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# United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict

MAJOR JOSEPH P. "DUTCH" BIALKE\*

## I. INTRODUCTION

With this new millennium comes a New World. Because of unprecedented advances in travel and communication over the previous century, it is a decisively smaller world. This smaller world emphasizes nation-state differences in ideologies, political economies, and cultures. Although the world is in constant turmoil and military conflict, this turmoil is currently manageable.

The United Nations (UN), with all its flaws, appears to be the foremost global structure capable of ensuring, maintaining, and making world peace in the new millennium. In 1945, the "Peoples of the United Nations" declared they were determined "to save succeeding generations from the scourge of war . . . to unite our strength to maintain international peace and security, and . . . to ensure . . . that armed force shall not be used, save in the common interest."<sup>1</sup> The hope was that nations, acting in concert and pursuing a common goal of peace, would produce a stable world.

In the Preamble to its Charter, the UN placed the maintenance of peace among nations as its primary reason for existence.<sup>2</sup> Similarly, Article 1 of the Charter states that the maintenance of "international peace and security" is one of the UN's purposes.<sup>3</sup> Indeed, the fact that it is listed first suggests it is the overriding purpose. However, if the UN Member States wish to preserve their moral authority to maintain peace, they must not sit idle during times of conflict.<sup>4</sup> Rather, they, through the UN, must be both reactive and proactive in maintaining peace and security.

The UN Charter obligates Member States to settle their disputes peacefully and to "refrain from the threat or use of force against the territorial

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\* Major Bialke (B.S.C.J.S., M.A., J.D., University of North Dakota, LL.M., University of Iowa) is assigned as Chief of International Agreements, International Affairs Division, United Nations Command and Headquarters, United States Forces in Korea, Yongsan Army Garrison, Seoul, Republic of Korea.

<sup>1</sup> U.N. CHARTER preamble.

<sup>2</sup> G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT'L L.R. 297 (1988).

<sup>3</sup> U.N. CHARTER art. 1, para. 1.

<sup>4</sup> Vladimir V. Grachev, *Legal Considerations for Military and Peacekeeping Operations—United Nations Peacekeeping in Transition*, 45 NAVAL L. REV. 273, 280 (1998).

integrity or political independence of any state.”<sup>5</sup> Members may not use force against one another, unless either exercising the “inherent right of individual or collective self-defence if an armed attack occurs,”<sup>6</sup> or giving assistance to the UN when it is “taking preventive or enforcement action.”<sup>7</sup> Further, Member States are obligated to “accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>8</sup>

As the world enters this new millennium, conflicts will inevitably occur between nation-states and civil wars will arise. Armed conflict, both international and internal, will continue.<sup>9</sup> However, the opportunity exists to make these conflicts less frequent and destructive as UN peacekeeping operations enter into a new era. The UN Charter provides the mechanisms, if they are properly applied, to manage conflicts throughout the globe. The UN Charter is a living political document, flexible enough to deal adequately with crises as they occur as long as the Member States have the collective political will to continue to effectively participate in peace operations.

These peace operations range from initial UN Charter classical peacekeeping operations under Chapter VI,<sup>10</sup> to the current trend of “active

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<sup>5</sup> U.N. CHARTER art. 2, para. 4.

<sup>6</sup> U.N. CHARTER art. 51.

<sup>7</sup> U.N. CHARTER art. 2, para. 5.

<sup>8</sup> U.N. CHARTER art. 25.

<sup>9</sup> Although armed conflict continues, the aspiration of every nation-state should be the end to conflict. In Geneva, on Aug. 12, 1999, United Nations Secretary General Kofi Annan “signed a solemn appeal calling on all peoples and governments to reject the idea that war is inevitable and to eradicate its underlying causes.” United Nations Press Release, *Calls for Renewed Efforts to Protect Civilians in War* (Aug. 13, 1999), available at <http://allafrica.com/stories/199908130003.html> (copy on file with the *Air Force Law Review*). *Accord* 22 USC § 2551:

An ultimate goal of the United States is a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which adjustments to a changing world are achieved peacefully.

<sup>10</sup> Traditionally defined as “blue helmet” operations, in 1992, Secretary-General Boutros Boutros-Ghali defined peacekeeping as

the deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.

BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE*, 45 (2d ed. 1995). Additionally,

[p]eace keeping has been described as the deployment of a United Nations presence in an area of conflict with the consent of the States, or where relevant, other entities concerned, and as an interim arrangement to contain

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and robust” Chapters VI<sup>11</sup> and VII peace-enforcement operations.<sup>12</sup> The number, diversity and spectrum of current peace operations present cogent issues regarding the application of the international law of armed conflict.<sup>13</sup>

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fighting, prevent the resumption of hostilities and restore international peace and security. The functions of peace keeping, which have traditionally ranged from observance of cease-fire, demarcation lines, or withdrawal of forces agreements, have in recent years widened to include monitoring of election process, delivery of humanitarian supplies, assisting in the national reconciliation process and rebuilding of a State’s social, economic and administrative infrastructure. Peace-keeping forces have no military mandate of enforcement powers, and although equipped with light defensive weapons, they may use them only in self-defence.

Daphna Shrager & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical issues*, in INTERNATIONAL COMMITTEE OF THE RED CROSS SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 40 (Umesh Palwankar ed., 1994) [hereinafter Shrager & Zacklin].

[P]eacekeeping describes the inherently peaceful action of an internationally directed force of military, police and sometimes civilian personnel to assist with the implementation of agreements between governments or parties which have been engaged in conflict. It presumes cooperation, and the use of military force (other than in self-defense) is incompatible with the concept.

J.C. Waddell, *Legal Aspects of UN Peacekeeping*, in THE FORCE OF LAW: INTERNATIONAL LAW AND THE LAND COMMANDER 47, 47 (Hugh Smith ed., 1994) [hereinafter Waddell].

<sup>11</sup> In the early and mid-90’s, in Somalia and Bosnia-Herzegovina, classical peace-keeping principles and norms developed during the Cold War were “strained to the breaking point.” “[T]he Security Council proclaimed ‘no-fly zones’ and ‘safe areas,’ declared punitive actions against warlords, and acquiesced in NATO-declared ‘exclusion zones’; . . . Member States established command arrangements that did not in all cases terminate in New York; . . . peace-keepers mounted anti-sniping patrols and called in air strikes.” Shashi Tharoor, *The Changing Face of Peace-keeping and Peace-Enforcement*, 19 FORDHAM INT’L L.J. 408, 414 (1995). Such “robust” peacekeeping operations have also been called “coercive peace-keeping.” Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. INT’L L. 93, 105 (1996).

<sup>12</sup> Peace-enforcement operations generally refer to nonconsensual operations conducted by United Nations military personnel or United Nations Member State forces. Secretary General Boutros Boutros-Ghali succinctly defined such operations as “peace-keeping activities which do not necessarily involve the consent of the parties concerned. Peace enforcement is foreseen in Chapter VII of the Charter.” BOUTROS-GHALI, *supra* note 10, at 12. Put another way,

[p]eace enforcement is a Chapter VII mandated operation carried out by United Nations forces or by States, groups of States or regional arrangements on the basis of an invitation of the State concerned (Korea 1950), or an authorization by the Security Council (Gulf, 1990). They have a clear combat mission and are empowered to use coercive measures to carry out their mandate.

The international law of armed conflict does not apply to classic “blue helmet” UN peacekeepers because they are not combatants,<sup>14</sup> that is, they are not engaging in military offensive operations. Blue helmet peacekeepers are authorized to use force only in self-defense. Conversely, it is well settled that the law of armed conflict does apply when forces authorized by the UN are “engaged in hostilities as a belligerent,” such as in the Korean or the Persian Gulf Conflicts.<sup>15</sup> In such cases, the UN forces are “treated in exactly the same way as the armed forces of a state.”<sup>16</sup> However, how the international law of armed conflict applies to post-Cold war UN peacekeeping operations when

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Shraga & Zacklin, *supra* note 10, at 40. “Peace enforcement’ . . . may be defined as a military operation in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and who may be engaged in combat activities.” Waddell, *supra* note 10, at 47-48.

<sup>13</sup> Air Force Pamphlet 110-31, International Law—The Conduct of Armed Conflict and Air Operations, para. 1-2 (d)(1) (Nov. 19, 1976) (reissue pending as AFPAM 51-710) [hereinafter AFPAM 110-31], defines the international law of armed conflict as,

a part of the international law primarily governing relationships between states. The term refers to principles and rules regulating the conduct of armed hostilities between states. Traditionally known as the law of war, the term ‘law of armed conflict’ is preferred. Since World War II, states have avoided formal declarations of war. Recent multi-lateral conventions, notably the 1949 Geneva Conventions, refer to armed conflict rather than war. International law regulating armed conflict applies if there is in fact an international armed conflict. It may also apply to armed conflicts that traditionally have not been viewed as ‘international’ but which clearly involve the peace and security of the international community.

*See also* Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 296 (1995):

The Hague and Geneva Conventions embody the laws of war, referred to as the *jus in bello*. The Hague Conventions are a series of treaties concluded at the Hague in 1907, which primarily regulate the behavior of belligerents in war and neutrality, whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the protection of the victims of armed conflict. In 1977 two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protection to victims of non-international armed conflict, were opened for signature, but were not as universally accepted.

*Id.* (footnotes omitted).

<sup>14</sup> Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 150 (Shirley V. Scott & Anthony Bergin eds., 1997) [hereinafter Cartledge, *International Humanitarian Law*].

<sup>15</sup> Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 188 (1996).

<sup>16</sup> *Id.*

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these operations become more active and robust, approaching combat, is not clear. Such robust operations include, for example, Somalia and Bosnia-Herzegovina, as well as the continuing mission to enforce the no-fly zone in Iraq.<sup>17</sup> The central issue is whether, and in what manner, the law of armed conflict applies to UN peacekeeping operations that arguably cross the threshold into armed conflict.

This article begins by detailing the history and applicable norms of UN peacekeeping and peace-enforcement operations, to include the use of force in self-defense as applicable to “classical” peacekeeping operations. The article then illustrates how the “principles and spirit” of the international law of armed conflict have been followed in traditional peacekeeping operations, as well as during robust peacekeeping operations. The article explains how, through practice, the international law of armed conflict has been followed in UN peace-enforcement operations, and argues the importance of keeping clear distinctions between UN peacekeeping and peace-enforcement operations. Additionally, the article briefly examines the recent Convention on the Safety of UN and Associated Personnel.

Following this, the article delves into the current uncertainty as to how and when the international law of armed conflict, the *ius in bello*,<sup>18</sup> applies to UN military forces. The article illustrates the past practice and position of the UN to not apply the law of armed conflict to peacekeeping operations, instead applying only the “principles and spirit” of the law. The article explains the importance of, in certain circumstances, UN military forces following the law of armed conflict so that the forces they oppose will reciprocate. The article then discusses the application of the law of armed conflict to UN peace-enforcement operations.

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<sup>17</sup> See generally, Roberto Suro, *U.S. Air Raids on Iraq Become an Almost Daily Ritual*, WASH. POST, Aug. 30, 1999, at A3. After Iraq continued to fire anti-aircraft weapons against United Nations authorized aircraft enforcing the no-fly zone, it became clear that the previous policy of simply returning fire in self-defense against only the offending radar and surface-to-air missile sites was not effective. In order to deter future attacks against coalition aircraft, the definition of aircraft self-defense was expanded authorizing follow-on attacks against secondary targets that had not previously engaged the aircraft. Pilots carried previously approved lists containing targets that could be engaged whenever Iraq threatened their aircraft. Additionally, the targets did not have to be engaged immediately, rather the retaliation could occur a day or two later. Such secondary targets included “a military installation 28 miles away” and “a military depot deep in the desert.” *Id.* Whether or how the laws of armed conflict apply in such circumstances is not clear. What is clear, however, is that the expanded definition of self-defense and its resulting implementation worked, at least in the short term. Iraq temporarily stopped engaging coalition aircraft that were enforcing the no-fly zone.

<sup>18</sup> The *ius in bello* means the law of armed conflict, international humanitarian law, or what was initially called the law of war. Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L L. 285, 287 n.5 (1996). In contrast, the *ius ad bellum* are the laws regarding the permissibility of employing the use of force in international law. *Id.* at 287 n.6. “*Ius*” is Latin meaning “law” or “right”. BLACK’S LAW DICTIONARY 837 (7<sup>th</sup> ed. 1999). In slight contrast, “*ius*” is Latin meaning “[l]aw in the abstract.” *Id.* at 863.

The article addresses whether the UN is bound by the international law of armed conflict, regardless of whether the UN is a signatory to the applicable Conventions. The article concludes that the law of armed conflict applies to peacekeeping forces if and when the forces cross the Geneva Conventions Common Article 2 threshold. However, the article posits that the armed conflict threshold for forces acting under the authority of the UN Security Council is somewhat higher than it is for conflicts between nation-states. Finally, the article asserts that the UN has the responsibility and duty to make clear the applicability or non-applicability of the international law of armed conflict to its peacekeeping forces, and recommends that if it is to be credible and effective in securing and maintaining global peace in this new millennium, the UN must do so.

## II. VARIATIONS AND NORMS OF UNITED NATIONS PEACE OPERATIONS

### A. Background and History of United Nations Chapter VI Peacekeeping

In 1945, the Security Council was conferred the “primary responsibility for the maintenance of international peace and security.”<sup>19</sup> The five permanent Members of the Council<sup>20</sup> were each given veto power,<sup>21</sup> pragmatically reflecting that, in order to maintain peace, there must be a consensus among the major powers. Following World War II, the drafters of the UN Charter presumed the victors, acting perhaps out of enlightened self-interest, would continue to cooperate with each other, in light of their recent successful joint effort. Instead, the opposite occurred. The world immediately became bipolar with conflicting Western democratic and Eastern communistic political ideologies undermining the new UN security mechanism.<sup>22</sup> This was the start of the “Cold War.”

During the Cold War, instead of greater cooperation among world powers, the powers continued to grow apart.<sup>23</sup> The East-West rivalry rendered the security enforcement mechanism envisaged by the UN Charter utterly ineffectual. The veto power of the Security Council’s permanent Members frustrated any attempt to exercise its Chapter VII security and peace-

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<sup>19</sup> U.N. CHARTER art. 24, para. 1.

<sup>20</sup> The five permanent members are the Republic of China (originally occupied by Taiwan; now occupied by the People’s Republic of China), France, the Union of Soviet Socialist Republics (now occupied by Russia), the United Kingdom of Great Britain and Northern Ireland, and the United States of America. U.N. CHARTER art. 23, para. 1.

<sup>21</sup> U.N. CHARTER art. 27, para. 3.

<sup>22</sup> Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT’L L. 71, 73 (1996); See generally G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT’L L.R. 297 (1988).

<sup>23</sup> Alan K. Henrikson, *The United Nations and Regional Organizations: “King-Links” of a “Global Chain,”* 7 DUKE J. COMP. & INT’L L. 35, 44 (1996).

enforcement responsibility. Initiative after initiative failed as one or more of the permanent Members vetoed them. Yet, conflicts continued throughout the globe—some related to the end of the era of European colonialism and some growing out of local conflicts. Both types of conflicts were frequently “affected and aggravated” by the ongoing Cold War between the great world powers.<sup>24</sup>

Indeed, the veto authority became a real impediment to peace. During the Cold War from 1945-1990, Security Council permanent Members vetoed 279 resolutions, effectively preventing the UN from taking constructive and determined action in over one hundred major conflicts. Those conflicts resulted in approximately twenty million deaths.<sup>25</sup> In response, and to facilitate the “adjustment or settlement of international disputes or situations which might lead to a breach of the peace,”<sup>26</sup> the UN generated a compromise—peacekeeping.<sup>27</sup>

### *1. Classical United Nations Peacekeeping: United Nations Chapter VI—Pacific Settlement of Disputes*<sup>28</sup>

The UN Charter does not explicitly mention, nor authorize, peacekeeping. In actuality, the UN invented the concept. Peacekeeping operations loosely developed out of the UN Charter, specifically, Chapter VI, entitled “Pacific Settlement of Disputes.” Chapter VI directs that the Security Council may investigate situations that might lead to potential conflict. The Security Council, after considering any dispute settlement-procedures previously adopted by the parties to the conflict, may make recommendations to resolve the conflict.<sup>29</sup> Yet, peacekeeping is not expressly addressed within Chapter VI. Rather, it is inferred from Article 33 of the Charter.<sup>30</sup> A peacekeeping mission, in accordance with Article 33, is a “peaceful means”

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<sup>24</sup> Edward J. Perkins, Comment, *United Nations Peace-Keeping*, 18 YALE J. INT’L L. 435 (1993).

<sup>25</sup> *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, para. 14, U.N. Doc. A/47/277/S/2411 (1992), at <http://www.un.org/Docs/SG/agpeace.html> (copy on file with the *Air Force Law Review*).

<sup>26</sup> U.N. CHARTER art. 1, para. 1.

<sup>27</sup> Perkins, *supra* note 24.

<sup>28</sup> U.N. CHARTER arts. 33-38.

<sup>29</sup> U.N. CHARTER art. 36, para. 1. See also, W. Michael Reisman, *Peacemaking*, 18 YALE J. INT’L L. 415, 416 n.9 (1993).

<sup>30</sup> U.N. CHARTER art. 33, para. 1 states: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” (emphasis added).

chosen and consented to by the parties to pursue a peaceful settlement of a conflict.<sup>31</sup>

The Charter originally did not anticipate military forces, deployed under UN authority, interposing themselves between parties to an armed conflict. However, the Charter is a flexible political document containing many possibilities and interpretations, depending upon the international situation. The creation of peacekeeping is the pragmatic realization of one of these possibilities.<sup>32</sup> In the words of a former UN Under Secretary-General for Political Affairs, “[t]he technique of peace-keeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947.”<sup>33</sup>

Although not specifically mentioned in the UN Charter, peacekeeping is implied from the UN’s primary purpose. Article 1, as stated earlier, denotes that the primary purpose of the UN is to maintain international peace and security. It follows that the UN should be empowered with the means to fulfill its purpose.<sup>34</sup> The powers of the UN can not be ascertained by construing the Charter strictly. To do so would severely constrain the UN and could prevent it from ever acting. The UN must have implied powers to allow it to act to achieve its chartered mandate. Through its implied powers, the UN has created peace observer and peacekeeping units as an approved method of fulfilling its primary purpose.<sup>35</sup> Although peacekeeping operations are not specifically mentioned in the UN Charter, the International Court of Justice established that the Charter was sufficiently broad enough to allow the Security Council to monitor a conflict without having to resort to a Chapter VII peace-enforcement action.<sup>36</sup>

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<sup>31</sup> J.M. Sanderson, *Dabbling in War: The Dilemma of the Use of Force in United Nations Intervention*, in PEACEMAKING AND PEACEKEEPER FOR THE NEW CENTURY 145, 148 (Olara A. Otunno et al. eds., 1998).

<sup>32</sup> Berdal, *supra* note 22, at 74.

<sup>33</sup> Brian Urquhart, *The United Nations, Collective Security, and International Peacekeeping*, in NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY 59, 62 (Alan K. Henrikson ed., 1986).

<sup>34</sup> *See* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11) [hereinafter Reparations Case] (“[T]he Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties.”) *Id.* at 182.

<sup>35</sup> Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT’L RET OG JUS GENTIUM 11, 12 (1985).

<sup>36</sup> *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 164-67 (Jul. 20). The I.C.J. agreed that the United Nations Charter authorized peacekeeping operations, to include peacekeeping operations authorized by the General Assembly. The I.C.J. cautioned, however, that “the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” *Id.* at 163.

Essentially, peacekeeping operations are a “stop-gap” measure that suspends a conflict in order to allow the peace process to occur.<sup>37</sup> In 1948, the UN mounted its first peacekeeping operation under Chapter VI. The United Nations Truce Supervision Organization (UNTSO) went to the Middle East to monitor the truce in the 1948 Arab-Israeli War. The unarmed observers of UNTSO continue their mission in the Middle East today. They work alongside the two armed Middle East peacekeeping organizations: the United Nations Disengagement Observer Force (UNDOF) in the Golan Heights and the United Nations Interim Force in Lebanon (UNIFIL).<sup>38</sup>

To be effective, a peacekeeping mission must be constructed according to the nature of the conflict, the parties involved, and the stability or fragility of the negotiated stay of the hostilities. Consequently, peacekeeping missions are as diverse as are the conflicts that generate them. For example, the UNTSO was deployed to monitor a cease-fire, while the United Nations Force in Cyprus (UNFICYP) and the United Nations Interim Force in Lebanon (UNIFIL) placed themselves between the parties to the conflicts preventing one side from crossing into the territory of the other. The Suez Canal/Sinai Peninsula Middle East United Nations Emergency Force II (UNEF II) also occupied a “buffer zone,” assisting the parties to the conflict to disengage and withdraw their forces. The Golan Heights United Nations Disengagement Observer Force (UNDOF) mandate included inspecting and verifying that the sides were complying with their accepted force sizes and weapons limits. Further exemplifying the diversity of peacekeeping operations, peacekeepers in both the Operations des Nations Unies au Congo (ONUC) and the UNFICYP directly assisted the parties to resolve their numerous ongoing controversies<sup>39</sup> by acting as on-the-spot mediators, directly participating in negotiations between the parties.

## 2. Chapter VI ½: Classical/Traditional Peacekeeping—The Applicable Norms

Classical, or what is also referred to as traditional, peacekeeping necessarily grew out of East-West Cold War antagonism in order to “fill a void created by the Cold War.”<sup>40</sup> Something needed to be done to help resolve regional conflicts, but permanent Members of the Security Council on one side of the bi-polar Cold War world simply vetoed resolutions that appeared beneficial to the other side and vice-versa. The UN created an end-run around this persistent use of the Security Council veto. This development is now

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<sup>37</sup> Reisman, *supra* note 29, at 415.

<sup>38</sup> BOUTROS BOUTROS-GHALI, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING* 17 (3d ed. 1996).

<sup>39</sup> Lehmann, *supra* note 35, at 15-16.

<sup>40</sup> Michael Stopford, *Peace-Keeping or Peace-Enforcement: Stark Choices for Grey Areas*, 73 U. DET. MERCY L. REV. 499, 502 (1996) (quoting Dag Hammarskjöld).

known as “classical” peacekeeping, and its source—Chapter VI ½. As a result, the UN was able to do something to bring about the “adjustment or settlement of international disputes or situations that may lead to the breach of the peace.”<sup>41</sup>

Though classical peacekeeping is not explicitly authorized in either Chapter VI or VII, it has an ever-increasing scope. Peacekeeping is more than just investigating and making recommendations to the parties on how to resolve a conflict as envisioned within the context of UN Charter Chapter VI. As a result, Secretary-General Dag Hammarskjold quaintly, but poignantly, expressed that classical peacekeeping is authorized by “United Nations Chapter VI and ½.”<sup>42</sup> This characterization by the former Secretary-General deftly acknowledged that classical peacekeeping is truly a creative endeavor. Yet, the Secretary-General’s jocose description also anticipated the great difficulty in determining precisely where classical peacekeeping lies on the international diplomacy spectrums between “consent and coercion” and “passivity and force.”<sup>43</sup>

Ultimately, Chapter VI and ½ peacekeeping is much more restrained than a Chapter VII peace-enforcement action. Classical peacekeeping is a sort of hybrid action of the United Nations—more vigorous than what Chapter VI authorizes, but much less robust than a Chapter VII peace-enforcement action. The classical peacekeeping mission is but one of many peace maintenance instruments available. The UN may resort to any of several types of peace operations that exist along a spectrum denoting different levels of host nation consent and military force. Nevertheless, understandably, “[m]ost U.N. operations are taken with full local consent.”<sup>44</sup>

Essentially, peacekeeping is the use of military forces to secure and maintain peace, rather than using them to engage in war. Military personnel were frequently used in the Cold War as peacekeepers out of the necessity to limit and resolve conflicts without formally, but futilely, presenting a proposal to the UN Security Council to face an almost certain permanent Member veto. The role of a UN peacekeeper is in many ways symbolic, an instrument that shows international resolve for restoring and enforcing peace. Peacekeepers, although usually armed, are “to remain above the battle and only to use their weapons in the last resort for self defence.”<sup>45</sup>

Peacekeepers are not combat forces—they merely monitor previously agreed-upon cease-fires and truces. This is not to say that traditional

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<sup>41</sup> U.N. CHARTER art. 1, para. 1.

<sup>42</sup> See Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing an Agenda for Peace*, WASH. Q. 51, 52 (Winter 1993).

<sup>43</sup> Stopford, *supra* note 40.

<sup>44</sup> WILLIAM J. DURCH, *THE EVOLUTION OF U.N. PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS* 5 (1993).

<sup>45</sup> Brian Urquhart, *The Future of Peace-Keeping*, 36 NETH. J. INT’L L. 50, 52 (1989).

peacekeepers never use force, but it is the exception and not the rule.<sup>46</sup> In practice, UN field commanders have rarely used force, except in self-defense. To operate otherwise would run counter to the need for continued consent of the parties and impartiality to them.<sup>47</sup> In the words of one author, “[t]he weapons used by a peacekeeper in achieving his objectives are those of negotiation, mediation, quiet diplomacy, tact and the patience of Job – not the self-loading rifle.”<sup>48</sup>

Peacekeepers are usually posted between rival factions. The peacekeeper’s role is not typical military duty, but to provide an international presence, one that hopefully discourages the parties to the conflict from resuming hostilities.<sup>49</sup> The real value of peacekeeping is its expression of international resolve. The peacekeepers wear blue helmets, display the UN’s blue flag, and above all, seek to remain impartial and neutral. Generally, the object of peacekeeping is not to resolve the conflict, but rather to encourage a passive environment that allows the parties to constructively negotiate.<sup>50</sup> In short, “peace-keeping is not a soldier’s job, but only a soldier can do it.”<sup>51</sup>

The innovation of peacekeeping allowed the UN to gain relevance in dealing with armed conflicts throughout the globe. From the 1950’s onward, it began to involve itself, albeit superficially, in mitigating and containing small regional conflicts.<sup>52</sup> With the consent of the belligerent parties to a local conflict, the UN intervened with lightly armed military forces.<sup>53</sup> Not surprisingly, even though the Security Council Members had the “primary responsibility for the maintenance of international peace and security,”<sup>54</sup> armed forces of its permanent Members rarely, if ever, participated in the peacekeeping operations.<sup>55</sup> The permanent Members of the Security Council

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<sup>46</sup> From 1960-64, the United Nations authorized a peacekeeping force to restore law and order to the Congo. The United Nations Operation in the Congo (Operations des Nations Unies au Congo - ONUC) redefined and expanded the use of force in self defense to prevent local factions from preventing the peacekeepers from carrying out their mandate and responsibilities. “The concept of self defense, as well as the principles of non-intervention and sovereignty, were loosely defined and greatly modified in the Congo Operation.” Jon E. Fink, *From Peacekeeping to Peace-Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT’L L. & TRADE 1, 15 (1995).

<sup>47</sup> Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT’L L. & POL’Y 239, 255-56 (1999).

<sup>48</sup> INDAR JIT RIKHYE, PEACEKEEPING: APPRAISALS & PROPOSALS 6 (1983).

<sup>49</sup> L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 324 (1993).

<sup>50</sup> Stopford, *supra* note 40.

<sup>51</sup> C.C. MOSKOS, JR., PEACE SOLDIERS: THE SOCIOLOGY OF A UNITED NATIONS MILITARY FORCE, 139 (1976).

<sup>52</sup> Berdal, *supra* note 22.

<sup>53</sup> Berdal, *supra* note 22, at 73-74.

<sup>54</sup> See U.N. CHARTER art. 24, para. 1.

<sup>55</sup> Berdal, *supra* note 22, at 73 n.11. The Soviet Union usually was extremely skeptical of United Nations peacekeeping operations, even actively opposing specific missions. Then, in 1987, the Soviet Union conceded the value of such operations. As a result, there was finally

reached a “basic understanding” that their military presence in such an operation could easily be counter-productive and possibly escalate a conflict rather than defuse it. Therefore, the permanent Members informally agreed that they should rarely, if ever, contribute forces to classical peacekeeping operations.<sup>56</sup>

As a result of the Security Council permanent Members’ political pragmatism, in not operationally participating in these largely symbolic United Nations peacekeeping missions, peacekeeping forces consisted of military personnel culled from small neutral countries, such as Austria, Fiji, Canada, and the countries of Scandinavia. This arrangement was first realized in 1956, during the Suez Canal Crisis, when Israel, France, and Great Britain invaded and occupied Egyptian territory. This military invasion by Israel and two permanent Security Council Members could have easily provoked the Soviet Union, another Security Council permanent Member State, to enter the conflict on behalf of Egypt. This would not have been desirable.<sup>57</sup>

To solve the dilemma, when Secretary-General Dag Hammarskjöld created the United Nations Emergency Force (UNEF I) in response, he expressly denied the participation of all Security Council permanent Members. The UNEF I, composed of small-state forces, deployed to the Egypt-Israeli border. The UNEF I acted as a buffer while the French and British forces withdrew. This astute political solution acted as precedent in future UN peacekeeping operations. It facilitated the acquiring of consent from the parties involved in the conflict, ensured that the UN remained impartial, and ultimately, prevented the potential escalation of conflicts by eschewing direct super-power involvement.<sup>58</sup>

UNEF I set numerous precedents for future UN peacekeeping operations. The consent of the host nation was now required for Chapter VI peacekeeping operations. Deployed peacekeeping forces would be impartial neutral observers and operate under UN command and control. Forces would be multi-national, but permanent Members of the Security Council would not contribute to them. Finally, the UN peacekeeping forces would operate under defensive rules of engagement.<sup>59</sup> These limitations became the norms for classical UN peacekeeping operations.

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unanimity among the major powers that the United Nations had international authority to conduct peacekeeping operations. See Urquhart, *supra* note 45, at 52.

<sup>56</sup> Richard Connaughton, *Military Intervention and UN Peacekeeping*, in *TO LOOSE THE BANDS OF WICKEDNESS* 171 (Nigel Rodley ed., 1992).

<sup>57</sup> Lori F. Damrosch, *The Role of the Great Powers in United Nations Peace-Keeping*, 18 *YALE J. INT’L L.* 429 (1993).

<sup>58</sup> *Id.*

<sup>59</sup> Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What Are the Applicable Norms*, 2 *REVUE BELGE DE DROIT INT’L* 559, 561 (1994). In summary,

[A] consistent body of [classical peacekeeping] practice and doctrine evolved over the years: peace-keepers functioned under the command and

*a. Host Nation Consent*

Without host nation consent, the UN is without authority to deploy armed forces on otherwise sovereign territory. The UN Charter states that “[t]he organization is based upon the principle of the sovereign equality of all its Members”<sup>60</sup> and that the United Nations shall not “intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>61</sup> Absent a Chapter VII peace-enforcement resolution, the Security Council may only make recommendations to a Member State. Chapter VI does not contain any express provision that allows the Security Council to create a multi-national armed force composed of military members from UN Member States and unilaterally deploy that force to another sovereign nation-state. If the UN were to do so, it would be intervening in a sovereign state’s domestic jurisdiction. However, if a nation consents to the deployment of UN peacekeeping forces on its soil, there is no violation of national sovereignty.<sup>62</sup>

Consent from the host nation remains the keystone of classical peacekeeping. As such, regardless of the consequences, if a nation or party to the conflict withdraws its consent, UN peacekeepers must withdraw. In 1967, for example, the United Arab Republic (Egypt) withdrew the consent it previously granted that allowed the stationing of the UNEF I. Egypt called for the complete withdrawal of UN peacekeeping forces from its territory. UN Secretary-General Dag Hammarskjold, fully understanding that UN forces could legally remain in Egypt only as long as its government allowed them to, ordered all UN forces to withdraw. Unfortunately, almost immediately after the UN forces withdrew from Egypt, the 1967 Middle East War began.<sup>63</sup>

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control of the Secretary-General; they represented moral authority rather than the force of arms; they reflected the universality of the United Nations in their composition; they were deployed with the consent and cooperation of the parties; they were impartial and functioned without prejudice to the rights and aspirations of any side; they did not use force or the threat of force except in self-defence; they took few risks and suffered a minimal number of casualties; and they did not seek to impose their will on any of the parties.

Tharoor, *supra* note 11.

<sup>60</sup> U.N. CHARTER art. 2 para. 1.

<sup>61</sup> U.N. CHARTER art. 2 para. 7.

<sup>62</sup> Brown, *supra* note 59, at 561-62.

<sup>63</sup> Lehmann, *supra* note 35, at 15. Secretary-General Dag Hammarskjold said the United Nations “could not request the Force to be stationed or operate on the territory of a given country without the consent of the Government of that country.” *Report of the Secretary General*, UN Doc. A/3302 (1956). After Egypt withdrew its consent, the United Nations Security Council could have changed the Chapter VI peacekeeping force into a Chapter VII coercive peacekeeping force. The Security Council did not seriously entertain this alternative. Yoel Arnon Tsur, *The United Nations Peace-Keeping Operations in the Middle East From*

After a country withdraws consent, peacekeeper force protection immediately becomes much more problematic. The country withdrawing consent might no longer recognize the UN personnel as having privileges and immunities while in the territory.<sup>64</sup> Additionally, a Member State that has contributed forces to the peacekeeping force may begin the immediate unilateral withdrawal of its troops ahead of the rest of the UN force. These factors work toward the UN removing UN personnel as soon as possible following withdrawal of consent.<sup>65</sup>

Finally, the UN and the host nation usually formalize the host-nation consent with a Status of Forces Agreement (SOFA). The host-nation agrees to afford UN military forces full respect and allow the forces freedom-of-movement throughout the area of operations. An additional provision of any such SOFA is that UN personnel have absolute jurisdictional immunity from the host nation regarding criminal matters. Jurisdictional immunity of peacekeepers has long been a prerequisite before UN Member States will contribute soldiers to a peacekeeping force.<sup>66</sup>

#### *b. Impartiality of the United Nations and United Nations Peacekeepers*

In a classical UN peacekeeping operation, the UN and UN peacekeeping military forces must remain impartial. The UN Charter treats all Member States of the UN as equal sovereigns.<sup>67</sup> In order to mediate a conflict effectively, the UN must maintain its status as a neutral and objective third party.<sup>68</sup> This neutrality distinguishes peacekeeping from peace-enforcement. In peace-enforcement, the Security Council determines an aggressor-state and then usually sides with the state that the aggressor-state unlawfully attacked.<sup>69</sup>

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1965 to 1976, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 183, 207-08 (A. Cassese ed., 1995).

<sup>64</sup> See generally Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16.

<sup>65</sup> Antonietta Di Blase, *The Role of the Host-Nation's Consent with Regard to Non-Coercive Actions by the United Nations*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 55, 78 (A. Cassese ed., 1995).

<sup>66</sup> R.C.R. Siekmann, *The Codification of General Principles for United Nations Peace-Keeping Operations*, 35 NETH. INT'L L. REV. 328, 331 (1988).

<sup>67</sup> U.N. CHARTER art. 2, para. 1.

<sup>68</sup> See Brown, *supra* note 59, at 561-66. In the words of one observer,

Impartiality is the oxygen of peace-keeping: the only way peace-keepers can work is by being trusted by both sides, being clear and transparent in their dealings, and by keeping lines of communication open. The moment they lose this trust, the moment they are seen by one side as the "enemy," they become part of the problem they were sent to solve.

Tharoor, *supra* note 11, at 417-18.

<sup>69</sup> U.N. CHARTER art. 39 states:

In classical peacekeeping, however, the UN must treat parties to a conflict equally and not support one over the other. Equal treatment is the norm unless, of course, one party is in clear violation of international law. This impartiality applies equally in international and civil conflicts. If the UN were to support a rebel movement over a nation-state government, this support would imply that the UN does not believe the government is equal to other nation-state governments. Conversely, if the UN supported a nation-state government over a rebel organization and the organization subsequently came into power, the UN and individual nation-states might be reluctant to then recognize the new government. Most importantly, however, impartiality is essential in order to ensure the safety of peacekeepers and obtain the consent, trust, and continued cooperation of the parties to the conflict.<sup>70</sup>

*c. Operational Control and the Chain-of-Command of United Nations Peacekeepers*

The UN is responsible for the direction and control of its peacekeeping forces. UN peacekeeping forces are required to follow its operational orders. The authority of the Security Council flows to the UN Secretary-General. The Secretary-General then appoints the Task Force Commander, who reports directly to, and takes orders from, the Secretary-General. In this way, the UN maintains operational control over a peacekeeping unit. However, direction and control of individual peacekeepers is often the responsibility of the individual soldier's country. As a result, the individual contributing nations still wield significant political influence as they may withdraw their individual forces at any time. However, the UN, as a matter of practice, alleviates the problem of one country prematurely withdrawing its forces from an operation by making the total force politically and geographically diverse. Therefore, even if one country withdraws its individual forces, the entire peacekeeping force does not become operationally compromised.<sup>71</sup>

Thus, a UN peacekeeping force is, by its very nature, multi-national. An individual soldier in this multi-national force is subject to both the UN and the soldier's respective national chain-of-command. The soldier's country

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The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 [measures not involving force] and 42 [demonstrations, blockade, and other operations by air, sea, or land forces], to maintain or restore international peace and security.

<sup>70</sup> See Brown, *supra* note 59, at 574-77. Classical peacekeeping's "fundamental principles are those of objectivity and nonalignment with the parties to the dispute, ideally to the extent of total detachment from the controversial issues at stake." INDAR JIT RIKHYE ET AL., *THE THIN BLUE LINE* 11 (1974).

<sup>71</sup> See Brown, *supra* note 59, at 574-77.

trains, arms, and equips the soldier. Further, soldiers may be disciplined only by their respective national contingents. Yet, the UN exercises operational control over, feeds, and houses the soldier. Both the UN and the contributing nation exercise some control over the soldier, but neither has complete control. This dual command arrangement, with its inherent divided loyalties, is oftentimes problematic.<sup>72</sup> Presently, however, there is no politically viable alternative.

*d. The Composition of United Nations Classical Peacekeeping Forces*

Peacekeepers within a UN force generally speak different languages and have different cultures, political ideologies, and religions. Although these differences obviously make peacekeeping operations more difficult, this extensive diversity in peacekeeping units gives legitimacy to the concept of neutrality and, hence, fosters better cooperation from the parties to the conflict. Further, a multi-national peacekeeping unit tends to be more compliant to the will of the UN Secretary-General than if the peacekeeping organization were composed of military personnel from only a single Member State. If all soldiers of a peacekeeping force came from a single Member State, that State could

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<sup>72</sup> See Brown, *supra* note 59, at 574-77. Most countries are reluctant to release complete control of the forces they provide to United Nations peacekeeping operations. The United States, for example, when providing forces to the United Nations, prohibits its personnel from taking an oath of loyalty to the United Nations. Specifically, 22 USC § 2387 states:

Whenever the President determines it to be in furtherance of the purposes of this chapter, the head of any agency of the United States Government is authorized to detail or assign any officer or employee of his agency to any office or position with any foreign government or foreign government agency, where acceptance of such office or position does not involve the taking of an oath of allegiance to another government or the acceptance of compensation or other benefits from any foreign country by such officer or employee.

See also GLENN BOWENS, LEGAL GUIDE TO PEACE OPERATIONS 365 (1998):

No President has ever relinquished command over U.S. forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice and flows from the President to the lowest U.S. commander in the field. The chain of command from the President to the lowest U.S. commander remains inviolate.

See also U.S. v. New, 50 M.J. 729 (ACCA 1999), *pet. granted*, 52 M.J. 465 (1999) (lawful for U.S. commander to order U.S. soldier to wear United Nations insignia and beret during United Nations peacekeeping deployment).

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potentially wield considerably more influence in the peacekeeping operation than either the UN or the Secretary-General.<sup>73</sup>

As mentioned earlier, the UN generally excluded permanent Security Council Members from direct participation in peacekeeping operations. The Secretary-General, possibly at the implicit behest of the permanent Members, excluded them from peacekeeping duties to prevent peacekeeping operations from being embroiled in Cold War politics. Nevertheless, permanent Members did participate in a few peacekeeping operations. For example, Great Britain contributed to the peacekeeping force in Cyprus and the United States contributed to the peacekeeping force in Egypt following the Egyptian-Israeli peace-treaty. These two operations were the exceptions and not the rule. During the Cold War, the permanent Members of the Security Council generally did not participate in UN peacekeeping operations.<sup>74</sup>

UN peacekeeping missions during the Cold War usually took place in generally civil operational environments.<sup>75</sup> The missions were often very successful. For example, the United Nations Disengagement Observer Force (UNDOF), deployed as observers to Syria in 1974 after the Yom Kippur War, masterfully facilitated the peaceful disengagement and withdrawal of both sides' armed forces from the disputed area.<sup>76</sup> After the successful withdrawal of forces, Egypt's President Nasser simply requested that UNDOF dissolve and it did.<sup>77</sup> Peacekeeping is, at present, internationally accepted as an appropriate vehicle for managing conflicts by acting as a buffer and giving parties to the conflict the ability to look for a long-term peaceful solution.<sup>78</sup>

The end of the Cold War raised legitimate expectations that the number of international conflicts throughout the globe would significantly decrease. However, due to an epidemic of post-Cold War intra-national conflicts, the UN increased its peacekeeping operations, both in number and mission complexity. From 1948 to 1988, the UN authorized only 13 peace operations. From 1988 to 1998, a period of just ten years, the UN authorized thirty-six peace operations—over a 1000% increase from the preceding forty-year period. Such operations included the robust Article VI ½-Article VII hybrid

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<sup>73</sup> See Brown, *supra* note 59, at 577-78.

<sup>74</sup> See Brown, *supra* note 59, at 578-79.

<sup>75</sup> The operative word is "generally." The conflict is usually held in abeyance. However, in most cases, the parties to the previous conflict remain armed, the land-area still heavily mined, and the underlying political problems far from resolved. Peacekeeping duty is never entirely safe.

<sup>76</sup> Berdal, *supra* note 22, at 74.

<sup>77</sup> Marianne von Grunigen, *Neutrality and Peace-Keeping*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 125, 134 (A. Cassese ed., 1995).

<sup>78</sup> Unfortunately, parties to a conflict may sometimes illegitimately use the buffer created by the United Nations peacekeeping force as simply cover to avoid constructive negotiating toward a settlement. For this reason, United Nations peacekeeping missions should look to restoring and maintaining peace, and, simultaneously, pursue a negotiated settlement to the conflict. Lehmann, *supra* note 35, at 17.

peacekeeping actions in Somalia, Haiti, and the Balkans.<sup>79</sup> However, classical peacekeeping missions, the type of peace operations that occurred during and immediately after the Cold War, are becoming less frequent. Classical peacekeeping operations are being replaced by UN-authorized action performed by regional military organizations.<sup>80</sup>

To illustrate, in mid-1993, UN peacekeepers numbered approximately 80,000 personnel. Four years later, at the end of 1997, the number of blue helmet peacekeepers dropped to 13,000.<sup>81</sup> This reduction is attributable to regional military alliances and organizations such as the North Atlantic Treaty Organization (NATO), under the authority of the UN, assuming most of the responsibility of peacekeeping. When these UN-authorized multi-national and regional peacekeeping missions throughout the globe are taken into account, the number of peacekeepers has remained constant.<sup>82</sup> This change in composition, from UN *ad hoc* classical peacekeeping forces to UN-authorized regional organization peacekeeping forces, has resulted in typically more robust, still dangerous, but more effective peacekeeping.<sup>83</sup>

Currently, the UN, if it wishes to engage in a peace operation, must rely upon the good will of a limited number of its Member States able to conduct such an operation. Often, such Member States may want to control and demand to know exactly where and how their forces are to be used—understandably so. Additionally, Member States might only agree to participate if the peacekeeping force is organized under a regional alliance, authorized by the UN to perform a peacekeeping operation, but not under the UN command structure. As a result, the UN might not be able to remain directly involved in many future peacekeeping missions. This lack of UN direct involvement could lead to it losing legitimacy and credibility. Countries could perceive the UN as weak as it contracts out to regional military alliances its peacekeeping responsibilities and obligations rather than performing them itself.<sup>84</sup>

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<sup>79</sup> See United Nations, *UN Peacekeeping: Some Questions and Answers*, <http://www.un.org/Depts/dpko/dpko/ques.htm> (copy on file with the *Air Force Law Review*); and Willy Lubin, *Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47 n.1 (1994).

<sup>80</sup> Grachev, *supra* note 4, at 277.

<sup>81</sup> Examples of such missions include Bosnia-Herzegovina under the North Atlantic Treaty Organization (NATO), Liberia and Sierra Leone under the Economic Community of West African States (ECOMOG), multinational forces in Haiti led by the United States, forces in Rwanda led by France, and forces in Albania led by Italy. See Grachev, *supra* note 4, at 276.

<sup>82</sup> Grachev, *supra* note 4, at 277.

<sup>83</sup> See generally Henrikson, *supra* note 23.

<sup>84</sup> See Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 FORDHAM INT'L L.J. 312, 320 (1995).

*e. Self-Defensive Rules of Engagement and the Use of Force by United Nations Peacekeepers in Classical Peacekeeping Operations*

The final customary norm of UN classical peacekeeping is that the use of force is restricted to self-defense. UN Charter Article 2(1) recognizes “the sovereign equality of all of its Members”<sup>85</sup> and Article 2(7)<sup>86</sup> restricts the UN from intervening in state domestic matters, except during Chapter VII enforcement actions.<sup>87</sup> Although the UN Charter does not explicitly address the use of armed force in a classical peacekeeping operation, nor provide any rules or guidelines,<sup>88</sup> authorized use of force in a classical peacekeeping operation is generally limited to self-defense. Further, the use of force must be proportional to the situation.<sup>89</sup>

Although peacekeeping operations use professional military personnel, they generally do not envisage combat as the means to mission accomplishment. In this regard, Chapter VI peacekeeping is clearly distinguished from Chapter VII peace-enforcement combat operations. Classical peacekeeping is founded on consent of the parties to the conflict. Since the parties have consented to the presence of the peacekeepers, the need to resort to force is greatly diminished. As a result, classical peacekeepers are generally only equipped with weapons for use in self-defense.<sup>90</sup> As explained by William Durch, “[p]eacekeepers may be armed, but only for self-defense; what constitutes appropriate self-defense will vary by mission, but because they are almost by definition outgunned by the disputants they are sent to monitor, any recourse to force must be calibrated to localize and diffuse, rather than escalate, violence.”<sup>91</sup>

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<sup>85</sup> U.N. CHARTER art. 2, para. 1.

<sup>86</sup> U.N. CHARTER art. 2, para. 7 states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

<sup>87</sup> Brown, *supra* note 59, at 570.

<sup>88</sup> See Siekmann, *supra* note 66, at 328.

<sup>89</sup> See generally Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993).

<sup>90</sup> Lehmann, *supra* note 35, at 15-16.

<sup>91</sup> DURCH, *supra* note 44, at 4. In 1958, United Nations Secretary-General Dag Hammarskjöld warned against interpreting “self-defence” too broadly. He said that “a wide interpretation of the right of self-defence might well blur the distinction between [peacekeeping] operations and combat operations, which would require a decision under Chapter VII of the Charter and an explicit, more far-reaching delegation to the Secretary-General than would be required for [peacekeeping] operations.” *Summary Study of the Experience Derived from the Establishment and Operation of the Force*, UN Doc. A/3943 of Oct. 9, 1958, paras. 178-79.

When a UN peacekeeping unit resorts to force, its neutrality and its obligations under international law might be legitimately questioned.<sup>92</sup> Restricting the use of force to self-defense attempts to ensure that the UN peacekeepers remain impartial to the conflict and do not take sides. Peacekeepers can maintain a presence in a country only if the country gives its consent. If a peacekeeping unit took sides in the conflict, it would, in essence, become a hostile force. The actions, and even the mere presence of such a force, could greatly damage relations with the host-country and easily lead the host-country to withdraw its consent. For this reason, it is imperative that UN peacekeeping units remain impartial and only use force in self-defense.<sup>93</sup>

A classical Chapter VI ½ peacekeeping force has no authority or mandate for offensive operations. To use force offensively against a party to the conflict would violate the sovereignty of a state and constitute unauthorized intervention in violation of UN Charter Articles 2(1) and 2(7) which assume that all Member States are equal sovereigns.<sup>94</sup> However, UN Charter Article 104 grants the UN, operating within the borders of its Member States, whatever legal rights are “necessary for the exercise of its functions and the fulfillment of its purposes.”<sup>95</sup> In this regard, it is imperative that a peacekeeping unit has the legal right to defend itself if attacked.<sup>96</sup> Equally necessary, a peacekeeping unit must be able to use force when aiding another peacekeeping force being attacked. Peacekeeping forces, of course, may also collectively defend themselves.<sup>97</sup>

Initially, the use of force in self-defense was generally limited to the most dire of circumstances. Such circumstances included the “imminent danger of death, bodily harm, arrest, or abduction.”<sup>98</sup> However, these restrictive rules of engagement proved unworkable. Out of operational necessity, the UN began to considerably broaden its definition of the use of force in self-defense. During the early 1960s, the UN authorized a 20,000-

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<sup>92</sup> See Lubin, *supra* note 79, at 48.

<sup>93</sup> See Brown, *supra* note 59, at 573. Sir Brian Urquhart explains: “Experience shows that a peace-keeping force which uses its weapons for purposes other than self-defence quickly becomes part of the conflict and therefore part of the problem. It loses its essential status as being above the conflict and acceptable to all sides.” Urquhart, *supra* note 45, at 54.

<sup>94</sup> See Brown, *supra* note 59, at 570.

<sup>95</sup> U.N. CHARTER art. 104.

<sup>96</sup> See Brown, *supra* note 59, at 570.

<sup>97</sup> See Brown, *supra* note 59, at 571.

<sup>98</sup> See Brown, *supra* note 59, at 571. Indeed, the Secretary-General first stated that members of a peacekeeping unit “could not use force on their own initiative.” A peacekeeping unit could legitimately use force in self-defense only if the force was taken in direct response to being attacked by a party using deadly force. *First Report of the Secretary-General*, para. 15, U.N. SCOR, 15<sup>th</sup> Sess., Supp., Jul.-Sep. 1960, at 19, U.N. Doc. S/4389 (1960), *cited in* Brown, *supra* note 59, at 571 n.90. This extremely restrictive authorization of the use of force in self-defense by a peacekeeping unit would only be viable when all parties to the conflict are entirely committed to resolving the conflict and, as a result, fully welcome and cooperate with the peacekeepers. Brown, *supra* note 59, at 571.

member force to establish law and order in the Congo. The UN peacekeeper rules of engagement initially authorized force only in self-defense. However, as the nature of the operation became more complicated, the UN resorted to an expansive definition of “self-defense”—to include even the authorization of pre-emptive strikes against parties to the conflict who were likely to attack the peacekeepers.<sup>99</sup> In subsequent classical peacekeeping operations, however, this expanded definition of self-defense has rarely been necessary or realistic.

To constitute the legitimate use of force in self-defense in a classical peacekeeping operation, the force must be both necessary and proportional. In other words, there must be a potential or real threat that justifies the use of force and the soldier may not use any greater force than is necessary to deal with the threat. If attacked with deadly force, a peacekeeper may respond with deadly force. After the threat is neutralized, the soldier must stop using force.<sup>100</sup> When a peacekeeper uses proportionate force in self-defense, the peacekeeper does not then lose noncombatant<sup>101</sup> protection. However, a peacekeeper, if engaged in sustained conflict and no longer acting strictly in self-defense, could lose noncombatant status, become a combatant<sup>102</sup> and then be *lawfully* engaged as a target.<sup>103</sup> As a practical matter, however, peacekeeping operations generally do not involve peacekeeping forces entering into a state of armed conflict with the actual parties to the conflict. Because peacekeepers in classical “blue helmet” peacekeeping operations have limited

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<sup>99</sup> D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 202-203 (1964).

<sup>100</sup> See Brown, *supra* note 59, at 573.

<sup>101</sup> The term noncombatant is used to describe individuals who may not be lawfully targeted. Such individuals include civilians, medical personnel, chaplains, and combat personnel who “have been placed out of combat by sickness, wounds, or other causes including confinement as prisoners of war.” AFPAM 110-31, *supra* note 13, at para. 3-4(a-d)(1976). The term also includes United Nations peace-keeping forces. See *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, § 1.2, ST/SGB/1999/13 (1999), available at [http://www.un.org/peace/st\\_sgb\\_1999\\_13.pdf](http://www.un.org/peace/st_sgb_1999_13.pdf) (copy on file with the *Air Force Law Review*) [hereinafter *Secretary-General's Bulletin*] (explaining that the “bulletin does not affect [United Nations peacekeepers’] status as non-combatants, as long as they are entitled to protection given to civilians under the international law of armed conflict.”).

<sup>102</sup> One source defines “combatant” as follows:

A combatant is a person who engages in hostile acts in an armed conflict on behalf of a Party to the conflict. A lawful combatant is one authorized by competent authority of a Party to engage directly in armed conflict. He must conform to the standards established under international law for combatants . . . The combatant, thus invested with authority, must be recognizable as such.

AFPAM 110-31, *supra* note 13, at para. 3-2(a-d). Combatants are lawful targets and may be engaged at any time during an armed conflict. See U.S. Dept. of the Air Force, Air Force Pamphlet 110-34, Commander’s Handbook on the Law of Armed Conflict, paras. 2-6 to 2-7 (1980) (reissue pending at AFI 51-709) [hereinafter AFPAM 110-34].

<sup>103</sup> See Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT’L L. 621, 625 n.12 (1995).

the use of force to self-defense, the application of the law of armed conflict to such operations has not been questioned.<sup>104</sup>

### **B. United Nations Charter Chapter VI $\frac{3}{4}$ Peacekeeping Operations—Robust Operations**

During post-Cold war active and robust Chapter VI  $\frac{1}{2}$  peacekeeping operations, the UN military forces tend to operate under more vigorous rules of engagement. Such robust operations are sometimes referred to as Chapter VI  $\frac{3}{4}$  peacekeeping operations. In such cases, the definition of self-defense is expanded. For example, in 1992, the United Nations Protection Force (UNPROFOR) was given the mission in Bosnia-Herzegovina to protect convoys and supplies designated for humanitarian purposes. The Secretary-General, while not authorizing the UN peacekeepers to engage in offensive operations, again used an expanded definition of “self-defense.”<sup>105</sup> The Secretary-General declared that peacekeepers in Bosnia-Herzegovina “would follow normal peace-keeping rules of engagement [and] would thus be authorized to use force in self-defence . . . It is noted that in this context self-defence is deemed to include situations in which armed persons attempt by force to prevent UN troops from carrying out their mandate.”<sup>106</sup> He also said that UN peacekeepers would protect convoys, if requested to do so by the UN High Commissioner for Refugees. UN peacekeepers would also accompany repatriated prisoners of war to safe areas, if requested to do so by the International Committee of the Red Cross (ICRC).<sup>107</sup>

This expanded (arguably loose) definition of self-defense is likely to become the applicable norm for UN peacekeeping forces in future robust peacekeeping operations. A UN force may protect itself in self-defense, and it may prevent another armed force from interfering with it, while it is carrying out a UN mandate. However, any response must be proportionate to the attack in that it is directed at subduing the attackers and it makes every reasonable effort to prevent the fight from escalating. Additionally, the use of armed force, taken in response to actions that prevent the accomplishment of the UN mandate, must be tied to humanitarian concerns. By limiting coercive use of force to humanitarian circumstances, the peacekeepers can maintain the moral authority necessary to ensure their safety and continue their mission.<sup>108</sup>

Because of the very recent development of robust Chapter VI  $\frac{1}{2}$  peacekeeping operations, as well as their inherent complexities, the UN has yet to create consistent and workable rules regarding the use of force in such operations. Although it has formulated workable guidelines as to the use of

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<sup>104</sup> See Gardam, *supra* note 18, at 291.

<sup>105</sup> GREEN, *supra* note 49, at 324.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

force in self-defense in classical Chapter VI ½ peacekeeping operations, there is little agreement as to how the laws of armed conflict apply during robust Chapter VI ½ operations.<sup>109</sup>

### C. United Nations Charter Chapter VII Peace-Enforcement Operations

Chapter VII of the UN Charter is entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.”<sup>110</sup> A Chapter VII peace-enforcement action is not a peacekeeping mission. Yet, just as the UN Charter does not mention peacekeeping, neither does it mention the term “peace-enforcement.” Even so, essentially any Chapter VII operation is one of creating and then maintaining peace. As the UN cannot be expected to mount a peacekeeping operation when there is no peace to be kept, Chapter VII envisages that the UN will, in certain circumstances, affirmatively enforce and make peace.

Peace-enforcement is distinct from peacekeeping as it usually involves the use of force against a nation-state, whereas classical peacekeeping limits the use of force to self-defense.<sup>111</sup> Yet, to date, the UN has never conducted, nor authorized, a “pure” peace-enforcement action. Rather, in the form of “neopeace-enforcement,”<sup>112</sup> the UN has only “invited” or “requested” its Member States to take offensive military action on its behalf. Further, it has only authorized four such “neopeace-enforcement” operations.<sup>113</sup> It is Article 43 of the UN Charter<sup>114</sup> that was envisaged to be the primary instrument of the

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<sup>109</sup> Akashi, *supra* note 84, at 320. Some say it is simply too difficult to apply the international law of armed conflict to United Nations peacekeeping operations. Instead, international humanitarian law should remain merely “relevant” to peacekeeping operations. Lehmann opines:

It is probably too complicated and not even necessary to try to incorporate the UN peace-keeping system into the negeal framework of international humanitarian law applicable in armed conflicts, but on a case by case basis special considerations might be given to the effect of that body of law on the proper functioning of the UN peace-keeping operations.

Lehmann, *supra* note 35, at 17.

<sup>110</sup> U.N. CHARTER arts. 39-51.

<sup>111</sup> See Gardam, *supra* note 18, at 290-92.

<sup>112</sup> Neopeace-enforcement refers to “the practice of the Security Council to contract out enforcement actions to Member States.” Sharp, *supra* note 11, at 103.

<sup>113</sup> Sharp, *supra* note 11, at 100-01. The four “neopeace-enforcement” actions were the authorization of Member States to repel North Korea’s invasion of South Korea in 1950, the authorization to intercept oil tankers bound for Southern Rhodesia in 1966, and two authorizations for Member States to eject Iraq from Kuwait in 1990-91. Sharp, *supra* note 11, at 102, n.41.

<sup>114</sup> U.N. CHARTER art. 43 states:

UN Security Council in peace-enforcement. The goal was creation of a standing UN military force to be used to secure and maintain international peace. Due to Member State political differences, this force has yet to come into being.<sup>115</sup>

As there are no military forces at the Security Council's direct disposal, its Military Staff Committee has no forces to direct in a "pure" peace-enforcement action. Instead, the Security Council occasionally has authorized Member States to conduct Chapter VII "neopeace-enforcement actions"<sup>116</sup> on behalf of the UN. The two most notable of these include the 1950 Korea neopeace-enforcement action and the 1991 neopeace-enforcement action against Iraq. In both cases, although it was the UN that authorized offensive military action, the operations were not under the command of the UN.<sup>117</sup> Further, in both cases, the forces authorized by the UN were "belligerent forces in an international armed conflict," and therefore, under existing international

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1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
  2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
  3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

<sup>115</sup> Sharp, *supra* note 11, at 101. One international law authority has proffered an idealistic, albeit presently politically impossible, approach to achieve more effective peacekeeping and increase United Nations credibility. Burns H. Weston has recommended that Member States specially train military forces for peacekeeping duties and agree to place them on permanent standby in accordance with United Nations Charter Article 43. See RICHARD A. FALK, ROBERT C. JOHANSEN, & SAMUEL S. KIM, *THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE* 362 (1993). Military equipment and supplies would be stockpiled and available for immediate use by peacekeeping forces activated on short notice. The United Nations would have much more flexibility to respond immediately with peacekeeping forces to crises as they arise. They would be available to be deployed into immediate action. If a regional crisis reached a certain established threshold, the United Nations would begin peacekeeping operations automatically, without consulting the Security Council. The peacekeeping forces could enter the territory of a country without first gaining that country's consent. United Nations peacekeeping operations would be directed toward securing an expeditious end to the conflict. However, more importantly, peacekeeping efforts would be directed toward the long-term stability of the region. *Id.* Such an arrangement would put the United Nations in the forefront of international peace and security.

<sup>116</sup> See Sharp, *supra* note 11, at 102-03.

<sup>117</sup> BOUTROS-GHALI, *supra* note 38, at 6.

law, the personnel who served in these armed forces were lawful targets.<sup>118</sup> For the purposes of this article, however, peace-enforcement actions refer to both “pure” peace-enforcement and “neopeace-enforcement” actions.

UN Charter Chapter VII provides the authority to enforce peace in the spirit of international collective defense. UN Member States, when authorized by the Security Council under Chapter VII, may take military action against an unlawfully expansionist military state or power.<sup>119</sup> Chapter VII of the Charter envisages that the UN Security Council would enforce the peace initially through provisional measures such as “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>120</sup> If these measures should prove to be inadequate, UN Charter Article 42<sup>121</sup> authorizes the Member States to pursue collective military offensive operations against the offending state or states.<sup>122</sup> The Security Council may “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”<sup>123</sup>

### *1. The Cold War–The Korean War*

During the Cold War, the UN Security Council authorized a Chapter VII peace-enforcement action to repel North Korea's invasion of South Korea. A unique set of circumstances led to this authorization. In 1950, to protest the UN decision to seat the Chinese Nationalist Formosa government instead of the Chinese Communists at the Security Council, the Soviet Union recalled its permanent representative from the Council.<sup>124</sup> On June 24th of that year, the North Koreans, supported by the Soviet Union, invaded South Korea. The United States called an emergency meeting of the Security Council. As a result of the fortuitous absence of the Soviet Union's representative and,

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<sup>118</sup> Sharp, *supra* note 11, at 102.

<sup>119</sup> Sanderson, *supra* note 31, at 148.

<sup>120</sup> U.N. CHARTER art. 41.

<sup>121</sup> U.N. CHARTER art. 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, or other operations by air, sea, or land forces of Members of the United Nations.

(emphasis added).

<sup>122</sup> Sanderson, *supra* note 31, at 148.

<sup>123</sup> U.N. CHARTER art. 42.

<sup>124</sup> BRIAN CROZIER ET AL., THIS WAR CALLED PEACE 92, 93 (1984). The Soviet Union recalled its Security Council permanent representative from Jan. 10, 1950 to Aug. 1, 1950. Berkhof, *supra* note 2, at 300 n.6.

concomitantly, the absence of the Soviet Union's permanent Member veto authority, the Council was able to denounce the invasion, order North Korea to withdraw its forces from South Korea,<sup>125</sup> and recommend that Member States provide military forces to counter North Korea's invasion of South Korea.<sup>126</sup>

If the Soviet Union had been present at the Security Council, there is little doubt that they would have vetoed the UN peace-enforcement operation. Countries, if they acted at all, would have had to take action in their sovereign national capacity instead of under the authority of the UN.<sup>127</sup> The absence of the Soviet Union permanent representative was an anomaly that never happened again.<sup>128</sup> The Soviet Union permanent representative did not miss future meetings of the Security Council.<sup>129</sup> The Security Council was again at an impasse.<sup>130</sup> As a result, the United States turned to the UN General Assembly, which passed the famous "Uniting for Peace Resolution."<sup>131</sup> This resolution authorized continuing military action against North Korea until the conflict concluded. With the Uniting for Peace Resolution, the General Assembly assumed a cooperative, but unequal, role with the Security Council in international peace and security.

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<sup>125</sup> J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 15 (1999). The Soviet Union was fully informed that the Security Council was going to vote to condemn the invasion of North Korea. The Soviet Union responded, taking the position that any vote without their presence would be illegal. The Soviet Union miscalculated in believing their absence was, in effect, a veto of any Security Council action. Instead, the Security Council voted without them, condemning North Korea's invasion of the South and authorizing a United Nations force to repel it. See Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 238 (1998).

<sup>126</sup> Henrikson, *supra* note 23, at 44.

<sup>127</sup> Lehmann, *supra* note 35, at 14.

<sup>128</sup> Berkhof, *supra* note 2, at 301.

<sup>129</sup> Godwin, *supra* note 125, at 15. The Soviet Union permanent representative returned to the Security Council on July 27, 1950. The representative then made numerous unsuccessful attempts to unseat the Formosa Nationalist Chinese representative from the Security Council. The Soviet Union permanent representative attended every subsequent Security Council meeting regarding Korea, vetoing every subsequent resolution pertaining to the Korean conflict. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 67 (1993).

<sup>130</sup> A. B. FETHERSTON, *TOWARDS A THEORY OF UNITED NATIONS PEACEKEEPING* 27 (1994).

<sup>131</sup> U.N. GAOR 5<sup>th</sup> Sess., Supp. No. 20, at 10 (UN Doc. A/1775) (1950). The General Assembly made the following resolution:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security [the General Assembly] may make appropriate recommendations for collective measures, including in the case of a breach of the peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security.

*Id.*

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The Korean conflict was the only time that the UN has undertaken a peace-enforcement action in the name of the UN. It condemned North Korea, a non-Member, for its aggression against South Korea. Because the Members of the UN had not created any military force as envisaged by UN Charter Article 43, the Security Council requested Member States to contribute military forces to be used in opposing North Korea's aggression. These forces were then organized and placed under the command of the UN. However, the United States provided the most forces and, most importantly, the command and control for the unified UN Command.<sup>132</sup> Ultimately, the UN Command and the United States Command were, for all practical purposes, the same. As a result, the UN had a very limited role in military operations throughout the Korean conflict.<sup>133</sup>

On July 27, 1953, the parties to the conflict signed an armistice at Panmunjom.<sup>134</sup> The borders were reestablished to substantially what they were prior to North Korea's invasion, and a demilitarized zone (DMZ) roughly along the 38<sup>th</sup> parallel still separates the two countries. Although the parties agreed to end active hostilities, it was merely the beginning of an unsettled peace. North Korea and South Korea are still technically in a state of war. The UN accepted victory in the form of a stalemate, a stalemate that still exists.<sup>135</sup> Today, the UN Command—with the United States continuing to act as the United Nations' named executive agent—remains vigilant, effectively deterring North Korea from resuming hostilities.

## 2. *Post-Cold War—The Persian Gulf War*

The Persian Gulf War is the second notable Security Council peace-enforcement action. The underpinnings of the conflict trace back to when Kuwait provided millions of barrels of oil on credit to Iraq during its 1980-88

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<sup>132</sup> GREEN, *supra* note 49, at 321-22. The United States contributed approximately 250,000 troops to Korean operations. Fifteen Member States contributed an additional 36,000 troops. Lehmann, *supra* note 35, at 14. United States personnel killed-in-action numbered 33,629. Other contributing countries' personnel losses numbered 3195. The high losses to the contributing nations made the United Nations Member States very reluctant to again choose this method of peace-enforcement. BERKHOF, *supra* note 2, at 301.

<sup>133</sup> Lehmann, *supra* note 35, at 14. *See also* Bruce Russett & James S. Sutterlin, *The U.N. in a New World Order*, FOREIGN AFF., Spring 1991, at 69, 73-74 ("The U.S. Commander of the U.N. Force in Korea never reported directly to the Security Council and the Military Staff Committee and the Security Council did not have any role in directing the military operations of the unified command.")

<sup>134</sup> BERKHOF, *supra* note 2, at 301. An armistice is merely a "temporary suspension of hostilities by agreement between the opponents." (emphasis added). WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 103 (9<sup>th</sup> ed. 1984).

<sup>135</sup> Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 238 (1998).

armed conflict with Iran.<sup>136</sup> When Kuwait would not forgive Iraq's extensive debt, Iraq became belligerent. Iraq accused Kuwait of "slant drilling" and taking disproportionate shares of a common oil field along the Iraq-Kuwait border. It further made accusations that Kuwait was exceeding oil quotas agreed to by the members of the Organization of Petroleum Exporting Countries (OPEC) and thereby was responsible for Iraq's lagging economy. Finally, Iraq demanded that Kuwait relinquish its sovereignty of certain islands in the Persian Gulf. Even though Iraq had previously assured its Arabian neighbors that it would not resort to military force, on August 2<sup>nd</sup>, 1990, Iraq attacked Kuwait. Iraq crossed its southern border and invaded Kuwait with over 100,000 troops. Kuwait's military was quickly routed. The Security Council, at the request and urging of the United States, convened an emergency meeting, condemned the invasion and demanded that Iraq immediately withdraw from Kuwait. This was the first of numerous Security Council actions leading up to the Persian Gulf War.

Military forces "invited" by the Security Council conducted the UN peace-enforcement action in Korea from 1950-53. In contrast, forces "authorized" by the Security Council conducted the UN peace-enforcement action in the Persian Gulf War in 1991.<sup>137</sup> Yet, the military action taken against Iraq also was not a true UN peace-enforcement action.<sup>138</sup> It was an action in collective self-defense. The Security Council first officially affirmed that Kuwait had "the inherent right of individual or collective self-defense, in response to an armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."<sup>139</sup> The Amir of Kuwait then requested the United States to assist Kuwait in collective self-defense to restore the legitimate Kuwaiti government.<sup>140</sup> After this request, the Security Council authorized "Member

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<sup>136</sup> For a discussion of the events leading up to armed conflict, see L.C. Green, *The Gulf 'War,' the UN and the Law of Armed Conflict*, 28 ARCHIV DES VOLKERRECHTS 369, 373-74 (1991).

<sup>137</sup> Lubin, *supra* note 79, at 49 nn.4-5.

<sup>138</sup> GREEN, *supra* note 49, at 322.

<sup>139</sup> S.C. Res. 661, U.N. SCOR, U.N. Doc. S/RES/661 (1990), reprinted in 29 I.L.M. 1325 (1990).

<sup>140</sup> The full text of the Aug. 12, 1990 letter from the Kuwaiti Amir to the President of the United States reads as follows:

Dear Mr. President,

I am writing to express the gratification of my government with the determined actions which the Government of the United States and other nations have taken and are undertaking at the request of the Government of Kuwait. It is essential that these efforts be carried forward and that the decisions of the United Nations Security Council be fully and promptly enforced. *I therefore request on behalf of my government and in the exercise of the inherent right of individual and collective self-defense as recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented.* Further, as

States co-operating with Kuwait . . . to use all necessary means to uphold and implement” the resolutions.<sup>141</sup> The Security Council gave Iraq an ultimatum to withdraw from Kuwait by January 15, 1991. After Iraq failed to do so, the Persian Gulf War Coalition began massive air strikes and, approximately a month later, conducted a ground assault that overwhelmed Iraqi forces in only three days. The Coalition fully liberated Kuwait, ejecting all Iraqi forces, by the end of February 1991.<sup>142</sup>

The action against Iraq was, ultimately, a UN authorized military action in “collective self-defense” in accordance with Article 51, and not a pure peace-enforcement action.<sup>143</sup> Coalition military forces remained under their own national contingents. The national contingents were organized and placed under the strategic command of United States General H. Norman Schwarzkopf. The Coalition forces did not wear UN insignia and were not bound to follow UN tactical instructions.<sup>144</sup>

#### **D. Peacekeeping Versus Peace-Enforcement**

Distinctions between peacekeeping missions authorized under UN Charter Chapter VI and peace-enforcement operations authorized under Chapter VII need to be clearly defined. Any use of force by a Chapter VI peacekeeper must be strictly construed, as Chapter VI peacekeepers may only use armed force in self-defense. UN peace-enforcement operations, on the other hand, routinely involve the use of force, oftentimes actual combat, as a means of securing peace. Accordingly, the two operations, peacekeeping and peace-enforcement, are fundamentally different.

Chapter VI peacekeeping operations should be specifically tailored to the situation or crisis and, generally, preclude offensive military operations. The rules of engagement regarding the use of force must be clear and

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we have discussed, I request that the United States of America assume the role of coordinator of the international force that will carry out such steps.  
With warmest regards,  
Amir of the State of Kuwait

(emphasis added) (copy on file with the *Air Force Law Review*).

<sup>141</sup> S.C. Res. 678, U.N. SCOR, 45<sup>th</sup> Sess., 2963 mtg., U.N. Doc. S/RES/678 (1990), *reprinted in* 29 I.L.M. 1565 (1990). This resolution was in sharp contrast to the Security Council’s 1950 Korea conflict resolution in which the Soviet Union “abstained” (was not present to vote) and the Republic of China voted affirmatively. In the Security Council’s resolution authorizing Member States to use all necessary means to eject Iraq from Kuwait, the People’s Republic of China abstained and Russia voted affirmatively.

<sup>142</sup> HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS* 17-18 (1996).

<sup>143</sup> Article 51 of the United Nations Charter states in pertinent part: “Nothing in the present Charter shall impair the inherent right or collective self-defence if an armed attack occurs against a Member of the United Nations . . .” U.N. CHARTER art. 51.

<sup>144</sup> GREEN, *supra* note 49, at 322-23.

peacekeeping soldiers must apply them equally to all parties to the conflict. In order to avoid losing credibility and to prevent escalating the conflict, Chapter VI peacekeeping soldiers must exercise great discretion in the use of force. If Chapter VI peacekeepers regularly use force, the mission becomes expanded to a *de facto* peace-enforcement mission for which the peacekeepers are not likely adequately prepared or equipped.<sup>145</sup>

The distinction between peacekeeping and peace-enforcement is, currently, not nearly as clear as many believe or would wish. The Security Council can change a peacekeeping mission or mandate so that it begins to take on the character of a peace-enforcement action. Secondly, peacekeeping operations frequently are animated and fluid, subject to rapid changes in intensity. As one highly experienced UN peacekeeper explains:

Once violence erupts the peacekeeper must often wait until the smoke of battle clears and the parties have agreed to take their first steps toward conflict resolution. In cases where the fighting does not stop and a decision is taken to intervene regardless, we are no longer talking about peacekeeping, but rather enforcement, intervention, or plain old war. Whatever we call it, we are in a totally different province from peacekeeping.<sup>146</sup>

The UN commander on the ground, duty-bound to protect his force, must then ascertain what laws apply. The commander is given a mission and is duty-bound to carry it out. Yet, as the commander's responsibilities and mission implicitly change from peacekeeping toward peace-enforcement, so do the applicability or non-applicability of the law of armed conflict. Unfortunately, the commander will not usually have a military lawyer immediately available to sort out whether or not the UN military force has become a party to the conflict resulting in the attendant application of the law of armed conflict.<sup>147</sup>

This is why there should continue to be a clear distinction between peacekeeping and peace-enforcement operations. UN “[f]orces must not cross the impartiality divide from peacekeeping to peace enforcement. If perceived to be taking sides, the force loses its legitimacy and credibility as a trustworthy third party, thereby prejudicing its security.”<sup>148</sup> Nevertheless, the distinction has of late been blurred as UN peacekeeping forces are given more robust operational contingencies causing peacekeeping missions to creep toward active peace-enforcement. This has the highly undesirable effects of eroding

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<sup>145</sup> Akashi, *supra* note 84, at 320-21.

<sup>146</sup> JAMES H. ALLEN, PEACEKEEPING: OUTSPOKEN OBSERVATIONS BY A FIELD OFFICER 39 (1996).

<sup>147</sup> Thomas B. Baines, The Laws of War and the Rules of Peacekeeping 3-4, Paper Presented to the Joint Services Conference on Professional Ethics (Jan. 31, 1997), at <http://www.usafa.af.mil/jscope/JSCOPE97/Baines97.htm> (copy on file with the *Air Force Law Review*).

<sup>148</sup> Max R. Berdal, *Fateful Encounter: The United States and UN Peacekeeping*, 36 SURVIVAL 1, 5-6 (1994).

the credibility of the mission and endangering peacekeepers.<sup>149</sup> In the words of former Secretary-General Boutros Boutros-Ghali:

The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.<sup>150</sup>

Unfortunately, the UN and its Member States do not have a clear and consistent policy regarding the use of force, except in the case of a classical peacekeeping operation in which peacekeepers are limited to the use of force in self-defense. Absent a cogent policy on the use of force in situations outside classical peacekeeping, a peacekeeping mission should not be allowed to become something it is not—a peace-enforcement mission. In other words, peacekeeping and peace-enforcement, in accord with their different mandates, must remain distinctly different missions. Peacekeeping should only be authorized under Chapter VI and peace-enforcement operations should only be authorized under Chapter VII. If a classical peacekeeping mission begins to change and take on the character of a peace-enforcement operation, the UN should formally change the mission. It should withdraw its noncombatant peacekeepers, modify its previous mandate to a Chapter VII operation, and deploy a more appropriately trained and equipped combat force to accomplish the mission.<sup>151</sup>

The decision to mount a Chapter VI peacekeeping mission results from political and military considerations that are quite different from those that would dictate a Chapter VII peace-enforcement action. Peacekeeping is intended to suspend a conflict and allow the parties to pursue a long-term peaceful solution. A peace-enforcement action, on the other hand, is the use of military force to compel the desired result. The dynamics of the peacekeeping and peace-enforcement are entirely distinct from each other. If the clear distinction between these two separate UN security mechanisms becomes blurred, other ongoing peacekeeping missions can lose credibility and peacekeepers could be endangered. Peacekeeping, in which force may only be used in self-defense, and peace-enforcement, in which force is used to obtain a desired result, must be kept as separate and distinct alternatives. They should not be looked upon as points on a continuum in which a peacekeeping mission

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<sup>149</sup> See *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fifteenth Anniversary of the United Nations, Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 50<sup>th</sup> Sess., para. 35, U.N. Doc. A/50/60, S/1995/1 (1995).

<sup>150</sup> *Supplement to an Agenda for Peace: Report of the Secretary General*, 9 para. 35, U.N. Doc. S/1995/1A/50/60 (1995).

<sup>151</sup> Akashi, *supra* note 84, at 320-21.

would, if the military or political situation should change, simply change with it and expand into a peace-enforcement action.<sup>152</sup>

If such a significant change in political or military circumstances occurs within a peacekeeping mission, the UN must re-evaluate its collective position. Should it wish to continue its mission as one of peace-enforcement, the UN should then withdraw its peacekeeping forces. It should exclusively and expressly undertake peace-enforcement missions only under Chapter VII. Then, Member States could contribute appropriately trained and equipped peace-enforcement military forces. As a practical matter, however, these forces, authorized under Chapter VII, might have both peacekeeping and peace-enforcement duties. The forces should be given the appropriate resources to adequately perform the enforcement operation and, if necessary, to escalate it. The peacekeeping forces should be given clear rules of engagement, tailored to the specific mission, as to when and in what circumstances armed force is to be used in order to avoid inappropriately escalating the conflict and undermining the UN intended end-state to the conflict.<sup>153</sup>

### **E. Protection of Peace-Keepers**

Over the past decade, the size and complexity of peacekeeping operations have greatly increased.<sup>154</sup> Concomitantly, the danger to

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<sup>152</sup> BOUTROS-GHALI, *supra* note 10, at 15-16; *see also* Marrack Goulding, *The Evolution of United Nations Peace-Keeping*, 69 INT'L AFF. 451 (1993). Goulding notes:

Creating this kind of grey area between peace-keeping and peace-enforcement can give rise to considerable dangers. In political, legal and military terms, and in terms of survival of one's own troops, there is all the difference in the world between being deployed with the consent and cooperation of the parties to help them carry out an agreement they have reached and, on the other hand, being deployed without their consent and with powers to use force to compel them to accept the decisions of the Security Council.

*Id.* at 461.

<sup>153</sup> Akashi, *supra* note 84, at 322.

<sup>154</sup> *See generally* Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, 121 (Helen Durham & Timothy L.H. McCormack eds., 1999) [hereinafter Cartledge, *Legal Constraints*].

Peacekeeping operations in the 1990s have seen the following activities being undertaken: military, including cease-fire monitoring, cantonment and demobilisation of troops, and ensuring security for elections; policing; human rights monitoring and enforcement; information dissemination; observation, organisation and conduct of elections; rehabilitation and reconstruction of State structures; repatriation and resettlement of large

peacekeeping personnel has also dramatically increased. Many countries have become reluctant to contribute troops to peacekeeping operations due to the dramatic increase in risks. In order to be able to better protect UN peacekeepers, the UN General Assembly has entertained several proposals by Member States. Ukraine, for example, proposed that the UN create an international mobile peacekeeping force, specifically trained and equipped to be used to provide back-up assistance to peacekeepers should they come under prolonged attack. New Zealand advocated that UN peacekeepers should be designated internationally protected persons. As such, anyone who harmed them would be criminally prosecuted.<sup>155</sup>

Some within the UN Secretariat believed the problem of protecting peacekeepers was so serious that it was imperative that the UN immediately act with a resolute response and policy. Others argued against the UN providing additional protections to its peacekeepers. These people were concerned that the UN would eventually have to negotiate with the same people who have been attacking the peacekeepers. In other words, if the UN were to criminalize these attackers, these people argued that it would then be impossible for the UN to work with them after hostilities had ceased.<sup>156</sup> Still others were concerned that if the UN enforced the protection of its peacekeepers through additional and possibly more destructive military action, the parties to the conflict might blame and then attack the peacekeepers for causing the additional action.<sup>157</sup>

This is not to say that peacekeepers were not afforded any protection. For example, the 1980 UN Convention on the Prohibition or Restriction on the Use of Conventional Weapons expressly provided that peacekeepers receive information regarding the location of mines within an area of operations. Specifically, Article 8 of the Convention's second Protocol requires that each party to the conflict must provide all available information regarding the number, types, and locations of mines and booby traps in the area to the UN peacekeeping force.<sup>158</sup> However, it was clear that much more had to be done.

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numbers of people; administration during transition of one regime to another; [and] working with or overseeing the operations of regional or non-UN peacekeeping operations.

*Id.* at 124, n.7 (citing Ramesh Thakur, *Introduction: Past Imperfect, Future Uncertain*, in *THE UNITED NATIONS AT FIFTY: RETROSPECT AND PROSPECT 7* (Ramesh Thakur, ed., 1996)).

<sup>155</sup> Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, in *NEW DIMENSIONS OF PEACEKEEPING* 181, 190 (Daniel Warner ed., 1995); *see also* Bloom, *supra* note 103, at 622. When finalized, the Safety Convention had drawn upon both the approaches of New Zealand and the Ukraine. *Id.*

<sup>156</sup> Peck, *supra* note 155, at 190.

<sup>157</sup> *See generally id.*

<sup>158</sup> Lehmann, *supra* note 35, at 16-17. Article 8 reads as follows:

Protection of United Nations forces and missions from the effects of minefields, mines and boobytraps.

In 1992, the UN General Assembly set up a committee to draft a Convention to protect UN peacekeepers. Three years later, the General Assembly adopted the Convention on the Safety of UN and Associated Personnel.<sup>159</sup> This Convention criminalizes attacks on UN personnel engaged in peacekeeping operations. In no way does the Convention limit the right of UN personnel to defend themselves.<sup>160</sup>

The Geneva Conventions do not address circumstances where the parties to a conflict attack UN peacekeepers and the peacekeepers respond in self-defense, but do not become “parties to the conflict.”<sup>161</sup> However, should an attack on a classical peacekeeper escalate into an armed conflict, the peacekeeper will not lose protection under the Safety Convention. If a classical peacekeeper engages an attacker strictly in self-defense, regardless of whether combat has taken place, the peacekeeper is still a noncombatant and not a party to the conflict, and, therefore, not a lawful target. The attacker, on the other hand, is a war criminal engaging in an unlawful attack on a noncombatant.<sup>162</sup>

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1. When the United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in the area, as far as it is able: a) remove or render harmless all mines or booby-traps in that area; b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and c) make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby-traps in that area.

2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission, except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or Have Indiscriminate Effects, art. 8, 1342 U.N.T.S. 137, 171, *reprinted in* 19 I.L.M. 1523, 1533 (1980).

<sup>159</sup> Convention on the Safety of United Nations Personnel, G.A. Res. 49/59, U.N. GAOR, 49<sup>th</sup> Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994) [hereinafter Safety Convention], *reprinted in* 34 I.L.M. 482, 492 (1995); *see generally* Gardam, *supra* note 18, at 287 n.4; and Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUS. J. INT'L L. 359, 370-464 (1996).

<sup>160</sup> Bloom, *supra* note 103, at 630. Article 21 of the Convention states that “Nothing in this Convention shall be construed so as to derogate from the right to act in self-defense.” Safety Convention, *supra* note 159.

<sup>161</sup> Greenwood, *supra* note 15, at 189.

<sup>162</sup> *See* Bloom, *supra* note 103, at 625-26 n.12.

### III. THE APPLICATION OF THE INTERNATIONAL LAWS OF ARMED CONFLICT TO UNITED NATIONS FORCES: HOW AND WHEN DOES THE LAW OF ARMED CONFLICT APPLY?

#### A. United Nations Classical Peacekeepers as Noncombatants

The law of armed conflict generally does not apply to peacekeepers because they are not in a state of armed conflict with anyone.<sup>163</sup> As noncombatants, UN peacekeepers are protected as such under Geneva Convention Common Article 3<sup>164</sup> and Additional Protocol I, Articles 37(1)(d)<sup>165</sup> and 38.<sup>166</sup> To designate themselves clearly as noncombatants, peacekeepers wear blue helmets and armbands. Only the UN may authorize the wearing of its emblems and symbols. It is unlawful for a non-peacekeeper to wear UN insignia to avoid being targeted. A party to the conflict that does so is guilty of perfidy<sup>167</sup> and may be punished accordingly.<sup>168</sup> It follows that Protocol I assumes that UN peacekeeper personnel have protected standing. However, the Protocol does not define or explain the extent or attributes of this “protected status.”<sup>169</sup> It is clear, however, that Protocol I is meant to apply to

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<sup>163</sup> Cartledge, *International Humanitarian Law*, *supra* note 14, at 150 (“[Traditional] UN peace-keeping operations by their very nature do not normally involve armed conflict.”).

<sup>164</sup> The four Geneva Conventions of 1949 provide identical language at Common Article 3, protecting “[p]ersons taking no active part in the hostilities.” *See, e.g.*, Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 19, 6 U.S.T. 3114 (entered into force Oct. 21, 1950).

<sup>165</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 37, 1125 U.N.T.S. 7. The Protocol prohibits “the feigning of protected status by the use of signs, emblems, or uniforms of the United Nations or of neutral or other states not parties to the conflict.” Art. 37(1)(d), 1125 U.N.T.S. at 21, *reprinted in* 16 I.L.M. at 1409.

<sup>166</sup> Article 38 of Protocol I makes it unlawful to misuse the United Nations flag or emblem. Article 38 states: “[I]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 38, 1125 U.N.T.S. 3, 22, *reprinted in* 16 I.L.M. 1391, 1409.

<sup>167</sup> Perfidy is a violation of the international law of armed conflict. Perfidy involves a party to the conflict “inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature*, Dec. 12, 1977, art. 37(1), 1125 U.N.T.S. 3, 22, *reprinted in* 16 I.L.M. 1391, 1409.

<sup>168</sup> *See* GREEN, *supra* note 49, at 323-24. Although the United States has not ratified Protocol I, the United States views the art. 37 & 38 perfidy provisions as customary international law. UNITED STATES ARMY OPERATIONAL LAW HANDBOOK, 5-2 & 5-3 (Manuel E. F. Supervielle et al. eds., 2000) [hereinafter OPS LAW HANDBOOK].

<sup>169</sup> Greenwood, *supra* note 15, at 190.

classical peacekeeping missions and not to apply during peace-enforcement actions where UN forces are engaged as combatants.<sup>170</sup>

However, the law of armed conflict will apply if the UN peacekeepers become a party to an armed conflict through the use of force for reasons other than self-defense. Should this happen, there are many resulting consequences. When the law of armed conflict applies, “captured force members would be entitled to prisoner of war status, forces actively engaged in hostilities would be lawful military targets, and enemies would be entitled to combatants’ privilege.”<sup>171</sup> Of primary importance, however, if UN peacekeepers are parties to the conflict and the law of armed conflict applies, is that the peacekeepers are no longer protected as noncombatants. As a result, the “participants in a conflict will target U.N. forces as enemies.”<sup>172</sup>

### **B. The Law of Armed Conflict as Applicable to Classical Peacekeeping Operations—The “Principles and Spirit” of the Law**

Classical peacekeeping forces are part of and act under the authority of the UN. The UN as an organization is not bound by the Conventions relating to the law of armed conflict, except in cases where the Conventions represent international customary law.<sup>173</sup> The international law of armed conflict, historically, has always been directed toward obligating parties to a conflict to conduct themselves in a manner that prevents unnecessary suffering. The law of armed conflict refers to belligerent parties, parties to the conflict, states,

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<sup>170</sup> Greenwood, *supra* note 15, at 190 n.26.

<sup>171</sup> Robert K. Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT’L L. & POL’Y 49, 58-59 (1993). The combatant’s privilege entitles a combatant to kill or wound an enemy combatant without criminal penalty. In addition, Goldman writes that “[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 which do not violate the laws and customs of war.” *Id.* See also Brian D. Titemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 110 (1997). Telford Taylor explains the 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.

cited in NATIONAL SECURITY LAW 359 (John Norton Moore et al. eds., 1990)

<sup>172</sup> Brian D. Titemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 111 (1997).

<sup>173</sup> REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 115 (Patricia S. Rambach et al eds., 1971) [hereinafter REPORT OF THE CONFERENCE]. However, individual states that are signatories to the respective conventions are bound.

enemy forces, powers, High Contracting Parties, and signatories. A UN peacekeeping force, however, does not nicely fit into any of these categories.<sup>174</sup> The UN is not a signatory to the Geneva Conventions and therefore, arguably, the UN forces are not obligated to follow the terms of the Conventions. Regardless of this view, the Geneva Conventions capsule a great deal of customary international law that would then apply to all parties to an international armed conflict.<sup>175</sup> As noted by Daphna Shraga and Ralph Zacklin of the ICRC:

[T]he argument that the United Nations cannot become a party to the Geneva Conventions because their final clauses preclude participation by the Organization, although still valid, is largely irrelevant to the question of applicability of these conventions to UN operations. The Geneva Conventions which have now been widely recognized as part of customary international law are binding upon all States, and therefore, also upon the United Nations, irrespective of any formal accession.<sup>176</sup>

Although the ICRC had long maintained that all international humanitarian law applies to UN peacekeepers whenever they use force, the UN had officially taken the position that peacekeepers are obligated to follow only the "principles" and "spirit" of the international law of armed conflict.<sup>177</sup> For example, the instructions given to the 1957 United Nations Emergency Force (UNEF) in the Sinai stopped well short of naming the UN as a party to the international law of armed conflict conventions. Instead of requiring UN forces to follow the Conventions, the Secretary-General directed that "[t]he force shall observe the *principles and spirit* of the general international conventions applicable to the conduct of military personnel."<sup>178</sup>

Similarly, the United Nations Force in Cyprus (UNFICYP) guidelines instructed the peacekeeping forces to respect the "principles and spirit" of international law regarding the conduct of military forces. Generally speaking, this meant that peacekeepers were not bound by all international law, such as the technical rules regarding the creation and operation of a prisoner of war camp. However, the peacekeeping forces, in keeping with the principles and spirit of the law of armed conflict were to conduct themselves in accordance with general principles of proportionality, military necessity, martial honor, chivalry, humanity, and the prevention of unnecessary suffering. Additionally, they were to avoid military action that could potentially discredit the UN or

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<sup>174</sup> Lehmann, *supra* note 35, at 16. However, individual participating states do fit into the categories.

<sup>175</sup> Bloom, *supra* note 103, at 624 n.11.

<sup>176</sup> Shraga & Zacklin, *supra* note 10, at 47.

<sup>177</sup> Cartledge, *Legal Constraints*, *supra* note 154, at 127.

<sup>178</sup> REGULATIONS FOR THE UNITED NATIONS EMERGENCY FORCE OF 20 FEBRUARY 1957: APPLICABILITY INTERNATIONAL CONVENTIONS, OBSERVANCE OF CONVENTIONS, para. 44, *reprinted in* R.C.R. SIEKMANN, BASIC DOCUMENTS ON UNITED NATIONS AND RELATED PEACEKEEPING FORCES 168 (2d ed. 1989) (emphasis added).

negatively affect the legitimacy of the mission. For example, in keeping with these principles, the peacekeepers were to distinguish between civilian and military forces and between civilian and military objectives. The UN forces could only use authorized weapons, prohibiting the use of weapons designed to cause unnecessary suffering.<sup>179</sup>

In writing the general operational guidelines for UNFICYP, the Secretary-General explicitly authorized the use of force when protecting UN posts. Further, the Secretary-General allowed UNFICYP to use armed force if a party attempted to gain unauthorized entrance to their posts, if peacekeeping forces were compelled to leave their posts, and if a party attempted to disarm them. Finally, the Secretary-General authorized peacekeepers to use force when required to stop a party from forcibly attempting to impede peacekeeping operations or attempting to prevent peacekeepers from fulfilling their responsibilities.<sup>180</sup>

The UN, as a “non-party” to the Geneva Conventions, sought to ensure the peacekeeping operations, both in theory and in practice, were entirely distinct from peace-enforcement combat operations. Applying the law of armed conflict to peacekeeping operations could ultimately lead to tragic consequences. For example, one fundamental law of armed conflict, specifically the combatant's privilege,<sup>181</sup> allows a military member of one force to shoot and kill an enemy combatant virtually at any time.<sup>182</sup> If peacekeepers shoot and kill hostile local inhabitants because of a misconception as to the application of the law of armed conflict to the peacekeeping operation, in addition to the actual tragedy, the entire operational mission would deteriorate. In short, it is unnecessary, dangerous and counterproductive to apply the law of armed conflict to most peacekeeping operations.<sup>183</sup> For this reason, and others, the UN has been very reluctant to endorse the application of the law of armed conflict to classical peacekeeping operations.

Even though it repeatedly declined to become a party to the Geneva Conventions, many called upon the UN to respect the Conventions and ensure UN forces complied with them.<sup>184</sup> In 1969, one commentator proposed that

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<sup>179</sup> Lehmann, *supra* note 35, at 16.

<sup>180</sup> Brown, *supra* note 59, at 571, citing *Aide-Memoire*, in *N. concerning the function and operation of UNFICYP*, U.N. SCOR, 19 Sess., Supp. For Apr.-Jun. 1964, at 13, U.N. Doc. S/5653 (1964). See also, discussion at *supra* note 46.

<sup>181</sup> See generally, discussion at *supra* note 171.

<sup>182</sup> Cartledge, *International Humanitarian Law*, *supra* note 14, at 153. Of course, there are exceptions to the combatant's privilege. Combatants who are *hors de combat*, such as a soldier in the act of surrendering, a prisoner of war, or one who is wounded or sick, may not lawfully be engaged. See, e.g., AFPAM 110-31, *supra* note 13, at para. 3-3(a).

<sup>183</sup> Cartledge, *International Humanitarian Law*, *supra* note 14, at 153.

<sup>184</sup> For example, the 1954 Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, made this resolution: “The Conference expresses the hope that the competent organs of the United Nations should decide, in the event of military action being taken in implementation of the Charter, to ensure application of the Convention by the armed

the UN enact a resolution binding itself and its military forces to follow the Geneva Conventions.<sup>185</sup> In 1971, the Institute of International Law adopted a resolution entitled “The Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which UN Forces may be Engaged.” Article 2 of the resolution states:

The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces, which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular:

- (a) the rules pertaining to hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;
- (b) the rules contained in the Geneva Conventions of August 12 1949;
- (c) the rules which aim at protecting civilian persons and property.<sup>186</sup>

The resolution never attracted a following. However, in 1991, the UN formulated its Model Participation Agreement to be used in peacekeeping operations. Before commencing a peacekeeping operation, the UN and the Member States that contribute forces agree to the following:

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forces taking part in such action.” *Reprinted in* R.C.R. SIEKMANN, BASIC DOCUMENTS ON UNITED NATIONS AND RELATED PEACE-KEEPING FORCES 78 (2d ed. 1989).

<sup>185</sup> REPORT OF THE CONFERENCE, *supra* note 173, at 111. Finn Seyersted of the Embassy of Norway proposed the following United Nations resolution:

[The . . . United Nations . . . ]

1. *Declares* that, should any force of the United Nations become involved in any armed conflict, it will apply the provisions of the Geneva Conventions of August 12, 1949, and the Hague Convention of May 14, 1954.
2. *Declares* that the United Nations will require the States providing personnel to any United Nations force to take, in respect for such personnel, such penal and other action as is necessary for the enforcement of the said Conventions.
3. *Declares* that, when the Conventions refer to the law or the courts of the Detaining or the Occupying Power or to the conditions of treatment of its nationals, the law courts and conditions of one or more of the States providing personnel will be applied, if the Organisation has no applicable law, competent courts or relevant conditions of its own.
4. *Requests* the Secretary-General to transmit this resolution to the International Committee of the Red Cross and to U.N.E.S.C.O.

REPORT OF THE CONFERENCE, *supra* note 173, at 111 n.23.

<sup>186</sup> Institute of International Law, *Resolutions Adopted and Recommendations Made by the Institute at its Wiesbaden Session, August 6-15, 1975, Conditions of Application of Rules, Other Than Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged, 56-II* ANNUAIRE DE L'INSTITUT DE DROIT INT'L 540 (1975), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 903 (Dietrich Schindler & Jiri Toman, eds., 1988).

[The United Nations peacekeeping operation] shall observe and respect *the principles and the spirit* of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving with [the United Nations peacekeeping operation] be fully acquainted with the *principles and spirit* of these Conventions.<sup>187</sup>

The principles and spirit of international humanitarian law can be an illusive concept. Yet, the concept has, for the most part, protected the noncombatant status of UN peacekeepers and has provided a framework for appropriate conduct in peacekeeping operations.

Military personnel participating in peace-keeping operations may use armed force for self-defense and in accordance with their mandate to accomplish their mission. Under existing international law they are not lawful targets as long as they remain non-belligerents, even though they may be deployed in areas of ongoing hostilities.<sup>188</sup>

### C. Equal Application of the Laws of Armed Conflict

Since 1928, international law has outlawed war.<sup>189</sup> As a result, some have argued that an aggressor-state should not be entitled to equal application of the law.<sup>190</sup> In other words, an aggressor-state and the state it unlawfully attacked should no more be on an equal legal footing than should a criminal be

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<sup>187</sup> *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations, Report of the Secretary-General, U.N. GAOR, 46<sup>th</sup> Sess., Annex, para. 28, U.N. Doc. A/46/185 (1991) (emphasis added).* Once a Member State contributes forces to a peacekeeping operation, the forces come under the Secretary-General who directs the forces through the United Nations Force Commander. The forces are under operational control of the United Nations, but concurrently serve under officers of their respective national contingents. Tittmore, *supra* note 171, at 79-80.

<sup>188</sup> Sharp, *supra* note 11, at 134-35.

<sup>189</sup> GENERAL TREATY FOR RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY 2 Bevens 732; 46 Stat. 2343; Treaty Series 796; 94 L.N.T.S. 57 (1928). Since 1928, “war” between nations has been prohibited. According to the 1928 Paris Treaty, the use of force is only authorized in self-defense or to punish unlawful aggression. The treaty essentially made war an international crime. REPORT OF THE CONFERENCE, *supra* note 173, at 94.

<sup>190</sup> See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112, 154 (1963); NATIONAL SECURITY LAW, *supra* note 171, at 369-70. A fundamental principle of the international law of armed conflict is that it applies equally to all parties to a conflict. The principle of “equal application” operates independently from the issue of the legality of the use of force, the *ius ad bellum*. See generally Gardam, *supra* note 18.

equal to the victim of a crime.<sup>191</sup> This theory of “unequal application,” however, presumes the existence of a legitimate means to determine the aggressor. The UN, for one, has not traditionally made decisions that name the aggressor and the subject of aggression to an armed conflict.<sup>192</sup> Further, neither the Hague nor the Geneva Conventions provide any basis for providing one party to the conflict more or less protection than another party.<sup>193</sup> Even more specifically, Article 1 of all four Geneva Conventions clearly states the Conventions are applicable in “all circumstances.”<sup>194</sup>

Yet, regarding peacekeeping operations, it has been suggested that UN forces “are soldiers without enemies and therefore fundamentally different from belligerent forces.”<sup>195</sup> If UN personnel were to be subject to the international law of armed conflict, this would place the UN, the global organization charged with maintaining international peace and security, on a plane equal to that of an aggressor nation-state whose use of force presumably violated international law.<sup>196</sup> However, the equality of the UN versus the nation-state waging an armed conflict of aggression is not at issue.

At issue is the equality of *military conduct* as between UN military personnel and the armed forces of the opposing nation-state in a robust-peacekeeping or peace-enforcement action. The UN should be at the forefront of respecting, and promoting respect among its Member States for the international law of armed conflict. The way to show such respect to the law, as well as to foster respect by its Member States, is to lead by example and adhere to the Conventions.<sup>197</sup> One might then expect that the principles of the law of armed conflict, as followed by UN forces, would also be followed by the belligerent parties taking action against the peacekeepers. For example, should a belligerent party detain UN military forces, rules regarding prisoners-of-war could be applicable.<sup>198</sup>

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<sup>191</sup> See REPORT OF THE CONFERENCE, *supra* note 173, at 98.

<sup>192</sup> The exception, of course, would be UN peace-enforcement actions.

<sup>193</sup> See REPORT OF THE CONFERENCE, *supra* note 173, at 99.

<sup>194</sup> See REPORT OF THE CONFERENCE, *supra* note 173, at 98.

<sup>195</sup> THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 598 (Bruno Simma ed., 1994).

<sup>196</sup> Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, in I YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 14 (Horst Fischer et al. eds, 1998).

<sup>197</sup> Toni Pfanner, *Application of International Humanitarian Law and military operations undertaken under the United Nations Charter*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 49-58 (Umesh Palwankar ed., 1994); See also Tittmore, *supra* note 171, at 105 (“[L]ess than strict adherence to the law of armed conflict by U.N.-authorized forces engaged in hostilities may actually encourage other parties to armed conflicts to disregard humanitarian law vis-à-vis U.N. forces.”).

<sup>198</sup> Lehmann, *supra* note 35, at 16. Additionally, Bowens notes:

The U.S. believes that individuals captured while performing UN peacekeeping or UN peace enforcement activities, whether as members of a UN force or a U.S. force executing a UN Security Council mandate, should,

As Sharp notes, “[u]nder existing international law, non-belligerent forces acting under the authority of the Security Council remain unlawful targets until their use of force meets the de facto test of common Article 2 of the four Geneva Conventions of 1949, at which time they become belligerents and lawful targets.”<sup>199</sup> However, in light of more frequent and robust UN peace operations, one possible solution is to change the law of armed conflict to give absolute protected status to all “persons who serve the international community under the authority of the United Nations”<sup>200</sup> and make them “unlawful targets under all circumstances.”<sup>201</sup> This argument loosely analogizes UN military forces to police officers in a global domestic society. However, “[i]nternational society does not replicate the features of a national community and the United Nations does not at this stage command the degree of support and respect for its authority which is accorded to the organs of government within most national societies.”<sup>202</sup>

UN military forces are not global police officers and any push to develop them into some kind of global police force is, although not utterly utopian, most certainly approaching a utopian view. In reality, the protection discussed above, if granted to UN military forces, would ultimately serve to endanger them. If the *same* penalty would inevitably attach to both the killing of noncombatant UN peacekeepers and the killing of combatant UN peace-enforcers, a party to a conflict might believe it prudent to preemptorily engage and eliminate lightly-armed noncombatant UN peacekeepers to forego any possibility of having to later oppose them as aggressive and more lethal combatant UN peace-enforcers. In other words, it would “encourage an approach that one might as well be hanged for a sheep as a lamb.”<sup>203</sup>

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as a matter of policy, be immediately released to UN officials; until released, at a minimum they should be accorded protections identical to those afforded prisoners of war under the 1949 Geneva Convention III (GPW) . . . . In appropriate cases, the U.S. would seek assurances that U.S. forces assisting the UN are treated as experts on mission for the United Nations, and thus entitled to appropriate privileges and immunities and are subject to immediate release when captured.

GLENN BOWENS, *LEGAL GUIDE TO PEACE OPERATIONS* 366 (1998). According to the Convention on the Privileges and Immunities of the United Nations, UN “experts on mission” are accorded “[i]mmunity from personal arrest or detention . . . [i]nviolability for all papers and documents . . . [and] [t]he same immunities and facilities in respect to their personal baggage as are accorded to diplomatic envoys.” Convention on the Privileges and Immunities of the United Nations, Feb. 12, 1946, 1 U.N.T.S. 15, art. VI, sec. 22. *See also* Lepper, *supra* note 159, at 365-69.

<sup>199</sup> Sharp, *supra* note 11, at 137-38.

<sup>200</sup> *Id.* at 164.

<sup>201</sup> *Id.*

<sup>202</sup> Greenwood, *supra* note 15, at 204.

<sup>203</sup> Greenwood, *supra* note 15, at 206.

Additionally, and perhaps more importantly, if UN forces were privileged with *superior* rights as to the use of force in a peace-enforcement operation, the law of armed conflict could become much more difficult to enforce in other conflicts against other parties. If UN personnel were not accountable under the law of armed conflict, the other parties to the conflict could very well believe they also should not be held accountable.<sup>204</sup>

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.<sup>205</sup> 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.”<sup>206</sup>

Nevertheless, during the Korean Conflict, some believed that the UN needed only to comply with those *ad hoc* international laws of armed conflict it chose. In 1952, the Committee on the Study of Legal Problems of the UN argued that the law of armed conflict was not designed to apply to UN operations. It explained:

The Committee agrees that the use of force by the United Nations to restrain aggression is of a different nature from war-making of a state. The purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis*. In the present circumstances then, the proper answer would seem to be, for the time being, that the United Nations should not feel bound by the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible

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<sup>204</sup> Peck, *supra* note 155, at 190. McCoubrey & White note the following:

It could hardly be appropriate for forces acting under UN authority to be seen as licensed to practice barbarities greater than anything permissible for the parties already engaged in the situation which they are emplaced to terminate. In short, those who seek to act in the cause of lawfulness and humanity must surely themselves, in principle, be willing to be bound, at the minimum, by the basic humanitarian norms of the *jus in bello*.

HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS* 155-56 (1996).

<sup>205</sup> See REPORT OF THE CONFERENCE, *supra* note 173, at 98.

<sup>206</sup> Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953).

with its purposes. We think it beyond doubt that the United Nations, representing practically all the nations of the earth, has the right to make such decisions.<sup>207</sup>

As a matter of practice, however, during both the Korean and the Persian Gulf conflicts, the peace-enforcement military forces authorized by the UN made every attempt to comply with the law of armed conflict. The peace-enforcement forces scrupulously complied with the applicable Conventions, despite continued blatant violations by both North Korea and Iraq.<sup>208</sup> Even though the Security Council determined that Iraq's invasion of Kuwait violated UN Charter Article 2(4),<sup>209</sup> the Security Council never maintained that Iraq's illegal act relieved Coalition military forces from their obligation to follow the law of armed conflict.<sup>210</sup> The Security Council did, however, rightly declare on numerous occasions that Iraq was legally bound to follow the international law of armed conflict.<sup>211</sup>

To foster reciprocal adherence to the international law of armed conflict, the UN, when obligated to do so, must also follow it. As the Air Force stated in one of its handbooks on the law of armed conflict:

The law of armed conflict applies equally to both sides in all international wars or armed conflicts. This is true even if one side is guilty of waging an illegal or aggressive war. The side that is acting in self-defense against illegal aggression does not, because of that fact, gain any right to violate the law of armed conflict. Even forces under the sanction of the United Nations as were United States forces in the Korean Conflict (1950-1953), are required to follow the law of armed conflict in dealing with the enemy. The military personnel of a nation may not be punished simply for fighting in an armed conflict. This is so even if the side they serve is clearly the aggressor and has been condemned for this by the United Nations. . .

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<sup>207</sup> William J. Bivens et al., *Report of Committee on the Study of the Legal Problems of the United Nations, Should the Laws of War Apply to United Nations Enforcement Action?*, 46 AM. SOC'Y INT'L L. PROC. 216, 220 (1952); see also GERHARD VON GLAHN, *LAW AMONG NATIONS* 699-700 (1992). Many have criticized the proposal that the United Nations should be able to unilaterally select the international laws of armed conflict with which it wishes to comply. See, e.g., LORHAR KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 292-96 (1956); Roda Mushkat, *Jus in Bello, Revisited*, 21 COMP. & INT'L L. J. S. AFR. 1, 17 (1988); AFPAM 110-31, *supra* note 13, at 1-17 n.47 ("If the United Nations picked and chose among the laws of war this would seem to be an invitation for the opposing belligerents to do the same. During the Korean War, as a matter of fact, the United Nations carefully observed the laws of war. This seems a more practical way of manifesting a superior legal and moral position.").

<sup>208</sup> See GREEN, *supra* note 49, at 320-23.

<sup>209</sup> Article 2(4) provides in pertinent part: "All Members shall refrain . . . from the . . . use of force against the territorial integrity or political independence of any state." UNITED NATIONS CHARTER art. 2(4).

<sup>210</sup> Gardam, *supra* note 89, at 411.

<sup>211</sup> See Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y. 335, 341-42 (1993).

Because, as a practical matter, all nations claim that their wars are wars of self-defense, the courts . . . [are] unwilling to punish officials for waging aggressive war if they are not at the policy-making level of government. . . . ‘a private citizen [or soldier must not] be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or if it starts right, when it turns wrong.’<sup>212</sup>

The recent Convention on the Safety of UN and Associated Personnel,<sup>213</sup> in light of the principle of equal application, recognized that there must be a clear distinction between the Safety Convention and the Geneva Conventions so UN personnel would be covered either by the Safety Convention or the Geneva Convention. However, a member of a UN military force would not be covered by both Conventions. The Safety Convention drafters likely made this clear distinction in order to prevent eroding the Geneva Convention principle of equal application. The overriding concern was that, if the Safety Convention criminalized the use of force against UN forces engaged in a peace-enforcement action, the principle of equal application would no longer exist. The attacking forces would no longer feel bound to follow the law of armed conflict.<sup>214</sup> The principle of equal application is indispensable if the UN wishes similar treatment from the aggressor-state.<sup>215</sup>

#### **D. The Law of Armed Conflict as it applies to Chapter VII Peace-Enforcement Operations**

Traditionally, the Security Council will specifically state, within a resolution itself, whether the action it authorizes is being taken under Chapter VII. However, determining whether a Security Council-authorized action involves “peace-enforcement” can be problematic. Further, the Security Council does not consistently use the term “enforcement” in its resolutions

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<sup>212</sup> AFPAM 110-34, *supra* note 102, at para. 1-4(b)(1-3).

<sup>213</sup> Safety Convention, *supra* note 159.

<sup>214</sup> Bloom, *supra* note 103, at 625. The Safety Convention clearly delineated peacekeeping from peace-enforcement actions:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as *combatants against organized armed forces and to which the law of international armed conflict applies.*

Safety Convention, *supra* note 159, at art. 2(2) (emphasis added).

<sup>215</sup> “During the American Revolution, for example, the United States was able to obtain prisoner of war status for its troops in enemy hands only after threatening to deny such status to captured British personnel.” AFPAM 110-34, *supra* note 102, at para. 8-4(a)(1).

which authorize enforcement actions. As a result, one must look to the “object and purposes of the resolution.”<sup>216</sup>

In both the Korean and Persian Gulf peace-enforcement actions, the law of armed conflict applied. In both conflicts, forces authorized by the UN adhered to the international law of armed conflict. In Korea, the UN Command, after an initial reluctance, agreed that it would follow and enforce the law of armed conflict. This included the Geneva Conventions, even though they had not yet entered into force for any of the nations contributing military forces to the UN Command. Similarly, when the Security Council authorized its Member States to take military action against Iraq in 1990, the law of armed conflict unquestionably applied. In fact, the Coalition frequently informed the world of its meticulous compliance with the law of armed conflict.<sup>217</sup>

It is well settled that UN military personnel who participate in peace-enforcement operations that breach the Common Article 2 threshold are combatants. Accordingly, the 1994 Convention of the Safety of United Nations and Associated Personnel clearly envisages that UN personnel engaging in a Chapter VII peace-enforcement action are *combatants* and may be lawfully targeted by the opposing force.<sup>218</sup> Additionally, in his Bulletin regarding UN forces and international humanitarian law, Secretary-General Kofi A. Annan, recently implied that UN forces, at times, may be actively be engaged as combatants.<sup>219</sup> Conversely, the Secretary-General expressly recognized the *noncombatant* status of UN classical peacekeepers, as long as the peacekeepers do not become parties to the conflict.<sup>220</sup> The Secretary-General also envisaged that certain circumstances and peacekeeper actions could cause the loss of noncombatant status making the peacekeeping forces parties to the conflict. In such a case, the international law of armed conflict would apply, in accordance with the Secretary-General’s Bulletin.<sup>221</sup>

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<sup>216</sup> Bloom, *supra* note 103, at 625.

<sup>217</sup> Greenwood, *supra* note 15, at 187-88.

<sup>218</sup> Article 2 states:

This Convention shall *not* apply to a United Nations operation authorized by the Security Council as an enforcement Action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as *combatants* against organized armed forces *and to which the law of international armed conflict applies*.

Safety Convention, *supra* note 159, at art. 2 (emphasis added).

<sup>219</sup> See *Secretary-General's Bulletin*, *supra* note 101, at § 1.1.

<sup>220</sup> The Secretary-General said the “[B]ulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel *or their status as noncombatants as long as they are entitled to the protection given to civilians under the international law of armed conflict.*” *Secretary-General's Bulletin*, *supra* note 101, § 1.2 (emphasis added).

<sup>221</sup> See *Secretary-General's Bulletin*, *supra* note 101, § 1.2.

A UN peace-enforcement mission can and should be mandated only by Chapter VII. All Chapter VII operations, however, do not necessarily equate to directives to engage an opposing force in an all-out war. Rather, UN forces carrying out a Security Council Chapter VII peace-enforcement mandate may very well find it desirable and appropriate to operate under some Chapter VI peacekeeping principles tailored to the specific mission. Yet, these UN peace-enforcement military personnel are combat troops given a combat mission. They must be in sufficient numbers and have proper armaments and clear rules of engagement. They must be given precise instructions as to what circumstances that they are authorized to use force. If force is ever used indiscriminately, a coercive but restrained peace-enforcement action could become full-scale combat. Such a development would escalate, rather than contain, the conflict and unfortunately defeat the purpose of the mission.<sup>222</sup> UN peace-enforcement military forces will further their mission, depending upon the intensity of the operation, by using sound discretion in the use of force and by making every attempt to foster the cooperation of the parties to the conflict, as do their classical peacekeeping counterparts.

#### **E. Can the United Nations be a Signatory to the Geneva Conventions?**

The Geneva Conventions do not technically apply to UN peacekeeping forces that perform classical peacekeeping missions. First, the UN is not a nation-state. At present, only nation-states may be parties to the Geneva Conventions.<sup>223</sup> The UN is not a signatory, as Article 2 (3) of the Geneva Conventions explicitly allows only nation-states to be parties.<sup>224</sup> Further, the context of the Geneva Conventions' reference to "Powers" suggests the phrase

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<sup>222</sup> Akashi, *supra* note 84, at 322.

<sup>223</sup> GREEN, *supra* note 49, at 323.

<sup>224</sup> Article 2, para. 3 is common to all four Geneva Conventions. It states:

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.

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. The UN Charter entered into force on June 25, 1945, four years before the adoption of the Geneva Conventions. Yet, the Geneva Conventions and subsequent protocols, even to this day, do not reference United Nations peacekeeping or peace-enforcement actions.

means nation-states, and does not extend to insurgent groups or international organizations.

However, a number of commentators have postulated that since the UN has international personality<sup>225</sup> to enter into treaties and multi-national conventions, the UN has the capacity to enter into the Geneva Conventions, provided the Conventions allowed it.<sup>226</sup> If the UN wished to accede to the Conventions, the parties to Conventions could simply consent to the accession by amending the accession clauses to the Conventions and allow it.<sup>227</sup> Even this consent and amendment may not be necessary, however, as the UN could potentially accede to all the Conventions under article 96 of Protocol I to the Geneva Conventions.<sup>228</sup> This article allows a party other than a nation-state to

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<sup>225</sup> Reparations Case, *supra* note 34. With respect to whether the United Nations had authority to enter into treaties, the Court held,

[T]he attribution of international personality is indispensable. . . . the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, but entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. . . . [The United Nations] is a subject of international law and capable of possessing international rights and duties . . . .

Reparations Case, *supra* note 34, at 178-79.

<sup>226</sup> See, e.g., F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR, 344 (1961). “[T]here can be no doubt that the United Nations has the inherent capacity to become a party to the conventions on warfare if their terms permit it to accede.” *Id.*

<sup>227</sup> See REPORT OF THE CONFERENCE, *supra* note 173, at 106.

<sup>228</sup> Article 96 states:

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party

affirmatively declare it will abide by the Geneva Conventions. Such a declaration then obligates the other parties to the conflict to reciprocate and follow the Conventions.

Even so, it may not be desirable to have the UN become a party to the Conventions. In peacekeeping operations, the UN forces are noncombatants, not combat forces. If it became a party to the Conventions, the parties to a conflict may look at peacekeepers differently, that is, as they might more aggressively view fellow combat troops.<sup>229</sup> In short, UN peacekeeping “forces might appear as ‘combatants.’”<sup>230</sup> This possibility is not attractive.

Ultimately, the UN is unlikely to become a party to the Conventions. Accession to the Conventions could fatally wound classical peacekeeping operations. “[A] *United Nations action*, even if governed by the same laws as war in its traditional sense, *must be clearly distinguished from war* . . . . [A]ccession by the United Nations to the conventions on warfare might blur the distinction.”<sup>231</sup>

The UN has consistently maintained that it is not, nor shall it become, a party to the Conventions.<sup>232</sup> However, this is not to say that the international

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to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, Dec. 12 1977, 1125 U.N.T.S. 3, 6, *reprinted in* 16 I.L.M. 1391, 1399 (1977).

Regardless of the wording of Article 96, there is no consensus as to whether the United Nations could become a party to the Conventions. As the International Committee for the Red Cross (ICRC) explains, “[n]or is it out of the question that the United Nations could be ‘a party to the conflict’ in the material sense, although the problem of accession of the United Nations to the Geneva Conventions and the Protocols remains a delicate question which has not yet been resolved.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 507 (Y. Sandoz et al. eds., 1987). Further, the UN, precisely because it is not a state, does not possess the adequate administrative and juridical authority to carry out the obligations inherent to the Conventions.

<sup>229</sup> REPORT OF THE CONFERENCE, *supra* note 173, at 111.

<sup>230</sup> Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, 294 INT’L REV. RED CROSS 227, 232 (1993).

<sup>231</sup> SEYERSTED, *supra* note 226, at 387.

<sup>232</sup> See generally R. SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 185 (1968). Simmonds notes that during peacekeeping operations in the Congo, the United Nations “refused to undertake the duty of compliance with the detailed provisions of the Conventions or to make any kind of official declaration by which it would engage itself to apply them in all circumstances.” *Id.* Nevertheless, even though the United Nations was not a party to the Conventions, customary law applied and was “equally binding without the necessity for any accession to them by the United Nations.” *Id.* at 180. In 1993, the United Nations in Somalia (UNISOM) peacekeeping force initially denied the International Committee of the Red Cross access to detained supporters of General Aidid. A United Nations military officer allegedly told the media: “The United Nations is not a signatory to the Geneva Convention and its Protocols. Consequentially, the United Nations has no duty to respect international human rights law.” Willy Lubin, *Towards the International*

law of armed conflict is not applicable to UN forces. Individual Member States that contribute forces to UN operations are bound. Further, the majority of Geneva Convention provisions are now universally recognized as customary international law.<sup>233</sup> The law of armed conflict is therefore pertinent to UN peacekeeping operations. As Roberts and Guelff note:

The United Nations itself is not a party to any international agreements on the laws of war. Moreover, these agreements do not expressly provide for the application of the laws of war to UN forces. However, it is widely held that the laws of war remain directly relevant to such forces.<sup>234</sup>

Even though a party to a conflict is not a signatory or party to the Geneva or Hague Conventions, it is still bound to follow any customary international law of armed conflict. Moreover, such parties to the conflict, in order to secure and maintain international credibility, usually will announce they will follow the principles of the Conventions. In the Korean War, neither the UN nor North Korea were parties to the Conventions. Nevertheless, both the Supreme Commander of the UN Forces and the North Korean Minister of Foreign Affairs stated their military forces would abide by the Conventions.<sup>235</sup>

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*Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47, 54-55 (1994).

<sup>233</sup> See, e.g., Gardam, *supra* note 18, at 319 n.117 (1996). "Although much of the law of armed conflict is codified, the majority of its provisions would now be reflected in custom." *Id.*

<sup>234</sup> Adam Roberts & Richard Guelff, *Prefatory Note*, in DOCUMENTS ON THE LAWS OF WAR 371 (A. Roberts & R. Guelff eds., 2d. 1989).

<sup>235</sup> GREEN, *supra* note 49, at 55. General Douglas MacArthur, Commander of United Nations Command, said his forces would comply with principles of the international law of armed conflict, specifically dealing with prisoners of war:

My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly the common Article three. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly. I do not have the authority to accept, nor the means to assure the accomplishment of responsibilities incumbent on sovereign nations as contained in the detailed provisions of the other Geneva Conventions and hence I am unable to accredit the delegations to the UNC (United Nations Command) for the purposes outlined in those conventions. All categories of non-combatants in custody or under the control of military forces under my command, however, will continue to be accorded treatment prescribed by the humanitarian principles of the Geneva Conventions.

*Cited in* SEYERSTED, *supra* note 226, at 184-85. Although the United Nations Command did not believe it was obligated to follow the Geneva Conventions because neither the United Nations nor North Korea were parties to them, the United Nations Command adhered to most terms of the Conventions. Further, "no state providing contingents maintained that the United

The law of armed conflict does not expressly refer to the UN, nor do the Conventions deal with the applicability of the law of armed conflict to UN forces. However, when a UN force abandons its neutral peacekeeping role and becomes a party to the conflict, or engages in a peace-enforcement action as a party to the conflict, the UN should be treated as a state. Concomitantly, the law of armed conflict would apply both to the UN forces, and the forces they oppose. In such cases, both the UN and the opposing forces are parties to the conflict required to treat each other as lawful combatants. Consequently, for example, captured forces of either side would be afforded all protections and rights provided under the third Geneva Convention.<sup>236</sup>

### **F. Common Article 2 of the Geneva Conventions: The Armed Conflict Threshold**

Common Article 2 of the Geneva Conventions<sup>237</sup> contemplates that the Conventions apply only during an international armed conflict. It is the threshold test for whether an international armed conflict exists causing the concomitant application of the international law of armed conflict.<sup>238</sup> A UN

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Nations collective action was not governed by the general laws of war.” SEYERSTED, *supra* note 226, at 187.

On July 13, 1950, both South and North Korea said they were following the Geneva Conventions regarding prisoners of war and cooperating with the International Red Cross. N.Y. TIMES, July 5, 1950, at 2.

<sup>236</sup> Greenwood, *supra* note 15, at 189.

<sup>237</sup> Article 2, common to all 4 Geneva Conventions, states:

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 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.

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.

<sup>238</sup> See Adam Roberts & Richard Guelff, *Prefatory Note*, in DOCUMENTS ON THE LAWS OF WAR 169-70 (A. Roberts & R. Guelff eds., 2d ed. 1989); according to Sharp,

force that limits its use of force strictly to self-defense will not cross the Common Article 2 threshold. However, a military force attacking a UN peacekeeping force, combined with the force used by the peace-keepers in self-defense and subsequent offensive counter-attack, might reach the threshold of international armed conflict that invokes Common Article 2. Once the parties reach this level of conflict, the rights and obligations of the law of armed conflict apply.<sup>239</sup>

However, what constitutes an “armed conflict” is difficult to define.<sup>240</sup> The ICRC, interpreting the Geneva Convention, provided the following definition:

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[S]hort of an actual declaration of war or a case of occupation, military forces do not become a party to an international armed conflict until such time they become engaged in a use of force of a scope, duration, and intensity that would trigger the *jus in bello* with respect to these forces. This threshold is a factual, subjective determination that centers on the use of force between the members of the armed forces of two states. These factors are to be considered conjunctively, and in the context of the assigned mission of the forces. For example, military forces conducting a noncombatant evacuation operation do not become a party to an armed conflict when they use limited force to rescue personnel. Similarly, military forces do not become a party to an armed conflict when they use limited force to accomplish an assigned humanitarian relief or peace operation. In contrast, individual or collective military action in response to outright aggression, such as the coalition response to the Iraqi aggression that led to the Persian Gulf war, does cross the Common Article 2 threshold and then triggers the application of the *jus in bello*.

Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22-23 (1997) (unpublished manuscript on file with author).

<sup>239</sup> See Bloom, *supra* note 103, at 625-26 n.12. Another observer writes:

The Laws of Armed Conflict do not normally apply to UN or other peacekeeping forces because neither they nor the UN are in armed conflict with anyone. They are there, inter alia, to separate the parties, provide protection for the delivery of humanitarian aid and, hopefully, provide a more rational atmosphere or environment in which the factions may come to a peaceful solution. However, they do (and are legally entitled to) take self-protective actions involving the use of force from time to time. *It goes without saying that if they cross the armed conflict threshold and enter into armed conflict then the Laws of Armed Conflict would apply.*

Garth Cartledge, *International Military Law*, <http://www.ozemail.com.au/~garthc/Index.html> [hereinafter *International Military Law*] (copy on file with the *Air Force Law Review*) (emphasis added).

<sup>240</sup> 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

[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.<sup>241</sup>

The ICRC definition is purposely worded very broadly in order to include an entire spectrum of conflicts and bring them under the Conventions.<sup>242</sup> Still, according to the ICRC, there is a prerequisite to the application of the international law of armed conflict—there must be “the presence of an armed conflict.”<sup>243</sup> One very practical definition is that an armed conflict exists when the Common Article 2 threshold is crossed. “That threshold is crossed when there is an identified enemy. There is an identified enemy when there are members of the enemy military or para-military forces belonging to another state committing acts of war in the apparent furtherance

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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.”); AFPAM 110-31, *supra* note 13, at para. 1-2(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 II: 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.”); and, 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1988-91 (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. . .”). *Id.* at 3457.

<sup>241</sup> COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean S. Pictet ed., 1958).

<sup>242</sup> *See* RICHARD I. MILLER, *THE LAW OF WAR* 275 (1975); *See also* AFPAM 110-31, *supra* note 13, at para. 1-5(c) (“Generally, the international community has encouraged broad application of the law of armed conflict to as many situations as possible to protect victims of conflicts.”); Greenwood, *supra* note 196, at 6 (“While the term ‘armed conflict’ is not defined in any of the conventions, it has generally been given a very broad definition.”); Sharp, *supra* note 11, at 121 (“[T]he threshold for the application of the Conventions was intended to afford maximum protection to belligerents and non-belligerents by ensuring the Conventions applied to as many interactions between the armed forces of states as possible.”).

<sup>243</sup> Pfanner, *supra* note 197, at 56.

of that state's policy.”<sup>244</sup> The question of whether the threshold has been crossed is a question of fact, not of politics.<sup>245</sup>

Yet, the Common Article 2 *de facto* threshold is not a bright line test. Although the UN accepts that its traditional peacekeeping forces may theoretically become combatants, and hence lawful targets, when its peace operation reaches “*some undefined level of intensity*,”<sup>246</sup> the UN has so far declined to specify any potential circumstances that would result in its peacekeepers crossing the threshold. As a result, UN military forces currently do not have clear guidance as to what level of intensity crosses the Common Article 2 threshold amounting to armed conflict. Further complicating the problem, in some recent peacekeeping operations, peacekeepers in pursuing their mandated missions have more frequently and robustly used military force. This increase in the use of force has raised a great deal of concern about whether such force is in accordance with the law of armed conflict.<sup>247</sup>

The United Nations Operation in Somalia (UNOSOM), for example, illustrates the difficulties and controversies inherent when attempting to determine whether a peacekeeping force has crossed the threshold into armed conflict and has therefore become a party to it. On October 3, 1993, the Unified Task Force (UNITAF) abandoned its previously impartial role and took military action against a specific Somali warlord, General Aideed. When

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<sup>244</sup> Cartledge, *International Humanitarian Law*, *supra* note 14, at 154.

<sup>245</sup> See Cartledge, *International Humanitarian Law*, *supra* note 14.

[W]hether or not there is armed conflict is a matter of fact, not a matter for declaration by some government or governing body. The application of laws of armed conflict is a matter which flows (and must flow) automatically upon the crossing of the threshold into armed conflict. The commencement of its application is not and cannot be retarded or denied because some person, body, body of persons or institution has decided or determined that laws of armed conflict are not to be applied. If its application was dependent upon the determination of such a body the question would become a political one which it quite clearly should not be.

Cartledge, *International Humanitarian Law*, *supra* note 14, at 152.

<sup>246</sup> Sharp, *supra* note 11, at 150.

<sup>247</sup> Gardam, *supra* note 18, at 288-89 n.10. Bowens opines:

The majority view, consistent with the United States position, is that international forces (composed of various national elements) are bound to the same extent by the law of war as national forces. We are to look beyond the guise of ‘international force,’ and to the individual state forces that make up the international force. If an individual state is involved in a (1) contention, (2) with another state, (3) where at least one side employs military force, (4) in an effort to overpower the other state, then despite the label used by the state parties for their actions or the reason for the contention, the event is an article 2 conflict.

BOWENS, *supra* note 72, at 321 (footnotes omitted).

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attempting to arrest him, intense fighting ensued. Eighteen U.S. soldiers and one Malaysian soldier were killed. Another seventy-eight U.S. soldiers, nine Malaysian soldiers, and three Pakistani soldiers were wounded. The UN Commission established to investigate the attack concluded that once UNITAF began taking action against General Aideed, they, arguably, crossed the threshold and were no longer “persons taking no active part in the hostilities” and hence became “parties to the conflict.” As a result of this change of status, UNITAF arguably was no longer guaranteed the minimal humane treatment protection accorded noncombatants under Common Article 3 of the Geneva Conventions.<sup>248</sup> However, the UN Secretary-General and the United States concluded the opposite: “It [is] the U.S. [and] UN . . . opinion that their forces [did] not become combatants, despite carrying out some offensive-type operations (e.g. Task Force Ranger in Somalia).”<sup>249</sup>

In order to avoid dealing with the knotty factual uncertainty of whether a given military operation has crossed the armed conflict threshold, the United States Chairman of the Joint Chiefs of Staff (CJCS) directs that United States military forces “will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.”<sup>250</sup> Similarly, the U.S. Army Operational Law Handbook supports that view:

The [law of war] (LOW) applies to all cases of declared war or any other armed conflict which may arise between the U.S. and other nations, even if the state of war is not recognized by one of them. FM 27-10, para. 8. It

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<sup>248</sup> See *Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them*, paras. 117-73, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc S/1994/653 (1994).

<sup>249</sup> OPS LAW HANDBOOK, *supra* note 168, at 5-2. AFPAM 110-31, takes a similar position: “[T]he international community has not regarded a few sporadic acts of violence, even between states, as indicating a state of armed conflict as existing.” AFPAM 110-31, *supra* note 13, at para. 1-2(b).

<sup>250</sup> CJCSI 5810.01A, Implementation of the DOD Law of War Program, para. 5a, (Aug. 27, 1999). Further, the Chairman’s standing rules of engagement provide:

U.S. forces will always comply with the Law of Armed Conflict. However, not all situations involving the use of force are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement.

CJCSI 3121.01, Enclosure A, Standing Rules of Engagement for U.S. Forces, para. 1.i (Oct. 1, 1994).

also applies to cases of partial or total occupation. The threshold is codified in common article 2 of the Geneva Conventions. Armed conflicts such as the Falklands War, the Iran-Iraq War, and Desert Storm were clearly international armed conflicts to which the law applied. . . . In peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the LOW legally applies to those operations. The issue hinges on whether the peace operations undertake a combatant role. . . . Despite the legal inapplicability of the LOW to [operations such as Somalia and Bosnia], it is nonetheless, the position of the US, UN and NATO that their forces will apply the "principles and spirit" of the LOW in these operations. . . . In applying the [Department of Defense] policy, however, allowance must be made for the fact that during these operations U.S. Forces often do not have the resources to comply with the LOW to the letter. It has been U.S. practice to comply with the LOW to the extent "practicable and feasible."<sup>251</sup>

In essence, the United States applies the principles and spirit of law of armed conflict to all military operations, yet reserves that its forces will be bound by the law of armed conflict only in cases when it is clear that the Common Article 2 threshold has been crossed. This pragmatic resolution to an issue of international law that is far from settled serves United States interests well. Yet, it does not address the larger question, that is, "what level of combat intensity is required before UN peacekeepers cross the Common Article 2 threshold, lose their noncombatant status, and become parties to the conflict, rendering them lawful military targets?"

The answer as to peacekeeping operations and UN-authorized peace-enforcement operations may very well be that, "the threshold for determining whether a force has become a party to an armed conflict [is] somewhat higher in the case of UN and associated forces engaged in a mission which has a primarily peace-keeping or humanitarian character than [is] the normal case of conflicts between states."<sup>252</sup> This theoretical "higher threshold," specific to UN peace operations, would bring international law in line with the UN's past practice and official policy regarding the peace operations in Haiti, Somalia and Bosnia. A formalized higher Common Article 2 threshold would allow the UN more flexibility and options during robust peacekeeping operations. Further, it would ensure UN personnel do not routinely lose their noncombatant status, and therefore become lawful targets, when engaged in robust peacekeeping operations. Yet, even if the Common Article 2 threshold existed at a somewhat higher level than that applicable to nation-states, peacekeepers would still have ample incentives to restrain their peace operations in such a way to stay beneath it. Such incentives include, for

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<sup>251</sup> OPS LAW HANDBOOK, *supra* note 168, at 5-2. *Accord* HUMANITARES VOLKERRECHT IN BEWAFFNETEN KONFLIKTEN—HANDBUCH ¶ 211, DSK AV207320065 (Aug. 1992): "Members of the German Army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts."

<sup>252</sup> Greenwood, *supra* note 196, at 24.

example, peacekeeper protection, mission legitimacy, and the obvious desire to avoid unnecessarily escalating the conflict.

### **G. The United Nations' Code of Conduct for Peacekeepers—Half a Solution**

There have been numerous and resounding demands that the UN should promulgate clear directives regarding the applicability of the international law of armed conflict to UN personnel.<sup>253</sup> In 1997, after decades of apparent apathy from the UN, the ICRC announced it had been recently working with the UN to prepare a Code of Conduct for UN peacekeepers. Previously, in May 1996, the ICRC and the UN had jointly prepared a proposed set of Directives for UN Forces Regarding Respect for International Humanitarian Law.<sup>254</sup> The ICRC explained that its directives would clarify the principles and spirit of international humanitarian law to which the UN has implicitly bound its forces for the past fifty years.<sup>255</sup>

Finally, the UN had provided its long-awaited official response, albeit a somewhat disappointing one. Secretary-General Kofi A. Annan, in his August 6, 1999 Bulletin, attempted to take a significant step towards clarification of the applicability of the international law of armed conflict in UN peacekeeping and peace-enforcement operations.<sup>256</sup> Instead, he merely provided half a solution with a one-size-fits-all code of conduct regarding all peace operations. He promulgated a directive that specified the very minimum standards of behavior expected of UN peace operations personnel. The Secretary-General's Bulletin entered into force on August 12, 1999, to coincide with the 50<sup>th</sup> anniversary of the adoption of the four Geneva Conventions.<sup>257</sup> The Bulletin declared the "fundamental principles and rules of international humanitarian law" pertaining to UN peacekeepers.<sup>258</sup>

The Bulletin is "applicable to United Nations forces conducting operations under United Nations command and control."<sup>259</sup> Unfortunately, the Bulletin does not clarify how the law of armed conflict applies during the

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<sup>253</sup> See, e.g., Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152, 182 (1999); Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and the United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 105-07 (1995); Tittlemore, *supra* note 171, at 115-17; HOWARD S. LEVIE, WHEN BATTLE RAGES, HOW CAN LAW PROTECT?: WORKING PAPER PROCEEDINGS OF THE FOURTEENTH HAMMARSKJOLD FORUM 64-65 (1971); *International Military Law*, *supra* note 239.

<sup>254</sup> Cartledge, *Legal Constraints*, *supra* note 154, at 121.

<sup>255</sup> Cartledge, *Legal Constraints*, *supra* note 154, at 121.

<sup>256</sup> *Secretary-General's Bulletin*, *supra* note 101.

<sup>257</sup> *Secretary-General's Bulletin*, *supra* note 101, at para. 10; see also *United Nations Calls for Renewed Efforts to Protect Civilians in War*, AFR. NEWS SERV., Aug. 13, 1999.

<sup>258</sup> *Secretary-General's Bulletin*, *supra* note 101, at Purpose Stmt.

<sup>259</sup> *Id.*

different types of UN peacekeeping operations. It simplistically states that the principles apply “to UN forces when in situations of armed conflict they are actively engaged as combatants, to the extent and for the duration of their engagement. [The principles of the Bulletin] are accordingly applicable in enforcement actions, or in peace-keeping operations when the use of force is permitted in self-defense.”<sup>260</sup>

In its desire to provide simple guidance, the Bulletin treats the use of force during a peace-enforcement action the same as the use of force in self-defense during a peacekeeping operation. Such reductionism fails to recognize that totally separate and different legal foundations authorize, as well as limit, the two forms of the uses of force, one being the law of armed conflict and the other being an inherent right to defend oneself.<sup>261</sup> A better solution would have been to clearly define the three predominant peace operations—classical peacekeeping operations, robust peacekeeping operations, and peace-enforcement operations—and then promulgate different directives with separate rules for each. This would have helped keep the different operations distinct and reduced potential confusion.

Further, the Bulletin tends to concentrate on the use of force in accordance with the international law of armed conflict and does not clearly acknowledge that peacekeepers rarely use force in order to accomplish their mission. The use of force during classical peacekeeping operations is the exception, not the rule, and then only in self-defense. The use of force in peace-enforcement operations, on the other hand, is authorized if permitted under the rules of engagement and the specific UN mandate. By implicitly merging the concepts of peacekeeping and peace-enforcement and concentrating on the principles of the international customary law of armed conflict, the Bulletin risks that peacekeepers may view the two types of peace operations as the same. This could result in some peacekeepers believing, albeit erroneously and regardless of their rules of engagement, that the authorization for the use of force in both circumstances, is similar and possibly even the same.<sup>262</sup>

Moreover, the Bulletin is potentially under-inclusive because it only applies to “United Nations forces.” For example, the guidelines do not appear to apply to UN “Associated Personnel.”<sup>263</sup> Nor do the guidelines appear to

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<sup>260</sup> *Id.* at para. 1.1.

<sup>261</sup> See Cartledge, *Legal Constraints*, *supra* note 154, at 121-22.

<sup>262</sup> See Cartledge, *Legal Constraints*, *supra* note 154, at 135-36.

<sup>263</sup> United Nations Associated Personnel are defined as:

- (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
- (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
- (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations

apply to military forces authorized by the UN, but under the control of regional military alliances. The guidelines would not apply, for example, to the NATO-led Stabilization Force (SFOR) in Bosnia-Herzegovina, forces in West Africa led by Nigeria, or the NATO-led Kosovo Force (KFOR). These forces are authorized by the UN, but are not under its command and control.<sup>264</sup> Such forces, of course, are still bound by customary international law, as well as their own respective national laws.

Yet, the Secretary-General's Bulletin represents the first time the UN has officially recognized that UN forces are bound by the same principles that bind national troops. The guidelines were formulated over the past several years, the principles underlying the guidelines having been drawn from the Geneva Conventions *mutatis mutandis*.<sup>265</sup> The Secretary-General promulgated

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or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfillment of the mandate of a United Nations operation.

Safety Convention, *supra* note 159, at art. 1, para. b.

<sup>264</sup> See generally Godwin, *supra* note 125, at 58-79. The International Committee of the Red Cross makes the following statement:

[T]he Bulletin applies only to UN forces conducting operations under the command and control of the United Nations. It does not apply to organizations authorized by the Security Council which are placed under the command of a state or regional organization. In such cases the States, or the groups of States concerned, must comply with the customary and treaty-based rules by which they are bound.

International Committee of the Red Cross, Comprehensive Review of the Whole Question of Peace-Keeping Operations in all its Aspects, Statement to the United Nations General Assembly (Oct. 20, 1999), available at <http://www.icrc.org/eng/search> (copy on file with the *Air Force Law Review*).

<sup>265</sup> See *U.N. Issues Guidelines for Peace Forces' Behaviour*, DEUTSCHE PRESS-AGENTUR, Aug. 10, 1999. Consider also the following statement from the International Committee of the Red Cross:

[T]he [International Committee for the Red Cross] has considered the question of the applicability of international humanitarian law to peace-keeping and peace-enforcement forces. It was felt essential to clarify this issue because troops of this kind are intervening with increasing frequency to situations of extreme violence in which they may have to resort to armed force. . . . For its part, the [United Nations] maintains that only the principles and spirit of [International Humanitarian Law] are applicable to these forces. Experts have formulated draft guidelines that spell out those 'principles' and the 'spirit' that the [United Nations] has undertaken to respect, within the framework of peace-keeping and peace-enforcement operations, whenever the use of force is authorized for reasons of legitimate defence or pursuant to a specific mandate issued by the Security Council.

the Bulletin, despite numerous objections from Member States. Upon release of the document he stated that “[t]he guidelines are not cast in stone, they will be revised in a few years time.”<sup>266</sup>

The three-page Bulletin succinctly restates what amount to uncontroversial and near-universal principles of customary international humanitarian law. UN military personnel may not attack “civilians or civilian objects.”<sup>267</sup> The UN personnel “shall respect the rules prohibiting or restricting weapons and methods of combat.”<sup>268</sup> Civilians will be “treated humanely,”<sup>269</sup> and women and children are afforded special protections from attack.<sup>270</sup> If the UN forces detain military personnel or civilians, the detained persons must be “treated in accordance with the relevant provisions of the Third Geneva Convention of 1949.”<sup>271</sup> Additionally, “[m]embers of the armed forces and other persons in the power of the UN who are wounded or sick shall be treated humanely and protected in all circumstances.”<sup>272</sup>

According to the Bulletin, if a UN military member violates these guidelines or other binding international humanitarian law, the member is “subject to prosecution in [the member's own] national courts.”<sup>273</sup> However,

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International Committee of the Red Cross, *Is International Humanitarian Law Applicable to Peace-Keeping and Peace-Enforcement Operations Carried Out by or Under the Auspices of the United Nations?* (Dec. 1, 1999), at <http://www.icrc.org/eng/search> (copy on file with the *Air Force Law Review*)

<sup>266</sup> See DEUTSCHE PRESS-AGENTUR, *supra* note 265. Several Member States have indicated that they may be less inclined to participate in peacekeeping operations as a result of the issuance of the guidelines. However, the UN does not believe that the guidelines will cause any Member State to either stop participating or reduce participation in United Nations peacekeeping operations. See Farhan Haq, *Rights: U.N. to Adhere to Geneva Conventions*, INT'L PRESS SERV., Aug. 10, 1999.

<sup>267</sup> *Secretary-General's Bulletin*, *supra* note 101, at para. 5.1. Although the Bulletin is generally uncontroversial, encapsulating customary international humanitarian law, it does contain at least one provision to which the United States would object. Paragraph 6-2 of the Bulletin states: “The use of certain conventional weapons, such as . . . anti-personnel mines, . . . is prohibited.” *Secretary-General's Bulletin*, *supra* note 101, at para. 6.2. Approximately two million anti-personnel mines are deployed in the Republic of Korea (South Korea) along the Demilitarized Zone (DMZ) to deter an invasion from the North. Both the United States and South Korea take the position that if they were to remove the mines, it would effectively allow North Korea to invade South Korea. More importantly however, North Korea may misperceive the removal of the mines along the DMZ as a pre-cursor to South Korea preparing to invade the North.

<sup>268</sup> *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 6.2, ST/SGB/1999/13 (1999), available at [http://www.un.org/peace/st\\_sgb\\_1999\\_13.pdf](http://www.un.org/peace/st_sgb_1999_13.pdf) (copy on file with the *Air Force Law Review*).

<sup>269</sup> *Id.* at para. 7.1

<sup>270</sup> *Id.* at paras. 7.3 & 7.4.

<sup>271</sup> *Id.* at para. 8.

<sup>272</sup> *Id.* at para. 9.1.

<sup>273</sup> *Id.* at para. 5; see also BOWETT, *supra* note 99, at 504 (“[N]ational contingents in the service of the United Nations are bound to the same extent and degree, to all those rules of warfare

this is voluntary on the part of the Member State. As one UN official explained, “‘there is nothing in this bulletin that will compel a member state to try its peacekeepers,’ although he noted that all signatories to the Geneva Conventions are obliged to do so.”<sup>274</sup>

Although overly simplistic, the Secretary-General's Bulletin is a notable and positive step. It is, for the most part, uncontroversial in that it simply restates customary international humanitarian law. It is equally applicable in both peacekeeping and peace-enforcement operations.<sup>275</sup> It does not “affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as noncombatants.”<sup>276</sup> Finally, the Bulletin expressly does not supersede the respective national laws of UN personnel, nor is it an “exhaustive list of principles and rules of international law binding upon military personnel.”<sup>277</sup> At present, it is little more than a minimum legal standard for the military conduct of UN forces.

This set of minimum standards of behavior is only half a solution however. Unfortunately, while the Bulletin expressly recognizes that UN forces, under UN Command, may effectively be engaged as combatants, it does not specifically address the circumstances in which this may occur. The Secretary-General does not provide any guidelines as to when and how a noncombatant UN peacekeeper may become a combatant. The Secretary-General implies that a noncombatant peacekeeper may lose the protection of the 1994 Safety Convention,<sup>278</sup> but does provide the circumstances under which this may occur.

If UN peacekeepers are to be protected and maintain their protected noncombatant status, they must be provided clear guidelines as to appropriate conduct and rules of engagement that are specific to each form of peace operation. To achieve this, the UN must first articulate a cogent definition of “armed conflict.” With this definition, there must be an unambiguous threshold of when a UN military operation becomes an armed conflict in which UN personnel become combatants and lose protection of the 1994 Safety Convention. In such a case, the international law of armed conflict would apply and the UN personnel would become lawful targets. Due to the obvious gravity of such a scenario, it is imperative the UN clarify this gap in the international law of armed conflict.

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which would obtain if the same forces were engaged in international armed conflict for the State alone.”).

<sup>274</sup> Haq, *supra* note 266.

<sup>275</sup> *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 1.1, ST/SGB/1999/13 (1999), available at [http://www.un.org/peace/st\\_sgb\\_1999\\_13.pdf](http://www.un.org/peace/st_sgb_1999_13.pdf) (copy on file with the *Air Force Law Review*).

<sup>276</sup> *Id.* at para. 1.2.

<sup>277</sup> *Id.* at para. 2.

<sup>278</sup> *Id.* at para. 1.2.

## IV. CONCLUSION

Classical peacekeeping customs and norms have developed over fifty years of operations. The characteristics of impartiality, consent of the parties, command and control of the UN force by the Secretary-General, and most importantly, the use of force limited to circumstances involving self-defense have led to successful missions and the protection of peacekeepers.

However, as peacekeeping missions become more robust, missions have become ambiguous and peacekeepers endangered. To better the chances of mission success, ensure the mission is performed in accordance with international law, and to provide more protection to the peacekeepers themselves, the UN must clearly define the different forms of peace operations. The UN must lead a coherent and determined effort to keep peacekeeping missions distinct from peace-enforcement missions. Additionally, the UN must collectively strive to fill the recognized gaps in the international law of armed conflict regarding its application to UN peace operations.

However, ultimately, the lack of clarity in the international law of armed conflict regarding UN peace operations is a failing on the part of the Member States. To successfully fill this void, the Member States must seek consensus to clearly define the legal status of UN military personnel for each specific form of peace operation.<sup>279</sup> The UN, at the behest of its Member States, should convene an international convention to delineate the level and intensity of armed conflict that changes the status of a noncombatant peacekeeper to that of a combatant peace-enforcer. If UN peace operations are subject to a higher Common Article 2 armed conflict threshold, the UN should affirmatively and formally say so. A peacekeeper has a fundamental right to know what circumstances change the peacekeeper from a noncombatant to a combatant, result in the loss of protection of the 1994 Safety Convention and, ultimately, make the peacekeeper a target that can be lawfully engaged.

These are momentous times. The UN may now come of age. Its envisaged role in 1945 can come to fruition if its Member States continue to collectively agree to practical and realistic methods of peacekeeping and peace-enforcement and, more importantly, the Security Council continues to garner the collective political will to cooperate and act for the common good.

The international community, and specifically the UN, still struggles with the vision of international peace and security. It does not often act with one voice and, as a result, oftentimes fails to act at all. Yet, despite the UN's many flaws and failings, it is indispensable. It remains the best hope for world security and the maintenance of peace.

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<sup>279</sup> See Ralph Zacklin, *Managing Peacekeeping from a Legal Perspective*, in *NEW DIMENSIONS OF PEACEKEEPING* 159 (Daniel Warner ed., 1995) ("Insistence on clarifying the nature of peacekeeping is not merely a lawyer's obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution.").

The post-Cold War world is one of uncertainty, but also one of promise and optimism. It will remain so only as long as the Member States of the UN effectively endeavor to “save succeeding generations from the scourge of war” and “unite our strength to maintain international peace and security.”<sup>280</sup>

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<sup>280</sup> U.N. CHARTER preamble.

# Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs

MAJOR KENNETH MICHAEL THEURER \*

## I. INTRODUCTION

Today, when a defense contractor enters into a contract with the United States the cost of environmental cleanup is often considered part of the contract price.<sup>1</sup> The contractor passes to the taxpayer the costs of complying with a myriad of environmental statutes and regulations. However, prior to the enactment of environmental legislation in the 1970's and 1980's, government contracts rarely addressed environmental issues or delineated the responsibilities of the parties. With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980, many defense contractors were suddenly faced with enormous liability for the cleanup of long-forgotten sites dating back as far as World War II.<sup>2</sup> Interested in sharing these unanticipated and prohibitive costs, the contractors sought contributions from the United States as an "owner," "operator" or "arranger" under CERCLA Section 107.<sup>3</sup> The success of these contractors has

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\* Major Theurer (B.S., Colorado State University; M.S., Boston University; J.D., University of Cincinnati; LL.M., George Washington University Law School) is an environmental litigation attorney assigned to the Environmental Law and Litigation Division, Air Force Legal Services Agency.

<sup>1</sup> Defense Contract Audit Agency (DCAA) Contract Audit Manual 7640.1, Vol. 1, ¶ 7-2120.1-2 (Jan. 2001) [hereinafter DCAAM 7640.1] ("Environmental costs are normal costs of doing business and are generally allowable costs if reasonable and allocable.... Environmental costs include costs to prevent environmental contamination, costs to clean up prior contamination, and costs directly associated with the first two categories including legal costs"); See generally Robert Burton, *DMMC Tackles High Profile Cost Issues*, 34 FALL PROCUREMENT LAW 14, 15 (1998).

<sup>2</sup> Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675 (1995 & Supp. 2000). As an example, in January 2000 the United States entered into a settlement agreement with Lockheed Martin to pay half of a \$265 million cleanup effort already incurred and one-half of future cleanup costs at the "Skunk Works" facility located in Burbank, California. The plant was used by the United States government and the defense contractor for the production of numerous warplanes including the F-117 Stealth Fighter. Andrew Blankstein, *U.S. to Reimburse Lockheed in Toxic Cleanup Environment: Under Settlement, Government Will Pay Firm More Than \$155 Million for Ground Water, Soil Contamination in Burbank*, L.A. TIMES, Jan. 21, 2000, at B1.

<sup>3</sup> See, e.g., *East Bay Mun. Util. Dist. v. United States*, 142 F.3d 479 (D.C. Cir. 1998) (finding wartime mining operation was not sufficiently controlled by federal government to establish operator liability); *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir. 1995) (holding government not liable as an operator for production of agent orange during Vietnam conflict at contractor plant); *FMC Corp. v. United States*, 29 F.3d 833 (3rd Cir. 1994) (holding government liable under an "actual control" theory for cleanup of a WWII defense contractor facility); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399 (N.D. Tex. 1995) (concluding government not liable under same reasoning as *United States v. Vertac*).

varied depending on a variety of factors including the federal circuit in which the action was brought. Faced with limited success in seeking contributions from the federal government under CERCLA, imaginative contractors have sought other avenues of redress.

One such avenue is to bring suit against the United States based on a breach of contract theory. Many defense contracts for war materials have included broad indemnity provisions.<sup>4</sup> Several defense contractors have attempted to recover cleanup costs under a contract theory based on these indemnification clauses. Only the Ninth Circuit has addressed the issue, yet they dismissed the claim on jurisdictional grounds without reaching the merits.<sup>5</sup> At least two cases are pending in the United States Court of Federal Claims.<sup>6</sup>

The United States Supreme Court may have lent support to such contractual theories in *United States v. Winstar*.<sup>7</sup> Read in the broadest light, *Winstar* stands for the proposition that the government will be liable for damages if, as a result of a subsequent change in the law, the United States denies a contractor the benefit of an earlier bargain.<sup>8</sup> With no clear majority, the Supreme Court's varying opinions and rationales do little to provide clear guidance in this area. The plurality decision discusses and intermixes the previous separate doctrines of "Unmistakability" and "Sovereign Acts"—and introduces the concept of "risk-sharing" as the primary arbiter of government liability.<sup>9</sup> The degree of uncertainty, introduced by *Winstar*, promises to produce litigation based on contracts already 50 years old for many more years to come.

This article addresses ongoing problems with the cleanup of defense contractor sites required under CERCLA, concluding that governmental liability should depend on the nature of the risk allocation in the particular contract. Section II briefly deals with the different situation contractors of today and yesterday face when dealing with environmental issues. Section III details defense contractor and governmental liability under CERCLA § 107. Section IV of the article focuses on contractors seeking damages from the United States under a breach of contract theory based on the enactment of CERCLA as a change in the law analogous to *Winstar*. The article analyzes the *Winstar* issue as applied to environmental issues by the Federal Circuit in *Yankee Atomic Electric Co. v. United States*.<sup>10</sup> Even if these contracts should survive the *Winstar* analysis, this article describes additional impediments to recovery.

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<sup>4</sup> See *infra* notes 24-94 and accompanying text.

<sup>5</sup> *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641 (9th Cir. 1998).

<sup>6</sup> See *infra* notes 25-46 and accompanying text.

<sup>7</sup> *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

<sup>8</sup> See *infra* notes 249-340 and accompanying text.

<sup>9</sup> 518 U.S. 839, 871-910 (1996).

<sup>10</sup> 112 F.3d 1569 (Fed. Cir. 1997). For a discussion, see *infra* notes 365-395 and accompanying text.

## II. DEFENSE CONTRACTS—NOW AND THEN

Presently the nation is faced with the aftermath of years of defense spending that paid little heed to environmental consequences. Nationwide, the cost of cleaning up federal sites is estimated at \$400 billion.<sup>11</sup> With such staggering costs, it is no surprise that defense contractors are seeking to share the costs with their contracting partner, the United States.

Today, defense contracts are required to consider environmental consequences throughout the procurement process. The same cannot be said of earlier defense contractor activities that continue to pose a threat to the environment. This section will briefly discuss environmental concerns as addressed in modern contracts. Second, the section will describe the provisions of older contracts and the resulting litigation. Finally, this section will discuss some of the inherent conflicts between the policies of environmental law and government procurement law.

### A. Environmental Costs in Modern Defense Contracts

In the present day acquisition process, the Federal Acquisition Regulations (FAR) set forth the types of costs a contractor may pass on to the government during the performance of a contract.<sup>12</sup> In general, the contractor may include as overhead costs any charges that are both reasonable and allocable to the particular defense contract.<sup>13</sup> “A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.”<sup>14</sup> Allocable costs are those: (a) “incurred specifically for the contract; (b) [that] benefit both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) [that are] necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.”<sup>15</sup>

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<sup>11</sup> See *\$400 Billion Toxic Cleanup Bill*, WASH. POST, July 18, 1996, at A25. See also Randall J. Bunn, *Contractor Recovery for Current Environmental Cleanup Costs under World War II-Era Government Contract Indemnification Clauses*, 41 A.F. L. REV. 163, 163 n.3 (1997). The cost of cleaning up federal facilities and federally controlled sites in Colorado alone is estimated at more than \$12 billion. Burt Hubbard, *Toxic Cleanup Dwarfs DIA Cost; Time Delays Adding To \$12 Billion Price Tag To Be Paid By Taxpayers*, THE DENVER ROCKY MOUNTAIN NEWS, Mar. 29, 1998, at 4A.

<sup>12</sup> Although there is no single statute governing acquisitions for all agencies, there is a single government-wide procurement regulation. 41 U.S.C.A. § 405 (1987 & Supp. 2000). The regulation, known as the Federal Acquisition Regulation (FAR) is codified at 48 C.F.R. Ch. 1 (1999). Individual agencies have supplemental regulations codified in various sections of 48 C.F.R. The Department of Defense Federal Acquisition Supplement (DFARS) is codified at 48 C.F.R. Ch. 2 (1999).

<sup>13</sup> FAR, 48 C.F.R. § 31.201-2 (1999) (allowable costs are those which are reasonable and allocable).

<sup>14</sup> FAR, 48 C.F.R. § 31.201-3 (1999) (determining reasonableness).

<sup>15</sup> FAR, 48 C.F.R. § 31.201-4 (1999) (determining allocability).

Neither the FAR, nor DOD supplements to the FAR (DFARS), contain specific cost principles dealing with environmental costs.<sup>16</sup> Instead, environmental costs are dealt with on an individual basis within each contract. Environmental costs are ordinarily recognized as allowable costs provided they are both reasonable and allocable to the contract at hand.<sup>17</sup> These “costs include costs to prevent environmental contamination, costs to clean up prior contamination, and costs directly associated with the first two categories including legal costs.”<sup>18</sup>

Additionally, modern defense acquisition policy requires consideration of environmental consequences throughout the procurement process.<sup>19</sup> Various environmental statutes, including the National Environmental Policy Act,<sup>20</sup> Clean Air Act,<sup>21</sup> Clean Water Act,<sup>22</sup> and Resource Conservation and Recovery Act,<sup>23</sup> contain provisions impacting the acquisition process. The FAR implements the mandates of these statutes. Unfortunately, environmental awareness is a relatively recent phenomenon, and was not considered in the formation of many Vietnam-era and earlier defense contracts.

## **B. Environmental Considerations—Defense Contracts Prior to and During the Vietnam Era**

In the past decade, there have been a substantial number of defense contractors facing large cleanup costs resulting from defense efforts going back fifty or more years. None of these contracts contained specific contract language dealing with the allocation of future environmental costs. In addition, the regulations and policies in force at the time of these contracts were silent as to the risk allocation of the environmental consequences. However, a number

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<sup>16</sup> See Burton, *supra* note 1, at 15.

<sup>17</sup> DCAAM 7640.1, Vol. 1, *supra* note 1, ¶ 7-2120.1.

<sup>18</sup> DCAAM 7640.1, Vol. 1, *supra* note 1, ¶ 7-2120.2.

<sup>19</sup> Department of Defense Directive (DODD) 5000.1, Defense Acquisition ¶ 4.2.12 (Mar. 15 1996) (canceled and superceded by DODD 5000.1, The Defense Acquisition System (Oct. 23, 2000)) (“It is DoD policy to prevent, mitigate, or remediate environmental damage caused by acquisition programs. Prudent investments in pollution prevention can reduce life-cycle environmental costs and liability while improving environmental quality and program performance. In designing, manufacturing, testing, operating and disposing of systems, all forms of pollution shall be prevented or reduced at the source whenever feasible.”). See also Hon. Jacques S. Gansler, Under Secretary of Defense (Acquisition and Technology), Address at the 24th Annual Environmental Symposium, Tampa, Florida (Apr. 7, 1998).

<sup>20</sup> National Environmental Policy Act, 42 U.S.C.A. § 4432 (requiring all federal policies, regulations, and public laws are required to be implemented in accordance with environmental policies set forth in the NEPA).

<sup>21</sup> 42 U.S.C.A. § 7606 (1995) (providing that contracts with violators of the CAA are prohibited and requires contracts entered into “must effectuate the purpose and policy” of the CAA).

<sup>22</sup> 33 U.S.C.A. § 1368 (1995) (preventing contracting with a person who has been convicted of violating the CWA at a facility where the violation occurred).

<sup>23</sup> 42 U.S.C.A. § 6901 (1995) (requiring that acquisitions set a preference for “recovered” materials instead of new).

of these contracts contained broad indemnification clauses. Today, defense contractors point to these clauses as allocating the risk of future environmental cleanup costs to the United States. The United States, as well as many courts, takes a much narrower view as to the scope of the indemnification clauses.

### *1. World War II-Era Contracts*

Many World War II era defense contracts contained indemnification clauses as part of their settlement agreements authorized under the Contract Settlements Act of 1944.<sup>24</sup> At least three of these contracts, Morgantown Ordnance Works, Willow Run, and Tucson Airport Authority, are the subject of ongoing or recent litigation within the federal courts.

In late 1940, DuPont entered into a cost-plus-a-fixed-fee contract with the Department of the Army for the design, construction, and operation of the Morgantown Ordnance Works plant near Morgantown, West Virginia.<sup>25</sup> The plant produced ammonia, methanol, formaldehyde, hexamine, ethylene urea, and heavy water.<sup>26</sup> These chemicals, produced under the contract, were used for the manufacture of weapons, including atomic bombs.<sup>27</sup>

The original contract included an indemnification clause whereby the government agreed:

that all work [under this contract] is to be performed at the expense of the Government and that the Government shall hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including liability to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of work under this [contract].<sup>28</sup>

This indemnification clause was unconditional—provided that DuPont officials exercised due care and good faith in the operation of the plant.<sup>29</sup>

In August 1945, the parties entered into a supplemental contract, pursuant to the Contract Settlement Act, to address the termination of the original contract.<sup>30</sup> The supplemental contract contained a clause excepting from final release “[c]laims by the Contractor against the Government, which are based upon the responsibility of the Contractor to third parties and which

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<sup>24</sup> Contract Settlement Act of 1944, 41 U.S.C.A. § 101 *et seq.* (1987).

<sup>25</sup> Complaint, *E.I. Du Pont De Nemours and Co. v. United States*, complaint filed, No. 99-101C (Fed. Cl., Mar. 2, 1999) at 2 [hereinafter *DuPont Complaint*].

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.*

<sup>28</sup> Cost-Plus-A-Fixed-Fee, Design, Engineering, Construction, Equipment and Operation Contract, No. W-ORD-490, War Department (Nov. 28, 1940) at Article III(A)(8) [hereinafter *DuPont Contract*]; *DuPont Complaint*, *supra* note 25, at 5.

<sup>29</sup> *DuPont Complaint*, *supra* note 25, at 5.

<sup>30</sup> *DuPont Complaint*, *supra* note 25, at 5.

involve costs reimbursable under the Contract, but which are not now known to the Contractor.”<sup>31</sup>

In January 1985, the EPA notified DuPont that it was a potentially responsible party (PRP) as defined under CERCLA § 107.<sup>32</sup> Subsequently, DuPont incurred considerable costs consistent with the National Contingency Plan (NCP).<sup>33</sup> On 25 August 1993, DuPont submitted a certified claim to the Contracting Officer under the Contract Disputes Act of 1978 for \$485,248.79.<sup>34</sup> The parties negotiated back and forth while DuPont continued to incur cleanup expenses. In November 1998, DuPont submitted what it termed a “final certified updated claim” in the amount of \$1,322,334.83, plus interest.<sup>35</sup> The Contracting Officer did not respond within 60 days and DuPont considered the absence of a response to be a denial of the claim.<sup>36</sup> In March 1999, DuPont filed suit against the United States in the United States Court of Federal Claims. The litigation is currently pending.

The United States Air Force is facing a similar claim brought by Ford Motor Company for the cleanup of the Willow Run site.<sup>37</sup> Today, that site, located in Ypsilanti, Michigan is contaminated with polychlorinated biphenyls (PCBs) and other contaminants from its long use as an industrial complex and airport.<sup>38</sup> The estimated cost of cleanup of the site is approximately \$70 million.<sup>39</sup> During World War II, the United States assumed ownership of the facility and contracted with Ford Motor Company to produce B-24 “Liberator” bombers.<sup>40</sup>

The cost-plus-fixed-fee contract, in many ways similar to the DuPont contract discussed above, provided the following protections to Ford upon termination:

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<sup>31</sup> DuPont Complaint, *supra* note 25, at 5.

<sup>32</sup> DuPont Complaint, *supra* note 25, at 8; The Morgantown Ordnance Works was added to the National Priorities List [hereinafter NPL] when the list was updated for the second time in 1984. 49 Fed. Reg. 40,320 (1984) (codified at 40 C.F.R. pt. 300).

<sup>33</sup> DuPont Complaint, *supra* note 25, at 9.

<sup>34</sup> DuPont Complaint, *supra* note 25, at 10.

<sup>35</sup> DuPont Complaint, *supra* note 25, at 14.

<sup>36</sup> DuPont Complaint, *supra* note 25, at 15.

<sup>37</sup> Complaint, Ford Motor Co. v. United States, complaint filed, No. 98-186 (Fed. Cl., Mar. 18, 1998) [hereinafter Ford Complaint].

<sup>38</sup> The Willow Run site by agreement between the PRPs, the EPA and the state was not placed on the NPL. *Willow Run PCBs to be Contained On-site*, SUPERFUND WK., Jan. 6, 1995, available at 1995 WL 7503998.

<sup>39</sup> *Willow Creek Begins PCB Dig*, SUPERFUND WK., Aug. 29, 1997, available at 1997 WL 12955954.

<sup>40</sup> Contract No. W 535-ac-21216, Sept. 26, 1941, at 2 (on file with the Environmental Law and Litigation Division, Air Force Legal Services Agency, Arlington, Va.) [hereinafter Ford Contract]. For a detailed discussion of the Willow Run contract and the indemnification clauses, see Bunn, *supra* note 11. At the peak of production, the plant turned out a B-24 bomber every fifty-nine minutes. WARREN B. KIDDER, *WILLOW RUN: COLOSSUS OF AMERICAN INDUSTRY, HOME OF HENRY FORD'S B-24 "LIBERATOR" BOMBER* 138, 189 (1995).

b. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

1. The Government shall *assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract*; and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of assuring to the Government, so far as possible, the rights and benefits of the Contractor under such obligations or commitments.<sup>41</sup>

The contract also contained provisions making rehabilitation of the plant an allowable cost.<sup>42</sup>

In March 1998, Ford Motor Company filed suit against the government in the United States Court of Federal Claims seeking reimbursement of its cleanup costs associated with the Willow Run site.<sup>43</sup> On April 20, 1999, Ford Motor Company, the Department of the Air Force, and other PRPs entered into a consent decree with the EPA for the cleanup of the site.<sup>44</sup> The settling federal agencies agreed to pay \$50,000 to the Superfund and an additional \$450,000 to the other settling defendants.<sup>45</sup> In addition, Ford Motor Company reserved the right to continue seeking indemnification from the United States under the Willow Run contracts in the United States Court of Federal Claims.<sup>46</sup>

Still another recent case involved a suit brought against the United States by General Dynamics based on a series of contracts from 1942-1945. These wartime contracts were for the modification of B-24 "Liberator" military aircraft in a three-hangar facility located at the Tucson Airport in Arizona.<sup>47</sup> The contracts were between the Army Air Forces and Consolidated Vultee Aircraft Corporation (Consolidated).<sup>48</sup> In 1944, at the conclusion of hostilities, the contracts were suspended, and in 1945 the contracts were terminated.<sup>49</sup> The wartime contracts contained the following termination clause that was included in the settlement agreement at the conclusion of the war:

(b) Upon termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(1) The Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good

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<sup>41</sup> Ford Contract, *supra* note 40 (emphasis added).

<sup>42</sup> Ford Contract, *supra* note 40.

<sup>43</sup> See Ford Complaint, *supra* note 37.

<sup>44</sup> Consent Decree, *United States v. Ford Motor Co.*, No. 98-71305, (E.D. Mich., Apr. 20, 1999), available at 1999 EPA Consent LEXIS 83.

<sup>45</sup> *Id.* at 13.

<sup>46</sup> *Id.* at 21.

<sup>47</sup> *Tucson Airport Auth. v. General Dynamics Corp.*, 922 F. Supp. 273, 277 (D. Ariz. 1996), *aff'd*, 136 F.3d 641 (9th Cir. 1998).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 278.

faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract, and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations and commitments. . . .

(c) Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever; . . . except that all rights and obligations of the respective parties in respect of costs, expenses and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable of determination as to either existence, validity, or amount, shall remain in full force and effect (except to the extent that responsibility therefor may have been assumed by the Government under or pursuant to the provisions of subparagraph (1) of paragraph (b) of this Article).<sup>50</sup>

In the 1980s, state and federal authorities discovered contaminated groundwater in the area surrounding the Tucson Airport.<sup>51</sup> In 1988, after tracing the source of contamination to the hangar facility, the EPA notified General Dynamics, the successor in interest to Consolidated, that they might be a PRP.<sup>52</sup> In 1994, the Tucson Airport Authority brought an action against General Dynamics for the cost of investigation and remediation of the contaminated site.<sup>53</sup> General Dynamics filed a third-party claim against the United States.<sup>54</sup> The claim alleged the United States had assumed all liabilities arising under the contract and was obligated to assume General Dynamic's defense.<sup>55</sup> The Ninth Circuit, affirming the district court, ruled that the district court lacked jurisdiction to hear the contractually based claims and dismissed the third-party claim.<sup>56</sup> The court noted that the Court of Federal Claims was the appropriate venue.<sup>57</sup> In 1999, the United States and General Dynamics entered into a consent decree with the EPA where the United States agreed to pay \$35 million dollars for the cleanup under CERCLA § 107.<sup>58</sup> Neither the United States, nor General Dynamics waived any possible future contractual claims based on the wartime contracts in the United States Court of Federal Claims.<sup>59</sup>

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<sup>50</sup> *Id.*; Contract No. W 535-ac-26999, Oct. 5, 1942 (on file with the Environmental Law and Litigation Division, Air Force Legal Services Agency, Arlington, Va.) [hereinafter Consolidated Contract].

<sup>51</sup> 922 F. Supp. at 277-78.

<sup>52</sup> 922 F. Supp. at 278.

<sup>53</sup> 922 F. Supp. at 278-79.

<sup>54</sup> 922 F. Supp. at 279.

<sup>55</sup> 922 F. Supp. at 279.

<sup>56</sup> 136 F.3d at 647.

<sup>57</sup> 136 F.3d at 648.

<sup>58</sup> Consent Decree, *United States v. Tucson Airport Authority*, No. CIV-99-313-TUC-WDB, (D. Ariz., June 17, 1999), available at 1999 EPA Consent LEXIS 124.

<sup>59</sup> *Id.* at 125-26.

## 2. Vietnam Era Contracts: Hercules and Vertac

Vietnam era contracts have also subjected defense contractors to unanticipated costs resulting from contamination years after contract performance. Contracts for the production of Agent Orange have resulted in both CERCLA cleanup costs and separate toxic tort lawsuits. In these cases, the contractors have sought recovery against the Government under contract theories. Without the specific indemnification provisions of the World War II era contracts, defense contractors have made imaginative arguments for implied indemnification.

During the 1960s, the United States entered a series of fixed-price production contracts for the production of a phenoxy herbicide known as Agent Orange.<sup>60</sup> The Department of Defense wanted the defoliant for use in the Vietnam Conflict to destroy enemy food supplies and hiding places.<sup>61</sup> The military entered into the contracts pursuant to the Defense Production Act of 1950 (DPA).<sup>62</sup> The contracts ran from 1964 to 1968 when they were terminated.<sup>63</sup>

In the late 1970s, veterans and their families brought a series of lawsuits claiming health problems relating to dioxin, a byproduct contained in Agent Orange.<sup>64</sup> The suits were consolidated in a class action and hours before trial the defendants settled for \$180 million.<sup>65</sup> Two of the defendants, Hercules Incorporated and Wm. T. Thompson Company (Thompson), brought suit against the United States in federal district court under tort theories of contribution and non-contractual indemnification.<sup>66</sup> After losing, the companies brought suit in the United States Claims Court seeking recovery under the contract.<sup>67</sup>

The contracts did not contain specific indemnification provisions similar to the World War II contracts discussed above.<sup>68</sup> However, § 707 of the DPA included the following provision:

No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . . notwithstanding that any

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<sup>60</sup> Hercules, Inc. v. United States, 516 U.S. 417, 419 (1996).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; Defense Production Act of 1950 [hereinafter DPA], Pub. L. No. 774, 64 Stat. 798 (codified as amended at app. 50 U.S.C.A. § 2061 *et seq.* (1991).

<sup>63</sup> 516 U.S. at 419.

<sup>64</sup> 516 U.S. at 420.

<sup>65</sup> The judge ruled that the viability of the “government contractor defense” could not be determined before a trial on the facts. *Id.* The plaintiffs who opted out of the class action subsequently lost at trial based on “government contractor defense.” *See In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987).

<sup>66</sup> 818 F.2d at 207.

<sup>67</sup> Hercules, Inc. v. United States, 25 Ct. Cl. 616 (1992); Wm. T. Thompson Co. v. United States, 26 Ct. Cl. 17 (1992).

<sup>68</sup> 516 U.S. at 424.

such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.<sup>69</sup>

Thompson claimed relief based on an implied warranty of specifications and based on a theory of contractual indemnification.<sup>70</sup> The Claims Court dismissed the claims and the Federal Circuit affirmed the lower court.<sup>71</sup> On appeal, the United States Supreme Court addressed the companies' contractual claims in *Hercules, Inc. v. United States*.<sup>72</sup> The contractors argued that the government, by providing specifications, warranted the contractor against the consequences of defects in the specifications.<sup>73</sup> The Court was unwilling to extend the *Spearin* doctrine beyond the government warranty that the "contractor will be able to perform the contract satisfactorily if it follows the specifications."<sup>74</sup> The Court concluded that the implied warranty of specifications does not apply to third-party claims against a contractor.<sup>75</sup>

Additionally, Thompson alleged that under the circumstances the contract should be read to include an "implied agreement to protect the contractor and indemnify its losses."<sup>76</sup> Thompson did not argue that any express provision constituted a specific indemnification agreement. Instead, it argued that circumstances surrounding the contract created an implied indemnification agreement.<sup>77</sup> The facts included that the "Government required Thompson to produce [Agent Orange] under authority of the DPA and threat of civil and criminal fines, imposed detailed specifications, had superior knowledge of the hazards, and, to a measurable extent, seized Thompson's processing facilities."<sup>78</sup> Additionally, Thompson argued § 707 of the DPA indicated a congressional intent to hold the contractor harmless for any liability flowing from compliance with the Act.<sup>79</sup> Finally, the contractor argued that simple fairness and equity should allow recovery.<sup>80</sup>

The Supreme Court was unwilling to find such an "implied indemnification agreement" for several reasons. First, the Court noted that it would be unlikely that a contracting officer would agree to an open-ended indemnification clause that would clearly violate the law.<sup>81</sup> The Anti-Deficiency Act (ADA) prohibits federal employees from entering into a

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<sup>69</sup> DPA § 707 (codified at 50 app. U.S.C. § 2157 (1991)).

<sup>70</sup> 516 U.S. at 421-22.

<sup>71</sup> 516 U.S. at 421.

<sup>72</sup> 516 U.S. at 417.

<sup>73</sup> See 516 U.S. at 424-25.

<sup>74</sup> 516 U.S. at 425 (quoting from *United States v. Spearin*, 248 U.S. 132, 136 (1918)).

<sup>75</sup> 516 U.S. at 425.

<sup>76</sup> 516 U.S. at 426.

<sup>77</sup> 516 U.S. at 426.

<sup>78</sup> 516 U.S. at 426.

<sup>79</sup> 516 U.S. at 429.

<sup>80</sup> 516 U.S. at 430.

<sup>81</sup> 516 U.S. at 427-28.

contract in excess of or before money has been appropriated.<sup>82</sup> The Comptroller General had repeatedly ruled that such open-ended agreements to indemnify contractors against third-party liability violate the ADA.<sup>83</sup> Second, at the time of the contract there was statutory authority to provide indemnification clauses in very particular and well-defined situations.<sup>84</sup> None of the statutory provisions for including an indemnification clause applied, and the contracting officer did not include such a provision. Third, the DPA § 707 provided a defense to liability, not an indemnification.<sup>85</sup> Finally, the Court held that fairness and equity arguments were beyond the jurisdiction of the Court.<sup>86</sup> The Supreme Court, under these circumstances, was unwilling to find an implied indemnification clause.

Another contract between Hercules and the United States for the production of Agent Orange resulted in a contractual dispute over Hercules' right to indemnification for CERCLA cleanup costs in *United States v. Vertac Chemical Corp.*<sup>87</sup> *Vertac* involved a Vietnam era defense contract for production of Agent Orange.

The defense contract at issue was a "rated contract" which, under the DPA, allowed the President to issue directives giving the contract priority over other contracts Hercules might have. Beginning in 1967, the United States directed Hercules to increase production—resulting in the entire facility being devoted to the production of Agent Orange. When Hercules was unable to meet production demands, the United States facilitated Hercules importation of chemicals.<sup>88</sup>

Hercules brought suit against the United States in district court citing two separate bases for recovery. First, the contractor argued the Government should be liable under CERCLA as an "operator" or "arranger."<sup>89</sup> The court rejected this argument as will be discussed in Section III of this article. Second, Hercules argued both immunity from liability and an implied right to

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<sup>82</sup> The Anti-Deficiency Act, 31 U.S.C.A. § 1341 (1983 & Supp. 2000). *See infra* notes 431-439 and accompanying text.

<sup>83</sup> 516 U.S. at 427; *In re Assumption of Liability of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361, 364-365 (1983).

<sup>84</sup> 516 U.S. at 428 (citing as an example, 50 U.S.C. § 1431 (Supp. V 1988)).

<sup>85</sup> 516 U.S. at 429-30.

<sup>86</sup> 516 U.S. at 430.

<sup>87</sup> *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir. 1995). In 1964, Hercules, a chemical manufacturer in Jacksonville, Arkansas, won a competitive bid to supply the United States with the defoliant. During the period 1964-1968, Hercules produced and supplied Agent Orange to the United States. During the contract, Hercules disposed of the waste associated with the production of Agent Orange. The United States was aware of the waste but not consulted concerning disposal. After the contract ended, Hercules produced other products using the same chemicals involved in the site's contamination. *Id.* at 806-07.

<sup>88</sup> *Id.* at 807. The contract also subjected Hercules to the Walsh-Healey Act—setting certain health and safety standards. The government conducted inspections pursuant to this act on two occasions. However, the government was not involved in personnel issues and did not own any of the equipment used in the plant. Hercules profited from the contract. *Id.* at 806-07.

<sup>89</sup> *See infra* notes 203-215 and accompanying text.

indemnification from the United States.<sup>90</sup> The district court summarily rejected these arguments without discussion.<sup>91</sup> On appeal, the Eighth Circuit affirmed the lower court's decision with a brief discussion of the merits.<sup>92</sup>

According to Hercules, § 707 of the DPA, as cited above, provides a clear and unambiguous immunity from CERCLA liability arising from the contract. In addition, the contractor asserted that Hercules' immunity granted under § 707, as well as the United States' waiver of sovereign immunity and liability under CERCLA, create an implied-in-fact contractual obligation to indemnify.<sup>93</sup>

The Eighth Circuit was not persuaded, reasoning that § 707 must be read harmoniously with the rest of the statute. Section 101(a) of the statute sets out the purpose of the DPA, which was to give certain defense contracts priority over other contracts when necessary for national defense. Section 707 was designed to immunize contractors from possible liability arising from the priority system. The court held "the protection afforded by section 707 of the DPA extends no further than the risk imposed by section 101(a) of the DPA."<sup>94</sup> Since the immunity argument failed, the indemnification argument likewise was without merit. The court found the United States never implicitly promised to indemnify the contractor against the type of liability asserted in this case.<sup>95</sup>

### C. Contracting v. CERCLA Policies

As defense contractors seek contributions from the United States, two policies inherent in different bodies of law clash.<sup>96</sup> In passing CERCLA, Congress wanted to ensure those "responsible for any damage, environmental harm, or injury from chemical poisons [are tagged with] the cost of their actions."<sup>97</sup> This responsibility is extended to the United States with broad waivers of sovereign immunity.<sup>98</sup> Procurement law, on the other hand,

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<sup>90</sup> 46 F.3d at 811.

<sup>91</sup> 46 F.3d at 812.

<sup>92</sup> 46 F.3d at 812-13.

<sup>93</sup> 46 F.3d at 812.

<sup>94</sup> 46 F.3d at 812 (quoting Hercules, Inc. v. United States, 24 F.3d 188, 203-04 (Fed. Cir. 1994)).

<sup>95</sup> 46 F.3d at 812.

<sup>96</sup> Phillip M. Kannan, *The Compensation Dimension of CERCLA: Recovering Unpaid Contract Costs*, 30 U. MEM. L. REV. 29, 52 (1999).

<sup>97</sup> S. REP. NO. 96-848, pp. 6119, 13, U.S. Code Cong. & Admin. News 1980, p. 6119 (1980); *United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998) (quoting passage with approval).

<sup>98</sup> The waiver of sovereign immunity under CERCLA provides:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

contains an obligation on the part of the United States to protect the public fisc.<sup>99</sup> This results in courts narrowly construing contracts to limit contractor recovery. With no easy solution, defense contractors continue seeking recovery both under CERCLA and traditional contract theories.

### **III: DEFENSE CONTRACTOR CLAIMS UNDER CERCLA**

When faced with the costly prospect of cleaning up a contaminated facility, defense contractors often turn to CERCLA to share the cost with other PRPs such as the United States. This section will examine the legislative history of CERCLA, as well as theories of liability and contribution. Next, this section will discuss how CERCLA applies to actions against the United States as a PRP. Then, scenarios where defense contractors have sought contributions against the United States as an “owner,” “operator,” and “arranger” will be analyzed. The section will conclude with a discussion of equitable allocation of costs when the United States is found to be liable as a PRP.

#### **A. Legislative History of CERCLA**

By the late 1970s, Congress had enacted major environmental legislation prohibiting the disposal of harmful pollutants into the water, the air, and onto land surface.<sup>100</sup> Nonetheless, each of these statutes was designed to prevent current and future pollution problems, and did little to address existing problems with toxic waste sites.<sup>101</sup> Startling revelations concerning the gravity and extent of toxic dumps within the nation highlighted the gap in the law and spurred Congress into action.<sup>102</sup>

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42 U.S.C.A. § 9620(a)(1) (1995).

<sup>99</sup> See *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed.Cir. 1992); *United States v. Hatcher*, 922 F.2d 1402, 1410 (9th Cir. 1991); *City of El Centro v. United States*, 922 F.2d 816, 824 (Fed.Cir. 1990) (dissent).

<sup>100</sup> See generally Federal Water Pollution Control Act, also known as the Clean Water Act [hereinafter CWA], 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 2000); Clean Air Act (CAA), 42 U.S.C.A. §§ 7401-7671q (1995 & Supp. 2000); Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§ 6901-6992k (1995 & Supp. 2000); Safe Drinking Water (Public Health Service) Act, 42 U.S.C.A. §§ 300f-300j-26 (1991 & Supp. 1998); Ocean Dumping (Marine Protection, Research, and Sanctuaries) Act, 33 U.S.C.A. §§ 1401-1445 (1986 & Supp. 2000).

<sup>101</sup> S. REP NO. 96-848, at 10-12 (1980), *reprinted in*, Arnold & Porter Legislative History: P.L. 96-510.

<sup>102</sup> In 1977, a reporter for a small upstate New York newspaper wrote an article detailing a particularly disturbing account of the actions of a large chemical company. For years, Hooker Chemical had discarded barrels of chemical waste into the abandoned Love Canal near Niagara Falls, New York. After filling the canal with toxic waste, the company sold the land to the city to build an elementary school and playground. The surrounding land was developed into a housing area. Over the years, the barrels began to deteriorate causing subsiding and the leaching of the chemicals into the surrounding earth. Residents of the area developed severe health problems including liver problems, miscarriages, birth defects, sores, and rectal

Responding to public pressure, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act in 1980.<sup>103</sup> Unlike other major environmental legislation, CERCLA does not contain a provision specifically stating the purpose or the goals of the statute.<sup>104</sup> However, the legislative history accompanying the statute lends some insight into congressional intent. According to the Senate Report, the primary goal of CERCLA is to create a “Superfund” to allow for the immediate cleanup and restoration of contaminated sites. Just as important was provision of a mechanism for holding liable those responsible for the waste.<sup>105</sup> In essence, the organizations that profit from the production of chemical wastes should be held responsible for cleanup efforts.

Congress implemented these objectives by creating a regime of strict, joint, and several liability on several classes of responsible parties—“owners,” “operators,” “arrangers,” and “transporters.”<sup>106</sup> The 1986 Amendments to CERCLA ameliorated the draconian impact of this strict, joint, and several liability by allowing responsible parties to seek contributions towards the cleanup costs from other responsible parties.<sup>107</sup> The courts are now permitted to distribute the cleanup costs among the responsible parties using principles of equity.<sup>108</sup>

### 1. Liability Under CERCLA § 107

CERCLA imposes strict liability on four classes of persons when there is a release or threatened release of a hazardous substance.<sup>109</sup> First, CERCLA imposes liability on the owner or operator of the applicable vessel or facility.<sup>110</sup>

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bleeding. In August 1978, President Carter declared the area a federal emergency. The school and homes in the area were boarded up, and residents were evacuated. *Id.* at 8-9.

<sup>103</sup> CERCLA, 42 U.S.C.A. §§ 9601-9675 (1995 & Supp. 2000).

<sup>104</sup> *See, e.g.*, CAA § 101, 42 U.S.C.A. § 7401 (1995); CWA § 101, 33 U.S.C.A. § 1251 (1986 & Supp. 2000); RCRA § 1002, 42 U.S.C.A. § 6901 (1995).

<sup>105</sup> S. REP. NO. 96-848, at 12-13 (1980), *reprinted in*, Arnold & Porter Legislative History: P.L. 96-510.

<sup>106</sup> *Id.* While the statute does not specifically mention strict liability, courts have interpreted the statute in that manner. *See FMC Corp.*, 29 F.3d. at 835 (“[l]iability for the costs incurred is strict”).

<sup>107</sup> CERCLA § 113(f), 42 U.S.C.A. § 9613(f) (1995); *See also* Martin A. McCrory, *Who’s on First: CERCLA Cost Recovery, Contribution, and Protection*, 37 AM. BUS. L.J. 3, 18-19 (1999).

<sup>108</sup> CERCLA § 113(f), 42 U.S.C.A. § 9613(f)(1) (1995) (“In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”)

<sup>109</sup> CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (1995).

<sup>110</sup> CERCLA § 107(a)(1), 42 U.S.C.A. § 9607(a)(1) (1995). The term “facility” is broadly defined to include:

- (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor

Second, any person who in the past owned or operated the applicable vessel or facility at the time the hazardous waste was disposed is also liable.<sup>111</sup> Third, persons who arrange for the transport, treatment, or disposal of hazardous substances are liable.<sup>112</sup> Finally, CERCLA imposes liability on a transporter who accepts hazardous wastes for transport to a site.<sup>113</sup>

Courts require plaintiffs to show four elements in order to recover costs under CERCLA § 107: (1) The site is a “facility” as defined in CERCLA § 101(9); (2) A “release” or “threatened release” of a “hazardous substance” from the site has occurred; (3) The release or threatened release has caused the United States to incur response costs; and (4) The defendants fall within at least one of the four classes of responsible persons described in CERCLA § 107(a).<sup>114</sup>

Liable parties are responsible for various costs associated with the release of a hazardous substance. They are liable for “all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan.” Next, a responsible party may be liable to any other person for necessary response costs consistent with the NCP. Additionally, a responsible party is liable for damages to natural resources including costs of assessing those damages. Finally, responsible parties are liable for the costs of any health assessments or health effects studies conducted under CERCLA § 104(i).<sup>115</sup>

CERCLA § 107 recognizes three very narrow affirmative defenses to liability. The first two eliminate liability if the release of the toxic substance results from either an “act of God” or an “act of war.”<sup>116</sup> An “act of God” is defined as “an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care

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vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

CERCLA § 101(9), 42 U.S.C.A. § 9601(9) (1995). The term “owner or operator” is tautologically defined as “any person owning or operating such facility.” CERCLA § 101(20)(A), 42 U.S.C.A. § 9601(20)(A) (1995). The Supreme Court has expounded upon the definition of “operator” in *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998); *see infra*, notes 193-198 and accompanying text.

<sup>111</sup> CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2) (1995).

<sup>112</sup> CERCLA § 107(a)(3), 42 U.S.C.A. § 9607(a)(3) (1995).

<sup>113</sup> CERCLA § 107(a)(4), 42 U.S.C.A. § 9607(a)(4) (1995).

<sup>114</sup> *Env'tl. Trans. Sys., Inc. v. Emsco, Inc.* 969 F.2d 503, 506 (7th Cir. 1992); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1378-79 (8th Cir. 1989); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989). The elements to be proved are not always consistent in various courts and are often fact-specific depending on the allegations of the plaintiff. *See, e.g., infra* text accompanying note 155.

<sup>115</sup> CERCLA § 107(a), 42 U.S.C.A. § 9607(a)(4)(D) (1995).

<sup>116</sup> CERCLA § 107(b), 42 U.S.C.A. § 9607(b)(1)-(2) (1995).

or foresight.”<sup>117</sup> Courts have interpreted this exception very narrowly.<sup>118</sup> While “acts of war” is not defined within the statute, courts have narrowly interpreted the definition to include only releases directly related to combat operations.<sup>119</sup> These two exceptions are so narrow as to have been virtually useless in limiting liability.

The final defense, raised most often, is to blame the release on an “act or omission of a third party.”<sup>120</sup> This defense is also limited in three very significant ways. First, the “act or omission” cannot occur in connection with a contractual relationship between the parties.<sup>121</sup> Second, the defendant must prove that he exercised due care with respect to the hazardous substance based on all the facts and circumstances.<sup>122</sup> Third, the defendant must show “he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.”<sup>123</sup> A defendant may raise any combination of these defenses.<sup>124</sup>

## 2. Contribution Actions Under CERCLA § 113(f)

While CERCLA § 107 grants a plaintiff a private right of action to recover costs associated with the cleanup of a contaminated site, it does not provide a method for one responsible party to seek contributions from other responsible parties.<sup>125</sup> In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), which added CERCLA § 113(f).<sup>126</sup> Under this provision, a person could now seek a contribution from any other party who was also a PRP. Responsibility would now be allocated among the responsible parties using “equitable factors as the court determines are appropriate.”<sup>127</sup> The effect of this amendment was to relieve the harsh consequences of placing the enormous cost of site cleanup on a single party without allowing a mechanism for sharing the costs among responsible parties.

To encourage parties to settle, the 1986 Amendment, adding § 113(f)(2), also provided a shield from further contribution claims once a responsible party enters into an approved settlement with the United States or a State.<sup>128</sup> This section, however, does not shield a PRP from a further action for

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<sup>117</sup> CERCLA § 101(1), 42 U.S.C.A. § 9601(1) (1995).

<sup>118</sup> *United States v. M/V Santa Clara I*, 887 F. Supp. 825, 843 (D.S.C. 1995) (a severe storm at sea did not qualify as an “act of God”); McCrory, *supra* note 107 at 15.

<sup>119</sup> *See United States v. Shell Oil Co.*, 841 F. Supp. 962, 970-72 (C.D. Ca. 1993); McCrory, *supra* note 107, at 15.

<sup>120</sup> CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1995).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See CERCLA § 107*, 42 U.S.C.A. § 9607 (1995).

<sup>126</sup> Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1647 (1986) (codified at 42 U.S.C.A. § 9613(f) (1995)) [hereinafter SARA].

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1648 (codified at 42 U.S.C.A. § 9613 (f)(2) (1995)).

cost recovery brought under § 107.<sup>129</sup> Without such protection from further cost recovery actions, the protections of § 113(f)(2) are thought to be extremely limited.<sup>130</sup>

### 3. Federal Government Liability—Waivers of Sovereign Immunity

CERCLA § 120, entitled “Federal Facilities,” provides that all branches of the federal government “shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [CERCLA § 107] of this title.”<sup>131</sup> Prior to the SARA in 1986, essentially identical language was contained in § 107.<sup>132</sup> The new amendments created a new section to deal with issues involving the cleanup of federal facilities.<sup>133</sup> However, there is no support for the proposition that by moving the language of § 120(a) from § 107 that Congress intended to limit the earlier waiver of sovereign immunity to government actions on federal facilities.<sup>134</sup> Further, the term “person” as used in CERCLA § 107, is defined in § 101 to include the United States government.<sup>135</sup>

Courts interpreting the breadth of the waiver of sovereign immunity have wrestled with two competing concepts. First, as a guiding principle, waivers of sovereign immunity are interpreted narrowly.<sup>136</sup> In contrast, courts construe remedial statutes, such as CERCLA, liberally to accomplish their

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<sup>129</sup> See *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) (“Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.”).

<sup>130</sup> See *McCrary*, *supra* note 107, at 33.

<sup>131</sup> CERCLA § 120(a), 42 U.S.C.A. § 9620(a)(1) (1995).

<sup>132</sup> Pub.L. No. 96-510, Title I, § 107(g), 94 Stat. 2767, 2783 (1980) (original waiver of sovereign immunity provided that “[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.”). The 1986 SARA amendments moved nearly identical language to the new § 120. Pub.L. No. 99-499, Title I, § 120, 100 Stat. 1613, 1666 (1986). See also, *FMC Corp.*, 29 F.3d at 842.

<sup>133</sup> CERCLA § 120, 42 U.S.C.A. § 9620 (1995).

<sup>134</sup> *FMC Corp.*, 29 F.3d at 842. The Third Circuit found the argument limiting government liability to “Federal Facilities” unavailing for three reasons. First, the language in the new § 120 clearly states the government will be held liable the same as any other person. *Id.* Second, the language in § 120 was essentially identical to the earlier waiver contained in the old § 107. *Id.* Finally, the language in the new § 120 provided for government liability under § 107. *Id.* See also Steven G. Davison, *Government Liability Under CERCLA*, 26 B.C. ENVTL. AFF. L. REV. 47, 52-54 (1997); William B. Johnson, Annotation, *Liability of Federal Government under § 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act*, 127 A.L.R. FED. 511, 528-29 § 5 (1995).

<sup>135</sup> CERCLA § 101(21), 42 U.S.C.A. § 9601(21) (1995).

<sup>136</sup> *United States v. Idaho*, 508 U.S. 1 (1993); *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992); *FMC Corp.*, 29 F.3d at 839.

goals.<sup>137</sup> The § 120 waiver clearly states the federal government should be treated the same as any other “person” in assessing liability under the statute.<sup>138</sup> The conflict comes to a head in cases where the government is acting in its sovereign capacity as a regulator—as opposed to as a “person.”

In balancing the competing concepts, courts have subdivided regulatory activities into those dealing with cleanup activities and other regulatory activities. Sovereign immunity is invariably recognized when the government is acting in its regulatory capacity to effectuate the cleanup of a site.<sup>139</sup> This immunity is consistent with the grant of immunity to state and local governments for their cleanup activities granted in § 107(d)(2).<sup>140</sup> When the government is involved in regulatory activities other than cleanup activities the trend is to find a waiver of sovereign immunity.<sup>141</sup> Nonetheless, the existence of regulatory oversight alone should be insufficient to find the government liable as a responsible person.<sup>142</sup>

Establishing a waiver of sovereign immunity is only the first step in assessing the liability of the federal government. Even with the waiver, the plaintiff still needs to establish that the government is within the class of PRPs set out in CERCLA §107(a). While this is not a significant hurdle when dealing with traditional facilities that are federally owned,<sup>143</sup> it is a far more difficult proposition when examining the relationship between defense contractors and the United States.

## **B. Government CERCLA Liability Based on Contractual Relationships**

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<sup>137</sup> *FMC Corp.*, 29 F.3d at 840 (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992)).

<sup>138</sup> See CERCLA § 120, 42 U.S.C.A. § 9620 (1995 & 1999 WESTLAW electronic update).

<sup>139</sup> The majority of these cases involve suits alleging EPA has failed in some manner during cleanup efforts. See, e.g., *FMC Corp.*, 29 F.3d at 839; *In re Paoli R.R. Yard PCB Litig.*, 790 F. Supp. 94 (E.D. Pa 1992), *aff'd without op.*, 980 F.2d 724 (3d Cir. 1992); *United States v. Atlas Minerals & Chems., Inc.*, 797 F. Supp. 411, 419-21 (E.D. Pa 1992); *United States v. Azrael*, 765 F. Supp. 1239 (D. Md. 1991); *United States v W. Processing Co.*, 761 F. Supp 725 (W.D. Wash. 1991).

<sup>140</sup> CERCLA § 107(d)(2), 42 U.S.C.A. § 9607(d)(2) (1995).

<sup>141</sup> *FMC Corp.*, 29 F.3d at 839-41; *United States v. Iron Mountain Mines*, 881 F. Supp. 1432 (E.D. Cal. 1995). But see *United States v. American Color and Chem. Corp.*, 858 F.Supp 445 (M.D. Pa 1994) (holding that government immunity is only waived when acting as a business concern and not in a regulatory capacity); *Johnson*, *supra* note 134, at § 7.

<sup>142</sup> *Davison*, *supra* note 134, at 83-4, *citing to* *Vertac Chem. Corp.*, 46 F.3d at 808; *United States v. Dart Indus.*, 847 F.2d 144, 146 (4th Cir. 1988); *Maxus Energy Corp.*, 898 F. Supp. at 406-7; *Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633, 638-39 (C.D. Cal. 1991); *Hassayampa Steering Comm. v. Arizona*, 768 F. Supp. 697, 702 (D. Ariz. 1991); *United States v. New Castle County*, 727 F. Supp. 854, 874 (D. Del. 1989); *New York v. City of Johnstown*, 701 F. Supp. 33, 36 (N.D.N.Y. 1988).

<sup>143</sup> See, e.g., *FMC Corp.*, 29 F.3d at 840 (“[A]lthough no private party could own a military base, the government is liable for cleanup of hazardous wastes at military bases because a private party would be liable if it did own a military base.”).

While the waiver of sovereign immunity has not been an insurmountable hurdle, establishing the United States' liability as a PRP under CERCLA § 107 is a challenge. The status of the United States as an "owner, operator, or arranger" based on a contractual relationship seldom presents a clear issue.

*1. Owner Liability—Elf Atochem North America, Inc. v. United States*

In some situations, defense contractors may assert the government should be liable as an "owner" under CERCLA § 107. The few reported cases have revolved around the definition of "facility" and what constitutes "disposal" of a hazardous substance.<sup>144</sup> Government contracts often involve the use by a defense contractor of government furnished property.<sup>145</sup> While there would be little issue in situations where the government furnished an entire plant, as in the case of a "GOCO" (government-owned contractor-operated facility),<sup>146</sup> the issue is murkier when the government provides machinery or equipment that is used at a defense contractor plant.

One such case is *Elf Atochem North America, Inc. v. United States*.<sup>147</sup> Elf Atochem of North America, Inc. (Elf) owned and operated a plant in Pittstown, New Jersey.<sup>148</sup> Elf produced the pesticide DDT for use during World War II. The pesticide was produced pursuant to a contract with the United States in support of the war effort. The government considered DDT a strategic pesticide vital to the war effort in Europe. As part of the contract, the United States leased to Elf's predecessor in interest the equipment necessary to produce the DDT.<sup>149</sup> The parties installed the equipment at the contractor's plant and connected it using company-owned pipes to waste ponds.<sup>150</sup>

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<sup>144</sup> See, e.g., *Elf Atochem North America, Inc. v. United States*, 868 F. Supp. 707, 709-11 (E.D. Pa. 1994) (describing both term "facility" and what constitutes a "disposal"); *Mead Corp. v. United States*, No. C-2-92-326, slip op., 1994 WL 733567 (S.D. Ohio Jan. 14, 1994) (describing both term "facility" and what constitutes a "disposal"); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342-43 (9th Cir. 1992) (describing broad reach of term "disposal").

<sup>145</sup> Government policy is to ordinarily require contractors to furnish all property necessary to perform a government contract. FAR, 48 C.F.R. § 45.102 (1999). However, there are many situations where government property, including materials and production facilities are used in the performance of government contracts. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 619 (3d ed. 1995). Part 45 of the FAR governs the use of government furnished property in government contracts. FAR, 48 C.F.R. Pt. 45 (1999).

<sup>146</sup> FAR, 48 C.F.R. § 45.301 (defining "facilities" as used in FAR to include "plant equipment and real property").

<sup>147</sup> *Elf Atochem*, 868 F. Supp. 707. See also *Rospatch Jessco Corp. v. Chrysler Corp.*, 962 F. Supp. 998, 1007-08 (W.D. Mich. 1995) (acknowledging government ownership of equipment but unable to determine whether there was a release of hazardous waste from the equipment to support government liability).

<sup>148</sup> *Elf Atochem*, 868 F. Supp. at 708, 713.

<sup>149</sup> *Id.* at 708.

<sup>150</sup> See *id.* at 708, 710-12.

Today, the site is contaminated with chlorobenzene and benzene—both are byproducts of DDT production.<sup>151</sup> The EPA placed the site on the NPL in 1983.<sup>152</sup> Subsequently, Elf entered into a consent decree with the EPA.<sup>153</sup> Elf then brought an action under CERCLA § 113(f), seeking contribution from the United States as a PRP.<sup>154</sup>

The district court set out a six-part test for liability—Elf needed to show that the United States 1) owned 2) a facility 3) at which hazardous substances 4) were disposed 5) and from which there is a release or threatened release 6) for which response costs have been incurred.<sup>155</sup> Ownership of the leased equipment was not an issue.<sup>156</sup> Both the United States and the district court acknowledged the expansiveness of the term “facility” as defined under CERCLA § 101(9)(A).<sup>157</sup> There was no dispute that the government owned the leased equipment and that the equipment fell within the CERCLA definition of “facility.”<sup>158</sup> Additionally, both parties agreed the DDT byproducts qualified as hazardous substances under the CERCLA § 101(14).<sup>159</sup> Further, neither party disputed that Elf had incurred response and cleanup costs.<sup>160</sup>

The primary point in contention was whether there was a “disposal” of the hazardous substance from the government-owned “facility.”<sup>161</sup> The court acknowledged that CERCLA was not intended to cover internal waste streams that were to be reclaimed or put to new use.<sup>162</sup> In addition, the court understood that the prevailing view among the circuits was that “disposing” requires an affirmative act where the “materials were considered waste and were thrown out, got rid of or dumped.”<sup>163</sup> While once again both parties agreed the product leaving the government equipment was “waste,” they disagreed as to the location of the disposal.<sup>164</sup> The United States argued that

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<sup>151</sup> *Id.* at 708.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* See *supra* notes 125-130 and accompanying text for a discussion of contribution actions under CERCLA § 113(f).

<sup>155</sup> *Elf Atochem*, 868 F. Supp. at 709. This is a slightly expanded recitation of the elements required to prevail under CERCLA § 107 than that set out by other courts. See *supra* note 114 and accompanying text.

<sup>156</sup> *Elf Atochem*, 868 F. Supp. at 709.

<sup>157</sup> *Id.* See *supra* note 110 describing definition of “facility.”

<sup>158</sup> *Elf Atochem*, 868 F. Supp. at 709.

<sup>159</sup> *Id.* at 709-10. Hazardous substances are broadly defined to include both listed and characteristic hazardous waste under RCRA, as well as hazardous wastes listed under other substantive environmental law including the CAA and CWA. CERCLA § 101(14), 42 U.S.C.A. § 9601(14) (1995).

<sup>160</sup> *Elf Atochem*, 868 F. Supp. at 712.

<sup>161</sup> *Id.* at 710-12.

<sup>162</sup> *Id.* at 710 (citing to H.R. REP. NO. 1491 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 711.

“disposal” required exposure to the environment.<sup>165</sup> The court rejected this argument as too narrow, instead finding that “when each of the waste streams left the United States’ equipment it was being sent to the pipes as a means of getting rid of it, transferring it, throwing it out; in other words, disposing of it.”<sup>166</sup>

The final issue was whether a “release” or “threatened release” of a hazardous substance occurred.<sup>167</sup> The United States, again narrowly focused, argued that the government-owned equipment discharged hazardous waste into Elf’s pipes—not the environment.<sup>168</sup> The court declined to agree, instead determining that the word “release” should be construed broadly.<sup>169</sup> The only requirement is an “eventual release, not an actual or imminent one.”<sup>170</sup> In addition, the court was not swayed by the concerns of other courts that this reasoning might “improperly merge owner liability into generator liability” if the release were to occur at a time separate from disposal.<sup>171</sup> In this case, “[t]he United States [was] not being sued for creating waste that was later released into the environment through no fault of its own. Rather, the United States [was] being sued for disposing of its waste directly from its equipment into pipes that lead directly to the environment.”<sup>172</sup>

Under the rationale set out in *Elf Atochem*, the government may incur liability as an “owner” of a “facility” as defined under CERCLA § 107 by providing government furnished property. In addition, the government may be liable when the contractor purchases equipment for which the government will reimburse the contractor as a direct cost under the contract.<sup>173</sup> In these situations, title for the equipment often passes to the government pursuant to contractual clauses—making the government the owner of the “equipment”<sup>174</sup>—and possibly a CERCLA “facility.” This was the situation in

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<sup>165</sup> *Id.* The United States based its opinions on two asbestos cases where discharges to a closed environment did not constitute disposal. 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1362 (9th Cir. 1990); Tragarz v. Keene Corp., 980 F.2d 411, 427 (7th Cir. 1992). The *Elf* court distinguished the asbestos cases because they dealt with the productive use of a hazardous substance rather than a waste stream as in the instant case. 868 F. Supp. at 711.

<sup>166</sup> 868 F. Supp. at 711.

<sup>167</sup> *Id.* at 711-12.

<sup>168</sup> *Id.* at 712.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (citing *Amland Props. Corp. v. Aluminum Corp.*, 711 F. Supp. 784, 793 (D.N.J. 1989)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> For a discussion of situations in which contract property becomes government property, see *CIBINIC & NASH*, *supra* note 145, at 620-22.

<sup>174</sup> Government contracts often contain clauses detailing situations in which title to contract property passes to the government. In fixed-price contracts the standard clause provides:

If this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost under this contract—

(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor’s delivery of such material; and

*Mead Corp. v. United States*, an unpublished district court opinion.<sup>175</sup> Although the government was the “owner” of a “facility,” the *Mead* court did not find a “release” because the hazardous waste was disposed of at a different time and location away from the “facility.”<sup>176</sup>

Liability in these cases is extremely fact specific and may depend on contract clauses defining ownership of property. Without being able to show actual government ownership of the affected facility, defense contractors have to look to a different theory on which to hold their contracting partner, the United States, liable.

## 2. Operator Liability—*FMC Corporation v. United States*

Without the facts necessary to show government ownership of a “facility,” defense contractors often assert the government should be liable as an “operator” for the disposal of a hazardous substance. There are at least a few cases, mentioned below, where the contractor was able to establish the “actual control” necessary to show the government acted as an “operator.” Government regulation of an industry has never been sufficient in itself to establish the government liability as an “operator.”<sup>177</sup> Instead, the courts have focused on the pervasive nature of the government’s involvement with a contractor facility.

*FMC Corporation v. United States* (FMC), a Third Circuit case, is the seminal case dealing with government “operator” liability based upon a wartime contract.<sup>178</sup> The case involved a facility located in Front Royal, Virginia that was owned and operated by American Viscose from 1937 until 1963. In 1963, FMC purchased the plant. In 1982, an EPA inspection

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- (ii) Title to all other material shall pass to and vest in the Government upon—
    - (A) Issuance of the material for use in contract performance;
    - (B) Commencement of processing of the material or its use in contract performance; or
    - (C) Reimbursement of the cost of the material by the Government, whichever occurs first.

FAR, C.F.R. § 52.245-2(c)(4) (1999).

<sup>175</sup> See *Mead Corp. v. United States*, No. C-2-92-326, slip op., 1994 WL 733567 (S.D. Ohio Jan. 14, 1994).

<sup>176</sup> *Id.* In *Mead*, pursuant to the contract the government owned equipment used by the defense contractor to manufacture munitions. *Id.* at 1. The waste was disposed of trenches on site at the contractor plant. *Id.* at 2. The court declined to find the government liable, apparently reasoning the government did not own the trenches. *Id.* at 4. The court found the release must occur at the facility from which the waste was disposed. *Id.* at 5.

<sup>177</sup> *East Bay Mun. Util. Dist. v. United States*, 142 F.3d 479 (D.C. Cir. 1998) (wartime mining operation was not sufficiently controlled by federal government to establish operator liability).

<sup>178</sup> *FMC Corp. v. United States*, 29 F.3d 833 (3d Cir. 1994). For an argument that the government should not be liable for its contractual relationships when it is acting in a regulatory capacity, see Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191 (1993).

revealed a hazardous substance in the groundwater near the site. The substance, carbon bisulfide, is a chemical byproduct from the production of rayon. EPA began a cleanup and informed FMC of their liability under CERCLA. In 1990, FMC brought an action against the United States pursuant to CERCLA § 113(f) seeking contribution for the cost of cleanup.<sup>179</sup> They alleged, among other things, that the government was liable as an “operator” based on the government’s pervasive involvement in a World War II contract with American Viscose.<sup>180</sup>

Based on the facts presented, the court found the United States liable as an “operator” under CERCLA § 107.<sup>181</sup> First, the court dealt with the waiver of sovereign immunity.<sup>182</sup> Using the reasoning discussed earlier, the court found the United States had waived its sovereign immunity and was subject to suit.<sup>183</sup> Next, the court turned to the issue of liability as an “operator” and applied the “actual control” test.<sup>184</sup>

The “actual control” test was originally developed in the context of related corporations.<sup>185</sup> Under the test, one corporation would be liable for the actions of another if it had “‘substantial control’ over the other corporation. [citation omitted]. At a minimum, substantial control requires ‘active involvement in the activities’ of the other corporation.”<sup>186</sup> The court extended the application of the test to situations where “the government [has] ‘substantial control’ over [a] facility and [had] ‘active involvement in the

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<sup>179</sup> 29 F.3d at 835.

<sup>180</sup> *Id.* FMC alleged the government was liable as an “owner,” “operator,” and “arranger.” *Id.* The government admitted to “owner” liability as it applied to government equipment at the plant. *Id.* at 838 and 854 (dissent). The court expressed no opinion as to “arranger” liability and merely affirmed the decision of the district court. *Id.* at 846. The contract in question was entered into after the attack on Pearl Harbor. It called for the production of high tenacity rayon—vital to the production of war-related products like airplane and truck tires. The War Production Board directed American Viscose’s production of high tenacity rayon; it was a diversion from the factory’s ordinary production of textile rayon. American Viscose was required to comply with War Production Board requirements or face seizure by the federal government. The production of high tenacity rayon involved the use of government-owned machinery, which was leased back to American Viscose. Adjacent to the site, the government built a plant to supply raw materials by direct pipeline. The government had representatives on site with authority to promulgate rules governing all operations at the site. The government was involved in investigating and resolving labor problems. In addition, the government was aware of the generation of hazardous waste and the disposal of 65,500 cubic yards of waste at highly visible on-site basins. *Id.* at 836-38.

<sup>181</sup> *Id.* at 845.

<sup>182</sup> *Id.* at 838-42.

<sup>183</sup> See *supra* notes 131-142 and accompanying text for a discussion of the sovereign immunity.

<sup>184</sup> *FMC*, 29 F.3d at 843-45.

<sup>185</sup> *Id.* at 843. See *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993) (developing “actual control” test as applied to corporations).

<sup>186</sup> *FMC*, 29 F.3d at 843.

activities' there."<sup>187</sup> The test is "inherently fact-intensive" and based on "the totality of the circumstances presented."<sup>188</sup>

The court focused on the government's "considerable day-to-day control over American Viscose." There were five factors the court stressed. First, the government directed the production of the high tenacity rayon, diverting American Viscose from its ordinary business. Second, the government maintained significant control over the process through regulations, inspectors, and the possibility of seizure. Third, the government supplied the raw materials from government-built plants, supplied an increased work force, and helped supervise employees. Fourth, the government furnished machinery used in the production of the rayon. Finally, the government set the price of the rayon and determined the marketing.<sup>189</sup>

The dissent in FMC applied the same test but argued that involvement in "nuts-and-bolts management decisions [is] necessary for [operator] liability under CERCLA."<sup>190</sup> According to the dissent, the majority misconstrued the facts by neglecting the following aspects. First, American Viscose performed the production of rayon for profit, subject to the same rules as the entire industry. Next, the firm's management remained in place and actually performed the day-to-day scheduling and made employee decisions. Additionally, the raw materials involved in the contamination were supplied by third parties, not the government. Furthermore, the government's involvement with employees at the plant was at the request of American Viscose. Finally, the government's ownership of equipment subjects it to owner liability—not operator liability. Based on this rendition of the facts, the dissent would not find the government liable as an "operator" of the facility.<sup>191</sup>

Courts applying this same test to Vietnam-era wartime contracts have not found the same degree of pervasive control by the government sufficient to justify government liability.<sup>192</sup> Given the unique fact-specific nature of the holding in FMC, it is unsurprising that few defense contractors would be able to satisfy the "actual control" test sufficiently to prove government liability.

In *United States v. Bestfoods*, a unanimous United States Supreme Court took on the issue of "actual control" in the context of corporate liability in parent-subsidary relationships.<sup>193</sup> The Court distinguished between derivative and direct liability.<sup>194</sup> Consistent with state law, the Court held that

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<sup>187</sup> *Id.* The Eighth Circuit adopted the same "actual control" test for application to defense contracts in *United States v. Vertac*, 46 F.3d 803 (8th Cir. 1995).

<sup>188</sup> *Id.* at 845.

<sup>189</sup> *Id.* at 844.

<sup>190</sup> *Id.* at 851(dissent) (citing *FMC v. United States*, 786 F. Supp. 471 (E.D. Pa. 1990)).

<sup>191</sup> *Id.* at 852-54.

<sup>192</sup> *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (government not liable as an operator or arranger for production of Agent Orange during Vietnam conflict at contractor plant); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399 (N.D. Tex. 1995) (government not liable using same reasoning as *United States v. Vertac*).

<sup>193</sup> 524 U.S. 51 (1998).

<sup>194</sup> *Id.* at 65.

when, but only when, the corporate veil may be pierced, may a parent be held liable for a subsidiary's violations of CERCLA. Otherwise, the focus is on the direct liability of the parent.<sup>195</sup> The Court noted that the nature of the parent-subsidary corporate relationship was irrelevant to the issue of direct liability.<sup>196</sup> Instead, the actions of the parent as an "operator" are critical.<sup>197</sup> The Court went on to clarify the definition of "operator" as it applies to the corporate relationship:

[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.<sup>198</sup>

After *Bestfoods*, the Third Circuit's reasoning in *FMC* seems suspect.<sup>199</sup> Certainly, one could argue that the "actual control" test survives as applied to government-contractor relationships. After all, the Third Circuit recognized the test was developed in the context of a related corporation and only applied it to government-contractor relationships because it was "instructive."<sup>200</sup> More damaging to their logic is the Supreme Court's admonition that the focus for "operator" liability is on operations directly related to disposal of hazardous waste and environmental compliance.<sup>201</sup> Few, if any, of the factors detailed by the Third Circuit for finding the government liable as an operator are related to hazardous waste disposal.<sup>202</sup>

In light of the high hurdles set by *FMC*, and raised immeasurably by *Bestfoods*, defense contractors will be unlikely to prevail by alleging the government is liable as an "operator" based on their contractual relationship. The next possibility is to allege the government is liable as an "arranger."

### 3. Arranger Liability: *United States v. Vertac*

The Eighth Circuit addressed "arranger" liability as it applies to defense contractors in *United States v. Vertac*.<sup>203</sup> *Vertac* involved a Vietnam era defense contract for production of Agent Orange as discussed in Section II of

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 66.

<sup>198</sup> *Id.* at 66-67.

<sup>199</sup> See Major Romans, *Supreme Court Clarifies Corporate Liability for Parent Corporations*, ARMY LAW., Oct. 1998, at 64.

<sup>200</sup> *FMC*, 29 F.3d at 843.

<sup>201</sup> *Bestfoods*, 524 U.S. at 66-67.

<sup>202</sup> See *supra* note 189 and accompanying text; Romans, *supra* note 199, at 64.

<sup>203</sup> 46 F.3d 803 (8th Cir. 1995).

this article. Based on the facts as alleged, the Eighth Circuit did not find the government liable as an “operator,” or an “arranger.”<sup>204</sup>

The court rejected the Hercules’ “operator” argument applying the “actual control” test as set out in FMC above.<sup>205</sup> The Eighth Circuit then turned to the issue of “arranger” liability. The legal standard for determining whether one is liable for arranging the disposal or treatment of a hazardous substance is whether they “had the authority to control, and did control” the production leading to the hazardous waste.<sup>206</sup> The court acknowledged that there was no requirement to prove “personal ownership or actual physical possession of hazardous substances as a precondition” for finding arranger liability—such a requirement would “be inconsistent with the broad remedial purposes of CERCLA.”<sup>207</sup>

However, the court placed serious limitations on the ability to find the United States liable as an “arranger” based on wartime contracts. First, the court dismissed Hercules’ argument that the government was liable based on the United States’ regulatory powers. “A governmental entity may not be found to have owned or possessed hazardous substances [as an “arranger”] merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances.”<sup>208</sup> Instead, the court would require immediate supervision and direct responsibility for the transportation or disposal of the hazardous substances generated at a facility. The court found none of the required supervision or any responsibility for waste disposal in the facts presented by Hercules.<sup>209</sup>

Hercules countered by arguing that in addition to the regulatory powers, the additional nature of the contractual relationship was enough to establish government liability. The court suggests that in certain circumstances “a government contract [may involve] sufficient coercion or governmental regulation and intervention to justify the United States’ liability as an arranger under CERCLA.”<sup>210</sup> However, the fact that the government could require the contractor to perform the contract and give it priority over other contracts was not sufficient for such a finding.

Hercules also argued that the United States, by supplying raw materials, in addition to having the authority to control the supply, production process, and end product, should be liable as an “arranger.”<sup>211</sup> The contractor analogized the situation to *Aceto*.<sup>212</sup> In that case, a chemical manufacturer

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<sup>204</sup> *Id.* at 809, 811.

<sup>205</sup> *Vertac*, 46 F.3d at 807-809; *See supra* notes 185-189 and accompanying text.

<sup>206</sup> *Vertac*, 46 F.3d at 810.

<sup>207</sup> *Id.* (quoting *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986)).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 811 (citing *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 886).

<sup>211</sup> *Id.*

<sup>212</sup> *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989).

hired an independent contractor to formulate pesticides. The manufacturer owned the raw materials, the work in progress, and the end product. Actual ownership throughout the process was sufficient to allege “arranger” liability, even though the manufacturer was not actually involved in the treatment or disposal of the hazardous substance.<sup>213</sup> In the present case, the court was not convinced that Hercules could show the United States supplied or owned either the raw material or work in progress.<sup>214</sup> Facilitating the acquisition of raw materials and the minimal involvement in the production process was insufficient to support the allegation. Thus, the court rejected each rationale asserting the government was liable as an “arranger.”<sup>215</sup>

While *Vertac* leaves open the possibility that a contractual relationship may lead to government liability, the circumstances appear quite limited.<sup>216</sup> Like the Supreme Court in *Bestfoods*, the court appears to be focused on the government’s direct involvement in the production and disposal of hazardous waste.<sup>217</sup> The ordinary contractual relationship between buyer and seller will not result in government liability.

#### 4. Allocation of Cost Under CERCLA § 113(f): *United States v. Shell Oil Company*

In the event that a defense contractor is able to show the government is also a PRP as either an “owner,” “operator,” or “arranger,” the allocation of

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<sup>213</sup> *Id.* at 1378-82.

<sup>214</sup> *Vertac*, 46 F.3d at 811.

<sup>215</sup> See also *Maxus Energy Corp. v. United States*, 898 F. Supp. 399 (N.D. Tex. 1995). Like *Vertac*, *Maxus* involved a Vietnam era contract for the production of Agent Orange. *Id.* at 402. Factually, the cases are nearly identical, although the contractor in *Maxus* did not dispose of barrels on site, most of the contamination was from leakage and spilling. The district court analyzed the contractors claim that their case was analogous to *Aceto*. *Id.* at 406. Once again, the court did not find actual or constructive government ownership of the raw materials or government control over the manufacturing process. The court refused to impose liability based upon the buyer-seller relationship under the contract. *Id.* at 406-07.

<sup>216</sup> See *United States v. Shell Oil*, CV 91-0589-RJK (1995 U.S. Dist. LEXIS 19778) (C.D. Cal. 1995) (unpublished). The district court in *Shell Oil* took exception to the analysis of “arranger liability” in *Vertac* and found the United States liable based on a World War II era contract for aviation fuel. *Id.* at 22. The court found the government to be an arranger because its control over the raw materials amounted to “ownership.” *Id.* In rejecting *Vertac* the court reasoned:

When the Government, as a practical matter, orders a private company to supply a finished product, dictates the delivery dates, the quantity to be shipped, the prices of the materials, the specifications of the raw materials, and provides the transportation for the raw materials, there can be no question but that it is “supplying” the raw materials within the meaning of *Aceto*.

*Id.* at 22.

<sup>217</sup> See *supra* notes 193-198 and accompanying text.

liability under CERCLA § 113(f)(1) must be adjudicated.<sup>218</sup> The courts are given remarkable discretion to apply “equitable factors as the court determines are appropriate.” In the context of a wartime defense contract, a district court made just such an allocation in *United States v. Shell Oil Company* (Shell Oil).<sup>219</sup>

Shell Oil involved the cleanup of the McCroll Superfund Site, a twenty-two acre site near Fullerton, California. The site was contaminated with acid sludge byproducts from the production of high-octane aviation fuel during World War II. The fuel was produced for the military under heavily regulated government contracts.<sup>220</sup> Despite claims of the “act of war,” and “innocent landowner” defenses, the district court found the oil companies liable as CERCLA “arrangers” in an earlier proceeding.<sup>221</sup> In an unpublished order, the United States was also adjudged liable as an “arranger.”<sup>222</sup>

During the War, the War Production Board and the Petroleum Administration subjected the oil industry to intense oversight. The degree of oversight included directives concerning supply of raw materials, quarterly inventories, quantities to produce, quality of fuel produced, and manufacturing specifications. Companies refusing to cooperate were subject to takeover, and individuals subject to criminal prosecution. The huge volumes demanded by the government resulted in by-products too great to be reused, treated, or disposed of based on the facilities available. The shortage of railroad tank cars precluded shipment of the waste to oil company facilities in Richmond, California. The government would not allow the oil companies to build treatment facilities. The government was aware, and at least tacitly agreed, to the oil companies contracting with McCroll to dump the hazardous byproducts at the McCroll site.<sup>223</sup>

The court, applying equitable factors, found the government 100 percent liable for the waste associated with the aviation fuel program.<sup>224</sup> The court articulated three reasons. First, equitable principles should place the cost of war on the United States as a whole as opposed to an individual contractor.<sup>225</sup> “The American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort.”<sup>226</sup>

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<sup>218</sup> CERCLA § 113(f), 42 U.S.C.A. § 9613(f) (1995). See *supra* notes 125-130 and accompanying text.

<sup>219</sup> 13 F. Supp 2d. 1018 (C.D. Cal. 1998).

<sup>220</sup> *Id.* at 1020.

<sup>221</sup> *United States v. Shell Oil Co.*, 841 F. Supp. 962 (C.D. Cal. 1993) (district court opinion discussing Shell Oil liability for cleanup of McColl Superfund Site).

<sup>222</sup> 13 F. Supp 2d. at 1019; see *supra* note 216.

<sup>223</sup> *Id.* at 1019-24.

<sup>224</sup> *Id.* at 1027.

<sup>225</sup> *Id.* (analogizing the oil company contract to the situation at the rayon plant in *FMC Corp.*, 29 F.3d at 833.) See *supra* notes 178-191 for a discussion of the FMC case.

<sup>226</sup> *Id.*

The other two reasons dealt with the blameless action of the oil companies. The oil companies had no alternative to land disposal since the government use precluded the availability of tank cars necessary for proper movement of the byproducts to the facility in Richmond, California. Finally, the government would not approve the oil companies' plans to build treatment plants.<sup>227</sup>

Once again, the success of the defense contractor even in the allocation process is extremely fact specific. Not many defense contractors will be able to show the degree of control the government exerted in Shell Oil, nor the blameless conduct of the contractors. The focus appears to be on the relative culpable conduct of the contracting parties and the degree to which each party benefited from the disposal of the hazardous substance.

### **C. Section Summary**

Despite the staggering costs involved, and the sentiment that society as a whole benefits from the successful prosecution of war and should therefore bear the costs as a whole—defense wartime contractors have been remarkably unsuccessful in seeking contributions for the cleanup of defense facilities from the United States. The hurdles enacted by Congress, as interpreted by the courts, greatly limit the situations where a defense contractor will make a successful showing of government liability. CERCLA does not mention contractual relations as a basis for liability—and the courts do not seem likely to create such a basis. Except in the rare case of actual government ownership of a facility operated by a contractor, “owner” liability will not apply. Even rarer will be instances where a contractual relationship will involve the degree of control over the manufacture, disposal, or treatment of hazardous waste to hold the government liable under an “operator” or “arranger” theory. Most contractors will have to seek another avenue to recover a share of the cost of cleanup—one such possibility is under a breach of contract theory.<sup>228</sup>

## **IV. CONTRACTOR RECOVERY UNDER THE CONTRACT**

### **A. Dealing with the Sovereign—The Government’s Split Personality**

While contractors may be perplexed by the difficulty of seeking contributions from the United States under CERCLA, they face an even more daunting task wading through the complexities of government procurement law. Contractors seeking reimbursement for CERCLA cleanup costs under a contract theory are arguing in essence that the government should assume the financial burden of changes in the law that increase the cost of contract

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<sup>227</sup> *Id.* at 1027-28.

<sup>228</sup> *See* Bunn, *supra* note 11. For an argument that CERCLA costs are more likely to be recovered under a CERCLA theory than under the contract, see Kannan, *supra* note 96, at 49-50.

performance. These arguments are generally based on either explicit or implicit promises by the government that they will assume the risk of such a change in the law. While this argument may be relatively new in the context of environmental cleanup costs, defense contractors have been making similar arguments since the days of the Civil War—only a few years after Congress passed legislation allowing for breach of contract claims to be brought against the United States.

The United States Court of Claims was established by statute in 1855 to hear claims, including contractual claims.<sup>229</sup> Prior to this time, Congress handled such matters on an ad hoc basis by passing private legislation.<sup>230</sup> The newly-formed court was writing on a largely clean slate. Many of the principles developed in the early cases survive today as courts sort out the circumstances under which the government will be treated as any other contracting party—and in what circumstances special exceptions should apply. Today, these competing methods of treating the government in its contractual relationships are sometimes referred to as the “congruence,” and the “exceptionalism” theories.<sup>231</sup> The United States Court of Claims first addressed the dichotomy between the government as lawgiver and the government as contracting partner when a Civil War defense contractor was stung by a change in the law.<sup>232</sup>

*United States v. Deming* involved a contract between Israel Deming and the United States Marine Corps, for the purchase of rations during the Civil War.<sup>233</sup> In 1861, the quartermaster, on behalf of the United States, entered into a contract for the daily supply of rations.<sup>234</sup> In August of that same year, Congress passed a duty on some of the supplies making up the rations.<sup>235</sup> Despite the loss, Israel Deming continued to supply rations for the remainder of the year.<sup>236</sup> In 1862, Deming again entered into a contract with the Marines to supply rations. In February 1862, Congress passed the Legal Tender Act,

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<sup>229</sup> Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855). This statute was a predecessor to the Tucker Act that gave the Court of Claims jurisdiction to hear claims against the United States. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (1887). These functions were later handled by the United States Claims Court which was established by the Federal Courts Improvement Act of 1982. P.L. 97-164, 96 Stat. 25 (1982). The court was renamed the United States Court of Federal Claims in 1992 by the Federal Courts Administration Act of 1992. P.L. 102-572, 106 Stat. 4506 (1992). For an interesting article covering the history and jurisdiction of the United States Court of Claims, see Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155 (1998).

<sup>230</sup> See William L. England, Jr., *Constitutionality of Article I Court Adjudication of Contract Disputes Act Claims*, 16 PUB. CONT. L.J. 338, 341 (1987).

<sup>231</sup> See generally Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633 (1996).

<sup>232</sup> *Id.* at 651-65.

<sup>233</sup> *Deming v. United States*, 1 Ct. Cl. 190 (1865).

<sup>234</sup> *Id.* at 190.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

which raised the cost of contract performance<sup>237</sup>—and once again the contractor suffered a loss.<sup>238</sup> The contractor filed suit for \$3,558.48 for damages caused by the imposition of new conditions upon the contracts.<sup>239</sup>

In one brief paragraph, the United States Court of Claims set forth what became known as the “Sovereign Acts” doctrine and explained the dual nature of the government as sovereign and the government as a private contractor:

This statement of his case is plausible, but is not sound. And herein is its fallacy: that it supposes general enactments of Congress are to be construed as evasions of his particular contract. This is a grave error. A contract between the government and a private party cannot be specially affected by the enactment of a general law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the government entering into a contract, stands not in the attitude of the government exercising its sovereign power of providing laws for the welfare of the State. The United States as a contractor are not responsible for the United States as a lawgiver were this action brought against a private citizen, against a body corporate, against a foreign government, it could not possibly be sustained. In this court the United States can be held to no greater liability than other contractors in other courts.<sup>240</sup>

The court elaborated on the dual nature of the government in a second case during the same term.<sup>241</sup> The court asserted that the government, while being sued as a contracting party, cannot be made liable for its acts as a sovereign.<sup>242</sup> Further, the court stated that:

In this court, the United States appear simply as contractors; and they are to be held liable only within the same limits as any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.<sup>243</sup>

While the Sovereign Acts doctrine is only one theory advanced for relieving the government from liability for changes in the law, these cases underscore

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<sup>237</sup> Legal Tender Act of 1862, ch. 33, 12 Stat. 345 (1862). This statute made the federal currency paper-based and not backed up by a gold standard resulting in a devaluation of the currency. 1 Ct. Cl. at 190.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Jones v. United States, 1 Ct. Cl. 383 (1865).

<sup>242</sup> *Id.* at 384.

<sup>243</sup> *Id.*

the complexities involved in dealing with the “split personality” of the government as both a contracting partner and as a sovereign.<sup>244</sup>

Over the years, courts have continued to struggle over the nature of the government as a contracting partner. The courts developed several judicial theories for limiting the government’s liability for contractual obligations based on changes in the law. In addition to the Sovereign Acts doctrine, a restriction known as the Unmistakability doctrine requires surrender of sovereign power to be in unmistakable terms.<sup>245</sup> The Reserved Powers doctrine prevents a sovereign from surrendering certain state powers under any condition.<sup>246</sup> In order for an agent to contract away the sovereign powers of the United States requires an “express delegation” of that authority.<sup>247</sup> The United States Supreme Court addressed each of these theories in *United States v. Winstar*, a case holding the government liable for an implied promise to assume the risk of a future change in the law.<sup>248</sup>

## **B. Allocating the Costs of Changes in the Law—*United States v. Winstar***

On July 1, 1996, the Supreme Court issued a ninety-eight page opinion.<sup>249</sup> The fragmented decision contains a plurality opinion by Justice Souter, a concurrence by Justice Breyer, a separate opinion concurring in the judgment by Justice Scalia, joined by Justices Kennedy and Thomas, and a dissent by Chief Justice Rehnquist joined in part by Justice Ginsburg.<sup>250</sup> The decision has generated scores of law review articles, many critical of the reasoning employed by the justices.<sup>251</sup> The opinions do little to clarify a confusing area of the law.

### *1. Factual Background*

*Winstar* involves a suit brought against the United States by three financial institutions (thrifts). The suit alleged a contractual breach and an

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<sup>244</sup> What is now known as the Sovereign Acts doctrine was explicitly adopted by the United States Supreme Court in only a single case, *Horowitz v. United States*, 267 U.S. 458 (1925), a three-page opinion, prior to its acceptance in *United States v. Winstar*. 518 U.S. at 923 (Scalia, concurring opinion).

<sup>245</sup> The modern Unmistakability doctrine traces its roots to canons of construction that disfavor implied government obligations in contracts. 518 U.S. at 874. See *Providence Bank v. Billings*, 4 Pet. 514, 7 L.Ed. 939 (1830); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L.Ed. 773 (1837).

<sup>246</sup> The Reserved Powers doctrine also traces its roots to the first half of the nineteenth century and shares its origin with the Unmistakability doctrine. 518 U.S. at 874; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535 (1848); *Stone v. Mississippi*, 101 U.S. 814 (1880); *Lynch v. United States*, 292 U.S. 571 (1934).

<sup>247</sup> See, e.g., *Home Tel. & Tel. v. City of Los Angeles*, 211 U.S. 265 (1908).

<sup>248</sup> *United States v. Winstar*, 518 U.S. 839 (1996).

<sup>249</sup> *Id.* The opinions span pages 839-937 of the U.S. Supreme Court Reporter.

<sup>250</sup> *Id.*

<sup>251</sup> A Westlaw KeyCite of the *Winstar* decision conducted on Mar. 4, 2000 indicated 104 secondary sources discussing the decision, many in a critical light.

unconstitutional taking by the United States brought about by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>252</sup> The basis for the dispute involved the savings and loan crisis in the 1980s.

In the late 1970s and early 1980s, the combination of high inflation and high interest rates caused the failure of numerous savings and loans. The response of government regulators was to deregulate the industry and reduce capital reserve requirements. Despite, and perhaps because of these measures, the savings and loan industry continued to falter and many thrifts failed. The Federal Savings and Loan Insurance Corporation (FSLIC) became stretched to the point that it lacked the resources to liquidate all of the failing thrifts. To avoid the impending crisis, the Bank Board decided to encourage healthy thrifts and outside investors to buy out the failing thrifts in “supervisory mergers.”<sup>253</sup>

Obviously, the liabilities of the failing thrifts exceeded their assets making them poor investments for other institutions. In addition, the FSLIC was in no position to offer a cash subsidy equal to the difference between the failed thrifts liabilities and assets. Instead, the Bank Board offered “cash substitutes” in the way of special accounting procedures. One incentive was to allow the acquiring institution to count “supervisory goodwill” towards the reserve requirement. “Supervisory goodwill” was the excess of the purchase price for the failed thrift over its assets. Without this incentive the acquisition would be impossible since the gaining thrift would, in most cases, become insolvent immediately after the purchase. Another incentive was to allow the acquiring institution to amortize the “supervisory goodwill” over periods of up to forty years. This allowed the thrifts to show “paper profits” in the initial years after the acquisition and seem more profitable than they were. A third incentive was to allow the acquiring thrift to use cash contributions from the FSLIC as “capital credit.” Without requiring the thrift to subtract the amount from the “supervisory goodwill,” this led to double counting of the amount in the capital reserve.<sup>254</sup>

The three thrifts involved in this case, Glendale Federal Bank, Winstar Corporation, and The Statesman Group, Inc. entered into agreements with the Bank Board in 1981, 1984, and 1988 respectively. The agreements involved the incentives discussed above.<sup>255</sup>

In 1989, responding to public pressure, Congress passed FIRREA. The legislation had immediate and drastic effects on the savings and loan industry. The FSLIC was abolished and the Office of Thrift Supervision under the Treasury Department replaced the Bank Board. More importantly many of the

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<sup>252</sup> Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [hereinafter FIRREA], Pub.L. No. 101-73, 103 Stat. 183 (codified in part at 12 U.S.C.A. § 1464 (1994)).

<sup>253</sup> The plurality opinion sets out the factual background of the case in great detail. *See* 518 U.S. at 844-61.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

“incentives” previously agreed to by the Bank Board were outlawed. Thrifts were required to maintain three percent of their total assets as core capital. Intangible assets, such as “supervisory goodwill,” were no longer counted as part of the required core capital. A transitional rule allowed the “supervisory goodwill” to be counted as half the core capital requirement, but only through 1995.<sup>256</sup>

Federal regulators seized and liquidated both Winstar and Statesman soon after FIRREA became law—because the thrifts did not meet the new capital requirements. Glendale avoided seizure, but only because of massive private investment. Each of the institutions filed suits that followed a tortuous path to the United States Supreme Court.<sup>257</sup> In 1996, six years after first bringing suit, the Supreme Court heard the case and delivered a very fragmented decision affirming the government’s liability in this situation.

## 2. *Plurality Opinion of Justice Souter—Focusing on Risk Allocation*

Justice Souter begins his opinion by deferring to the lower courts on the question of whether a contract even existed between the government and the thrifts. Unlike a typical government contract, the basis for the “contract” was many disparate documents which the government asserted were merely statements of existing policy and not a contractual undertaking. Disagreeing, Justice Souter approves of the lower court’s determination that the documents which were incorporated into a final agreement composed a contractual commitment. The contractual commitment included an approval of the proposed merger, and an agreement to record “supervisory goodwill” as a capital asset to be amortized over a period of years.<sup>258</sup>

Justice Souter finds nothing in the documentation that purported to bar the government from making changes in the manner of regulating the industry in the future.<sup>259</sup> Instead, relying on principles of private contracts, the Court considers “this promise as the law of contracts has always treated promises to

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<sup>256</sup> *Id.*

<sup>257</sup> Each party originally filed suit in the Court of Federal Claims and was granted summary judgment against the United States for breach of contract. *See Winstar Corp. v. United States*, 21 Ct. Cl. 112 (1990) (finding an implied-in-fact contract but requesting further briefing on contract issues); 25 Ct. Cl. 541 (1992) (finding contract breached and entering summary judgment on liability); *Statesman Sav. Holding Corp. v. United States*, 26 Ct. Cl. 904 (1992) (granting summary judgment on liability to Statesman and Glendale). The courts rejected the government’s two central defenses based on the Unmistakability doctrine and the Sovereign Acts doctrine. *See* 518 U.S. at 859. The cases were consolidated on appeal to the Federal Circuit. *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993). A panel from the Federal Circuit reversed, finding the allocation of the risk to the government was not “unmistakable.” *Id.* at 811-13. On rehearing *en banc*, the full court reversed the panel and affirmed the Court of Federal Claims. *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*).

<sup>258</sup> 518 U.S. at 861-67.

<sup>259</sup> *Id.* at 868.

provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence.”<sup>260</sup> Justice Souter finds this to be an implied promise to shift the risk of changes in the law—he never cites to specific language in the agreement.<sup>261</sup> This section of the opinion concludes that the passage of FIRREA constituted a breach of this implied promise.<sup>262</sup>

Justice Souter’s conclusions concerning the nature of the contract are critical to his later reasoning in the opinion. By characterizing the contracts as risk-shifting agreements rather than promise not to change the law—Justice Souter avoids application of the Unmistakability doctrine and the Sovereign Acts doctrine.

Justice Souter traces the origins of the Unmistakability doctrine to the English common law concept that “one legislature may not bind the legislative authority of its successors.”<sup>263</sup> This concept was limited in this country by the Contract Clause of the United States Constitution that barred states from passing laws that impair the obligations of contracts.<sup>264</sup> Early courts realized the Contracts Clause could become a serious threat to the sovereign responsibilities of states.<sup>265</sup> One solution was the development of the Reserved Powers doctrine that would forbid the contracting away of certain sovereign powers.<sup>266</sup> The second solution was the development of the Unmistakability doctrine to strictly construe contracts purporting to barter away sovereign power. By 1862, the Supreme Court formulated the Unmistakability doctrine as the requirement that no sovereign power will be surrendered “unless such surrender has been expressed in terms too plain to be mistaken.”<sup>267</sup>

The Unmistakability doctrine was formulated to address problems with the Contracts Clause that prohibit states from passing laws that abrogate their contractual obligations.<sup>268</sup> However, the Contract Clause is not applicable to the federal government.<sup>269</sup> It was not until 1986 that the Supreme Court expanded the scope of the doctrine to include contractual relations between the federal government and contractors.<sup>270</sup> In *Bowen v. Public Agencies Opposed to Social Security Entrapment*, the Court dealt with a state-federal agreement regarding the right of a state to withdraw state employees from the social

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<sup>260</sup> *Id.* at 868-69.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 872 (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1765)).

<sup>264</sup> U.S. CONST. art I, § 10, cl. 1.

<sup>265</sup> 518 U.S. at 874.

<sup>266</sup> See *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535 (1848) (holding that a state's contracts do not surrender its eminent domain power).

<sup>267</sup> *Winstar*, 518 U.S. at 875 (citing *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173 (1862)).

<sup>268</sup> The clause provides: “No state shall, without the Consent of Congress, . . . pass any . . . Law impairing the Obligation of Contracts. . . .” U.S. CONST. art I, § 10, cl. 1.

<sup>269</sup> *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984).

<sup>270</sup> *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986).

security scheme. In 1983, Congress changed the law eliminating the right to withdraw. The State of California and citizen groups filed suit. The Court applied the doctrine to federal contracts stating “contractual arrangements, including those to which the sovereign itself is a party, ‘remain subject to subsequent legislation’ by the sovereign.”<sup>271</sup>

The Court reached a similar conclusion a year later in *United States v. Cherokee Nation of Okla.*<sup>272</sup> In that case, the Government had conveyed a property right in the Arkansas River to an Indian Tribe through a treaty. Subsequently, the government made navigation improvements that the tribe asserted damaged their property interests. The Indian Tribe sued the United States seeking just compensation. The Court held that the government’s navigational easement was an element of sovereignty that could only be surrendered in “unmistakable terms.”<sup>273</sup>

Justice Souter whittles these cases down to the simple holding that:

a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.<sup>274</sup>

Justice Souter then makes a jump in logic to conclude that: “[t]he application of the doctrine thus turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government.”<sup>275</sup> Justice Souter maintains that this is not remedy-based because “the particular remedy sought is not dispositive.” According to him, there are cases where a claim for damages could in effect block the exercise of a sovereign power such as taxation—and the Unmistakability doctrine would have to be satisfied. At the other extreme, “humdrum” supply contracts would never be subject to the Unmistakability doctrine. Provided that a contract is “reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it.”<sup>276</sup>

Using this rationale, the Unmistakability doctrine is inapplicable to the facts in *Winstar*. The “contracts” between the thrifts and the United States do not attempt to bind Congress from future changes in the law. Instead, Justice Souter reads the contracts “as solely risk-shifting agreements and [the thrifts] seek nothing more than the benefit of promises by the Government to insure

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<sup>271</sup> *Id.* at 52 (quoting *Merion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)).

<sup>272</sup> *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987).

<sup>273</sup> *Id.* at 707.

<sup>274</sup> *Winstar*, 518 U.S. at 878.

<sup>275</sup> *Id.* at 879.

<sup>276</sup> *Id.* at 879-80.

them against any losses arising from future regulatory change.”<sup>277</sup> Thus, by creating the legal fiction of an implied agreement to indemnify, Justice Souter avoids application of the Unmistakability doctrine to the present case.

Using a similar type of reasoning, Justice Souter dispatches the next two

government arguments. The Reserved Powers doctrine traces its history as a limitation placed on the Contracts Clause.<sup>278</sup> The doctrine is meant to prevent a state from contracting away an “essential attribute of its sovereignty.”<sup>279</sup> The government argued the doctrine has a similar application to contracts by the federal government. Even so, Justice Souter once again points out that the contract in this case was for indemnification. “[A] contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty.”<sup>280</sup>

A similar fate met the government’s argument that the Bank Board lacked the authority to “fetter the exercise of sovereign power.”<sup>281</sup> Justice Souter agrees that the authority to contract away sovereign power must be clear and unmistakable. However, there was no such contract and the Court could avoid the issue.<sup>282</sup>

Justice Souter goes to great lengths to analyze and then reject a “sovereign acts” defense that the government did not emphasize in their presentation to the Court.<sup>283</sup> He rejects the argument claiming that the “facts of this case do not warrant application of the doctrine, and even if that were otherwise the doctrine would not suffice to excuse liability under this governmental contract allocating risks of regulatory change in a highly regulated industry.”<sup>284</sup> In making his argument, Justice Souter applies his analysis to all government contracts, refusing to distinguish between regulatory and non-regulatory contracts.<sup>285</sup> Further, he fails to explain any interaction between the Sovereign Acts and Unmistakability doctrines.

In formulating his view of the Sovereign Acts doctrine, Justice Souter relies upon the sole Supreme Court case addressing the issue. The Supreme

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<sup>277</sup> *Id.* at 881.

<sup>278</sup> *See Stone v. Miss.*, 101 U.S. 814 (1880).

<sup>279</sup> *Winstar*, 518 U.S. at 888 (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977)).

<sup>280</sup> *Id.* at 889.

<sup>281</sup> *Id.* Justice Souter based his analysis on an earlier case, *Home Tel. & Tel. Co. v. Los Angeles*, 211 U.S. 265, 273 (1908).

<sup>282</sup> 518 U.S. at 890-91.

<sup>283</sup> The government devoted only three of their forty-six page brief to the Sovereign Acts doctrine as compared to twenty pages applied to the Unmistakability doctrine. Brief for the Petitioner at 43-46, *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (No. 95-865) (*available at* 1996 WL 99716). *See also* Joshua I. Schwartz, *Assembling Winstar: Triumph Of The Ideal Of Congruence In Government Contracts Law?*, 26 PUB. CONT. L.J. 481, 515-16 (1997) (hereinafter Schwartz II).

<sup>284</sup> 518 U.S. at 891.

<sup>285</sup> *Id.* at 894.

Court had adopted the Sovereign Acts doctrine in *Horowitz v. United States*.<sup>286</sup> In that case, the Ordnance Department agreed to sell silk to a private contractor and to ship the material within a specified time. Another federal agency placed an embargo on the shipment of silk, substantially delaying the delivery. Meanwhile, the price of silk plummeted and the contract became unprofitable to the contractor. The contractor filed suit for damages and on appeal, the Supreme Court rejected the claim holding: “the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its ‘public and general’ acts as a sovereign.”<sup>287</sup>

Justice Souter is mindful that the purpose behind the Sovereign Acts doctrine is to ensure the government is to be treated the same as a private contractor—the congruence principle.<sup>288</sup> He sets up a two-part test to apply the Sovereign Acts doctrine. First, one must determine whether the sovereign act is attributable to the government as a contractor. Second, if the answer is no, one should apply ordinary principles of private contract law—the impossibility doctrine.<sup>289</sup>

Applying the first prong requires a determination of the degree of governmental “self-interest” in the sovereign act.<sup>290</sup> *Horowitz’s* “public and general” criteria are one method of ensuring the sovereign act is relatively free of self-interest. If the impact on a government contract is “incidental to the accomplishment of a broader governmental objective,” ordinary private contract principles apply.<sup>291</sup> “The greater the Government’s self-interest, however, the more suspect” the claim of the Sovereign Acts defense should be.<sup>292</sup> Justice Souter holds: “a governmental act will not be “public and general” if it has the substantial effect of releasing the Government from its contractual obligations.”<sup>293</sup>

The first prong only exempts the government, under the prescribed circumstances, from the ordinary contracting principle that “a contracting party may not obtain discharge if its own act rendered performance impossible.”<sup>294</sup> The second prong applies the common-law doctrine of impossibility that:

[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was

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<sup>286</sup> *Horowitz*, 267 U.S. at 458.

<sup>287</sup> *Id.* at 461.

<sup>288</sup> 518 U.S. at 892-93.

<sup>289</sup> *Id.* at 896.

<sup>290</sup> Justice Souter defines governmental self-interest as instances where the government tries “to shift its legitimate public responsibilities to private parties.” *Id.* at 896.

<sup>291</sup> *Id.* at 898.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 899.

<sup>294</sup> *Id.* at 904.

made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.<sup>295</sup>

To assert the impossibility defense, the government would need to prove that the nonoccurrence of the change in the law was a basic assumption of the contract.<sup>296</sup> The law assumes the parties will have “bargained with respect to any risks that are both within their contemplation and central to the substance of the contract.”<sup>297</sup> Absence of a provision gives rise to the inference that the risk was assumed by the government.<sup>298</sup>

Under the facts presented, Justice Souter does not find for the government under either prong of the test. FIRREA did not lack the “self-interest” necessary to find that it was “public and general.” The act had the substantial effect of relieving the government of its obligations to the thrifts under the agreements. Justice Souter points to the legislative history where it was clear Congress expected the legislation to have a severe impact on agreements between the government and the thrifts. The fact that the purpose of FIRREA was “to advance the general welfare” did not lessen the impact on the government’s contractual obligations. Therefore, Justice Souter would not allow the government to be relieved of its obligations under the Sovereign Acts defense.<sup>299</sup>

Nonetheless, Justice Souter applies the second prong assuming for the purpose that FIRREA qualified as a “public and general” act. However, he also finds that the impossibility defense is not available to the government. The very existence of the contract for regulatory treatment between the government and the thrifts argues against any assumption by the parties that the rules would not change. In addition, Justice Souter had already found the contract included an implied agreement to indemnify the thrifts. Language or circumstances that allocate the risk of a change to the party seeking discharge also negates the impossibility defense.<sup>300</sup>

For the reasons stated above, Justice Souter, joined by Justices Stevens and Breyer, and in part by Justice O’Connor found for the thrifts. No part of the decision was joined by a majority of the Court and the reasoning in the concurring opinions differed substantially—creating doubt as to the validity of rationale.

### *3. Concurrence of Justice Breyer: Unmistakability, Who Needs It?*

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<sup>295</sup> RESTATEMENT (SECOND) OF CONTRACTS § 261.

<sup>296</sup> 518 U.S. at 905 (citing RESTATEMENT (SECOND) OF CONTRACTS § 261).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* (citing *Lloyd v. Murphy*, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944) (“[i]f [the risk] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.”)).

<sup>299</sup> *Id.* at 903-04.

<sup>300</sup> *Id.* at 905-10.

Justice Breyer, although concurring with Justice Souter's plurality opinion, wrote separately to address a different view of the Unmistakability doctrine. Justice Breyer is unwilling to legitimize Unmistakability by even referring to it as a doctrine, instead it is merely "unmistakability" language contained in a few distinguishable cases.<sup>301</sup> Justice Breyer sharply rejects the government and dissent's notion that the Unmistakability doctrine is an incantation that "normally shields the Government from contract liability where a change in the law prevents it from carrying out its side of the bargain."<sup>302</sup> A firm believer in congruence principles, Justice Breyer acknowledges that the language might have been appropriate in the few cases where applied by the Supreme Court. However, it was "not intended to displace the rules of contract interpretation applicable to the Government as well as private contractors in numerous ordinary cases, and in certain unusual cases, such as this one."<sup>303</sup>

The government as contractor should be "governed generally by the law applicable to contracts between private individuals."<sup>304</sup> Justice Breyer argues that the congruence principle makes sense on policy grounds. "[I]n practical terms it ensures that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting."<sup>305</sup> Justice Breyer makes only small concessions to the exceptionalism theory that the government should be treated differently:

This is not to say that the government is always treated just like a private party. The simple fact that it is the government may well change the underlying circumstances, leading to a different inference as to the parties' likely intent—say, making it far less likely that they intend to make a promise that will oblige the government to hold private parties harmless in the event of a change in the law. But to say this is to apply, not to disregard, the ordinary rule of contract law.<sup>306</sup>

Justice Breyer finds additional support for his congruence views in the Tucker Act, which allows suits for damages against the United States based on "any claim . . . founded . . . upon any express or implied contract."<sup>307</sup> In the past the Supreme Court has allowed such suits based on implied-in-fact

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<sup>301</sup> *Id.* at 910-19 (Breyer, J., concurring).

<sup>302</sup> *Id.* at 910.

<sup>303</sup> *Id.* at 911.

<sup>304</sup> *Lynch v. United States*, 292 U.S. 571, 579 (1934). Justice Breyer also cites the following cases as precedent for application of congruence principles to government contracts. *See Perry v. United States*, 294 U.S. 330, 352 (1935); *Sinking Fund Cases*, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen").

<sup>305</sup> 518 U.S. at 913 (Breyer, J., concurring).

<sup>306</sup> *Id.*

<sup>307</sup> Tucker Act, 28 U.S.C. § 1491(a)(1).

contracts “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”<sup>308</sup> According to Justice Breyer, this evinces an intent by Congress to allow suits based on promises that are far from unmistakable—and lends support to the theory the government should be treated the same as a private party.<sup>309</sup>

Justice Breyer finds two bases for rejecting application of the unmistakability language. First, the three cases where the Supreme Court used language referring to unmistakability should not be read as imposing a requirement of clear language before surrendering sovereign power. Justice Breyer determines that the outcome of these cases did not rest on application of the unmistakability language contained in the decision. In two of the cases, Justice Breyer concludes there was no evidence of any type of promise not to change the law in the first place.<sup>310</sup> In the third case, there was statutory language where Congress reserved the right to alter or amend the law.<sup>311</sup> The facts of those cases did not warrant extension of this language into a doctrine of contract interpretation.

The second reason for limiting application of the unmistakability language is the nature of the promises in the earlier cases. In those cases, the claim was that the government had promised not to “legislate, or otherwise exercise its sovereign powers.”<sup>312</sup> This is far different from ordinary contracts, or even unusual cases such as in *Winstar*. These contracts only promise to hold a party harmless for changes in the law—changes that the government is free to make.<sup>313</sup> Justice Breyer dismisses the government argument that financial liability might deter future legislation and therefore warrants application of an Unmistakability doctrine. Application of a different rule of contract interpretation based on “the amount of money at stake, and therefore (in the Government's terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory.”<sup>314</sup>

In sum, Justice Breyer finds that the unmistakability language found in those earlier decisions might reflect the “unique features of sovereignty” present. He concludes, however, that the language was not “meant to establish

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<sup>308</sup> 518 U.S. at 914 (Breyer, J., concurring) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923)).

<sup>309</sup> *Id.*

<sup>310</sup> See *Merion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987). *Merion* involved leases by an Indian tribe to private parties to extract oil and gas. The private parties maintained the leases contained an implicit waiver not to impose a tax. The Court found the lease was silent on the issue and was not willing to infer a waiver from silence. 455 U.S. at 148. *Cherokee* involved interpretation of a treaty that was likewise silent as to whether sovereign rights had been contracted away. 480 U.S. at 706-07.

<sup>311</sup> *Bowen*, discussed *supra* note 270, contained a congressional statute that reserved the right to “alter, amend, or repeal” any provision. *Bowen*, 477 U.S. at 55.

<sup>312</sup> 518 U.S. at 916 (Breyer, J., concurring).

<sup>313</sup> *Id.* at 916-17.

<sup>314</sup> *Id.* at 917.

an ‘unmistakability’ rule that controls more ordinary contracts, or that controls the outcome here.”<sup>315</sup> As applied to *Winstar*, the agreements contained promises to hold the thrifts harmless were inferred from the contractual language. “[T]here is no special policy reason related to sovereignty which would justify applying an ‘unmistakability’ principle here.”<sup>316</sup>

#### 4. *Concurrence of Justice Scalia—Unmistakability, Reversing the Presumption*

Justice Scalia, joined by Justices Thomas and Kennedy, concurs in the judgment. However, they offer a substantially different rationale for their decision. In a brief opinion, Justice Scalia defines the Unmistakability doctrine in a new way and subsequently rejected the Sovereign Acts doctrine as adding nothing to the law.

Justice Scalia begins by taking issue with the plurality’s characterization of the contractual agreements between the United States and the thrifts. By characterizing the contracts as “risk-shifting agreements” the plurality contends that the contracts did not “constrain the exercise of sovereign power, but only [made] the exercise of that power an event resulting in liability for the Government.”<sup>317</sup> Justice Scalia finds this ploy to avoid application of sovereign defenses without merit. This approach “has no basis in our cases, which have not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue.”<sup>318</sup> Even more, this method of contractual interpretation is invalid: “Virtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance: ‘The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.’”<sup>319</sup>

Additionally, Justice Scalia criticizes the plurality opinion for finding the Unmistakability doctrine was not applicable to the facts presented in the case. “The ‘unmistakability’ doctrine has been applied to precisely this sort of situation—where a sovereign act is claimed to deprive a party of the benefits of a prior bargain with the government.”<sup>320</sup> However, unlike the dissent, Justice Scalia does not find that application of the Unmistakability doctrine precludes the thrifts’ claim.

While professing a philosophy of congruence, Justice Scalia is forced to recognize the exceptional nature of government contracts. Applying congruence principles, he argues that the Unmistakability doctrine does little

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<sup>315</sup> *Id.* at 918.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 919 (Scalia, J., concurring).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* (quoting OLIVER W. HOLMES, *The Path of the Law* (1897), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391, 394 (S. Novick ed. 1995)).

<sup>320</sup> *Id.* at 920.

beyond “normal principles of contract interpretation.”<sup>321</sup> “Generally, contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party’s own action.”<sup>322</sup> In almost the same breath, he recognizes the exceptionalist idea that the government-as-contractor is different. “Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding.”<sup>323</sup> Therefore, the Unmistakability doctrine creates a reverse presumption that the government has not agreed to contract away its sovereign authority.

When the subject matter of a contract involves an agreement to regulate in a particular manner, Justice Scalia would not require a further second promise not to renege on that promise. According to Justice Scalia, the dissent argument that the government only agrees to certain regulation unless it is subsequently changed is absurd. Such an argument “is an absolutely classic description of an illusory promise.” Therefore, Justice Scalia concludes that the agreement between the thrifts and the government constituted an “unmistakable” promise that satisfies the requirements of the law.<sup>324</sup>

In a single paragraph, Justice Scalia dismisses the government’s arguments based on “reserved powers” and “express delegation.” Neither of these principles is well defined by Supreme Court jurisprudence. Justice Scalia finds the Reserved Powers notion inapplicable to contracts setting out commercial risks.<sup>325</sup> Instead the “reserved powers” are “the federal police power or some other paramount power.”<sup>326</sup> Whatever is required by the “express delegation” concept was satisfied by the regulations allowing the Bank Board to enter these types of contracts.

Justice Scalia expresses little use for the Sovereign Acts doctrine:

In my view the "sovereign acts" doctrine adds little, if anything at all, to the "unmistakability" doctrine, and is avoided whenever that one would be—i.e., whenever it is clear from the contract in question that the Government was committing itself not to rely upon its sovereign acts in asserting (or defending against) the doctrine of impossibility, which is another way of saying that the Government had assumed the risk of a change in its laws.<sup>327</sup>

This summary rejection is less surprising when one realizes that Justice Scalia’s explanation of the Unmistakability doctrine is based on the same principles that the plurality and dissent use to describe the Sovereign Acts doctrine.<sup>328</sup>

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 921.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 923 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

<sup>327</sup> *Id.* at 923-24.

<sup>328</sup> *See* Schwartz II, *supra* note 283, at 543-44.

## 5. *Rehnquist's Dissent—Saving Unmistakability and Sovereign Acts*

In a dissenting opinion, Chief Justice Rehnquist expresses concern that the plurality has announced sweeping and untenable changes to the Unmistakability doctrine and virtually eliminated the Sovereign Acts doctrines. Justice Ginsburg joins in the Chief Justice's dissent except with respect to his argument concerning the Sovereign Acts doctrine.

The dissent argues that the primary opinion effects drastic changes in the Unmistakability doctrine “shrouding the residue with clouds of uncertainty.”<sup>329</sup> Both the dissent and plurality agree “that the unmistakability doctrine is a ‘special rule’ of government contracting which provides, in essence, a ‘canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms.’”<sup>330</sup> The Chief Justice's primary disagreement with the plurality opinion concerns Justice Souter's framework for applying the doctrine. Practically speaking, there is no way to determine whether an award of damages would amount to an exemption or block to sovereign authority before an assessment of liability. In other words, the test requires an assessment of damages before liability is established. The Chief Justice remarks that if this were permitted, any plaintiff could avoid the defense “by claiming the Government had agreed to assume the risk, and asking for an award of damages for breaching that implied agreement.”<sup>331</sup>

Additionally, Chief Justice Rehnquist does not agree with the plurality's justifications for departing from the precedent set out in earlier cases. The plurality opinion argues that the contracts at issue in *Winstar*, unlike the earlier precedents, “do not purport to bind Congress from enacting regulatory measures”—and hence, the Unmistakability doctrine should not be applied. The Chief Justice points out that the very purpose of a canon of construction is to determine whether the contract impermissibly binds Congress—and therefore it would have to be applied first. The Chief Justice remarks: “if a canon of construction cannot come into play until the contract has first been interpreted as to liability by an appellate court, and remanded for computation of damages, it is no canon of construction at all.”<sup>332</sup>

Likewise, the dissent does not believe that the Unmistakability doctrine has impaired the government's ability to enter contracts. For decades, the law has prevented Congress from changing the law to avoid contractual obligations without paying damages. On the flip side, the law has also recognized that the government does not “shed its sovereign powers because it contracts.” To date, the dissent observes there has not been a “diminution in bidders” that would require such a drastic change in the law.<sup>333</sup>

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<sup>329</sup> 518 U.S. at 924 (Rehnquist, C.J., dissenting).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 927.

<sup>332</sup> *Id.* at 930-31.

<sup>333</sup> *Id.* at 929.

The dissent also criticizes the plurality for changes to “the existing sovereign acts doctrine which render the doctrine a shell.” Chief Justice Rehnquist asserts that Justice Souter has mischaracterized the long history of the doctrine that has emphasized the dual roles of the government as contractor and sovereign. “By minimizing the role of lawgiver and expanding the role as private contractor, the principal opinion has thus casually, but improperly, reworked the sovereign acts doctrine.”<sup>334</sup> The dissent disagrees that the basic premise of *Horowitz* is “to put the Government in the same position it would have enjoyed as a private contractor.” The dissent would emphasize the holding from *Deming* that “[t]he United States as a contractor are not responsible for the United States as lawgiver.”<sup>335</sup>

The dissent is equally critical of the pluralities new characterization of the “public and general” requirement as depending on governmental motive for enacting a change to the law. Accordingly, the requirement of determining whether a sovereign act is “self-interested” is unworkable. The Chief Justice is particularly disturbed by the plurality’s use of the comments of individual legislators to determine whether an act is “self-relief.”<sup>336</sup> Instead, the dissent would leave the law as it is. Under *Lynch*, specific legislation aimed at avoiding payment of a contract is a breach. “But, as the term ‘public and general’ implies, a more general regulatory enactment . . . cannot by its enforcement give rise to contractual liability on the part of the Government.”<sup>337</sup> Using this standard, the dissent would find FIRREA to be “public and general” and would allow the government to assert the sovereign act doctrine as a defense.

Justice Scalia’s concurrence is also singled out for criticism. The dissent takes exception to Justice Scalia’s finding of an implicit obligation not to frustrate the contract through subsequent sovereign acts. Such an “implicit” promise does not comport with the dissent’s view of “unmistakable terms.” The Chief Justice likewise is critical of Justice Scalia’s failure to make findings necessary to support his decision. Justice Scalia errs by relying on the findings of lower courts that ruled the Unmistakability doctrine does not apply.<sup>338</sup>

The Chief Justice concludes by critiquing Justice Breyer for finding an “unmistakable” promise to pay the thrifts in the event that the regulatory scheme changed. Justice Breyer does not make findings of fact himself but relies on the “principal opinion’s careful examination of the circumstances.” The dissent argues that Justice Breyer errs by making an “illusory factual finding” not supported in the record.<sup>339</sup>

According to Chief Justice Rehnquist, none of the other opinions can reach their desired result “without changing the status of the Government to

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<sup>334</sup> *Id.* at 931.

<sup>335</sup> *Id.* (quoting 1 Ct. Cl. at 191).

<sup>336</sup> *Id.* at 933-34.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 935-36.

<sup>339</sup> *Id.* at 936-37.

just another contractor under the laws of contracts.” This does not comport with the dissent’s strongly exceptionalist view that “[m]en must turn square corners when they deal with the government.” This view is based on “the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government.”<sup>340</sup>

### C. Distilling *Winstar*—What’s left?

#### 1. Weaknesses

The Court in *Winstar* leaves future courts and practitioners in serious doubt as to the state of law. Very few of the principles stated by the plurality command the support of a majority of the justices. There are certain common areas, however, that both other members of the Court and outside commentators soundly and justifiably criticize.

One question unanswered by the Court is why the documents in this case constitute a contract as opposed to a consent agreement. Historically, regulatory agreements have been analyzed under the Takings Clause rather than using principles of government contract law.<sup>341</sup> By finding a contractual agreement, the Court in *Winstar* then is forced to apply principles that might not be appropriate.

After accepting as given the existence of a contract, Justice Souter’s use of a “recharacterization” device to avoid application of the sovereign defenses is difficult to justify except as a ploy to reach a desired outcome.<sup>342</sup> Justice Souter reads an implied promise not to change the regulatory scheme into the agreements between the thrifts and government. One of the few points agreed upon by the majority of the Court is the fallacy of this approach. All agree that the Unmistakability doctrine is a “canon of construction.” Black’s Law Dictionary defines “Canons of construction” as “[t]he system of fundamental rules and maxims which are recognized as governing the construction or interpretation of written instruments.”<sup>343</sup> In other words, the Unmistakability doctrine should be used to determine whether there is in fact an enforceable contract between the government and a private party.

Contrary to common sense, the plurality finds an enforceable contract before they decide to apply the Unmistakability doctrine. Justice Souter invokes Holmes’ theory that “promises to provide something beyond the promisor’s absolute control . . . [is] a promise to insure the promisee against

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<sup>340</sup> *Id.* at 937.

<sup>341</sup> Alan R. Burch, *Purchasing the Right to Govern: Winstar and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 KY. L.J. 245, 251-52 (Winter 1999-2000).

<sup>342</sup> See Michael P. Malloy, *When You Wish Upon Winstar: Contract Analysis and the Future of Regulatory Action*, 42 ST. LOUIS U. L.J. 409, 440 (1998) (“There is more than a little obfuscation in this recharacterization.”).

<sup>343</sup> BLACKS’S LAW DICTIONARY 142 (6th ed. 1990).

loss arising from the promised condition's nonoccurrence.”<sup>344</sup> Applying this logic, Justice Souter avoids the application of the Unmistakability doctrine because a promise to insure or indemnify, he argues, does not ordinarily implicate issues of sovereignty.<sup>345</sup> Using this same logic, almost any contract could be viewed in the same manner and the doctrine would be virtually worthless.

While the plurality may have used this technique to sidestep application of the Unmistakability doctrine, they ignore the minefield they may have entered. During the same term as *Winstar*, the Supreme Court examined these issues in the *Hercules* decision discussed in Section II of this article.<sup>346</sup> Broad agreements to indemnify or insure ordinarily run afoul of the Anti-Deficiency Act which prevents government officials from spending money that Congress has not appropriated or allocated for that contract.<sup>347</sup> Government officials that enter such agreements without specific authority would be acting *ultra vires* rendering the agreement void. As the *Hercules* court asserts, “[t]here is also reason to think that a contracting officer would not agree to the open-ended indemnification. . . .”<sup>348</sup> Therefore, it may not be reasonable for the court to find an “implied” agreement to insure or indemnify to begin with. The better rule is to step back and apply the Unmistakability doctrine as intended—as a rule of construction.

Equally faulty is the plurality’s application of an untenable “remedy-based” test to determine application of the Unmistakability doctrine.<sup>349</sup> Justice Scalia criticizes this approach in part because it is without precedent.<sup>350</sup> However, more problematic is the application of the rule. When does an agreement to pay damages effectively limit sovereign authority? The answer does not appear to be the amount of damages sought. The *Winstar* cases, and similar agreements with other thrifts, involved potential liability of extraordinary sums of money.<sup>351</sup>

Another problem is the failure of any of the opinions to explain the interaction and relation between the Sovereign Acts and Unmistakability doctrines. The doctrines, although similar, have different origins. The Sovereign Acts doctrine has a long history as applied to federal contracts. The United States Claims Court and its predecessors have addressed it numerous times since the court’s inception in the mid-1800’s. The doctrine has

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<sup>344</sup> 518 U.S. at 868-69 (Souter, J.).

<sup>345</sup> *Id.* at 920 (Scalia, J., concurring); See Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDIS. L.J. 467, 485 (1999).

<sup>346</sup> See *supra* notes 60-86 and accompanying text.

<sup>347</sup> Burch, *supra* note 341, at 312-13.

<sup>348</sup> 516 U.S. at 426-28 .

<sup>349</sup> See Michael W. Graf, *The Determination of Property Rights in Public Contracts After Winstar v. United States: Where has the Supreme Court Left Us?*, 38 NAT. RESOURCES J. 197, 226-234 (1998).

<sup>350</sup> 518 U.S. at 919 (Scalia, J., concurring).

<sup>351</sup> One commentator suggests the price in these cases approached \$30 billion, Burch, *supra* note 341, at 421.

traditionally been applied to contracts made by the government in its private capacity as contractor.<sup>352</sup> The Unmistakability doctrine traces its history to English common law concerning the power of one legislature to bind the next. In our country, it was developed in the context of the Contract Clause. The doctrine has only been applied to federal contracts for less than two decades—and in only a couple cases.<sup>353</sup>

The dissent at least recognizes that the doctrines are “not entirely separate principles”—but offers no further explanation.<sup>354</sup> Justice Scalia would do away with the Sovereign Acts doctrine, since he believes it adds nothing. However, his reformulation of the Unmistakability doctrine seems to be derived in large part on the Sovereign Acts doctrine.<sup>355</sup> With *Winstar* as a precedent, courts today cannot say with any degree of confidence which doctrine applies and in what situations.

The *Winstar* decision has also been criticized for failing to distinguish between agreements the government enters as a regulator and others it enters into as a market-participant. More than one commentator has suggested that this distinction should be used to clarify application of the Sovereign Acts doctrine and the Unmistakability doctrine.<sup>356</sup> One suggestion is that the Unmistakability doctrine should not be applied to agreements with the government-as-contractor—leaving only application of the Sovereign Acts doctrine.<sup>357</sup> For regulatory, or government-as-sovereign agreements both doctrines would be applied, although the Sovereign Acts doctrine would add little.<sup>358</sup>

## 2. Areas of Agreement

In spite of internal discord and external criticism, some guiding principles find support among a majority of the justices and survive *Winstar*. One area of agreement among a majority of the justices is a condemnation of Justice Souter’s “recharacterization” of the government’s agreements into

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<sup>352</sup> See Burch, *supra* note 341, at 379.

<sup>353</sup> Justice Scalia criticizes the “so-called” Sovereign Acts doctrine because it has only been applied by the Supreme Court in a single case, *Horowitz*. 518 U.S. at 923. He never acknowledges the long history as applied to federal contracts within the specialized United States Claims Court and its successors. See, e.g., *Deming*, 1 Ct. Cl. at 190; *Jones*, 1 Ct. Cl. 383; *Sunswick Corp. v. United States*, 109 Ct. Cl. 772 (1948). The use of the Unmistakability doctrine is more susceptible to this criticism. It has only been applied to federal contractual agreements in a single case, *Bowen*. 477 U.S. 41. The other two cases mentioned involved a contract between an Indian tribe and a private party, *Merion*, and a treaty with an Indian tribe, *Cherokee*. See 455 U.S. 130; 480 U.S. 700.

<sup>354</sup> 518 U.S. at 937 (Rehnquist, C.J., dissenting).

<sup>355</sup> Schwartz II, *supra* note 283, at 554-55.

<sup>356</sup> See, e.g., Graf, *supra* note 349, at 255-56; Burch, *supra* note 341, at 386-87; Malloy, *supra* note 342, at 446 (“The opinion refused to accept a simple dichotomy between ‘regulatory’ and ‘nonregulatory’ capacities of the government. . .”).

<sup>357</sup> Graf, *supra* note 349, at 255.

<sup>358</sup> Graf, *supra* note 349, at 255.

promises to compensate in the event of a regulatory change. The concurring opinion of Justice Scalia, joined by Justices Thomas and Kennedy as well as the dissent of Chief Justice Rehnquist, joined by Justice Ginsburg, all reject this device.

One commentator has suggested “one would not go far astray in simply considering [the plurality opinion to be] the majority opinion.”<sup>359</sup> Of the four defenses raised by the government, “unmistakability,” “reserved powers,” “express delegation,” and “sovereign acts,” the three majority opinions diverge significantly only on the Unmistakability doctrine.<sup>360</sup> A majority of the justices would apply an Unmistakability doctrine but only the two-member dissent leave any teeth in that doctrine.

Another view, suggested by Professor Schwartz, would ignore labels such as Unmistakability or Sovereign Acts and instead look at the underlying principles in order to find agreement:

[T]he key element of an approach likely to command majority support is a rebuttable presumption that by entering a contract the Government does not promise to curtail the exercise of its sovereign power that could affect contractual performance. The strength of this presumption and the kind of evidence necessary to rebut it is primarily a function of the level of generality of the governmental action that interferes with the promised performance. Careful attention to the particular undertaking involved and the surrounding circumstances is required in determining whether the risk of a change in regulatory regime has been assigned to the Government. The allocation of this risk *cannot* be determined simply by automatically recharacterizing a governmental promise that literally concerns the regulatory treatment to be afforded a contractor into a promise of indemnity in the event of regulatory change.<sup>361</sup>

Without an adequate framework, courts since 1996 have been forced to assess agreements between the United States and their contracting partners. The aftermath will include confusion and litigation as courts are forced to reassess the doctrines “clarified” by the United States Supreme Court.<sup>362</sup>

#### **D. *Winstar* Creeps into the Environmental Field—*Yankee Atomic Electric Company v. United States***

Less than one year after the Supreme Court rendered the decision in *Winstar*, the Court of Appeals for the Federal Circuit took up a case addressing similar issues.<sup>363</sup> The Court reversed a decision by the Court of Federal

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<sup>359</sup> Graf, *supra* note 349, at 255.

<sup>360</sup> Burch, *supra* note 341, at 372-73.

<sup>361</sup> Schwartz II, *supra* note 283, at 556.

<sup>362</sup> See Malloy, *supra* note 342, at 450 (“What is both extraordinary and unfortunate, however, is the absolute lack of guidance with which the *Winstar* decision leaves us.”).

<sup>363</sup> *Yankee*, 112 F.3d 1569. In the environmental field, most of the commentary has been on the application of *Winstar* principles to habitat conservation plant contracts under the Endangered Species Act. See, e.g., Amy C. Derry, Note, *No Surprises After Winstar*:

Claims applying the Sovereign Acts and Unmistakability doctrines to a contract between the Department of Energy and a nuclear energy plant.<sup>364</sup> The *Yankee* decision applies the teachings of *Winstar* to more traditional government contracts in a non-regulatory field. In addition, it expands the Sovereign Acts and Unmistakability doctrines to contracts that may be considered fully performed before a change in the law frustrated the contractor's expectations. The decision reveals the difficulty in applying the splintered *Winstar* holdings to subsequent cases. The case is also illustrative of how the Court of Federal Claims and the Federal Circuit will apply the Sovereign Acts and Unmistakability doctrines to future claims.

### *1. Yankee Atomic and the Energy Policy Act*

Yankee Atomic Electric Company (Yankee Atomic) located in Rowe, Massachusetts was formed in 1954 by a variety of utilities that banded together to produce nuclear-generated electricity.<sup>365</sup> From 1963 until its closure in 1992, Yankee Atomic entered into a series of fixed-price contracts with the United States for the purchase of enriched uranium to be used as fuel for the nuclear reactor.<sup>366</sup> In the late 1980s, Congress realized that the agencies selling the nuclear fuel had failed to price the material high enough to pay for the clean up of the radioactive waste left as the government processing plants aged and were decommissioned.<sup>367</sup> In response, Congress passed the comprehensive Energy Policy Act of 1992 to address many concerns—including the cleanup of these sites.<sup>368</sup>

The Energy Policy Act created the Uranium Enrichment Decontamination and Decommissioning Fund to finance the cleanup of the government-owned enrichment plants. The funds were to be raised in part with public funds and in part by a special assessment of domestic utilities. The special assessment was divided among utilities based on the number of DOE-produced uranium enrichment units a particular utility actually used. If a utility purchased a DOE enrichment unit and sold it to another utility, it did not count. By the same token, if they purchased a DOE enrichment unit from another utility, it was counted in assessing the using utility's pro-rata share of the assessment.<sup>369</sup>

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*Contractual Certainty and Habitat Conservation Planning Under the Endangered Species Act*, 17 VA. ENVTL. L.J. 357 (1998); Jean O. Melious & Robert D. Thornton, *Contractual Ecosystem Management Under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments?*, 26 ECOLOGY L.Q. 489 (1999).

<sup>364</sup> See *Yankee Atomic Elec. Co. v. United States*, 33 Fed. Cl. 580 (1995).

<sup>365</sup> 33 Fed. Cl. at 582.

<sup>366</sup> 112 F.3d. 1572.

<sup>367</sup> H.R. REP. NO. 474, 102d Cong., 2d Sess., pt. I, at 142, 144; pt. VIII, at 76, 78 (1992), reprinted in 1992 U.S.C.C.A.N. 1965, 1967, 2294, 2296.

<sup>368</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

<sup>369</sup> 112 F.3d at 1572.

Yankee Atomic was assessed \$3 million even though they had already closed prior to passage of the Act.<sup>370</sup> The company filed suit in the Court of Federal Claims to recover these funds. The Court of Federal Claims ruled in favor of Yankee Atomic. Applying the Sovereign Acts doctrine the court determined that “[t]he doctrine of ‘public and general’ ‘sovereign acts,’ laid down in [Horowitz] does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused.”<sup>371</sup> In other words, the court believed the Energy Policy Act was targeted to avoid a government contract. On appeal, the Federal Circuit disagreed.

## 2. Federal Circuit Applies *Winstar*

As in *Winstar*, the characterization of the agreement was dispositive to the outcome of the case. Both Yankee Atomic and the Federal Court of Claims viewed the special assessment as a retroactive price increase to the earlier contracts between the United States and the contractor.<sup>372</sup> The government viewed the special assessment as unrelated to the earlier contracts and instead as an exercise of the sovereign taxing authority.<sup>373</sup> To sort through the issues the Federal Circuit applied the Sovereign Acts and Unmistakability doctrines in sequence.

The Federal Circuit appears to adopt the *Winstar* plurality’s version of the Sovereign Acts doctrine but applies it only in part. In assessing the dual natures of the government, the court states: “The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.”<sup>374</sup> On the other hand, the “Government-as-sovereign must remain free to exercise its powers.”<sup>375</sup> The Federal Circuit reasons that the Sovereign Acts doctrine is employed to balance the roles. The Sovereign Acts doctrine “is not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts.”<sup>376</sup> Application of the doctrine entails determining whether the government acted with the purpose of benefiting the Government-as-contractor, or whether the legislation was passed for the public benefit.<sup>377</sup>

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<sup>370</sup> *Id.* at 1573.

<sup>371</sup> 33 Fed. Cl. at 585 (quoting *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963)).

<sup>372</sup> 112 F.3d at 1573.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 1575.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

The Federal Circuit turns a blind eye to the *Winstar* plurality's analysis of the Sovereign Acts doctrine as an examination of the degree of the government's self interest. Noticeably missing is an application of the plurality's observation that: "[W]hen we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."<sup>378</sup> Missing also is consideration of the plurality's "holding that a governmental act will not be 'public and general' if it has the substantial effect of releasing the Government from its contractual obligations."<sup>379</sup> Further, the Federal Circuit fails to complete the analysis. The *Winstar* plurality determined that if the sovereign act is "public and general," "the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law."<sup>380</sup>

Even with the truncated analysis, it is difficult to see how the Federal Circuit differentiates the Energy Policy Act from FIRREA in terms of the amount of governmental "self-interest" involved. Both acts involved sweeping changes to their respective fields and only small portions of each directly affected contractual agreements with the government. However, both acts had severe economic consequences for private parties that were current or former contracting parties with the United States.

The Federal Circuit avoids this difficulty by not making any comparison at all. Instead, they focus exclusively on the Energy Policy Act and faults Yankee Atomic for focusing on the aspects of the act that affect them directly. The court asserts the purpose of the Energy Policy Act was to spread the cost of a problem they only realized after making the contract. The Federal Circuit makes much of the fact that utilities not involved directly in contracts with the United States had to pay based on the amount of DOE-manufactured enriched uranium they purchased on the secondary market. This emphasis is difficult to reconcile with *Winstar*. Thrifts that were not involved in agreements with the Bank Board were also affected by the changes in capital requirements under FIRREA. FIRREA also purported to be enacted to protect the public and was a "mammoth" legislation only parts of which involved the agreements at issue in *Winstar*.

Nonetheless, the Federal Circuit found the Energy Policy Act to be "public and general" and therefore the Sovereign Acts defense was applicable. Instead of completing the *Winstar* plurality's Sovereign Acts analysis concerning whether the contracts had allocated the risk, the court immediately steps to the Unmistakability doctrine.

The Federal Circuit carefully steps through the *Winstar* Unmistakability thicket by trying to analyze the facts in a manner inoffensive to each of the

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<sup>378</sup> 518 U.S. at 896.

<sup>379</sup> *Id.* at 899.

<sup>380</sup> *Id.* at 896.

opinions. The Federal Circuit believes that the Supreme Court justices were consistent in the formulation of the doctrine that:

[A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.<sup>381</sup>

The court acknowledges that the problem is not in articulation of the doctrine, but rather in deciding under what circumstances it applies. The Federal Circuit notes that the plurality found application of the doctrine depended on the nature of the contractual agreement. At the same time, the Federal Circuit observes that five other Supreme Court justices disagreed with this reasoning. The Federal Circuit reacted by applying both tests.

The Federal Circuit observes the contracts between DOE and Yankee Atomic could be easily characterized as risk-shifting agreements.<sup>382</sup> The agreements at issue are fixed-price contracts. As the Supreme Court has held “[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.”<sup>383</sup> Before venturing too far down this trail, the Federal Circuit notes that “the plurality also expressly stated that application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government.”<sup>384</sup> The opinion argues that the damages Yankee Atomic is seeking would in effect be a tax rebate that the plurality “seemed to recognize as a block to the exercise of sovereign power.”<sup>385</sup> Using that rationale, the Federal Circuit applies the Unmistakability doctrine.

According to the court, next comes an analysis of whether the contracts between Yankee Atomic and the government contained an unmistakable promise not to impose a general assessment against all utilities that benefited from DOE’s enrichment services.<sup>386</sup> This characterization of the issue is of paramount importance because Yankee Atomic argued that the fixed-price nature of the contract is an unmistakable promise forbidding a future price increase. By requiring that the “unmistakable promise” be in such precise terms, the court, of course, finds no such promise. The Federal Circuit determined that the contract was fully performed when the government

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<sup>381</sup> 112 F.3d at 1578 (quoting *Winstar*, 518 U.S. at 878).

<sup>382</sup> *Id.* at 1579.

<sup>383</sup> *United States v. Spearin*, 248 U.S. 132, 136 (1918); *See also* *ITT Arctic Servs., Inc. v. United States*, 524 F.2d 680, 691 (Ct. Cl. 1975) (that “the [seller] in a fixed-price contract assumes the risk of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices.”).

<sup>384</sup> 112 F.3d at 1579.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 1580.

provided the enriched uranium and the contractors paid the negotiated price.<sup>387</sup> Yankee Atomic did have a vested contract right, but the subsequent legislation was unrelated to any attempt to retroactively increase the price.<sup>388</sup>

Thus, the Federal Circuit finds for the United States because the passage of the Energy Policy Act was a “public and general” sovereign act and the contractual agreements did not contain unmistakable promises that would preclude the government from exercising that sovereign power. While the *Yankee* decision can be viewed as an expansion of *Winstar* principles into a non-regulatory setting and to include completed contracts, the Federal Circuit’s application of the principles is quite restricted.<sup>389</sup> Less certain will be future cases where the application of the Unmistakability doctrine cannot be reconciled with the competing *Winstar* opinions.

The dissent begins by noting a problem virtually ignored by the majority opinion.<sup>390</sup> These contracts were fully and satisfactorily performed. Therefore, Yankee Atomic cannot make a claim that the government breached the contract. However, the completed contract does create a vested property right protected by the Takings Clause of the Fifth Amendment.<sup>391</sup> “The Fifth Amendment prohibits the federal government from depriving a person of property ‘without due process of law’ and from taking private property ‘without just compensation.’”<sup>392</sup> Once the contract was fully performed, the government may not deprive a party of the benefits of those contracts.

The dissent views the Energy Policy Act as nothing more than a retroactive price increase. The dissent does not consider it important that the

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<sup>387</sup> *Id.*

<sup>388</sup> It is important to note that when analyzing the CERCLA issue that the Federal Circuit indicates it would apply the same analysis to either an ongoing contractual relationship or a vested contract right. *See* 112 F.3d. at 1580, 1582.

<sup>389</sup> While the *Yankee* court applied the *Winstar* analysis of the Unmistakability and Sovereign Acts doctrines to completed contracts in a non-regulatory setting, some commentators view the decision as a reversal in direction, giving the government a free hand to repudiate contracts. *See* Deneen J. Melander & Nancy R. Wagner, *Winstar and Yankee Atomic: The Government’s Power to Retroactively Alter Contracts*, 28 NAT’L CONTRACT MANAGEMENT J. 1 (1997).

<sup>390</sup> However, the majority does note:

Throughout its briefs, Yankee Atomic contends that the special assessment constitutes a breach of its contracts with the Government. Technically, however, this does not appear to be a case involving a breach of contract. Typically, a contract breach occurs while the contract is being performed, whereas the contracts in the present case have been fully performed by both parties. This appears to have been the view of the Court of Federal Claims, as indicated by the notable absence in its opinion of any reference to breach of contract. This distinction does not affect our decision, however. Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic’s prior contracts with the Government.

*Id.* at 1573 n.2.

<sup>391</sup> U.S. CONST. amend. V.

<sup>392</sup> 112 F.3d at 1582 (citing *Lynch*, 292 U.S. at 579) (Mayer, C.J. dissenting).

legislation was to relieve the government from the burden of unforeseen costs. The nature of the fixed-price contract allocated the risk of unforeseen costs to the seller—in this case the United States.<sup>393</sup> The Fifth Amendment “was designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.”<sup>394</sup>

Based on this reasoning, the dissent does not believe that either the Sovereign Acts or Unmistakability doctrines should be applied. The Sovereign Acts doctrine is a defense to a government breach of contract. However, because this is not a breach case, the dissent viewed the doctrine as wholly inapplicable. Likewise, the Unmistakability doctrine is a canon of construction because Yankee Atomic is not seeking enforcement of a contractual obligation. Instead, they are seeking to prevent an unlawful exaction of Yankee Atomic’s money. Based on this reasoning, the dissent found for Yankee Atomic based on an illegal taking theory.<sup>395</sup>

## **E. *Winstar* Meets CERCLA—Defense Contractors Seek to Share the Burden**

### *1. Applying Winstar Criteria*

The *Yankee* court was fortunate that its analysis did not depend on which *Winstar* version of the Sovereign Acts and Unmistakability doctrines was applied. The court was able to reach the same ends with alternate applications of the facts to the law. Applying the *Winstar* decision to the contracts illustrated in Section II of this article forces one to wade through the thicket. Each version of the doctrines leads down a different path—in the end, at least in this application, the paths seem to converge.

Unlike the situation in *Winstar*, the World War II and Vietnam era agreements are classic agreements entered into by the government-as-contractor. The World War II era contracts were cost-plus-fixed-fee supply contracts for the production and modification of contracts. The Vietnam era contracts discussed in *Hercules* and *Vertac* were fixed-price supply contracts for the sale of the herbicide, Agent Orange.<sup>396</sup> Neither the World War II nor

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<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 1583 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>395</sup> *Id.* at 1583-84.

<sup>396</sup> *Hercules*, 516 U.S. at 419 (the government “entered into a series of fixed-price production contracts”). The *Vertac* opinion does not specify the nature of the contracts for the purchase of Agent Orange. However, both *Hercules* and *Vertac* specify that the contractor bid for the contract from the government indicating use of sealed bidding which was the preferred technique used at that time in government contracting. JOHN CIBINIC, JR. & RALPH C. NASH,

Vietnam Era contracts contained any language explicitly allocating the cost of environmental cleanup. None contained explicit language whereby the government promised not to change the law with respect to environmental regulation.

Given the age of these contracts, one could assume the contracts have been fully completed by both parties. However, the World War II contracts contained provisions whereby claims unknown to the contractor survived the final settlement.<sup>397</sup> This would presumably include the explicit indemnification provisions contained in the contracts. The Vietnam era contractors would argue that the implied indemnification agreements likewise survived the contract.

The *Winstar* court started with the presumption that not only was there a contract, but also a breach of contract. Moreover, the *Winstar* breach occurred during the period of contract performance. In assessing a breach, it is well established that the latest point at which a breach can occur is when the contract is complete.<sup>398</sup> CERCLA, being passed in 1980, occurred many years after the performance was completed in the defense contracts discussed in Section II. However, after *Yankee*, the finality of the contract does not appear to affect the application of the Sovereign Acts and Unmistakability doctrines.

Applying the *Winstar* plurality's Sovereign Acts doctrine requires two steps. The first step is an analysis of whether the act is attributable to the government-as-contractor. If it is not, the second step is to apply ordinary rules applicable to private contracts—specifically the impossibility defense.<sup>399</sup>

The first step in assessing whether the sovereign act should be attributed to the government in its role as contractor is an examination of the statute. This requires an analysis of the degree of “self-interest” in the legislation. The “public and general” language provides criteria for determining the amount of governmental self-interest. CERCLA, more so than the Energy Policy Act or FIRREA, was passed to address national concerns.<sup>400</sup> The statute has no provisions that can be construed as targeting contracting partners of the United States. In fact, under broad waivers of sovereign immunity, the United States and all private parties are essentially treated the same. Impact on federal contracting obligations can properly be considered “incidental to the accomplishment of a broader governmental objective.”<sup>401</sup> In spite of enormous costs to its contracting partners, it is difficult to make a straight-faced argument that CERCLA was passed in order to relieve the

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JR., FORMATION OF GOVERNMENT CONTRACTS 505 (3d ed. 1998). Sealed bidding requires the use of fixed-price contracts. FAR, 48 C.F.R. § 14.104 (1999).

<sup>397</sup> See *supra* note 50 and accompanying text.

<sup>398</sup> See, e.g., *Mulholland v. United States*, 361 F.2d 237, 239-40 (Ct. Cl. 1966) (at the latest, a breach of contract claim accrues when the contract is completed); *Henke v. United States*, 60 F.3d 795, 799-800 (Fed.Cir. 1995).

<sup>399</sup> See *supra* notes 283-300 and accompanying text.

<sup>400</sup> For a discussion of the legislative history leading up to the passage of CERCLA, see *supra* notes 101-106 and accompanying text.

<sup>401</sup> *Winstar*, 518 U.S. at 898.

government of its contractual burdens.<sup>402</sup> The *Yankee* court would end the analysis here; however, the *Winstar* plurality would then apply the private contract law of impossibility to determine whether the government should be relieved of its obligation to perform.

The *Yankee* court's failure to address this prong may in part be because they recognized this classic defense to a breach of contract is conceptually difficult to apply to a completed contract. Nonetheless, application of the defense may be useful in assessing whether or not the government's action should be excused regardless of whether the action is labeled a taking or a breach. In order to assert the impossibility defense, the *Winstar* plurality required the government to show that the nonoccurrence of the sovereign act was a basic assumption of the contract. In addition, the government would have to show the contract did not allocate the risk of the change.

The *Winstar* plurality found that in the context of a regulatory agreement, the parties undoubtedly contemplated the possibility of a regulatory change. For the government, this was fatal to the impossibility defense in *Winstar*. In the context of the defense contracts at issue here, it is a safe assumption that neither party anticipated that Congress would pass CERCLA in response to widespread toxic contamination.

Next, the government must clear a second hurdle—proving no allocation of the risk. The *Yankee* court highlights that the nature of the contract itself may suggest a risk allocation. *Yankee* is the fairly atypical situation in which the government is the seller. In the contracts involving recovery of CERCLA cleanup costs, the government acted as the buyer. Nonetheless, the rules are clear regardless of the government's role as buyer or seller. A fixed-price contract places the risk of unanticipated costs on the seller.<sup>403</sup> In contrast, cost-reimbursement contracts remove the risk of unanticipated costs from the seller.<sup>404</sup> “[U]nder a cost-reimbursement contract, the contractor's profit is not affected by the cost of performance because incurred costs will be reimbursed and the amount of the fee is predetermined.”<sup>405</sup>

The World War II contracts can be distinguished from their Vietnam-era counterparts by type—the former being cost-reimbursement and the latter being fixed-price. The government assumed the risk of unanticipated costs in the earlier contracts but not the latter. Using this rationale, one can argue that the impossibility defense is not available to the government where they have assumed the risk of unanticipated costs through the use of cost-reimbursement type contracts. Presumably, the World War II contractors would prevail, at least through this stage of the analysis.

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<sup>402</sup> The Senate report accompanying the legislation makes no mention of a desire to eliminate the government's contractual obligations. See S. REP. 96-848, *supra* note 97.

<sup>403</sup> *ITT Arctic Serv., Inc.*, 524 F.2d at 691.

<sup>404</sup> *CIBINIC & NASH*, *supra* note 396, at 1061.

<sup>405</sup> *Id.*

There is no clear indication from *Winstar* about whether the Unmistakability doctrine should be applied independently of the Sovereign Acts doctrine. The *Yankee* court, however, indicates the doctrine should only be applied if the Sovereign Acts doctrine indicates the act is “public and general.” But then again, the *Yankee* court did not apply the impossibility defense.

The *Winstar* plurality, in a portion of the decision opposed by a majority of the justices, applies a threshold test to determine whether or not to apply the Unmistakability doctrine. The threshold test is that if a contract can reasonably be construed as containing a risk-shifting component, and if that component can be enforced without barring the exercise of sovereign power, then there is no reason to apply the Unmistakability doctrine.<sup>406</sup> The *Yankee* court, consistent with the *Winstar* majority, applies the Unmistakability doctrine whenever the issue of liability turns on a sovereign act by the government.

The defense contracts discussed in Section II above can easily be characterized as risk allocations. If a court were to apply the plurality’s threshold test, the Unmistakability doctrine would not be applicable to the World War II cost-reimbursement contracts, since the government is allocated the risk of unanticipated costs. However, the Vietnam era fixed-price contracts allocate risk to the contractor, and therefore the Unmistakability doctrine would apply. However, before dropping the requirement that the contract contain an unmistakable promise, the plurality would first examine the contracts to see if enforcement would block exercise of the sovereign power.

Damages sought to enforce the defense contracts at issue would not be an affront to the government’s sovereignty. While “[t]he Government cannot make a binding contract that it will not exercise a sovereign power . . . it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government’s sovereign act.”<sup>407</sup> According to the *Winstar* plurality, the only type of enforcement that would block the exercise of sovereign power would be an injunction, or damages that amount to a tax rebate. Typically, the plurality would not find enforcement of “humdrum supply contracts” subject to the Unmistakability doctrine.<sup>408</sup> The vitality of CERCLA would not be harmed by enforcement of these contracts. As a goal, CERCLA seeks to spread the cost of environmental cleanup to those who benefited from the destruction of the environment.<sup>409</sup> CERCLA shifts the cost to governmental and private entities alike. There doesn’t appear to be any CERCLA policy that would be thwarted by enforcement of the contracts.

While the *Winstar* plurality never discusses application of the Unmistakability doctrine, both the concurring opinion of Justice Scalia and the dissent discuss application of the doctrine. Justice Scalia treats the

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<sup>406</sup> 518 U.S. at 880.

<sup>407</sup> *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl. 1967).

<sup>408</sup> 518 U.S. at 880.

<sup>409</sup> See *supra* note 105 and accompanying text.

Unmistakability doctrine as a rule of presumed intent. This reverse presumption is that the government did not promise that none of its sovereign acts will incidentally prevent contract performance by itself or the other party to the contract. When the subject matter of the contract is to maintain the current state of the law, Justice Scalia would not require a second promise to keep the first promise. In the context of a regulatory agreement, Justice Scalia was willing to find an unmistakable promise implicit in the nature of the contract.<sup>410</sup> Chief Justice Rehnquist, in his dissent, takes a more literal view. The dissent asserts that “a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms.”<sup>411</sup> The Federal Circuit in *Yankee* never spells out exactly what standard they are applying.

However, the *Yankee* court does provide some very specific guidance that is useful in analyzing defense contracts involving CERCLA cleanup costs. First, the Federal Circuit will not imply an unmistakable promise from a fixed-price contract that allocates risk to the government.<sup>412</sup> Second, they will not imply an unmistakable promise from general legislation.<sup>413</sup> Therefore, it is probable that they will not find a waiver of sovereign authority in unmistakable terms based on the cost-reimbursement nature of the World War II production contracts. With certainty, they would not find a waiver in the Vietnam fixed-price Agent Orange contracts given that they already allocate the risk to the contractor. The defense contractors in both situations can counter that in addition to the nature of the contract, the contracts also contain either actual or implied indemnity provisions.

The World War II defense contracts all contained very specific indemnification clauses incorporated into the termination settlement agreements. While the language of the three vary slightly, the Tucson agreement is illustrative of all three. It provides in part that “[t]he Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract. . . .”<sup>414</sup> In addition, it provides that some claims will survive final settlement. The settlement agreement provides that all claims will:

cease forthwith and forever; ...except that all rights and obligations of the respective parties in respect of costs, expenses and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable of determination as to either existence, validity, or amount, shall remain in full force and effect.<sup>415</sup>

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<sup>410</sup> 518 U.S. at 919-22 (Scalia, J., concurring).

<sup>411</sup> 518 U.S. at 926 (Rehnquist, C.J., dissenting).

<sup>412</sup> 112 F.3d at 1580.

<sup>413</sup> *Id.*

<sup>414</sup> Consolidated Contract, *supra* note 50.

<sup>415</sup> *Id.*

These indemnification clauses appear on the face to be a very precise allocation of the risk of further unanticipated costs under the contract and should qualify as a waiver of sovereign authority in unmistakable terms. The costs associated with CERCLA legislation certainly qualify as costs or liabilities imposed on the contractor.<sup>416</sup> While litigation over the meaning of the provisions of the indemnity clause is likely, on the face they appear to be a promise in “unmistakable terms.”

The *Yankee* court comments in the context of that case that the contract did not expressly state “that Yankee Atomic will be immune from any future assessments made by the Government upon the industry as a whole.”<sup>417</sup> The Federal Circuit does not explicitly state that they would require the “unmistakable terms” of a waiver to be so detailed. Additionally, there is no case law suggesting such an impossible standard. Such a requirement would preclude parties from allocating the risk of events they could not specifically anticipate. Certainly, such an interpretation would be a dispositive obstacle in the CERCLA cleanup cases. Virtually no one during the 1940s anticipated the consequences of waste disposal on the environment—or the need for legislative remedies such as CERCLA.

The Vietnam-era Agent Orange contracts do not contain similar express indemnity clauses. Instead, the contractors find implied indemnification agreements based on the nature of the contract and the Defense Production Act.<sup>418</sup> The Supreme Court, as discussed in Section II, was unwilling to read an implied indemnification agreement into the contract.<sup>419</sup> In addition, the *Yankee* court is unwilling to find a waiver of sovereign authority in unmistakable terms based on general legislation. Therefore, the prognosis for a contractual recovery is dim.

In sum, after wading through the Sovereign Acts and Unmistakability doctrines as twisted and convoluted by the Supreme Court and Federal Circuit, the results are fairly predictable. First, it is indisputable that CERCLA is “public and general” and qualifies as a sovereign act. There is no evidence to support an argument that Congress passed the legislation intending to benefit the government-as-contractor. Applying the plurality’s second step—the impossibility defense—yields the same results as application of the Unmistakability doctrine. The application of any of the articulated tests is heavily influenced by the degree of risk allocation present in the contract. The World War II contractors have strong arguments based on both the risk allocations inherent in the cost-reimbursement contract and the express indemnification clauses provided within the contract. The fixed-price contracts entered into by the Agent Orange contractors are another story. The nature of the contract allocates the risk to the seller and the evidence to support even an

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<sup>416</sup> The definition of “impose” is “[t]o levy or exact as by authority; to lay as a burden tax, duty or charge.” BLACKS’S LAW DICTIONARY 518 (6th ed. 1990).

<sup>417</sup> 112 F.3d at 1579.

<sup>418</sup> *Hercules*, 516 U.S. at 426, 429-30.

<sup>419</sup> See *supra* notes 60-86 and accompanying text.

implied indemnification clause is weak. Therefore under any analysis, the World War II contractors should prevail—at least to this point. Fixed-price supply contracts without indemnification provisions—i.e. the Agent Orange type contracts—present a far weaker case.

## 2. *Further Obstacles*

In both *Winstar* and *Yankee*, the courts were able to complete their analysis after discussion of the Unmistakability and Sovereign Acts doctrines. Neither of those cases involved additional issues typical of more ordinary supply contracts.<sup>420</sup> Even if a defense contractor prevails through this state of the analysis, they will encounter several more legal hurdles before recovering under a contract theory. These issues, although each could warrant another article, will only be briefly discussed.

Contractors seeking reimbursement of CERCLA cleanup costs must select the appropriate forum for the suit. In 1996, General Dynamics sought to enforce the Consolidated Contract discussed in Section II in the federal district court of the District of Arizona.<sup>421</sup> They filed suit under the Administrative Procedures Act (APA).<sup>422</sup> The contractor specifically sought specific enforcement of contractual provisions calling for the United States to assume the contractor's defense in the CERCLA actions. The District Court granted summary judgment to the United States, finding the court lacked jurisdiction. On appeal, the Ninth Circuit discussed the limitations of federal district court jurisdiction.<sup>423</sup>

The Court begins by noting that in a suit against the United States the starting assumption is that no relief is available unless it is specifically provided. “[T]hat a plaintiff against the United States may receive less than complete relief in the federal courts should not necessarily be viewed as an inappropriate result, for such a plaintiff is accorded, by statute, more relief than historical principles of sovereign immunity would allow.”<sup>424</sup> The APA provides for jurisdiction in federal district court if three conditions are met: “(1) its claims are not for money damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its claims do not seek relief expressly or impliedly forbidden by another statute.”<sup>425</sup> The Ninth Circuit determined that only the third prong prevented the relief General Dynamics sought.

By seeking specific performance of the contract, General Dynamics satisfied the first two prongs of the test.<sup>426</sup> Even if the remedy requires a payment of money, the court found a suit for specific performance is not

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<sup>420</sup> 518 U.S. at 880.

<sup>421</sup> *Tucson Airport Authority v. General Dynamics Corp.*, 922 F. Supp. 273 (D. Ariz. 1996).

<sup>422</sup> Administrative Procedures Act, 5 U.S.C. § 701, *et. seq.*

<sup>423</sup> *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641 (9th Cir. 1998).

<sup>424</sup> *Id.* at 644.

<sup>425</sup> *Id.* at 645.

<sup>426</sup> See Seamon, *supra* note 229 for an article discussing limitations of seeking specific performance from the government.

equivalent to an action for “money damages.”<sup>427</sup> Likewise, because the Court of Federal Claims is not authorized to grant equitable relief, there is no adequate remedy available elsewhere. The Ninth Circuit pointed to a Supreme Court decision holding: “We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief.”<sup>428</sup>

The third prong is problematic for General Dynamics because the Tucker Act forbids such relief. The Tucker Act provides that “[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . .”<sup>429</sup> While the district courts have concurrent jurisdiction for claims under \$10,000, the Court of Federal Claims has exclusive jurisdiction over other claims. If the claims are contractually based, the district court has no jurisdiction. Since General Dynamics is seeking to have the district court determine what its rights under the contract are, the claim is contractually based. Therefore, defense contractors will be required to bring suit in the Court of Federal Claims with the limitation that they will be limited to a monetary remedy.<sup>430</sup>

More than one commentator suggests that the Anti-Deficiency Act presents a major obstacle to the claims of defense contractors for CERCLA cleanup costs under a contract theory.<sup>431</sup> The Anti-Deficiency Act flows from the Appropriations Clause of the United States Constitution that places control of the purse strings within the Congress. The Clause states: “no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>432</sup> The Act provides:

- (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--
  - (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
  - (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.<sup>433</sup>

However, the courts have long held that neither the Anti-Deficiency Act nor the Appropriations Clause is a defense to a breach of contract claim against the government.<sup>434</sup> “[N]either the Appropriations Clause of the Constitution, nor the Anti-Deficiency Act, shield the government from liability

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<sup>427</sup> *See id.*

<sup>428</sup> *Bowen v. Mass.*, 487 U.S. 879, 905 (1988).

<sup>429</sup> Tucker Act, 28 U.S.C. § 1491(a)(1).

<sup>430</sup> *See* 136 F.3d at 646-47.

<sup>431</sup> *See, e.g., Bunn, supra* note 11, at 218-27; *Kannan, supra* note 96, at 31.

<sup>432</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>433</sup> Anti-Deficiency Act, 31 U.S.C.A. § 1341 (1983 & Supp. 2000).

<sup>434</sup> *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (“exhaustion of appropriation justifies stopping a contractor's work, but does not constitute a defense to a breach of contract claim”); *Parsons v. United States*, 15 Ct. Cl. 246, 247 (1879).

where the government has lawfully entered into a contract with another party.”<sup>435</sup>

The ADA, therefore, does not provide an independent defense for the government for the breach of a contract *lawfully* entered into with another party. On the other hand, a contract that has been entered into in violation of a statute is *void ab initio* and the government may avoid the contract.<sup>436</sup> This includes contracts entered into “in the face of express congressional prohibition.”<sup>437</sup> The Supreme Court noted in *Hercules* that ““the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary.””<sup>438</sup>

As far as the World War II contracts are concerned, the Contracts Settlement Act of 1944 provided that authority. The Act provides in part:

Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this Act . . . in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement. This subsection shall not limit or affect in any way any authority of any contracting agency under the First War Powers Act, 1941, or under any other statute.<sup>439</sup>

Therefore, the contracts did not violate the Anti-Deficiency Act at formation, because of statutory authority to include broad indemnification provisions. The Anti-Deficiency Act was neither a bar making them *void ab initio* nor a defense to a subsequent breach of those contracts.

Contractors seeking enforcement of an indemnification provision would have the additional burden of showing the CERCLA cleanup costs are sufficiently related to the contract. Each of the contracts discussed in Section II are worded slightly differently—but each suggests the indemnification clause is limited to liability arising from the contract performance.<sup>440</sup> Commentators have suggested that costs incurred so many years after contract performance are simply too attenuated.<sup>441</sup> The counter argument is that the contamination occurred at the time of contract performance and flowed directly from contract performance.

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<sup>435</sup> *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 570 (1997).

<sup>436</sup> See generally *CIBINIC & NASH*, *supra* note 404, at 74-77.

<sup>437</sup> *Amer. Tel. & Tel. Co. v. United States*, 124 F.3d 1471, 1494-95 (Fed. Cir. 1997).

<sup>438</sup> *Hercules*, 516 U.S. at 428 n.10 (quoting *In re Assumption by Gov't of Contractor Liab. to Third Persons—Reconsideration*, 62 Comp. Gen. 361, 364-365 (1983)).

<sup>439</sup> 41 U.S.C. § 120.

<sup>440</sup> See, e.g., Consolidated Contract, *supra* note 50; DuPont Contract, *supra* note 28; and Ford Contract, *supra* note 40 and accompanying text for the language of the indemnification clauses.

<sup>441</sup> See Bunn, *supra* note 11, at 227-30, for an in-depth analysis of whether the costs are allowable and a comparison to cases of third-party liability arising from asbestos claims.

### 3. Finality vs. The Takings Clause

A final legal impediment to defense contractor recovery is the concept of “finality.” The contracts at issue are in many cases more than 50 years old. As the dissent in *Yankee* observed, the latest a breach of contract claim can accrue is when a contract is complete.<sup>442</sup> Today, a contract is completed when the government issues final payment.<sup>443</sup> Before making final payment, the government often requires a release of claims and liabilities. Provisions of the FAR often bar claims not asserted before final payment.<sup>444</sup> There are limited circumstances where a contractor can avoid a release and still assert a claim after “final payment.”<sup>445</sup>

However, the World War II contracts discussed in Section II, are subject to Settlement Agreements entered into pursuant to the Contract Settlement Act of 1944. The stated purpose of the Act was in part “to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts.”<sup>446</sup> The Act defines “the term ‘final and conclusive,’ as applied to any settlement, finding, or decision means that such settlement, finding or decision shall not be reopened, annulled, modified, set aside, or disregarded . . . in any suit, action, or proceeding except as provided by this chapter.”<sup>447</sup> In addition, the Act spells out exceptions to finality:

where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profit under section 1191 of Appendix to Title 50, unless exempt or exempted under such section; or (4) by mutual agreement before or after payment. . .

<sup>448</sup>

In a case interpreting the Act, the Court of Appeals for the Federal Circuit held: “It is clear that Congress did not intend, unless there was a plain or explicit exception, to leave contracts open and unsettled for decades. Rather, Congress wanted to end with finality war-time contracts and move swiftly into a peacetime economy.”<sup>449</sup>

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<sup>442</sup> 112 F.3d at 1582.

<sup>443</sup> See CIBINIC & NASH, *supra* note 145, at 1209-38.

<sup>444</sup> See, e.g., Changes Clause, FAR, 48 C.F.R. § 52.243-1(c) (1999).

<sup>445</sup> Contractors have successfully asserted several theories to avoid a general release, including: a) lack of consideration for a supplemental agreement; b) mutual mistake by the parties concerning the release; c) economic duress and use of unfair tactics by government in getting contractor to sign release; d) fraud; and e) lack of authority by government official. See CIBINIC & NASH, *supra* note 145, at 1231-38.

<sup>446</sup> Contract Settlement Act of 1944, 41 U.S.C. § 101(b).

<sup>447</sup> 41 U.S.C. § 103(m).

<sup>448</sup> 41 U.S.C. § 106(c).

<sup>449</sup> Am. Employers Ins. Co. v. United States, 812 F.2d 700 (1987).

The contracts at issue appear to contain language with explicit exceptions exempting certain contractor claims from finality. Each of the settlement agreements contain different but similarly broad language exempting currently unknown claims arising from the final settlement. The DuPont Contract exempts “[c]laims by the Contractor against the Government, which are based upon the responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor.”<sup>450</sup> The Consolidated Contract exempts: “costs, expenses and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable of determination as to either existence, validity, or amount, shall remain in full force and effect. . . .”<sup>451</sup> Finally, the Ford settlement agreement apparently contained language exempting unknown third-party claims arising from the contract.<sup>452</sup> The courts will have to wrestle with whether these are “plain and explicit” exceptions that justify leaving these extremely old contracts open. However, a finding that the contracts have been fully performed and finally settled may not sound the death knell to a contractor’s suit.

After *Yankee*, the finality of a contract apparently has no impact on the court’s analysis of a contractor’s claim when applying the Sovereign Acts and Unmistakability doctrines. The majority states the reasoning is the same: “[r]egardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic’s prior contracts with the Government.”<sup>453</sup> The dissent, disagreed stating the Unmistakability and Sovereign Acts doctrines are not applicable to unlawful takings cases.<sup>454</sup>

The Takings Clause of the Fifth Amendment states: “Nor shall private property be taken for public use, without just compensation.”<sup>455</sup> Although takings cases typically involve the government confiscating private property for public use, the clause has been found to prevent government interference with other property interests, including contractual rights. “Rights against the United States arising out of a contract with it are protected by the Fifth Amendment” of the United States Constitution.<sup>456</sup> “Congress [is] without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure would be not the practice of economy, but an act of repudiation.”<sup>457</sup> The purpose of the Takings Clause of the Fifth Amendment is to prevent the government “from forcing some people alone to bear public

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<sup>450</sup> DuPont Contract, *supra* note 28.

<sup>451</sup> Consolidated Contract, *supra* note 50.

<sup>452</sup> See Bunn, *supra* note 11, at 232.

<sup>453</sup> 112 F.3d at 1573 n2.

<sup>454</sup> *Id.* at 1583 (dissent).

<sup>455</sup> U.S. CONST. amend. V.

<sup>456</sup> *Lynch*, 292 U.S. at 579.

<sup>457</sup> *Perry v. United States*, 294 U.S. 330, 352-53 (1935).

burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>458</sup> Further, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>459</sup>

Historically, claims of an unlawful taking based on CERCLA have not been successful. While the Supreme Court has never addressed the issue, many district and circuit courts have. In one of the most often cited cases, *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.* (NEPACCO), the Eighth Circuit rejected a takings claim because the government-mandated cleanup did not deprive the plaintiff of a "property interest" protected under the Fifth Amendment.<sup>460</sup> Many of the other claims have involved situations where the government-mandated cleanup required physical occupation of the plaintiff's property.<sup>461</sup> In the few cases where the plaintiff prevailed, they were able to establish the physical occupation was permanent.<sup>462</sup> Very few cases have involved claims of an unlawful taking based on a contractual relationship with the government.

In *Eastern Enterprises v. Apfel* (Eastern), the United States Supreme Court addressed the applicability of the Takings Clause to the Coal Act.<sup>463</sup> The Coal Act was passed in 1992 to address the failing pension programs initially established in 1950 and 1974. In an attempt to stabilize pensions, Congress assessed corporations that had employed miners in the past. Eastern Enterprises, which had been out of the coal business since 1965, was assessed. They filed suit claiming this was an unlawful taking.<sup>464</sup> The Supreme Court agreed. In reaching their decision the Court held: the "inquiry, by its nature, does not lend itself to any set formula, and the determination whether "'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive."<sup>465</sup> However, the Court enunciated at least three factors they consider important: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."<sup>466</sup>

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<sup>458</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>459</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

<sup>460</sup> *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986).

<sup>461</sup> *See, e.g., Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Auth.*, 983 F. Supp. 319 (No. Dist. N.Y. 1997).

<sup>462</sup> *See Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1992).

<sup>463</sup> *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998); *Coal Indus. Retiree Health Benefit Act of 1992* [hereinafter *Coal Act*], 26 U.S.C.A. §§ 9701-9722 (1994 & Supp. II).

<sup>464</sup> 524 U.S. at 504-18.

<sup>465</sup> *Id.* at 522.

<sup>466</sup> *Id.*; One district court, in an unpublished opinion, applied the test set out in *Eastern* to CERCLA. The court rejected the notion that CERCLA liability amounted to a taking, however, the case did not deal with a vested contract as a property right. *See United States v.*

Hercules, Inc., in continuing litigation arising from the cleanup of the Jacksonville, Arkansas site discussed in Section II, argued CERCLA involved an unconstitutional taking in light of the Supreme Court's decision in *Eastern*.<sup>467</sup> The district court summarily dismissed the claim finding the retroactive application of CERCLA was constitutional in light of *NEPACCO*.<sup>468</sup> The court did not discuss the effect of CERCLA on the Agent Orange contracts as a taking of a vested property right.

In 1993, prior to the *Eastern* decision, the district court rejected Shell Oil's unlawful taking claim. In finding Shell liable for the cleanup of the McColl superfund site, the district court found CERCLA does not involve taking issues at all. "In view of the statutorily provided right of contribution, CERCLA's provision for allocating liability for the cleanup of public hazards cannot fairly be characterized as a taking at all." The court reasoned this was because: "CERCLA, as amended by SARA, clearly provides a mechanism by which parties held liable for response costs under section 107(a) may allocate those costs among themselves through contribution suits under section 113(f). . . ."<sup>469</sup>

To date, no court has squarely addressed whether retroactive application of CERCLA is an unlawful taking of a vested property right in completed contracts. Certainly, the right of contribution under CERCLA is limited to other PRPs. As discussed in Section III, a contracting partner is not ordinarily considered a PRP—absent some fairly extraordinary circumstances. Without a right to contribution, the *Shell* court may have reached a different conclusion. After all it was that same court that in a subsequent decision, remarked: "[t]he American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort."<sup>470</sup>

## F. Section Summary

Defense contractors seeking to recover CERCLA cleanup costs under contractual theories are entering an area of the law fraught with uncertainty. *Winstar* does provide precedent for claims against the government when changes in the law adversely affect its contractual relationship. *Yankee* extends the analysis to completed contracts and to non-regulatory agreements with the government. The primary obstacle will be CERCLA's characterization as a "public and general" sovereign act. However, that does not end the analysis.

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Asarco, Inc., Case No. CV 96-0122-N-EJL, *available at* 1999 U.S. Dist. LEXIS 18924 (Dist. Idaho 1999).

<sup>467</sup> *United States v. Vertac Chem. Corp.*, 33 F. Supp 2d. 769, 784-85 (E.D. Ark. 1998).

<sup>468</sup> *Id.*

<sup>469</sup> *Shell Oil Co.*, 841 F. Supp. at 974.

<sup>470</sup> *Shell Oil Co.*, 13 F. Supp 2d. at 1027.

Defense contractors have a colorable claim when the contractual relationship allocates the risk of change to the government.

## V. CONCLUSION

Today, as a matter of law and policy, government contracts are required to incorporate provisions designed to protect the environment. In addition, parties to government contracts are subject to a veritable plethora of environmental regulations and oversight by the EPA. However, the country is still faced with the cost of years of environmental neglect and the challenge of paying the bill. The environmental costs of defense contracts alone are substantial. This article has reviewed the challenge of spreading the cost among those responsible for the widespread contamination resulting from defense contracts.

Section II began by outlining some of the provisions in current contracting procedures to avoid environmental problems and to allocate the costs of environmental cleanup. As a contrast, a number of defense contracts from the Vietnam and World War II eras were discussed. None of those contracts contained explicit provisions to deal with environmental consequences. As a result, several of those contracts have resulted in litigation. Litigation over two of the World War II contracts is pending currently in the United States Court of Federal Claims.

Section III examined in some detail the liability of defense contractors under CERCLA. The various attempts by contractors to assert government liability as a contracting partner was discussed. Because a contractual relationship is not enough to establish a party as a PRP, defense contractors have had to struggle to show the United States was either an "owner," "operator," or "arranger." The key factor has been to establish that the government exercised a substantial degree of control. However, after *Bestfoods*, many of the factors used by the court in *FMC* do not appear to be applicable. The ability of defense contractors to establish the government as a PRP, based on a contractual relationship, in the future looks unlikely.

Section IV turned to another avenue by which defense contractors have attempted to recover the costs of environmental cleanup. *United States v. Winstar* was analyzed in detail as a case where the Supreme Court found the government liable for a breach of contract following a Congressional change in the law. The Unmistakability and Sovereign Acts doctrines were examined as ways to determine the allocation of risk when the law changes and frustrates contractual expectations. *Yankee* examined application of the difficult *Winstar* principles to the effect of a change in the law on a completed contract. The defense contracts, discussed in Section II, were then analyzed in light of the court's teachings. The article concludes that the nature of the contract and the specific provisions allocating the risk of change should be paramount in assessing the claims. As a result, claims under the World War II contracts appear to have merit. In contrast, the Vietnam era fixed-price contracts appear to allocate the risk to the contractor. Section III concluded by briefly

examining other obstacles as well as alternate theories of liability under the Takings Clause.

In the final analysis, the question is reduced to the following: “who should bear the cost of defense contracts that benefited both the public at large and the individual defense contractors?” The district court in *Shell Oil* believed that “the American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort.” However, the entire purpose of entering written contracts is to assign risk. When a contract fails to clearly assign risk, allocating responsibility and cost entails a tortured journey through a judicial maze. The result after *Winstar* is uncertainty.

# **Defensive Information Operations and Domestic Law: Limitations on Government Investigative Techniques**

LIEUTENANT COLONEL JOGINDER S. DHILLON\*  
LIEUTENANT COLONEL ROBERT I. SMITH\*\*

## **I. INTRODUCTION**

Our society is becoming ever more reliant on the Internet and our national information infrastructure. As is common in this country, our laws have been slow to develop in this new venue. Unlike commercial enterprises that may choose to take advantage of gaps and loopholes in the law, those engaged in protecting our national security face a tougher challenge. The protectors of our national security should not be free to take advantage of these gaps and loopholes, as they are charged not only with ensuring that their conduct is consistent with the letter and spirit of our laws, but that they also act consistent with our constitutional values. While a commercial enterprise may choose to act in the absence of legislation prohibiting a given act, the defenders of national security not only must ask “may” they legally perform this act, but they also must ask whether they “should” perform the act. This additional constraint becomes critically important in the area of electronic surveillance, where evolving technology threatens individual rights and liberties.

However, while the information age presents tremendous promise of benefits to our nation, so too does it bring increased vulnerabilities. Our infrastructures used to be protected by physical distance or isolation from threats, the availability of effective defenses, and the belief of our opponents that we were likely to retaliate. Today’s weapons limit the effectiveness of all of these layers of defense. Our increasingly wired world is becoming increasingly vulnerable to numerous threats, including malicious hackers, curious teenagers, terrorists, organized crime, and foreign powers. Anonymous Internet users may attempt to gain access to our infrastructures while physically remote from the site of the intrusion, and they act with reduced threats of detection and little risk of retaliation.

This article consists of three parts. Section II reviews the nature of the critical information infrastructure. The discussion covers some of the recent

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\* Lieutenant Colonel Dhillon (B.S., USAF Academy; J.D., Harvard University; LL.M., University of Houston) is Chief, Operational Law, United States Space Command & North American Aerospace Defense Command, Peterson AFB, Colorado.

\*\* Lieutenant Colonel Smith (B.S., USAF Academy; J.D., Boalt Hall, U.C. Berkley; LL.M., The John Marshall Law School) is Chief, Information Technology & Privacy, General Law Division, Office of the Air Force Judge Advocate General, The Pentagon, Washington, DC.

directives from the President, as well as a discussion of the Internet in general. Section III discusses the nature of threats against that infrastructure. The discussion includes a review of some actual and some simulated intrusion attempts against the computer systems, and the known results of those incidents. Section IV of the article reviews the relevant domestic laws and the constraints they place on those charged with defending these infrastructures. The discussion covers Fourth Amendment law, the Computer Fraud and Abuse Act, the Electronic Communications Privacy Act, the Foreign Intelligence Surveillance Act, and the Posse Comitatus Act.

## II. THE IMPACT OF INFORMATION TECHNOLOGY

### A. The President's Response

Life is good in America because things work. When we flip the switch, the lights come on. When we turn the tap, clean water flows. When we pick up the phone, our call goes through. We are able to assume that things will work because our *infrastructures* are highly developed and highly effective.<sup>1</sup>

In order to ensure that Americans may continue to rely on our critical infrastructures, President Clinton created the President's Commission on Critical Infrastructure Protection (PCCIP).<sup>2</sup> The PCCIP is charged with reviewing physical and cyber threats to eight critical infrastructures. These infrastructures include transportation, production and storage of fossil fuels, water supply, emergency services, continuity of government service, banking and finance, electrical power, and information and communications.<sup>3</sup>

Historically, many of these critical infrastructures were "physically and logically separate systems that had little interdependence."<sup>4</sup> However, the combination of advances in technology and the push for ever-increasing levels of efficiency has driven these systems to a state of increased automation and interdependence.<sup>5</sup> This networking and interlinking of our critical infrastructures

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<sup>1</sup> The Report of the President's Commission on Critical Infrastructure Protection, *Critical Foundations: Protecting America's Infrastructures*, Oct. 1997, p.3 [hereinafter *Critical Foundations*].

<sup>2</sup> Exec. Order No. 13,010, 61 Fed. Reg. 37,345 (July 17, 1996), available at [http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html) [copy on file with the *Air Force Law Review*].

<sup>3</sup> *Critical Foundations*, supra note 1, at 4.

<sup>4</sup> WHITE PAPER, *The Clinton Administration's Policy on Critical Infrastructure Protection: Presidential Decision Directive 63*, May 22, 1998, p.1, available at <http://www.doc.gov/cio/oipr/whitepaper.html> (copy on file with the *Air Force Law Review*) [hereinafter WHITE PAPER].

<sup>5</sup> The chief of the Federal Bureau of Investigation's National Infrastructure Protection Center

has “created new vulnerabilities to equipment failures, human error, weather and other natural causes, and physical and cyber attacks.”<sup>6</sup>

In the past, “[t]he physical breadth of the infrastructures made it difficult for a potential malefactor to cause anything other than an isolated disturbance.”<sup>7</sup> However, the networking and interdependence of the critical infrastructures today places almost no limit on the damage that may be wrought by a sophisticated potential malefactor. Furthermore, these threats are real, and an inability to properly respond to the threats could prove very costly.<sup>8</sup> The President has made clear that he does not intend to allow these threats to remain unchallenged.

It has long been the policy of the United States to assure the continuity and viability of critical infrastructures. President Clinton intends that the United States will take all necessary measures to swiftly eliminate any significant vulnerability to both physical and cyber attacks on our critical infrastructures, including especially our cyber systems.<sup>9</sup>

## **B. The Internet**

The Internet has both enabled the increased interoperability and efficiency of the information age, and acts as its Achilles heel. “The Internet is not a

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highlights the interdependence as follows:

[E]lectronic power grids and natural gas pipelines are controlled by computer systems, and those computers may be linked to each other and to the company headquarters by publicly accessible telecommunications systems and commercially available information technologies to allow efficient management of power generation and smooth delivery to consumers. Billions of shares are traded each day over the telephone or Internet, and the stock exchanges could not function today without their vast networks of computers. Banks no longer rely on ledger books and safe deposit boxes to account for and secure their holdings, but depend on computerized accounting systems to manage depositors’ accounts. The telecommunications system itself no longer uses operators to manually plug in calls to a switchboard but depends on computerized switching stations to handle the billions of calls placed each day. The government also relies on computers and publicly available communications systems to conduct the nation’s business.

Michael Vatis, *Cybercrime, Transnational Crime and Intellectual Property Theft*, Prepared Statement to the Joint Economic Committee, United States Congress, Mar. 24, 1998, *available at* <http://www.house.gov/jec/hearings/cyber/vatis.htm> (copy on file with the *Air Force Law Review*) [hereinafter Michael Vatis].

<sup>6</sup> WHITE PAPER, *supra* note 4, at 1.

<sup>7</sup> Michael Vatis, *supra* note 5, at 2.

<sup>8</sup> See Robert MacMillian, *Big Increase in Net Warfare Predicted*, NEWSBYTES, Mar. 23, 2000 (noting China plans to create a fourth branch of their armed forces devoted to cyber warfare).

<sup>9</sup> WHITE PAPER, *supra* note 4, at 1.

physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.”<sup>10</sup> The Internet sprang forth from research conducted by the Defense Advanced Research Projects Agency (DARPA).<sup>11</sup> The major breakthrough came with the development of packet switching networks. Prior to packet switching, the networking of computers required a dedicated direct link between the two computers. The expense of creating direct links and the error rates observed in the former method resulted in a horribly expensive and inefficient system.<sup>12</sup>

Packet switching allowed data to be broken into small packets of information. The labeling of these packets potentially allowed each packet to follow a different route to the destination computer. Once the packets arrived at the destination computer, the packets were rearranged into the correct order, regardless of the order of transmission or receipt.<sup>13</sup> The DARPA scientists further improved the system by proving that the technology could work over satellites and other wireless networks.<sup>14</sup> The age of the Internet was upon us, and things would never be the same again.

What grew from a desire to have a communication system cable of routing around a nuclear attack, has grown into huge network of homes and businesses. There are now up to one billion people on the Internet.<sup>15</sup> Each of these people

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<sup>10</sup> American Civil Liberties Union v. Janet Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996).

<sup>11</sup> Dr. Robert E. Kahn, Statement to the Senate Committee on the Judiciary, Nov. 4, 1997, Federal News Service.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> “Estimates that there will be over 1 billion users on the Internet by 2000 underscores the importance of establishing trust and security in a highly distributed, network-centric computing environment such as the Defense Information Infrastructure (DII).” Arthur L. Money, Testimony Before the House Armed Services Committee, Subcommittee on Military Procurement, Military Research and Development, Feb. 23, 1999, available at <http://www.house.gov/hasc/testimony/106thcongress/99-02-23money.htm> (copy on file with the *Air Force Law Review*).

The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. It is indisputable, however, that the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide, of which approximately 60 percent located within the United States, are estimated to be linked to the Internet. This count does not include the personal computers people use to access the Internet using modems. In all, reasonable estimates are that as many as 40 million people around the world can and do access the enormously flexible communication Internet medium. That figure is expected to grow to 200 million Internet users by the year 1999.

*ACLU v. Reno*, 929 F. Supp. at 830.

theoretically not only has access to e-mail and the world wide web, but also potential access to the systems that control our critical infrastructures. Worse yet, our security measures have not adapted to the changed nature of the threat.

### **III. THE NATURE OF THE THREAT**

We have spent years making systems interoperable, easy to access, and easy to use, yet we still rely on the same methods of security that we did when data systems consisted of large mainframe computers housed in closed rooms with limited physical access. By doing so, we are building an information infrastructure, the most complex the world has ever known, on a very insecure foundation. . . . An article in China's People's Liberation Daily stated that . . . 'an adversary wishing to destroy the United States only has to mess up the computer systems of its banks by high-tech means. This would disrupt and destroy the U.S. economy.' If we overlook this point and simply rely on the building of a costly standing army, it is just as good as building a contemporary Maginot Line.<sup>16</sup>

#### **A. Difficulties in Measuring the Threat**

##### *1. The Private Sector*

Federal Bureau of Investigation (FBI) estimates that electronic crime totals more than \$10 billion a year.<sup>17</sup> The true extent of electronic crime is difficult to measure. First, victims may not be aware that an intruder has accessed their system. Second, even if aware, a company may not want to report the crime. This reluctance to report the intrusion may stem from the fear of a loss of competitive

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<sup>16</sup> George Tenet, Testimony to the Senate Governmental Affairs Committee, June 24, 1998, Federal News Service.

<sup>17</sup> See Center for Strategic and International Studies, *Cybercrime. . . Cyberterrorism. . . Cyberwarfare. . . : Averting an Electronic Waterloo*, 1998, available at <http://www.csis.org/pubs/cyberfor.html>.

The U.S. today faces a new and unprecedented threat: strategic information warfare. There is now the potential for a dedicated, sophisticated adversary to conduct coordinated strikes against the computers, communications systems, and databases that underpin modern society. This is not mere hacking or computer crime; rather the objectives are geopolitical and economic. And traditional national security measures will be ineffective. . . . This report assess that threat and points the way towards practical responses.

*Id.* at Forward.

position—they may lose business if they are perceived as vulnerable to attack.<sup>18</sup> Alternatively, the company may not desire to report the incident because they do not want investigators to gain access to their systems. Some estimate that less than 20% of the victims of electronic crime report the incidents to law enforcement.<sup>19</sup>

## 2. *The Department of Defense*

The Defense Information Infrastructure (DII) presents a large target. The Department of Defense (DOD) relies on the DII's more than two million computers, 10,000 local area networks, and 100 long-distance networks.<sup>20</sup> "Despite the existence of dedicated military communications satellites, more than 95 percent of military communications travels via the commercial telephone networks."<sup>21</sup> Given there are so many potential points of entry, and the nature of the information available on the DII, it is of little surprise that the DII is one of the main targets for intrusion attempts.

The DOD was the target of 22,126 detected attacks in 1999 alone.<sup>22</sup> Of these intrusion attempts, about 10 a day require a detailed investigation.<sup>23</sup> Again, the full magnitude of the problem may not yet be known. The Defense Information Systems Agency (DISA) conducts a Vulnerability Analysis and Assessment Program.<sup>24</sup> According to Secretary Hamre, DISA targeted the DII for 38,000 intrusion attempts. DISA successfully gained access in nearly two out of three attempts, and the target detected only four percent of the successful intrusions.<sup>25</sup> Of the detected intrusions, only 27 percent were reported to DISA as required by government procedures.<sup>26</sup> These numbers, while unacceptable, are better than results in the private sector.<sup>27</sup>

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<sup>18</sup> See *Cyber Threats Are All Too Real: Governments Fail to Comprehend Information Warfare*, NAT'L POST, Feb. 20, 1999, § D, at 3 (citing example involving the theft of \$10 million from Citibank, and the subsequent use of the incident by competitors).

<sup>19</sup> *Id.*

<sup>20</sup> General Accounting Office, *Information Security—Computer Attacks at Department of Defense Pose Increasing Risks*, (GAO/AIMD-96-84) May 1996, 12, available at [http://epic.org/security/GAO\\_DOD\\_security.html](http://epic.org/security/GAO_DOD_security.html) (copy on file with the *Air Force Law Review*) [hereinafter *Information Security*].

<sup>21</sup> Department of the Air Force, *A Primer on Legal Issues in Information Operations*, p.4 (copy on file with the authors).

<sup>22</sup> See Daniel Verton, *Cyberdefense Alarms Ring on Hill*, FEDERAL COMPUTER WEEK, Mar. 10, 2000, available at <http://www.fcw.com>; Daniel Verton, *Cyber Attacks Up 300 Percent This Year*, Military and C4I, Inforwar.com, Nov. 8, 1999, available at <http://www.inforwar.com>.

<sup>23</sup> John J. Hamre, Testimony Before the Senate Armed Services Committee, Subcommittee on Emerging Threats and Capabilities, Mar. 16, 1999 (copy on file with the *Air Force Law Review*).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Matthew G. Devost, *National Security in the Information Age 16 (1995)* (unpublished M.A. thesis, The University of Vermont), available at <http://www.terrorism.com/documents/devostthesis.html> (citing the results of a study showing an 88

While the number of intrusion attempts is staggering, few of the attempts are known to be the work of foreign agents, terrorists, or organized crime. It is believed that the vast majority of the attacks are the result of fledgling hackers seeking prestige within their community. “[H]ackers see the Department of Defense as . . . the big banana. The final exam. The ultimate challenge . . . to test their skills.”<sup>28</sup> However, even these hackers can pose a significant risk, as they routinely publish their exploits on the Internet and may post stolen information as proof of their exploits.

## **B. Real World Results for Intrusion Attempts and Exercises**

Both the private sector and the DOD have fallen victim to malicious hackers. The best known example in the private sector targeted the telephone system. Additionally, the DOD has released the results of several simulated intrusion attempts.

### *1. The Private Sector Example*

In March 1997, a teenaged hacker disabled a telephone local loop in central Massachusetts.<sup>29</sup> This shut down the telephone system for the entire area. More than 600 residents serviced by the local loop lost all telephone service, including 911 emergency services.<sup>30</sup> One of those “residents” was the air traffic control tower at the Worcester Airport.<sup>31</sup> As a result of the hacker’s actions “the

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percent success rate for intrusion attempts, a 4 percent detection rate, and a response rate of 5 percent for the detected intrusions).

<sup>28</sup> Michael Vatis, Testimony Before the United States Senate, June 10, 1998.

<sup>29</sup> The Department of Justice Press Release stated

In many respects, a loop carrier system serves the same function as a circuit breaker box in a home or an apartment. Individual wires do not run from each plug or light in a home or an apartment to the electric company. Rather, the myriad of plugs and lights are connected to a circuit breaker box in a corner of the home or apartment, to which the electric company attaches a single, efficient cable. If the circuit breaker box is disabled, however, none of the lights and outlets in the house can function. Loop carrier systems are used by telephone companies to integrate service provided over hundreds of telephone lines for digital transmission over a single, high capacity fiber-optic cable to a central office.

Department of Justice Press Release, *Juvenile Computer Hacker Cuts Off FAA Tower At Regional Airport—First Federal Charges Brought Against A Juvenile For Computer Crime* (Mar. 18, 1998), available at <http://www.usdoj.gov/criminal/cybercrime/juvenilepld.htm> (copy on file with the *Air Force Law Review*).

<sup>30</sup> Jack Danahy, *Framing the Issues: Some Examples*, A Presentation to the Center for Law, Ethics, and National Security at Duke University, Apr. 1998, p.2.

<sup>31</sup> *Id.*

air traffic control tower [was] unable to printout progress of incoming and passing aircraft.”<sup>32</sup>

Bell Atlantic technicians spent more than two hours trying to locate the problem, and another four hours to restore service.<sup>33</sup> Security countermeasures designed to prevent future intrusion attempts took more than a year to implement.<sup>34</sup> Had the hackers targeted a more vital communication point, the results could have been catastrophic.

## 2. *The Department of Defense*

Intruders into the DII “have stolen, modified, and destroyed both data and software. . . . They have shut down entire systems and networks, thereby denying service to users who depend on automated systems to help meet critical functions.”<sup>35</sup> This section discusses two real world examples, and the results of two exercises conducted by the DOD.

For three months in 1994, two malicious hackers repeatedly gained unauthorized access to a computer network at an Air Force research and development facility in Rome, New York. The Rome Laboratory is the Air Force’s lead research facility for all information technology issues. The facility needs to interact with academia, software developers, and other entities, therefore, it is connected to the Internet.<sup>36</sup>

System administrators did not detect the intruders for five days.<sup>37</sup> Furthermore, because the intruders used multiple systems as intermediaries in their intrusion attempts, tracking the hackers back to their homes in Great Britain proved difficult and time consuming. The trail included multiple sites within the United States and South America.<sup>38</sup> While they had unauthorized access to the network, the hackers caused substantial damage.

The attackers were able to seize control of Rome’s support systems for several days and establish links to foreign Internet sites. During this time, they copied and downloaded critical information such as air tasking order systems data. By masquerading as a trusted user at Rome Laboratory, they were able to successfully attack systems at other government facilities, including the National Aeronautics and Space Administration(NASA) Goddard Space Flight Center, Wright-Patterson Air Force Base, some Defense contractors, and other private sector organizations.<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Information Security, supra* note 20, at 13.

<sup>36</sup> *Id.*

<sup>37</sup> Lieutenant Colonel John Pirog, Rome Lab Break-In, Presentation to the Legal Aspects of Information Operations Symposium, Air Force Judge Advocate General School, Oct. 20, 1999.

<sup>38</sup> *Information Security, supra* note 20, at 13.

<sup>39</sup> *Id.*

The Air Force estimates that responding to the intrusion cost approximately \$500,000. However, the damage to national security is difficult to quantify. The extent of the problem is illustrated by the fact that the Air Force may not yet know everything the hackers did while in the system. For example, they may have placed “malicious code in software which could be activated years later, possibly jeopardizing a weapons system’s ability to perform safely and as intended.”<sup>40</sup>

The second example, because it occurred during a time of military tensions, caused even more consternation. In February 1998, the United States was preparing to employ military force against Iraq. During preparations, the Air Force Information Warfare Center detected a coordinated series of intrusions into the DII. The intruders were traced to the Middle East.<sup>41</sup> During the investigation, investigators discovered a series of trapdoors that would enable the intruders to return undetected at a later date. The systems did not contain any classified information, however,

Pentagon officials worried that by tampering with the data, the hackers could disrupt military operations, especially the U.S. force buildup then occurring in the Persian Gulf. Unsure where the attacks were originating or how many hackers were involved, Deputy Defense Secretary John J. Hamre notified President Clinton early in the search that the intrusions might be the first shots of a genuine cyber war, perhaps by Iraq as it faces a renewed threat of U.S. airstrikes.<sup>42</sup>

However, the hackers proved to be two sixteen year-old Americans in California acting under the guidance of an eighteen 18 year-old Israeli “mentor.” The Americans were sentenced to perform community service, and were ordered to refrain from using a computer during their probationary period. Three DOD exercises demonstrate that both the National Information Infrastructure (NII) and DII remain vulnerable. In 1997, the Joint Chiefs of Staff directed a no-notice exercise known as “Eligible Receiver.” The exercise was designed to test the government’s response to a coordinated cyber assault on the NII/DII.<sup>43</sup>

Approximately forty DOD employees made up the entire “enemy” force. The employees were not computer experts, but had a working knowledge of information technology. They were given approximately three months to plan their “attack,” and their “weapons” were limited hacker tools available on the Internet.<sup>44</sup> The “enemy” proved to be a formidable foe.

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<sup>40</sup> *Id.*

<sup>41</sup> Gregory Vistica and Evan Thomas, *The Secret Hacker Wars*, NEWSWEEK, June 1, 1998, at 60.

<sup>42</sup> *Id.*

<sup>43</sup> F. Whitten Peters and Richard Marshall, *Defensive Information Operations*, Presentation to the Legal Aspects of Information Operations Symposium, Air Force Judge Advocate General School, Oct. 18, 1997.

<sup>44</sup> Ellie Padgett, Testimony to the United States Senate Subcommittee on Technology, Terrorism

[T]he hackers found it exceptionally easy to penetrate well-defended systems. Air traffic control systems were taken down, power grids made to fail, oil refineries stopped pumping--all initially apparent accidents. At the same time . . . [it] proved remarkably easy to disrupt the [DOD logistics] network both by changing orders so that, for example headlamps rather than missiles end up at a fighter squadron, and to interrupt the logistics flow by disrupting train traffic. . . The result was a serious degradation of the Pentagon's ability to deploy and to fight. In other words, a team of hired hackers, using commercially available information and artificially constrained by the law and the rules of the game, had successfully shown that an electronic Pearl Harbor is not only possible today but could be completely successful.<sup>45</sup>

More recently, the DOD has released the results of the Web Risk Assessment Team (WRAT). The WRAT was created by the Joint Task Force for Computer Network Defense, and "is made up of reservists who spend one weekend each month scanning DOD Web sites."<sup>46</sup> The WRAT found "as many as 1,300 'discrepancies,' some of them involving highly classified information."<sup>47</sup> The team also found war plans on more than ten sites, and more than twenty sites containing detailed maps of DOD locations.<sup>48</sup>

The team located plans for an annual exercise known as Cobra Gold. The site contained "an entire list of the participating units, communications frequencies and call signs for aircraft and data on Identification Friend or Foe squawks."<sup>49</sup> The team also found a site that contained detailed discussion of "Site R," which "serves as the alternate Joint Communications Center for U.S. nuclear forces."<sup>50</sup> The details included floor plans for the facility, as well as a photograph depicting tunnel entryways.<sup>51</sup>

Each of the sites was supposed to contain only unclassified information. The fact that so much classified information was available on an unclassified system raises many questions. But it also demonstrates that the stakes in computer network defense can be rather high.<sup>52</sup> This article now turns to the legal constraints in place in this area.

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and Government Information, June 10, 1998, Federal Document Clearing House, Inc.

<sup>45</sup> JAMES ADAMS, *THE NEXT WORLD WAR: COMPUTERS ARE THE WEAPONS AND THE FRONT LINE IS EVERYWHERE* 187-88 (1998).

<sup>46</sup> Dan Verton, *DOD Web-Watchers Find War Plans Online*, FEDERAL COMPUTER WEEK, Apr. 26, 2000, available at <http://www.fcw.com>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> In response to these problems, the Department of Defense is considering moving all of its networks off of the Internet. See Dan Verton, *DOD Pushing Forward on Internet Disconnect*, FEDERAL COMPUTER WEEK, Apr. 26, 2000, available at <http://www.fcw.com> (stating Department of Defense remains committed to developing a technical architecture that will allow it to disconnect from the Internet).

## IV. DOMESTIC LEGAL CONSTRAINTS

### A. Fourth Amendment Law

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment places limits upon the government's ability to intrude into the lives of the people. The government's motive for the intrusion generally is irrelevant. The parameters of the Fourth Amendment are not absolute, rather, they reflect an attempt to preserve the government's authority to maintain public order, while protecting individual liberty and autonomy.<sup>53</sup> The Fourth Amendment is composed of two independent clauses. The first clause requires reasonableness on the part of the government when intruding into certain aspects of the lives of the people.<sup>54</sup> The second clause mandates the requirements for the issuance of a warrant.<sup>55</sup> A question remains as to whether or not a warrantless search is per se unreasonable.

Many believe warrantless searches generally are unreasonable. As one commentator put it, "[t]he firm rule until the late 1960's was that in order for a search to be 'reasonable,' law enforcement officials desiring to conduct a search must first obtain a warrant from a neutral and detached magistrate by establishing probable cause that a law had been violated."<sup>56</sup> However, as the nature of crime

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<sup>53</sup> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

<sup>54</sup> A debate still rages over which clause is the central purpose of the Fourth Amendment. See Jennifer Y. Buffaloe, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 529 n.2 (Summer, 1997) ("Compare JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42 (1966) . . . , with Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994) (arguing that the 'core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness.')").

<sup>55</sup> "Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.' *Coolidge v. New Hampshire*, [403 U.S. at 481]; *Katz v. United States*, [389 U.S. at 356]" *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 304 (1972).

<sup>56</sup> Jennifer Y. Buffaloe, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 530 (Summer 1997). See *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring) ("But it is by

and the sophistication of criminals has changed over time, the Supreme Court has created numerous exceptions to the warrant requirement, and has viewed the reasonableness clause as an additional restriction on these exceptions.<sup>57</sup> This portion of the article will review the applicability of the Fourth Amendment and the exceptions. Specifically, it will address how the exceptions apply to the actions of national security agencies responding to real or perceived intrusion attempts.

### *1. The Changing Nature of Fourth Amendment Protection*

For most of our history, the Supreme Court interpreted the Fourth Amendment very literally. “Unless government agents searched or seized tangible ‘houses, papers, or effects,’ Fourth Amendment protections failed to apply.”<sup>58</sup> Perhaps the best example of the literal interpretation is found in the case of *Olmstead v. United States*.<sup>59</sup> *Olmstead* involved the actions of United States prohibition officers who placed wiretaps on telephone wires of suspected prohibition violators. The devices were placed on wires in a manner that did not require a physical trespass onto the suspects’ property, and did not involve a physical intrusion onto their property. The Court ruled that the Fourth Amendment was not implicated, as the actions of the agents did not amount to a search.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an *actual physical invasion* of his house or ‘curtillage’ for the purpose of making a seizure.<sup>60</sup>

Justice Brandeis wrote a now-famous dissent wherein he argued that the Court should interpret the Fourth Amendment in light of the principles it was designed to protect.<sup>61</sup> Justice Brandeis feared that technology would advance, and

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now axiomatic that the Fourth Amendment’s proscription of ‘unreasonable searches and seizure’ is to be read in conjunction with its command that ‘no Warrants shall issue, but upon probable cause.’”).

<sup>57</sup> See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (identifying twenty exceptions to the warrant preference rule); Elise Bjorkan Clare et al., *Warrantless Searches and Seizures*, 84 GEO. L.J. 717, 743 (1996) (thirteen categories of exceptions, including searches in which the special needs of law enforcement make the probable cause requirement impracticable).

<sup>58</sup> Michelle Skatoff-Gee, *Changing Technologies and the Expectation of Privacy: A Modern Dilemma*, 28 LOY. U. CHI. L.J. 189, 192 (Fall, 1996).

<sup>59</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>60</sup> *Id.* at 466 (emphasis added).

<sup>61</sup>

Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was

would allow the government to perform formerly prohibited acts in new ways that the framers could not have foreseen.<sup>62</sup> Justice Brandeis characterized the Fourth Amendment as being designed to protect the people's right to be let alone. He concluded that if acts of the Government invaded on that right, such acts would trigger Fourth Amendment scrutiny.<sup>63</sup>

Nearly forty years passed before the views of Justice Brandeis won out. *Katz v. United States*<sup>64</sup> involved the results of wiretaps that had been placed on the outside of a public telephone booth.<sup>65</sup> By a seven to two vote, the Supreme Court decided to abandon *Olmstead's* physical trespass standard, and instead relied upon the concept of reasonable expectations of privacy. In the words of Justice

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with reference to such a clause that this Court said in *Weems v. United States*, 217 U.S. 349, 373: 'Legislation, both statutory and constitutional is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. . . . The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.

*Id.* at 472-73 (Brandeis, J., dissenting).  
<sup>62</sup>

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

*Id.* at 474.  
<sup>63</sup>

[I]t follows necessarily that the [Fourth] Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it. . . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment.

*Id.* at 478.

<sup>64</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>65</sup> *Id.* at 348.

Stewart, “the Fourth Amendment protects people, not places.”<sup>66</sup> The Court thereby shifted the focus of the inquiry from where and how the interception took place, to the expectation of the suspect.<sup>67</sup>

However, the majority opinion did not prove to be the lasting standard against which future searches and seizures would be measured. Justice Harlan wrote a concurring opinion that set out the test that is still in use today.<sup>68</sup> Justice Harlan invoked a two-part test to determine whether a given scenario triggers the protections of the Fourth Amendment. First, the individual must have exhibited an actual expectation of privacy. Second, that expectation must be one that society is willing to recognize as reasonable.<sup>69</sup> This article now turns to how the

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<sup>66</sup> *Id.* at 351.

<sup>67</sup>

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a ‘constitutionally protected area.’ The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’ deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

*Id.* at 351 (citations omitted).

<sup>68</sup> One commentator has observed,

Based on Justice Harlan’s concurring opinion in *Katz v. United States*, the Supreme Court has developed a two-part test to determine whether a given inspection is a search: if the government action has violated an individual’s subjective expectation of privacy, and if society recognizes that expectation as reasonable, then the inspection is a search and the protections of the Fourth Amendment apply. . . . [T]he *Katz* test remains the relevant inquiry for determining whether a search has taken place.

Note, *Keeping Secrets in Cyberspace: Establishing Fourth Amendment Protection for Internet Communication*, 110 HARV. L. REV. 1591, 1596 (May, 1997).

<sup>69</sup>

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States*, and unlike a field, *Hester v. United States*, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant. . . . As the Court’s opinion states, ‘the Fourth Amendment protects people, not places.’ The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a ‘place.’ My understanding of the

Court applies this test in cyberspace this new venue.

## 2. *The Fourth Amendment and Cyberspace*

Computers serve as “repositories of personal information” such as financial records, personal notes, trade secrets and other matters that seem to fit within the definition of “papers and effects.”<sup>70</sup> However, since the Court has shifted away from literal interpretation, a court must analyze cases involving computers using the two-part reasonableness test. Most courts attempting to resolve novel issues generally attempt to analogize the situation to one previously decided.<sup>71</sup> The choice of analogy often determines the outcome. Cyberspace has many unique features that are not easily analogized to previous situations. This article will now look at some of the features of cyberspace, and what analogies have or should be made.

Electronic mail (e-mail) is one area where courts and commentators have chosen to apply the analogy of first class mail.<sup>72</sup> While at first appearing to be a useful analogy, it is not a perfect fit. Mail recipients have a reasonable expectation of privacy in sealed letters being forwarded by first class mail.<sup>73</sup> However, there are significant differences between the handling of first class mail and the handling of e-mail. One of the main differences involves the carrier. First class mail is handled by the United States Postal Service. Society can and should view an expectation of privacy in matter handled by the federal government as being reasonable. However, e-mail is handled by many actors, and few if any of them are state actors. E-mail sent over the Internet may reside on numerous mail servers before reaching the mail server of the user’s Internet Service Provider. Additionally, many networks are configured to send duplicate copies of all e-mail to the system administrator. Given these differences, it is not a forgone conclusion

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rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

*Katz*, 389 U.S. at 361 (Harlan, J., concurring) (citations omitted).

<sup>70</sup> Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 81 (1994).

<sup>71</sup> *See, e.g., United States v. Myers*, 46 F.3d 668, 670 (7th Cir.), *cert. denied*, 116 S.Ct. 213 (1995) (holding that the use of a thermal imager to detect heat emanating from a home did not constitute a search on the basis that it was comparable to a dog sniffing a luggage for drugs).

<sup>72</sup> *See, e.g., Chris J. Katopsis, “Searching” Cyberspace: The Fourth Amendment and Electronic Mail*, 14 TEMP. ENVTL. L. & TECH. J. 175, 176 (1995); Winick, *supra* note 70, at 81-82.

<sup>73</sup> *See, e.g., United States v. Maxwell*, 45 M.J. 406, 416 (C.A.A.F. 1996)

that society should view an expectation of privacy in e-mail as reasonable.

Courts also may choose to analogize cyberspace to the telephone system. However, not all information traveling over telephone lines receives Fourth Amendment protection. In *Smith v. Maryland*,<sup>74</sup> the Court ruled that the telephone company could lawfully use pen registers<sup>75</sup> to record the telephone numbers dialed from a private residence. The Court ruled that there are numerous legitimate business reasons for recording this information, and that the recording did not implicate the Fourth Amendment.<sup>76</sup> Using this analogy tends to indicate that an Internet Service Provider could record the addressees on all e-mail being sent from their system. However, this analogy would not appear to authorize the interception of the contents of those communications.<sup>77</sup>

Another analogy involves characterizing cyberspace as a physical place or object. Under this analogy, the storage device for a computer could be viewed as a closed container or file cabinet.<sup>78</sup> Questions may arise under either analogy. For example, if a person stores his or her electronic documents on a remote server on the Internet, who owns the filing cabinet or sealed container, and who may consent to a search of the contents?<sup>79</sup> Additionally, given the huge quantities of information capable of being stored in very inexpensive storage facilities, how “particularly” does a warrant have to describe the place to be searched?<sup>80</sup>

Despite the problems inherent in using analogies when dealing with cyberspace, courts generally have found that the Fourth Amendment protects information stored on computers.<sup>81</sup> However, as discussed earlier, there are numerous exceptions to the warrant requirement. This article will focus on whether, and if so how, these exceptions may apply in cyberspace.

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<sup>74</sup> 442 U.S. 735 (1979).

<sup>75</sup> “Pen registers are used to identify outgoing numbers called from a subject’s phone line.” Air Force Office of Special Investigations, Office of the Staff Judge Advocate, Legal Guide to Computer Crime, (1994) at 15.

<sup>76</sup> *Smith v. Maryland*, 442 U.S. at 743-44.

<sup>77</sup> An exception would be cases in which a court were to find a legitimate business reason for recording the contents of the e-mail. Prior to the enactment of the Digital Millennium Copyright Act, one example of a legitimate business requirement would have been to avoid copyright infringement actions.

<sup>78</sup> Winick, *supra* note 70, at 82.

<sup>79</sup> *Minnesota v. Olson*, 495 U.S. 91, 95-100 (1990) (overnight guest has reasonable expectation of privacy).

<sup>80</sup> “A typical home computer with a modest 100 megabyte storage capacity can contain the equivalent of more than 100,000 typewritten pages of information.” Winick, *supra* note 70, at 81.

<sup>81</sup> *See, e.g.*, *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (determining that a reasonable expectation of privacy existed in the private America Online account of an active duty Air Force officer charged with, among other things, transporting or receiving child pornography in interstate commerce.); *United States v. Lyons*, 992 F.2d 1029 (10th Cir. 1993) (seizure of data from hard disks did not violate defendant’s subjective expectation of privacy because he had no right to exclude others from the property in question.); *United States v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997) (determining that the extent of the expectation of privacy in e-mail transmissions are contextually dependent).

### 3. *Cyberspace and the Exceptions to the Warrant Requirement*

Despite the clear preference for warrants,<sup>82</sup> the Supreme Court has created several exceptions where the government need not seek a warrant, and may not even need to be acting under probable cause.<sup>83</sup> These exceptions include searches incident to a lawful arrest;<sup>84</sup> seizure of items in plain view;<sup>85</sup> exigent circumstances;<sup>86</sup> consent;<sup>87</sup> and border searches.<sup>88</sup>

The question here is whether the government's interests in responding to intrusion attempts against the NII/DII are of such import as to justify the creation of a new exception or the use of a pre-existing exception.<sup>89</sup> The most appropriate point for the application of an exception to the warrant requirement is in the early stages following the detection of an intrusion attempt. The first step in such situations is to attempt to determine the identity of the intruder. Such intruders typically weave their way to their target through a series of intermediate computers, and take other steps to mask their true identity.<sup>90</sup> If an intruder uses certain techniques, once he or she departs, tracing them back to their source is very difficult, if not impossible. Those attempting to defend the NII/DII from authorized access must act with speed and stealth. Does this situation meet the requirements of the hot pursuit or exigent circumstances exception?

One could argue that the exigent circumstances exception should apply. However, to reach this conclusion would require an extension of the exigent circumstances exception, particularly where the defender is part of the DOD. The attractiveness of applying the exigent circumstances exception comes from the fact that while the defenders are not physically in pursuit of a suspect, they are

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<sup>82</sup> See *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (“But it is by now axiomatic that the Fourth Amendment’s proscription of ‘unreasonable searches and seizures’ is to be read in conjunction with its command that ‘no Warrants shall issue, but upon probable cause.’”); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (holding that the requirement for a warrant exists absent an applicable pre-existing exception).

<sup>83</sup> See, e.g., Jeremy J. Calsyn et al., *Warrantless Searches and Seizures*, 86 GEO. L.J. 1214 (1998).

<sup>84</sup> *United States v. Robinson*, 414 U.S. 218, 234-36 (1973) (holding that the safety of the arresting officer justifies, but limits the scope of, a warrantless search of a person incident to a lawful arrest).

<sup>85</sup> *Horton v. California*, 496 U.S. 128, 136 (1990) (holding that no warrant required when officer is in a lawful position to observe apparently incriminating evidence).

<sup>86</sup> *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) (holding that reasonable belief that entry is in response to one in need of “immediate aid” permissible).

<sup>87</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (holding that no warrant required if a person with authority has consented).

<sup>88</sup> *United States v. Ramsey*, 431 U.S. 606 (1977) (holding that warrant not required at the border to search individuals or items entering the country).

<sup>89</sup> For a discussion of the formal national security exception to the warrant requirement, see *supra*, section IV.C., the Electronic Communication Privacy Act.

<sup>90</sup> Michael Vatis, Prepared Statement to the Senate Committee on Judiciary, Subcommittee on Technology, Terrorism, and Government Information, Federal News Service, June 10, 1998, p.3.

engaged in a concerted effort to identify a suspect before he or she can destroy evidence or commit further misdeeds.<sup>91</sup> However, the United States military does not act primarily to collect evidence of wrongdoing, the United States military may only act if their primary motivation relates to national security.<sup>92</sup> Since the core purpose of the exigent circumstances exception is the preservation of evidence, and that is not the main motivation of the military, rather than extend the exigent circumstances exception, perhaps a better fit may be found under the “special needs” exception.

The Supreme Court first recognized the “special needs” exception in *New Jersey v. T.L.O.*<sup>93</sup> The case involved a warrantless search at a school. A student had been observed smoking in a school restroom. An assistant vice principal then searched the student’s purse. The results of the search indicated the student may have been involved in the use and distribution of marijuana. The Supreme Court ruled that the evidence was obtained in a lawful manner.

Justice White wrote for the Court and noted the government’s substantial interest in “maintaining an environment [in the schools] in which learning can take place.”<sup>94</sup> The Court then balanced the state’s interest in “swift and informal disciplinary procedures” against the student’s right to privacy.<sup>95</sup> The Court concluded that the warrant requirement would unduly burden the government and was likely “to frustrate the purpose behind the search.”<sup>96</sup>

It was, however, the concurring opinion of Justice Blackmun that contained what would become the parameters of the special needs exception. Justice Blackmun feared that the Court’s balancing approach could be too broadly applied. He argued that the balancing should only take place when required by a “special law enforcement need for greater flexibility.”<sup>97</sup> “The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable cause requirement, and in applying a standard determined by balancing the relevant interests.”<sup>98</sup>

The Court has applied the special needs exception several times since its

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<sup>91</sup> See, e.g., *U.S. v. Santana*, 427 U.S. 38 (1976).

<sup>92</sup> The Department of Defense includes organizations that are responsible and authorized to perform law enforcement, intelligence/counter-intelligence, and service provider functions within the national security context. This discussion focuses on the primary national security role and responsibility of the DOD. Others, such as the FBI are tasked with law enforcement, not the military. Aside from “turf” battles preventing the military from stepping into the fray motivated by law enforcement purposes, as will be discussed below, the Posse Comitatus Act, 18 U.S.C. § 1385, specifically limits the participation of the Air Force in domestic law enforcement.

<sup>93</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>94</sup> *Id.* at 340.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 351 (Blackmun, J., concurring).

<sup>98</sup> *Id.* at 350-351 (Blackmun, J., concurring).

creation. *O'Connor v. Ortega*<sup>99</sup> extended the special needs exception to workplace searches. The Court justified the exception on the government's substantial interest in maintaining an efficient and proper workplace. "Requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome."<sup>100</sup> *Griffin v. Wisconsin*<sup>101</sup> extended the exception to include warrantless searches of the homes of probationers. The Court ruled that so long as the search was based upon a reasonable suspicion that it would produce evidence of a probation violation, a warrant was not required.<sup>102</sup> The special need to preserve "the deterrent effect of the supervisory arrangement" justified the application of the exception.<sup>103</sup> In *Skinner v. Railway Labor Executives Association*,<sup>104</sup> the Court extended the exception to include the warrantless drug and alcohol testing of railroad employees. As the Court put it,

The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."<sup>105</sup>

In *National Treasury Employees Union et al. v. Von Raab*,<sup>106</sup> a case decided the same day as *Griffin*, the Court extended the exception to include suspicionless searches of employees seeking sensitive jobs with the United States Customs Service. It was the duty of the United States Custom Service to provide for the security of the nation that served as the special need.<sup>107</sup>

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<sup>99</sup> *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>100</sup> *Id.* at 720.

<sup>101</sup> *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

<sup>102</sup> *Id.* at 873-74.

<sup>103</sup> *Id.* at 878.

<sup>104</sup> *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

<sup>105</sup> *Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)).

<sup>106</sup> *Nat'l Treasury Employees Union et al. v. Van Raab*, 489 U.S. 656 (1989).

<sup>107</sup>

The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. . . . It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching traveler's entering the country. . . . While reasonable tests designed to elicit [information that bears on employee's fitness to perform their duties] doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

*Id.* at 668-71

The most recent special needs case involved mandatory drug testing for students wishing to participate in school sponsored athletics.<sup>108</sup> Here, the Court looked to the importance of “detering drug use by our Nation’s schoolchildren” as the special need.<sup>109</sup> “Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude [the school’s] Policy is reasonable and hence constitutional.”<sup>110</sup>

One can argue that the desire to determine the identity of an ongoing intrusion attempt against the NII/DII involves “special needs beyond normal law enforcement.” After all, such activities are motivated by a compelling interest in avoiding an “electronic Pearl Harbor,” not the collection of evidence for ordinary law enforcement purposes.<sup>111</sup> As the Court put it in another, much older case: “To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.”<sup>112</sup> If the government has a reasonable suspicion unauthorized users are attempting to gain access to critical infrastructures, a limited special needs exception may be appropriate, particularly if the actions taken are relatively unintrusive and for limited duration.

However, under current case law, courts may be precluded from applying such just such an exception. The Supreme Court ruled, during the age of Watergate, that an interest in protecting national security does not override the warrant requirement of the Fourth Amendment.<sup>113</sup> The Court noted “Successive Presidents for more than one-quarter of a century have authorized [electronic] surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court.”<sup>114</sup> The case involved three defendants charged with conspiracy to destroy government property, including one charged with the dynamite bombing of a Central Intelligence Agency building in Ann Arbor,

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<sup>108</sup> *Vernonia School District 47J v. Action*, 515 U.S. 646 (1995).

<sup>109</sup> *Id.* at 664.

<sup>110</sup> *Id.* at 665.

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It is a mistake, however, to think that the phrase ‘compelling state interest,’ in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.

*Id.* at 661.

<sup>112</sup> *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

<sup>113</sup> *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972) (referred to as the “*Keith*” case).

<sup>114</sup> *Id.* at 299.

Michigan.<sup>115</sup> Some of the evidence was obtained pursuant to electronic surveillance authorized by the Attorney General (acting on behalf of the President) and not a magistrate.

The Attorney General stated that he approved the wiretaps “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.”<sup>116</sup> The government asserted that the warrantless surveillance was lawful because it constituted “a reasonable exercise of the President’s power (exercised through the Attorney General) to protect the national security.”<sup>117</sup> The Supreme Court was not persuaded.

The Court first recognized that implicit in the duty imposed by Article II, §1, of the Constitution is the “power to protect our Government against those who would subvert or overthrow it by unlawful means.”<sup>118</sup> The Court noted that electronic surveillance could be “an effective investigatory instrument in certain circumstances”<sup>119</sup> The Court further opined that “[i]t would be contrary to the public interest for Government to deny itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.”<sup>120</sup> This is true because “unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.”<sup>121</sup>

Along with these domestic security surveillance issues comes a temptation for abuse. As the Court noted,

History abundantly documents the tendency of government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect “domestic security.” Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.<sup>122</sup>

In other words, the case involved two vital interests for Americans—domestic security interests and free speech interests. The Court put it thus,

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 301.

<sup>118</sup> *Id.* at 310 (quoting Article II, § 1 duty to “preserve, protect and defend the Constitution of the United States”).

<sup>119</sup> *Id.* at 312.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 314.

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.<sup>123</sup>

In resolving the tension between the two interests, the Court asked “whether the needs of the citizens for privacy and free expression may not be better protected by requiring a warrant” before the government may engage in electronic surveillance for domestic security purposes.<sup>124</sup> While at the same time, the Court must ask “whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.”<sup>125</sup>

In the end, the Court concluded that “prior judicial approval is required for the type of domestic security surveillance involved in this case.”<sup>126</sup> However, in addition to the doors left open by the questions left unanswered, the Court stated that the warrant requirements in domestic security cases could differ from the requirements for other cases. In fact, the Court stated that “different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.”<sup>127</sup>

Despite this holding, one could argue that responding to a detected intrusion attempt against the nation’s critical infrastructures might result in a different outcome when balancing the interests. Unlike the situation in *Keith* where free speech interests were directly at stake, responding to an attempted unauthorized intrusion into the NII/DII does not directly invoke free speech. Additionally, the *Keith* opinion deals with the gathering of intelligence as opposed to military operations in response to a criminal act and in furtherance of national security objectives. The Court could not have understood the national security implications of our emerging reliance on a networked information infrastructure. These differences may shift the balance, and lead the Court to conclude that a reasonable exercise of the president’s constitutional powers as commander-in-chief does not violate the Fourth Amendment.

The Fourth Amendment is not the only limitation on government responses to ongoing intrusion attempts. Several federal statutes come to bear on the issue as well. This article now turns to those statutes.

## **B. Computer Fraud and Abuse Act**

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 315.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 324.

<sup>127</sup> *Id.* at 322-323 (for an application of different probable cause standards see the discussion on the Foreign Intelligence Surveillance Act, *supra* section VI.D.).

[I]n most cyber attacks, the identity, location, and objective of the perpetrator are not immediately apparent. Nor is the scope of his attack--i.e., whether an intrusion is isolated or part of a broader pattern affecting numerous targets. This means it is often impossible to determine at the outset if an intrusion is an act of vandalism, organized crime, domestic or foreign terrorism, economic or traditional espionage, or some form of strategic military attack. The only way to determine the source, nature, and scope of the incident is to gather information from victim sites and intermediate sites such as Internet Service Providers and telecommunications carriers.<sup>128</sup>

If one were able to “hack-back” to locate the source of an attack without violating the Fourth Amendment, the question becomes whether the Computer Fraud and Abuse Act (CFAA) would provide an independent barrier to such action. The CFAA of 1986<sup>129</sup> was the first federal legislative foray into computer crimes. Prior to its enactment, federal law only touched computer crimes through application of more generic criminal laws, or through the use of the mail and wire fraud statutes.<sup>130</sup>

As originally enacted in 1984, the CFAA was intended to protect federally owned or operated computers.<sup>131</sup> It “prohibited unauthorized access to certain categories of computers if the defendant realized monetary gain or obtained access to classified material.”<sup>132</sup> It was amended in 1986 and 1994. The 1994 amendments were intended to broaden its reach to reflect the broader range of means of using computers to wreak havoc. The law now protects “computers used by financial institutions or the federal government”<sup>133</sup> and any “computer

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<sup>128</sup> Michael A. Vatis, Statement for the Record to the Senate Armed Service Committee, Subcommittee on Emerging Threats and Capabilities, Federal Document Clearing House, Mar. 16, 1999, at 2.

<sup>129</sup> 18 U.S.C. § 1030.

<sup>130</sup> See R. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* 12-19 (1997).

<sup>131</sup> One commentator has noted

The decision to pass a statute that limited federal intervention to certain specific situations reflected legislators’ realization that the scope of the computer crime problem was not well known and that their actions might have unforeseen repercussions. Legislators considered and rejected broader bills that criminalized the use of a computer as a part of a scheme to defraud that affected interstate commerce, choosing instead to protect only the most vital federal interests that could be injured by computer users.

Note, *The Computer Fraud and Abuse Act of 1986: A Measured Response to a Growing Problem*, 43 VAND. L. REV. 453, 454 (1990)

<sup>132</sup> The Computer Abuse Amendments of 1990, Senate Report 101-544 (1990).

<sup>133</sup> *Id.*

which is used in interstate or foreign commerce or communications.”<sup>134</sup> The Act covers acts of fraud involving computers, and the unauthorized destruction or alteration of data stored in computers.<sup>135</sup>

Section 1030(a) contains the substantive protections that may be used to prosecute intrusion attempts against the NII/DII.<sup>136</sup> However, 18 U.S.C.

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<sup>134</sup> 18 U.S.C. § 1030(e)(2).

<sup>135</sup> The Act defines a protected computer as follows:

a computer exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution, or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or which is used in interstate or foreign commerce or communications.

18 U.S.C. §1030(e)(2).

<sup>136</sup> Section 1030(a) reads as follows:

(a) Whoever—

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y.[(y)] of section 11 of the Atomic Energy Act of 1954 [42 USCS § 2014(y)], with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the

§1030(a)(2)(C) is of particular importance to this article. Section 1030(a)(2)(C) prohibits obtaining “information from any protected computer if the conduct involved an interstate or foreign communication” by intentionally accessing a computer without access or exceeding authorized access.<sup>137</sup> The CFAA definition of “protected computer” includes all computers “used in interstate or foreign commerce or communications.”<sup>138</sup> Given the nature of the Internet, it seems clear that a court would rule that all computers connected to the Internet are “used in interstate or foreign commerce or communications.” Therefore, while the CFAA originally was enacted to protect information on computers owned or operated by the federal government, it now may be read to prohibit the DOD from taking certain actions to respond to those attacks.

However, an argument can be made that the CFAA provides an exception for such conduct. Section 1030(f) reads, “This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.”

This provision appears to leave the door open for properly authorized activities of those DOD components with law enforcement or intelligence/counter-intelligence missions. For example, each branch of the military service contains an investigative unit that performs the dual roles of law

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object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$ 5,000 in any 1-year period;

(5) (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage;

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if—

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;

(7) with intent to extort from any person, firm, association, educational institution, financial institution, government entity, or other legal entity, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

18 U.S.C. § 1030(a).

<sup>137</sup> 18 U.S.C. § 1030(a)(2)(C).

<sup>138</sup> 18 U.S.C. § 1030(e)(2).

enforcement and counter-intelligence.<sup>139</sup> Additionally, each branch of the service contains an intelligence unit.<sup>140</sup> The CFAA does not prohibit these units from responding to intrusion attempts against the NII/DII. However, the exception does not explicitly include a national security provision. The legislative history of the CFAA<sup>141</sup> does not contain any discussion of this section, and no cases have addressed the issue. It is our view that the statute should not be construed to restrict the authority of the President, acting pursuant to his constitutional power as the commander-in-chief to direct operations to accomplish legitimate national security objectives. However, this authority has not been clearly defined. It appears appropriate only in circumstances in which significant national security interests are at risk. Therefore, the CFAA appropriately places additional limits beyond the Fourth Amendment on some elements of the military. However, the CFAA is not the only limitation on these activities.

### C. Electronic Communications Privacy Act

The Federal Wiretap Act originally was enacted as Title III of the Omnibus Control and Safe Streets Act of 1968. The enactment was a legislative response to the holding in the *Katz* case that the warrant requirement applied to electronic surveillance not involving a physical trespass.<sup>142</sup> Title III set out the parameters for the seizure of wire communications by the government. Such seizures were authorized only in the course of investigating certain listed criminal acts. The Federal Wiretap Act required probable cause that less intrusive investigative techniques would fail. It further required that techniques be employed to limit the likelihood of intercepting innocent conversations. Finally, it required that the target be informed of the seizure after the investigation concluded.<sup>143</sup>

However, while Title III as originally enacted protected all electronic transmissions of voice communications, regardless of the method of transmission, it did nothing to protect communications in the age of e-mail.<sup>144</sup> In response, Congress enacted the Electronic Communications Privacy Act of 1986 (ECPA). The ECPA was an attempt to “reestablish the balance between privacy and law enforcement, which Congress found had been upset, to the detriment of privacy, by the development of communications and computer technology and changes in

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<sup>139</sup> In the Air Force, this unit is the Air Force Office of Special Investigations.

<sup>140</sup> In the Air Force, this unit is the Air Intelligence Agency.

<sup>141</sup> Senate Report No. 99-432, reprinted in 4 U.S.C.C.A.N. 2479.

<sup>142</sup> See Basil W. Mangano, *The Communications Assistance For Law Enforcement Act and Protection of Cordless Telephone Communications: The Use of Technology as a Guide to Privacy*, 44 CLEV. ST. L. REV. 99, 104 (1996).

<sup>143</sup> James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 ALB. L.J. SCI. & TECH. 65, 71 (1997) (citing 18 U.S.C. §§ 2511, 2516, 2518).

<sup>144</sup> *Id.*

the structure of the telecommunications industry.”<sup>145</sup> It did this by extending some of the protections afforded voice communications to other forms of electronic communications.<sup>146</sup>

The ECPA does not, however, contain all of the same protections originally afforded to voice communications. For example, instead of limiting the interception powers to a set list of criminal acts, the ECPA allows interceptions for the investigation of all felonies.<sup>147</sup> Additionally, while Title III contained an exclusionary rule for evidence obtained in violation of its terms, the ECPA does not.<sup>148</sup>

While *Katz* may have been the driving force behind Title III, *Keith* opened the door for differing standards of probable cause and different procedures for electronic surveillance conducted for national security purposes. As the Court put it in *Keith*, “we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime.’”<sup>149</sup> The Court went on to state that “[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.”<sup>150</sup> Despite this invitation, Congress has not applied different standards or procedures for national security cases under Title III or ECPA. This failure to adopt a different balance, while protective of civil rights, potentially puts the NII/DII at unnecessary risk. Unfortunately, it may take a major cyber incident before Congress and the American public decide to take the Court’s invitation to establish different

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<sup>145</sup> *Id.* at 73.

<sup>146</sup> 18 U.S.C. § 2510(a)(12) defines Electronic Communication as

any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

18 U.S.C. § 2510(a)(12).

<sup>147</sup> While it is true that the list of felonies is itself a list of criminal acts, this difference in coverage allows more flexibility and does not require an amendment to ECPA to respond to new types of serious criminal activity.

<sup>148</sup> See Dempsey, *supra* note 143, at 74.

<sup>149</sup> 407 U.S. at 321.

<sup>150</sup> *Id.*

standards of probable cause in this area.<sup>151</sup> However, Congress will have an example of just such a different standard, as it created one in the Foreign Intelligence Surveillance Act.

### **D. Foreign Intelligence Surveillance Act**

Congress reacted to reported abuses of the Nixon Administration and the potential for future abuses and enacted the Foreign Intelligence Surveillance Act (FISA).<sup>152</sup> While the Nixon Administration's abuses may have brought the issue to light, Congress determined that previous administrations had engaged in questionable electronic surveillance. The Senate Select Committee to Study Government Operations with Respect to Intelligence Activities concluded that although the "number of illegal or improper national security taps and bugs conducted in the Nixon administration may have exceeded those in previous administrations . . . every President since Franklin D. Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercised that authority."<sup>153</sup> The purpose of FISA was to design "a secure framework by which the Executive Branch could conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights."<sup>154</sup> This framework limited the definition of foreign intelligence and provided additional protections for United States persons.

#### *1. The Mechanics of Electronic Surveillance Under FISA*<sup>155</sup>

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<sup>151</sup> For an example of a policy that likely goes too far in allowing government access, see Associated Press, *Britain Plans Spy Center for Private E-mail*, CHI. TRIB., May 11, 2000, § 1, at 6.

<sup>152</sup> See 114 Cong. Rec. 14, 750 (1968) (remarks of Senator Hart)

As I read it—and this is my fear— . . . the President . . . could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government and thus possibly exempt from Title III's procedures under 2511(3).

*Id.*

<sup>153</sup> Robert A. Dawson, *Foreign Intelligence Surveillance Act: Shifting the Balance: the D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1386 (June 1993)

<sup>154</sup> Foreign Intelligence Surveillance Act of 1978: Hearing Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 95th Congress, 1st Sess. 13 (1977) (quoted in S. Rep. No. 604, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., pt. 1 at 15 (1977)), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916.

<sup>155</sup> FISA also addresses physical searches (50 U.S.C. §§ 1821-29), pen register, and trap and trace devices (50 U.S.C. §§ 1841-46), and access to certain business records (50 U.S.C. §§ 1861-63). However, this article will only discuss electronic surveillance.

## §1801 Definitions

Among the definitions under FISA, the definition of a United States “person” is the most important. This is important because United States persons are entitled to heightened protections under FISA. FISA defines a United States person as

a citizen of the United States, an alien lawfully admitted for permanent residence, . . . an unincorporated association a substantial number of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or other association which is a foreign power.<sup>156</sup>

A “foreign power” is an entity meeting any of six definitions.

- (1) a foreign government or any component thereof whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefore;
- (5) a foreign-based political organization, not substantially composed of United States persons; or
- (6) an entity that is directed and controlled by a foreign government or governments.<sup>157</sup>

Just as FISA differentiates between United States persons and all others, it also distinguishes between these various types of foreign powers for certain purposes. For example, 50 U.S.C. §1802(a)(1)(A) authorizes certain activities without a Foreign Intelligence Surveillance Court (FISC) order, but only if the targets fit within one of the first three categories.

Any person (including a United States person) may be deemed an agent of a foreign power if he or she meets one or more of four tests. The first category includes anyone who “knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States.”<sup>158</sup> The second category includes anyone who, at the “direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities

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<sup>156</sup> 50 U.S.C. § 1801(i).

<sup>157</sup> 50 U.S.C. § 1801(a).

<sup>158</sup> 50 U.S.C. § 1801(b)(2)(A).

involve or are about to involve a violation of the criminal statutes of the United States.”<sup>159</sup> The third category includes anyone who “knowingly engages in sabotage<sup>160</sup> or international terrorism,<sup>161</sup> or activities that are in preparation therefor, for or on behalf of a foreign power.”<sup>162</sup> The final category includes anyone who knowingly aids, abets or conspires with any person in the conduct of the acts covered by the first three categories.<sup>163</sup>

People other than United States persons may also be considered agents of a foreign power under two additional situations. The first situation is if they “act in the United States as an officer or employee of a foreign power,” or as a member of a group engaged in international terrorism or activities in preparation therefore (regardless of where they act).<sup>164</sup> Second, if they act “for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicates that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities.”<sup>165</sup>

The Act includes two categories of foreign intelligence information. The first category targets specific conduct or information, while the second category generally targets certain groups. The first category covers information regarding

actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; sabotage or international terrorism by a foreign power or an agent of a foreign power; or clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.<sup>166</sup>

If the surveillance does not target any United States person, the

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<sup>159</sup> 50 U.S.C. § 1801(b)(2)(B).

<sup>160</sup> 50 U.S. § 1801(d) defines sabotage as activities that involve a violation of 18 U.S.C. §§ 2151 et seq., or that would involve such a violation if committed against the United States.

<sup>161</sup> In order for activities to meet the definition of international terrorism, they must meet three tests. First, they must “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any other state.” Second, the acts must “appear to be intended to—(A) intimidate or coerce a civilian population; (B) influence the policy of a government by intimidation or coercion; or (C) affect the conduct of government by assassination or kidnapping.” Finally, they must “occur totally outside the United States or transcend national boundaries in terms or means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.” 50 U.S.C. § 1801(c).

<sup>162</sup> 50 U.S.C. § 1801(b)(2)(C).

<sup>163</sup> 50 U.S.C. § 1801(b)(2)(D).

<sup>164</sup> 50 U.S.C. § 1801(b)(1)(A).

<sup>165</sup> 50 U.S.C. § 1801(b)(1)(B).

<sup>166</sup> 50 U.S.C. § 1801(e)(1)(A)-(C).

information need only relate to these activities. However, if the surveillance targets any United States person, the information must be necessary to the United States' ability to protect against these specific activities.<sup>167</sup> The second category, while much broader in the scope of activities covered, is much more narrow in who it may target. This category of foreign intelligence information must relate to (or if a United States person is targeted it must be necessary to) the national defense or the security of the United States or the conduct of the foreign affairs of the United States. However, only information relating to a foreign power or foreign territory is a proper target under this category.<sup>168</sup>

Minimization procedures play an important role under FISA. The Attorney General must adopt specific procedures that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of information not publicly available concerning "unconsenting United States persons."<sup>169</sup> Such procedures must prohibit the dissemination of "nonpublicly available information, which is not foreign intelligence information, . . . in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance."<sup>170</sup> There are two exceptions to the above requirements. First, §1801(h)(3) authorizes procedures for "the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes."<sup>171</sup> Additionally, in the case of electronic surveillance conducted under 50 U.S.C. §1802 (surveillance without an order), a court order must be issued before any communications to which a United States person is a party may be disclosed, disseminated, or used for any purpose<sup>172</sup> or retained for longer than twenty-four hours.<sup>173</sup>

### §1802 Electronic Surveillance Without a Court Order

FISA provides for the President, through the Attorney General, to authorize electronic surveillance without a FISC order.<sup>174</sup> The surveillance must be for the purpose of acquiring foreign intelligence information, and may only last for up to a year.<sup>175</sup> The Attorney General must make certain sworn, written

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<sup>167</sup> 50 U.S.C. § 1801(e)(1).

<sup>168</sup> 50 U.S.C. § 1801(e)(2).

<sup>169</sup> 50 U.S.C. § 1801(h)(1) (these procedures must also be consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information).

<sup>170</sup> 50 U.S.C. § 1801(h)(2).

<sup>171</sup> 50 U.S.C. § 1801(h)(3).

<sup>172</sup> The court order requirement applies to uses of such information under 50 U.S.C. § 1801(h)(3).

<sup>173</sup> 50 U.S.C. § 1801(h)(4).

<sup>174</sup> 50 U.S.C. § 1802.

<sup>175</sup> 50 U.S.C. § 1802(a)(1).

statements. First, he or she must certify either that the surveillance is solely directed at either the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, or the acquisition of technical intelligence, other than spoken communications of individuals, from property or premises under the open and exclusive control of a certain types of foreign powers.<sup>176</sup> For purposes of this section, the statute limits the definition of foreign power to those found in 50 U.S.C. §1801(a)(1)-(3).<sup>177</sup>

Next, the Attorney General's sworn, written certifications must also state that "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party,"<sup>178</sup> and that "the proposed minimization procedures meet the requirements of the Act."<sup>179</sup> Electronic surveillance conducted under this section may not continue for more than one year.<sup>180</sup>

### §1804 Applications for Court Orders

All applications for FISC orders must be made by a federal officer and must be approved by the Attorney General. The application must include "the identity, if known, or a description of the target of the electronic surveillance."<sup>181</sup> The application also must include a statement of the facts and circumstances relied upon to justify the belief that "the target of the electronic surveillance is a foreign power or an agent of a foreign power; and each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."<sup>182</sup> Additional requirements include a statement of the proposed minimization procedures and a detailed description of the nature of the information sought and the type of communications or activities to be subjected to surveillance.<sup>183</sup>

A specified national security or defense expert must also make certain certifications. These certifications include that the information sought is indeed foreign intelligence information, that the purpose of the surveillance is to obtain foreign intelligence information, and that the information cannot reasonably be obtained by normal investigative techniques.<sup>184</sup>

The application also must include a statement of the means by which the surveillance will be effected, a statement as to whether or not physical entry is required, a statement regarding the period of time for which the surveillance will

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<sup>176</sup> 50 U.S.C. § 1802(a)(1)(A).

<sup>177</sup> 50 U.S.C. § 1802(a)(1)(A)(ii).

<sup>178</sup> 50 U.S.C. § 1802(a)(1)(B).

<sup>179</sup> 50 U.S.C. § 1802(a)(1)(C).

<sup>180</sup> 50 U.S.C. § 1802(a)(1).

<sup>181</sup> 50 U.S.C. § 1804(a)(3).

<sup>182</sup> 50 U.S.C. § 1804(a)(4).

<sup>183</sup> 50 U.S.C. § 1804(a)(5)-(6).

<sup>184</sup> 50 U.S.C. § 1804(a)(7)(A)-(C).

be required, and details regarding any previous applications involving any of the people, places, or facilities targeted in this application.<sup>185</sup>

### §1805 Issuing Court Orders and Emergency Orders

A FISA judge<sup>186</sup> is required to approve the electronic surveillance if he or she makes certain findings.<sup>187</sup> These findings must include a finding of probable cause that the target of the electronic surveillance is a foreign power or an agent of a foreign power.<sup>188</sup> Additionally, the judge must find probable cause that “each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.”<sup>189</sup> The judge must additionally find that the proposed minimization procedures meet the requirements of FISA and that the application contains the requisite certifications.<sup>190</sup>

The Attorney General may approve an emergency order when he or she reasonably determines that “an emergency situation exists with respect to employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained.”<sup>191</sup> The Attorney General must find a factual basis for issuance of an order under the Act. Finally, an application for an order must be made as soon as practicable, but no more than twenty-four hours after the Attorney General authorizes the emergency action.<sup>192</sup>

### Miscellaneous Provisions

Two other provisions merit attention. Section 1806 describes the situations where the fruits of FISA electronic surveillance may be used.<sup>193</sup> Furthermore, this section provides for the suppression of unlawfully obtained information, or information obtained by surveillance not made in conformity with the Act.<sup>194</sup> Additionally, any otherwise privileged communication does not lose

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<sup>185</sup> 50 U.S.C. § 1804(a)(8)-(10).

<sup>186</sup> The Chief Justice of the United States publicly designates seven district court judges from seven of the United States judicial circuits. These judges have jurisdiction to hear applications for orders. 50 U.S.C. § 1803(a).

<sup>187</sup> 50 U.S.C. § 1805(a).

<sup>188</sup> 50 U.S.C. § 1805(a)(3)(A) (Note, however, that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment.).

<sup>189</sup> 50 U.S.C. § 1805(a)(3)(B).

<sup>190</sup> 50 U.S.C. § 1805(a)(4)-(5).

<sup>191</sup> 50 U.S.C. § 1805(e)(1).

<sup>192</sup> 50 U.S.C. § 1805(e)(2).

<sup>193</sup> 50 U.S.C. § 1806.

<sup>194</sup> 50 U.S.C. § 1806(e).

its privileged character by virtue of its being obtained under the Act.<sup>195</sup>

The act also criminalizes intentionally engaging in electronic surveillance under color of law except as authorized by the Act.<sup>196</sup> Additionally, criminal sanctions exist for anyone disclosing or using information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by the Act.<sup>197</sup>

## 2. Application of FISA in Cyberspace

Since the enactment of FISA, the world has experienced the explosive growth of both the personal computer industry and the Internet. What formerly required physical trespass by agents of foreign powers at great personal risk, now can often be accomplished from a lone personal computer with a dial-up connection to the Internet.<sup>198</sup> Hackers often attempt to exploit sensitive national security systems.<sup>199</sup> These attempts can use techniques such as spoofing and site hopping to avoid detection by law enforcement personnel. Compounding the problem is the fact that law enforcement is critically understaffed to trace even a fraction of the detected intrusion attempts.<sup>200</sup> While many of these intrusion attempts are motivated by adolescent angst, some originate with foreign powers or agents of foreign powers.<sup>201</sup> FISA no longer strikes an appropriate balance.

Under FISA, a FISC order cannot issue unless the judge finds probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power. However, FISA grew out of cases from involving situations where the government could characterize the target. The computer era no longer allows us to do so, at least not initially. When a computer network intrusion attempt is detected, the source of the attempt is unknown. If the government is limited to traditional law enforcement means, the intruder will be gone before he or she is identified. For example, if any hop involves an unfriendly country, traditional techniques may never discover the identity of the

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<sup>195</sup> 50 U.S.C. § 1806(a).

<sup>196</sup> 50 U.S.C. § 1809(a)(1).

<sup>197</sup> 50 U.S.C. § 1809(a)(2).

<sup>198</sup> See, e.g., LAWRENCE T. GREENBERG ET AL., *INFORMATION WARFARE AND INTERNATIONAL LAW* (1997).

<sup>199</sup> See, e.g., Robert Suro, *FBI Cyber Squad Fallin Behind in Rise in Computer Intrusions*, WASH. POST, Oct. 7, 1999 (suggesting Russia poses the largest threat and reporting on the theft of “sensitive information about essential defense technical research” and characterizing the FBI office responsible for investigating suspected crimes as “still more virtual than real”).

<sup>200</sup> *Id.* (detailing the rise in computer crimes, but a shortfall in trained law enforcement agents to investigate the crimes).

<sup>201</sup> The threat posed by foreign governments is likely to increase in the future. See, e.g., Bill Gertz, *China Plots Winning Role in Cyberspace*, WASH. TIMES, Nov. 17, 1999 (reporting that “China is preparing to carry out high-technology warfare over the Internet and could develop a fourth branch of the armed services devoted to information warfare”).

intruder if that country chooses not to cooperate and allow United States authorities to review logs in the computers used for the hop. Even more troublesome is the case of a hacker using a prepaid long distance calling card from a pay telephone to start his or her intrusion attempt. Traditional law enforcement will, at best, reach back as far as the telephone, but there is not likely to be any record of who used the telephone.

If an appropriately limited exception allowed active electronic surveillance during the intrusion attempt, government officials would be able to detect the source of more intrusions. Any such process must adequately balance both the rights guaranteed by the Fourth Amendment and the government's ability to collect foreign intelligence information and protect national security.<sup>202</sup>

### *3. A Proposed Amendment*

The first step in addressing the problem is to designate which systems are vital to our national defense or security. Shockingly, while some systems are vital to our national security, under current law, the government is limited to the same tools used to investigate an intrusion attempt against, for example, the local video rental store. An appropriate individual or group could designate these vital systems. For example, the law could require that the systems be identified in an Executive Order. Additionally, in order to prevent abuses, the FISA court could review any such designation either at the time of the designation, or at any later probable cause hearing. The detection of an intrusion attempt against one of these vital systems would trigger a three-phased response.

The first phase is based on exigent circumstances. The Supreme Court has recognized exigent circumstances exceptions to the warrant requirement, however, these exceptions "have been few in number and carefully delineated."<sup>203</sup>

These exceptions, in general, "serve the legitimate needs of law enforcement officers to . . . preserve evidence from destruction."<sup>204</sup> One could argue that any attempt at unauthorized access to any federal interest computer could trigger an exigent circumstances exception.<sup>205</sup> However, limiting the exigent circumstances exception to those cases involving properly designated systems is another means of carefully tailoring the exception to the legitimate and compelling need to protect national security and to collect foreign intelligence information.

The initial phase would last for up to twenty-four hours. Within that period, the government would need to make an application to a FISA judge. This

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<sup>202</sup> While FISA currently is limited to foreign intelligence information, such a limitation is solely based on the Act itself, and the Supreme Court specifically stated that a differing probable cause standard may apply to national security cases as well. *See, Keith*, 407 U.S. at 322-23.

<sup>203</sup> *Keith*, 407 U.S. at 318.

<sup>204</sup> *Keith*, 407 U.S. at 318.

<sup>205</sup> All such acts involve criminal activity under The Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030, et seq. Any delay in responding to secure a warrant could in the loss of evidence.

application would identify the system involved, it would include sworn statements regarding any information the government has regarding the identity of the intruder, and a sworn statement that the purpose of the surveillance is to gather foreign intelligence or national security information. Such an application could also indicate any minimization procedures being used to minimize the interception of unrelated information (say, for example, on intermediate systems used by the intruder). If the judge finds probable cause that the purpose of the surveillance is proper, and that the minimization procedures are adequate, he or she would issue an order authorizing the government to continue the surveillance pending identification of the intruder. These orders could be for limited time periods. Such time limitations should be long enough to allow additional evidence to be obtained. However, they should also be short enough as to present an administrative burden that would serve as an additional barrier to abuse. A one-week period would seem appropriate.

The second phase would end when the judge denies an application, or a renewal application.<sup>206</sup> If the government were successful in identifying or locating the intruder, the third phase would begin. In this third and final phase, the government would seek a normal FISA order, or a Title III order, as appropriate. During this third phase, one could argue that the government should be allowed to make use of presumptions used elsewhere under FISA. For example, current military regulations presume that a person or organization outside the United States is not a United States person “unless specific information to the contrary is obtained.”<sup>207</sup> Likewise, an alien in the United States is not presumed to be a United States person “unless specific information to the contrary is obtained.”<sup>208</sup> These presumptions are particularly appropriate in computer intrusion cases, because even if the government can locate the computer used in the intrusion attempt, it is unlikely that the government will be able to identify the operator of the computer.<sup>209</sup> An additional limitation on military defenders of the NII/DII is found in the Posse Comitatus Act.

### **E. Posse Comitatus Act**

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<sup>206</sup> However, a procedure could exist to allow the government to continue the surveillance pending the results of any appellate procedure authorized under the amendment.

<sup>207</sup> Department of Defense Regulation 5240.1-R, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons ¶ 25.b. (Dec. 1982).

<sup>208</sup> *Id.*

<sup>209</sup> Some may argue that such presumptions are inappropriate given that most reported intrusions ultimately involved United States persons. However, one can imagine that the government may not want to report detected intrusions by foreign agents. For example, the government may not want the foreign agent to know that they have been detected. Additionally, the individuals behind sophisticated intrusion attempts currently may go untraced under the current process. At any rate, once sufficient information is gathered regarding the identity or location of an intruder, then the government will be constrained by the appropriate rules.

The Posse Comitatus Act<sup>210</sup> (PCA) reflects our deeply rooted belief in the division between civil law enforcement and military actions.<sup>211</sup> Indeed, the concept of limiting military involvement in civil matters has been a part of Anglo-American history since it was first included in the Magna Carta in 1215.<sup>212</sup> The PCA was enacted in 1878 in response Southern complaints about the use of federal troops in a law enforcement role during the Reconstruction period.<sup>213</sup> The PCA states,

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>214</sup>

While the provisions of the PCA are deeply rooted in American history, they remain statutory. Congress remains empowered to authorize military assistance to civilian law enforcement.<sup>215</sup> An example of such an authorization is

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<sup>210</sup> 18 U.S.C. § 1385.

<sup>211</sup> See Laird v. Tatum, 408 U.S. 1, 15-16 (1972) (“The concerns of the Executive and Legislative Branches . . . reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment’s explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime.”).

<sup>212</sup> Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 404 (1986)

<sup>213</sup> Testimony of Brigadier General Walter B. Huffman, Assistant Judge Advocate General of Military Law and Operations, United States Army, before the House Judiciary Committee, July 20, 1995. One author comments

[The Military Reconstruction Laws] one way or another imposed on the Army the duties of initiating and implementing state-making on the basis of biracial citizen participation. Protecting the personnel of the federal courts and Freedman’s Bureau, shielding blacks and whites who collaborated in the new order of equality under state law from retaliations by indignant vigilante neighbors, and monitoring the quality of the daily marketplace justice in ten thousand villages—these were tasks that West Point had not prepared Army officers to perform.

HAROLD HUMAN, ULYSSES GRANT I, EMPEROR OF AMERICA?: SOME CIVIL-MILITARY CONTINUITIES AND STRAINS OF THE CIVIL WAR AND RECONSTRUCTION, IN *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES* (Richard H. Kohn ed., 1991).

<sup>214</sup> 18 U.S.C. § 1385 (1998). Although the provisions of the PCA do not literally apply to the United States Navy, Department of Defense policy applies the same limitations on the Navy. See Department of Defense Directive 5525.5, DOD Cooperation with Civilian Law Enforcement Officials (Jan. 15, 1986).

<sup>215</sup> The ‘posse comitatus’ restriction on the use of U.S. military forces to enforce laws within the United States is not contained in the Constitution but rather in a post-reconstruction era Act of

the involvement of the United States military in the drug interdiction campaign.<sup>216</sup> Additionally, while the PCA has been a part of our criminal law for more than 120 years, no one has ever been prosecuted for violating it.<sup>217</sup> However, courts have had opportunities to interpret it.

Several cases have dealt with defendants arguing that the actions of the military improperly assisted in their prosecution.<sup>218</sup> Other cases have involved private causes of actions against military officials participating in or authorizing certain operations.<sup>219</sup> Finally, the United States has used the PCA to shield itself from liability in a Federal Tort Claims Act case.<sup>220</sup>

Courts have applied several tests in determining whether the PCA has been violated in a given case. One test requires direct, active involvement by one or more military members. This test is founded upon the observation that “the prevention of the use of military supplies and equipment was never mentioned in the debates, nor can it reasonably be read into the words of the Act.”<sup>221</sup> A second line of cases prohibits the use of one or more military members in a role that pervades the activities of civil law enforcement organizations.<sup>222</sup> This standard seems to allow the use of military equipment, but may prohibit the use of military members to operate or maintain the equipment. It also may prevent the use of military advisor. The final standard prevents the use of military members in a manner that amounts to the exercise of regulatory, proscriptive, or compulsory military power.<sup>223</sup> This test focuses on how military power is employed against the citizenry.

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Congress. See 18 U.S.C. § 1385. That Act expressly recognizes that Congress can enact statutes authorizing military involvement in law enforcement. Further, its provisions have been construed by the courts to be limited to activities that involve the direct execution of laws, e.g., making arrests. In contrast, the Posse Comitatus Act has not been construed to preclude the military from providing logistical, technical, and other forms of assistance to law enforcement. For example, the military has traditionally provided assistance to law enforcement in explosive ordnance disposal. Recently, Congress enacted statutes specifically addressing the use of the military in response to terrorist incidents involving chemical and biological weapons of mass destruction. See 10 U.S.C. § 382; 18 U.S.C. §§ 175a and 2332e. Further, more generic statutes authorize the President to use military forces to resolve domestic emergencies. See 10 U.S.C. §§ 331- 333.

<sup>216</sup> Defense Drug Interdiction Assistance Act, Pub. L. No. 99-570, §§ 3051-57 (1986).

<sup>217</sup> Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 953, 961 (Summer 1997).

<sup>218</sup> See, e.g., *United States v. Walden*, 490 F.2d 372, 375 (4th Cir.), cert. denied, 416 U.S. 983 (1974); *United States v. Cotten*, 471 F.2d 744, 747-48 (9th Cir.), cert. denied, 411 U.S. 936 (1973); *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1999).

<sup>219</sup> *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985); *aff'd en banc*, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264, 108 S. Ct. 1253, 99 L. Ed. 2d 288 (1988).

<sup>220</sup> *Wrynn v. United States*, 200 F. Supp. 457 (E.D. N.Y. 1961).

<sup>221</sup> *United States v. Red Feather*, 392 F. Supp. 916, 922 (1974).

<sup>222</sup> *United States v. Jarmillo*, 380 F. Supp. 1375 (D. Neb. 1974).

<sup>223</sup> See *United States v. McArthur*, 419 F. Supp. 186 (D. N.D. 1975), *aff'd sub nom United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976).

It is the nature of their primary mission that military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation. The posse comitatus statute is intended to meet that danger. [T]he feared use [of military personnel] which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority.<sup>224</sup>

Under any of these standards, the use of military members to trace the trail of an intruder into the NII/DII may violate the PCA. One could argue that such actions are in response to criminal activities directed against military assets, and that the PCA allows the military some latitude.<sup>225</sup> However, the nature of the Internet again must be considered. Since most intrusion attempts directed against the NII/DII will involve innocent intermediate computer systems, Congress should be more explicit in whether, and to what extent the military may become involved in such activity. This clarification will be particularly necessary as the role and responsibility of the DOD in performing “Homeland Defense” receives greater attention.

## V. CONCLUSION

The Internet has forever changed the nature of our lives. However, while the wired world brings with it many advantages, so too does it bring many new, and potentially catastrophic dangers. Congress needs to maintain an appropriate balance between our civil liberties and the national security. A return to the days of unfettered Executive discretion is unwise and dangerous. However, potential intruders have access to a host of very effective “weapons” on the Internet. The defenders of our NII/DII need access to appropriate tools under appropriate circumstances in order to defend our national security. The current state of affairs allows too many intruders to escape identification. The time to authorize limited exceptions to current law is now, not after we suffer an “Electronic Pearl Harbor.”

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<sup>224</sup> *Id.* at 193-94.

<sup>225</sup> *See United States v. Banks*, 539 F.2d 14, *cert. denied*, 429 U.S. 1024 (1976).

# **An Army View of Neutrality in Space: Legal Options for Space Negation**

MAJOR DAVID L. WILLSON\*

## **I. INTRODUCTION**

Commanders do have options with regard to space control and denying the use of space to the enemy and those assisting the enemy. Because the gap between technology and the law has widened significantly in recent years, military attorneys who advise commanders on space matters have to step away from traditional thought processes and think “outside the box.” This may involve looking back at some very old legal theories to enable commanders to accomplish their mission. The response, “sorry sir you cannot do that because it is illegal,” is rarely acceptable. The military attorney’s goal should be to find legally acceptable solutions wherever possible to support the commander’s objective. This article is a concrete example of the type of legal support military attorneys should advocate. It provides an analysis of a potential real-world problem a commander might face by examining the current law as well as some antiquated law. In doing so, it serves as one limited example of how legal solutions, instead of just options, should be provided for the commander.

Imagine the following scenario. You are a commander planning for a major battle. As the plan develops you attempt to anticipate the moves of your adversary, President Osama Shareif, ruler of Northland. The U.S. is either engaged in or on the verge of armed conflict with Northland. You receive the intelligence preparation of the battlefield (IPB) describing Northland’s capabilities relating to space support. You are informed that they are able to utilize satellites in planning, coordinating, and launching extremely precise and lethal attacks. Northland is using satellite communications to coordinate all of their troop movements, and satellite imagery less than thirty-two hours old to locate your troops and weapons. Northland is also using satellite navigation to guide their planes, tanks, and helicopters, and using missiles equipped with satellite guided navigation equipment allowing them precision targeting and stealthy tracking avoidance.

More disturbing to you is the discovery that the satellite support is coming from a commercial company, HERCULES, located within the borders of Passivaland, a neutral country. You thought Passivaland was an ally, or at least, would not get involved in support of Northland. What can you do to

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\* Major Willson (B.A., C.W. Post College; J.D., Touro School of Law; LL.M., The Judge Advocate General School) is the International & Operational Law Attorney, Army Space Command, Colorado Springs, CO.

prevent this company within Passivaland from providing support to Northland? You realize that provision of the satellite services mentioned above would require three different satellite systems, probably owned by three different companies. But you also realize that the time is quickly approaching when individual companies or consortiums will offer one-stop shopping for all available satellite services.

Your goal is to deny Northland access to any and all satellite services. There are numerous methods of accomplishing this goal. One such method, destroying and interfering with Northland's ability to access satellite services, was the method used in Desert Storm. Attacking Northland directly using force or interfering with its ground systems would be the best military option,<sup>1</sup> but for political reasons this option is not available. Nonetheless, you must concentrate on interfering with or destroying HERCULES' ability to provide these services. You realize that you may not attack the satellite system in space or the ground components located in Passivaland without legal justification, because Passivaland is a neutral country.

This article will analyze legal theories that might allow the U.S. to use force against assets such as HERCULES' satellites and ground components. If the U.S. can establish that HERCULES is providing direct support to Northland with the knowledge of Passivaland, and if Passivaland is otherwise legally responsible for the activities of HERCULES, then Passivaland is no longer entitled to protection under the laws of neutrality. In such a case, the U.S. could then use force against the satellite in space, or ground components in Passivaland, provided there are no other less intrusive options available to stop the assistance to Northland. These other options might include diplomatic and other nonviolent actions to put Passivaland on notice.

This article argues that during armed conflict, the United States may legally interfere<sup>2</sup> with a neutral country's commercial satellites (and ground support systems)<sup>3</sup> if they are supporting enemy operations. Central to the argument is a showing that States are responsible for all space-related

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<sup>1</sup> This was the case during the Persian Gulf War, the U.S. destroyed Iraq's ground towers cutting off their ability to use satellite communications. *See generally infra* note 28, and accompanying text. Some of the services require the State to be able to access them, but satellite images can be transferred to a State very easily.

<sup>2</sup> Interference consists of a wide spectrum of actions from jamming (the blocking of a transmitted signal by overpowering it with noise) and spoofing (the deliberate alteration or replacement of a signal with a false one), to destruction of the satellite or the ground components supporting it. *See generally* Lieutenant Commander J. Todd Black, *Commercial Satellites: Future Threats or Allies?*, 52 NAVAL WAR COLLEGE REV. 99, 109 (1999), available at <http://www.nwc.navy.mil/press/Review/1999/winter/art5-w99.htm> (copy on file with the *Air Force Law Review*).

<sup>3</sup> The word satellite as used throughout this article may refer to more than one satellite. Satellite services may be provided for a single satellite or an entire constellation of satellites. *See id.* at 108.

activities originating or controlled from their territory.<sup>4</sup> Typically, under the laws of neutrality, a State is not required to restrict the actions of private citizens and commercial companies located within its borders.<sup>5</sup> Yet the treaties relating to outer space hold the launching *State* responsible for the activities of all space objects, despite commercial ownership and operation.<sup>6</sup>

The article continues in Section II by providing background into the capabilities of satellites, how their use may threaten the United States, and how they can be rendered inoperable or destroyed. Section III analyzes numerous treaties, which support the argument that States are ultimately responsible for the satellites listed on their registry despite the satellite belonging to a commercial or private company. Section IV examines the theory of neutrality and the obligations of a neutral State. Section V discusses U.S. options for use of force, such as self-defense and the right of angary.

## II. BACKGROUND

### A. The Commercialization of Space

Satellites and the support they provide are now an integral part of the United States military arsenal, and a vital link for support to commanders and troops on the battlefield. For example, communications, navigation, and remote sensing provide vital support and are now the eyes, ears, and communication links for commanders. Because satellite support is so critical to the United States, one of the U.S. military goals is to attain complete control and dominance of space.<sup>7</sup> In order to attain this goal the United States will not only have to consider the negation and protection of military satellites, but commercial satellites as well.

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<sup>4</sup> See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967) [hereinafter Outer Space Treaty]. This treaty lays the foundation for most other treaties relating to outer space, and holds States responsible for activities in space. *Id.* at art. VI.

<sup>5</sup> See 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, T.S. No. 540 [hereinafter Hague Convention (V)], cited in U.S. Army, Field Manual 27-1, Treaties Governing the Law of Land Warfare 18 (Dec. 7, 1956) [hereinafter FM 27-1].

<sup>6</sup> See generally discussion *infra* Section III. “Launching State” refers to the state from whose territory the satellite was launched. Convention on the Registration of Objects Launched into Outer Space, Jan. 14, 1975, art. I, 28 U.S.T. 695, 1023 U.N.T.S. 15 (entered into force Sept. 15, 1979) [hereinafter Registration Convention].

<sup>7</sup> See United States Space Command, *Long Range Plan: Implementing USSPACECOM Vision for 2020* (March 1998) 20 [hereinafter *Long Range Plan*], available at <http://www.peterson.af.mil/usspace/>. “Control of Space is the ability to assure access to space, freedom of operations within the space medium, and an ability to deny others the use of space, if required.” *Id.* Remote sensing is the collection of images of the earth’s surface using satellites. See *infra* note 43, and accompanying text.

As commercial space systems provide global information and nations tap into this source for military purposes, protecting (as well as negating) these non-military space systems will become more difficult. Due to the importance of commerce, and its effects on national security, the United States may evolve into the guardian of space commerce—similar to the historical example of navies protecting sea commerce.<sup>8</sup>

Many rogue States, such as Iraq, Iran, and North Korea, now have access to satellite support allowing them enhanced war-fighting capabilities. The playing field is quickly leveled when an adversary gains access to satellite images that reveal what the battlefield looks like. He can use these images to determine grid coordinates and use satellite navigation for precision guided missiles (PGMs). Additionally, his command and control (C2) will be greatly enhanced with the use of reliable secure satellite communications.<sup>9</sup> Lieutenant General Costello, Commander, Space and Missile Defense Command and Army Space Command, recently commented that satellites now make it impossible for armies to hide on the battlefield.<sup>10</sup> The element of surprise is lost when your adversary has continuous updated pictures of the battlefield produced by satellites.

The threat of equality on the battlefield became very evident to the United States during the Persian Gulf War. Prior to the ground war in 1991, Iraq was purchasing satellite images of the Middle East from France and Russia. Many of the images were provided by the French commercial company Systeme Probatoire d'Observation de la Terre (SPOT).<sup>11</sup> Had Russia and France not agreed to stop selling these images to Iraq, General Schwarzkopf's "Hail Mary" maneuver may have not been as successful.<sup>12</sup>

The commercialization of space is rapidly increasing. It may be extremely difficult, if not impossible, in the near future to deny an adversary's

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<sup>8</sup> *Long Range Plan*, *supra* note 7. "The United States must win and maintain the capability to control space in order to assure the progress and pre-eminence of the free nations. If liberty and freedom are to remain in the world, the United States and its allies must be in the position to control space." *Long Range Plan*, *supra* note 7, at 20 (quoting General Thomas D. White, former Air Force Chief of Staff).

<sup>9</sup> See BOB PRESTON, PLOWSHARES AND POWER: THE MILITARY USE OF CIVIL SPACE 221-24 (1994) [hereinafter PRESTON].

<sup>10</sup> Lieutenant General John Costello, Remarks at The Judge Advocate General's School, U.S. Army, Charlottesville, VA (Mar. 11, 1999).

<sup>11</sup> See PRESTON, *supra* note 9, at 27. SPOT is a French-owned satellite system used to produce images of objects on the Earth.

<sup>12</sup> PRESTON, *supra* note 9, at 35. General Schwarzkopf moved VII and XVIII Corps 300 to 500 miles to the extreme west prior to the liberation of Kuwait. He did this after Saddam's ability to see, through the use of satellites and aircraft, was denied. He referred to this move as the "Hail Mary." See James T. Hackett, *Why the Kinetic Energy Anti-Satellite Program is Needed*, MISSILE DEFENSE MONITOR 2 (Aug. 21, 1997), available at [http://www.fas.org/MHonArc/BMDList\\_archive/msg00250.html](http://www.fas.org/MHonArc/BMDList_archive/msg00250.html) (copy on file with the *Air Force Law Review*).

access to commercial satellite services.<sup>13</sup> Support will soon be available to anyone who can pay for it, to include third world rogue countries and terrorists. The proliferation of space services increases the importance of having thought through the legality of attacking a commercial satellite system registered<sup>14</sup> to a neutral State whose company is located within the borders of the State.

Communication and remote sensing are two important services provided by commercial satellite providers to the civilian and military sectors. These services enable a military of any size to be quicker, more mobile, and more lethal. Many countries do not have the technology or resources to develop and own space systems. Even countries that can afford space assets rely on commercial space support, because it is cheaper. Leased commercial satellite services can quickly enhance a smaller country's military capabilities and reduce a superpower's advantage.<sup>15</sup> "Advanced technologies can make third-class powers into first-class threats."<sup>16</sup> In order for the U.S. to retain its advantage in space, it must deny its adversaries access to these services during periods of armed conflict.<sup>17</sup>

Space is rapidly becoming a very profitable and congested frontier. As of January 29, 1999, there were 2561 satellites orbiting Earth, and 2671 as of June 21, 2000.<sup>18</sup> The U.S. has 741 satellites registered and the Commonwealth of Independent States (Russia et al.) has 1335. The remaining 595 satellites belong to smaller countries and international organizations.<sup>19</sup> These figures are deceiving. Satellites may be owned and operated by a private company, but must be listed on the registry<sup>20</sup> of the

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<sup>13</sup> *Id.*

<sup>14</sup> All objects launched into space must be registered to a particular country, similar to the flag registration of ships. Registration Convention, *supra* note 6, at art. II.

<sup>15</sup> PRESTON, *supra* note 9, at 305.

<sup>16</sup> *Long Range Plan*, *supra* note 7, at 2 (quoting Richard Cheney, Vice President of the U.S., and Former Secretary of Defense).

<sup>17</sup> See United States Space Command, *Vision for 2020*, <http://www.spacecom.af.mil/usspace/visbook.pdf> [hereinafter *Vision 2020*] (copy on file with the *Air Force Law Review*).

<sup>18</sup> U.S. Space Command, *Satellite Boxscore* (June 21, 2000), at <http://www.spacecom.af.mil/usspace/boxscore.htm> (copy on file with the *Air Force Law Review*). This internet site, periodically updated, identifies the number of satellites and space debris presently orbiting the Earth, and which country or organization is responsible for the object.

<sup>19</sup> *Id.*

<sup>20</sup> The registry is the document States are required to maintain listing all space objects launched and/or controlled from their territory. If two or more states participate in the launching of an object they will decide which state shall register the object. For a discussion of the Registration Convention, and the registration process, see *infra* notes 78-83 and accompanying text.

country from which they were launched.<sup>21</sup> Well over 250 of the 2671 satellites in orbit in June 2000 were operated by international organizations, non-governmental organizations, or private corporations. The number of satellites in orbit has more than doubled in the last three years, and will probably be around 10,000 in ten years.<sup>22</sup>

Military budgets are getting thinner, and the reality is that the commercial sector can provide satellite services cheaper than States can. Even the U.S. military uses commercial satellites for a large portion of its space support.<sup>23</sup> During Desert Storm twenty-five percent of the U.S. military communications was provided over commercial satellite systems.<sup>24</sup> One day we may find ourselves defending against armed attacks supported by commercial satellite companies, possibly even the same companies supporting our forces.<sup>25</sup> Not too long ago, the security implications were just coming into perspective.

Today commercial [companies] routinely gather photographic data that, until a few years ago, even intelligence agencies could only dream of. What's more, they are selling the photographs to anyone who can afford them. The photos not only are valuable for the study of earth resources but also can reveal the position and status of such militarily significant objects such as tanks, ships and airplanes.<sup>26</sup>

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<sup>21</sup> Article II of the Registration Convention requires that the launching State register the space object unless there are two or more launching States, then the States shall jointly determine which one will register the object. Registration Convention, *supra* note 6, at art. II.

<sup>22</sup> See Black, *supra* note 2, at 99 (citing Robert Ropelewski, *Satellite Services Soar*, AEROSPACE AMERICA 26 (Nov. 1996)).

<sup>23</sup> The U.S. uses satellite communication "for 75% of its long-distance military communications." PRESTON, *supra* note 9, at 224 n.28 (citing Hackett and Ranger, *Proliferating Satellites Drive U.S. ASAT Need*, SIGNAL 156 (May 1990)).

<sup>24</sup> See PRESTON, *supra* note 9, at 132.

<sup>25</sup> See generally Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look at the Outer Space Treaty and Peaceful Purposes*, 60 J. AIR L. & COMM. 237, 239 (1994) [hereinafter Morgan]. Morgan's article helpfully explores the extent to which the U.S. military may use commercial satellite systems without violating international law. He states that during the Persian Gulf War the U.S. leased satellite communication services from a commercial company. The International Telecommunications Satellite Organization (INTELSAT) moved its satellites into position in order to support and provide communication services to the Coalition forces. *Id.* at 237 n.8. "INTELSAT [is] an international treaty organization with over 125 member countries, provid[ing] global telecommunications services of every type." DAVID W.E. REES, *SATELLITE COMMUNICATIONS, THE FIRST QUARTER CENTURY OF SERVICE* 29 (1989), *cited in* Morgan, at 253. Organizations such as INTELSAT and the International Maritime Satellite Organization (INMARSAT)—a 72-nation international organization that provides satellite telecommunications services primarily to the maritime community—provide military satellite services to all of their signatories, which include countries such as Iraq, Iran, Libya, Somalia, and many others. Morgan, *supra* note 25, at 246, 253, 256. Many smaller countries are using commercial satellite companies and organizations to fulfill their military space needs. Morgan, *supra* note 25, at 246-7.

<sup>26</sup> William J. Broad, *Private Cameras in Space Stir U.S. Security Fears*, N.Y. TIMES, Aug. 25, 1987, C3.

Today, fourteen years after this paragraph was written, the commercial satellite market is booming, with no apparent end in sight.

Operation Desert Storm was the first war in which satellites played a major role for the U.S. ground commander.<sup>27</sup> Prior to the war, President Saddam Hussein's ground forces were matched in size with the Coalition forces, and Iraq possessed relatively modern weapons purchased with oil money. A critical difference between the two was that the Coalition forces had space systems allowing them to see, hear, and speak to each other—a capability which Iraqi forces lost within the first hours of the war.<sup>28</sup> Martin Faga, Assistant Secretary of the Air Force for Space at the time of the war stated, “[t]he world watched and learned. Many . . . will want and will eventually obtain their own space assets . . . adversaries will seek to dilute the effectiveness of ours.”<sup>29</sup> U.S. Space Command takes the increasing importance of space commercialization to its logical conclusion: “As commercial space systems provide global information and nations tap into this source for military purposes, protecting (as well as negating) these non-military space systems will become more difficult.”<sup>30</sup>

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<sup>27</sup> See Major Douglas S. Anderson, *A Military Look Into Space: The Ultimate High Ground*, 1995 ARMY LAW. 19, 20 [hereinafter Anderson].

<sup>28</sup> See Martin C. Faga, Keynote Remarks to the National Space Outlook Conference, National Space Club (June 18, 1991), *quoted in* PRESTON, *supra* note 9, at 3. At the time of this symposium, Martin Faga was the Assistant Secretary of the Air Force for Space, and arguably had the best perspective on the contributions of military space to the Persian Gulf War.

On numerous occasions during the war, senior military officers would stop me in the halls of the Pentagon. The gist of their comments was that they had known space was valuable but had never realized how much it would contribute and how critical it would be to performing the mission.

*Id.* at 3.

<sup>29</sup> *Id.*

<sup>30</sup> See *Vision 2020*, *supra* note 17. This document contains the U.S. Space Command's vision for 2020. It discusses the present and future impact space has on the U.S. military, and provides a general guide as to where the command and military space operations are headed. The vision discusses four concepts that must be implemented in order to attain the vision, space dominance. They are: control of space, global engagement, full force integration, and global partnerships. Under the concept of controlling space there is a need to protect space assets even when those assets are commercial. “Due to the importance of commerce and its effects on national security, the United States may evolve into the guardian of space commerce similar to the historical example of navies protecting sea commerce.” *Vision 2020*, *supra* note 17. Commercial satellite services, equivalent to the U.S.' capabilities, are quickly becoming available to anyone who can pay for them. Black, *supra* note 2, at 99. The U.S. has pledged to augment its own capabilities through use of commercial satellite technology. See, e.g., National Science and Technology Council, *National Space Policy* (Sept. 19, 1996), *available at* <http://ast.faa.gov/licensing/regulations/nsp-pdd8.htm> (copy on file with the *Air Force Law Review*). Further, “[i]f the U.S. military can use commercial systems to augment its capabilities, so can an adversary with access to similar systems.” Black, *supra* note 2, at

## B. Communication

“Satellite communications offer unique attributes of mobility, security, and terrain independence with powerful advantages for military use.”<sup>31</sup> A military command with reliable and secure communication has greater command and control (C2) despite adverse conditions such as weather, terrain, or distance.<sup>32</sup> Denying our adversaries this capability has proven extremely useful in winning battles and saving lives. Communication satellites, as stated earlier, played a pivotal role in the Gulf War.<sup>33</sup> The Coalition forces had a clear advantage over Iraq by being able to communicate with each other, despite the fact there were numerous militaries from different nations fighting together. Prior to the ground war, Iraq had three International Telecommunications Satellite Organization (INTELSAT) communications terminals and one Intersputnik terminal that allowed President Saddam Hussein to communicate with his southern forces.<sup>34</sup> He was capable of the same command and control as the U.S. and Coalition forces prior to the destruction of his communication terminals, destroyed by air strikes and ground attacks.<sup>35</sup> Imagine if the communication terminals were mobile, destroying them would have been much more difficult. For purposes of the analysis under this hypothetical destruction of Northland’s communication ground stations (stationary or mobile) is not an option or cannot be accomplished. This could be due to the mobility of the stations, the inability to locate them, or they may be located on protected property such as a hospital, or are used by the civilian community for vital communications.

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99. It may be difficult for any country including the U.S., to convince a commercial satellite company, that is reaping profits from the sale of their services, that it should deny these services to one of the belligerents to a conflict. The convincing may be simple if the company is located within the territory of one of the belligerents, the company will become a target. The issue becomes more complicated when the company is located within neutral territory, as stated earlier in the thesis. Diplomatic protests, possible threatened civil action or economic sanctions may be options, but they are not immediate and probably not feasible or at least attractive options in an armed conflict. This leaves armed attacks of the satellites and/or the ground components supporting the satellites, as the quickest and best option.

<sup>31</sup> PRESTON, *supra* note 9, at 221.

<sup>32</sup> HACKETT, *supra* note 23, at 156.

<sup>33</sup> HACKETT, *supra* note 23, at 126.

<sup>34</sup> HACKETT, *supra* note 23, at 134. INTELSAT is an international organization that provides satellite communication services to its members. Morgan, *supra* note 25, at 253.

<sup>35</sup> HACKETT, *supra* note 23, at 126-7.

### C. Navigation

Satellites can be used in missile navigation for precision targeting.<sup>36</sup> Prior to the use of satellites for navigation, missiles had to be programmed to follow preset navigational path to their targets. Today, Global Positioning System (GPS) components installed in missiles allow them to travel to their targets without relying on preset terrain features, thus avoiding radar and warning systems.<sup>37</sup>

This same technology is commercially available to any country. “GPS computer components, available commercially, could be added to the brains of Iranian cruise missiles or boost the accuracy of Chinese ballistic missiles . . . .”<sup>38</sup> Military forces worldwide are buying U.S. GPS technology.<sup>39</sup> Adversaries may be able to use our own GPS to target U.S. troops and

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<sup>36</sup> Lisa Burgess and Neil Munro, *Enemies could use GPS for their favor*, ARMY TIMES (Dec. 13, 1993) 40.

<sup>37</sup> *Id.* at 40. See also PRESTON, *supra* note 9, at 253. GPS navigation installed in a missile allows the missile to fly over random flight paths enroute to its target, rather than following a flight path based on terrain features which may be tracked. Missiles without GPS must follow a flight path, which has been mapped out using terrain features for the missile to recognize. During the Gulf War U.S. missiles became vulnerable because the Iraqi’s were able to predict the flight paths after a number of strikes. The two primary navigation systems available in the world today are the United States’ GPS and the Russian Global Navigation System (GLONASS). Black, *supra* note 2, at 102-3. The U.S. basic GPS, which is operated by the Department of Defense, used to be two services, the Precise Positioning System (PPS) and the Standard Positioning System (SPS). GPS is now one service and all users enjoy the same seven meter accuracy. See *infra* note 41. The PPS system was used strictly by the U.S. military, had a 16-meter accuracy, and was used for precise weapons delivery. The SPS, which was available to anyone, only had a 100-meter accuracy; therefore it was not suitable for weapons delivery. PRESTON, *supra* note 9, at 250. The PPS is still equipped with a system, known as selective availability which may be used to deliberately degrade the SPS to create an error up to 100-meters, which may be implemented in a time of crisis. One concern with implementing selective availability is that it could be disastrous to civilian users who would not anticipate the increase in degradation. Commercial ships, vehicles, and airplanes use the SPS service for navigation and landing. U.S. Policy Statement on the GPS, *reprinted at XXII ANNALS OF AIR AND SPACE LAW* 457 (1997) (stating, GPS consists of a constellation of satellites supported by ground stations, data links, and command and control facilities operated and maintained by the Department of Defense. The SPS is the civil and commercial service provided by GPS). Differential GPS, created by civilian users, is a technique that was developed to circumvent the 100-meter navigation error. This system provided the civilian users roughly the same accuracy as the PPS, 16-meters. See Jeffrey A. Rockwell, *Liability of the United States Arising Out of the Civilian Use of the Global Positioning System* (1996) (unpublished LL.M. thesis, McGill University) (on file with the Nahum Gelber Law Library, McGill University). The Differential GPS, as stated above is no longer necessary, because pursuant to the Clinton Administration 1996 announcement in May of 2000, GPS 16-meter accuracy was made available to all. This allows all GPS users the same 16-meter accuracy, and thus precise targeting.

<sup>38</sup> Burgess, *supra* note 36, at 40.

<sup>39</sup> Burgess, *supra* note 36, at 40. (“[M]ilitary researchers in China, Iran and India are working to include U.S.-developed navigation technology into their next-generation missiles.”)

weapons.<sup>40</sup> GPS selective availability has now been turned off and all users enjoy the same degree of accuracy—seven meters.<sup>41</sup> In addition, GPS, available to anyone, may soon become accurate to within one or two meters. “Indeed, civil GPS technology is becoming so widely available the GPS location of targets soon will be combined with detailed photographs taken by such commercial remote-sensing satellites as the French SPOT, . . . .”<sup>42</sup> GPS may also be used by troops and aircraft for position location and to navigate across featureless terrain such as a desert.

#### D. Remote Sensing

Remote-sensing is the collection of images of the Earth’s surface using satellites.<sup>43</sup> It is used by militaries for a near real-time image of the battlefield including troop and weapon positions.<sup>44</sup> Satellite images provide commanders a view of the battlefield, allowing them to more accurately plan their attack based on enemy troop and weapon positions. Remote sensing in the hands of an adversary is dangerous to the U.S. because of the loss of surprise and stealth. As suggested earlier, Iraq’s blindness to the battlefield allowed General Schwarzkopf to carry out his “Hail Mary.” As of 1995, Russia, Canada, Japan, France, Brazil and India possessed international remote-sensing satellites.<sup>45</sup> The French company SPOT offers to clients a video-moving map, which provides, “simulat[ed] low-level flight over the imaged terrain, intended for mission planning or familiarization for military aircraft and cruise missiles.”<sup>46</sup>

The key to remote sensing is resolution. Attaining greater resolution leads to a clearer picture and more useful information. “Presidential Directive

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<sup>40</sup> PRESTON, *supra* note 9, at 256-7. The U.S. must ensure that GPS is not used in peacetime by terrorists for navigation, or in wartime by belligerents for precision attack. Anyone with knowledge of explosives, model airplanes and the GPS could build a pilotless aircraft equipped with explosives and send it to a target in the U.S.

<sup>41</sup> Interview with Captain Ronald A. Chernak, Navigation Payload Analyst, 2 Space Operations Squadron, Schriever AFB, Colorado Springs, CO (Jan. 3, 2001) [hereinafter Chernak]. Selective availability was turned off on May 1, 2000 as ordered by President Clinton. An accuracy difference still exists though between civilian and military users. Civilian users only have access to the single L1 frequency providing an accuracy of approximately seven to nine meters. The accuracy for military users is approximately 5-7 meters. The military has access to the L2 frequency, which is encrypted. The L2 combined with the L1 frequency eliminates most of the error caused by signal defraction in the Earth’s ionosphere. *Id.*

<sup>42</sup> Ken Taormina, marketing manager for Martin Marietta’s intelligence-related business, *quoted in* Burgess, *supra* note 36 at 40. See generally PRESTON, *supra* note 9, at 27.

<sup>43</sup> HAMILTON DESAUSURE, *Remote Sensing Satellite Regulation By National and International Law*, 15 RUTGERS COMPUTER & TECH. L.J. 351 (1989).

<sup>44</sup> *Id.*

<sup>45</sup> PRESTON, *supra* note 9, at 29.

<sup>46</sup> PRESTON, *supra* note 9, at 316.

23 (PDD 23), issued in 1994, states that dissemination of imagery with resolution of one meter or less might be harmful to U.S. national security.”<sup>47</sup> Space Imaging, a U.S. based company, offers one-meter color imagery over the internet.<sup>48</sup> SPOT, a French commercial imagery company, advertises ten-meter resolution, but its capability has been described as being closer to five-meters.<sup>49</sup>

Present space capabilities pose a threat to the U.S. when placed in the hands of an adversary. The U.S. must be prepared to deny or negate the enemy’s ability to capitalize on these capabilities whether it is their own, leased, or purchased from a commercial company. This denial or negation will likely include pursuing avenues ranging from political protests to the threat or use of force against commercial industry and possibly neutral territory. General Thomas D. White, the Air Force Chief of Staff in 1955 stated, “[t]he United States must win and maintain the capability to control space in order to assure the progress and pre-eminence of the free nations. If liberty and freedom are to remain in the world, the United States and its allies must be in position to control space.”<sup>50</sup>

One method for controlling space is negation. “Negation is the ability to deny, disrupt, deceive, degrade, or destroy an adversary’s space systems and services. It involves military actions to target ground-support sites and infrastructure, ground-to-space links, or spacecraft.”<sup>51</sup> The first step in developing a legal argument to justify negation is determining who or what is legally responsible for the space activities the U.S. intends on negating.

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<sup>47</sup> Black, *supra* note 2, at 100.

<sup>48</sup> Space Imaging at <http://www.spaceimaging.com/level2/level2products.htm>.

What does one-meter data show? What objects can you ‘see’ in the images? In a one-meter resolution image, objects that are one-meter in size on the ground can be distinguished, provided those objects are well removed from other objects and have separate and distinct visual characteristics. For example, objects such as swimming pools, cars and trucks, boats and tennis courts, which are all recognizable because of their context within their surroundings, can easily be detected. White stripes in parking lots and crosswalks are also visible because of the sharp contrast against the black asphalt. One-meter imagery cannot ‘see’ individual people. A large number of people grouped together, on the other hand, could be seen, such as in a football stadium but there, we only know these are people because we are familiar with the context.

*Id.* Space Imaging also offers 0.82-meter panchromatic (black and white) imagery. *Id.*

<sup>49</sup> Black, *supra* note 2, at 100. See also Spot Imaging at <http://www.spotimage.fr/home/present/welcome.htm> (copy on file with the *Air Force Law Review*).

<sup>50</sup> See *Long Range Plan*, *supra* note 7.

<sup>51</sup> *Long Range Plan*, *supra* note 7.

### III. STATE JURISDICTION AND SOVEREIGNTY OVER SATELLITES

The State is ultimately responsible for all space activities originating or controlled from its territory. This section discusses who may be held responsible for the activities of satellites in space. With reference to our hypothetical example, it is important to establish Passivaland's responsibility for the activities of the commercial company HERCULES located within the borders of Passivaland. Under the laws of neutrality the Nation-State is normally not held responsible for the activities of commercial companies located within its borders.<sup>52</sup> International law only requires the neutral State to restrict the actions of its citizens or commercial entities in very limited circumstances. If Passivaland, under the laws of neutrality, were able to claim immunity from responsibility for the actions of HERCULES, the U.S. would be limited in its recourse against HERCULES. This is because the ground components are located within Passivaland's borders and the satellite is considered to be under the jurisdiction and control of Passivaland.<sup>53</sup> Establishing that Passivaland is responsible for the activities of HERCULES may allow the U.S. to claim Passivaland has breached its status as a neutral and attack its territory or assets, including a satellite in space.

Under international law, the protection afforded neutral territory is "inviolability."<sup>54</sup> In addition to this provision, several other principles emerge from an analysis of the four relevant treaties dealing with outer space. The next two sections analyze these other principles, drawn from the following treaties: The Multilateral Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty);<sup>55</sup> the Convention on Registration of Objects Launched Into Outer Space (Registration Convention);<sup>56</sup> the Convention on the International Liability for Damage Caused By Space Objects (Liability Convention);<sup>57</sup> and the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects

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<sup>52</sup> For example, "[a] neutral is not bound to prevent the export, on behalf of one or the other of the belligerents, of arms, munitions, or any other war material by private persons . . . , unless, of course, it wishes to prohibit such exports at its own discretion." GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 845 (6th ed. 1992) [hereinafter VON GLAHN].

<sup>53</sup> See Outer Space Treaty, *supra* note 4, at art. VIII.

<sup>54</sup> Hague Convention (V), *supra* note 5, at art. 1 ("The territory of neutral Powers is inviolable.").

<sup>55</sup> Outer Space Treaty, *supra* note 4.

<sup>56</sup> Registration Convention, *supra* note 6, at art. II.

<sup>57</sup> Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 (entered into force Sept. 1, 1972) [hereinafter Liability Convention].

Launched Into Outer Space (Rescue Agreement).<sup>58</sup> These treaties constitute the near-totality of law relating to outer space. An analysis of these treaties reveals the signatories' clear intent to hold the State, and not the individual or commercial entity, responsible for all activities in and from space.

### A. Outer Space Treaty

The Outer Space Treaty, the first treaty relating exclusively to space, was the precursor for the other treaties listed above, as well as others.<sup>59</sup> This Treaty is important because it holds States responsible for supervision, jurisdiction, control, and damage caused by all space objects the State has registered regardless of who owns and operates the object.<sup>60</sup> Article VI imposes upon States the responsibility to supervise all "national" activities conducted in space by a government or private entity.<sup>61</sup> This article ensures "parties cannot escape their international obligations under the treaty by virtue of the fact that activity in outer space or on celestial bodies is conducted through the medium of non-governmental entities or international

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<sup>58</sup> Agreement on the rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer space, Apr. 22, 1968, 19 U.S.T. 7570, T.I.A.S. 6599, 672 U.N.T.S. 119 (effective Dec. 3, 1968) [hereinafter Rescue Agreement].

<sup>59</sup> Of the space treaties, the Outer Space Treaty—considered the "Magna Carta" of space law—enjoys the broadest subscription and the highest regard. It entered into force in 1967 and enjoys the support of over one hundred nations, including the United States. The treaty's main purpose is to ensure the peaceful use of space and the moon and other celestial bodies, as well as protect the common interests of all mankind in the exploration and use of outer space. See generally Morgan, *supra* note 25, at 296. See also, Anderson, *supra* note 27, at 24; Major General Walter D. Reed and Colonel Robert W. Norris, *Military Use of the Space Shuttle*, 13 AKRON L. REV. 665 (Spring 1980); and GLENN H. REYNOLDS & ROBERT P. MERGES, *OUTER SPACE: PROBLEMS OF LAW AND POLICY* 62 (2nd ed. 1997) [hereinafter REYNOLDS & MERGES]. The Outer Space Treaty accomplished a great deal. "It provides limits on military activities beyond earth, prevents the extension of terrestrial sovereignty to space or celestial bodies, and establishes a framework for the further development of law governing activity in outer space. . . ." Reed & Norris, *supra* note 59, at 675.

<sup>60</sup> Outer Space Treaty, *supra* note 4, at arts. VI, VIII. See also REYNOLDS & MERGES, *supra* note 59, at 74 (arguing that Article VI of the Outer Space Treaty "would prohibit, as a matter of treaty obligation, strictly private, unregulated activity in outer space or on celestial bodies even at a time when such private activity becomes most common-place.")

<sup>61</sup> Outer Space Treaty, *supra* note 4, at art. VI (stating, "States Parties to the Treaty shall bear international responsibility for national activities in outer space, . . . whether such activities are carried on by governmental agencies or by non-governmental entities. . . ."). See also, Youseff Sneifer, *Federal Product Liability Litigation Reform: Recent Developments and Statistics: Comment: The Implications of National Security Safeguards on the Commercialization of Remote Sensing Imagery*, 19 SEATTLE U. L. REV. 539, 549-50 (Spring 1996). The right of private entities to participate in space activities while being supervised by their state of registry was the result of a compromise between the Soviet Union and Western states. The Soviets advocated the ban of private activity in space, while the Western States advocated the right of private commercial ventures. See NATHAN C. GOLDMAN, *AMERICAN SPACE LAW: INTERNATIONAL AND DOMESTIC* 72 (1988).

organizations.”<sup>62</sup> Additionally, Article VI requires authorization and supervision by the State of registry for non-governmental activities in space.<sup>63</sup>

This article supports the conclusion that States are ultimately responsible for space objects, thus allowing the U.S. to hold Passivaland directly responsible for the space activities of the commercial companies located within its borders, such as HERCULES. These concept is similar those developed in the United Nations Convention on the Law of the Sea III (UNCLOS III). Under UNCLOS III, all ships shall sail under the flag of one State only, and every “State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”<sup>64</sup> This includes the State maintaining a register of all ships, which fly its flag.<sup>65</sup> The drafters of the Outer Space Treaty clearly intended to hold States responsible for supervising all space activities, outer space being akin to international territory similar to the high seas, just as States are responsible for the conduct of ships flying their flag.<sup>66</sup>

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<sup>62</sup> Paul Dembling & Daniel M. Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COMM. 419, 436 (1967) [hereinafter Dembling & Arons]. Dembling and Arons both worked for NASA at the time of this article, Dembling as the General Counsel, and Arons as an Attorney-Advisor. The article discusses State responsibilities for activities in outer space.

<sup>63</sup> Outer Space Treaty, *supra* note 4, at Article VI (stating, “The activities of non-governmental entities in outer space . . . shall require authorization and continuing supervision by the appropriate State Party to the Treaty.”).

<sup>64</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 92, 94, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter UNCLOS III]. The U.S. has signed but not ratified the treaty.

<sup>65</sup> *Id.* at art. 94.

<sup>66</sup> Dembling & Arons, *supra* note 62, at 437. Dembling and Arons analyze the treaty through an accumulation of U.N. documents and summaries of the delegates’ testimony made during the creation of the treaty. It was the intent of the delegates to hold the State wholly liable for all space activities connected to their territory. The delegates, aware that Article VII would place liability on individual states, did not object to it. Dembling & Arons, *supra* note 62, at 438. A French delegate stated: “The questions of liability . . . were extremely complicated, and if any reference to them was included in the Treaty under discussion, it should be very brief and simple and should merely establish the principle concerned.” U.N. Doc. A/AC.105/C.2/SR. 67 at 10. “The discussions which took place at the formal meetings were summarized and published in the form of Summary Reports.” Dembling & Arons, *supra* note 62, at 438 n.38. The Indian delegate questioned the word “internationally,” as used to modify the word “liable,” arguing that “internationally” would be acceptable if it meant “absolutely,” in referring to the State’s liability. A number of other delegations agreed with this view. The committee decided that the term “absolute liability” would not be acceptable because it was still being refined in discussions relating to the drafting of the treaty on liability, later to become the Liability Convention. The committee drafting the Liability Convention, not yet in existence at the time of the drafting of the Outer Space Treaty, determined that the term “absolute liability” was subject to limitations and qualifications. A proposal was then made by several delegations, on the Outer Space Treaty committee, to make reference in the Outer Space Treaty to the existence of a treaty on liability. This was determined to be too dangerous because a reference to a treaty that did not yet exist might weaken the present treaty. Dembling & Arons, *supra* note 62, at 439. The bottom line was that the committee for

While Article VI requires that States take responsibility for and supervise activities in space, Article VII holds States liable for all damage caused to property by satellites and other space objects registered to them.<sup>67</sup> Commercial ownership and operation of the object does not matter, the State is liable.<sup>68</sup>

Finally, according to Article VIII, regardless of where in space an object is, the State on whose registry it appears retains jurisdiction and control over it.<sup>69</sup> The registry, discussed below under the Registration Convention, is the document created by a State upon launching an object into space.<sup>70</sup> If the launch is a private commercial launch, the object is registered to the launching State. If two or more States are involved in the launch, they shall decide among themselves which one will register the object.<sup>71</sup> This article along with Articles VI and VII of the Outer Space Treaty, require States to take responsibility for and supervise all space-related activities, whether conducted by the government or private industry. The three remaining space treaties outline in more detail the specific liability and responsibility of the State as first articulated by the Outer Space Treaty.

### **B. Rescue Agreement, Liability Convention, and Registration Convention**

The Rescue Agreement, Liability Convention, and Registration Convention all reinforce the basic principle of State responsibility established in the Outer Space Treaty. The State, as mentioned above, cannot avoid responsibility for activities in space by claiming the space object is owned and controlled by a private or commercial entity,<sup>72</sup> such as HERCULES.

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the Outer Space Treaty and others intended to hold States absolutely liable for space activities but had difficulty with the terms.

<sup>67</sup> Outer Space Treaty, *supra* note 4, at art. VII (“Each party to the Treaty that launches or procures the launching of an object into outer space . . . and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty. . .”).

<sup>68</sup> Outer Space Treaty, *supra* note 4, at arts. VI, VII.

<sup>69</sup> Outer Space Treaty, *supra* note 4, at art. VIII (stating, “A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object . . .”). The Registration Convention requires that once an object is launched into space, the responsible State shall create a registry which will be made known to the Secretary General of the United Nations. *See* Registration Convention, *supra* note 6, at art. II. For further information on the Registration Conventions, see *infra* notes 80-83, and accompanying text.

<sup>70</sup> *See* Registration Convention, *supra* note 6, at art. II.

<sup>71</sup> Registration Convention, *supra* note 6, at art. II.

<sup>72</sup> *See generally supra* note 62 and accompanying text.

The primary focus of the Rescue Agreement, enacted in 1968, was to facilitate international cooperation and peaceful exploration of space by obligating States to assist each other in the rescue of astronauts and fallen or stray space objects.<sup>73</sup> States having knowledge of a fallen space object must notify the launching authority and assist in the return of the object to that authority.<sup>74</sup> The term “launching authority” is defined as “the State responsible for launching.”<sup>75</sup>

The Liability Convention of 1972 holds States absolutely liable for the activities of their space objects which cause damage to the surface of the earth, or to aircraft in flight.<sup>76</sup> The Convention further establishes fault-based liability for damage to another States’ property in space.<sup>77</sup> The type of damage foreseen was one object running into another in space or an object falling out of orbit. The liability established by the Convention is joint and several where there is more than one State involved or responsible for the object. Regardless of ownership, government or private, the launching State is liable.<sup>78</sup> “A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.”<sup>79</sup> Many countries, such as the United States, regulate the space-related activities of the companies within their borders by requiring licenses and insurance.

Finally, the Registration Convention, which entered into force in 1976, requires States register all objects either launched from their territory or whose launch they have procured, and report the existence of this registry and contents to the Secretary General of the United Nations.<sup>80</sup> The Registry was

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<sup>73</sup> Rescue Agreement, *supra* note 58, at Preamble.

<sup>74</sup> Rescue Agreement, *supra* note 58, at art. 5.

<sup>75</sup> Rescue Agreement, *supra* note 58, at art. 6.

<sup>76</sup> Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, art. II, 24 U.S.T. 2389, 961 U.N.T.S. 187 (entered into force Sept. 1, 1972).

<sup>77</sup> *Id.* at art. III.

<sup>78</sup> *See id.* at arts. II, III, V. Article V specifies “[w]henver two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused. A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching.” *Id.* at art. V.

<sup>79</sup> *Id.* at art. II.

<sup>80</sup> Registration Convention, *supra* note 6, at art. II. Article II reads, in part, as follows:

1. When a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the United Nations of the establishment of such a registry.
2. Where there are two or more launching States in respect of any such space object, they shall jointly determine which one of them shall register the object in accordance with paragraph 1 of this article, bearing in mind the provisions of [the Outer Space Treaty and any other binding treaties] . . . .

established to create a central depository of all objects launched into space to facilitate the enforcement of the other treaties.<sup>81</sup> The State of registry is the State on whose registry a space object is carried in accordance with Article II of the Convention.<sup>82</sup> Where there is more than one State involved, the States will decide who will register the object.<sup>83</sup>

Based on the treaties discussed above, the State of registration is responsible for all objects, commercial and government, launched into space. Passivaland, therefore, would be responsible for the activities of HERCULES. The U.S. can hold Passivaland responsible for the activities and conduct of HERCULES in supporting Northland.

### **C. No State Responsibility or Sovereignty over the Satellite.**

As outer space becomes more commercialized, and in turn more profitable, arguments against State jurisdiction and control over commercial companies involved in space activities will appear with increasing frequency. With the influx of commercial companies entering the space arena creating new venues for economic growth and revenue to launching States, such States may be reluctant to impose burdensome restraints on these moneymaking ventures within their territories.

Today due to the vast commercialization of space and the amount of money involved, restricting or limiting the activities of a commercial company in another country may be more difficult than it was during the Gulf War.<sup>84</sup> Regardless of the commercialization of space, space assets will most likely continue to be considered national assets when owned by private organizations.<sup>85</sup> If this were not true, if one day States are not held responsible for space objects, the U.S. would not have to worry about

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3. The contents of each registry and the conditions under which it is maintained shall be determined by the State of registry concerned.

Registration Convention, *supra* note 6, at art. II. Under article III, the Secretary-General of the U.N. maintains a Register, to which there is full and open access, containing the information furnished by the states relevant to objects they have launched. Registration Convention, *supra* note 6, at art. III.

<sup>81</sup> Registration Convention, *supra* note 6, at Preamble.

<sup>82</sup> Registration Convention, *supra* note 6, at art. I(c).

<sup>83</sup> Registration Convention, *supra* note 6, at art II(2).

<sup>84</sup> Black, *supra* note 2, at 107. Lieutenant Commander Black argues that States may not be able to control commercial entities involved in space. It is very conceivable that in the future States will seek to limit their liability to damage caused by space objects launched and controlled by commercial entities within their territory, especially in the wake of the commercialization of space. Certainly commercial entities faced with increasing taxes and restrictions will seek to limit their ties to individual States and expand their freedoms in space.

<sup>85</sup> Again, similar to the flagging of ships under UNCLOS III, *supra* note 64.

violating neutral territory, but only about claims for loss when the satellite of the organization is destroyed. What about States who are not signatories to the various treaties, are they then immune from responsibility? Probably not, treaties such as the Outer Space Treaty, Liability Convention, Registration Convention, and Rescue Agreement, appear to be so widely accepted that they would be probably considered customary international law and would thus be applicable to all nations, even non-signatories.

In our hypothetical scenario, before the U.S. can pierce Passivaland's sovereignty by attacking the HERCULES satellite or its ground components, the legal authority and justification must be established by showing Passivaland's breach of neutrality. HERCULES, as stated, is operated by a private organization but registered in Passivaland. It is being used to provide communication, navigation, and remote sensing support to Northland. Northland is using these satellite services to launch attacks against U.S. troops. Since Passivaland is neutral, we must analyze the laws of neutrality to determine if the support to Northland from the HERCULES Company may be regarded as a breach of Passivaland's neutral status. Under international law neutral territory is inviolable and may not be invaded or attacked.<sup>86</sup>

#### IV. LAW OF NEUTRALITY

“Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents and recogni[z]ed by belligerents, such attitude creating rights and duties between the impartial State and the belligerents.”<sup>87</sup> Under this definition, a neutral State must refrain from any participation or support in an armed conflict that may appear as partiality to one of the belligerents. This may include restricting activities from within its territory, which support one or more of the belligerents.<sup>88</sup> Neutral territory is protected by law and is inviolable as long as the neutral State remains impartial.<sup>89</sup> Belligerents are required to respect neutral property and may not move troops or munitions of war onto or across neutral territory.<sup>90</sup>

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<sup>86</sup> See *supra* note 54.

<sup>87</sup> LOUIS HENKIN ET. AL., INTERNATIONAL LAW CASES AND MATERIALS 875 (3d ed. 1993) [hereinafter HENKIN].

<sup>88</sup> FM 27-10, *supra* note 54, ¶ 512. “Traditionally, neutrality on the part of a State not a party to the war has consisted in refraining from all participation in the war, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents. It is the duty of belligerents to respect the territory and rights of neutral States.”

<sup>89</sup> A State need not declare its neutrality, it is assumed if the State is not a belligerent. See FM 27-1, *supra* note 54, at 18. Article 2(4) of the U.N. Charter prohibits “the threat or use of force against the territorial integrity or political independence of any state. . . .” U.N. CHARTER, art. 2(4).

<sup>90</sup> This flows from the principle of “inviolability.” See Hague Convention (V), *supra* note 5, at art. 1. The Army explains article 1 as follows:

Belligerents are also prohibited from entering neutral territory without authorization, and may suffer possible consequences for this action.<sup>91</sup> However, as discussed shortly, the neutrality principles do not necessarily apply to the citizens or private commercial companies of the neutral State.

### A. Obligations of a Neutral State

The laws of neutrality originate from international law and the laws of war. The main body of law relating to neutrality comes from the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907.<sup>92</sup> The State must prevent its territory from becoming a base camp for military operations and prevent belligerents from using its territory or resources for purposes of the war.<sup>93</sup> The neutral State may not allow a belligerent to move troops or supplies through the neutral territory; erect communications stations on neutral territory; use any facility of this kind established on the neutral territory prior to the war; and may not allow combatants to form on the neutral territory to assist the belligerents.<sup>94</sup>

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The foregoing rule prohibits any unauthorized entry into the territory of a neutral State, its territorial waters, or the airspace over such areas by troops or instrumentality's of war. If harm is caused in a neutral State by the unauthorized entry of a belligerent, the offending State may be required, according to the circumstances, to respond in damages.

FM 27-1, *supra* note 5, at 18. *See also* U.S. Army, Field Manual 27-10, The Law of Land Warfare, ¶ 515 (Jul. 18, 1956) [hereinafter FM 27-10].

<sup>91</sup> FM 27-1, *supra* note 5, at 18. One consequence may be the requirement to pay damages. Information operations shed a new light on this area of law, neutrality, and the concepts of borders. In the past some nations, when in a neutral status, have refused to allow belligerents engaged in a conflict to fly through their air space. Computer attacks typically transcend numerous borders undetected.

<sup>92</sup> *See* Hague Convention (V), *supra* note 5.

<sup>93</sup> 2 L. OPPENHEIM, INTERNATIONAL LAW §§ 294, 361 (H. Lauterpacht ed., 1952) [hereinafter OPPENHEIM].

<sup>94</sup> Hague Convention (V), *supra* note 5, at arts. 2-4. These articles provide as follows:

Article 2: Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Article 3: Belligerents are likewise forbidden to—(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea; (b) Use of any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

The neutral State must also prevent its territory from becoming, in effect, an intelligence bureau transmitting messages from its territory to aid one belligerent or provide intelligence on military operations.<sup>95</sup> The neutral State is not required to restrict a belligerent's use of public utilities owned by the State, a company, or private individual, if the service is public and available equally to any of the belligerents.<sup>96</sup> Although the neutral State may not assist or support a belligerent, it is under no obligation to "prohibit all exports of possible war materials to belligerents."<sup>97</sup> In this regard, the neutral State is not required to prohibit private citizens from providing supplies to belligerents, including munitions of war. Although the State is not required under the laws of neutrality to restrict the activities of its citizens or private commercial companies, it may be in the State's best interests to avoid the perception of partiality.

Further, when the issue is space support, the usual neutrality concept of allowing States to take a hands-off position with regard to their citizens' activities in support of a belligerent, does not apply. As discussed previously, the four treaties relating to outer space require the launching or registering State to take responsibility for all national space activities. As a result, Passivaland is responsible for the activities of all space objects listed on its

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Article 4: Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Hague Convention (V), *supra* note 5, at arts. 2-4. The laws of neutrality are antiquated. The international community will have to decide whether allowing any military communication facilities constitutes a violation of neutrality. Cellular communications and satellite communications make it so a nation cannot easily accuse a neutral of aiding an adversary. Additionally, the use of various forms of communications have become so intertwined between commercial, civil, and military uses that a nation would be hard pressed to label a communication link as being strictly military.

<sup>95</sup> "It was added by the Commission of Jurists who drafted the Rules that the neutral Power must take the necessary action 'to prevent the transmission of information destined for a belligerent concerning military forces or military operations.'" HOWARD S. LEVIE, 2 THE CODE OF INTERNATIONAL ARMED CONFLICTS 829-30 (1986) [hereinafter LEVIE]. "In 1939 several neutral States adopted legislation prohibiting the transmission of information concerning the position, movement, or cargo of national and foreign shipping." OPPENHEIM, *supra* note 93, § 356 n.3.

<sup>96</sup> Article 8 of Hague Convention (V) states: "A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals." Hague Convention (V), *supra* note 5, at art. 8

<sup>97</sup> HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 298 (1992). Similarly, Hague Convention (V), article 7, provides that "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet." Hague Convention (V), *supra* note 54, at art. 7.

registry. Passivaland is liable to the international community for the activities of HERCULES and must supervise and, if necessary, restrict the use of its satellites. The actions of the HERCULES satellites cannot be considered actions of a private citizen acting independent of the government of Passivaland. The actions of HERCULES' satellites are directly attributable to Passivaland.

### **B. Actions of Private Citizens of the Neutral State**

A discussion of the duties of the neutral citizen will assist in understanding violations of neutrality. The neutral State has no obligation, in most situations, to restrict or forbid a private company or individuals from providing public communication services, supplies, munitions, or even military intelligence such as photos or information to one of the belligerents.<sup>98</sup> Although the State is not required to restrict the activities of its citizens, the private support to a belligerent such as the dispatch of military intelligence from within neutral territory could easily be attributed to the State. A belligerent may not be able to detect from where the military intelligence is coming. It may not be readily apparent that a private citizen or company is providing the intelligence instead of the State, or that the support is not State sanctioned. The neutral State should take caution to avoid even the appearance of partiality, or it may be accused of acting as a belligerent and lose the protection of neutrality.<sup>99</sup> An aggrieved belligerent could probably make a good argument for self-defense and a neutrality violation after attacking the neutral's perceived support for the opposing belligerent.

### **C. Violations of Neutrality**

It is the combination of Passivaland's responsibility under the Liability Convention for satellites on its registry, and the type of support being provided by the satellites that may cause the State to lose its neutral status. What type of satellite support would constitute a violation of the laws of neutrality, thus causing Passivaland to lose its protection as a neutral? It can

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<sup>98</sup> VON GLAHN, *supra* note 52, at 845, *citing* Hague Convention (V). FM 27-10 construes article 7 of Hague Convention V as follows:

Commercial transactions with belligerents by neutral corporations, companies, citizens, or persons resident in neutral territory are not prohibited. A belligerent may purchase from such persons, supplies, munitions, or anything that may be of use to any army or fleet, which can be exported or transported without involving the neutral State.

FM 27-10, *supra* note 90, ¶ 527.

<sup>99</sup> OPPENHEIM, *supra* note 93, § 356.

be argued that providing remotely sensed images of U.S. troop and weapon positions is a clear violation and may even be considered an act of aggression against the U.S. Providing unsecure communication or navigation support services probably would not violate neutrality because they are akin to a public service utility available to anyone without discrimination. Before analyzing these types of support under the laws of neutrality, it is important to note that the present laws of neutrality were written in 1907 and relate to the media of support in existence at the time, such as sea going vessels and telegraphs.<sup>100</sup> The 1977 Protocols to the Geneva Conventions provide more recent rules relating to neutrality, such as the protection of neutral citizens, though neither of the Protocols address space support.<sup>101</sup>

A violation of neutrality has been defined as “nothing more than a breach of a duty deriving from the condition of neutrality.”<sup>102</sup> Violations of neutrality may be slight or grave depending on the circumstances. A slight violation may only provoke a complaint, but a grave violation may cause the aggrieved party to declare the right to use self-defense against the neutral State.<sup>103</sup> No clear distinction exists between acts constituting a violation of neutrality and those that do not, nor between those categorized as slight versus grave. The neutral State must be wary as to how its actions or the actions of its citizens will be perceived. Ultimately, the aggrieved belligerent will determine whether neutrality has been violated and what action to take in retaliation. It may choose to complain to the government of the neutral State or to an international organization such as the United Nations Security Council. On the other hand, it may also choose to use force and claim self-defense. Realistically, the aggrieved belligerent will determine on its own whether there has been a breach of neutrality and react according its best interests, taking into consideration the anticipated response of the international community.

Any activity aiding one belligerent and not the other may be perceived as a violation. If a neutral State provides military intelligence concerning one belligerent to another, the neutral State will clearly be perceived as violating the laws of neutrality.<sup>104</sup> During World War I, many neutral States, including the U.S. before its entry into the war, took various steps to prevent telegraphs and wireless installations within their territories from either being used by belligerents or used by private citizens to pass coded messages to one of the

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<sup>100</sup> See FM 27-1, *supra* note 54, at 18.

<sup>101</sup> See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 48, 1125 U.N.T.S. 3. (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, art. 48, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

<sup>102</sup> OPPENHEIM, *supra* note 93, § 358.

<sup>103</sup> OPPENHEIM, *supra* note 93, § 359.

<sup>104</sup> OPPENHEIM, *supra* note 93, § 356.

belligerents.<sup>105</sup> Neutral States took these steps to avoid the perception of partiality.<sup>106</sup>

Technically, telegraphs and other wireless apparatus of the past, just as the GPS or satellite communications of the present, could be seen as equivalent to public utilities that could be provided lawfully to belligerents in a nondiscriminatory fashion. The use or availability of such services to one or more belligerents would not appear to cause a violation of neutrality. It is the perception created by the alleged support, as in the case during World War I, which will be the driving force behind the aggrieved State's decision to retaliate. Providing navigation and communication services may be perceived by some as a violation, but is not likely so in fact.

On the other hand, a strong argument can be made that providing satellite imagery (remote sensing) would be a violation of neutrality because it can be considered military intelligence. Navigation and communication services, because of the manner in which they are provided, are not direct support. The type of communication envisioned in this context is not secure satellite communications typically utilized by military. Instead it would be unsecure commercial satellite communications available to the general public. The navigation and communication services are better categorized as indirect support or services similar public utilities.

An example of direct support would be a one-on-one interaction between a customer and the support provider similar to an operator connecting a call for a customer, or providing secure assured satellite access and bandwidth for communications. This is distinguished from indirect support or a service wherein the customer merely has an account for communication access, similar to a cell phone, whenever needed, but which is not specifically guaranteed or secured. Communication and navigation services are similar to public telephone services. The company providing the service does little to directly support a particular customer other than maintains the satellite and ground systems. On the other hand, the provision of satellite imagery requires that the satellite be in position, the lens aimed, an image captured, in most cases analyzed, and then sent to the customer. A telephone company does not provide this direct service to each individual user, but maintains and operates the system for use by all of its customers.

As the law of neutrality states, "A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals."<sup>107</sup> Although the supplier may be able to deny the service

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<sup>105</sup> OPPENHEIM, *supra* note 93, § 356. "In 1939 several neutral States adopted legislation prohibiting the transmission of information concerning the position, movement, or cargo of national and foreign shipping." *Id.* § 356, n.3.

<sup>106</sup> *Id.* § 356.

<sup>107</sup> See Hague Convention (V), *supra* note 5, at art. 8.

to a particular user, the support is not personal and direct but simply made available to the public.<sup>108</sup> Therefore, allowing access to or providing the opportunity for navigation or communication services to a user in most cases is indirect support. Neutral States are not required to restrict belligerents from using their public utilities, which in this case would include satellite communications and navigational services.<sup>109</sup>

In our hypothetical example, a few key questions emerge at this point. First, is it possible for HERCULES to prevent Northland from accessing its satellite system, thus denying the service or support? Second, if Passivaland (HERCULES) can deny Northland access to communication and navigation services and refuses to, has Passivaland violated the laws of neutrality? The answer to the second question goes back to the foregoing analysis on whether the service is defined as direct or indirect support. This may be more a political matter than a legal one. An argument may be made either way under the current laws of neutrality. Some may argue that any support provided to one of the belligerents by a neutral or from within its territory that is knowing and preventable is direct support and thus a violation.

On the other hand, some may believe in a strict interpretation of the law under Hague Convention (V),<sup>110</sup> and argue that the neutral State is not obligated to restrict the actions of its citizens. If the service is available to anyone without discrimination, and HERCULES takes a neutral and indirect role, similar to a telephone company, the answer should be “no.” In this case, then the U.S. would be required to rely on other legal or political avenues to prevent the use by Northland.

In a recent U.S. Department of Defense legal assessment (DOD Assessment) regarding information operations, the General Counsel’s office take the position that if a neutral allows (or does not prevent) a belligerent from using its information systems, the aggrieved belligerent will have a limited right of self-defense to prevent such use by its enemy.<sup>111</sup> Whether this theory implies a loss of neutral status and protection for the neutral State is not clear from the paper. The DOD Assessment poses as a solution using jamming techniques in theater to deny the satellite (or information systems) support to one belligerent.<sup>112</sup> This is a viable option and would not appear to violate the rights of a neutral.

In our scenario though, a theater denial of these services and/or attacking our adversary directly to negate the space support is not a viable option. We must negate by affecting the ground stations in Passivaland or the

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<sup>108</sup> See generally PRESTON, *supra* note 12, at 123, 235.

<sup>109</sup> See Hague Convention (V), *supra* note 5, at art. 8.

<sup>110</sup> See Hague Convention (V), *supra* note 5, at art. 8.

<sup>111</sup> Department of Defense Office of General Counsel, An Assessment of International Legal Issues In Information Operations 9 (2d ed., Nov. 1999) (unpublished manuscript on file with the *Air Force Law Review*).

<sup>112</sup> *Id.* at 9.

satellites. Based on the techniques suggested by the DOD Assessment for negating neutral support (jamming in theater), there is probably no need to conduct an analysis under the laws of neutrality. A neutral nation would be hard pressed to argue that its neutral status or territory had been violated based on one belligerent jamming information systems or satellite support to its adversary in theater. One concern would be the effect the jamming had on critical civilian infrastructure, though this is a topic that could consume another entire article.

The DOD Assessment implies, through examples, that providing precision navigation and weather information services would constitute a violation of neutrality by a neutral nation, or at least provide the aggrieved belligerent a limited right of self-defense. The assessment did not provide enough detail to discern the specifics of this position. One can only speculate that the DOD Assessment merely analyzed the type of information that would be provided by navigation or weather support and then determined that providing this information would violate one's neutral status. If this is in fact the DOD Assessment's view, it is incorrect as has been shown above in the analysis of direct versus indirect support.

For example, the U.S. cannot deny the use of its GPS system or degrade its accuracy to an individual, a group, or even a region through the system without affecting all users.<sup>113</sup> As the assessment states, individuals or areas can be jammed in response to the use of the system by a belligerent. Surely DOD Assessment is not implying that a neutral who operates a navigational system is required to actively jam all belligerents use of that system in-theater in order to retain their neutral status. Navigational support and weather information, available to anyone with the equipment to receive it, would be examples of indirect support that would not cause a neutral nation to be in violation of the laws of neutrality. Article 7 of Hague Convention (V) states that a neutral is not bound to prevent the shipment of supplies by private citizens to one or more of the belligerents, even if the supplies are munitions.<sup>114</sup> In this case, as discussed earlier, it would be a stretch for the U.S. or any other nation as a belligerent to argue a violation of neutrality based on navigational support such as that provided by GPS. Without more information on the extent or type of weather information support to which the DOD Assessment refers, it cannot be determined if there would be a violation of neutrality.

The third medium of support in our hypothetical is remote sensing (satellite imagery). Remote sensing is the production or creation of an image of an area or object on the earth using a satellite.<sup>115</sup> The image produced by the satellite is downloaded to the ground station where it is either analyzed or

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<sup>113</sup> See Chernak, *supra* note 41.

<sup>114</sup> Hague Convention (V), *supra* note 5, at art. 7.

<sup>115</sup> See *supra* note 43, and accompanying text.

forwarded for analyses.<sup>116</sup> This type of support clearly violates the laws of neutrality. Passivaland's (HERCULES') satellite is being used to provide military intelligence concerning the U.S. military activities to Northland. This is direct support. In order to produce images of the battlefield the satellite must be positioned and focused on a particular area or object. Northland, therefore, must articulate the areas to be photographed and HERCULES must take specific steps to provide those images.<sup>117</sup> These steps include capturing the image, downloading, and analyzing it.

Providing military intelligence to a belligerent is a serious breach of neutrality.<sup>118</sup> These images provide the enemy a clear view of the battlefield and vital information relating to troop and weapon positions. Remote sensing eliminates the element of surprise. Article 3 of Hague Convention (V) states, in part, that belligerents may not use communication devices located on neutral territory for purely military purposes if the devices are not open for public use.<sup>119</sup> This statement may be interpreted in many different ways. However, the essence is that neutral territory may not be used as a base camp or intelligence bureau for one or both of the belligerents. Providing remotely sensed images of the battlefield to one belligerent concerning the movements of the other would clearly violate this rule.

The laws of neutrality, as with much of international law, are inadequate when applied to modern technology. International law has failed to remain constant with technology and probably never will. In order to provide further analysis for our scenario, we will examine one recent international treaty, the Constitution and Convention of the International Telecommunication Union (CCITU), as well as the two proposed (but never ratified) international agreements—the 1923 Hague Rules of Aerial warfare, and the Hague Radio Rules. These sources will assist in analyzing how providing space support may cause a non-belligerent nation to lose its neutral status.

Article 34 of the CCITU allows members to “stop the transmission of any private telegram which may appear dangerous to the security of the State or contrary to their laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage or any such telegram or part thereof, except when such notification may appear dangerous to the security of the State.”<sup>120</sup> Members may also “cut off any other private

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<sup>116</sup> See PRESTON, *supra* note 9, at 315.

<sup>117</sup> PRESTON, *supra* note 9, at 317, 326.

<sup>118</sup> See *generally* note 95, and accompanying text.

<sup>119</sup> Hague Convention (V), *supra* note 5, at art. III. For the language of article III, see *supra* note 94.

<sup>120</sup> Constitution and Convention of the International Telecommunication Union, Dec. 22, 1992, art. 34(1), S. Treaty Doc. No. 104-34 (1996) (as amended through 1994).

telecommunications which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency.”<sup>121</sup>

Although these articles apply in peacetime, they would still apply to our scenario because the U.S. is not at war with Passivaland. The U.S., under Article 34, can cut off or stop private transmissions between Passivaland and Northland under the premise that the transmissions threaten U.S. national security. The U.S.’s only requirement is to provide notification to Passivaland, unless the notification may further endanger the security of the U.S. The U.S. must also notify the other members of the ITC through the Secretary General of the United Nations. What means or methods can the U.S. use to stop or cut off these transmissions? Article 34, and the CCITU as a whole, do not identify the means or methods. For example, may the U.S. interfere with or destroy the satellite ground components in Passivaland or even the satellite under the CCITU? This also is not clear from the treaty. The CCITU merely states that the threatened nation may stop the transmission.

Although they were never ratified, the 1923 Hague rules of Aerial warfare and the Hague Radio Rules<sup>122</sup> refer to the regulation of air space and radio waves. These media are more similar to satellite operations than the present adopted rules that relate to the laws of telegraph usage and sea vessels (under the laws of the sea). An analysis of these sources will enable a prediction of how the law might be interpreted today.

Under the proposed Hague Rules of Aerial warfare Rules, espionage was defined as collecting intelligence on one belligerent from an aircraft with the intent to provide it to another.<sup>123</sup> The neutral State was bound, within its means and jurisdiction, to prevent “aerial observations of the movements, operations, or defenses of one belligerent, with the intention of informing the other belligerent.”<sup>124</sup> A neutral citizen in an aircraft taking notes or photographs of the battlefield for one of the belligerents is clearly analogous to a satellite from a neutral State engaging in the same activity. The difference is technology now allows this form of espionage to be conducted from the safety of another territory, not in enemy airspace subject to attack. Supplying remotely sensed images of troop and weapon positions to a belligerent, either from an aircraft in enemy airspace or from a satellite, would be a violation of neutrality under the Hague Rules of Aerial warfare.

According to the proposed Hague Radio Rules, a neutral State was not required to restrict or prohibit the use of radio stations within its territory, except if necessary to prevent the transmission of information to a belligerent

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<sup>121</sup> *Id.* at art. 34(2).

<sup>122</sup> *Reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 207 (Dietrich Schindler & Jirí Toman eds., 1988) [hereinafter Schindler & Toman].

<sup>123</sup> *Id.* at 212.

<sup>124</sup> *Id.* at 215.

relating to military forces or operations.<sup>125</sup> The commission drafting the Rules added that the neutral State must take the necessary steps “to prevent the transmission of information destined for a belligerent concerning military forces or military operations.”<sup>126</sup> This is not to say this rule would prohibit the use of satellite communication and navigation services by belligerents. International law did not require this restriction. Rather, States imposed it unilaterally during World War I.<sup>127</sup> This imposition of the restriction and proposal of the rules indicates the intent of States to remain neutral, thus avoiding even the appearance of providing partial support.

It is thus clear from an analysis of international law, as well as proposed but never adopted rules of law, that providing remotely sensed images of the battlefield to a belligerent violates the laws of neutrality. In contrast, supplying satellite navigation and communication services does not violate the laws of neutrality.<sup>128</sup> But let us change our hypothetical scenario just slightly. Assume the satellite navigation system used by Northland is not owned by a commercial company in Passivaland but by the government of Passivaland itself. Would this change the neutral status of Passivaland based on the navigational support? The proverbial lawyer’s response would be, “it depends.” The DOD Assessment would appear to say “yes.” Looking at the current GPS capabilities described above, the answer is “no.” The GPS system cannot be used to deny or degrade user accuracy for a single user, a group of users or even a particular region. The selective availability of the system which creates the accuracy error is either on, affecting the entire world, or off.<sup>129</sup> Therefore, we cannot claim that a nation has lost its neutral status for providing satellite navigational services.

Does this concept hold true when all of the satellite services are combined? As noted earlier, navigation systems can be placed in missiles causing them to have greater stealth and target precision.<sup>130</sup> If Passivaland provides a combination of navigation services and satellite imagery to Northland and knows the services are being used for precision targeting of troop and weapon positions, it has violated the laws of neutrality. In this situation, Passivaland may even be considered a belligerent because of the severity of the violation. Consequently, this same argument may be applied to communication services being used for command and control. If Passivaland is aware its satellites are being used for communicating troop movements and

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<sup>125</sup> See LEVIE, *supra* note 95, at 829.

<sup>126</sup> *Id.* at 829-30.

<sup>127</sup> See *supra* note 105, and accompanying text.

<sup>128</sup> “Unneutral service, especially by ships or aircraft, is rendered to a greater or lesser degree where ‘Subjects [of a neutral Power], prompted either by the desire for profit or by their own sympathies, give material help to one of the belligerents, or perhaps to both.’” H.A. SMITH, *THE LAW AND CUSTOM OF THE SEA* 104-5 (1954), *quoted in* MCCOUBREY & WHITE, *supra* note 97, at 311.

<sup>129</sup> See Chernak, *supra* note 41.

<sup>130</sup> See *generally supra* note 37, and accompanying text.

this use can be prevented, the argument can be made that Passivaland has violated its neutral status, or at the very least has created that perception. When the communication support is used to relay intelligence derived from satellite imagery there is a clear argument for a neutrality violation.

The Hague Rules of Aerial Warfare allow the offended belligerent some recourse in response to violations of neutrality. The following are some examples of actions deemed appropriate under the 1923 Rules. Neutral aircraft were subject to capture, if after being warned by a belligerent condemning their activity, they continued to engage in violations of neutrality.<sup>131</sup> The aircraft could then be condemned, and possibly destroyed, depending on the military necessity.<sup>132</sup> In addition, a commander could fire on a neutral aircraft that disregarded warnings and flew over a sensitive area.<sup>133</sup>

Although not binding law, but a reflection of the law at the time, the U.S. Naval War Code of 1900 allowed for the capturing of neutral vessels carrying messages for the adversary. The captors considered these vessels to be in service to the enemy and thus no longer neutral.<sup>134</sup> Neutral vessels or aircraft were subject to capture if while traveling on or over international territory (the high seas) they were caught dispatching military intelligence to one of the belligerents.<sup>135</sup>

What actions then may the U.S. take to prevent Passivaland from supporting Northland? Prior to any action involving force, the U.S. should file diplomatic protests with Passivaland. The United Nations Security Council should be consulted as well. If there were insufficient time to pursue these options, the use of force would be authorized.<sup>136</sup> Under the proper circumstances, the U.S. may use force in response to support to a belligerent by a neutral. "Vessels or aircraft so engaged [in violations of neutrality] are liable to capture and . . . to be destroyed."<sup>137</sup>

A caveat to the foregoing conclusion is that a country in support of a United Nations peacekeeping force during a U.N. sanctioned action is not in

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<sup>131</sup> Schindler & Toman, *supra* note 122, at 215-16.

<sup>132</sup> Schindler & Toman, *supra* note 122, at 215-16.

<sup>133</sup> MCCOUBREY & WHITE, *supra* note 97, at 309.

<sup>134</sup> CAPTAIN CHARLES H. STOCKTON, UNITED STATES NAVY, THE LAWS AND USAGES OF WAR AT SEA: A NAVAL WAR CODE 13 (1900) [hereinafter WAR CODE] ("A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. . ."). This Code was written by Captain Stockton for, and published by the U.S. Government, to assist Naval commanders.

<sup>135</sup> See LEVIE, *supra* note 95, at 831.

<sup>136</sup> See MCCOUBREY & WHITE, *supra* note 97, at 308.

<sup>137</sup> MCCOUBREY & WHITE, *supra* note 97, at 311. Mr. McCoubrey states that these assets may be destroyed if they cannot be conveyed to an appropriate prize jurisdiction. In the case of a satellite, it is unlikely it could be sent anywhere, thus destruction would be the only option. In this regard, the destruction to which the author refers is due primarily to the fact that out of military necessity the belligerent has no recourse but to destroy the ship.

violation of neutrality laws.<sup>138</sup> During the Persian Gulf War the U.S. and other Coalition forces leased satellite communication services from INTELSAT who moved its satellites into position to support the Coalition forces.<sup>139</sup> Clearly a State acting in support of a U.N.-sanctioned operation would not be violating its neutral status by providing satellite support. In this instance the country opposing the U.N. operation would probably consider all nations supporting the operation as adversaries and thus lawful targets. A decision not to attack the alleged neutral that is providing support would most likely be a political decision of survival versus a legal decision based on the laws of war and neutrality.

## V. U.S. OPTIONS AND THE USE OF FORCE

U.S. options in response to the actions of HERCULES range from diplomatic protests and requests for sanctions against Passivaland, to interference or destruction of the satellite and ground systems. If the threat to the U.S. were not imminent, diplomatic protests to the United Nations Security Council and the leaders of Passivaland would be the best options. For purposes of this analysis assume we will assume these actions have failed. Either Passivaland claims it cannot restrict the activities of HERCULES, or it refuses to restrict commercial activities within its borders, claiming the laws of neutrality are not being violated.

By protesting to the U.N. Security Council and Passivaland, the U.S. has put Passivaland and the world on notice that it considers Passivaland's actions or inaction's to be a violation of the laws of neutrality. If the U.S. resorts to the use of force the argument justifying it will thus be strengthened.

The U.S. right to use force to prevent HERCULES from providing support to Northland is the next step in the analysis. The U.S. may consider jamming or spoofing the satellite signals.<sup>140</sup> These are excellent options provided they are effective to prevent HERCULES' assistance to Northland.<sup>141</sup> If not, the U.S. must ultimately consider the use of force. On the other hand, an argument can be made that the interference of a satellite signal by jamming or spoofing is a form of force—an argument beyond the scope of this article, however. If the U.S. believes Passivaland has breached its neutral status by supporting Northland, then the U.S. could attack the satellite in space or the ground components in Passivaland.

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<sup>138</sup> See FM 27-10, *supra* note 90, ¶ 513.

<sup>139</sup> See Morgan, *supra* note 25, and accompanying text.

<sup>140</sup> Jamming is the “blocking of a transmitted signal by overpowering it with noise, and spoofing [is] the deliberate alteration or replacement of a signal with a false one.” Black, *supra* note 2, at 109.

<sup>141</sup> One drawback to jamming and spoofing is that satellite services in many cases are provided by a constellation of satellites and therefore they would all have to be jammed or spoofed. Black, *supra* note 2, at 109.

## A. Right of Angary

If we now assume, continuing our hypothetical scenario, that Passivaland has not violated its neutral obligations, what legal avenues are available, if any, for the U.S. to use force to prevent Passivaland's satellite support to Northland. Recalling that international law has failed to keep pace current with technology, we are forced to look to the laws and theories in existence, regardless of how old they may be. Angary (*jus angariae*) is one such legal theory we will explore. Under the right of angary, or *jus angariae*, the U.S. may take control of or destroy Passivaland's satellite if shown to be a military necessity, regardless of whether Passivaland has violated the laws of neutrality. "[T]he modern right of angary is a right of belligerents to destroy, or use, in case of necessity, for the purpose of offence or defence, neutral property on their territory, or on enemy territory, or on the open sea."<sup>142</sup> This right applies to all types of property to include vessels and other forms of transport, arms, provisions and other personal property, as long as it will serve a military need.<sup>143</sup> A belligerent may exercise this right against neutral property under the same circumstances it may use against enemy property in time of war. The neutral owner, though, must be fully indemnified.<sup>144</sup>

This theory of law is similar to the theory of military requisition.<sup>145</sup> Requisition is a negotiation for services or supplies in return for compensation between an occupying military and the local authorities of the occupied nation. Angary is an outright taking with a requirement of compensation to

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<sup>142</sup> OPPENHEIM, *supra* note 93, at 761. As von Glahn puts it, the law of angary

developed when belligerents lacked sufficient vessels for their purposes. They claimed, under these circumstances, a right to seize neutral merchant ships in their ports and to force them and their crews to carry troops, provisions, and materiel to certain places on payment of freight charges in advance. . . . Unlike the original law, the modern concept applies only to property and does not permit the use of neutral crews of ships or trains seized under this right.

VON GLAHN, *supra* note 52, at 866.

<sup>143</sup> As Oppenheim states, "All sorts of neutral property, whether it consists of vessels or other means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided it is serviceable to military ends and wants." OPPENHEIM, *supra* note 93, at 762.

<sup>144</sup> "The conditions under which the right may be exercised are the same as those under which private enemy property may be utilized or destroyed; but in every case the neutral owner must be fully indemnified." OPPENHEIM, *supra* note 93, at 762.

<sup>145</sup> Requisition consists of, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or other public authorities, or to social or cooperative organizations, [and it] is prohibited, except where such destruction is rendered absolutely necessary by military operations." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 53, 6 U.S.T. 3516 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

the aggrieved party under conditions not amounting to occupation.<sup>146</sup> This right, although not presently listed in a military code, appeared in the U.S. Naval War Code of 1900.<sup>147</sup> It stated that taking and destroying neutral naval vessels was within the authority of a belligerent provided there was a military necessity, and that the owners were fully compensated.<sup>148</sup>

According to von Glahn, the right of angary may be employed when a military necessity exists.<sup>149</sup> The necessity will override the legal rights of the neutral State.<sup>150</sup> Consequently, Article 53 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, relating to requisition, prohibits the destruction of real or personal property belonging to an individual or the State, unless absolutely necessary by military operations.<sup>151</sup> Both concepts, angary and requisition, appear to have been developed to allow a belligerent to obtain the supplies needed to continue its mission. Angary has been used in the past to obtain neutral ships to transport supplies as well as to sink the ships to prevent the adversary from advancing. An incident of angary occurred in 1918 during World War I when the U.S. and British took eighty-seven Dutch vessels under the proclamation of March 20, 1918.<sup>152</sup> The U.S. and British Governments in an exercise of the right of angary requisitioned the ships. The government of the Netherlands protested “but the United States defended on the theory of extreme emergency, which made the principle of angary applicable.”<sup>153</sup>

Many scholars believe the right of angary is obsolete because no case has arisen in recent history.<sup>154</sup> However, the right should not be considered

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<sup>146</sup> Occupation exists when one State physically occupies the territory of another by use of military forces. See FM 27-10, *supra* note 90, ¶ 412.

<sup>147</sup> See WAR CODE, *supra* note 134.

<sup>148</sup> See WAR CODE, *supra* note 134, at 13. The War Code’s Article 6 contained the following provision:

If military necessity should require it, neutral vessels found within the limits of belligerent, authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters.

WAR CODE, *supra* note 134, at 7-8. See also, FM 27-1, *supra* note 54, art. 53 (relating to the seizure or destruction of civilian property when a military necessity exists).

<sup>149</sup> VON GLAHN, *supra* note 52, at 868.

<sup>150</sup> VON GLAHN, *supra* note 52, at 868 (“[W]henver a seizure is legitimized by a prize court, military necessity has triumphed over the undoubted legal rights of neutrals, despite the inevitable payment of compensation for seized property.”).

<sup>151</sup> Geneva Convention (IV), *supra* note 145, at art. 53.

<sup>152</sup> *The Taking of Ships in American Ports*, 35 AM. J. INT’L L. 500 (1941).

<sup>153</sup> *Id.*

<sup>154</sup> OPPENHEIM, *supra* note 93, at 760-61.

obsolete until it is made absolutely clear by States that it no longer exists.<sup>155</sup> “[B]elligerents will not easily renounce the use of any right unless it is absolutely clear it does not exist, or no longer exists.”<sup>156</sup> Many scholars agree the right of angary has always been a part of customary international law, and thus should not be considered obsolete.<sup>157</sup> Such principles are created by a State or States, and appear to become customary when accepted by a majority of the international community. Therefore, any concept or theory in international law assumed to be obsolete could be reintroduced by any nation.

The right of angary is applicable today despite the fact it has not been invoked in decades. The U.S. may claim angary to legally justify the destruction of Passivaland’s satellite in international territory, provided a compelling military necessity can be shown. Of course, destroying one or more satellites can quickly become very costly. Because of prohibitive cost, political considerations, and fear of creating a war in space, destruction of the satellite would probably be a last resort. The U.S. should attempt spoofing, jamming, or seizing the satellite for its own use, if possible, before destroying it.<sup>158</sup>

It is possible because of the similarity in the two theories that requisition evolved from angary. The theory of requisition, discussed above, could be considered the modern form of angary. In order for theories such as angary and requisition to be applicable to modern technology they will have to be revised or completely redeveloped. International law has not remained current with existing technology, and probably never will. New laws must be created and old ones modified to provide the international community guidance during times of peace and armed conflict.

## **B. Self-Defense**

The U.S. may use force against Passivaland in self-defense if this course of action is necessary to prevent Northland from attacking the U.S.

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<sup>155</sup> OPPENHEIM, *supra* note 93, at 761. Oppenheim compares the incident in 1918 when during World War I Dutch ships were requisitioned by the Allies. Although he states that this was not angary under the old right, he claims that this incident is an example of the modern right of angary, and “[f]or this reason it cannot with certainty be said that the right is obsolete.” *Accord* VON GLAHN, *supra* note 52, at 866 (agreeing that the Dutch incident constituted angary). *See also*, note 3, wherein Oppenheim cites Rolin, who argues that the right of angary on the open sea is inadmissible, and the requisitioning of neutral property on the high seas must be justified by military necessity and not angary.

<sup>156</sup> OPPENHEIM, *supra* note 93, at 760.

<sup>157</sup> Rainer Lagoni, *Angary, Right of*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 166 (R. Bernhardt, ed., 1992).

<sup>158</sup> “A duty to pay compensation for any damage done in the exercise of the right of angary is now generally recogni[z]ed.” OPPENHEIM, *supra* note 93, at 762-63. The amount of compensation the U.S. would be required to pay must be taken into consideration prior to any action.

The support to Northland from within Passivaland's borders, whether Passivaland refuses to prevent it or is unable to, may create for the U.S. a military necessity requiring it to act in self-defense. There are very limited circumstances in which the U.S. can use self-defense as its legal shield to justify attacking Passivaland as a neutral. As stated, this support has caused Passivaland to lose its neutral status, at least as it applies to the satellite(s) and its supporting systems. The U.S. is legally justified under the inherent right of self-defense to use force against the satellite or the ground systems in Passivaland if those systems are used to mount an attack against the U.S.<sup>159</sup> This right may only be exercised in response to an armed attack that has either been launched or is imminent. The threatened State is then justified in using force to quash the attack.<sup>160</sup>

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<sup>159</sup> Article 2(4) of the U.N. Charter prohibits States from using or threatening to use force against the territorial integrity or political independence of another State. U.N. CHARTER, art. 2(4). For the language of article 2(4), see *supra*, note 89. This prohibition may be overcome under the right of self-defense, which is the inherent right of each State in customary international law to defend itself. This right is codified in Article 51 of the U.N. Charter. Article 51 states that nothing in the Charter shall impair the inherent right of self-defense if an armed attack occurs against a member of the U.N. U.N. CHARTER, art. 51. There are essentially two schools of thought with respect to what actions justify a claim of self-defense in international law. The pre-U.N. Charter theory and the post-U.N. Charter theory.

The first view embodies the theory that the adoption of the U.N. Charter did not alter or restrict the inherent right of self-defense as it existed in customary international law. The State retains the power to decide when self-defense is appropriate. The scholars holding this theory argue that the words "armed attack" in Article 51 do not prevent a state from using force to meet an unlawful force which does not amount to an "armed attack." For instance, a heavy troop concentration on the border may justify "anticipatory" or "preventive" uses of force to meet and quell the attack before it actually occurs. VON GLAHN, *supra* note 52, at 131. Therefore, the use of force against a state can be justified even though there has been no armed attack. The customary international law concept of self-defense is that States may use military force in anticipation of an armed attack. See REX J. ZEDALIS, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 98 (1985). These scholars also argue that Article 51 of the U.N. Charter should not be interpreted to restrict the inherent right of self-defense. Professor Phillip C. Jessup, at one time sitting as a judge on the International Court of Justice, stated that the "right of self-defense by its very nature must escape legal regulation." PHILLIP C. JESSUP, *A MODERN LAW OF NATIONS* 163 (1952), *quoted in*, ROBERT F. TURNER, *Coercive Covert Action and the Law*, 20 YALE J. INT'L L. 427, 433 (1995).

Advocates of the second school of thought argue that Article 51 has narrowed the right of self-defense, allowing force to be used only in response to direct or imminent attack. This view, also receiving much scholarly support, is consistent with Article 2(4) which outlaws the use of force against the territorial integrity of another State, and Article 2(3), which requires a "peaceful settlement of disputes." U.N. CHARTER, arts. 2(3), 2(4).

<sup>160</sup> HENKIN, *supra* note 87, at 421. The use of force against the territorial integrity of another state may therefore be legally employed, but the State concerned "will have to prove the gravity and imminence of such an attack in order to justify an action of self-defense . . . ." STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 100 (1996). Most agree today that with the existence of weapons of mass destruction and the minimum amount of time required to launch such an attack, the party claiming self-

The use of force in self-defense is an appropriate response in our hypothetical scenario. Assuming an attack is imminent, and that striking Northland will not adequately prevent it, the U.S. can justify the use of force against Passivaland in self-defense. For example, if HERCULES was supplying images of U.S. troop or weapons positions to Northland, and Northland was using the images to attack U.S. troops and weapons, the satellite and ground systems would become military objectives and lose their protection as neutral property.<sup>161</sup> Although remote sensing is considered direct support where military intelligence is provided, it could be argued that that alone it is not enough to justify self-defense, due to the lack of imminence of the attack.<sup>162</sup> There is much room for argument though as to what constitutes an imminent attack. Self-defense has been claimed in the past, whether legally or not, where imminence clearly was not a factor.<sup>163</sup> In this case it seems clear however that the U.S. would be well within its right to use force in self-defense.

### C. Military Necessity, Proportionality, Immediacy

#### 1. Military Necessity

In the analysis of the use of force in self-defense against objects that are not strictly military targets and do not belong to the enemy (i.e. the satellite and its ground components), the rules of military necessity,

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defense does not have to wait “like a sitting duck” until the attack is already in progress. *See id.*, at 149, 154.

<sup>161</sup> Protocol I defines military objective as follows:

Attacks shall be limited strictly to military objectives, . . . [M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer[ ] a definite military advantage.

Protocol I, *supra* note 101, at art. 52(2).

<sup>162</sup> *See* Space Imaging, *supra* note 48 (the company advertises several days as a quick turn around on an order).

<sup>163</sup> In 1981 Israel bombed an inactive nuclear reactor in Iraq claiming self-defense. Israel argued that Iraq was going to use the reactor to make nuclear weapons to threaten Israel. In 1985 the U.S. bombed targets in Libya claiming self-defense in response to State-sponsored attacks in Europe. The U.S. argued that Libya was responsible for bombing a nightclub in Germany which killed American servicemen and intelligence reports indicated further attacks against the U.S. were being planned. *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 159 (1996).

proportionality, and immediacy must be considered.<sup>164</sup> Under the rule of necessity, force must be the only option remaining and no peaceful means of addressing the situation may be ignored. “Force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile.”<sup>165</sup> This statement defines the parameters for the use of force in self-defense.

Obviously if all other methods have failed or are futile, the requirement of necessity in self-defense will automatically be satisfied. Necessity in the hypothetical justifies the U.S.’ use of force against the territorial integrity of Passivaland in order to quell the attack. This is due to imminence of the attack and the futility of employing other methods of thwarting the attack. The U.S. has explored all other options and they have failed or are futile. This imminent situation combined with Passivaland’s violation of their neutral status opens the door for the U.S. to use force against the satellite(s) and the ground stations.

## 2. Proportionality

A second rule in the law of self-defense, proportionality, “require[s] the military means used bear a proportional relationship to the military end pursued.”<sup>166</sup> Even in a war of self-defense, a State may use whatever legal means necessary to defeat the enemy.<sup>167</sup> Therefore illegal means or weapons, such as chemical weapons, may not be used regardless of the situation. An extreme example of a disproportionate response would be dropping a nuclear bomb on a sniper.

Protocol I states that an attack that may cause incidental loss of civilian life or damage to civilian property must not be excessive in relation to the military advantage gained.<sup>168</sup> In light of this rule, the satellite would

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<sup>164</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 202 (2d ed. 1994).

<sup>165</sup> See O. SCHACHTER, *The Right of States to Use Armed Force*, 82 MICH. L.R. 1620, 1635 (1984), cited in DINSTEIN, *supra* note 164, at 202.

<sup>166</sup> LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 40 (Peter O. Trooboff ed., 1975). See also, Article 51 through 59 of Geneva Protocol I, which relate to attacks on civilian objects, unprotected objects, and using precaution in attacks. Protocol I, *supra* note 101.

<sup>167</sup> DINSTEIN, *supra* note 164, at 231-32.

<sup>168</sup> Protocol I, *supra* note 101, at art. 51. Paragraph 5 states in part

Among others, the following types of attacks are to be considered indiscriminate:

...

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

appear to be, proportionally, the best target due to the probability of little or no collateral damage to civilians and other property.<sup>169</sup> One argument for destroying the ground stations rather than the satellite is that a satellite system may consist of a constellation of hundreds of satellites and be difficult to destroy. In choosing this option the U.S. may be forced to destroy many of satellites.<sup>170</sup> Additionally, the physical destruction of a satellite in orbit will create space debris, which may collide with other satellites possibly disabling or destroying them. This would be considered collateral damage if the satellites destroyed by the debris do not belong to the U.S., or fratricide if they belong to the U.S. Either way, this consequence must be seriously considered.

### 3. *Immediacy*

Finally, immediacy requires there be no extended length of time between the initial attack by the enemy and the action taken in self-defense.<sup>171</sup> International law leaves the exact amount of time open to interpretation. The instances of self-defense claimed by the U.S. and Israel, discussed above,<sup>172</sup> are clear examples where the State claimed the right but immediacy or the imminence of the attack did not seem to be a factor in the equation. Destroying a satellite is probably not a task that can be accomplished quickly and would therefore not prevent any attacks close at hand. If the U.S. can justify legally attacking Passivaland territory in self-defense then this would be the best option.

## VI. CONCLUSION

The commercialization of space has and will continue to create many complex legal issues. The hypothetical scenario presented in this article is just one of many situations that may occur in the future due to increasing commercialization. There are many more factors to consider which have not been mentioned or considered in this article. States may be forced to resort to old theories of law as well as to create some new ones if treaties and

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Protocol I, *supra* note 101, at art. 51(5).

<sup>169</sup> As stated earlier, this analysis does not consider the technical aspects or shortcomings of destruction of the satellite. One possible consideration is the extent to which the civilian sector depends on the use of the satellite for basic needs such as navigation or communication and what effect destruction would cause.

<sup>170</sup> Black, *supra* note 2, at 108. This would create enormous debris possibly interfering with friendly satellites.

<sup>171</sup> DINSTEIN, *supra* note 164, at 203.

<sup>172</sup> See *supra* note 163.

customary international laws do not remain current with technology. Can the U.S. legally attack commercial property located in neutral territory? Yes, under the right circumstances the U.S. is legally justified in using force against the territorial integrity of the neutral State. The crucial link to the justification for such an act is the treaties relating to outer space. These treaties impose upon States the responsibility for space activities related to their territory by registration. This responsibility will allow the U.S., or any other country, to protest to the U.N. and the neutral State, and claim that the neutral State has violated its neutral obligations through satellite support to a belligerent. The violated State is then within its right, out of necessity if the neutral State does not take action, to deny the belligerent's use of the satellite by force that is necessary and proportional.

Determining when a nation has violated its neutral status comes down to determining the extent of its knowledge of the support to a belligerent, its ability and willingness to deny that support, and the extent of the measures it must take to deny the support. Practically speaking, a neutral State will consider other factors as well deciding whether to stop the support. These include potential lost profits, and the short and long term consequences of stopping or not stopping the support.

States are ultimately responsible for all national activities in space. This is a vital tool for controlling commercial companies who operate in space. This tool may dissipate as more and more commercial satellites are launched and controlled by international consortiums consisting of companies from multiple countries. It may also get to the point where we cannot determine the space assets from which the support is coming from or which State is responsible.

Our hypothetical scenario assumes some facts that may or may not be realistic at present, and it does not consider many other factors. For instance, does the U.S. now have the ability to accurately determine who or where a case of satellite support came from in every instance? Would there ever be a situation where the satellite support could not be negated by merely attacking the adversary using it rather than the source providing the support? Many satellite support companies have ground support centers all over the world that can access information from the satellites. Given this, could we totally prevent the support by destroying some ground components? Additionally, commercial entity providing satellite support to our adversary may also be providing support to us. And finally, would the analysis be the same in a peacetime scenario in which we need to negate the neutral commercial satellite support to rogue elements of a peace process or to terrorists?

These are just a few of the many issues that will arise and become more complex as technology and the uses of outer space develop. Unless international law and technology are correlated with each other, which seems quite unlikely, the law will continue trailing behind. The discussion of the

selected theories has hopefully laid a foundation for further analysis of the international law applicable to space and the operation of satellites.

# International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice

MAJOR CHRISTOPHER M. SUPERNOR\*

## I. INTRODUCTION

International law is often criticized for lacking any formal means of enforcement.<sup>1</sup> International criminal tribunals are not supported by an international police force. Many of the individuals indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) remain at large,<sup>2</sup> and the Yugoslavian government has systematically refused to arrest

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\* Major Supernor (B.S., Rensselaer Polytechnic Institute, J.D., Florida State University School of Law, LL.M., The Judge Advocate General's School, U.S. Army) is a country program manager for the Defense Institute of International Legal Studies, Newport Naval Station, Rhode Island.

<sup>1</sup> "The weakest link in all of international law is the lack of effective enforcement mechanisms." Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 408 (Summer 1998). International criminal law is weakened by a lack of enforceability. FARHAD MALEKIAN, *THE MONOPOLIZATION OF INTERNATIONAL CRIMINAL LAW* 56 (1995). International criminal law provides only a mirage of justice since international tribunals lack any coercive power to bring an accused before the court. Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 364-65 (2000). International criminal law has failed and it will continue to fail without a means of enforcement. *Id.* at 393.

<sup>2</sup> The ICTY indicted 98 individuals. *International Criminal Tribunal for the Former Yugoslavia: Key Figures*, available at <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Mar. 1, 2001) (copy on file with the *Air Force Law Review*). Nine of the indicted individuals have died and charges have been dropped against 18 others. *Id.* Proceedings are ongoing for 38 of the indicted individuals. *Id.* Twenty-seven of the indicted individuals remain at large. The three principal architects of the Bosnian genocide, ex-Yugoslavian President Slobodan Milosevic, Dr. Radovan Karadzic, and General Ratko Mladic, are among the most notable fugitives in Yugoslavia. Radovan Karadzic, an indictee of the ICTY who is charged with responsibility for killing up to 6,000 Muslims at Srebrenica in 1995, lives in a closely guarded stronghold outside Pale in the Serb Republic. Brian James, *Out of Sight, But Not Out of Mind; Night & Day*, MAIL ON SUNDAY (London), Aug. 10, 1997, at 10. Mr. Richard Holbrooke, the United States Ambassador to the United Nations, explained that "NATO troops have been reluctant to arrest Karadzic, who travels with 20 to 80 bodyguards." David J. Lynch, *Bosnian Serb Leader Faces Capture as his Power Fades*, USA TODAY, Nov. 8, 2000, at 22 A. For several years, the residence of another indictee, General Ratko Mladic, the former commander of the Bosnian Serbs, "the Butcher of the Balkans", was also a matter of public knowledge. James, *supra*, at 10. On Mar. 25, 2000, Mladic attended a soccer match in Belgrade with an escort of bodyguards, the Yugoslavian foreign minister, army chief of staff, and the Serbian Prime Minister. *War Criminal Watch*, COALITION FOR INTERNATIONAL JUSTICE, <http://www.wcw.org> (last visited Mar. 9, 2001) (copy on file with the *Air Force Law*

indicted war criminals.<sup>3</sup> Even the October 2000 popular uprising that ousted Slobodan Milosevic from Yugoslavia's presidency has done little to improve Yugoslavia's level of cooperation with the ICTY. Mr. Vojislav Kostunica, Yugoslavia's newly elected president, has not permitted Serbs to be extradited to The Hague.<sup>4</sup> Mr. Kostunica has stated that a Yugoslavian national truth commission should address Yugoslav war crimes.<sup>5</sup> The departing president of the ICTY, Gabrielle McDonald, has criticized the United Nations Security Council (UNSC) for "doing too little to help bring indicted people to justice."<sup>6</sup>

Without an international police force, who can the international community rely on to hunt war criminals and bring them to justice? In the United States, domestic bounty hunters have proven more effective at ensuring an alleged criminal's presence at trial than State law enforcement has.<sup>7</sup> Can international bounty hunters prove an efficient means to bring war criminals to justice?<sup>8</sup>

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*Review*). Only recently has General Mladic gone into hiding. *After Years in Open, War-Crimes Suspect Drops out of Sight*, CHICAGO TRIBUNE, Feb. 22, 2001, News, at 20.

<sup>3</sup> *Kosovo War Criminals May Go Free*, HUMAN RIGHTS WATCH, <http://www.hrw.org/hrw/press/1999/feb/kos0209.htm> (Feb. 9, 1999) (copy on file with the *Air Force Law Review*); YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 201 (1999); Brown, *supra* note 1, at 414. ("Most of the indictees still at large are apparently living free in the areas where the local authorities have failed to comply with their legal obligation to arrest those indicted.")

<sup>4</sup> David Buchan, *Downfall of Milosevic*, THE FINANCIAL TIMES (LONDON), Oct. 7, 2000, World News, at 6. Western governments continue to pressure Yugoslavia's new government to fully cooperate with the ICTY. On Oct. 25, 2000, the United States Congress approved a \$100 million aid package to Serbia but conditioned the aid on the new Yugoslav government's cooperation on arresting and transferring those indicted by the ICTY for war crimes. Steven A. Holmes, *\$100 Million Voted for Serbia, But with War-Crimes Strings*, N.Y. TIMES, Oct. 26, 2000, at A13. Recently, Yugoslavia stated its intent to try Slobodan Milosevic in Yugoslavia for abuse of power and theft of national property rather than turn Milosevic to the ICTY to face war crime charges. Alan Sipress, *Yugoslavia Vows Milosevic's Arrest This Month*, WASH. POST, Mar. 7, 2001, at 24.

<sup>5</sup> See Diane F. Orentlicher, *A Look at . . . War Crimes and Punishment*, WASH. POST, Nov. 26, 2000, Outlook, at B3.

<sup>6</sup> Terence Neilan, *World Briefing: United Nations: Council Criticized on War Crimes*, N.Y. TIMES, Nov. 4, 1999, at A6. Although States are bound to follow orders from the ICTY, the Appeals Chamber of the ICTY has held that the ICTY is not vested with any authority to issue sanctions against a recalcitrant State. *Prosecutor v. Blaskic*, No. IT-95-14-AR108 bis, para. 33 (I.C.T.Y. Oct. 29, 1997) (judgment on request for review of trial decision of July 18, 1997), available at [www.un.org/icty](http://www.un.org/icty). The UNSC is the only international organ that can enforce the authority of an international tribunal. However, the UNSC has not taken any affirmative action in response to Yugoslavia's and the Bosnian-Serb Republika Srpska's refusal to render its citizens to the ICTY. Brown, *supra* note 1, at 410.

<sup>7</sup> See *infra* note 98 and accompanying text.

<sup>8</sup> This paper focuses on the feasibility of using international bounty hunters to apprehend war criminals. International bounty hunters could also be used to pursue individuals whose crimes did not occur in the context of an armed conflict. International bounty hunters could also be tasked with the responsibility to pursue individuals wanted for piracy, terrorism, drug trafficking, or violations of human rights. For example, international bounty hunters might

Shortly after Ms. Carla del Ponte, the Chief United Nations (UN) prosecutor at the ICTY, called for “creative ways” to arrest fugitive war criminals, on April 21, 2000, in Smederevo, Serbia, Mr. Dragan Nikolic, an indicted war criminal, was handed over to American Stabilization Force soldiers by bounty hunters.<sup>9</sup> The bounty hunters smuggled Mr. Nikolic out of Serbia and handed him over to NATO troops in Bosnia who transferred him to the ICTY in the Netherlands.<sup>10</sup> During an April 28, 2000 court appearance, Mr. Nikolic pleaded not guilty to eighty separate war crimes charges and requested that the ICTY dismiss his case on the grounds that his arrest was illegal.<sup>11</sup> On May 17, 2000, Serbian police arrested eight persons in Serbia who were allegedly involved in kidnapping Mr. Nikolic.<sup>12</sup> Serbian police

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prove useful to capture Osama Bin Laden. *See Infra* note 121 and accompanying text. However, before advocating such an expansive role for international bounty hunters, one must recognize that the use of international bounty hunters is an erosion of state sovereignty by the international community. Nations jealously guard their rights as a sovereign. The author believes that any curtailment of sovereign rights to permit the use of international bounty hunters must be approached cautiously and in a narrowly defined context. The effectiveness of international bounty hunters should first be verified before establishing an expansive use of international bounty hunters. To test the effectiveness of international bounty hunters, the UNSC should permit the ICTY to issue international arrest warrants that bounty hunters could seek to enforce. *See Infra* pp. 35-37. Only if the use of international bounty hunters proves itself in this narrowly defined context should a more expansive use of international bounty hunters be explored.

<sup>9</sup> Zeljko Cvijanovic & Vesna Peric Zimonjic, *Belgrade Crackdown: “Bounty Hunters Strike Inside Serbia to Seize War Crimes Suspects,”* THE INDEPENDENT (LONDON), May 18, 2000, at 14.

<sup>10</sup> *Id.* Two men posing as police officers forced Mr. Nikolic into the trunk of a car where he was driven to the border of Bosnia. *Id.* After crossing the Drina river by boat, Mr. Nikolic was handed over to American soldiers. *Id.*

<sup>11</sup> *Id.* Mr. Stevan Todorovic, another indicted war criminal who was captured by bounty hunters has also asked the court to dismiss his case because of the illegality of his arrest. *See* Maggie O’Kane, *Tougher Rules for Arrest of Suspects,* THE GUARDIAN (LONDON), Oct. 20, 2000, Foreign Pages, at 18. On Oct. 20, 2000, judges at the ICTY ordered NATO to reveal details of Mr. Todorovic’s apprehension. *Id.* On Nov. 20, 2000, Canada, Denmark, Germany, Italy, Netherlands, NATO, Norway, United Kingdom, and the United States appealed the decision of the trial chamber. *ICTY–Status of Cases as of 11 April 2001,* <http://www.un.org/itcy/glance/casestatus.htm> (Todorovic Case) (copy on file with the *Air Force Law Review*). However, before this appeal was decided, Todorovic negotiated a plea agreement whereby he would plead guilty to count one of his 27 count indictment and he would withdraw all pending motions related to the circumstances of his arrest. *Id.* The prosecution withdraw the remaining 26 counts and will recommend to the court that Todorovic be sentenced to not less than five years of imprisonment and not more than 12 years of imprisonment. *Id.* Count one of Todorovic’s indictment accuses him of committing a crime against humanity by persecuting individuals on political, racial, and religious grounds. *Id.* NATO and its member states may have pressured the prosecution to obtain a plea agreement with Todorovic to avoid having to disclose the details of Todorovic’s capture by bounty hunters.

<sup>12</sup> Cvijanovic & Zimonjic, *supra* note 9. On Nov. 24, 2000, a Serbian court in Smederevo sentenced seven of these persons to serve between two-to-six years of imprisonment for

claim that unspecified “foreign services” paid £31,000 (British pounds) for the kidnapping.<sup>13</sup>

This paper discusses the feasibility and practicality of utilizing international bounty hunters to deliver war criminals to justice. Part I of this paper provides a brief overview of some of the available sources of international law that establish war crimes. Part II discusses the international community’s growing interest in prosecuting war criminals and the inadequacy of relying on extradition treaties, military forces, and UNSC enforcement sanctions to capture fugitive war criminals. Part III briefly considers the viability of utilizing an international police force to capture war criminals. Part IV analyzes the effectiveness of domestic bounty hunters. Part V discusses the available legal alternatives for establishing international bounty hunters. Part VI discusses whether a bounty hunter’s forced abduction of an indicted war criminal violates the UN Charter. Part VII explores the practical applications of how an international bounty should function.

## II. WAR CRIMES

International and domestic courts rely on treaties applicable to armed conflicts and customary international law<sup>14</sup> when defining war crimes. A war crime is defined as any violation of international law governing war.<sup>15</sup> However, only grave breaches of the law involving the mistreatment of protected individuals are typically prosecuted.<sup>16</sup>

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abducting Nikolic. *Seven Charged with Abducting War Crimes Go on Trial*, AGENCE FRANCE PRESSE, Dec. 5, 2000, at International News.

<sup>13</sup> Cvijanovic & Zimonjic, *supra* note 9. Thirty-one thousand British pounds is about forty-five thousand U.S. dollars.

<sup>14</sup> Customary international law results when States observe a constant practice out of a sense of legal obligation. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987). Article 38(1) of the Statute of the International Court of Justice defines customary international law as the general practice of States accepted as law. STAT. OF THE INT’L CT. OF J., June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945).

<sup>15</sup> “Every violation of the law of war is a war crime.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) para. 499 [hereinafter AR 27-10]. However, some international law scholars contend that technical violations of the law of war do not constitute war crimes. See Yoram Dinstein, *The Universality Principle and War Crimes*, in 71 INTERNATIONAL LAW STUDIES, THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM, 17, 21 (Michael Schmitt & Leslie Green, eds., 1998). Professor Dinstein believes that only serious violations of the law of war such as the grave breaches of the Geneva Conventions constitute war crimes. *Id.*

<sup>16</sup> Harold Wayne Elliott, *The Trial and Punishment of War Criminals: Neglected Tools in “New World Order?”* 82 (1998) (unpublished Doctor of Juridical Science dissertation) (on file with the University of Virginia Law Library).

The four 1949 Geneva Conventions<sup>17</sup> protect persons who are not taking an active part in an armed conflict. Protected persons include the sick and wounded, prisoners of war and civilians under the control of an occupying force. Murder, torture, inhuman treatment and willfully causing great suffering or serious injury to a protected person in the course of an international armed conflict are grave breaches to the Geneva Conventions and constitute war crimes.<sup>18</sup> The Additional Protocols of 1977 extended these protections to all civilians.<sup>19</sup> Common Article 3 to the 1949 Geneva Conventions also provides basic fundamental protections to all persons during all armed conflicts, both international and internal. Common Article 3 prohibits murder, torture, the taking of hostages, outrages upon personal dignity, and the carrying out of executions without the judgment of a regularly constituted court.<sup>20</sup>

The Geneva Conventions focus upon the protection of persons during armed conflict, while the Hague Conventions<sup>21</sup> focus on the means and methods of warfare.<sup>22</sup> The 1907 Hague Convention concerning the laws and customs of land warfare prohibits parties to an international armed conflict from using poisoned weapons, employing arms that are calculated to cause great suffering, and improperly using a flag of truce.<sup>23</sup> The 1907 Hague Convention also requires combatants to protect, as far as possible, buildings of historical or cultural significance, and hospitals.<sup>24</sup>

On December 9, 1948, the United Nations general assembly approved a convention,<sup>25</sup> which established that genocide, whether committed in war or

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<sup>17</sup> There were four Geneva Conventions of 1949: The 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 [hereinafter GWS]; The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS at Sea]; The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; The 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 [hereinafter GC].

<sup>18</sup> See GWS, *supra* note 17, art. 49, 50; GWS at Sea, *supra* note 17, art. 50, 51; GPW, *supra* note 17, art. 129-30; GC, *supra* note 17, art. 146.

<sup>19</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Conflicts, Dec. 12, 1977, 11 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Conflicts, Dec. 12, 1977, 11 U.N.T.S. 3, 16 I.L.M. 1442.

<sup>20</sup> See GWS, *supra* note 17, art. 3; GWS at Sea, *supra* note 17, art. 3; GPW, *supra* note 17, art. 3; GC, *supra* note 17, art. 3.

<sup>21</sup> Of the thirteen 1907 Hague Conventions, the most important for land operations is the fourth. Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention No. IV].

<sup>22</sup> See, e.g., BEIGBEDER, *supra* note 3, at 9.

<sup>23</sup> Hague Convention No. IV, *supra* note 21, at art. 23.

<sup>24</sup> Hague Convention No. IV, *supra* note 21, at art. 27.

<sup>25</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

peace, is a crime under international law.<sup>26</sup> The convention defined genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.<sup>27</sup>

The four Geneva Conventions, the Hague Conventions, and the Genocide Convention have all matured into customary international law.<sup>28</sup> Accordingly, all States are legally bound by these conventions regardless of whether or not a State is a party to any of the conventions. Individuals who violate any of these conventions during an armed conflict may be prosecuted as a war criminal.<sup>29</sup> Additionally, under customary international law, a commander may be held accountable for his subordinates' war crimes if he knew or should have known that his subordinates were involved in war crimes and he did not take reasonable measures to prevent the crimes.<sup>30</sup> Domestic criminal courts generally rely on the above sources of international law for the prosecution of a war crime.

The recent international war crimes tribunals for the Former Yugoslavia and Rwanda were each provided with a statute drafted by the UNSC that codified the specific war crimes that each court could prosecute.<sup>31</sup>

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<sup>26</sup> BEIGBEDER, *supra* note 3, at 12-13; Major Marsha Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 60-61 (1999).

<sup>27</sup> Genocide Convention, *supra* note 25, art. II.

<sup>28</sup> See, e.g., Mills, *supra* note 26, at 50.

<sup>29</sup> The sources of international law briefly discussed in this article are not the only available sources that establish war crimes. Other international treaties could also establish individual criminal responsibility for wrongful acts committed during an armed conflict. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103d Cong. (1993), reprinted in 32 I.L.M. 800 (1993) (entered into force Apr. 29, 1997). The Nuremberg Charter established criminal liability for waging a war of aggression (crimes against peace), for violations of the laws and customs of war, and for major inhumane acts committed against a civilian population before or during an armed conflict (crimes against humanity). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex containing the Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 154, 82 U.N.T.S. 279. This article provides the most commonly relied upon international law source that establishes war crimes.

<sup>30</sup> AR 27-10, *supra* note 15, para. 501; Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL L. REV. 155 (June 2000); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (July 1999); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL L. REV. 1 (1973); Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 71-79 (Fall 1996) (discussing the command responsibility doctrine utilized in the trial of General Yamashita); Trial of General Tomoyuki Yamashita (U.S. Milit. Comm'n, Manila, Oct. 8-Dec. 7, 1945), IV LAW REP. TRIALS WAR CRIM. 1, 4 (U.N. War Crimes Comm'n 1948). Protocol I imposes criminal liability upon a superior when he knew or should have known that his subordinates were committing war crimes and he failed to take all feasible measures within his power to prevent it. Protocol I, *supra* note 19, art 86.

<sup>31</sup> Statute of the International Tribunal for the Former Yugoslavia, adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827

The statute for the ICTY provides jurisdiction for grave breaches of the 1949 Geneva Conventions, violations of the law or customs of war, genocide, and crimes against humanity.<sup>32</sup> Under the ICTY statute, crimes against humanity include murder, enslavement, torture, rape, and the deportation and persecution of any civilian population on racial, political or religious grounds.<sup>33</sup> The statute for the International Criminal Tribunal for Rwanda (ICTR) provides jurisdiction for breaches of common Article 3 to the 1949 Geneva Conventions, violations of the 1977 Additional Protocol II, and crimes against humanity.<sup>34</sup> The list of crimes against humanity for the ICTR and the ICTY are identical.<sup>35</sup> However, the statute for the ICTY requires a nexus to the armed conflict before there can be a crime against humanity while the statute to the ICTR only requires a crime against humanity to be committed as part of a widespread or systematic attack against any civilian population.<sup>36</sup>

On July 17, 1998, at a UN Diplomatic Conference in Rome, 120 States voted to establish a permanent International Criminal Court (ICC).<sup>37</sup> The ICC will come into force when 60 States or more have ratified or accepted the court's statute.<sup>38</sup> The ICC statute provides jurisdiction for the ICC to prosecute genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>39</sup>

### III. JUSTIFYING THE NEED FOR AN INTERNATIONAL BOUNTY HUNTER

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(1993), *reprinted in* 32 I.L.M. 1159 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 [hereinafter ICTR Statute].

<sup>32</sup> BEIGBEDER, *supra* note 3, at 152.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 175. The differences between the statutes for the ICTY and ICTR can be accounted for by the differences between the armed conflict in Yugoslavia and Rwanda. The conflict in Yugoslavia had both an internal and international aspect but the conflict in Rwanda was strictly internal. *Id.* at 174-75.

<sup>35</sup> *Id.* at 175.

<sup>36</sup> *See id.*

<sup>37</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute on the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF/189/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

<sup>38</sup> *Rome Statute of the International Criminal Court: Ratification Status*, <http://www.un.org/law/icc/statute/status.htm> (last modified Feb. 12, 2001). One hundred and twenty-nine nations have signed and twenty-five nations have ratified the court's statute. *Id.* On June 9, 2000, France, a permanent member of the United Nations Security Council, ratified the court's statute. *Id.*

<sup>39</sup> ICC Statute, *supra* note 37. Although, the ICC will not exercise jurisdiction over the crime of aggression until a provision defining this crime is adopted. Under articles 5, 12, and 123, this provision could not be adopted until seven years after the ICC statute has taken effect. *Id.*

The international community's interest in the prosecution of war criminals has never been greater. For the first time since World War II, international prosecutions for war criminals are not just a theoretical possibility. The international criminal tribunals for the Former Yugoslavia and Rwanda demonstrate the UNSC's ability and willingness to create *ad hoc* tribunals for specific armed conflicts. Recent proposals have discussed the possibility of creating additional *ad hoc* tribunals to prosecute war crimes that were committed in Kosovo, Sierra Leone, and Cambodia.<sup>40</sup> The ICC is evidence of the growing support for a permanent standing international court to prosecute war crimes. States have also demonstrated a renewed interest in using their domestic courts to prosecute war criminals.<sup>41</sup>

Universal jurisdiction under customary international law gives States the right to use their domestic courts to prosecute war criminals.<sup>42</sup> Customary international law obligates States to search for, prosecute, or extradite war criminals.<sup>43</sup> The 1949 Geneva Conventions obligated States to enact domestic legislation to enable the State to fulfill its obligation to prosecute war

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<sup>40</sup> Carlotta Gall, *U.N. Mission in Kosovo proposes to Set Up a War Crimes Court*, N.Y. TIMES, June 23, 2000, at A3. United Nations Press Release, SC/6910, *Council Asks Secretary-General, Sierra Leone to Negotiate Agreement for Creation of Independent Special Court*, Aug. 14, 2000, available at [www.un.org](http://www.un.org) (copy on file with the *Air Force Law Review*); United Nations Press Release, SG/SM/7481, *United Nations Legal Counsel Completes Formal Discussions with Cambodian Government on Establishment of Tribunal to Try Former Khmer Rouge Leaders*, Jul. 6, 2000, available at <http://www.un.org/News/Press/docs/2000/20000706.sgsm7481.doc.html>, (copy on file with the *Air Force Law Review*).

<sup>41</sup> See *Infra* notes 47 and 48 and accompanying text.

<sup>42</sup> M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 356-60 (3d ed. 1996). Universal jurisdiction under customary international law permits States to enact legislation that grants its domestic criminal courts jurisdiction to prosecute war criminals. BEIGBEDER, *supra* note 3, at 133. Universal jurisdiction permits a State to prosecute a war criminal irrespective of the war criminal's nationality or place of the commission of the offense, or of any link between the prosecuting State and the war criminal. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 511-13 (1992). The rationale for universal jurisdiction is that there are certain offenses, which by their very nature, affect the interests of all States. *Id.* at 512-13.

United States federal courts have recognized universal jurisdiction over war crimes. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). The American Law Institute's Restatement also states that war crimes are subject to universal jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1987). In 1996, a Spanish judge ruled that crimes against humanity enjoy universal jurisdiction and started a criminal investigation into the torture and murder of Spanish citizens in Argentina. BEIGBEDER, *supra* note 3, at 133. In 1997, a German court utilized the doctrine of universal jurisdiction to convict a Bosnian Serb for taking part in a massacre of 14 Muslims in Bosnia. *Id.* at 134. However, French courts have declined to accept universal jurisdiction in a number of cases. *Id.*

<sup>43</sup> Mills, *supra* note 26, at 48 & n.6.

criminals.<sup>44</sup> After the 1949 Geneva Conventions, the United States relied on Articles 18 and 21 of the Uniform Code of Military Justice (UCMJ) to fulfill its obligation under international law to have a domestic forum for the prosecution of war criminals. Article 18 of the UCMJ permits the United States military to try by general courts-martial its own military member or any prisoner of war for violations of the law of war.<sup>45</sup> Article 21 of the UCMJ permits the United States military to try any individual at a military commission for violations of the law of war.<sup>46</sup> Recently, in 1996, the United States enacted the War Crimes Act to expand federal court jurisdiction over war crimes to include the prosecution of violations of common Article 3 to the 1949 Geneva Conventions provided that a victim or the offender is a United States citizen.<sup>47</sup>

In 1999, Spain relied on universal jurisdiction to request the extradition of General Pinochet from the United Kingdom for alleged human rights violations committed in Chile.<sup>48</sup> Although Spain's extradition request was denied based upon Britain's determination that the 84-year-old Pinochet was mentally unfit to stand trial, this case emphasizes the continuing validity of universal jurisdiction.<sup>49</sup> The Pinochet case also established the precedent that there is no immunity for a sitting head of State who commits crimes against humanity.<sup>50</sup>

The continuing efforts of States to use their domestic courts to prosecute war criminals and the recent creation of international war crime tribunals will lead to increasing numbers of indicted war criminals. However, attempts by domestic or international courts to prosecute war criminals are often frustrated because there is not an effective means to obtain custody over alleged war criminals.

States are obligated under the 1949 Geneva Conventions to try individuals who commit or order grave breaches before their own criminal courts or to hand over such persons for trial in another State.<sup>51</sup> The duty to

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<sup>44</sup> See GWS, *supra* note 17, art. 49; GWS at Sea, *supra* note 17, art. 50; GPW, *supra* note 17, art. 129; GC, *supra* note 17, art. 146; BEIGBEDER, *supra* note 3, at 8.

<sup>45</sup> UCMJ art. 18.

<sup>46</sup> UCMJ art. 21.

<sup>47</sup> War Crimes Act of 1996, 18 U.S.C.A. § 2441(a) (1996).

<sup>48</sup> *The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity*, AMNESTY INTERNATIONAL ON-LINE, <http://www.web.amnesty.org/ai.nsf/index/EUR450211998> (visited Mar. 9, 2001) (Amnesty International's Spanish language 1998 third party position paper on General Pinochet's extradition case before the English House of Lords).

<sup>49</sup> See Charles Trueheart, *Rights Activists Cheer Pinochet Precedent*, WASH. POST, Jan. 14, 2000, at A22.

<sup>50</sup> *Id.*

<sup>51</sup> See GWS, *supra* note 17, art. 49; GWS at Sea, *supra* note 17, art. 50; GPW, *supra* note 17, art. 129; GC, *supra* note 17, art. 146; BEIGBEDER, *supra* note 3, at 8.

extradite also exists in Additional Protocol I and the Genocide Convention.<sup>52</sup> Additionally, the UN General Assembly has repeatedly asserted that a State's refusal to cooperate in the arrest, extradition, trial, and punishment of persons accused of war crimes is contrary to the UN Charter.<sup>53</sup> Both the ICTY statute and the ICTR statute require States to cooperate with the international criminal tribunals by arresting and extraditing persons accused of war crimes.<sup>54</sup>

While States are obligated under international law to cooperate with any efforts to prosecute war criminals, the international community lacks effective enforcement measures for noncompliance.<sup>55</sup> The international community is overly dependent upon each State's willingness to comply with its obligations under international law. The use of extradition treaties, military forces, and enforcement sanctions by the United Nation Security Council have each proven to be an ineffective means of obtaining custody of an international fugitive.<sup>56</sup>

If a State is seeking custody of an individual present in another State, that State may seek extradition of that individual pursuant to an existing extradition treaty between those two States. However, not every State chooses to enter into extradition treaties.<sup>57</sup> Even when there is an extradition treaty between two States, the treaty may only provide that extradition is discretionary.<sup>58</sup> For example, the extradition treaty between the United States and Mexico does not require either State to extradite its citizens.<sup>59</sup> The United States does not consider its own extradition treaties as creating a *per se* obligation to extradite. The United States' view is that the State's right to

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<sup>52</sup> Protocol I, *supra* note 19, art. 88; Genocide Convention, *supra* note 25, art. VII. Professor Bassiouni has compiled an extensive list of international criminal law conventions that establish a duty to extradite. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 788-800 (1992).

<sup>53</sup> *Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973); G.A. Res. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971); G.A. Res. 95(I), 1 U.N. GAOR Supp. (No. 2) at 188, U.N. Doc. A/64/Add. 1 (1947); *Extradition and Punishment of War Criminals*, G.A. Res. 3, 1 U.N. GAOR at 9-10, U.N. Doc. A/OR/1-1/R (1946).

<sup>54</sup> ICTY Statute, *supra* note 31, art. 29; ICTR Statute, *supra* note 31, art. 28.

<sup>55</sup> The efforts of the ICTY have been severely stagnated by its inability to coerce individual states to secure the arrest and detention of high-profile defendants. Penrose, *supra* note 1, at 353.

<sup>56</sup> See *infra* notes 64 through 67 and accompanying text.

<sup>57</sup> During the time that there were 185 member States to the United Nations, the United States had only entered into approximately 100 separate extradition treaties. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 16-17 (3d ed. 1996).

<sup>58</sup> Most extradition treaties permit one or both States discretion to refuse extradition. Brigitte Belton Homrig, *Abduction as an Alternative to Extradition: A Dangerous Method to Obtain Jurisdiction over Criminal Defendants*, 28 WAKE FOREST L. REV. 671, 676 (1993).

<sup>59</sup> Extradition Treaty Between the United States of America and the Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

protect its sovereignty and its right to grant asylum overrides a State's treaty obligation to extradite.<sup>60</sup>

Where no treaty exists, a State may seek extradition based upon the customary international law principles of reciprocity and comity.<sup>61</sup> Reciprocity is an exchange of fugitives between States. Under the principle of reciprocity, a State extradites an individual to a government requesting extradition in exchange for that government's promise to extradite an individual from their territory.<sup>62</sup> The principle of comity is when a State chooses to extradite an individual as an act of courtesy or good will.<sup>63</sup>

Extradition requests, whether based upon treaties or customary international law, are often cumbersome and ineffective. Nations are often unable or unwilling to arrest and extradite indicted criminals. The existence of non-cooperative States effectively creates safe havens for international

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<sup>60</sup> BASSIOUNI, *supra* note 57, at 108. The United States Secretary of State may exercise executive discretion to override a duty to extradite under treaty obligations. *Id.*

<sup>61</sup> *Id.* at 5-7; Argiro Kosmetatos, *U.S.-Mexican Extradition Policy: Were the Predictions Right About Alvarez?*, 22 FORDHAM INT'L L.J. 1064, 1068 (March 1999).

Suspected war criminals have been extradited despite the absence of an extradition treaty. On Dec. 11, 1974, the Supreme Court of Bolivia denied France's request to extradite, Klaus Barbie, a Nazi war criminal known as the "The Lyons butcher," on the basis that there was no extradition treaty between France and Bolivia. Jean-Olivier Viout, *The Klaus Barbie Trial and Crimes Against Humanity*, 3 HOFSTRA L. & POL'Y SYMP. 155, 156-57 (1999). However, as a result of a change in the Bolivian government, on Feb. 6, 1986, Barbie was summarily expelled from Bolivia and flown to the French territory of Guyana where he was arrested by French authorities. *Id.* at 161-62. The French courts disregarded Barbie's contention that he should be released because his custody was obtained by an illegal extradition. *Id.*

In March 2000, Secretary of State Madeleine Albright authorized the extradition of Pastor Ntakirutima, a Rwandan genocide suspect, to the ICTR despite the absence of an extradition treaty with Rwanda. See Betsy Pisik, *Rwanda Tribunal Victory*, WASH. TIMES, Mar. 6, 2000, at A12. Although the United States does not have an extradition treaty with Rwanda, in 1995, President Clinton entered into an executive agreement with the ICTR, which promised that the United States would agree to surrender persons in its territory that were charged or convicted by the tribunal. Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Jan. 24, 1995, U.S.-ICTR, 1996 WL 165484; *Ntakirutima v. Reno*, 184 F.3d 419, 422 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 977 (2000). To implement this executive agreement, in 1996, Congress enacted legislation that provided that federal extradition statutes apply to the surrender of persons to the ICTR. National Defense Authorization Act, Pub. L. 104-106, § 1342, 110 Stat. 486 (1996). The United States Court of Appeals for the Fifth Circuit rejected Ntakirutima's arguments that the Constitution of the United States requires that an extradition must occur pursuant to a treaty. *Ntakirutima*, 184 F.3d at 424-27. A majority of the Court held that either a federal statute or a treaty may confer the power to extradite. *Id.*

<sup>62</sup> Kosmetatos, *supra* note 61, at 1069 n.26.

<sup>63</sup> *Id.* at 1069 n.27.

fugitives.<sup>64</sup> The best evidence of the failings of extradition requests is the frequent examples of State abductions and the tolerance of these abductions by domestic courts. The abduction of an individual by State agents within the jurisdiction of another State without its consent violates the sovereignty and territorial integrity of that State.<sup>65</sup> Furthermore, a State-sponsored abduction violates the UN Charter, which prohibits a State from using force against another State except in self-defense.<sup>66</sup> Out of frustration, States have repeatedly resorted to abducting an alleged criminal in violation of international law as the only available means to obtain custody.<sup>67</sup>

On May 11, 1960, "Israeli agents abducted Adolf Eichmann, a Nazi war criminal infamous for his role in Hitler's "final solution," from Argentina and flew him to Israel.<sup>68</sup> In February 1963, Argoud, a leader of a military revolt against President DeGaulle was kidnapped from Munich, West Germany.<sup>69</sup> In 1964, Egyptian agents attempted to kidnap Mordecai Luk, an alleged double agent for Egypt and Israel, by shipping him in a trunk to Egypt.<sup>70</sup>

"As a long-standing practice, U.S. law enforcement agents occasionally engaged in state-sponsored abductions in lieu of extradition as a more expedient means of arresting fugitive offenders in foreign jurisdictions."<sup>71</sup> On June 21, 1989, the United States Department of Justice expressed its opinion that the President has constitutional authority to direct the Federal Bureau of Investigation to abduct a fugitive from a foreign State even if those actions

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<sup>64</sup> According to estimates of Nazi hunters from the Anti-Defamation League and the World Jewish Congress, between as many as 40,000 and 50,000 Nazis sought refuge in Latin America after World War II. CHARLES ASHMAN & ROBERT J. WAGMAN, *THE NAZI HUNTERS* 303 (1988).

<sup>65</sup> BASSIOUNI, *supra* note 57, at 219. State abduction violates the domestic law where the abduction occurs and international law. I. A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 72 (1971).

<sup>66</sup> U.N. CHARTER art. 2, para. 4. The United Nations Security Council ordered Israel to make reparations to Argentina for abducting a Nazi war criminal, Eichmann, from Buenos Aires. U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960).

<sup>67</sup> Despite the widespread existence of extradition treaties, international abduction has "occurred fairly consistently worldwide throughout the last 160 years." Jonathan A. Gluck, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 DUKE L.J. 612, 613 (Dec. 1994).

<sup>68</sup> Homrig, *supra* note 58, at 698. Israel also allegedly considered kidnapping Alois Brunner, another Nazi war criminal, from Syria but ruled against it because political matters in that part of the world made it impractical to risk the negative reaction of another Eichmann-type of raid. ASHMAN & WAGMAN, *supra* note 64, at 27.

<sup>69</sup> BASSIOUNI, *supra* note 59, at 220 n.9.

<sup>70</sup> *Id.* at 221 n.11.

<sup>71</sup> Kosmetatos, *supra* note 61, at 1064. In recent years, United States authorities have engaged in dozens of kidnappings of foreign suspects wanted for drug-related offenses. Stephen J. Hedges, et al., *Kidnapping Drug Lords*, U.S. NEWS & WORLD REP., May 14, 1990, at 28 ("Kidnapping is an attractive law-enforcement tool because it avoids lengthy extraditions and official corruption that can shield and even free suspects.").

violate international law.<sup>72</sup> In 1989, United States military forces abducted General Manuel Noriega from Panama to face United States drug-dealing charges.<sup>73</sup> United States DEA agents offered former Mexican police officers a \$50,000 reward to abduct Dr. Humberto Alvarez-Machain who was wanted by United States law enforcement for helping drug lords torture a DEA agent.<sup>74</sup> On April 3, 1990, the former Mexican police officers abducted Dr. Machain and delivered him to the United States.<sup>75</sup> On July 15, 1993, in Nigeria, FBI agents abducted Omar Mohammed Ali Rezaq, a Palestinian who was wanted for killing one American and injuring another during the hijacking of an Egyptian airline.<sup>76</sup>

For the most part, domestic courts have tolerated State-sponsored abductions by holding that a State's illegal or irregular method in bringing a defendant to court does not divest the court of its jurisdiction over the defendant. The United States Supreme Court has held that a State-sponsored abduction in violation of international law did not deprive a federal court of criminal jurisdiction over the abducted individual.<sup>77</sup> The ICTY has not yet decided whether it will continue to maintain personal jurisdiction over an abducted individual.<sup>78</sup> Despite judicial tolerance of the practice, State sponsored abductions are not an acceptable solution for obtaining custody of war criminals. State sponsored abductions violate customary international law<sup>79</sup> and undermine world public order by encouraging the erosion of international law.<sup>80</sup>

The UNSC could use its enforcement powers to lawfully authorize a military invasion of a State to forcibly remove an indicted war criminal.<sup>81</sup> However, authorizing a large-scale military invasion to pursue one person seems counter-productive to the UNSC's mission of maintaining international

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<sup>72</sup> Gluck, *supra* note 67, at 652 n.218 (citing an internal memorandum from the U.S. Department of Justice); Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 B.U. INT'L L.J. 1 (1996) (criticizing the Department of Justice opinion).

<sup>73</sup> Homrig, *supra* note 58, at 677-78; *United States v. Noriega*, 746 F. Supp. 1506, 1511 (1990) (describing the circumstances surrounding Noriega's abduction).

<sup>74</sup> Homrig, *supra* note 58, at 685.

<sup>75</sup> Homrig, *supra* note 58, at 685.

<sup>76</sup> Kristin Berdan Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 460 (Winter 1994).

<sup>77</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Ker v. Illinois*, 119 U.S. 436 (1886); BASSIUNI, *supra* note 57, at 228 (United States courts traditionally uphold personal jurisdiction over a criminal defendant that was secured by illegal methods, including abduction by government agents.).

<sup>78</sup> See *supra* note 11, and accompanying text.

<sup>79</sup> The United States Supreme Court has determined that customary international law is binding on the United States when there is no controlling treaty, executive or legislative act, or judicial decision. *The Paquete Habana*, 175 U.S. 577 (1900).

<sup>80</sup> BASSIUNI, *supra* note 57, at 219.

<sup>81</sup> U.N. CHARTER art. 42.

peace and security since the use of a large military force to capture a protected fugitive would most likely lead to an armed conflict. In any event, even if the UNSC authorized a large-scale military invasion to hunt for a fugitive war criminal, it is doubtful that such a mission would succeed.<sup>82</sup> The use of a large-scale military invasion force is not an efficient enforcement mechanism to capture war criminals. Military forces are not trained to hunt for individual fugitives. A single individual is easy to hide, and a large-scale military invasion might only prompt the fugitive to relocate to another State.

The UNSC could limit its authorization to the use of small-scale military forces to capture an indicted war criminal. A small, clandestine military strike force might be able to successfully capture a suspected war criminal without provoking an armed conflict since a small military force could enter a State by stealth as opposed to brute force. However, it would be extremely difficult for the UNSC to craft resolutions on an *ad hoc* basis that authorize States to use military forces to pursue a suspected war criminal but also restrict this grant of authority to use of only a small-scale strike force.<sup>83</sup> Furthermore, any UNSC resolution that called upon all States to undertake a small-scale military operation to abduct an indicted war criminal would also provide an advance warning of such an operation to the fugitive. Accordingly, *ad hoc* resolutions for small-scale military operations would undermine the element of surprise that would be essential for the operation's success. If the

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<sup>82</sup> Between June 1993 and 1994, in Somali, United States military forces and other UN military forces were unable despite their best efforts to capture General Mohammed Farah Aideed, a Somali warlord. Moyiga Nduru, *Aideed's supporters vow to fight on: Death of Somali Warlord Could Trigger War*, 715 ETHNIC NEWS WATCH 12 (1996). The United States, with other UN peacekeeping forces, went into Somalia in December 1992 for humanitarian reasons. *General Aideed Obituary*, THE ECONOMIST, Aug. 10, 1996, Arts, Books and Sport, at 69. In June 1993, General Aideed's men killed 24 Pakistanis peacekeepers that were trying to close down a Somali radio station. *Id.* This incident prompted the US-led peacekeepers to focus their energies on capturing General Aideed. *Id.* In October 1993, three US helicopter gunships were brought down as they stormed a building in a failed attempt to capture General Aideed. *Id.* General Aideed's men were seen on television dragging a dead American pilot through the streets of Mogadishu. *Id.* The US withdrew its troops from Somalia in 1994, and the rest of the UN peacekeepers left in March 1995. Nduru, *supra*. In August 1996, General Aideed died of a heart attack that was related to an injury sustained following a July 24, 1996 assassination attempt by a rival Somali faction. *Id.*

<sup>83</sup> If the UNSC could craft such a resolution, it would effectively create the equivalent of state-supervised bounty hunters. Like bounty hunters, these small-scale military forces would rely on stealth and surprise to capture fugitive war criminals. Alternatively, the UNSC could adopt this article's recommendation of passing a resolution that provides private actors with immunity from domestic law for the forceful acts necessary to act as international bounty hunters. *See infra* notes 128 through 133 and accompanying text. It would be much easier for the UNSC to pass a single resolution that established a system of private international bounty hunters than it would be to craft *ad hoc* resolutions for small-scale military operations for each fugitive war criminal. Furthermore, if the UNSC established a system of private international bounty hunters, this would not preclude States from choosing to assist private bounty hunters by providing them with training, equipment, intelligence, and transportation.

UNSC had its own standing military force, it could avoid this problem, but at present the UNSC is ill-equipped to authorize small-scale military operations to abduct indicted war criminals.

Even when a State's military force is already present in a foreign State by invitation or pursuant to a UN' mission, military commanders would still be reluctant to take on the responsibility of hunting war criminals since the search and apprehension of suspected war criminals would usually be counter productive to the commander's peacekeeping or peace-enforcement mission. Neutrality is the key to effective peacekeeping and peace-enforcement. It is hard to be perceived as neutral when military forces are actively engaged in the pursuit of alleged war criminals.<sup>84</sup>

Both the United States and NATO were reluctant to use military forces in Bosnia to hunt for indicted war criminals in Bosnia.<sup>85</sup> NATO policy was to arrest indicted war criminals only if they were encountered in the course of normal operations.<sup>86</sup> The Pentagon insisted that the arrest of suspected war criminals was the responsibility of local law enforcement or political authorities.<sup>87</sup> The real reason for the military's reluctance was that any aggressive effort on their part to hunt indicted war criminals would jeopardize the negotiated peace.<sup>88</sup>

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<sup>84</sup> On July 10, 1997, after British troops arrested one suspected war criminal and killed another who resisted arrest in the Bosnian town of Prijedor, a spate of retaliatory hand-grenade attacks, stabbings, and bombings was directed against NATO units. Chris Hedges, *Dutch Troops Seize Two War Crimes Suspects, Wounding One*, N.Y. TIMES, Dec. 19, 1997, at A20.

<sup>85</sup> Jamie McIntyre, *Who Will Catch Bosnia War Criminals?*, CNN INTERACTIVE WORLD NEWS, <http://cnn.com/world/9612/19/pentagon.bosnia> (Dec. 19, 1996) (copy on file with the *Air Force Law Review*).

<sup>86</sup> BEIGBEDER, *supra* note 3, at 162.

<sup>87</sup> Eileen O'Connor, *Pentagon denies current training for Bosnian 'snatch missions'*, CNN INTERACTIVE WORLD NEWS, <http://www9.cnn.com/WORLD/9708/13/bosnian.war.criminals/> (Aug. 13, 1997) (copy on file with the *Air Force Law Review*). Despite the Pentagon's rejection of any legal responsibility to arrest war criminals indicted by the ICTY, NATO troops have arrested a few of the indicted war criminals. NATO's strict stance against actively pursuing indicted war criminals may have softened after General Wesley Clark replaced General George Joulwan as the overall NATO commander. Steven Erlanger, *NATO Action Reflects Shift in Tactics*, N.Y. TIMES, July 11, 1997, at A5. On July 10, 1997, a British military operation led to the arrest of one indicted war criminal and the killing of another. *Id.* On Dec. 18, 1997, Dutch troops arrested two war crimes suspects. Hedges, *supra* note 84, at A20. On Jan. 22, 1998, United States troops arrested war crimes suspect, Goran Jelusic. Mike O'Connor, *G.I.'s in Bosnia Make Their First Arrest of a War-Crimes Suspect*, N.Y. TIMES, Jan. 23, 1998, at A7. NATO troops have arrested nineteen of the individuals currently in custody before the ICTY. *International Criminal Tribunal for the Former Yugoslavia: Key Figures*, <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Mar. 29, 2001) (copy on file with the *Air Force Law Review*). Thirteen individuals voluntarily surrendered themselves to the ICTY and six others were arrested by domestic law enforcement. *Id.* Despite these arrests, NATO troops do not actively hunt war criminals, and they are unwilling to make any attempt to capture a well guarded or politically connected war criminal such as Slobodan Milosevic or Ratko Mladic.

<sup>88</sup> See BEIGBEDER, *supra* note 3, at 162-163.

The UNSC could employ other enforcement sanctions besides authorizing a military invasion to compel the extradition of an indicted war criminal. However, the use of economic and political enforcement sanctions have proven ineffective at compelling a non-cooperative State to render custody of an international fugitive. In November 1999, the UNSC imposed economic sanctions against Afghanistan for harboring Bin Laden after he was indicted on United States criminal charges for masterminding the United States 1998 embassy bombings in Kenya and Tanzania.<sup>89</sup> The UNSC ordered all States to freeze Afghanistan government assets and banned all flights to Afghanistan.<sup>90</sup> However, to date, the UNSC enforcement sanctions have not convinced Afghanistan to hand over Bin Laden.<sup>91</sup>

As the interest in prosecuting war criminals grows so will the need for international bounty hunters. Although States are obligated under international law to cooperate with the prosecution of war criminals, far too frequently States are unable or unwilling to fulfill their obligation. The use of extradition treaties, military forces, and sanctions by the UNSC have often proved to be ineffective tools for obtaining custody of suspected war criminals. If the international community is truly interested in prosecuting war crimes, then it needs to find effective legal alternatives for obtaining custody over fugitives. Establishing an international police force or authorizing international bounty hunters could provide the international community with an effective means to bring war criminals to justice.

#### **IV. INTERNATIONAL POLICE FORCE AS AN ALTERNATIVE TO BOUNTY HUNTERS**

The UNSC could consider creating a permanent international police force as opposed to relying on private international bounty hunters. Although the UN does not have a permanent standing international police force, the UN frequently creates *ad hoc* international police forces to assist with particular peace operations. In 1998, approximately 3,000 civilian police officers were engaged in peace promoting missions throughout the world.<sup>92</sup> The capabilities

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<sup>89</sup> Barbara Crossette, *New Sanctions Incite Attacks by Afghans at U.N. Sites*, N.Y. TIMES, Nov. 16, 1999, at A6.

<sup>90</sup> Brian Blomquist, *Afghans Defy Deadline to Hand over Bin Laden*, N.Y. TIMES, Nov. 14, 1999, at Metro 5.

<sup>91</sup> Afghanistan's Taliban regime has stated that Afghan hospitality makes it impossible to turn a house guest over to his enemies, but it has assured the United States that Bin Laden is under virtual house arrest because of international concerns. Holger Jensen Scripps, *Taliban Snubs Hijackers But Won't Hand Over Bin Laden*, DESERT NEWS (Salt Lake City), Jan. 2, 2000, Viewpoint, at AA04.

<sup>92</sup> Nilas Gunnar Billinger, *Report of the Special Swedish Commission on International Police Activities*, in *POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY* 459, 479 (Robert B. Oakley, et al., eds., 1998). This book is a collection of essays

of United Nation civilian police officers do not go much beyond traditional monitoring, training, or advisory tasks, however.<sup>93</sup> United Nation civilian police officers can not substitute as law enforcement for a failed State.<sup>94</sup> In a host nation with a functioning government, UN police officers can not operate without the cooperation of the host nation's government and law enforcement officers. The UN sends civilian police officers to rebuild and reform a host State's police force, not to perform law enforcement. The *ad hoc* United Nation civilian police forces that have been used in the past are incapable of capturing indicted war criminals in an uncooperative State. If the UN wanted an international police force to apprehend indicted war criminals, it would need to create a permanent standing police force. Such a force would need to be heavily armed and be prepared to enter a foreign State with armed force. A permanent international police force capable of arresting fugitive war criminals from rogue States might more closely resemble a military force than a civilian police force.

The creation and management of a permanent international police force for apprehending war criminals would involve substantially more effort than the creation of a legal framework to permit the operation of international bounty hunters. The UN Charter envisioned that the UN would possess its own standing military force but this has never occurred.<sup>95</sup> If, after approximately fifty years, the UN has been unable to implement its original intent of possessing a standing military force; it is difficult to envision the creation of a standing international police force. The cost of maintaining an international police force would be enormous.<sup>96</sup> Even if the UN could convince its member States to fund and man an international police force, it is

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that discuss in detail the role of United Nations civilian police in recent peace operations such as Cambodia, El Salvador, Mozambique, Somalia and Haiti.

<sup>93</sup> *Id.* at 39.

<sup>94</sup> *Id.*

<sup>95</sup> Under Article 43 of the United Nations Charter, each member State was required to complete a "special agreement" with the Security Council that governed the type and number of military forces that the nation was obligating itself to provide to the Security Council for the purpose of maintaining international peace and security. U.N. CHARTER art. 43. However, the Security Council has never signed an Article 43 special agreement and does not have its own military forces. Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773, 782 (March 1993) (questioning the feasibility of creating a standing U.N. military force and recommending that the UN avoid being drawn into a major debate over this issue). The UN has never had a permanent, standby, or on-call military force acting under UN authority and prospects for one in the near future remain grim. David J. Scheffer, *Peacekeeping, Peacemaking, & Peacebuilding: The Role of the United Nations in Global Conflict: Permanent Peacekeeping: The Theoretical & Practical Feasibility of a United Nations Force: United Nations Peace Operations and Prospects for a Standby Force*, 28 CORNELL INT'L L.J. 649 (Spring 1995).

<sup>96</sup> In 2000, it cost over ninety-five million dollars just to run the ICTY for one year. *International Criminal Tribunal for the Former Yugoslavia: Key Figures*, <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Mar. 29, 2001) (copy on file with the *Air Force Law Review*).

questionable whether the UN could effectively manage such a force. Who would control the day-to-day operations of an international police force? How many locations throughout the world would an international police force need to be effective? These issues are beyond the scope of this article. Even if there were an international police force, the possibility of having a system of international bounty hunters would still be viable. Just as domestic bounty hunters thrive in the United States alongside state law enforcement, they could contribute to the apprehension of war criminals in the presence of an international police force.

## V. WHAT MAKES A BOUNTY HUNTER EFFECTIVE?

Each year in the United States, approximately seven thousand bounty hunters arrest between 25,000 to 30,000 fugitives.<sup>97</sup> Bounty hunters have proven themselves more efficient than law enforcement at ensuring a defendant's presence at trial.<sup>98</sup> How do domestic bounty hunters work?

In the United States, in order to be released after arrest, most defendants hire a bail bondsman to post a bond with the court.<sup>99</sup> The State then delivers custody of the defendant to the bail bondsman who must return the defendant to the court to receive a refund of his bond.<sup>100</sup> When the State transfers custody of the defendant to the bail bondsman, it also transfers powers to search for and arrest the defendant.<sup>101</sup> To guarantee a defendant's presence in court, bail bondsmen hire bounty hunters who are fully vested with the bail bondsmen's broad powers over the defendant.<sup>102</sup>

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<sup>97</sup> Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 732-33 (Fall 1996).

<sup>98</sup> Bounty hunters return 99.2% of all individuals in the custody of bondsman while law enforcement returns 92% of individuals under public bail. *Id.* at 738 n.31. Mr. Bob Burton, president of the National Institute of Bail Enforcement Agents, claims that of the approximately 22,000 annual arrests by bounty hunters only about 15 of those arrests involve "errors." Kirk D. Richards and Matthew Marx, *Proposed Law Would Limit Who Can Be Bounty Hunter*, COLUMBUS DISP., Oct. 3, 2000, at 1C.

<sup>99</sup> Drimmer *supra* note 97, at 735. With the exception of the Philippines, commercial bailbondman do not exist outside of the United States. F. E. DEVINE, *COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES* 15 (1991). Other common law countries have chosen to use methods of recognizance, criminal penalties, nonfinancial control of conduct, or noncommercial financial security deposit to insure an accused's presence at trial. *Id.* at 201. The most common type of bail system utilized by common law countries is the recognizance system. *Id.* Under the recognizance system, the accused or a noncommercial surety pledges to pay money to the State if the accused fails to appear at court. *Id.* Typically, no money is deposited with the court and a debt to the State is only incurred if the accused fails to appear at trial. *Id.*

<sup>100</sup> Drimmer, *supra* note 97, at 735.

<sup>101</sup> Drimmer, *supra* note 97, at 736.

<sup>102</sup> Drimmer, *supra* note 97, at 736.

In 1872, the United States Supreme Court held that bounty hunters possess the same rights of search and arrest as a sheriff over an escaping prisoner.<sup>103</sup> Bounty hunters are legally entitled to break into a suspect's home and use whatever force is necessary, including deadly force, to arrest a fugitive.<sup>104</sup> Despite these sweeping powers, domestic bounty hunters are largely unlicensed and unregulated because they are viewed as private parties to whom constitutional restrictions do not apply.<sup>105</sup> Recently, several States have enacted or are considering enacting laws to regulate domestic bounty hunters.<sup>106</sup>

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<sup>103</sup> Taylor v. Taintor, 83 U.S. 366, 371-72 (1872) (recognizing the bounty hunter's comprehensive common law right of recapture over a bailed defendant).

<sup>104</sup> Drimmer, *supra* note 97, at 750-53. According to Thomas Nixon, the chief instructor for the National Institute of Bail Enforcement Agents, although bounty hunters can legally break into a fugitive's home, most gain access simply by knocking at the door. Janet Caggiano, *Skip Tracers; For Bounty Hunters, the Work Is 97 Percent Boredom and 3 Percent Fear*, RICH. TIMES DISP., Sep. 5, 1999, at G1. Nixon, a practicing bounty hunter, usually gains entry by posing as a salesman or courier; or he just waits until the fugitive leaves. *Id.*

<sup>105</sup> Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 736 (Fall 1996). The author criticizes the lack of regulation of bounty hunters for causing unnecessary violence, the destruction of property, and the arrest of innocent victims. *Id.* at 737. These concerns, and an infamous 1997 Arizona case, prompted several States to enact or consider legislation to regulate bounty hunters. The 1997 Arizona case concerns five men who broke into a private residence and engaged in a gun battle with one of the home's occupants. Adam Cohen, *Murders at Dawn—Bounty Hunters Storm the Wrong House in Phoenix, Killing Two and Spurring the Cry for Safeguards*, 150:11, TIME, Sep. 15, 1997, at 91. Two of the five intruders were shot before the intruders killed two of the home's occupants. After the fight, the five intruders told police that they were bounty hunters who mistakenly hit the wrong house while looking for a California fugitive. *Id.* The leader of the raid was recently convicted of first degree murder and nine other criminal charges. *Sentencing for Bounty Hunter Stalled, Hearing on New Trial Set*, ARIZONA REPUBLIC, Jan. 30, 1999, Valley and State, at B2. State prosecutors maintained that the five intruders broke into the home under the mistaken belief that they would find a large amount of drugs and money and that their claims of being bounty hunters was merely a cover story. *Id.* Regardless of whether the intruders were truly acting as bounty hunters or not, their criminal acts spurred legislation nationwide that attempted to prevent bounty hunter misconduct.

<sup>106</sup> A Nevada law, effective Oct. 1, 1997, requires bounty hunters to obtain a license. NEV. REV. STAT. ANN. § 697.173(1) (LEXIS 2000). To qualify for a bounty hunter license in Nevada, a individual must be 21 years of age or older, be a United States citizen, have graduated high school, submit a negative drug test, undertake a psychological examination, complete required training, and pass a written examination. Furthermore, Nevada excludes anyone convicted of a felony, a crime of moral turpitude, or a crime involving the unlawful use, sale, or possession of a controlled substance from holding a bounty hunter's license. *Id.* at § 697.173(2).

Other representative state statutes also deal with bounty hunters: IND. CODE ANN. § 27-10-3-5 (LEXIS 2000) (to obtain a permit bounty hunters must be at least 18 years old, a U.S. citizen, a resident of Indiana for six months and have no recent criminal convictions); GA. CODE ANN. § 17-6-57 (LEXIS 2000) (must have a firearms license, be a U.S. citizen, 25 years old, and notify local sheriff and police chief before engaging in surveillance, apprehension, or capture); N.H. REV. STAT. ANN. § 597:7-b (LEXIS 2000) (requires bounty hunters to be trained

A domestic bounty hunter is paid only if he presents the fugitive or his death certificate to the court.<sup>107</sup> But financial incentives alone do not provide bounty hunters the necessary tools to hunt fugitives. Domestic bounty hunters could not exist without the legal immunity for the forceful acts necessary to arrest a fugitive. Without this immunity, domestic bounty hunters would face criminal and civil liability for their forceful acts in apprehending fugitives.<sup>108</sup>

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and certified by the Professional Bail Agents of the United States, to register with the secretary of state, and to notify local law enforcement before searching for a fugitive); UTAH CODE ANN. § 53-11-108 (LEXIS 2000) (applicant for license must be at least 21 years of age, a citizen or legal resident of the U.S., not be convicted of a felony or a crime involving violence, fraud, or moral turpitude, have completed a training program of not less than 16 hours, have at least 1,000 hours of experience as a bail recovery agent or law enforcement officer); TENN. CODE ANN. § 40-11-318 (LEXIS 2000) (prohibits individuals with felony convictions from serving as bounty hunters and requires bounty hunters to notify local law enforcement before attempting to take any person into custody); ARK. STAT. ANN. § 16-84-114 (LEXIS 2000) (requires bounty hunters to notify local law enforcement before attempting to apprehend a fugitive).

In 1999, West Virginia unsuccessfully attempted to pass legislation that would require bounty hunters to be licensed and will likely try to pass similar legislation again next year. *Bounty Hunters' Charges Could Spur Law*, CHARLESTON GAZETTE, Aug. 7, 1999, at 3A. Pennsylvania is considering legislation that would require bounty hunters to be 21 years of age or older, to be a citizen of the United States, to pass a background check for mental stability, to undergo 80 hours of training, and to not have a conviction for a felony, first or second degree misdemeanor, or any crime involving violence or fraud. S. Res. 1 931, 183rd Gen. Assem., 1999-00 Sess. (Pa. 1999). On Jan. 19, 2000, a bill was introduced in Virginia that would regulate bounty hunters. S. Res. 582, Va. 2000 Sess. (Va. 2000). In 2000, Ohio is considering legislation that would require bounty hunters to be licensed and to notify local law enforcement before attempting to make an arrest. Kirk D. Richards and Matthew Marx, *Proposed Law Would Limit Who Can Be Bounty Hunter*, COLUMBUS DISPATCH, Oct. 3, 2000, at 1C. Representative William A. Hutchinson, an Arkansas Republican, has proposed federal legislation in the United States House of Representatives that would require all bounty hunters in the United States to notify local law enforcement before attempting to obtain custody of a fugitive. Citizen Protection Act of 1998, H.R. 3168, 105th Cong., 2d Sess.

In 1999, Alaska strictly prohibited all bounty hunters from operating within their State by passing a law that prohibits private persons from making any arrest for a crime not committed or attempted in their presence. ALASKA STAT. § 12.25.025 (LEXIS 2000). Kentucky, Wisconsin, and Illinois passed laws that prohibit companies from posting bonds for profit. *Wanted: Get Out of Jail Free—Are Bounty Hunters Needed?*, CINCINNATI ENQUIRER, Apr. 21, 1999, Editorial, at A14; DEVINE, *supra* note 99, 52-53. Furthermore, Kentucky law requires bounty hunters working for an out-of-state bondsmen to obtain a warrant from a Kentucky judge before arresting a fugitive in Kentucky. *Id.*

<sup>107</sup> Drimmer, *supra* note 97, at 743. Bounty hunters typically earn ten percent of the bond, plus expenses. Caggiano, *supra* note 104, at G1.

<sup>108</sup> Despite legal immunity, bounty hunters still face criminal liability for mistakenly entering the wrong property or for using force against the wrong person. In a 1999 incident in DeKalb County, Georgia, two bounty hunters kicked in a door at a wrong address and terrified a 14 year-old girl who was there alone. Bill Torpy, *Playing with a Different Set of Rules; Modernizing Bounty Hunting*, ATLANTA JOURNAL, Feb. 28, 1999, Local News, at 1E. Both bounty hunters were charged with criminal damage to property and one was also charged with misdemeanor battery. *Id.*

Likewise, an efficient system of international bounty hunters could not exist absent a legal immunity from State domestic laws for the forceful acts necessary to apprehend an indicted war criminal. A bounty might encourage someone to provide information concerning the whereabouts of a war criminal, but in most cases it would not encourage someone to pursue a war criminal's apprehension. No matter how large the reward, a private party would be foolish to attempt to arrest a war crimes fugitive when faced with the risk of criminal convictions for kidnapping and other offenses under domestic law. The Serbian bounty hunters who kidnapped Mr. Nikolic were convicted by a Serbian court and sentenced to serve two-to-six years of imprisonment.<sup>109</sup> The nine men who captured Mr. Stevan Todorovic for a bounty were also convicted by a Serbian court in the town of Uzice and received from one and a half years to eight and a half years of imprisonment.<sup>110</sup> An efficient system of international bounty hunters can not be established without legal immunity for the forceful acts necessary to apprehend and deliver a war criminal to trial.

## VI. ESTABLISHING INTERNATIONAL BOUNTY HUNTERS

Generally, sovereign States are free to criminalize conduct that occurs on their territory. However, in certain specific circumstances, the international community has chosen to pierce the veil of State sovereignty in order to immunize an individual from the possibility of domestic criminal prosecution. For example, representatives to the principal and subsidiary organs of the UN while exercising their functions and while traveling to their place of meeting are immune from arrest, detention, and all kinds of legal process.<sup>111</sup> Another example of immunity from domestic law is combatant immunity. During international armed conflicts, military members are directed to kill, destroy property, or commit other such acts that would normally be considered criminal acts. However, if a military member acted in accordance with the law of war, customary international law provides him with a blanket of immunity

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Bounty hunters may also face civil liability for mistakenly entering the wrong property or for using force against the wrong person. In a 1994 incident, bounty hunters wrongfully arrested a woman who was mistaken for a fugitive and transported her from Manhattan, New York to Tuscaloosa, Alabama. Cohen, *supra* note 105, at 91. A federal jury in New York awarded the wrongfully arrested woman \$1.2 million. *Id.*

A Georgia law holds bounty hunters strictly liable for all damages when a bounty hunter enters the wrong property and causes property damage or injury. GA. CODE ANN. § 17-6-58(c) (LEXIS 2000). Effective July 1, 2000, New Hampshire will require bounty hunters to carry liability coverage in the amount of \$300,000. N.H. REV. STAT. ANN. § 597:7-b (LEXIS 2000).

<sup>109</sup> See *supra* note 12 and accompanying text.

<sup>110</sup> *Nine Convicted in Kidnap of War-Crimes Suspect*, N.Y. Times, Dec. 11, 2000, at A15.

<sup>111</sup> Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, art. IV.

for his pre-capture warlike acts.<sup>112</sup> How could worldwide immunity from domestic laws be created for international bounty hunters?

The United States or any other individual State could not by itself create worldwide immunity from every State's domestic laws for international bounty hunters. A group of States could ratify a treaty that provides international bounty hunters with immunity from domestic criminal prosecutions. However, while using a treaty to create immunity for international bounty hunters is theoretically possible, it is practically nonviable. First, it would be extremely difficult to achieve a consensus among States on such a novel idea. Second, even if a consensus could be obtained, any treaty would only bind the signatories to the treaty. Nonparty States would create safe havens for fugitives and completely frustrate the efforts of international bounty hunters. Third, the treaty process takes too long.<sup>113</sup>

In 1994, the UN chose the treaty process as a means to provide protection to military members to military forces performing a UN peacekeeping mission that was authorized under Chapter VI of the UN Charter.<sup>114</sup> States that have ratified the Convention on the Safety of United Nations and Associated Personnel are obligated to criminalize the murder, kidnapping, or attack upon the person or liberty of any UN or associated personnel.<sup>115</sup> After approximately six years, only thirty-three States have ratified this treaty.<sup>116</sup> The inability to achieve a broad international consensus on protecting peacekeepers most likely contributed to the UNSC's decision to bypass the normal treaty route when it created the ICTY. The UNSC did not pursue a treaty to create the ICTY because the treaty process would have taken years, if not decades, and could have been defeated by opposition from a number of States.<sup>117</sup> The best alternative for providing immunity from domestic laws for international bounty hunters would be an enforcement action by the UNSC.

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<sup>112</sup> Major Geoffrey Corn & Major Michael L. Smidt, "To Be or Not To Be, That is the Question" *Contemporary Military Operations and the Status of Captured Personnel*, June 1999 ARMY LAW. 1, 14. The GPW does not explicitly mention combatant immunity but it is inferred from the cumulative effect of the protections within the GPW. *Id.* at n.124.

<sup>113</sup> For example, the Genocide Convention opened for signature on Dec. 11, 1948 but was not ratified by the United States until 40 years later on Nov. 25, 1988. Genocide Convention, *supra* note 25.

<sup>114</sup> Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. G.A.O.R. Supp. (No. 49) at 299, U.N. Doc. A/49/49 (1994) (hereinafter CSUNAP); see also Lieutenant Colonel Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUS. J. INT'L LAW 359 (Winter 1996), for an in-depth discussion of the drafting process and meaning of the Convention on the Safety of United Nations and Associated Personnel.

<sup>115</sup> See CSUNAP, *supra* note 114, art. 9.

<sup>116</sup> Judith Kumin, *Foreign Aid Workers Need Protection Too*, OTTAWA CITIZEN, Sep. 21, 2000, at A21.

<sup>117</sup> BEIGBEDER, *supra* note 3, at 150.

Worldwide immunity for international bounty hunters could be created by a resolution by the UNSC.<sup>118</sup> Under the UN Charter, the UNSC has substantial powers to maintain international peace and security. If the UNSC determines that a threat to international peace exists then it may use its enforcement authority to eliminate that threat,<sup>119</sup> even going so far as to displace domestic law. Article 42 of the UN Charter authorizes the UNSC to call upon multinational military forces to restore international peace. Article 41 of the UN Charter permits the UNSC to impose measures not involving the use of armed force to maintain international peace. Article 41 further permits the UNSC to enact arms, air travel, oil embargoes, economic, and financial sanctions.<sup>120</sup> The UNSC has also used its Article 41 enforcement authority to attempt to coerce a non-cooperative State to turn over custody of an international fugitive. In November 1999, the UNSC imposed economic sanctions against Afghanistan for harboring Bin Laden who was charged with complicity in the United States 1998 embassy bombings in Kenya and Tanzania.<sup>121</sup> In this instance, the UNSC determined that a sole criminal fugitive remaining at large constituted a threat to international peace. Furthermore, the UNSC has also used its broad enforcement authority under Article 41 to create the ICTY and ICTR.

In the *Tadic* case, the Appeals Chamber of the ICTY rejected the defense's argument that the UNSC lacked the authority to create an international criminal tribunal.<sup>122</sup> The *Tadic* defense argued that Article 41 only permits the UNSC to impose economic and political measures.<sup>123</sup> The Appeals Chamber held that the examples of economic and political sanctions expressly contained in Article 41 do not exclude other types of enforcement

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<sup>118</sup> State members to the United Nations must accept and carry out decisions by the Security Council. U.N. Charter art. 25. Security Council decisions must have affirmative votes from nine of the fifteen members of the Council and not be subject to the veto of any of the permanent members. *Id.* art. 27. The permanent members to the Security Council are the United States, China, the Russian Federation, the United Kingdom and France. *Security Council*, available at <http://www.un.org/Overview/Organs/sc.html#MEMBERS> (last visited Apr. 17, 2001) (copy on file with the *Air Force Law Review*).

<sup>119</sup> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

<sup>120</sup> See BEIGBEDER, *supra* note 3, at 150-51.

<sup>121</sup> Crossette, *supra* note 89. The United Nations Security Council ordered all countries to freeze Afghanistan government assets and to ban all flights to Afghanistan. Blomquist, *supra* note 90. On Dec. 19, 2000, the Security Council voted to broaden its sanctions against Afghanistan. *UN Council Applies More Pressure on Taliban*, CHICAGO TRIBUNE, Dec. 20, 2000, News, at 4. However, Afghanistan's leaders still refuse to hand over Osama Bin Laden. *Id.*

<sup>122</sup> *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 31-37 (I.C.T.Y. Oct. 2, 1995), reprinted in 35 ILM 32 (1996), available at [www.un.org/icty](http://www.un.org/icty) (copy on file with the *Air Force Law Review*).

<sup>123</sup> *Id.* para. 34.

measures.<sup>124</sup> Article 41 grants broad discretion to the UNSC to take any measures not involving the use of armed force in order to maintain international peace and security.<sup>125</sup> Furthermore, the Appeals Chamber declined to review the UNSC's determination that an international criminal tribunal could effectively meet its objective of restoring the peace.<sup>126</sup> In conclusion, the UNSC has very broad discretion in crafting enforcement mechanisms under Article 41 to promote international peace and security.

Although an international bounty hunter might forcibly abduct an indicted war criminal with a weapon, the use of an international bounty hunter should not be considered the use of an “armed force”. The “armed force” contemplated by Article 42 of the UN Charter is the employment of military forces. The use of international bounty hunters would not constitute “armed force” under Article 42 because they are not in the military and they are not State actors. If a State provided substantial logistical and intelligence assistance to a private bounty hunter, one could argue that the bounty hunter should be considered the equivalent of a State actor and the bounty hunter’s actions should constitute the use of an “armed force” under Article 42. Whether the use of an international bounty hunter would constitute the use of “armed force” as defined by Article 42 is purely an academic argument. The UNSC can authorize an enforcement action under either Article 41 or Article 42. The important issue for this paper is whether the powers of the UNSC are broad enough to establish international bounty hunters and not whether the UNSC should cite to Article 41 or Article 42 of the UN Charter when it establishes such a system.

If the UNSC determined that arresting indicted war criminals would promote or maintain international peace then the UNSC could implement enforcement measures to compel their arrest. Prosecuting war criminals promotes international peace by deterring future war crimes. Punishing the perpetrators of war crimes also helps eliminate the need for victims to commit war crimes in revenge. By creating the ICTY and the ICTR, the UNSC recognized the importance of the prosecution of war criminals for restoring international peace.<sup>127</sup> The UNSC could just as easily determine that the apprehension of indicted war criminals is also necessary to promote peace since an international criminal tribunal can not fulfill its intended role in restoring international peace if it is unable to obtain custody of its indicted war criminals. Accordingly, the UNSC could use its broad enforcement authority to pass a resolution that provides international bounty hunters with legal immunity from State domestic law for the forceful acts necessary to arrest indicted war criminals. All UNSC resolutions are immediately binding on all

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<sup>124</sup> *Id.* para. 35.

<sup>125</sup> *Id.* paras. 31-37.

<sup>126</sup> *Id.* para. 39.

<sup>127</sup> Mills, *supra* note 26, n.6; ICTY Statute, *supra* note 31.

members to the UN; therefore, the UNSC could effectively create a worldwide immunity from domestic laws for international bounty hunters.<sup>128</sup>

## **VII. WOULD THE FORCEFUL ACTS OF AN INTERNATIONAL BOUNTY HUNTER VIOLATE THE UNITED NATIONS CHARTER?**

Article 2(4) of the UN Charter prohibits a State from using force or threatening to use force against another State's territory or political independence. Included in this prohibition is a State's unilateral decision to kidnap an individual from a foreign State. However, the abduction of an individual from a foreign State by an international bounty hunter would not violate Article 2(4) because the international bounty hunter is a private party. Article 2(4) regulates the conduct of States not individuals. In any event, even if bounty hunters were considered to be acting as State agents, the forceful acts committed by international bounty hunters would still not violate Article 2(4) if international bounty hunters were acting pursuant to a UNSC resolution. The UNSC has the authority to authorize uses of force that would otherwise violate Article 2(4). Articles 41 and 42 of the UN Charter permit the UNSC to trump the prohibitions of Article 2(4) in the interests of maintaining international peace. Accordingly, a UNSC resolution that establishes a legal immunity for international bounty hunters from domestic laws for the forceful acts necessary to arrest a war criminal would not violate the U.N. Charter.

## **VIII. PRACTICAL CONSIDERATIONS CONCERNING INTERNATIONAL BOUNTY HUNTERS**

The UNSC could establish worldwide legal immunity for international bounty hunters for the forceful acts necessary to arrest indicted war criminals. However, whose indictments could an international bounty hunter seek to enforce? Who would be responsible for funding the reward? Should international bounty hunters be given the absolute right to cross international borders? Should international bounty hunters be required to notify local law enforcement before attempting an arrest? Who should adjudicate criminal and civil claims against bounty hunters for use of excessive force? Should international bounty hunters be licensed, and if so, who should be the licensing authority? Where should the international bounty hunter be required to deliver custody of the captured fugitive? When should an international bounty hunter be paid? Can the UNSC realistically expect private parties to capture indicted

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<sup>128</sup> U.N. CHARTER arts. 25 & 48. Currently, 189 States are members of the United Nations. *List of Member States*, at <http://www.un.org/Overview/unmember.html> (last visited Apr. 17, 2001) (copy on file with the *Air Force Law Review*).

war criminals? Each of these issues must be carefully considered by the UNSC before privatizing the enforcement of justice.

### **A. Whose Indictments Could an International Bounty Hunter Seek to Enforce?**

The UNSC must carefully decide which war crime indictments international bounty hunters could act upon. One legal scholar, Ms. Beverly Izes, has proposed that the UN formally legitimize State-sponsored abductions of war criminals by defining an explicit set of circumstances that prescribe when a State may perpetrate a kidnapping.<sup>129</sup> Ms. Izes proposed that the UN create a list of crimes that would justify a State-sponsored abduction.<sup>130</sup> Furthermore, before a State attempted an abduction of a suspected war criminal, there must be a refusal by the refuge State to extradite the suspect, a refusal to bring the suspect to trial, or a clear case of where the local trial of a war criminal was a sham.<sup>131</sup> This type of proposal would give each State the authority to issue an indictment that an international bounty hunter could seek to enforce. However, creating an expansive system that permitted international bounty hunters to enforce the war crime indictment of any State or entity would be a grave mistake.

Domestic courts or self-appointed commissions of rogue States could issue spurious indictments against world leaders for political purposes.<sup>132</sup> An expansive authority to issue war crime indictments could easily lead to the wrongful abductions of heads of State and other governmental leaders. For these reasons, the authority to issue war crimes indictments that can be acted upon by international bounty hunters must be limited to impartial institutions whose sole interest is the pursuit of justice.

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<sup>129</sup> Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 10 (Fall 1997). Ms. Izes also stated that abducted individuals should be permitted to bring human rights actions to an international tribunal for any abduction that failed to follow the United Nation's procedural guidelines on State-sponsored abductions. *Id.* at 14.

<sup>130</sup> *Id.* at 2.

<sup>131</sup> *Id.* at 14.

<sup>132</sup> On February 29, 1992, after ten months of hearings and approximately 3,000 witnesses, a self-appointed commission found President George Bush, Vice-President J. Danforth Quayle, Secretary of Defense Richard Cheney, and General Norman Schwarzkopf guilty of nineteen war crimes committed during the course of the Gulf War. BEIGBEDER, *supra* note 3, at 137-38. These crimes included crimes against peace, indiscriminate bombing, use of prohibited weapons of mass destruction, and crimes against humanity. *Id.* Lacking any enforcement authority, the commission did not pass any sentence but condemned these individuals in the strongest possible terms. *Id.* The commission ignored Iraq's unlawful act of aggression against Kuwait and that the UNSC had acted within its rights under the UN Charter in authorizing the use of military force against Iraq. *Id.* at 138. It also ignored Iraq's own war crimes. *Id.* The commission's real objective was to influence public opinion against the war. *Id.*

The UNSC could limit the authority to issue an indictment that international bounty hunters may act upon to the UNSC itself. Because it would be too burdensome for the UNSC to act upon every potential indictment, the UNSC should delegate the responsibility to international criminal tribunals. Probable cause determinations necessary for indictments are better suited for a judicial body. Initially, it would be prudent for the UNSC to limit the authority to issue such indictments to a single international criminal tribunal. The ICTY is an excellent candidate for such authority.

The ICTY has had difficulty in obtaining indicted individuals, and it could benefit from the efforts of international bounty hunters. Furthermore, the ICTY already has a judicial procedure in place for issuing international arrest warrants. Before issuing an international arrest warrant, an indicted individual is given the opportunity to voluntarily come before the court. It is only after an indicted individual is not arrested that the ICTY issues and transmits an international arrest warrants to all States.<sup>133</sup> Accordingly, an indicted war criminal and States would be provided with a fair opportunity to transfer custody of the indicted war criminal to the ICTY before the authority of international bounty hunters were unleashed. If the use of international bounty hunters with the ICTY proved successful, the UNSC could expand the authority to use international bounty hunters, giving it to other international criminal tribunals such as the ICTR or the ICC.

### **B. Who Would be Responsible for Funding the Bounty Hunter's Reward?**

Locating funding for rewards should not be difficult. The UNSC could simply call upon member States to fund reward money for indicted war criminals. In 1987, West Germany offered nearly a half-million dollar reward for the arrest of Josef Schwammberger who was wanted for war crimes he committed as a Nazi SS captain in charge of two Jewish ghettos and a work camp.<sup>134</sup> Germany is offering a reward of 500,000 Deutsche Marks for

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<sup>133</sup> Indictments for the ICTY are prepared by a prosecutor and confirmed by a judge of the Trial Chamber if a *prima facie* case has been presented. If an indicted individual is not arrested, a public hearing is held before the full Trial Chamber. If the full Trial Chamber is satisfied that the indictment was issued upon probable cause then the full Trial Chamber will issue and transmit an international arrest warrant. *Id.* at 153. *See also* Rule 61, Procedure in Case of Failure to Execute a Warrant, Rules of Procedure and Evidence, IT/32/Rev. 9, ICT-FY, July 5, 1996. The ICTY has issued international arrest warrants against twelve of the indicted individuals. *Fact Sheet: International Criminal Tribunal for the Former Yugoslavia*, <http://www.un.org/icty/glance/procfact-e.htm> (last modified Mar. 29, 2001) (copy on file with the *Air Force Law Review*). International arrest warrants have not resulted in the apprehension of any fugitive war criminals. *Id.*

<sup>134</sup> ASHMAN & WAGMAN, *supra* note 64, at 30-32 (Schwammberger was known as the “mass murderer of Poland”). On November 17, 1987, people interested in collecting the reward led Argentine police to a small village where Schwammberger was hiding. *Id.* at 32.

information that leading to the arrest of Alois Brunner, another Nazi war criminal.<sup>135</sup> The United States Department of State is offering rewards of up to five million dollars for information that leads to the capture of any of the fugitive war criminals indicted by the ICTY.<sup>136</sup> If the United States is willing to offer money just for information that leads to the capture of a war criminal then it should also be willing to offer money for the actual arrest of a war criminal. States whose citizens were victims of a war crime should also be willing to fund rewards for capture of the individuals responsible for those crimes. The UNSC could also solicit funds from private groups interested in promoting human rights.<sup>137</sup> Organizations such as Amnesty International may be willing to spearhead private collection efforts to raise bounties for war criminals. The more egregious the crimes, the easier it should be to raise a substantial reward for that criminal's capture.

### **C. Should International Bounty Hunters be Given the Absolute Right to Cross International Borders?**

International bounty hunters could not be effective without the freedom to travel between States. However, the UNSC should not extend an absolute right to enter foreign States to international bounty hunters since such a right could be easily abused. Illegal aliens, drug traffickers, and other international criminals could falsely claim that they were acting as international bounty hunters when caught entering a State illegally. International bounty hunters should be expected to enter States through their own legal and independent means.

After an international bounty hunter has obtained custody of a fugitive war criminal, the UNSC should provide the international bounty hunter with the absolute right to cross international borders while en route to delivering custody of his prisoner. If an international bounty hunter presents a copy of the indictment and he has custody of the indicted individual, State officials should be required to let the international bounty hunter and his prisoner continue to their destination.

### **D. Should International Bounty Hunters be Required to Notify Local Law Enforcement Before Attempting an Arrest?**

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<sup>135</sup> *Arrest Order Filed for Nazi Brunner*, SUN-SENTINEL (Fort Lauderdale), Sep. 11, 1997, Editorial, at 14A.

<sup>136</sup> *Diplomatic Security Service: U.S. Department of State*, <http://www.dssrewards.net/english/warcrimes/torture.html> (last visited Apr. 17, 2001).

<sup>137</sup> The authors of *The Nazi Hunters* state that two wealthy American businessmen offered them a "blank check" for anyone who could abduct Alois Brunner, a Nazi war criminal hiding in Syria. ASHMAN & WAGMAN, *supra* note 64, at 28.

Unlike domestic bounty hunters, international bounty hunters should not be required to notify local law enforcement. In the United States, requiring domestic bounty hunters to notify local law enforcement before attempting an arrest is a reasonable requirement. Local law enforcement should always be willing and able to assist bounty hunters in bringing a fugitive to justice. In the international forum, a State might actually be protecting a war criminal. An indicted war criminal might actually be running the State and in control of the State's law enforcement. Accordingly, international bounty hunters should not be required to notify local enforcement before attempting to arrest a suspected war criminal.

#### **E. Who Should Adjudicate Criminal and Civil Claims Against Bounty Hunters for the Use of Excessive Force?**

International bounty hunters will be pursuing individuals who desperately want to avoid a lengthy prison sentence. Indicted war criminals who were prominent government officials or senior military commanders could even be protected by armed bodyguards. Accordingly, International bounty hunters will often need to use force or threaten the use of force in order to successfully apprehend an indicted war criminal.

An international bounty hunter should have the legal right to forcibly enter an indicted war criminal's home and to use a reasonable amount of force to arrest that individual. Furthermore, an international bounty hunter should also be entitled to forcibly enter the home of a third party when he reasonably believes that an indicted war criminal is present. International bounty hunters should also be permitted to use reasonable force against any third parties who attempt to obstruct the bounty hunter's efforts to apprehend an indicted war criminal. An international bounty hunter should only be permitted to use deadly force against an indicted war criminal or a third party in self-defense. Accordingly, an international bounty hunter could only use deadly force if he reasonably believed that he was threatened with grievous bodily harm.

Of course, a prudent bounty hunter will look for any way possible to capture an indicted war criminal with a minimal amount of force. After all, a violent confrontation not only threatens the welfare of a fugitive, it also threatens the welfare of the bounty hunter. International bounty hunters would also have a financial incentive to limit their use of force against an indicted war criminal if they could not collect their reward if the indicted war criminal died during an attempted arrest. However, the strongest incentive for international bounty hunters to limit their use of force against both indicted war criminals and third parties would be the possibility of a criminal or civil complaint against the bounty hunter for excessive use of force.

Like domestic police officers, the conduct of international bounty hunters must be reviewable by some judicial body. An international bounty hunter should have complete criminal and civil immunity from State domestic

law for his use of force during an actual or attempted arrest of an indicted war criminal since a State that has been harboring an indicted war criminal can not be trusted to impartially and fairly adjudicate a criminal or civil complaint against an international bounty hunter. However, an international bounty hunter's conduct during an attempted arrest should be reviewed by the same international court who issued the indictment that the bounty hunter was trying to enforce. This international court should have sole jurisdiction to adjudicate both criminal and civil claims against international bounty hunters for use of excessive force. Furthermore, this international court should use all or any portion of a bounty hunter's reward to satisfy a criminal fine or a civil judgment against a bounty hunter.

#### **F. Should International Bounty Hunters be Licensed? By What Licensing Authority?**

Who should be eligible to hunt for war criminals? The UNSC could limit its grant of legal immunity from domestic law for the forceful acts necessary to capture a fugitive war criminal to licensed individuals. Although most jurisdictions within the United States do not require licenses, the modern trend is to license bounty hunters.<sup>138</sup> Requiring a license could insure that all bounty hunters receive some minimal training. Requiring a license also provides the means to exclude certain individuals from serving as an international bounty hunter. For example, ex-convicts could be excluded from acting as international bounty hunters. The UNSC could ask the UN General Assembly or an international criminal tribunal to develop the needed criteria to qualify for an international bounty hunter license and to issue any licenses. Even so, international bounty hunters should not be licensed.

Requiring all international bounty hunters to obtain a license assumes that all individuals want to work as a bounty hunter on a recurring basis. In fact, many individuals who decide to forcefully capture an indicted war criminal may do so only as the result of a one-time opportunity rather than a decision to pursue a career as an international bounty hunter. The best person to apprehend a particular war criminal might not be the full-time professional bounty hunter but an acquaintance, friend, business partner, political rival, or estranged spouse of the war criminal. If licenses were not required, individuals who have no interest in a career as a professional bounty hunter would be free to capture fugitive war criminals.

Requiring international bounty hunters to obtain a license before attempting to apprehend a war criminal would greatly reduce the number of persons engaged in the hunt. The UNSC or the international community should not be concerned about the character of the individual who delivers the custody of a fugitive war criminal, as long as custody is delivered. The UNSC

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<sup>138</sup> See *supra* notes 105-106.

should be concerned about the possibility of wrongful arrests of individuals who are unreasonably mistaken for fugitive war criminals. However, requiring international bounty hunters to hold licenses does not preclude the possibility of wrongful arrests. Even highly trained police officers occasionally arrest the wrong individual. If a bounty hunter wrongfully arrests an individual who is mistaken for an indicted war criminal then that bounty hunter would be subject to domestic civil and criminal liability. The possibility of liability under domestic law should be sufficient by itself to deter wrongful arrests. Requiring bounty hunters to be licensed would substantially reduce the number of individuals who could arrest war criminals while doing little to reduce the risk of wrongful arrests.

Requiring international bounty hunters to obtain licenses might substantially impede a bounty hunter's efforts to apprehend fugitive war criminals. It could make it reasonably easy for States to learn the identities of bounty hunters. A State that opposes the use of international bounty hunters or one that intentionally harbors a war criminal could use this information to obstruct a bounty hunter's efforts. A State could explicitly or surreptitiously deny a bounty hunter entrance or could keep a fugitive war criminal informed of the bounty hunter's whereabouts. Of course, a State could not actively obstruct a particular bounty hunter if the bounty hunter's identity were unknown.

The potential detriments of requiring licenses for international bounty hunters outweigh any of the potential benefits. A licensing requirement for international bounty hunters would greatly reduce the number of bounty hunters, impose an unnecessary administrative burden, and potentially offer rogue States a means to obstruct the efforts of bounty hunters. While a licensing requirement would be an effective means to ensure that bounty hunters receive some training, it is doubtful that training would provide any significant benefit by preventing wrongful arrests since these arrests are already punishable by civil and criminal domestic law. The best way for the UNSC to avoid wrongful arrests is to ensure that indictments for war criminals contain sufficient information to identify a fugitive. Indictments should contain as much identifying information as possible, such as recent photographs, an accurate physical description, and a list of any identifying scars or tattoos.<sup>139</sup>

### **G. Where Should the International Bounty Hunter be Required to Deliver Custody of the Captured Fugitive?**

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<sup>139</sup> For example, Janko Janjic, a fugitive war criminal indicted by the ICTY, is extensively tattooed. *War Criminal Watch*, COALITION FOR INTERNATIONAL JUSTICE, <http://www.wcw.org> (see "sightings" section for the ICTY on this web site) (last visited Apr. 17, 2001). One tattoo on his forehead reads "I was dead before I was born." *Id.*

Ideally, the international bounty hunter should deliver the indicted war criminal to the court that issued the indictment. In many circumstances this would involve travel over great distances and through many different States. It would be more practical if the court could identify suitable destinations for delivery of the fugitive that were reasonably close to the anticipated point of capture. What constitutes a suitable destination for the bounty hunter to transfer custody depends upon the circumstances of each particular case. Possible delivery locations could include the embassy of any State that posted reward money for that war criminal or any location where the military forces of such State were located. If a State contributed to the reward for the capture of an indicted war criminal, it would be reasonable to trust that State with the responsibility of completing delivery of a captured fugitive to the court. Accordingly, indictments should identify not only the court that issued the indictment as an acceptable destination for the delivery of the fugitive but it should also include other reasonable locations as acceptable destinations.

#### **H. When Should an International Bounty Hunter be Paid?**

In the United States, domestic bounty hunters are paid upon returning the defendant or the defendant's death certificate to the court. Likewise, international bounty hunters should only be paid for the delivery of an indicted war criminal. Reward money could be released to the bounty hunter after the court that issued the indictment confirms the identity of the delivered individual as the person named in the indictment. International bounty hunters should not be rewarded for causing an indicted individual's death. Payment of reward money for causing an indicted individual's death could transform international bounty hunters into international assassins. It would be far easier to kill an indicted war criminal than to transport that individual through a State that has been intentionally harboring him.<sup>140</sup> Furthermore, paying international bounty hunters only upon delivery of an indicted war criminal will help minimize the amount of force that an international bounty hunter uses to arrest a fugitive since the bounty hunter would collect nothing if the fugitive dies.

#### **I. Can the UNSC Realistically Expect Private parties to Capture Indicted War Criminals?**

Pursuing a career as an international bounty hunter would require far more expertise than pursuing one as a domestic bounty hunter. Even with legal immunity for the forceful acts necessary to arrest a war criminal, an

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<sup>140</sup> After Syria denied extradition requests for Alois Brunner, a Nazi war criminal, State agents unsuccessfully attempted to execute Brunner with mail bombs. See ASHMAN & WAGMAN, *supra* note 64, at 18. One bomb cost Brunner two of his fingers and the second bomb cost him one of his eyes. *Id.*

international bounty hunter would require some knowledge of domestic law. The professional international bounty hunter might need to become familiar with a State's privacy laws if he sought government or private commercial records to help trace a fugitive's whereabouts. A bounty hunter might need to possess a weapon to coerce the cooperation of an indicted war criminal. Accordingly, the professional bounty hunter would also need to be aware of any domestic laws that prohibit or regulate the possession of firearms or other weapons.

The professional international bounty hunter must also consider the possibility that a foreign State might use its power to protect an indicted war criminal. For over twenty-five years, the Syrian government has openly protected a Nazi war criminal, Alois Brunner, who as the chief deputy to Adolf Eichmann was responsible for the deaths of more than 100,000 Jews and some 60,000 others.<sup>141</sup> In 1987, a privately sponsored effort to kidnap Brunner from Syria was called off because Brunner was too closely guarded by Syrian police.<sup>142</sup>

An indicted war criminal could even be the head of a foreign State. When an indicted war criminal is controlling a State, the State will probably disregard the legal immunity granted by the UNSC and criminally prosecute the bounty hunter for any attempts to arrest the indicted war criminal. On May 24, 1999, the ICTY indicted the head of Yugoslavia, President Slobodan Milosevic for war crimes.<sup>143</sup> Could an international bounty hunter realistically be expected to abduct a head of State?

Although varying domestic laws between States make international bounty hunting a complex business, the substantial rewards offered for indicted

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<sup>141</sup> CHARLES ASHMAN & ROBERT J. WAGMAN, *THE NAZI HUNTERS* 17 (1988). In 1954, France tried Brunner in absentia and sentenced him to death. *Id.* at 26. Brunner worked in Damascus, Syria as an assistant manager for a trading company that represented West German firms under the alias, Dr. George Fischer. *Id.* In 1960, Syrian police arrested Dr. Fischer for drug smuggling but after Syrian officials learned his true identity, he was welcomed to the country and became a security advisor to the Syrian government. *Id.* at 26-27. Brunner helped train Syrian police in effective interrogation methods and he is believed to be responsible for plotting several anti-Israelis incidents throughout the world, including the 1961 attempted bombing of the World Jewish Congress in Vienna. *Id.* at 27. Syria repeatedly denied West Germany's extradition requests for Brunner and even provided Brunner with armed, uniformed bodyguards. *Id.* at 27-28. The French, Greek, Czech, Austrian, and Israeli authorities all want custody of Brunner. James, *supra* note 2, at 10. Poland is also considering demanding Brunner's extradition but then Syrian President Hafez Assad stated that to his knowledge Brunner was not in his country. *Plea Over War Criminal*, BIRMINGHAM POST, Jan. 19, 2000, News, at 9. But President Hafez Assad's recent death has provided new hope that Brunner will finally face extradition. Syria's new President, Assad's son, Bashar-al-Assad, is considering extraditing Brunner to Germany in exchange for closer diplomatic ties with Western countries. Allan Hall and Gabriel Milland, *Last Major War Criminal to Go Back to Germany*, EXPRESS, Oct. 31, 2000.

<sup>142</sup> ASHMAN & WAGMAN, *supra* note 64, at 30.

<sup>143</sup> *Outstanding Public Indictments*, <http://www.un.org/icty/glance/indictlist-e.htm> (last modified Mar. 29, 2001) (copy on file with the *Air Force Law Review*).

war criminals could reasonably attract a corporate interest. A corporation with a legal staff and employees with previous military or police experience could handle the complex issues involved with international bounty hunting and earn a generous profit.<sup>144</sup> However, even a corporation would not pursue all indicted war criminals. A corporation would realistically assess its chances at success before expending its resources to pursue any specific war criminal. A corporation engaged in international bounty hunting might deem it too high of a risk to pursue a war criminal who was a State leader.

Even if professional bounty hunters shied away from pursuing certain indicted war criminals, this does not foreclose the possibility of arrest by an individual who has no interest in pursuing a career as an international bounty hunter. Arresting an indicted war criminal may not be a complex matter if the indicted criminal happens to be a neighbor, relative, spouse, or business partner. Many individuals, out of mere circumstance, may be in an excellent position to abduct an indicted war criminal, and might choose to do so if it was lawful and financially profitable. For example, while a corporate bounty hunter might be unable to locate and arrest Slobodan Milosevic, a political rival might have the access and government allies necessary to deliver Milosevic to the ICTY.

During the summer of 2000, after reading an article about the United States' five million-dollar bounty for indicted war criminals, five journalists on vacation in Bosnia spontaneously decided to search for Radovan Karadzic.<sup>145</sup> After only a few days of inquiries, they met with a high-ranking member of the Serb secret police.<sup>146</sup> The Serb policeman mistook the journalists for a CIA hit team and offered to provide them with information on Karadzic's security detail and when and where Karadzic traveled in exchange for twenty percent of the bounty for Karadzic's capture and American passports for himself and his family.<sup>147</sup> The Serb policeman explained that he had been profiting from cigarette and liquor smuggling across the Bosnia border but that he was now "being squeezed" by Karadzic's lieutenants.<sup>148</sup> He needed to get Karadzic before Karadzic's men came to get him.<sup>149</sup> The five journalists provided all of this information to an American Lieutenant Colonel at the NATO base in Sarajevo. Although it is unknown when and if NATO will attempt to act on

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<sup>144</sup> A former British military commander is already attempting to establish Justice Action, the world's first non-governmental war crimes investigation unit. James Clark, *Colonel Bob to Lead Hunt for War Criminals*, LONDON SUNDAY TIMES, Jan. 28, 2001, Home News. The group will be staffed by former police officers and military investigators. *Id.* Justice Action is seeking funding from private individuals and charitable organizations. *Id.* The group will not act as an international police force but will attempt to put pressure on governments to apprehend and prosecute war criminals. *Id.*

<sup>145</sup> Scott Anderson, *What I Did on My Summer Vacation*, ESQUIRE, No. 4, Vol. 134, 104.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

this prospect for capturing Karadzic,<sup>150</sup> this episode illustrates that private bounty hunters can realistically enlist the help of individuals closely associated with fugitives.

International bounty hunters could also circumvent the power and authority of an obstructive State by tricking the indicted war criminal into leaving the State where he or she is protected. If an indicted war criminal could be lured to a State that would not use its powers to protect him or her then an arrest could be more easily accomplished. An indicted war criminal could be lured to a different State by many different techniques. A Caribbean cruise sweepstakes award or an invitation to a fictitious job interview could persuade someone to travel abroad. An international bounty hunter posing as an Internet love interest could entice an indicted war criminal to a foreign rendezvous. The possible avenues to entice a fugitive out of a protective State are only limited by the boundaries of a bounty hunter's imagination.

The abilities of private parties to hunt indicted war criminals should not be underestimated. The efforts of private citizens at hunting Nazi war criminals have out-performed the efforts of the world's governments.<sup>151</sup> Simon Wiesenthal has been personally responsible for ferreting out thousands of Nazi war criminals.<sup>152</sup> Neal Sher, a director of the Department of Justice's Office of Special Investigations, the government organization responsible for locating Nazi war criminals in the United States, has admitted that Simon Wiesenthal had a better track record at hunting Nazi war criminals than most governments.<sup>153</sup>

International bounty hunters would also benefit from the vast expanse of information available on the Internet. A website devoted to the most recent sightings of individuals who are indicted by the ICTY already exists.<sup>154</sup> Private bounty hunters are already responsible for capturing two of the war criminals indicted by the ICTY.<sup>155</sup> Additionally, States would not be precluded from helping private international bounty hunters. A State could assist an international bounty hunter by providing intelligence, equipment, training, and transportation.

While international bounty hunters may not be able to arrest every indicted war criminal, the UNSC can reasonably expect international bounty hunters to capture indicted war criminals given the examples of domestic bounty hunters, the successful efforts of private parties at locating Nazi war criminals, and the possibility of State assistance. Whether motivated by justice, financial gain, or other self-serving goals, private parties are in an

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<sup>150</sup> *Id.*

<sup>151</sup> CHARLES ASHMAN & ROBERT J. WAGMAN, *THE NAZI HUNTERS* 280-97.

<sup>152</sup> *Id.* at 287.

<sup>153</sup> *Id.* at 290.

<sup>154</sup> *War Criminal Watch*, COALITION FOR INTERNATIONAL JUSTICE, <http://www.wce.org> (visited Apr. 17, 2001).

<sup>155</sup> *See supra* notes 11 and 110, and accompanying text.

excellent position to contribute effectively to the apprehension of indicted war criminals if given the opportunity.

## IX. CONCLUSION

Increasing the number of available forums to prosecute war criminals will not serve the interests of justice if the international community lacks the ability to locate and arrest indicted war criminals. There is no international police force to hunt and apprehend war criminals. Extradition treaties, the use of military forces, and UNSC economic sanctions are often ineffective means for obtaining custody of war criminals. If the UNSC wishes the ICTY and ICTR to fulfill its intended role of promoting international peace then the UNSC must find ways to forcefully bring indicted war criminals to trial.

The UNSC could lawfully authorize a multinational military force to use all necessary means to apprehend an indicted war criminal. However, the use of military forces could trigger a widespread-armed conflict. Furthermore, using military forces, which are engaged in peace-keeping, to hunt for war criminals would compromise their neutrality and potentially destabilize a negotiated peace. In many cases, the use of international bounty hunters to apprehend an indicted war criminal would be a more effective alternative than the use of military forces.

Private international bounty hunters will obviously not be concerned about the political ramifications of their actions. Nonetheless, an international bounty hunter is more likely to capture an indicted war criminal peacefully than is a military force. An international bounty hunter can not capture an indicted war criminal by waging a war against a State's military or police force, but must apprehend an indicted war criminal by stealth and surprise and with a minimal amount of force. Further, an international bounty hunter will carefully limit his use of force against an indicted war criminal because the former will not be paid if the latter dies. And, an international bounty hunter will cautiously avoid the use of force against third parties because of potential civil and criminal liability. The ideal grant of immunity from State domestic law for international bounty hunters for the forceful acts necessary to apprehend an indicted war criminal would not be limitless. A bounty hunter, like a civilian police officer, could still be held accountable for an excessive or unnecessary use of force.

Authorizing private parties to apprehend indicted war criminals could provide excellent opportunities for individuals who are personally acquainted with the war criminal. The best person to capture an indicted war criminal might be that individual's neighbor, coworker, estranged spouse, or political rival. These individuals could be capable of capturing an indicted war criminal with very little force if given a financial incentive and a lawful authority to act.

The UNSC should pass a resolution that provides international bounty hunters with immunity from domestic laws for the forceful acts necessary to

arrest an indicted war criminal. The international bounty hunter should have the same authority to use force as a civilian police officer pursuing an escaping felon. The UNSC should call upon both States and private organizations to fund the rewards offered for fugitive war criminals. To test the effectiveness of international bounty hunters, the UNSC should permit the ICTY to issue international arrest warrants that bounty hunters could seek to enforce. These international arrest warrants should only be issued after States are given a fair opportunity to surrender custody of the indicted individual to the ICTY. The international arrest warrants should contain sufficient information to enable the accurate identification of the indicted individual and specify all acceptable locations for delivery of the fugitive. International bounty hunters should have the right to cross international borders when traveling with the indicted war criminal to a location designated in the indictment for delivery of the fugitive. Given the examples of domestic bounty hunters, the successful efforts of private parties at locating Nazi war criminals, and the possibility of State assistance, the UNSC can reasonably expect international bounty hunters to capture indicted war criminals. Even if the establishment of international bounty hunters does not result in the arrest of every indicted war criminal, it would still be a significant step in the right direction.