enemy who had at no time been within the country's territorial jurisdiction.[10] The Court specifically stated that "[n]othing in the text of the Constitution extends such a right, *nor does anything in our statutes*."[11] The Court pointed out that even the lower court recognized an absence of any statute or case that would support their position, but rather they relied on "fundamentals."[12] The Court noted that this was not the first time it had addressed a motion for leave to file petitions for *habeas corpus* involving enemy aliens detained overseas.[13]

As part of its analysis of the issue of whether or not the right of *habeas* applied, the Court spent a considerable amount of time highlighting the differences between the legal rights afforded to citizens versus those afforded to aliens. The majority opinion noted that our law and the laws of most of the civilized world have long recognized distinctions between citizens and aliens.[14] The Court understood the importance to distinguish the rights and privileges inherent to citizenship, as compared to the rights afforded to various categories of aliens. After all, the Court noted, "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."[15]

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[9] Eisentrager, 339 U.S. at 768.
[10] *Id*.
[11] *Id*. (emphasis added).
[12] *Id*.
[13] *Id*. The Court listed the litany of related litigation compelling it to consider the issues raised in *Eisentrager*:

> From January 1948 to today, motions for leave to file petitions for *habeas corpus* in this Court, and applications treated by the Court as such, on behalf of over 200 German enemy aliens confined by American military authorities abroad were filed and denied. *Brandt* v. *United States*, and 13 companion cases, 333 U.S. 836; *In re Eichel* (one petition on behalf of three persons), 333 U.S. 865; *Everett* v. *Truman* (one petition on behalf of 74 persons), 334 U.S. 824; *In re Krautwurst*, and 11 companion cases, 334 U.S. 826; *In re Ehlen "et al.*," and *In re Girke "et al.*," 334 U.S. 836; *In re Gronwald "et al.*," 334 U.S. 857; *In re Stattmann*, and 3 companion cases, 335 U.S. 805; *In re Vetter*, and 6 companion cases, 335 U.S. 841; *In re Eckstein*, 335 U.S. 851; *In re Heim*, 335 U.S. 856; *In re Dammann*, and 4 companion cases, 336 U.S. 922-923; *In re Muhlbauer*, and 57 companion cases, covering at least 80 persons, 336 U.S. 964; *In re Felsch*, 337 U.S. 953; *In re Buerger*, 338 U.S. 884; *In re Hans*, 339 U.S. 976; *In re Schmidt*, 339 U.S. 976; *Lammers* v. *United States*, 339 U.S. 976. And see also *Milch* v. *United States*, 332 U.S. 789.

Id. at 768, n. 1.
[14] Eisentrager, 339 U.S. at 769.
[15] *Id*.

The State has a duty to protect its citizens, especially those who have shown true faith and allegiance to the nation. "Because the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance, Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad."[16] The Court aptly noted, "[c]itizenship is a high privilege." [17]

The rights of aliens tend to increase with the increase in that alien's connection to the country. Presence in the country affords certain rights, and those rights are expanded as the alien moves closer to acquiring full citizenship. But the *Eisentrager* Court noted that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[18] Under qualified conditions, *resident* enemy aliens have been provided access to our courts,[19] but "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[20]

And so, the Supreme Court of the United States concluded that while the privilege of litigation has been extended to aliens because their presence in the country implied protection, no such basis applied in this case. The prisoners at issue had at no relevant time been within any territory over which the Untied States held sovereignty, and all other aspects of their crimes, capture, trial and imprisonment, were well beyond the territorial jurisdiction of any United States court.[21]

The Court also took pains to recognize the impact their decision would have on the capabilities of commanders to prosecute war and ensure wartime

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[16] *Id*. at 770.

[17] *Id*. (quoting United States v. Manzi, 276 U.S. 463, 467 (1928)).

[18] Eisentrager, 339 U.S. at 771.

[19] *Id*. at 776. The Court outlined the limited situations in which resident aliens have been granted access:

> Our rule of generous access to the resident enemy alien was first laid down by Chancellor Kent in 1813, when, squarely faced with the plea that an alien enemy could not sue upon a debt contracted before the War of 1812, he reviewed the authorities to that time and broadly declared that "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity." Clarke v. Morey, 10 Johns. (N.Y.) 70, 72. A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy." Ex parte Kawato, 317 U.S. 69, 75.

[20] *Id*.

[21] *Id*. at 778.

security, including the impact on the war effort should the requested relief be granted to the petitioners.[22] They appreciated the importance of preserving the President's power over enemy aliens, "undelayed and unhampered by litigation."[23] Furthermore, the Court noted that the plight of the enemy alien in the custody of the United States is "far more humane and endurable than the experience of our citizens in some enemy lands."[24] In the end, the Court in *Eisentrager* paid great deference to the Executive Branch and how it prosecutes war. Through a well developed examination of not only the law relating to *habeas* writs, but also the impact of a decision allowing aliens held overseas access to our courts during wartime, the Court determined that nothing in our statutes or our constitution afforded aliens held overseas during wartime access to the writ of *habeas corpus*.[25]

II. RASUL V. BUSH: THE SUPREME COURT REVERSES ITSELF

On September 11, 2001, terrorist enemies who had declared war on the United States at least twice in the previous 4 years ferociously attacked our nation.[26] Hijacked planes were used as missiles and flown into the World Trade Center in New York City as well as the Pentagon in Washington, D.C., killing approximately 3,000 [TRY pages 4-14 and 313-315 – describes the airline flights and states the number murderd] innocent people.[27] A fourth plane was brought down in a field in Pennsylvania thanks to the heroic efforts of the passengers on board. In addition to the staggering loss of life, the

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[22] *Id*. at 779.
[23] *Id*. at 774.
[24] Eisentrager, 339 U.S. at 771-72
[25] *Id*. at 790-91.
[26] *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at 47-48 (2004), *available at* http://www.gpoaccess.gov/911/index/html . The first declaration was spelled out by bin Laden in February 1998:

> [T]he 40-year-old Saudi exile Usama Bin Ladin and a fugitive Egyptian physician, Ayman al Zawahiri, arranged from their Afghan headquarters for an Arabic newspaper in London to publish what they termed a fatwa issued in the name of a "World Islamic Front." Claiming that America had declared war against God and his messenger, they called for the murder of any American, anywhere on earth, as the "individual duty for every Muslim who can do it in any country in which it is possible to do it."

The 9/11 Report, at 47 (quoting *Jihad Against Jews and Crusaders, World Islamic Front Statement*, AL QUDS AL ARABI, February 23, 1998). A second declaration was spelled out by bin Laden during an interview shown on PBS entitled *PBS Frontline: Hunting Bin Ladin* (PBS television broadcast, May 1998, *available at* www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html). *See* The 9/11 Report, at 47, n.2.
[27] The 9/11 Report, at 4-14.

attacks destroyed hundreds of millions of dollars of property and had a devastating long-term impact on the economy of the United States.[28]

In response to these unprovoked attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks…or harbored such organizations or persons."[29] Acting within the authority of this resolution, the President dispatched the armed forces of the United States into Afghanistan in an effort to root out and destroy al Qaeda and the Taliban regime that had supported it.[30]

During the course of the ensuing combat operations, a number of individuals who had taken up arms against the United States were captured on the field of battle. Approximately 640 of those captured were taken to the United States Naval Base at Guantanamo Bay, Cuba, where they have been held since early 2002.[31] Two British citizens, two Australian citizens, and twelve Kuwaiti citizens, all being held at Guantanamo, joined together and through family members filed suit under federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals.[32]

The district court considered the suits as *habeas* petitions and, citing a lack of jurisdiction, dismissed them. In making this determination, the district court relied on *Johnson v. Eisentrager*[33], holding that aliens detained outside United States sovereign territory may not invoke *habeas* relief.[34] The court of appeals affirmed the district court's decision.[35] The Supreme Court granted certiorari and reversed the lower courts, holding that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay, Cuba.[36]

The Court in *Rasul* begins by describing the lease agreement between the United States and Cuba that permits the United States to occupy the Naval Base at Guantanamo Bay. The newly independent Republic of Cuba leased the

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[28] *Id*. at 4-14, 315-317..

[29] Rasul v. Bush, 159 L. Ed. 2d 548, 554 (2004) (quoting Authorization for Use of Military Force, Pub. L. No. 107- 40, §§ 1-2, 115 Stat. 224 (2001)).

[30] Rasul, 159 L. Ed. 2d at 554.

[31] *Id*. at 554-55.

[32] *Id*. at 563. When the Court granted certiorari, "the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody." *Id.* at 554, n. 1.

[33] 339 U.S. 763 (1950).

[34] Rasul v. Bush, 215 F. Supp 2d. 55, 68 (D.D.C. 2002).

[35] Rasul v. Bush, 321 F.3d 1134, 1144 (D.C. Cir. 2003).

[36] Rasul, 159 L. Ed. 2d at 556.

base, "comprised of approximately 45 square miles of land and water along the southeast coast of Cuba," to the United States in 1903 in the aftermath of the Spanish-American war.[37] "Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],' while 'the Republic of Cuba consents that during the period of occupation by the United States…the United States shall exercise complete jurisdiction and control over and within said areas.'[38]

As the majority opinion continues the Court seems to set the stage for its holding by stating that *habeas corpus* has developed over the years, growing "beyond the limits that obtained during the 17th and 18th centuries,"[39] and that at the core of *habeas corpus* review is the power of the courts to review Executive detentions being conducted without judicial trial.[40] After illustrating the law, the court focuses on the question before them by identifying the issue as "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[41]

The respondents in *Rasul* argued that the answer to this jurisdictional question was settled in *Eisentrager,* for all the reasons cited above.[42] Here the Court cites from the *Eisentrager* opinion what it has determined was the justification for the denial of the petitions in that case, as follows:

> "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed

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[37] *Id.* at 554.
[38] *Id*. at 554-55. (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418) (hereinafter 1903 Lease Agreement).
[39] Rasul, 159 L. Ed. 2d at 556 (quoting Swain v. Pressley, 430 U.S. 372, 380, n. 13 (1977)).
[40] *Id*.
[41] *Id*. at 557. The petitioners invoked the Court's jurisdiction under 28 U.S.C. §§ 1331 and 1350; the Administrative Procedures Act, 5 U.S.C. §§ 555, 702, 706; the Alien Tort Statute, 28 U.S.C. §1350; and the general federal habeas corpus statute, 28 U.S.C. §§ 2241-2243. The Court focuses on whether or not a statutory basis exists that permits the petitioners to file for habeas, as opposed to a Constitutional right to access to the writ. *Id*. at 555.
[42] *Id*. at 557.

> outside the United States; (f) and is at all times imprisoned outside the United States."[43]

The *Rasul* Court then goes on to state, "[o]n this set of facts, the Court concluded, 'no right to the writ of *habeas corpus* appears.'"[44] The *Rasul* Court seems to imply that the Court in *Eisentrager* was establishing a "bright line" rule by listing these six factors and implying that all six factors must be met in order to deny the petition. Furthermore, the Court in *Rasul*, when concluding that the Court in *Eisentrager* found no right to the writ "on this set of facts," fails to reference the paragraph that follows the one cited from *Eisentrager*, which places great emphasis on the jurisdiction issue. That paragraph reads:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. *No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign*, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.[45]

The *Rasul* Court distinguishes the petitioners in this case with the petitioners from *Eisentrager*, pointing out that, unlike the prisoners in *Eisentrager*, the detainees in this case are not nationals of countries at war with the United States.[46] Further the majority notes that the petitioners have taken the novel approach of denying that they were engaged in or plotted acts of aggression against the United States.[47] Finally, the Court states that the petitioners in this case have not yet been charged or convicted, much less afforded access to a military tribunal, and that they have been held for more than two years "in territory over which the United States exercises exclusive jurisdiction and control."[48]

In addressing these six factors, the Court is of the opinion that they were only relevant to the *Eisentrager* petitioner's *constitutional* entitlement to habeas corpus, and that the *Eisentrager* Court made little more than a passing reference to the absence of *statutory* authorization.[49] In an effort to set a historical context for its conclusion, the Court provides background to support its holding that a statutory right for habeas review exists for persons detained

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[43] *Id*. at 557-58 (quoting Eisentrager, 339 U.S. at 777).
[44] *Id*. at 558 (quoting Eisentrager, 339 U.S. at 781).
[45] Eisentrager, 339 U.S. at 777-78 (emphasis added).
[46] Rasul, 159 L. Ed. 2d at 558.
[47] *Id*.
[48] *Id*.
[49] *Id*.

outside the territorial jurisdiction of any federal district court. The context is set out as follows: "[i]n 1948, just two months after the *Eisentrager* petitioners filed their petition for *habeas corpus* in the U.S. District Court for the District of Columbia, the Supreme Court issued its decision in *Ahrens v. Clark*."[50] In *Ahrens*, 120 German nationals being held at Ellis Island, New York, filed petitions citing the *habeas* statute to prevent their deportation to Germany. The *Ahrens* detainees, like the prisoners in *Eisentrager*, had also filed their petitions in the U.S. District Court for the District of Columbia. Reading the phrase "within their respective jurisdictions" as used in the *habeas* statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lack jurisdiction to entertain the detainees' claims.[51]

The district court in *Eisentrager* relied on the *Ahrens* decision when it dismissed the German's petition for habeas.[52] The court of appeals in *Eisentrager* agreed that, as interpreted by *Ahrens*, the district court lacked jurisdiction under the habeas statute, but nevertheless reversed the district court on constitutional grounds. The court of appeals concluded that while no statutory right existed as interpreted by *Ahrens*, the petitioners did have a constitutional right to *habeas corpus* secured by the Suspension Clause.[53] The court of appeals reasoned "if a person has a right to a *writ of habeas corpus*, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute."[54]

The Supreme Court in *Rasul* interpreted this to mean that the court of appeals in *Eisentrager* had concluded that the *habeas* statute, as interpreted in *Aherns*, had created an unconstitutional gap that had to be filled by reference to "fundamentals."[55] The *Rasul* court went on to state:

> In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that "nothing in our statutes" conferred federal court jurisdiction, and accordingly evaluated the Court of Appeals' resort to "fundamentals" on its own terms. Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager's* resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on

[50] *Id*. (citation omitted). *See* Ahrens v. Clark, 335 U.S. 188 (1948).
[51] Rasul,159 L. Ed. 2d at 558 (citing *Ahrens*, 335 U.S. at 192).
[52] *See Eisentrager*, 339 U.S. at 767, 790.
[53] Rasul, 159 L. Ed. 2d at 559 (citing Eisentrager v. Forrestal, 174 F.2d 961, 965 (1949)); *See also*, U.S. CONST., Art. I, § 9, cl. 2.
[54] Eisentrager, 174 F.2d at 965.
[55] *Rasul*, 159 L. Ed. 2d at 559 (citing Eisentrager v. Forrestal, 174 F.2d at 963).

> the Constitution as the source of their right to federal habeas review.[56]

What does this all mean? Essentially, today's Court believes that the Supreme Court in *Eisentrager* evaluated the merits of that case under the assumption that no statutory right to *habeas* existed for the German prisoners, receiving their guidance from *Aherns*, and instead evaluated the case from the perspective of whether or not they had a *constitutional* right to *habeas*. Today's Court goes on to say that subsequent decisions of the Court have since provided guidance as to whether or not a statutory right exits, concluding that it does.[57]

The Court relies heavily on *Braden*, setting forth the proposition that *Braden* overruled the *Ahrens* decision. According to the Court:

> *Braden* established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all. Because *Braden* overruled the statutory predicate to *Eisentrager's* holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims.[58]

Equally as important is the fact that the *Rasul* Court found that the *Braden* decision held that application of the writ does not necessarily depend upon the location of the party invoking it, but rather upon the location of the government actor who has orchestrated the detention.[59]

After concluding that the statutory right to *habeas* is afforded to detainees located outside the territorial jurisdiction of the United States and that the *writ of habeas* depends upon the location of the government actor

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[56] *Rasul*, 159 L. Ed. 2d at 559.

[57] *Id*. at 559-60. (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95 (1973)).; The Court goes on to cite and discuss several cases in addition to *Braden*. The *Rasul* Court summed up *Braden* as follows: "

> this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process."

Rasul, 159 L. Ed. 2d at 559 (quoting *Braden*, 410 U.S. at 494-95).

[58] *Id*. at 560 (quoting *Braden*, 410 U.S at 499-500). 28 U.S.C. §2241 authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the …laws…of the United States."

[59] *Id*. at 562.

imposing the detention, the Court went a step further. In response to the Respondent's position that there exists a "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless specifically stated,[60] the Court concluded that in this case, the application of such a tenet is unnecessary. Extraterritoriality, said the Court, is irrelevant when dealing with the application of the writ with respect to persons detained within "the territorial jurisdiction" of the United States.[61] The Court, in concluding that Guantanamo Bay, Cuba, falls within the territorial jurisdiction of the United States, referred to the 1903 Lease Agreement and noted that "[b]y the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."[62]

The Court essentially found that given the nature of the lease between the United States and Cuba, Guantanamo Bay Naval Base falls within the territorial jurisdiction of the United States, not because the United States has ultimate sovereignty over the base but rather because the United States exercises "complete jurisdiction and control" over the base.[63] The Court went a step further and addressed the applicability of the statute to a detainee based on that detainee's citizenship as well as where that detainee was geographically located: "Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."[64]

The Court discusses several cases, which it concluded stood for the proposition that the application of the *habeas* statute to the detainees held at Guantanamo Bay is consistent with the historical reach of the writ of *habeas corpus*.[65] The cases cited essentially turned on the definition of what falls under the "sovereign's control,"[66] one case concluding that the applicability of the "writ depended not on the formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."[67] Based on the statutory application of section 2241 as well as the jurisdictional reach of the court, the Court concluded the District Court has jurisdiction to hear the petitioners'

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[60] *Id*. at 560.
[61] *Id*. at 561 (citing Foley Bros,. Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
[62] *Id*. (citing 1903 Lease Agreement, *supra* note 38).
[63] Rasul, 159 L.Ed. 2d at 561.
[64] *Id*.
[65] *Id*. at 561-62, nn.11-14.
[66] *Id*. at 562.
[67] *Id*. at 562 (quoting Ex parte Mwenya, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)).

habeas corpus petitions challenging the legality of their detention at Guantanamo Bay.[68]

Finally, the Court addressed the Petitioners' claim that the district court had jurisdiction under 28 U.S.C. § 1350, the Alien Tort Statute, as well as 28 U.S.C. § 1331, the Federal Question Statute.[69] On this point the Court concluded as follows: "Nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."[70] The Court went on to note that the Alien Tort Statute[71] allows aliens to sue for an "actionable tort . . . committed in violation of the law of nations or a treaty of the United States."[72] And finally, the Court found that the fact that the detainees were being held in military custody was immaterial to the question of the district court's jurisdiction over their *nonhabeas* statutory claims.[73]

It is the language of the Court here that seems to open the door to claims by enemy combatant detainees beyond those being held at Guantanamo Bay. By concluding that the reach of *habeas* depends primarily upon the location of the government entity behind the detention, the Court is essentially removing the distinction between those detainees held at Guantanamo and those held, for example, at a military prison in Afghanistan, regardless of the fact that Afghanistan is a sovereign country. Couple this with the Court's language regarding the rights of aliens to sue in district court based on an actionable tort, and you seem to have an extension of the right to access United States courts not just to those held at the naval base in Cuba, but to detainees held in United States custody anywhere in the world.

III. THE DISSENT

The dissent, lead by Justice Antonin Scalia, approached the case very differently from the majority. In fact, Justice Scalia refers to the majority's decision as "an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field."[74] In a lengthy opinion, the dissent argues that the majority was wrong on several points, including their interpretation of *Braden* and *Ahrens* and the impact and applicability of those cases on *Eisentrager*, the statutory applicability of section 2241 to enemy aliens, as well as the extraterritorial reach of the statute. The dissent also

[68] *Id*. at 563.
[69] *Id*.
[70] *Id*.
[71] 28 U.S.C. § 1350.
[72] *Id*. (quoting 28 U.S.C. § 1350).
[73] *Id*.
[74] Rasul, 159 L. Ed. 2d at 566 (Scalia, J., dissenting).

disagrees with the majority on its appliance of territorial jurisdiction over Guantanamo Bay, Cuba.[75]

First, the dissent takes issue with the Court's interpretation of the *habeas* statute and it's reading that applicability of the statute turns on the location of the custodian rather than the location of the detainee. This, argues Justice Scalia, essentially ignores a plain reading of the language of the statute. According to Justice Scalia, "even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee."[76] Justice Scalia goes on to cite section 2241(a) of the statute, which states: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*."[77]

The statute gets more specific, requiring that "[t]he order of a circuit judge shall be entered in the records of *the* district court of *the district wherein the restraint complained of is had*."[78] Furthermore, section 2242 of the statute provides that petitions that are addressed to the Supreme Court, and not the district court, must state the reasons why the application was not made "to *the* district court of *the district in which the applicant is held.*".[79] Justice Scalia points out that the statute is quite clear, that regardless of whom the writ is directed to, whether it is the detainee or the custodian, a necessary requirement is that some federal district court have territorial jurisdiction over *the detainee*.[80] The majority acknowledges that the detainees are not located within the territorial jurisdiction of any federal district court, but as Justice Scalia points out, this is not, as it should be, the end of the case.[81]

Scalia next takes aim at the logic behind the majority's interpretation of *Ahrens* and *Braden*. The issue in *Ahrens* was "whether the presence within the territorial jurisdiction of the district court of the person detained is prerequisite to filing a petition for a writ of habeas corpus."[82] Justice Scalia notes that the *Ahrens* Court held the authority to issue the writ extends only to those detained within the territorial jurisdiction of the district court, and that it was not sufficient "that the jailer or custodian alone be found in the jurisdiction."[83]

What is most significant about *Ahrens*, according to Scalia, is that the Court "reserved the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert

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[75] *Id*. at 566-77.
[76] *Id*. at 566.
[77] *Id*. (quoting 28 U.S.C. §2241(a)).
[78] *Id*.
[79] Rasul, 159 L. Ed. 2d at 566 (Scalia, J., dissenting) (quoting 28 U.S.C. §2242).
[80] *Id*. at 566.
[81] *Id*. at 567.
[82] *Id*. (quoting Ahrens v. Clark, 335 U.S. 188, 189 (construing 28 U.S.C. § 452, the statutory precursor to § 2241)).
[83] *Id*. (quoting *Ahrens*, 335 U.S. at 190).

federal rights."[84] Scalia states that that question, the same question presented to the Court in *Rasul*, was resolved in *Eisentrager* insofar as noncitizens are concerned.[85] Here, Scalia disagrees with the majority's interpretation that the Court of Appeals in *Eisentrager* "implicitly conceded that the district court lacked jurisdiction under the *habeas* statute as it had been interpreted in *Ahrens*," and "in essence …concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'"[86] Scalia states that the court of appeals in *Eisentrager* in fact concluded that there *was* statutory jurisdiction by applying the canon of constitutional avoidance, and that the Supreme Court subsequently overruled this conclusion.[87]

In reversing the court of appeals, the Supreme Court in *Eisentrager* focused much of its attention on the rejection of the lower court's constitutional analysis, since the doctrine of constitutional avoidance provided the foundation for the lower courts' statutory conclusions. But according to Scalia, "the opinion (of the Supreme Court in *Eisentrager*) *had* to pass judgment on whether the statute granted jurisdiction, since that was the basis for the judgments of both lower courts."[88]

If the Supreme Court concluded that there existed no constitutional right to *habeas*, this would not reverse a judgment based on a statutory right to *habeas*. And the Court in *Eisentrager* in fact held that no right to *habeas* existed under the *habeas* statute, finding that "[n]othing in the text of the Constitution extends such a right, *nor does anything in our statutes*."[89] Scalia concludes that the Court in *Eisentrager* did not spend much time analyzing the statute because it considered it an obvious fact that the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.[90]

Scalia next addresses the majority's misplaced reliance on *Braden*. According to Justice Scalia, the majority was of the opinion that *Ahrens* stood for the proposition that a district court only had jurisdiction to issue a writ on behalf of a petitioner detained within its territorial jurisdiction, and that this holding was overturned by *Braden*, which allowed a petitioner detained in Alabama to challenge his detention in district court in Kentucky.[91] *Braden*, according to Scalia, however, did not overrule *Ahrens*, but in fact distinguished *Ahrens*.[92] Scalia highlighted language in the *Braden* decision that pointed to

[84] *Id*. (quoting *Ahrens*, 335 U.S. at 192, n.4).
[85] Rasul, 159 L. Ed 2d at 567 (Scalia, J., dissenting).
[86] *Id*.
[87] *Id*. at 567-68.
[88] *Id*. at 568.
[89] *Id*. (quoting *Eisentrager*, 339 U.S. at 768).
[90] Rasul, 159 L. Ed. 2d at 569 (Scalia, J., dissenting).
[91] *Id*.
[92] *Id*.

the specific facts of that case and determined that the rule of *Ahrens* did not control *under those facts*: "[h]ere, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. *Under these circumstances*, it would serve no useful purpose to apply the Ahrens rule and require that the action be brought in Alabama."[93]

In other words, Justice Scalia states that *Braden* did not question the general rule of *Ahrens*, that a petitioner must be located within the jurisdictional reach of the court to which the petition is applied, but rather that under the specific facts of *Braden*, a petitioner may seek a writ of *habeas* in a jurisdiction in which he is legally confined, even though he is physically confined in another jurisdiction. In essence, the Petitioner in *Braden* was being held in Alabama at the request of officials in Kentucky. The *Braden* Court recognized that it made little sense to require the Petitioner to challenge the basis for his detention with the courts in Alabama when it was Kentucky that was directing his detention. *Braden* was misapplied in *Rasul*, whereas *Eisentrager* most definitely controls.[94]

Before moving on, Justice Scalia takes exception to the concurring opinion of Justice Kennedy, who agreed with the majority and concluded that jurisdiction under the habeas statute was dependent upon, among other conditions, the availability of legal proceedings and the length of the detention. Scalia determines that it is impossible to interpret the statute's geographic application as being based on the conditions mentioned by Justice Kennedy.[95]

Moving back to the majority's interpretation of *Braden* and its misapplication to this case, Justice Scalia points out that the majority inaccurately describes *Braden* as citing cases in which *habeas* petitioners located overseas and therefore outside the jurisdiction of the district court were nevertheless allowed to proceed in the District Court for the District of Columbia.[96] The problem, Scalia writes, is that *Braden* specifically states that "[w]here *American citizens* confined overseas" sought relief under the *habeas* statute, the Court has held the petitioners presence outside the district does not bar the availability of the writ on a jurisdictional basis.[97]

Justice Scalia concludes that it is neither the decision in *Ahrens* nor the decision in *Braden* that overrules the Court in *Eisentrager*. It is, in fact, the

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[93] *Id*. at 570 (quoting *Braden*, 410 U.S. at 498-99).
[94] *Id*.
[95] Rasul, 159 L. Ed. 2d at 570, n.4 (Scalia, J., dissenting) Justice Scalia notes some problems with Justice Kennedy's reasoning: "Among the consequences of making jurisdiction turn upon circumstances of confinement are (1) that courts would *always* have authority to inquire into circumstances of confinement, and (2) that the Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus." *Id.*
[96] *Id*.
[97] *Id*. at 571. In fact, *Eisentrager*, as Justice Scalia points out, specifically addressed the issue of citizenship, stating "[w]ith the citizen we are now little concerned, except to set his case apart *as untouched by this decision* and to take measure of the difference between his status and that of all categories of aliens." *Id*. (quoting *Eisentrager*, 339 U.S. at 769).

Court's decision in this case, *Rasul*, that overrules *Eisentrager* and for the first time extends the *habeas* statute to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts.[98] And it is this holding that has far reaching implications regarding the Executive's ability to detain prisoners of war unencumbered by the burden of litigation.

Justice Scalia notes that by ignoring *Eisentrager*, the Court "boldly extends the scope of the habeas statute to the four corners of the earth."[99] Scalia reaches this conclusion by pointing out that in the majority opinion, the Court claims that *Braden* stands for the proposition that "a district court acts 'within [its] respective jurisdiction' within the meaning of section 2241 as long as 'the custodian can be reached by service of process.'"[100] The consequences of this holding are staggering. This ruling, according to Scalia, permits an enemy combatant non-citizen of the United States, captured on the field of combat, access to the district court to file a petition against the Secretary of Defense under 28 U.S.C. § 2241, challenging the basis of their detention.[101] As a result of this opinion and without acknowledgement to these implications, federal courts will be inundated with petitions not just from the approximately 600 detainees at Guantanamo, but also from other prisoners held around the world. Given the fact that at the end of World War II, the United States had nearly 2 million prisoners of war in custody,[102] the ramifications of this opinion could not only lead to significantly clogged courts, but would also result in courts overseeing one aspect of the way the President prosecutes war.[103]

Finally, Justice Scalia addresses the issue regarding the status of Guantanamo Bay, by arguing that in light of the majority's position that the place of detention has no bearing on the statutory availability of *habeas* relief, the status of Guantanamo Bay is "entirely irrelevant to the issue here."[104] It is key to note that the Court, in the majority opinion, is applying the *habeas* statute *domestically*, to the petitioners' custodians, and therefore the doctrine that statutes are presumed to have no extraterritorial effect does not apply.[105]

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[98] *Id*. Justice Scalia notes the import: "Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction – and thus making it a foolish place to have housed alien wartime detainees." *Id*.

[99] *Id*. at 571-72.

[100] Rasul, 159 L. Ed. 2d at 572 (Scalia, J., dissenting) (quoting *Rasul*, 159 L. Ed. 2d at 559) (alteration in original)). The majority repeats this position in Part IV of its opinion when it states that §2241 of the statute requires nothing more than the District Court's jurisdiction over petitioners' custodians. *Id*. at 562.

[101] *Id*. at 572.

[102] *Id*. (citing Department of Army, G. Lewis & J. Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, Pamphlet No. 20-213, p. 244 (1955)).

[103] Rasul, 159 L. Ed. 2d at 572 (Scalia, J., dissenting).

[104] *Id*. at 573.

[105] *Id*.

Despite this conclusion, the Court spends a considerable amount of time in the opinion rejecting the respondents' argument that the doctrine applies by stating that it has no application to Guantanamo Bay. If this were the case, it would imply that *all* United States law, and not just section 2241, would apply to Guantanamo Bay.[106]

According to Justice Scalia, the crux of the majority's opinion regarding Guantanamo Bay is two fold. First, the Court finds that the presumption against extraterritorial effect does not apply to Guantanamo Bay because of the terms of the lease.[107] Specifically, that the United States has "complete jurisdiction and control" over the Guantanamo Bay Naval Base and that the United States can exercise its control indefinitely; therefore application of the *habeas* statute is not barred by the fact that Guantanamo Bay happens to be located in Cuba.[108] Justice Scalia points out, however, that the lease agreement also explicitly recognizes "the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]."[109] The majority never explains how "complete jurisdiction and control" without sovereignty causes a Naval Base in Cuba to become part of the United States for purposes of the application of domestic laws.[110]

Scalia argues that having "jurisdiction and control" via a lease is no different than acquiring "jurisdiction and control" by lawful force of arms. This would in essence make parts of Afghanistan and Iraq subject to domestic U.S. laws. "Indeed," Scalia goes on to point out, "if 'jurisdiction and control' rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees" also should have been subject to U.S domestic law.[111]

The second reason cited by the Court to support their proposition that domestic law applies to Guantanamo Bay is the Respondent's concession that there would be *habeas* jurisdiction over a United States citizen in Guantanamo Bay.[112] But as Justice Scalia points out, the Respondent conceded this point *not* based on the special status of Guantanamo Bay, but rather based on the fact that citizens of the United States may have more rights with respect to the *habeas* statute, that United States citizens regardless of location may have greater access to *habeas* rights.[113] This is the very same conclusion reached by

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[106] *Id*. Justice Scalia points out that this would include, for example, the federal cause of action recognized in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), which would allow prisoners to sue their captors for damages.
[107] *Id*. (citing Rasul, 159 L. Ed. 2d at 561).
[108] Rasul, 159 L. Ed. 2d at 573 (Scalia, J., dissenting) (citing 1903 Lease Agreement, *supra* note 38).
[109] *Id*.
[110] *Id*. at 574.
[111] *Id*.
[112] *Id*.
[113] Rasul, 159 L. Ed. 2d at 574 (Scalia, J., dissenting).

the *Eisentrager* Court, which at the same time held "that aliens abroad *did not have habeas corpus* rights."[114]

Finally, Justice Scalia tackles the majority's position that the Court's approach to *habeas* jurisdiction as it applies to aliens abroad is "consistent with the historical reach of the writ,"[115] concluding that none of the sources cited by the majority support that claim.[116] Scalia notes that the first set of cases cited by the majority deal with claims by aliens clearly detained in domestic territory, and therefore those cases are irrelevant because they do not deal with the territorial reach of the writ.[117] The remaining cases cited by the majority involve instances where the writ was issued to "exempt jurisdictions" and "other dominions under the sovereign's control."[118] These cases also do not apply because Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to United States citizens.[119]

Justice Scalia concludes that Guantanamo Bay is neither an "exempt jurisdiction" nor does it fall under the category of "other dominions under the sovereign's control," thus the cases cited by the majority fail to support its contention that application of the writ in this circumstance is "consistent with the historical reach of the writ."[120] "Exempt jurisdictions," as defined by the cases cited by the majority, included areas in England where the Crown had ceded management of municipal affairs to local authorities but did not delegate the King's authority over the writ.[121] No such similar arrangement exists involving Guantanamo Bay.

Justice Scalia states that the category of "other dominions under the sovereign's control fare[s] no better."[122] Each dominion listed in the cases cited by the majority, as well as the territories listed as dominions by Blackstone, were sovereign territories of the Crown and included such properties as colonies, acquisitions and conquests.[123] In any event, as Justice Scalia points out, "to the extent the writ's 'extraordinary territorial ambit' did extend to exempt jurisdictions, outlying dominions, and the like, that extension applied only to British *subjects*. The very sources the majority relies on say so."[124]

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[114] *Id*. (quoting Eisentrager, 339 U.S. at 769-70).
[115] *Id*. (quoting Rasul, 159 L. Ed. 2d at 558).
[116] *Id*.
[117] *Id*. (citing Rasul, 159 L. Ed. 2d at 561, n.11).
[118] Rasul, 159 L. Ed. 2d at 574 (Scalia, J., dissenting) (citing *Rasul*, 159 L. Ed. 2d at 562, nn.12-13).
[119] *Id*.
[120] *Id*. at 574-75.
[121] *Id*. at 574 (citing 1 W. Holdsworth, History of English Law 108, 532 (7th ed. rev. 1956); 3 W. Blackstone, Commentaries, *78- *79).
[122] *Id*. at 575.
[123] Rasul, 159 L. Ed. 2d at 575 (Scalia, J., dissenting).
[124] *Id*.

In the end, Justice Scalia concluded that 28 U.S.C. § 2241, the *habeas* statute, does not extend to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. Scalia firmly stated that the *Eisentrager* decision, under the rule of *stare decisis*, controls in this case and should not be departed from lightly, especially at a time where such a departure could significantly impair our Nation's conduct at war.[125]

IV. THE CONSEQUENCES

The full impact of the Supreme Court's decision in *Rasul v. Bush* has yet to be felt, but already forces are in motion on both sides as a result of this case.[126] By expanding the jurisdiction of the *habeas* statute beyond our borders and beyond our citizenry, while paying little heed to the consequences of such action during a time of war, the Supreme Court has created a hurdle that will unnecessarily frustrate the President's ability to effectively prosecute the Global War on Terror in several ways. It opens the doors of the courthouse to potentially countless detainees and prisoners of war from around the world, both present and future, who wish to challenge their detention by U.S. forces. It will impose an unnecessary burden upon commanders and soldiers in the field by requiring them to simultaneously engage in both combat and prepare for potential litigation surrounding that combat. This decision will also hamper the intelligence gathering efforts of our military by limiting interrogation capabilities due to the premature introduction of the litigation process, and may result in the early release of numerous detainees because the burden of defending their detention may require the release of classified information. And rather than provide clarity with its ruling, the Supreme Court has instead provided ambiguity that will likely result in further litigation concerning the process and procedures necessary to meet the Court's demands.

Rather than overrule nearly a half-century of judicial precedent, the Court should have left this matter to Congress. As Justice Scalia indicates, while pointing out one of the more twisted ironies of the Court's decision:

> Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the

[125] *Id*. at 576-77.

[126] Mike Mount, *Panels to Review Gitmo Detention*, CNN, (July 7, 2004)), *available at* http://www.cnn.com/2004/LAW/07/07/gitmo.review.panel/index.html.

> district of their confinement. . . whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts.[127]

As fully illustrated in *Eisentrager*, this Court's decision in *Rasul* has the potential of adding an enormous burden upon our military at a time when their attention needs to be clearly focused on the Global War on Terror. Instead, the 600 detainees at Guantanamo Bay as well as other military prisoners held around the world have the potential of clogging the courts with petitions for *habeas*. These petitions will lead to hearings requiring the production of evidence and witnesses. Those witnesses will no doubt come from the battlefields of Afghanistan and bases in Iraq and will include both ground troops and senior commanders alike. The evidence requested will likely include requests for highly sensitive or classified information that could easily impact our military's decisions as to whether or not to even go forward with the continued detention of certain detainees rather than risk the disclosure of such information. While our soldiers in the field already go to great lengths to ensure proper targeting and minimal collateral damage, they will now be expected to collect evidence throughout the battle in preparation for the potential litigation that will likely arise should they take prisoners.

And what of those detainees that are deemed to be not worth the burden of having to defend their detention while our soldiers are still engaged in combat? Recent reports indicate that nearly 10% of those detainees that have so far been released have since rejoined the battle and have either been re-captured or killed while engaging in fighting against U.S. forces.[128] While it is conceivable that some detainees may not have been involved in direct combat against the United States, is it reasonable to believe that the military got it wrong with over 600 detainees?

Today we are dealing with a new kind of enemy. An enemy that does not wear the uniform of one specific country. An enemy that hides among the civilian populace. An enemy that uses places like mosques and hospitals as places of refuge for both combatants as well as the tools of war. An enemy that masks his true identity and counts on torture and beheadings among his weapons of choice. An enemy who often times is compelled by cowardice to hide in the shadows while detonating roadside bombs that kill and maim

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[127] Rasul, 159 L. Ed. 2d at 577 (Scalia, J., dissenting) (footnote and citation omitted). Justice Scalia cites as an example that the Congress could "provide for jurisdiction by placing Guantanamo Bay within the territory of an existing district court; or by creating a district court for Guantanamo Bay, as it did for the Panama Canal Zone, see 22 U.S.C. §3841(a)(repealed 1979)." *Id*. at 577, n.7. Justice Scalia added: "The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish – and, as a result, to forum shop." *Id*.

[128] Shaun Waterman, *Released Detainees Return to Fighting U.S*., United Press International (July 6, 2004), *available at* http://www.upi.com/view.cfm?StoryID=20040705-080713-4578r

soldier and civilian alike. An enemy that seeks to conduct their murderous aggression not just on the streets of Baghdad but on the streets of New York and Los Angeles. The importance of discovering the secret plans of this shrouded enemy cannot be overstated. This Court's decision will now hamper that ability to collect intelligence and discover the future plans of our enemies, because resources will need to be shifted to defend the very detention itself. This is truly a unique proposition unheard of in the history of warfare, and could result in this nation paying a very high price.

Some, like Justice Kennedy in the concurrence to *Rasul*, express concern over the length of the detention, and argue that this should be a factor in determining whether a detainee should have access to federal courts in order to challenge his detention. But while it is true that a military tribunal had already convicted the petitioners in *Eisentrager* at the time they filed their petition, it is also a fact that hostilities between the United States and Germany had ended. In the present case, the United States is still very much at war with al Qaeda and the remnants of the Taliban. Despite that, the military tribunal process has been underway for some time.[129] Defense teams have been assembled. Some individuals have been identified as ready to be prosecuted. Defense counsels have even begun to meet with their clients. The Petitioners have "never been afforded access to any tribunal"[130] but that does not mean that they won't at some appropriate time be brought before a tribunal, and certainly long before the War on Terror is won. While it would be helpful to know just how long this war will last, a close review of history will show that Adolf Hitler was not magnanimous enough to set an end date for his aggression during World War II. Neither has al Qaeda.

The language of the Court's decision does not limit itself to Guantanamo Bay, because the logic used to justify the decision can easily be applied to enemy combatants detained in places like Kabul, Baghdad, Tehran, or North Korea. Within days of this decision, a lawyer for none other than Saddam Hussein filed an appeal to the United States Supreme Court, asking the Court for permission to file an indigent appeal on Saddam's behalf.[131] There will no doubt be more petitions filed in addition to the 600 likely to be filed by lawyers representing the detainees currently being held at Guantanamo Bay. By opening our courts to our enemies and allowing them to essentially

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[129] News Transcript, Department of Defense, *Announcements of Key Personnel For Military Commissions, etc.* (December 30, 2003) (on file with author); Press Release, Department of Defense, *Military Commission Charges Referred* (June 29, 2004) (on file with author); *Bin Laden Aides to Face Military Tribunals*, WALL STREET JOURNAL (February 25, 2004); For more information regarding military commissions visit the DoD website at http://www.defenselink.mil/news/commissions.html.

[130] Rasul, 159 L. Ed. 2d at 558.

[131] Associated Press, *Saddam Lawyer Wants Supreme Court Intervention* (9 Jul 04), *at* http://www.foxnews.com/printer_friendly_story/0,3566,125164,00.html

place our soldiers on trial, aid and comfort is provided to our enemies and the war effort is undoubtedly harmed.

The Department of Defense, in response to the Court's surprising decision, has begun to create panels of officers who will review each detainee's case on a case-by-case basis and determine whether continued detention is warranted.[132] An order establishing the combatant status review tribunals was issued on the 7th of July 2004 by Deputy Secretary of Defense Paul Wolfowitz and details the procedures involved in establishing the review tribunals.[133] This could very easily lead to the release of a number of detainees, not because they were simply innocent bystanders, but because allowing them access to federal court would overly burden the war effort.

The Court's decision in *Rasul* makes one thing very clear. It is time for Congress to step forward and pass legislation that clarifies to a divided Court that the privilege of having access to U.S. courts and the protection of U.S laws must not be extended to our enemies overseas. Congress should revise the federal *habeas* statute and specifically state that its application does not extend to enemy aliens detained by our military forces overseas, and they must do it without further delay.

[132] Mike Mount, *Panels to Review Gitmo Detention*, CNN, (July 7, 2004), *available at* http://www.cnn.com/2004/LAW/07/07/gitmo.review.panel/index.html.

[133] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) (on file with author).

UNITED STATES V. HENDERSON: SPECIAL COURT-MARTIAL CONVENING AUTHORITY CANNOT REFER A CAPITAL CHARGE

MAJOR MIKE RODERICK*

I. FACTS

In *United States v. Henderson*,[1] the Court of Appeals for the Armed Forces held that a special court-martial lacked jurisdiction over a capital charge of willfully hazarding a vessel and the lesser-included charge of negligently hazarding a vessel. Henderson, who was Damage Controlman Fireman Apprentice onboard the USS TARAWA, built an improvised explosive device out of urine sample tubes, crushed flare powder, electrical wires, oil and washers. He intended to detonate the device onboard ship in order to commit suicide. After Henderson built the device, he placed it in a box and stored in the fan room onboard ship. The device was found and removed before he could initiate his suicide plan.

The charges against Henderson, including the charge of willfully hazarding a vessel in violation of Article 110, UCMJ, were referred to a special court-martial by the commanding officer of the USS TARAWA, an officer who exercised only special court-martial jurisdiction. Henderson entered into a plea agreement in which he agreed to plead guilty to, inter alia, the lesser-included offense of negligently hazarding a vessel. It is important to note that the charge of willfully hazarding a vessel, however, was not dropped from the charge sheet and the lesser-included offense was not referred separately. Henderson was convicted of those charges to which he pleaded guilty and was acquitted of the charges to which he had pleaded not guilty, including the offense of willfully hazarding a vessel.

II. LAW

The jurisdiction of a special court-martial over a non-mandatory capital offense was a legal question in which the court reviewed de novo.

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[1] United States v. Henderson, 59 M.J. 350 (C.A.A.F. 2004).

Willfully hazarding a vessel is a non-mandatory capital offense, punishable by "[d]eath or such other punishment as a court-martial may direct."[2] Negligently hazarding a vessel is a lesser-included, noncapital offense, punishable by "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years."[3]

Article 19, UCMJ, "jurisdiction of special courts-martial," provides in pertinent part: "[S]pecial courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter, and, under such regulations as the President may prescribe, for capital offenses." Rule for Courts-Martial [hereinafter R.C.M.] 201(f)(2)(C), a regulation prescribed by the President, withholds jurisdiction over mandatory capital cases from special courts-martial, but does provide for jurisdiction over non-mandatory capital offenses under two circumstances: (1) when permitted by an "officer exercising general court-martial jurisdiction over the command which includes the accused"; and (2) when authorized by regulation by the Secretary concerned. The government presented no evidence that either of these exceptions applied in this case.

III. WAS THE FACT THAT THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY HAD NO AUTHORITY TO REFER A NON-MANDATORY CAPITAL CHARGE TO A SPECIAL COURT-MARTIAL A NONJURISDICTIONAL PROCEDURAL DEFECT?

The government first asked the court to find that the error was a nonjurisdictional procedural defect that was forfeited because it was not raised at trial, overruling *United States v. Bancroft*.[4] *Bancroft* was a Korean War case where the accused had been charged with violation of Article 113, UCMJ, for sleeping at his post. A conviction for violation of Article 113 during time of war is punishable "by death or such other punishment as a court-martial may direct." The charges were referred to a special court-martial, which found Bancroft guilty. The Court of Appeals of the Armed Forces, noted that neither the officer exercising general court-martial jurisdiction nor the Secretary of the Navy had authorized the referral and held that the special court-martial did not have jurisdiction to try the non-mandatory capital offense of sleeping at a post during wartime in violation of Article 113. The special court-martial's findings and sentence on that charge were therefore void.[5]

The facts in *Henderson* were strikingly similar to *Bancroft*. As in *Bancroft*, the officer making the referral exercised only special court-martial jurisdiction and referred a capital charge to a special court-martial without the authorization to do so. The court took this occasion to reaffirm their holding in

[2] *Manual for Courts-Martial, United States* (2002 ed.) [hereinafter *MCM*], Part IV, para. 34.e.
[3] *Id.*
[4] United States v. Bancroft, 3 C.M.A., 11 C.M.R. 3 (1953).
[5] *Id.* at 11.

Bancroft, and held that the court-martial in the present case lacked jurisdiction over the capital charge of willfully hazarding a vessel.

IV. ALTERNATIVELY, IF THE SPECIAL COURT-MARTIAL HAD NO JURISDICTION OVER THE CAPITAL CHARGE, COULD A PRETRIAL AGREEMENT BE CONSTRUED AS A NEW REFERRAL OF THE NON-CAPITAL LESSER-INCLUDED CHARGE?

The government next argued that, if the court found that there was no jurisdiction over the charge of willfully hazarding a vessel, when the special court-martial convening authority entered into a pretrial agreement with Henderson, in which Henderson agreed to plead guilty to the lesser–included charge of negligently hazarding a vessel, that agreement became the "functional equivalent" of a referral authorized under R.C.M. 601.

Essentially, the government asserted that the agreement was a new referral of the lesser-included charge of negligently hazarding a vessel, a charge that the commanding officer of the USS TARAWA was authorized to refer as a special court-martial convening authority. In support of their argument they cited *United States v. Wilkins.*[6] Wilkins was charged with larceny but entered into a pretrial agreement with the special court-martial convening authority in which he agreed to plead guilty to receiving stolen property. The offense of receiving stolen property was not included in the original referral of charges, nor is it a lesser-included offense of larceny. The court concluded that the pretrial agreement between Wilkins and the convening authority was the functional equivalent of a referral of the charge and specifications of receiving stolen property. The court's based its decision on the rationale that while a referral is a jurisdictional prerequisite, the form of the referral is not jurisdictional. The unusual form of the referral was therefore a nonjurisdictional irregularity in the trial process.[7]

The court distinguished *Wilkins* from the case at hand. In *Wilkins*, the convening authority had the authority to refer both the larceny and receiving stolen property charges to the special court-martial, and the court-martial had subject matter jurisdiction over both of the offenses. *Henderson* involved a challenge to the jurisdiction of a special court-martial to try a non-mandatory capital offense in the absence of authorization from either the officer exercising general court-martial jurisdiction over the accused or from the Secretary of the Navy – it was not simply a challenge to the "form" of the referral. The special court-martial lacked jurisdiction ab initio. "[W]hen a criminal action is tried before a court which does not have jurisdiction, the entire proceedings are a nullity."[8]

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[6] United States v. Wilkins, 29 M.J. 421 (C.M.A 1990).
[7] *Id*. at 424-25.
[8] Bancroft, 3 C.M.A. at 11, 11 C.M.R. at 11.

The primary distinction between this case and *Bancroft* is that Henderson was not convicted of a capital offense but only of a noncapital, lesser-included offense. That distinction, however, does not change the result. Because the offense of negligently hazarding a vessel never achieved the status of an independent charge, the court's jurisdiction over it derived only from the improperly referred capital offense of willfully hazarding a vessel, an thus rises and falls with the jurisdiction over the greater offense. To recognize the pre-trial agreement in this case as the "functional equivalent" of a new referral would require the court to find jurisdiction where it does not exist, which the court declined to do.

V. UNDER THE GENERAL PRINCIPLES OF NOTICE PLEADING, WHEN A SPECIAL COURT-MARTIAL CONVENING AUTHORITY REFERS A CAPITAL CHARGE, DOES IT IMPLICITLY REFER A LESSER-INCLUDED NONCAPITAL OFFENSE AT THE SAME TIME?

Lastly, the government argued that when the special court-martial convening authority referred the charge of willfully hazarding a vessel to the special court-martial, it implicitly referred the lesser-included offense of negligently hazarding a vessel at the same time, under the general principles of notice pleading relying on *United States v. Virgilito*,[9] that a lesser-included offense does not have to be independently referred if the allegations "fairly embrace the elements of the lesser offense and thus give adequate notice to the accused of the offenses against which he must defend."[10]

The court found that *Virgilito* did not apply in the case at hand, as it did not involve any defect in the court's jurisdiction over the originally preferred charge. Henderson's special court-martial had no jurisdiction to try a capital charge without authorization from either the officer exercising general court-martial jurisdiction over the accused or from the Secretary of the Navy. Since the lesser-included charge of negligently hazarding a vessel was never formally referred under R.C.M. 601, it was dependent on the greater charge and was fatally tainted by the lack of jurisdiction.

VI. CONCLUSION

Unless authorized by the officer exercising general court-martial jurisdiction, or by regulation by the Secretary concerned, an officer exercising special court-martial jurisdiction does not have authority to refer a non-mandatory capital charge to trial. Additionally, the officer exercising special

[9] United States v. Virgilito, 22 C.M.A. 394, 396, 47 C.M.R. 331, 333 (1973).
[10] *Id*.

court-martial jurisdiction does not have the authority to refer a noncapital lesser-included charge of a capital charge to trial, unless it has been formally referred.

WHAT DO SPECIAL INSTRUCTIONS BRING TO THE RULES OF ENGAGEMENT? [1] CHAOS OR CLARITY

MAJOR PAUL E. JETER*

During the evening of 17 April 2002 near Kandahar, Afghanistan, soldiers from Alpha Company, 3rd Battalion, Princess Patricia's Canadian Light Infantry, were engaged in night live-fire training south of Kandahar at Tarnak Farms Range. While the Canadian soldiers were training, two U.S. F-16 fighter aircraft were returning from a mission over Afghanistan. As they passed south of Kandahar, the flight lead noticed what he described as fireworks coming from an area a few miles south of Kandahar. Perceiving this as surface-to-air fire (SAFIRE) directed at them, the flight asked permission from an Airborne Warning and Control System (AWACS) aircraft to obtain the coordinates of the site. While attempting to get the coordinates, the wingman requested permission to fire on the location with his 20mm cannon. AWACS told him to standby and later requested additional information on the SAFIRE along with directing him to hold fire. The wingman gave the information and immediately declared that he was "rolling in in self-defense." He then released a 500 pound laser-guided bomb that impacted on a Canadian firing position at the Tarnak Farms Range. Four Canadians were killed and eight wounded. All the wounded soldiers were immediately evacuated from the

[1] The format for explaining the Rules of Engagement came from Major Dawn R. Eflein, *A Case Study of Rules of Engagement in Joint Operations: The Air Force Shootdown of Army Helicopters in Operation Provide Comfort,* 44 A.F. L. REV. 33 (1998).

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> *area for medical treatment. When the two F-16s landed, they were told they had released a bomb on friendly forces.*[2]

"This incident mark(ed) the third time that U.S. forces had been involved in friendly fire accidents during the conflict in Afghanistan."[3] Another cause for concern was that this friendly fire fatality refreshed memories of another tragedy that happened on 14 April 1994, during Operation PROVIDE COMFORT. "On that date, two United States Air Force F-15 fighter aircraft shot down two United States Army UH-60 Blackhawk helicopters in the skies over northern Iraq.[4] Why were Coalition forces in Afghanistan in the first place? In the wake of the accident, why are Coalition forces still today conducting military operations?

> On 11 September 2001, terrorists trained by the al-Qaeda organization hijacked four commercial airliners, crashing them into the two World Trade Center towers in New York City, the Pentagon in Washington, D.C., and a field in Pennsylvania. On 6 October 2001, the United States and several coalition partners launched Operation ENDURING FREEDOM (OEF), a military campaign designed to destroy the al-Qaeda terrorist network's main base of support in Afghanistan and the Taliban regime that had provided both a safe haven and substantial material support to al-Qaeda.[5]

On 17 September 2002, the National Security Strategy of the United States of America was released to the public. The purpose was to reinforce the commitment and priorities of our nation as defined by our nation's leadership.

> Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, the task has changed dramatically. … Terrorists are organized to penetrate open societies and to turn the power of modern

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[2] U.S. DEP'T OF AIR FORCE, FRIENDLY FIRE INVESTIGATION BOARD REPORT: TARNAK FARMS FRIENDLY FIRE INCIDENT NEAR KANDAHAR, AFGHANISTAN, 17 APRIL 2002, at 2 (7 June 2002) [hereinafter FRIENDLY FIRE BOARD REPORT], *available at* http://www.centcom.mil/News/Reports/Tarnak_Farms_Report.htm.

[3] CABLE NEWS NETWORK, *U.S: Friendly Fire Pilot Reported Being Fired Upon* (Apr. 18, 2002), *available at* http://www.cnn.com/2002/WORLD/asiapcf/central/04-18/Afghanistan.Canada.

[4] Bruce B. Auster, *The Perils of Peacekeeping*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 28; John R. Harris & John Lancaster, *Jets over Iraq Mistakenly Down American Helicopters, Killing 26*, WASH. POST, Apr. 15, 1994, at A1; Michael R. Gordon, *26 Killed as U.S. Warplanes Down Two U.S. Helicopters over Kurdish Area of Iraq*, N.Y. TIMES, Apr. 15, 1994, at A1.

[5] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 3.

> technologies against us. To defeat this threat we must make use of every tool in our arsenal-military power … America will help nations that need our assistance in combating terror. And America will hold to account nations that are compromised by terror, including those who harbor terrorists-because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorist to develop new home bases. Together, we will seek to deny them sanctuary at every turn.[6]

America, before this articulation of our national objectives, was employing this policy in the international armed conflict appropriately named Operation ENDURING FREEDOM in Afghanistan. This conflict was being prosecuted through a multinational effort led by America and several coalition partners making it a combined operation.[7] With this combined operation, came the increase of America military operational activities and the potential for misfortune which was the case on 17 April 2002. On 7 June 2002, a Coalition Investigation Board (CIB) consisting of U.S. and Canadian personnel released their findings about the incident.[8]

> The Coalition Investigation Board found by clear and convincing evidence that the cause of the friendly fire incident on 17 April 2002 was the failure of [Major Harry Schmidt], the 170th Expeditionary Fighter Squadron Weapons Officer and the incident flight wingman, to exercise appropriate flight discipline. This resulted in a violation of the rules of engagement and the inappropriate use of lethal force. Under the circumstances, Major [Harry Schmidt] acted with reckless disregard for the foreseeable consequences of his actions, thereby endangering friendly forces in the Kandahar area.[9]

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[6] GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002).

[7] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 3; *see also* "Any future crisis in which force is used likely will be fought by coalition troops rather than on a unilateral basis." Eflein, *supra* note 1, at 34 n. 9 (quoting Lieutenant Commander Guy Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4 (citing Waldo Freeman, *The Challenges of Combined Operations*, MILITARY REV., Nov. 1992, at 2)).

[8] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 47.

[9] *Id.* at 45-46; *see also* David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html ; Vernon Loeb, *2 U.S. Pilots Charged in Bombing of Canadians*, WASH. POST, Sept. 14, 2002, at A01; David Pugliese and Glen McGregor, *Fighter Pilots Likely to Face Court Martial: Friendly-Fire Incident could Bring 10 Years in Prison*, CALGARY HERALD, Sept. 14, 2002, at A5; Brad

> The Board also found by clear and convincing evidence that an additional cause of the incident was the failure of [Major William Umbach], the 170th Expeditionary Fighter Squadron Commander and the incident flight lead, to exercise appropriate in-flight leadership. This resulted in his wingman's violation of the rules of engagement and inappropriate use of lethal force. Under the circumstances, Major [William Umbach] acted with reckless disregard for the foreseeable consequences of his actions, thereby endangering friendly forces in the Kandahar area.[10]

The CIB cited other substantial contributing factors and other finding of significance.[11] This friendly fire incident, referred to as Tarnak Farms, has

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Knickerbocker, *"Friendly Fire" Deaths Vex the U.S. Military*, CHRISTIAN SCI. MONITOR, Jan. 7, 2003, at 2.

[10] *Id*.

[11]

> SUBSTANTIAL CONTRIBUTING FACTORS The Board found substantial evidence of four contributing factors*:* First, the commander of the 332nd Air Expeditionary Group (332 AEG/CC), openly expressed frustration with what he perceived as severe failings with regard to the Operation ENDURING FREEDOM Airspace Control Order, command and control processes, and flow of intelligence information to the units, but failed adequately to communicate these concerns to his superiors. His failure in his responsibility as a commander to notify his superiors of such serious concerns, coupled with his indiscrete sharing of these concerns with subordinates, bred a climate of mistrust and led to an operational environment within his unit inconsistent with the Commander's Intent for Operation ENDURING FREEDOM. Second, the 332nd AEG/CC failed to establish clear standards or provide adequate mission planning support to line pilots for use in pre-flight mission planning, leading to the lack of an appropriate level of situational awareness by the incident flight. Third, the 170thExpeditionary Fighter Squadron suffered from a lack of clearly defined squadron leadership roles and responsibilities, contributing to a lack of uniform training and standards for squadron personnel, including the incident flight pilots, before and during combat operations. Fourth, the 170thExpeditionary Fighter Squadron failed to establish an adequate squadron mission planning process, resulting in inadequate mission preparation and the lack of an appropriate level of situational awareness by the incident flight.
>
> OTHER FINDINGS OF SIGNIFICANCE Finding 1: Mission planning and preparation was not consistent across several units. Finding 2: Airspace Control Order breakout, display and use are inconsistent in Operation ENDURING FREEDOM operations. Finding 3: The Coalition Air Operations Center has no capability of recording internal or external communications to aid in debriefing. Finding 4: Ground forces are not required to report live-fire training or activity within the given Air Tasking Order day. Finding 5: Ground forces are not currently represented at the Air Expeditionary Group level. Finding 6: The Airspace Control Order description of the Tarnak Farms did not encompass all types of weapons that

proceeded to another forum based on the ripple effect of the CIB findings. The unit commander preferred charges against the two pilots consisting of involuntary manslaughter, assault and dereliction of duty.[12] On 13 January 2003, an Article 32 hearing was convened to determine whether the pilots should be court-martialed for the mistaken bombing. As of the date of this study, the investigating officer has not completed the Article 32 report.

However, the question that Tarnak Farms poses is whether the pilot had the authority in self-defense to act in the way he did?[13] The pilots' claimed they were defending themselves against what they thought was hostile ground fire.[14] This defense embraces the concept that they were adhering to the rules of engagement (ROE).[15] This argument appears to be history repeating itself in 2002. During 1994,"the Blackhawk helicopters shoot down resulted in an accident report asserting that the pilots who fired the two missiles were acting in accordance with the rules of engagement."[16] Conclusively at the CIB stage

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> were being fired. Finding 7: The JTF-SWA Air Defense Artillery Liaison Officer was not properly trained in Battlefield Coordination Detachment operations. Finding 8: U.S. Air Force AWACS have no capability to record external and internal communications or the Situational Information Display (SID) to aid in mission debriefs. Finding 9: Surface-to-Air Fire (SAFIRE) analysis was insufficient at the squadron level. Finding 10: The 332nd AEG was not managing and monitoring Go pill usage IAW USAF directives. Finding 11: Post-incident actions were not consistent with established USAF procedures.

BOARD REPORT, *supra* note 2, at 45-46.

[12] David M. Halbfinger, *UnusualFactors Converge in Case Against War Pilots*, N.Y. TIMES, Jan. 25, 2003, *available at* http://www.nytimes.com/2003/01/25/national/25pilo.html ; Vernon Loeb, *2 U.S. Pilots Charged in Bombing of Canadians*, WASH. POST, Sept. 14, 2002, at A01; David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html ; David Pugliese and Glen McGregor, *Fighter Pilots Likely to Face Court Martial: Friendly-Fire Incident could Bring 10 Years in Prison*, CALGARY HERALD, Sept. 14, 2002, at A5.

[13] *Id.*

[14] *Id*; *see also* Lisa Kernek, *Criminal Trial Considered Against Two Illinois Air National Guard Pilots*, SPRINGFIELD STATE JOURNAL-REGISTER, Sept. 13, 2002, *reprinted in* COPLEY NEWS SERVICE, Sept. 14, 2002, LEXIS, News Group File.

[15] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02: DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 459 (12 April 2001) [hereinafter JOINT PUB. 1-02]; JP 1-02 states "rule of engagement are directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered." *Id.* at 459.

[16] U.S. DEP'T OF AIR FORCE, 2 AIRCRAFT ACCIDENT INVESTIGATION BOARD REPORT: U.S. ARMY UH-60 BLACKHAWK HELICOPTERS, REP'T NOS. 87-26000 & 88-26020, at 48 (27 May 1994) [hereinafter AIRCRAFT ACCIDENT BOARD REPORT] (quoting the Statement of Opinion of Major General James Andrus, Board President) ("The flight lead, acting within the specified ROE, fired a single missile and shot down the trail Blackhawk helicopter. At flight lead's direction, the F-15 wingman also fired a single missile and shot down the lead Blackhawk helicopter."). Following the accident, the Secretary of Defense ordered an investigation into the causes of the accident. The product of that investigation was a 22-volume report. The investigation was conducted in accordance with *Air Force Regulation 110-14, Aircraft*

of Tarnak Farms, the findings did not agree that the flight wingman properly exercised the right to self-defense.[17] The crux of these findings was the failure of the pilot to exercise appropriate flight discipline. A key factor in reaching this conclusion was analyzing the pilot's actions in relations to the special instructions (SPINS).[18] In contrast, to the pilots' claim that they took appropriate actions in self-defense in accordance with the standing rules of engagement (SROE), the CIB concluded noncompliance with OEF ROE by determining the pilots failed to leave the immediate threat area as mandated by the OEF SPINS.[19] If the arguments for compliance or noncompliance are both true, then was the accident the result of a "ROE-SPINS disconnect?"[20]

In actuality, there is no ROE-SPINS disconnect. During military operations involving air assets the JFACC has the authority through SPINS to further restrict ROE as promulgated by the JFC. SPINS are a primary measure by which the JFACC controls air operations through campaign strategy, operational constraints and tactical procedures. SPINS have several sections which provide in detail how ROE will be applied in mission execution. Therefore, they are just as binding on the pilots as ROE issued by operations orders (OPORD) from the combatant commander; and for a pilot to use force appropriately, he must comply with the SPINS and ROE.

Accident Investigation (replaced by *Air Force Instruction* 51-503, *Aircraft, Missile, Nuclear and Space Accident Investigations* (1 July 1995)). This means that testimony was taken under oath and was available for use against service personnel. No safety investigation was done. *See* David A. Fulghum & Jeffrey M. Lenorovitz, *Iraq Shootdown May Trigger Legal Action*, AVIATION WEEK & SPACE TECH., May 2, 1994, at 18. The Secretary of Defense also ordered an investigation into the ROE; *See* Richard Lacayo, *Deadly Mistaken Identity*, TIME, Apr. 25, 1994, at 50, 51 ("[Secretary of Defense] Perry ordered one investigation into the event and another into the rules of engagement that govern the two no-fly zones in Iraq, as well as the one over Bosnia.").

[17] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 45-46.

[18] JOINT PUB. 1-02, *supra* note 15, at 327; *see also* "Special Instructions sets forth operational constraints or procedures" [hereinafter SPINS]. Lieutenant Colonel (Lt Col) Robert A. Coe & Lt Col Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 A.F.L. REV. 49, 75 (1997) [hereinafter Coe & Schmitt]; *see also* "SPINS, are periodically issued by the [Joint Air Operations Center] JAOC . . . and usually have several sections that contain ROE." U.S. DEP'T OF AIR FORCE, INTERNATIONAL & OPERATIONAL LAW DIVISION, THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, AIR FORCE OPERATIONS AND THE LAW 273 (2002) [HEREINAFTER AF OPS LAW HANDBOOK].

[19] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter US STANDING RULES OF ENGAGEMENT OR SROE]; FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 36.

[20] ROE-SPINS disconnect refers to circumstances in which the Rules of Engagement and Special Instructions, either as promulgated or executed, fail to adequately deconflict ROE principles with operational constraints.

I. INTRODUCTION

Since the "War on Terrorism" has been advocated by President George W. Bush, United States armed forces have been engaged in coalition operations amounting to war. The effectiveness of these military operations will be driven by integrated joint operations, communications and interoperability.[21] Additionally, new challenges will have to be identified and need to be addressed as we fight.

This article will focus on ROE and SPINS in joint/combined/coalition air operations, using the Tarnak Farms incident of Operation ENDURING FREEDOM as a case study.[22] Specifically, it will focus on whether an unfortunate result was generated by directives and guidance promulgated in the ROE and SPINS. Additionally, it will explore and examine if there existed a conflict between the ROE and SPINS impacting self-defense. It will identify and examine the process of the creation of these documents. Since air operation ROE and SPINS are drafted and coordinated at a Joint Air Operations Center (JAOC) this article will also examine the JAOC's impact on these documents as well as the joint air operations process. With the CIB findings and the referral of charges, the Air Force's course of actions asserted and signaled that the pilots violated the OEF ROE. However, the pilots contend that they acted in self-defense in accordance with SROE. If plausible, then the ROE and SPINS may have been in conflict.

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[21] JOINT PUB. 1-02, *supra* note 15, at 412; JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS II-4 [hereinafter JOINT PUB. 3-0].

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> To discuss in more detail, Joint operations" are military actions conducted by joint forces or Service forces in relationships (e.g., support, coordinating authority), which, of themselves, do not create joint forces. The requirement to plan and conduct joint operations demands expanded intellectual horizons and broadened professional knowledge. Leaders who aspire to joint command must not only have mastered the essentials of their own Service capabilities, but also must understand the fundamentals of combat power represented by the other Services. Beyond that, they must have a clear sense of how these capabilities are integrated for the conduct of joint and multinational operations. This individual professional growth, reinforced by military education and varied Service and joint assignments, leads to a refined capability to command joint forces in peace and war.

JOINT CHIEFS OF STAFF, JOINT DOCTRINE ENCYCLOPEDIA 412 (16 Jul. 1997) [hereinafter JOINT PUB. ENCYCLOPEDIA], *available at* https://www.dtic.mil/doctrine/joint_doctrine_encyclopedia.htm. (However, in combined operations (with coalition partners) the terms and concepts transform to reflect the operation. For example Joint Air Operations Center (JAOC) it is usually referred to as a Combined Air Operations Center (CAOC) and the JFACC designated as the CFACC (combined vice joint)). *Id*. at 100, 277.

To set the background for the analysis, this article will first address ROE for armed conflicts, identify two types of ROE and their interaction. Secondly, it will describe the JAOC and how ROE from the strategic level is transformed into strategy, constraints and procedures for application at the tactical level. Thirdly, it will explain the existence of SPINS in an air operation. Within this framework, it will analyze how ROE and SPINS interconnect to be viewed as important documents for mission planning and execution. Finally, it will explore whether there exists a conflict between ROE and SPINS.

II. RULES OF ENGAGEMENT

In order to identify whether some hostile action allows an affirmative response one has to know the triggering mechanism. ROE provides that guidance. In a situation where the elements for potential armed conflict exist, ROE is a tool to regulate the use of force. U.S. forces receive their directions from the President through their chain of command in the form of ROE. The legal factors which serve as a foundation for ROE, that is, customary and conventional law principles regarding the right of self-defense and the laws of war, are varied and complex.[23]

Although ROE can be complex, a workable framework for understanding it can be attained by dissecting it by purposes. ROE represents the intersection of political, military, and legal purposes.[24] The purposes all

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[23] For discussion on ROE *see also* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES (2003) [hereinafter ROE HANDBOOK].

[24] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 68 (2003) [hereinafter OPS LAW HANDBOOK].

> Purposes of ROE: As a practical matter, ROE perform three functions: (1) Provide guidance from the President and Secretary of Defense to deployed units on the use of force; (2) Act as a control mechanism for the transition from peacetime to combat operations (war); and (3) Provide a mechanism to facilitate planning. ROE provide a framework that encompasses national policy goals, mission requirements, and the rule of law.
>
> Political Purposes: ROE ensure that national policy and objectives are reflected in the action of commanders in the field, particularly under circumstances in which communication with higher authority is not possible. For example, in reflecting national political and diplomatic purposes, the ROE may restrict the engagement of certain targets, or the use of particular weapons systems, out of a desire not to antagonize the enemy, tilt world opinion in a particular direction, or as a positive limit on the escalation of hostilities. Falling within the array of political concerns are such issues as the influence of international public opinion, particularly how it is affected by media coverage of a specific operation, the effect of host country law, and the status of forces agreements with the United States (i.e., SOFAs).
>
> Military Purposes: ROE provide parameters within which the commander must operate in order to accomplish his assigned mission: (1) ROE provide

work together to influence the drafting of ROE in every military operation. "Thus, many factors influence an operation's [ROE], including national command policy, mission, operational environment, commander's intent, and international law."[25] Practically, ROE are the commander's rules for the use of force, specifying the circumstances and limitations in which forces may engage the enemy.[26] The rules may reflect the will of the government and commanders, but military members must adhere to the rules in order to carry out the mission.

Forces operating in accordance with applicable ROE, conduct warfare in compliance with international laws and fight within restraints and constraints specified by superior commanders. Objectives are justified by military necessity and attained through appropriate and disciplined use of force. ROE always recognizes the inherent right of self-defense. Properly developed ROE are clear and tailored to the situation. In a nutshell, ROE delineate what can be attacked, how it can be attacked, and whose permission you need to attack it.[27]

III. TYPES OF RULES OF ENGAGEMENT

Since armed conflicts vary and are driven by particular circumstances so will ROE. One way to categorize ROE is by the scale of the conflict. Thus, when a conflict is initiated then the SROE is in place for U.S. forces to look to as a source of guidance. If a conflict intensifies the ROE adapts to the crisis. This flexible ROE can be labeled Peacetime to Combat Operation ROE. The

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> a ceiling on operations and ensure that U.S. actions do not trigger undesired escalation, i.e., forcing a potential opponent into a "self-defense" response. (2) ROE may regulate a commander's capability to influence a military action by granting or withholding the authority to use particular weapons systems by vesting or restricting authority to use certain types of weapons or tactics. (3) ROE may also reemphasize the scope of a mission. Units deployed overseas for training exercises may be limited to use of force only in self-defense, reinforcing the training rather than combat nature of the mission.
>
> Legal Purposes: ROE provide restraints on a commander's action consistent with both domestic and international law and may, under certain circumstances, impose greater restrictions on action than those required by the law. ... Commanders must therefore be intimately familiar with the legal bases for their mission. The commander may issue ROE to reinforce principles of the law of war, such as prohibitions on the destruction of religious or cultural property, and minimization of injury to civilians and civilian property.

Id.

[25] U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS VI (June 1993)

[26] SROE *supra* note 19, at GL-26; *see also* JOINT PUB. 1-02, *supra* note 15, at 459.

[27] U.S. DEP'T OF AIR FORCE, C2 WARRIOR SCHOOL, RULES OF ENGAGEMENT 5 (n.d.) (lecture advance sheet) [hereinafter ROE ADV SHT], *available at* https://afc2tig.hurlburt.af.mil/c2ws/courses.htm.(last updated Jan. 9, 2003).

development of ROE in the previous categories would be applicable to all military services in the overall planning stage of a conflict. However, when the focus shifts to operational capabilities each military service normally has developed campaign ROE to fit their mission. Consequently, each type of ROE distinctively has an impact on the military actions of U.S. forces.

A. The Joint Chiefs of Staff Standing Rules of Engagement

"The Joint Chiefs of Staff Standing Rules of Engagement (SROE) have been termed 'the tether between the NCA and the soldier.'"[28] This statement has merit because the SROE are meant to be real-time guidance from our national leaders to the military member. The U.S. SROE are the basic ROE documents for all U.S. forces during military attacks on the U.S. and during all military operations, contingencies, and terrorist attacks outside the territory of the U.S.[29] On 15 January 2000, the Chairman of the Joint Chiefs of Staff

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[28] U.S. DEP'T OF AIR FORCE, 12TH AIR FORCE, JUDGE ADVOCATE OFFICE, *Supplement to 612 COS/DOOCOS Operations Duty Officer Guide for an Air Operations Center* S1-30 [hereinafter 12 AF/JAO SUPPLEMENT]; NCA was the term of art to refer to the President of the United States and the Secretary of Defense. A change was instituted to discontinue the use of that term and to refer to the parties in their full title.

[29] SROE, *supra* note 19, at 1.

> [SROE is divided into fourteen enclosures. Each enclosure gives guidance on when and how force may be used]
>
> Enclosure A (Standing Rules of Engagement): An unclassified [version] details the general purpose, intent, and scope of the SROE, emphasizing a commander's right and obligation to use force in self-defense. Critical principles, such as unit, individual, national, and collective self-defense; hostile act and intent; and the determination to declare forces hostile are addressed as foundational elements of all ROE;
>
> Enclosures B-I: These classified enclosures provide general guidance on specific types of operations: Maritime, Air, Land, and Space Operations; Information Operations; Noncombatant Evacuation Operations, Counterdrug Support Operations; and Domestic Support Operations; .
>
> Enclosure J (Supplemental Measures): Supplemental measures found in this enclosure enable a commander to obtain or grant those additional authorities necessary to accomplish an assigned mission. Tables of supplemental measures are divided into those actions requiring President of Secretary of Defense approval, those that require either President or Secretary of Defense approval or Combatant Commander approval, and those that are delegated to subordinate commanders (though the delegation may be withheld by higher authority). The new SROE now recognizes a fundamental difference between the supplemental measures. Those measures that are reserved to the President or Secretary of Defense or CINC are generally restrictive, that is, either the President or Secretary of Defense or CINC must specifically permit the particular operation, tactic, or weapon before a field commander may utilize them. Contrast this with the remainder of the supplemental measures, those delegated to subordinate commanders. These measures are all permissive in nature, allowing a commander to use any weapon or tactic

(CJCS) issued an updated version of the SROE.[30] The instructions cover the continuum of conflict from peacetime to military operations other than war (MOOTW) to armed conflicts. Based on these established instructions, every military member is trained to adhere to these rules unless new ROE are promulgated from competent military authority. If the mission changes the SROE "can be easily and quickly amended or clarified to meet mission-specific requirements."[31] However, some SROE fundamental principles remain constant such as the inherent right to self-defense.[32] Therefore, SROE are the foundation for the use of force by a soldier, sailor, marine, or airman.

> available and to employ reasonable force to accomplish his mission, without having to get permission first. Inclusion within the subordinate commanders supplemental list does not suggest that a commander needs to seek authority to use any of the listed items. SUPPLEMENTAL ROE RELATE TO MISSION ACCOMPLISHMENT, NOT TO SELF-DEFENSE, AND NEVER LIMIT A COMMANDER'S INHERENT RIGHT AND OBLIGATION OF SELF-DEFENSE; .
>
> Supplemental measure request and authorization formats are contained in Appendix F to Enclosure J. Consult the formats before requesting or authorizing supplemental measures; .
>
> Enclosure K (Combatant Commanders' Theater-Specific ROE): Enclosure K contains specific rules of engagement submitted by Combatant Commanders for use within their Area of Responsibility (AOR). Those special ROE address specific strategic and political sensitivities of the Combatant Commander's AOR and must be approved by CJCS. They are included in the SROE as a means to assist commanders and units participating in operations outside their assigned AORs. To date, two CINCs have received approval of and promulgated theater-specific ROE, CENTCOM and PACOM. Their theater-specific ROE can be found at: CENTCOM – http://www.centcom.smil.mil/ccj3/ops2.htm; PACOM – http://www.hq.pacom.smil.mil/j06/j06/jo6.htm. If you anticipate an exercise or deployment into any geographic CINCs AOR, check with the CINC SJA for ROE guidance;
>
> Enclosure L (Rules of Engagement Process): This new, unclassified enclosure (reprinted in Appendix A to this chapter) provides guidelines for incorporating ROE development into military planning processes. It introduces the ROE Planning Cell, which may be utilized during the development process. It also names the JA as the "principal assistant" to the J-3 or J-5 in developing and integrating ROE into operational planning.[Enclosure GL is the Glossary]

OPS LAW HANDBOOK, *supra* note 24, at 69-70; SROE, *supra* note 19, at 3-4, enclo. A - GL.

[30] A new SROE is currently under revision with an expected published date of 15 April 2003, Major Eric Jensen, Professor, INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY .

[31] JOINT CHIEFS OF STAFF, JOINT PUB. 5-00.2, JOINT TASK FORCE PLANNING GUIDANCE AND PROCEDURES, IV-7 [hereinafter JOINT PUB. 5-00.2]; *see also* "The SROE should be considered a template for developing ROE in all operations involving U.S. forces." AF OPS LAW HANDBOOK, *supra* note 18, at 275.

[32] SROE, *supra* note 19, at 2. The definitions for self-defense are found in Enclosure A-3 - A-4 and GL-17.

B. Campaign Rules of Engagement

The starting point for all ROE should be the SROE. As a crisis forms which may require military action, staffs at the strategic level evaluate and coordinate how the ROE fits into the mission. Focusing on aerospace operations,"[t]he development of air campaign ROE is a process that must begin early in the Crisis Action Phase of any potential contingency."[33] "During the Crisis Action Phase, the ROE Cell at the strategic level will coordinate and develop ROE for the mobilization phase and force-on-force phase of the air campaign."[34] Additionally, in this phase the appropriate authorities will review allies' and other components' objectives and strategies to develop applicable ROE.[35] Eventually, this upper echelon of guidance will flow down to the next level of planning. However, with all service military planners,

> [t]he challenge is to balance competing interests in the formation of ROE. ROE that are too constrained will prevent the warfighter from getting the job done. ROE that are too broad could allow military operations which may be inconsistent with national objectives or may allow room for fratricide.[36]

Once the objectives of the mission are defined the next step is to transform the guidance into a plan of execution. This is done at the operational level of planning by functional experts. In aerospace operations, the purpose of developing a plan is to identify in detail how air power will support a commander's overall campaign plan.[37] ROE will be evaluated and developed to match the overall strategic objectives with the challenges, restrictions and capabilities associated with the campaign. ROE and plans developed at the operational level will be transmitted to operators at the tactical level who execute the campaign. In order to understand the ROE under which the pilots fight, comprehending who, where and how they are developed is essential. The Joint Air Operation Center for aerospace operations is the focal point at this next stage of mission planning and execution.

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[33] 12 AF/JAO SUPPLEMENT *supra* note 28, at S1-11.
[34] 12 AF/JAO SUPPLEMENT *supra* note 28, at S1-30.
[35] JOINT PUB. ENCYCLOPEDIA *supra* note 22, at 626
[36] 12 AF/JAO Supplement , *supra* note 28, at S1-11.
[37] JOINT CHIEFS OF STAFF, JOINT PUB. 3-56.1, COMMAND AND CONTROL FOR JOINT AIR OPERATIONS III-2 [hereinafter JOINT PUB. 3-56.1].

IV. JOINT AIR OPERATION CENTER

Planning for joint operations begin with comprehending the joint force mission. The command and control center in joint air operations which transforms strategic guidance to an operational and executable plan is the Joint Air Operations Center (JAOC).[38] The JAOC is the aerospace operations planning and execution focal point for the joint task force (JTF) under the JFC and is where centralized planning, direction, control, and coordination of aerospace operations occur.[39] JAOC divisions and branches are responsible for planning, executing, and assessing aerospace operations and directing changes as the situation dictates in support of the JFC's operation or campaign plan.[40] The JAOC is an integral part of the big picture when planning and executing any air campaign involving joint or combined forces. Therefore, understanding how it fits into the joint air operations plan and functions is important.

A. Joint Air Operation Center Functions

The JAOC functions as the hub between strategic and tactical aerospace forces. "Although the Air Force provides the core manpower capability for the JAOC, other Service component commands contributing aerospace forces provide personnel in accordance with the magnitude of their force contribution."[41] To coordinate aerospace operations, the JFC will

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[38] U.S. DEP'T OF AIR FORCE INSTRUCTION 13-1AOC, 3 OPERATIONAL PROCEDURES-AEROSPACE OPERATIONS CENTER (1 July 2002) [hereinafter AFI 13-1AOCV3]

[39] JOINT PUB. 3-56.1 *supra* note 39, at C-1; *see also* AIR FORCE DOCTRINE DOCUMENT 2, ORGANIZATION AND EMPLOYMENT OF AEROSPACE POWER, (17 Feb, 2000) [hereinafter AFDD 2].

[40] *Id.* at app. C; AFI 13-1AOCV3, *supra* note 38, para. 2.2.

[41] AFI 13-1AOCV3, *supra* note 38, para. 2.2; *see also* AFDD 2, *supra* note 39, at 75 which states the primary functions of the JAOC are to:

> 1. Develop aerospace operations strategy and planning documents that integrate air, space, and information operations to meet JFACC objectives and guidance.
> 2. Task and execute day-to-day aerospace operations; provide rapid reaction, positive control, and coordinate and deconflict weapons employment as well as integrate the total aerospace effort.
> 3. Receive, assemble, analyze, filter, and disseminate all source intelligence and weather information to support aerospace operations planning, execution, and assessment.
> 4. Issue airspace control procedures and coordinate airspace control activities for the air space control authority (ACA) when the JFACC is designated the ACA.
> 5. Provide overall direction of air defense, including theater missile defense (TMD), for the area air defense commander (AADC) when the JFACC is designated the AADC.

appoint a JFACC.[42] The JFACC's authority is derived from and delegated by the JFC who in turn was appointed by the appropriate geographic combatant

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6. Plan, task, and execute the theater intelligence, surveillance, and reconnaissance (ISR) mission.
7. Conduct operational level assessment to determine mission and overall aerospace operations effectiveness as required by the JFC to support the theater combat assessment effort.
8. Produce and disseminate an air tasking order (ATO) and changes.
9. Provide for the integration and support of all air mobility missions.

Id.

[42] JOINT PUB 3-56.1, *supra* note 39, at vi;

Joint Force Commander-a general term applied to a combatant commander, subunified commander, or joint task force commander authorized to exercise combatant command (command authority) or operational control over a joint force. Also called JFC. [hereinafter JFC];

Joint Force Air Component Commander- The commander within a unified command, subordinate unified command, or joint task force responsible to the establishing commander for making recommendations on the proper employment of assigned, attached, and/or made available for tasking air forces; planning and coordinating air operation; or accomplishing such operational missions as may be assigned. The joint force air component commander is given the authority necessary to accomplish missions and tasks assigned by the establishing commander. Also called JFACC. [hereinafter JFACC];

Joint force land component commander- The commander within a unified command, subordinate unified command, or joint task force responsible to the establishing commander for making recommendations on the proper employment of assigned, attached, and/or made available for tasking land forces; planning and coordinating land operations; or accomplishing such operational missions as may be assigned. The joint force land component commander is given the authority necessary to accomplish missions and tasks assigned by the establishing commander. Also called JFLCC.

Joint force maritime component commander - The commander within a unified command, subordinate unified command, or joint task force responsible to the establishing commander for making recommendations on the proper employment of assigned, attached, and/or made available for tasking maritime forces and assets; planning and coordinating maritime operations; or accomplishing such operational missions as may be assigned. The joint force maritime component commander is given the authority necessary to accomplish missions and tasks assigned by the establishing commander. Also called JFMCC.

Joint force special operations component commander - The commander within a unified command, subordinate unified command, or joint task force responsible to the establishing commander for making recommendations on the proper employment of assigned, attached, and/or made available for tasking special operations forces and assets; planning and coordinating special operations; or accomplishing such operational missions as may be assigned. The joint force special operations component commander is given the authority necessary to accomplish missions and tasks assigned by the establishing commander. Also called JFSOCC.

JOINT PUB. 1-02, *supra* note 15, at 277 - 278.

commander.[43] The JFACC exercises his operational and tactical command and control through a JAOC which transmits his strategy, operational constraints and tactical procedures by the Air Tasking Order (ATO), Airspace Control Order (ACO) and SPINS.[44] Therefore, the JAOC functions as a fully integrated facility and staff to fulfill all of the JFACC's responsibilities by acting as a receiver, planner, assessor and director of aerospace operations.[45]

B. Joint Air Operation Center Process

The JAOC provides the means and methods for the JFACC to orchestrate the air campaign in a joint environment. The JAOC has the task of command and control of the air assets and components assigned to the theater from a central location. The JFC and JFACC's strategy and guidance are transmitted to the JAOC director. "The JAOC director is charged with effectively conducting joint aerospace operations."[46] This means he transmits JFC and JFACC guidance to the five JAOC divisions and multiple support and specialty teams.[47] Each of these JAOC divisions has different responsibilities that support the formulation of SPINS and the integration of ROE.[48] Additionally, they gain valuable input from the multiple support and specialty

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[43] JOINT PUB. 3-56.1, *supra* note 39, at II-2. "The authority and command relationships of the JFACC are established by the JFC. These typically include exercising operational control (OPCON) over assigned and attached forces and tactical control (TACON) over other military capabilities/forces made available for tasking"; *Id. see also* JOINT PUB. ENCYCLOPEDIA, *supra* note 37, at 383; JOINT PUB. 5-00.2, *supra* note 31, at III-5; JOINT PUB. 1-02, *supra* note 15, at 277.

[44] AFI 13-1AOCV3, *supra* note 38, para. 1.2.6; JOINT PUB. 5-00.2, *supra* note 31, at III-5; JOINT PUB. 3-56.1, *supra* note 39, at II-6.

[45] JOINT PUB. 3-56.1, *supra* note 39, at C-1; JOINT PUB. 1-02, *supra* note 15, at 275.

[46] AFI 13-1AOCV3, *supra* note 38, para. 3.5.1.

[47] AFI 13-1AOCV3, *supra* note 38, para. 3.5.1.2.

[48] AFI 13-1AOCV3, *supra* note 38, para. 3.5 (The baseline [J]AOC organization includes an [J]AOC director, five divisions (Strategy; Combat Plans; Combat Operations; Intelligence, Surveillance, and Reconnaissance; and Air Mobility));
"The Strategy Divisions concentrates on the long-range planning of aerospace operations to achieve theater objectives by developing, refining, disseminating, and assessing the programs of the JFACC's aerospace strategy and Joint Air Operations Plan (JAOP)." AFI 13-1AOCV3, *supra* note 38, para. 4.1;
"The Combat Plans Division (CPD) applies operational art to develop detailed execution plans for aerospace operations." AFI 13-1AOCV3, *supra* note 38, at 5.1;
"The Combat Operations Division (COD) is responsible for monitoring and executing the current ATO (i.e., "today's war")." AFI 13-1AOCV3, *supra* note 38, para. 6.1;
"The Intelligence, Surveillance and Reconnaissance Division (ISR) will plan, coordinate, task and execute the intelligence, surveillance and reconnaissance mission (operation and support) in conjunction with the CPD and COD." AFI 13-1AOCV3, *supra* note 38, at 7.1;
"The Air Mobility Division (AMD) will plan, coordinate, task, and executed the air mobility mission. AFI 13-1AOCV3, *supra* note 38, at 8.1.

team as they go through the process of generating the SPINS and ROE.[49] The divisions publish and disseminate a daily ATO, ACO and any updated SPINS after getting approval from the JFACC.[50] Although the JAOC sends out taskings, it is also planning ahead based on feedback from the tactical operators along with considering the objectives of the JFC and JFACC.[51] As long as the operation is going the JAOC is in action and manned 24 hours. With the updated input, the JAOC functional teams will review and revise the air campaign plans that will be transmitted to the forces through the daily ATO, ACO and SPINS.

V. SPECIAL INSTRUCTIONS

The JFACC expresses his air campaign objectives and strategy to subordinates through SPINS. SPINS are a primary document which provide in detailed ROE for the overall air campaign. They also provide instructions on other operational procedures and tactics. Once complete, SPINS are jointly transmitted with the ATO and ACO to assist operational aircrews in planning for execution of the mission.

A. Special Instructions within the Air Tasking Order

The purpose of SPINS is to provide clear instructions based on authoritative guidance. SPINS reflect the strategy and objectives that were issued from the President and Secretary of Defense and sent through the respective chain of command. For example, "the ROE will be published first in the Operation Orders then subsequently in the SPINS to the ATO."[52] Since SPINS are an integral part of the ATO and disseminated by the JAOC they gain their authority from the JFACC. SPINS provide details to the tactical operators on how to adhere to the current ROE as they plan for mission tasking, coordination and execution. Therefore, SPINS are a control mechanism which the JFACC uses to provide operational and tactical direction at appropriate levels of detail in order to execute the air campaign.[53] When SPINS are issued they have the power of a direct order based on the command

[49] AFI 13-1AOCV3, *supra* note 38, at 9.1; *see also* (chapter 9 lists the multiple support/specialty teams which consist of Component Liaison (e.g. BCD, SOLE, NARLE, MARLO, etc), Information Warfare, Judge Advocate Weather Support, Logistics, and System Management Function. The specialty/support functions provide the AOC with diverse capabilities to help orchestrate theater aerospace power.).
[50] AFI 13-1AOCV3, *supra* note 38, para. 5.3.7.2.
[51] JOINT PUB. 3-56.1, *supra* note 39, at III-1, IV-4.
[52] 12 AF/JAO SUPPLEMENT , *supra* note 28, at S1-11.
[53] JOINT DOCTRINE ENCYCLOPEDIA, *supra* note 22, at 643.

authority of the JFACC to accomplish the mission which is derived from the JFC.[54]

B. Special Instructions in connection to Rules of Engagement

In theory, the promulgation of the ROE in Operation Orders should be straight forward, all inclusive and simple guidance. In reality, ROE are additionally scrutinized and broken down in detail for clear and effective application. ROE goes through a process of creation, review and revision. One of the tools to simplify the complexity of ROE in air operations are SPINS. In order to tackle this task, functional experts constantly review and revise ROE to match the current conditions of the air campaign. The SPINS are an amplification of the changing and complex ROE provisions. Additionally, SPINS are not only guidance for ROE, but they provide detailed guidance on other operational aspects like communications and air refueling procedures.[55] Since SPINS are intended to provide clear and detailed guidance on how to comply with ROE, they are constantly reviewed by an ROE Cell to ensure they are properly amplifying the ROE. The ROE Cell ensures this through quality control measures.[56]

Another safeguard to prevent an ROE-SPINS disconnect is the functional teams within the JAOC and training of the tactical operators. In the JAOC, there are two particular focal points to highlight in the operational level which focus on ROE and SPINS, they are the Combat Plan Division (CPD) and the ROE Cell. The Combat Plans Division based on inputs from all JAOC functional teams creates current SPINS which provides specific expanded guidance on all ROE provisions applicable to the operation[57] Moreover, the ROE cell, a subgroup within the CPD, acts a part of a comprehensive system of ROE quality control to ensure ROE meets changing operational parameters.[58] In practicality, the comprehensive system for ROE and SPINS

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[54] JOINT PUB. 3-56.1, *supra* note 39, at II-2, IV-10.

[55] AFI 13-1AOCV3, *supra* note 38, at 8.6.1.1, 5.7.2.4; JOINT PUB. 3-56.1 *supra* note 39, at IV-9; JOINT PUB. 1-02, *supra* note 15, at 643.

[56] 12 AF/JAO Supplement , *supra* note 28, at S1-11, S1-16; AFI 13-1AOCV3, *supra* note 38, at 9.4.; SROE, supra note 19, at encl. L.

[57] AFI 13-1AOCV3, *supra* note 38, at 5.1.

[58] 12 AF/JAO Supplement , *supra* note 28,at S1-11, S1-16; AFI 13-1AOCV3, *supra* note 40, at 9.4. *see also*.

> At the Joint Air Operation Center JAOC) level, an ROE Planning Cell may be formed. The purpose of the Cell is to review the ROE and develop the necessary changes and additions for the air operation plan. The Cell includes representatives from Plans, Combat Operations, Judge Advocate, subject matter experts (i.e. air defense, information operations, space, intelligence, etc.), and coalition partners. ROE development should be integrated into mission planning, so that it is not merely an afterthought to the completed plan. While it is true that ROE should never drive the mission, it is equally true that there are certain identifiable political, military

quality control would be exercised at all levels in order to catch any deficiencies and conflicts between the documents. In fact, "validation of ROE and proposed revisions [are] the responsibility of all echelons-from flying units to JTF headquarters-but the JAOC bears the lion's share of responsibility."[59] Once the ROE Cell proposed recommendations are integrated into the CPD's product of the ATO it is forwarded for the JFACC approval.[60] Since the JFACC exercises operational command through the JAOC, the transmitted ATO, ROE, SPINS, and ACO have tactical control authority of a direct order from the commander.[61] Therefore, these groups within the JAOC are heavily involved in the development of applicable and relevant ROE which are amplified in the SPINS in order for air operation planning and execution.

In reference to training as a safeguard against ROE-SPINS disconnect, all military members receive training and are briefed on ROE before entering a conflict. However, aircrews receive additional training and briefings to compliment their participation in air operations. ROE are a part of units training and when they deploy to operational bases, they will participate in initial theater training. This task is handled by the command and control element at the tactical level which is the Wing Operations Center (WOC).[62] Additionally, for mission planning and execution purposes the WOC emphasizes the ROE and SPINS as frequently as possible so "at this tactical level (operators) should be educated in the law of armed conflict and trained in the rules of engagement, [so] it comes down to an aircrew commander's

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> and legal influences on any specific mission that may limit the probable use of force in mission accomplishment. This will vary depending on the assigned mission, higher headquarters' planning guidance, and what geopolitical region of the world is affected. ROE development is a continuous process that plays a critical role in every step of crisis action planning (CAP) and deliberate planning. Early identification of potential or existing limitations on the use of force and either working around them or building a justification for amending them can be critical to mission success and force protection.

ROE ADV SHT, *supra* note 27, at 5-6.

[59] AF OPS LAW HANDBOOK, *supra* note 18, at 274.

[60] AFI 13-1AOCV3, *supra* note 38, at 5.3.7.2; JOINT PUB. 3-56.1 0, *supra* note 37, at III-1; JOINT PUB. 1-02, *supra* note 15, at III-1.

[61] JOINT PUB. 3-56.1 0, *supra* note 37, at II-2.

[62] AFI 13-1AOCV3, *supra* note 38, at 2.10;

> The Wing Operation Center is a wing commander's C2 element. It can include a command post, command section, battle staff, and other planning and support personnel. The WOC functions as the operations center for units assigned or attached to the wing for operations. As required, the WOC is capable of connecting with the Aerospace Operation Center, Control and Reporting Center, and Air Support Operations Center through voice and data communications. The WOC is responsible for translating tasks and missions.

Id.

judgment in deciding when, where and how to employ military force."[63] Nevertheless, even with the ROE training the operators are not totally abandoned to put what they know into practice without assistance. Even during the execution of a mission the operators are connected with the JAOC which attempts to provide real time guidance to ensure compliance with the ATO, ROE and SPINS.[64] Therefore, the JFACC's authority and the JAOC's importance are constantly emphasized to the aircrews so they know to whom and where to look for as a source of ROE guidance and authority.

Eventually, the ROE, which are provided in detail through the SPINS, are approved by the JFACC and transmitted to the tactical level for execution in the operation. Therefore, when an aircrew is conducting the mission based on the ATO, they are required to comply with the SPINS, which amplify the current air operation ROE.

VI. TEMPLATE FOR ROE AND SPINS INTERACTION

As mentioned above, SPINS restate the ROE and provide the JFACC's amplification on specific ROE measures. As such, SPINS elaborate in detail on how to comply with the current air operation ROE measures. A perceived conflict can occur when detailed SPINS are more restrictive than ROE. However, the JFACC has the authority as a commander to make SPINS more restrictive for those in his airspace. Therefore, the SPINS are binding and take precedence over SROE. This is especially significant when the perceived conflict involves the right of self-defense.

The SROE is the template for ROE modifications. National leadership has established through the SROE the principle of the inherent right to self-defense. Additionally, they have articulated that the SROE differentiate between the use of force for self-defense and for mission accomplishment.[65] One of the purposes of ROE is to lay out the parameters of self-defense and what triggers a right to use force in self-defense. The fundamental US policy on self-defense is repeatedly restated throughout the SROE: "These rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other US forces in the vicinity."[66] The commander has the authority to exercise this right of self-defense when faced with a hostile act or a demonstration of hostile intent.

To illustrate these concepts in an air operations scenario, assume the following situation. A conflict has occurred and military force was employed by U.S. national leadership. Air campaign ROE has been developed. The

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[63] Lt Col John Humphries, *Operational Law and Rules of Engagements in OPERATION DESERT SHIELD and DESERT STORM* (2000) (copy on file with author).
[64] AFI 13-1AOCV3, *supra* note 38, at 6.1.1.
[65] SROE, *supra* note 19, at 2.
[66] *Id.* at A-2.

Joint Chiefs of Staff (JCS) published Operation Orders which proscribed the SROE and ROE limitations. This authoritative document has been disseminated to the participating U.S. forces, reinforcing the inherent right to self-defense. As the military operation continued the JFACC, through the detailed SPINS, has promulgated further ROE restrictions, including restrictions on self-defense which maybe in the form of operational constraints or tactical procedures. Assume further that the JFACC has included a provision in the SPINS operation section which states "do not put yourself in harms way and if you get fired on do not go back to engage the enemy." Now, the situation arises that an Army aviator aware of SPINS promulgated from the JAOC is mission tasked on the daily ATO. In contrast to the SPINS on self-defense, his Army Aviation Brigade Commander, also promulgates ROE for his brigade which emphasize the fundamental US policy on self-defense.[67] This clearly appears to be a potential conflict between ROE and SPINS. What does the aviator do?

There is no ROE-SPINS disconnect in this case. First, the aviator is a commander in the sense of the SROE. Second, the JFACC of the airspace is also a commander in the sense of the SROE. Third, the JFACC has the authority which is derived from the JFC to further restrict ROE through the SPINS. Although the aviator is assigned to the Army Commander, when he operates within the airspace of the JFACC which is scheduled on the ATO he takes on the status of a soldier under a senior commander.[68] Based on the JFACC's command authority there is a superior-subordinate relationship between him and the aviator. Finally, in the unclassified portion of the glossary in the SROE the parameters to invoke use of force in individual self-defense are established.

> Individual self-defense. The individual's inherent right of self-defense is an element of unit self-defense. It is critical that individuals are aware of and train to the principle that they have

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[67] SROE, *supra* note 19, at A-2; The US fundamental policy on self-defense is "These rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other U.S. forces in the vicinity." *Id*

> Right of Self-Defense. A commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend that commander's unit and other US forces in the vicinity from a hostile act or demonstration of hostile intent. Neither these rules, nor the supplemental measures activated to augment these rules, limit this inherent right and obligation. At all times, the requirements of necessity and proportionality, as amplified in these SROE, will form the basis for the judgment of the on-scene commander (OSC) or individual as to what constitutes an appropriate response to a particular hostile act or demonstration of hostile intent.

Id. at A-3.

[68] JOINT PUB. 3-56.1, *supra* note 37, at vi,vii, II-2.

> the authority to use all available means and to take all appropriate actions to defend themselves and other U.S. personnel in their vicinity. In the implementation of these SROE and other ROE, commanders have the obligation to ensure that the individuals within that commander's unit understand when and how they may use force in self-defense. When individuals assigned to a unit respond to a hostile act or demonstrated hostile intent in the exercise of self-defense their use of force must remain consistent with lawful orders of their superiors, the rules contained in this document, and other applicable rules of engagement promulgated for the mission or AOR.[69]

Therefore, the JFACC's superior orders in the form of the SPINS provide details for the aviator on how ROE will be applied in self-defense as he executes his mission. This includes restrictions on the inherent right of self-defense based on campaign strategy, operational constraints or tactical procedures. In addition, the ROE sections of the SPINS are as binding on the aviator as ROE from an OPORD.[70] So what is the aviator to do if confronted with engaging the enemy outside of his ATO tasking? The aviator should defer to the SPINS which have limited his use of force in self-defense. In order for the aviator to use force appropriately in a given situation triggering self-defense, he must comply with the SPINS. Accordingly, when given the situation to use force in self-defense and the JFACC has further restricted the ROE through the SPINS, the tactical operator has to comply with the limitations. There is no room for broadening the restrictions without approval by the appropriate authority such as the JFACC .[71]

In summary, there is no conflict between ROE and more restrictive SPINS in this case. This is because of the JFACC's authority to further restrict ROE through the SPINS. During military operations involving air assets the JFACC has the authority through SPINS to further restrict ROE as promulgated by the JFC. The SPINS specify operational constraints which are binding on the pilots as ROE. Thus, for the pilot to use force appropriately in self-defense he must comply with the SPINS. This is illustrated by the recent incident at Tarnak Farms where two U.S. pilots killed four Canadians and wounded eight others.

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[69] SROE, *supra* note 19, at GL-17.
[70] *Id.* at L-3; JOINT PUB. 3-56.1, *supra* note 37, at vi, vii.
[71] JOINT PUB. 3-56.1 0, *supra* note, 37 at IV-10.

VII. APPLICATION OF TARNAK FARMS TO TEMPLATE FOR ROE AND SPINS

A. Beginning and History

On 6 October 2001, the United States and several coalition partners launched Operation ENDURING FREEDOM (OEF), a military campaign designed to destroy the al-Qaeda terrorist network's main base of support in Afghanistan and the Taliban regime that had provided both a safe haven and substantial material support to al-Qaeda.[72]

> Beginning with small numbers of Special Operations Forces, ground forces began widespread operations within Afghanistan. The numbers of ground troops greatly increased with the introduction of Marine ground forces and Army light infantry and airborne troops. Because they were effectively defeated and dispersed by coalition and Afghan opposition forces, remaining al-Qaeda and Taliban forces disbursed in small units throughout Afghanistan, particularly in the mountain and border regions. As a result, traditional battle lines have not formed, with hostile forces spread throughout the country, widely interspersed with coalition and friendly Afghan ground forces. With the exception of a brief period of intense air activity during OPERATION ANACONDA, the tempo of air operations has been substantially lower.[73]

The hostilities continued into the year 2002. Coalition air superiority was gained, by early March 2002, after Operation ANACONDA. The effect was the air campaign scaled back to mostly air support missions for military forces on the ground, when and if needed.

B. Command & Control Structure

After the President and Secretary of Defense authorized OEF the operational responsibilities fell on U.S. Central Command (USCENTCOM).[74]

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[72] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 3.
[73] *Id.*
[74] *Id.*

> U.S. Central Command (USCENTCOM, MacDill AFB, FL). Southwest Asia, some eastern African countries, and part of the Indian Ocean.U.S.
> • U.S. Northern Command (USNORCOM, TBD). Forces in the U.S. and portions of the Atlantic Ocean. Geographic responsibility for Canada and Mexico.

> The chain of command was the following, Commander-in-Chief, U.S. Central Command (CINCCENT), General Tommy R. Franks. He appointed his senior air commander, Lieutenant General T. Michael Moseley, as the Coalition Forces Air Component Commander, known as the CFACC, to plan and direct air operations within CENTCOM's geographic area of responsibility. "As the CFACC, Lieutenant General Moseley executes his responsibilities through the CAOC, which was relocated to a new and technically sophisticated facility in Southwest Asia in August 2001. [75]
>
> As part of OEF, fighter, bomber, and gunship aircraft and crews from the United States, the United Kingdom, and France have engaged in operations against al-Qaeda and Taliban forces and installations throughout Afghanistan. U.S. aircraft and crews from all services fly in OEF, operating from ships and bases in Southwest and Central Asia, the Arabian Gulf, and the Indian Ocean. Centrally controlled from the Coalition Air Operations Center (CAOC), these aircraft fly a variety of close air support (direct support for ground forces), interdiction (pre-planned bombing missions), reconnaissance, and support missions. [76]

This command structure meant that the CFACC, as the commander in the sense of the SROE, has tactical control over all OEF flying missions within the tactical area of responsibility. This included tactical control of the F-16 aircraft involved in the Tarnak Farms accident.[77]

C. 17 April 2002: The Bombing

> On 17 April 2002, Major [Harry Schmidt] and Major [William Umbach], both members of the 170 Expeditionary Force Squadron (EFS), were scheduled to fly a mission to provide two

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> • U.S. European Command (USEUCOM, Stuttgart, Germany). NATO, some Middle East, most African countries, and, effective 1 October 2000, the waters off the west and west coast of Africa and the waters off Europe.
> • U.S. Pacific Command (USPACOM, Camp Smith, Hawaii). Pacific Ocean, Pacific Rim countries and some along the Indian Ocean.
> • U.S. Southern Command (USSOUTHCOM, Miami, FL). Central and Latin America and the Caribbean.

AF OPS LAW HANDBOOK, *supra* note 18, at 177-178; U.S. DEP'T OF DEFENSE, UNIFIED COMMAND PLAN (n.d.), *available at* https://www.dod.mil/specials/unified command/ (last updated Mar. 26, 2003).

[75] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 3.

[76] *Id.*; (The CAOC is the same as a JAOC but in a coalition operation.)

[77] *Id.* at 6.

> F-16 aircraft over Afghanistan, readily available for on-call taskings to support coalition ground forces. COFFEE flight was tasked on the daily Air Tasking Order (ATO), to be armed with precision-guided bombs. COFFEE 51, [Major Umbach], was the flight leader for the mission and COFFEE 52, [Major Schmidt], was his wingman.[78]
>
> On 17 April 2002, both COFFEE pilots were commanders for ROE purposes. COFFEE 51 was the commander of the two-ship flight and COFFEE 52 was the commander of his individual aircraft…Therefore, the right to invoke self-defense was an inherent right of each of the pilots.[79]

This is important because as a commander for ROE purposes, each pilot had the right to use force in self-defense.[80]

In analyzing whether self-defense was appropriate, taking into account what relevant information they were exposed to before and during the flight are important in determining the decision process of the pilots. One key question during the mission planning is whether they were rebriefed on the current SPINS and ROE.

> At 1500L, [they] both attended a pilot meeting that included a discussion of an unsuccessful bombing mission flown by the squadron on a previous day…At 1620L, they attended the mass brief for their mission that night…Major Umbach presented the briefing that was prepared by the 170 EFS Mission Planning Cell…The mass brief lasted approximately 20 minutes.[81]
>
> COFFEE flight took off from [base] tasked to conduct an on-call interdiction mission in the northeastern section of Afghanistan. In this role, COFFEE flight was to transit to the assigned area, loiter for [ ] hours, and then return to its home base. A KC-135 tanker aircraft…was assigned to support this mission with pre- and post-strike [air-to-air refueling] AAR. The refueling was to take place in an area located

[78] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 8; David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003 *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html.
[79] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 18.
[80] SROE, *supra* note 19, at 2, A-2, GL-23, GL-26.
[81] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 8.

> approximately [ ]nm southwest of the Tarnak Farm/[Kandahar Air Field] KAF area.[82]
>
> No significant events occurred during the scheduled period of flight, and COFFEE flight was not tasked to employ any weapons…At approximately 2115Z, COFFEE flight departed heading for the refueling site…The weather was clear and it was a dark night as the moon had already set…To prepare for the rendezvous with an air refueling tanker, the COFFEE flight pilots had made their weapons systems safe…COFFEE flight planned to return to their base after refueling…COFFEE flight was preparing to rendezvous with the assigned air refueling tanker near Tarnak Farms Range.[83]

The on call interdiction stage of the mission may have come to a close, however, as long as they were under the control of the CAOC, the SROE and OEF ROE still applied. "At the same time, approximately 100 soldiers from Alpha Company, 3 PPCLI (Princess Patricia's Canadian Light Infantry), were training on the Tarnak Farms Range."[84] "Tarnak Farms was a former base for al Qaeda once owned by Osama bin Laden that had been converted early last year [2002] into a firing range for coalition troops…The squad of Canadian light infantrymen were conducting routine exercises." [85] "They had arrived at the range in the late afternoon for night live-fire training"[86] The firing range

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[82] MAURICE BARIL ET AL., BOARD OF INQUIRY - TARNAK FARMS 2002 FINAL REPORT pt. III (2002) (AIR EVENTS) [hereinafter BOI FINAL REPORT], *available at* http://www.vcds.forces.gc.ca/boi/intro_e.asp (last updated Sept. 16, 2002). Coe & Schmitt, *supra*, note 18, at 54.

> Interdiction missions are those whose purpose is to disrupt and destroy enemy ground forces, and/or their support, before they can be brought to bear against friendly forces. This allows friendly forces to halt an enemy offensive and seize the initiative, thereby rendering the enemy reactive, rather than proactive. Interdiction sorties usually target second and third echelon forces. In many cases, however, they take the form of attacking enemy lines of communication (LOCs) in order to separate its tooth (fighting power) from its tail (logistic support). 8 Interdiction targets may also include personnel and supplies that have not reached the front and assets used to transport them (trains, trucks, etc.). Likewise, attacks against command and control facilities (except those with national responsibilities) are interdiction missions because they disrupt the enemy's ability to maneuver and direct forces to, from, and around the theater of operations. Interdiction missions are performed by the F-16, F-15E, A-10, and (occasionally) F-117.

Id.

[83] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 8.

[84] *Id*. at 9.

[85] David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003 *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html.

[86] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 9.

and the training should have been available information to the pilots before their mission and if not the CAOC should have had access to that information. The pilots' claim there was a breakdown in communications that prevented them from knowing the Canadian infantry was in the area or training.[87]

> COFFEE flight reported that they were witnessing surface-to-air-fire (SAFIRE) off to the right side of their formation…COFFEE 51 [Maj Umbach] requested permission to take a mark, which was approved…At this point, COFFEE 52 [Maj Schmidt] put his night vision goggles back on and then made a right hand turn away from his flight lead and began a descent…COFFEE 51 remained above and started to fly a wide right turn around the location of the reported SAFIRE… COFFEE 52 made a descending left turn, putting the SAFIRE site in the center of his [sights] in an attempt to mark the coordinates…While doing do COFFEE 52 descended and slowed his air speed…and reported that he could see the source of the reported SAFIRE.[88].

At this point the pilot's were still in communication with the Airborne Warning and Control System (AWACS) personnel and the CAOC. This is a crucial point because command authority and control authority are critical in taking a course of action and determining who would be the decision maker.

> Although only authorized to exercise limited *command authority* when the CAOC is not available, AWACS crews do have *control authority* when on station. In accordance with the OEF ROE, the authority to engage targets rests with CAOC. Only in the case of a loss of communication do AWACS personnel have authority to actively approve engagement of a target. However, AWACS personnel are empowered to deny engagement, except in the case of self-defense. In the case of an invocation of self-defense, the involved aircraft commander accepts authority. [89]

Additionally, this procedure would be explained in detail in the SPINS under the communication section.[90]

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[87] Doug Simpson, *Commander: Pilots Warned of Allied Troops*, TOP STORIES -AP, Jan. 17, 2003 (copy on file with author).
[88] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 9.
[89] *Id.* at 21.
[90] AFI 13-1AOCV3, *supra* note 40, at 5.7, 5.7.2.4.

> [After some exchange between COFFEE 52 and AWACS's controllers]… COFFEE 52 [stated] 'Okay I've got a, uh I've got some men on a road and it looks like a piece of artillery firing at us. I am rolling in in self-defense…COFFEE 52 then called 'bombs away'…releas[ing] one 500 pound GBU-12 laser-guided bomb…After the bomb detonated, COFFEE 52 called 'shack' over the radio frequency, indicating a direct hit on the target…Upon arrival at their deployed location, the pilots were met planeside.[91]

The two pilots of the friendly fire incident were informed that four Canadian soldiers were killed and eight were injured.[92] In response to his actions, the pilot claimed he used force appropriately because of the inherent right to self-defense as a commander in the OEF ROE.

D. ROE

The SROE was the source of OEF ROE.[93] The OEF ROE reflected the type of conflict which U.S. forces were confronting in Afghanistan. This military campaign was an international armed conflict which invoked the principles of the law of armed conflict (LOAC). Since the operation was designed to destroy the al-Qaeda terrorist network and the Taliban regime the U.S. forces on 6 October 2001 were in an offensive posture.[94] Additionally, U.S. forces were already conducting operations in CENTCOM with missions Operation NORTHERN and SOUTHERN WATCH (ONW and OSW). Therefore, models for ROE in this theater were accessible, but these missions were no-fly zone missions.[95] In contrast, OEF would be force on force with the added factors of U.S. ground forces. This meant once air superiority was achieved and ground troops' activities increased, hostile acts and intent became a higher priority for determining use of force in air operations ROE. To

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[91] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 10.

[92] *Id.*; BOI FINAL REPORT, *supra* note 82, pt.II (CHRONOLOGY OF EVENTS); Brad Knickerbocker, *"Friendly Fire" Deaths Vex the U.S. Military*, CHRISTIAN SCI. MONITOR, Jan. 7, 2003, at 2; Lisa Kernek, *Criminal Trial Considered Against Two Illinois Air National Guard Pilots*, SPRINGFIELD STATE JOURNAL-REGISTER, Sept. 13, 2002, *reprinted in* COPLEY NEWS SERVICE, Sept. 14, 2002, LEXIS, News Group File; David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003 *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html; Vernon Loeb, *2 U.S. Pilots Charged in Bombing of Canadians*, WASH. POST, Sept. 14, 2002 at A01; David Pugliese & Glen McGregor, *Fighter Pilots Likely to Face Court Martial: Friendly-Fire Incident could Bring 10 Years in Prison*, CALGARY HERALD, Sept. 14, 2002, at A5.

[93] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 17.

[94] *Id.* at 3.

[95] Timothy P. McIlmail, *No-Fly Zones: The Imposition of Enforcement of Air Exclusion Regimes over Bosnia and Iraq*, 17 LOY. L.A. INT'L & COMP. L.J. 35, 48 (1994).

establish air operation ROE, initially USCENTCOM utilized an operations order to formulate a plan of attack for OEF, which influenced the air campaign strategy of the CFACC. The appointed senior air commander, Lieutenant General T. Michael Moseley, was assigned the task of planning and directing air operations. As the CFACC, he executed his responsibilities through the CAOC.[96] Additionally, "he distributed guidance, objectives and unit taskings primarily through Rules of Engagement (ROE), Air Tasking Orders (ATO), Special Instructions (SPINS), and Airspace Control Order (ACO), all of which are produced by the CAOC staff."[97] With this function in place, the coalition air operations over Afghanistan were controlled from the CAOC. Additionally, the CAOC performed near real-time monitoring of all air missions flown in support of OEF so CFACC command authority was air theater wide.[98]

Specifically focusing on the issue of ROE for self-defense in OEF. The control measures the CFACC established were as follows:

> The OEF ROE do not differ significantly from the Standing Rules of Engagement (SROE) on the issue of self-defense. When invoking self-defense, in OEF as in other theaters, the requirements of necessity and proportionality are applicable. The decision to employ force, including lethal force, in response to a hostile act or hostile intent resides with the on-scene commander.[99]

Thus, the OEF ROE substantially followed the same principles that COFFEE flight operators were trained to apply before they arrived in theater. The control measures that were in place addressed operational constraints and tactical procedures such as the following:

> ROE for Anti-Aircraft Artillery (AAA): In the OEF AOR prior to 17 April 2002, AAA was known to exist throughout the theater and SAFIRE reports, including AAA, were routinely made by aircrews operating over Afghanistan. The OEF ROE state that: "Aircraft always have the right of self-defense against AAA." The OEF ROE also state that: "…aircraft should NOT

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[96] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 3-4.
[97] *Id*.; JOINT PUB 3-56.1, *supra* note 37, at II-2.
[98] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 4.
[99] *Id*.; SROE, *supra* note 19, at GL-23 "The definition of on scene commander is a commander of forces within an area of military operations that also contains a hostile or potentially hostile force." *Id*.

> deliberately descend into the AAA range to engage and destroy AAA units which fire well below their altitude".[100]

The key to this OEF ROE was that the limitations were set by measurable parameters which were provided in detail in OEF SPINS. Thus, in order to understand the limitations, OFE SPINS should provide some insight and clarity about the measurable parameters. This would be imperative because specific mission planning information such as minimum altitude levels and potential AAA locations that the pilots were knowledgeable of or had a duty to be knowledgeable of would be found in the OEF SPINS.

E. SPINS

"OEF SPINS state[d] that it is critical for coalition air forces to do everything they can to minimize the potential for self-defense situations." [101] The OEF SPINS which provided in detail how ROE would be applied in mission execution which were applicable on 17 April 2002 to Tarnak Farms were the following:

> Special Instructions (SPINS) – Section 1 Commanders Guidance: This section details CFACC's guidance to all aircrew participating in OEF. Such guidance addresses operational objectives, commander's intent and mission tasks and priorities…Special Instructions (SPINS) – Section 3 Communication Article 8.6.2: This article explains the Surface-to-air Fire (SAFIRE) reporting requirements… Special Instructions (SPINS) – Section 4 Airspace Article 4.3: Defines and provides the details on where information on[undisclosed] will be published…Special Instructions (SPINS) – Section 5 ROE Article 5.2.2: This article describes the concept of self defen[s]e and how it will be applied in theatre…Special Instructions (SPINS) – Section 5 ROE Article 9: This article provides the details on how ROE will be applied for defen[s]e against SAM's and AAA threats…Special Instructions (SPINS) – Section 5 ROE Article 10: This article provides the details on how ROE will be applied in the case of Air to Ground Attacks. It includes details on the right to Self Defen[s]e…Special Instructions (SPINS) – Section 6 Operations Article 2.6: This

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[100] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 17.

[101] *Id*. at 23; BOI FINAL REPORT, *supra* note 82, Annex J (RELEVANT AIR ORDERS AND INSTRUCTIONS) "It is critical, however, that coalition forces plan and execute such that they minimize the chance of a self-defence situation." *Id*.

> article provides details on the minimum operating altitudes in Afghanistan for fixed wing aircraft.[102]

These SPINS are significant because not only did they reflect the modifications to the SROE, but also they were the current binding limitations on the operational aircrews.[103] The crucial limitation set by the CFACC and promulgated in the SPINS was

> [A]ircraft were directed to fly no lower than [undisclosed] feet [above ground level] AGL for normal flying operations and no lower [undisclosed] feet for situations in which they planned to employ ordnance. COFFEE 52 set his altitude warning for[undisclosed]. As he approached the perceived SAFIRE location, he descended below [undisclosed] feet [mean sea level] MSL and the altitude warning sounded.[104]

Additionally, "OEF ROE directed that aircraft should not descend into the lethal range of a AAA system firing well below them in order to attack in self-defense."[105] The facts state "[B]oth COFFEE 51 and 52 stated they believed the ground fire was burning out around 10,000 feet AGL, well below their initial transit altitude."[106] Therefore, given the OEF SPINS and the actions of the pilots the conclusion is they violated the SPINS. The issue is whether the flight wingman had the authority in self-defense to use force in the way he did against the back drop of whether OFE SPINS were in conflict with the fundamental US policy on self-defense.[107]

F. Interaction

When you apply the facts of Tarnak Farms to the principle that the CFACC had the authority through SPINS to further restrict ROE, then you must conclude that the use of force by the pilot was inappropriate. The main point to support this claim is based on the CFACC's command authority and the SROE. The basic SROE was in place which firmly established the inherent right to self-defense.[108] COFFEE 52 clearly was an on scene commander in

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[102] BOI FINAL REPORT, *supra* note 82, pt. IV (AIR-GROUND COORDINATION)

[103] *Id*. pt. II (AIR EVENTS); "The SPINS, updated regularly, were also available to all aircrew to guide them in the conduct of their mission. SPINS are theatre-specific and were written specifically for OEF. Updated daily via the ATO and Weekly SPINS Updates, they contain essential information indispensable for the conduct of the mission." *Id.*

[104] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 41.

[105] *Id.* at 20.

[106] *Id.* at 19.

[107] SROE, *supra* note 19, at A-2.

[108] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 18. "The OEF ROE do not differ significantly from the Standing Rules of Engagement (SROE) on the issue of self-defense." *Id*.

the definition of the SROE. The CFACC operating through the CAOC was a senior commander under the definition of the SROE. The CFACC promulgated and disseminated his restrictions through the SPINS which amplified the ROE and were binding on all aircraft flying in the CFACC's airspace. On 17 April 2002, both pilots had been flying in theater for over 30 day and the facts support that they were knowledgeable or had a duty to be knowledgeable of the daily SPINS.[109] Under the SROE the pilot had the inherent authority to take all appropriate actions in self-defense. Nevertheless, the pilot's authority to use force in individual self-defense under the SROE was limited by the lawful orders of his superior, the rules contained in the SROE, and other applicable ROE promulgated for the mission.[110] This would include the SPINS. The SPINS were a lawful order by the CFACC which proscribed in detail how to handle AAA. When the pilot perceived the AAA threat and descended toward the site, placing himself in harms way along with transitioning below the restricted altitude, he violated the SPINS. By violating the SPINS to mark the SAFIRE he lost his ability to justify his use of force in self-defense under the OEF ROE.[111] This would be similar to a LOAC violation where the combatant uses a lawful weapon, but in an unlawful manner and claims it is not a LOAC violation. In this case, the CFACC had the authority to further restrict OEF ROE, consequently, the pilot's use of force was not proper.

When the pilot's actions were reviewed by other F-16 pilots they found his actions were inappropriate.[112]

> Numerous F-16 pilots interviewed by the Board stated that if they had found themselves in similar circumstances to those confronted by COFFEE flight on the evening of 17 April 2002, their immediate course of action would have been to accelerate

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[109] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 41; BOI FINAL REPORT, *supra* note 83, pt. III (air events).

[110] SROE, *supra* note 19, at GL-17.

[111] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 35-36.

[112] *Id*. The tactics used by the pilot in dealing with the AAA threat was not viewed as the best course of action to exercise in the situation. In support of the CFACC's limitations, the actions by the pilot before he used force in self-defense were contrary to his training in tactics and techniques.

> AFTTP 3-1.5, Tactical Employment F-16 C/D states,[T]he pilot always retains the right of self-defense and the defense of other friendly assets unable to protect themselves. This right, however, should not be used as a planned work-around for solving poor tactics and decision trees. The F-16 pilot must make a conscious decision that the immediate threat outweighs the risk of fratricide. In situations where there is not an immediate threat, i.e., outside of abort range or nobody is spiked, or when SA on friendly positions is unknown, maintain a conservative, defensive approach to the situation until certain of compliance with the ROE.

Id.

> to greater airspeed, climb in altitude, and leave the immediate area to evade and avoid the threat. COFFEE flight took none of these actions. Neither COFFEE 51 nor COFFEE 52, both of whom stated they believed they were being targeted at some point by the ground fire, aggressively maneuvered their aircraft in the face of what they presumably believed was a surface-to-air threat. Throughout the entire engagement, COFFEE 51 maintained a slow rate, level right-hand turn approximately five miles from the source of the ground fire, almost completely circling the Tarnak Farms range. COFFEE 52 turned back toward the SAFIRE and descended below recommended altitude to take a mark. Later, he turned back toward the SAFIRE again and slowed to well below tactical airspeed. He never appeared to maneuver defensively.[113]

It is not inconceivable to accept that some ROE principles and SPINS have qualified language that may present options for the decision makers.[114] Nonetheless, the burden is on the commander to assess what is the better course of action. [115] COFFEE 52 could make an argument that OEF SPINS authorized him to mark the location of the SAFIRE.[116] This would have allowed him to lawfully engage in the maneuver he was performing in accordance with the SPINS. However, the problem with this argument is that "there were alternative methods of taking a mark in the F16C so COFFEE 52's descent towards the site and transition below the restricted altitude floor was not necessary to obtain the SAFIRE coordinates."[117] Additionally, the CFACC's limitation for coalition air forces to do everything they can to minimize the potential for self-defense which was more restrictive in nature

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[113] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 17, 19.

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> Coffee 52 not only remains within the immediate vicinity of the perceived threat, but also increases the risk by descending lower to the threat while allowing his airspeed to occasionally decrease below optimal maneuvering speed. It is quite surprising and contrary to both SPINS and accepted defensive reactions that Coffee 52 would willingly allow himself to be exposed to a higher threat envelope through such actions. While the altitude minimums published may have permitted him to get this low to accomplish a 'mark', better airmanship would have dictated remaining at altitude or performing the designation at a greater distance from the perceived threat.

BOI FINAL REPORT, *supra* note 82, pt. IV (BLAME).

[115] SROE, *supra* note 19, at A-3.

[116] BOI FINAL REPORT, *supra* note 82, pt. III (AIR EVENTS); BOI FINAL REPORT, *supra* note 82, pt. IV (BLAME); BOI FINAL REPORT, *supra* note 82, pt. IV (AIR- GROUND COORDINATION).

[117] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 35; "The F-16 has a system that allows the pilot to preset an altitude warning level so that he will be alerted when his aircraft descends below an established altitude floor." *Id.* at 41.

should have taken precedence over marking the SAFIRE.[118] Despite this, the pilot deliberately descended below the restricted altitude and placed himself in harms way. Given the nature of the perceived threat of the AAA and the minimum operating altitudes in Afghanistan for fixed wing aircraft the pilot violated the ROE and SPINS.[119] The SROE principle for self-defense by the pilot was applicable, but the CFACC's superior lawful orders through the OEF SPINS were the controlling mandate.[120] In sum, this supports the statement that for the pilot to use force appropriately, he must comply with the SPINS and ROE. Therefore, in the Tarnak Farms case the claim by the pilots that they took appropriate action in self-defense is not supportable because they violated OEF SPINS promulgated by the CFACC and the present actions of the United States Air Force reinforce this principle.[121]

In summary, the fundamental premise should be that SPINS are drafted in concert with ROE. The distinction is that SPINS are amplification deemed necessary for complex ROE provisions. Based on the factors of amount of guidance, review, revision and functional expert coordination that drives the existence of ROE and SPINS, these are solid coexisting documents. Just as air power brings air superiority to a fight, SPINS bring clarity to ROE provisions. During military operations involving air assets the JFACC has the authority through SPINS to further restrict ROE as promulgated by the JFC. SPINS are a primary measure by which the JFACC controls air operations through campaign strategy, operational constraints and tactical procedures. SPINS are just as binding on the operational aircrews as ROE issued by an operations order (OPORD), and for a pilot to use force appropriately, he must comply with the SPINS and ROE.

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[118] BOI FINAL REPORT, *supra* note 82, Annex J (RELEVANT AIR ORDERS AND INSTRUCTIONS) It is critical, however, that coalition forces plan and execute such that they minimize the chance of a self-defence situation; *see also* FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 20 "OEF SPINS directed aircraft not to descend into the lethal range of an AAA system firing well below them in order to attack in self-defense." *Id*.

[119] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 35; BOI FINAL REPORT, *supra* note 82, pt. III (AIR EVENTS); BOI FINAL REPORT, *supra* note 82, pt. IV (AIR- GROUND COORDINATION).

[120] SROE, *supra* note 2, at GL-17.

[121] David M. Halbfinger, *UnusualFactors Converge in Case Against War Pilots*, N.Y. TIMES, Jan. 25, 2003, *available at* http://www.nytimes.com/2003/01/25/national/25pilo.html ; Vernon Loeb, *2 U.S. Pilots Charged in Bombing of Canadians*, WASH. POST, Sept. 14, 2002, at A01; David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html ; David Pugliese and Glen McGregor, *Fighter Pilots Likely to Face Court Martial: Friendly-Fire Incident Could Bring 10 Years in Prison*, CALGARY HERALD, Sept. 14, 2002, at A5.

[121] David M. Halbfinger, *UnusualFactors Converge in Case Against War Pilots*, N.Y. TIMES, Jan. 25, 2003, *available at* http://www.nytimes.com/2003/01/25/national/25pilo.html ; Vernon Loeb, *2 U.S. Pilots Charged in Bombing of Canadians*, WASH. POST, Sept. 14, 2002, at A01; David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html ; David Pugliese & Glen McGregor, *Fighter Pilots Likely to Face Court Martial: Friendly-Fire Incident Could Bring 10 Years in Prison*, CALGARY HERALD, Sept. 14, 2002, at A5.

VIII. CONCLUSION

"Air operations in the modern battlespace are extraordinarily complex by any measure, and require constant coordination between line operational aircrew and their chain of command at all levels."[122] However, as complex as air operations can be, the tools and guidance for regulating U.S. forces in when, where, how, why and against whom they may use force are substantially established. In military operations involving air assets when a JFACC under a JFC is controlling air assets, the command and control measures to comply with ROE through SPINS is solid. The JFACC has the authority to further limit ROE as promulgated by the JFC. Additionally, he implements that authority through the SPINS and it is binding on those air assets operating in his airspace. The operational aircrews are knowledgeable or have a duty to be knowledgeable of the campaign strategy, operational constraints and tactical procedures. These guidance and directives can be found in the main documents used by aircrew in the operational theater for purposes of mission tasking, planning, coordination and execution such as ATO, ACO and SPINS.[123] These documents, and in particular the SPINS, amplify ROE and are constantly reviewed and revised by the JAOC before they are disseminated to the tactical operations level.[124] When disseminate by the JFACC they are binding as ROE and have the authority as orders from the JFC. Tarnak Farms confirms this proposition.

Based on the open sources available at the time, the CIB pinpointed a factor which could be targeted for improvement by judge advocates (JAG). The CIB found by clear and convincing evidence that the cause of the friendly fire incident at Tarnak Farms was the pilots' failure to exercise appropriate flight discipline.[125] Since the pilots' claim they acted appropriately to use force in self-defense, then this is an area where JAG intervention can have an impact. The pilot made a poor decision at Tarnak Farms on 17 April 2002 by violating the ROE and SPINS resulting in him losing his ability to justify his bombing in self-defense. This undermined his defense of self-defense to the CIB and the United States Air Force.[126]

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[122] BOI FINAL REPORT, *supra* note 82, pt. IV (AIR-GROUND COORDINATION).
[123] BOI FINAL REPORT, *supra* note 83, pt. IV (AIR-EVENT).
[124] JOINT PUB. 3.56-1, *supra* note 39, para 5.1.3.
[125] FRIENDLY FIRE BOARD REPORT, *supra* note 2, at 45.
[126] Dave Hirschman, *Ex-Military Pilot Call Charges Risky Precedent*, Atlanta Journal-Constitution, Jan. 21, 2003, (copy on file with author). "The [Article 32 Hearing] proceeding marks the first time U.S. pilots have faced criminal prosecution for a friendly fire accident." *Id.* "The defense for the pilots contents that Major Schmidt and Major Umback were victims of bad information, communication, fatigue and the fog of war" David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html; Elaine M. Grossman, *'Friend Fire' Case Begs Question: When Does 'Fog of War' Creep In?*, INSIDE THE PENTAGON, Jan. 30, 2003, (copy on file with author)

> Major Schmidt's descent and slowdown put his plane 'in harm's way,' [Brigadier General Stephen T. Sargeant, Co-President of the CIB] said, violating both the rules of engagement and the pilot's special instructions, known as SPINS. 'In my opinion this is a reckless disregard for the spins'.[127]

However, this should prompt functional experts involved with the formulation and training of ROE to review the process to ensure the operators have the knowledge and information to exercise appropriate ROE measures. [128] This training should also include clear instruction on the authority of the JFACC to restrict the right of self-defense through the SPINS.

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[127] David M. Halbfinger, *General Says Pilots Broke Rules*, N.Y. TIMES, Jan. 22, 2003, *available at* http://www.nytimes.com/2003/01/22/national/22pilo.html.

[128] SROE, supra note 19, at A-4; Dave Hirschman, *Ex-Military Pilot Call Charges Risky Precedent*, Atlanta Journal-Constitution, Jan. 21, 2003, (copy on file with author).

> "Military pilots are sharply critical of the prosecution…,saying the legal effort could cost American lives in future battles…Some legal experts say [Major] Schmidt and [Major] Umbach should face prosecution, however, Loren Thompson, a military analyst at the Lexington Institute , said charging them could rein in overly aggressive pilots and soldiers who might jeopardize U.S. objectives. 'We're fighting a new kind of war in which it's doubly important to be careful about the political consequences of what we do', he said. 'We can't have our people acting indiscriminately. They have to be especially careful, and they have to know there are consequences."

Id.