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ARTICLES

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ARTICLES

INTEGRATING TITLE 18 WAR CRIMES INTO TITLE 10: A PROPOSAL TO AMEND THE UNIFORM CODE OF MILITARY JUSTICE

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During a house-to-house sweep in search of unauthorized weapons in the summer of 2003, U.S. soldiers enter the home of an Iraqi man. The man is brought outside and ordered to kneel on the ground. His hands are tied with plastic handcuffs. Inside, other soldiers search the house. After finding an AK-47 rifle, the squad leader takes the rifle and orders the man to be brought inside. One solider cuts the plastic handcuffs and leaves the room. The squad leader lays the rifle near the man, and says aloud to his fellow soldiers, "I feel threatened." He then fires two shots, killing the man.[1] *Is this murder or a war crime?*

An Iraqi prisoner in the custody of Navy SEALs is hung "Palestinian style" with his hands cuffed behind his back and hung suspended from his wrists. He is beaten by several men during a series of interviews and interrogations. An army sergeant is called in to help move the uncooperative prisoner, and when the unconscious man is lowered off of his wrists, blood flows out of his mouth. His death is later ruled as a homicide.[2] *Is this assault, torture, or a war crime?*

I. INTRODUCTION

Following reports of detainee abuse coming out of Iraq and Afghanistan, some U.S. military members have been tried and convicted under the Uniform Code of Military Justice (UCMJ)[3] for their involvement. Despite the international and war-related character of these offenses, allegations have been charged as common crimes under United States Code, Title 10 (e.g., aggravated assault, dereliction of duty, maltreatment of detainees, murder) even though conduct of members of the U.S. armed forces that constitutes a "grave breach" of the Geneva Conventions can be prosecuted a war crime in U.S. civilian courts under Title 18.

The War Crimes Act[4] of 1996 sought to implement the Geneva Conventions[5] by incorporating grave breaches of the Conventions and

[1] This paragraph describes a scenario from Sadr City, Iraq, as reported by Edmund Sanders, *Troops' Murder Cases in Iraq Detailed*, L.A. TIMES, Dec. 7, 2004, at A1, and Karl Vick, *Two Days in August Haunt Charlie Company*, WASH. POST, Dec. 14, 2004, at A1.

[2] *See* Conor O'Clery, *New Prisoner Abuse Claims*, IRISH TIMES, Feb. 19, 2005, at 11; R. Jeffrey Smith, *Army Files Cite Abuse of Afghans; Special Forces Unit Prompted Senior Officers' Complaints*, WASH. POST, Feb. 18, 2005, at A16.

[3] 10 U.S.C. §§ 801-946 (2005).

[4] 18 U.S.C. § 2441 (2005).

[5] 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 Geneva

violations of other laws of war into the federal criminal code. This Act expanded federal criminal jurisdiction over U.S. military members by giving the United States jurisdiction to try War Crimes Act violations in federal civilian courts.

Violations of a federal criminal statue, such as the War Crimes Act, may be tried before courts-martial. Article 134 of the UCMJ, the "general article," allows the military to import non-capital federal criminal statutes and charge them in a military court-martial. This broadens the subject matter of criminal offenses available to military courts. Not only are the punitive articles of the UCMJ[6] available to the military prosecutor, any federal criminal statute that applies where the crime was committed could also be charged under the general article. For example, this provision would generally allow military authorities to incorporate the War Crimes Act into military prosecutions and charge U.S. service members with certain war crimes.

While the UCMJ has the flexibility to import federal law into trials by courts-martial, it has its limits. Courts have interpreted the language of the general article to bar importation of federal capital crimes into UCMJ proceedings. Where federal civilian courts have jurisdiction over criminal offenses that authorize the death penalty, these same Title 18 crimes may not be brought before a court-martial under Article 134. Turning again to the War Crimes Act, for the most serious war crimes—those in which the victim dies as a result of the accused's conduct—the statute authorizes the death penalty. Such crimes cannot be charged as war crimes in a trial by court-martial, and military prosecutors must charge the underlying conduct as a violation of another punitive article.

The reliance on Title 10 to prosecute war crimes creates an anomaly. The Department of Defense (DoD) is normally the agency that prosecutes members of the U.S. armed forces. Federal criminal law allows for punishment of certain war crimes, yet the application of Title 18 war crimes is severely restricted in military courts-martial. The effect of this limitation is that courts-martial must continue to largely rely on the offenses defined by Title 10, instead of Title 18, when charging crimes that occur during an armed conflict.

Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; 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 Geneva Convention III]; 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 Geneva Convention IV].

[6] Articles 77-134 are considered the punitive articles. The first six articles describe and define the criminal responsibility theory regarding principals (Article 77, 10 U.S.C. § 877 (2005)), accessories after the fact (Article 78, 10 U.S.C. § 878 (2005)), lesser included offenses (Article 79, 10 U.S.C. § 879 (2005)), attempts (Article 80, 10 U.S.C. § 880 (2005)), conspiracy (Article 81, 10 U.S.C. § 881 (2005)), and solicitation (Article 82, 10 U.S.C. § 882 (2005)). Articles 83 through 132 of the UCMJ contain crimes defined by Congress. Article 133 is a type of general article that applies only to officers and sets forth the elements for conduct unbecoming an officer. Article 134 contains the elements of proof required under the general article as well as more than fifty specific Article 134 offenses defined by the President.

As a result, the most egregious crimes under the laws of war committed by U.S. military members are charged as often less severe common crimes under the UCMJ. For example, the intentional, fatal shooting of a person protected by the Geneva Conventions will likely be charged as murder under Article 118, and torture will likely be charged as an aggravated assault under Article 128. Compared to Title 18 crimes, war-related offenses tried by courts-martial will often carry lower maximum penalties.[7]

The UCMJ currently defines offenses that fall into three broad categories: crimes that are purely military offenses with no corresponding civilian provisions,[8] common crimes that appear in both the UCMJ and in most state and federal criminal codes,[9] and offenses that by definition or explanation[10] are related to military operations, combat, or war.[11] Despite its

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[7] Although other sanctions, such as loss of rank, loss of pay, extra duties, hard labor, and restrictions on liberty, may be imposed through nonjudicial punishment or by a court-martial, this article discusses maximum punishments primarily in relation to confinement. The lack of discussion of a bad-conduct or dishonorable discharge is not intended to diminish the severity of a punitive discharge, which is the only court-martial punishment described as "severe" and carrying a stigma. U.S. DEP'T OF ARMY, DA-PAM 27-9, MILITARY JUDGES' BENCHBOOK 66-67 (15 Sept. 2002).

[8] These offenses include dereliction of duty (Article 92, 10 U.S.C. § 892 (2005)), insubordinate conduct toward a superior (Article 91, 10 U.S.C. § 891 (2005)), failure to report for duty at the time prescribed (Article 86, 10 U.S.C. § 886 (2005)), and desertion (Article 85, 10 U.S.C. § 885 (2005)).

[9] Examples of offenses falling under this category include drunk driving (Article 111, 10 U.S.C. § 911 (2005)), wrongful use of illegal drugs (Article 112a, 10 U.S.C. § 912a (2005)), larceny (Article 121, 10 U.S.C. § 921 (2005)), rape (Article 120, 10 U.S.C. § 920 (2005)), and housebreaking (Article 130, 10 U.S.C. § 930 (2005)).

[10] Among these offenses are missing a movement (Article 87, 10 U.S.C. § 887 (2005)), misbehavior before the enemy (Article 99, 10 U.S.C. § 899 (2005)), a subordinate compelling surrender (Article 100, 10 U.S.C. § 900 (2005)), improper use of a countersign (Article 101, 10 U.S.C. § 901 (2005)), forcing a safeguard (Article 102, 10 U.S.C. § 902 (2005)), failing to safeguard abandoned or captured property, looting or pillaging (Article 103, 10 U.S.C. § 903 (2005)), aiding the enemy (Article 104, 10 U.S.C. § 904 (2005)), and misconduct as a prisoner (Article 105, 10 U.S.C. § 905 (2005)).

Some of these articles fall into this class by the factual context in which they occur. For example, if a sailor returns one day late from leave, he could be subject to punishment for being absent without authority under Article 86. If the same tardiness caused him to miss the scheduled departure of his ship, he may be punished for missing a movement under Article 87, which carries a much greater penalty. The maximum penalty allowed for being absent without authority for three days or less is one month of confinement. In contrast, missing a movement through neglect allows for a maximum punishment of one year of confinement and a bad-conduct discharge. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Appendix 12, at 1 (2005 edition) [hereinafter MCM]. (Note that, in addition to the UCMJ, the MCM contains rules promulgated under the President's constitutional authority as Commander-in-Chief, and as provided for in Article 36 of the UCMJ. U.S. CONST. art. II, §. 2, cl. 1; 10 U.S.C. § 836 (2005). These rules include the Rules for Courts-Martial, Military Rules of Evidence, and maximum punishments.).

[11] In the 1928 MCM, Articles of War 75-82 (misbehavior before the enemy, subordinate compelling commander to surrender, improper use of countersign, forcing a safeguard, captured property to be secured for public service, dealing in captured or abandoned property, corresponding with or aiding the enemy, and spying) were listed under the subheading "War Offenses." U.S. DEP'T OF ARMY, MANUAL FOR COURTS-MARTIAL 221-22 (1928 edition)

intentional, direct application to military operations and discipline, the UCMJ has failed to keep up with evolving international humanitarian laws affecting warfare. When it comes to war crimes, the code largely languishes in the pre-Geneva Conventions era.[12] During nearly every conflict, reports of serious misconduct by U.S. forces emerge. The DoD responds by bringing such offenders before courts-martial, but the resulting convictions are for common crimes, not war crimes.

This article analyzes the limitations and disadvantages of charging war crimes under the UCMJ and examines five proposals for closing the gap between Title 10 and Title 18 regarding war crimes. Ultimately, this article proposes adding a new war crimes article to the UCMJ to: 1) align the UCMJ with existing federal criminal law; 2) better insulate U.S. military members from the use of military commissions; and 3) enjoy the preventive benefit of having a separate article that specifically defines and punishes war-related crimes.

Part II of this article provides an historical backdrop for analyzing the possibility of using the military commission to try U.S. service members for offenses against the law of war. This section outlines the history of military statutory law from the 1775 Articles of War to the UCMJ. This part then describes how military jurisdiction was exercised and expanded since the implementation of the initial American Articles of War, eventually leading to the creation and evolution of the military commission.

Parts III, IV, and V focus on the mechanics of the UCMJ. To analyze how military members are and can be charged with war crimes under current military law, it is crucial to understand where courts-martial and military commissions derive their authority, how the general article is used to import federal criminal offenses into trials by court-martial, and how Congress has limited the reach of the general article. Part III examines the statutory grant of jurisdiction to general courts-martial under the UCMJ. It focuses in particular on UCMJ Article 18, which grants general courts-martial jurisdiction to act in two spheres of competence: as courts-martial trying offenses contained in Title 10, and as military commissions exercising jurisdiction under the law of war. This part goes on to examine the legislative history of the UCMJ and analyze Congress's intent regarding the use of military commissions to try U.S. service

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(corrected through 1943) [hereinafter 1928 MCM]. UCMJ Articles 101, 105, and 106 explicitly include the words "in time of war" in the text of the statute; Articles 99, 100, 102, 103, and some provisions of Article 104 necessarily imply deployment or combat circumstances. 10 U.S.C. §§ 899-906 (2005).

A few UCMJ articles allow for a greater punishment during a time of war. The offenses of desertion (Article 85, 10 U.S.C. § 885 (2005)), striking or willfully disobeying a superior commissioned officer (Article 90, 10 U.S.C. § 890 (2005)), and misbehavior of a sentinel (Article 113, 10 U.S.C. § 913 (2005)) may trigger the death penalty in time of war. The maximum punishment for a self-inflicted injury during a time of war increases from five to ten years (Article 115, 10 U.S.C. § 915 (2005)).

[12] The UCMJ was enacted in 1950, five years before the United States ratified the Geneva Conventions.

members. Part IV explains the UCMJ's general article and how offenses charged under the three clauses of Article 134 differ in their subject matter and elements, particularly when a prosecution seeks to base charges on a federal criminal statute. Next, Part V discusses certain limitations of Article 134 and how not all federal criminal statues are eligible for importation into trials by court-martial. This section explains the case that erected the bar to charging capital offenses under the general article and examines the scope of the bar.

Part VI ties the previous sections together and takes a deeper look at the War Crimes Act. This section first provides an overview of the War Crimes Act and its legislative history. Although the legislative history contains some discussion on the use of military commissions and the DoD practice of charging U.S. armed forces personnel with common crimes under the UCMJ, there was no active debate on the need to update the UCMJ after war crimes were codified in Title 18. This section next discusses how the War Crimes Act might impact the use of military commissions to try U.S. armed forces personnel for grave breaches of the Geneva Conventions and other acts that violate the federal criminal statute. Finally, this section discusses how the limitations described in Part V, particularly the bar to charging capital offenses under Article 134, affect the importation of both the War Crimes Act and the anti-torture statute into the UCMJ.

Part VII comments on the inadequacy of the status quo and the DoD's reliance on common crimes to bring before courts-martial what are often war crimes. It looks at how the status quo can impact double jeopardy and the perceived compliance of the United States with its international obligations. Further, it scrutinizes the use of Articles 92 (dereliction of duty), 93 (maltreatment of subordinates), and 128 (assault) to argue the inadequacy of the use of courts-martial to charge war crimes. Finally, Part VIII discusses five alternatives for holding U.S. military members accountable for war crimes. Appendix 1 provides a proposed new UCMJ Article 102 that integrates Title 18 war crimes into Title 10 and Appendix 2 summarizes reports of possible war crimes stemming from the current conflicts in Iraq and Afghanistan.

II. THE DEVELOPMENT OF MILITARY LAW

A. From the Articles of War to the Uniform Code of Military Justice: A Brief History

The UCMJ can trace its American roots to the Articles of War of 1775. The American Articles of War consisted of rules for the continental army that were based on the British Articles of War.[13] The push for independence in the

[13] The American Articles of War derived its substance from the British Articles of 1774, which in turn developed from various codes ordained by the King of England. WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 5-9 (1955); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 18-20 (photo. reprint 1988) (1920); *Establishment of Military Justice: Hearings of S. 64 Before the Senate Subcomm. on Mil.*

American colonies created an urgent demand to implement a military code of their own, and England's system was both convenient and familiar.[14] In 1776, the Articles of War were modified and adopted at the suggestion of General George Washington.[15]

The focus of the early codes remained on the conduct of hostilities and the maintenance of military discipline. The early American codes did not specifically include common crimes in their scope, but they contained a general provision for trying non-capital crimes, disorders, and neglects prejudicial to good order and military discipline.[16] General George Washington, for example, reported trials of soldiers for killing a cow, theft of fowl, and stealing shirts and blankets,[17] crimes which were likely punished under the general article. Later versions of the Articles of War incorporated some common crimes, but until the twentieth century, military jurisdiction over serious crimes such as rape and murder attached only during wartime.[18]

Congress modified the Articles of War in 1806, 1874, and 1916, with the latter date marking the first complete revision of the military code.[19] The Articles were amended in 1920 to incorporate recommended changes resulting from experiences in World War I and, with minor adjustments, governed the U.S. Army through World War II.[20] With the experience of a second major war revealing the need for further reforms,[21] the Articles were again substantially amended and became effective for the U.S. Army on February 1, 1949.[22]

Affairs, 66th Cong. 24 (1919) [hereinafter *Establishment of Military Justice Hearings*] (testimony of Maj. J.E. Runcie, U.S. Army (Retired)).

[14] *Establishment of Military Justice Hearings, supra* note 13, at 25 (testimony of Maj. J.E. Runcie, U.S. Army (Retired)).

[15] AYCOCK & WURFEL, *supra* note 13, at 10. These Articles were apparently adopted without public discussion. *Establishment of Military Justice Hearings, supra* note 13, at 25 (statement of Sen. George E. Chamberlain). General Washington and other military men continued to have influence in the conventions leading up to the ratification of the Constitution. AYCOCK & WURFEL, *supra* note 13, at 11-12. As a twenty-two-year-old infantry captain-lieutenant, John Marshall was appointed the Deputy Judge Advocate in the Army of the United States in 1777 and helped to shape the development of American military law before his appointment to the Supreme Court. *Id.* at 11.

[16] AM. ARTICLES OF WAR OF 1775, art. L, *reprinted in* WINTHROP, *supra* note 13, at 957; AM. ARTS OF WAR OF 1776, § XVIII, art. 5, *reprinted in* WINTHROP, *supra* note 13, at 971.

[17] O'Callahan v. Parker, 395 U.S. 258, 306 n.3 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

[18] WAR DEP'T, COMPARISON OF PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 47 (1912), *available at* http://www.loc.gov/rr/frd/Military_Law/new_articles_war.html (last visited Jan. 20, 2006). Through World War II, military prosecutions for the crimes of rape and murder were limited to peacetime offenses committed outside of the United States. ARTICLES OF WAR, arts. 92-93, *reprinted in* 1928 MCM, *supra* note 11, at 223.

[19] AYCOCK & WURFEL, *supra* note 13, at 13-14.

[20] *Id.* at 14.

[21] Of more than 15,000,000 Americans who served during World War II, approximately 90,000 were court-martialed and 141 were executed. 95 CONG. REC. H5723-34 (daily ed. May 5, 1949) (statements of Reps. Elston and Vinson). Congressman Elston, who chaired the committee that advocated for the 1949 revisions to the Articles of War, discussed his concerns about command control over courts-martial. *Id*. at H5723. Representative Durham echoed this concern. Sharing

Following World War II, Congress also wanted a code that would apply to all branches of the military and create greater uniformity in the substantive and procedural law governing the administration of military justice.[23] A proposed uniform code drew from the Articles of War and Articles for the Government of the Navy and would eventually supersede these codes.[24] The objective of the new military code was to maximize the efficiency of the fighting force while safeguarding the military justice system from arbitrariness and abuse.[25] Congress strove to find the balance. After a series of hearings throughout the spring of 1949,[26] the UCMJ became effective in 1951.[27]

The UCMJ permanently transformed the nature of military law. The UCMJ was more than a structural change to ensure uniformity across all

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feedback he received from lawyers who had first-hand experience with military justice actions during the war, he described how they found it disturbing "that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command to choose the members of the court, to review and alter their decision, and to change any sentence imposed." *Id.* at H5725. Representative Durham also commented on the public surprise at learning that many judges, prosecutors, and defense counsel at courts-martial were not lawyers and had no legal training. *Id*. at H5725. He highlighted one case in which a Navy enlisted man with a good combat record received a five-year sentence and a dishonorable discharge for hitting a young officer (a "90-day wonder") during an escalating argument. *Id.*

[22] AYCOCK & WURFEL, *supra* note 13, at 14.

[23] *Uniform Code of Military Justice: Hearings on H.R. 2498 before the House Subcomm. on Armed Services*, 81st Cong. 600 (1949) [hereinafter *1949 House Hearings*] (testimony of Prof. Edmund M. Morgan, Jr., Harvard Law School).

[24] *Id.* The proposed code also superseded the Disciplinary Laws of the Coast Guard; the Marine Corps and Air Force did not have separate codes. *Id.* Congress also considered the federal criminal code and the penal codes of several states as well as numerous reports on World War II military and naval justice. S. REP. NO. 81-486, at 4 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2226.

[25] Representative Carl Vinson, after whom the third nuclear-powered aircraft carrier was later named, captured the tension between these two goals:

> The objective of civilian society is to make people live together in peace and reasonable happiness. The object of the armed forces is to win wars. This being so, military institutions necessarily differ from civilian institutions. Many military offenses are acts that would be rights in the civilian society. . . . Our problem stems from our desire to create an enlightened system of military justice which not only preserves and protects the rights of the members, but also recognizes the sole reason for the existing of a military establishment—the winning of wars.

95 CONG. REC. H5725 (daily ed. May 5, 1949).

[26] *See generally 1949 House Hearings, supra* note 23; *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. (1949). These materials are available on the Library of Congress's website on military legal resources, at http://www.loc.gov/rr/frd/Military_Law/ (last visited Jan. 20, 2006). After incorporating amendments that were debated at the hearings, House Bill 4080 was substituted as a "clean bill" for House Bill 2498. 95 CONG. REC. H5723-34 (daily ed. May 5, 1949) (statement of Rep. Brooks).

[27] H.R. CON. RES. 4080, 81st Cong. (1950) (enacted).

branches of service.[28] It added articles, defined new crimes, and established rules designed to protect the substantive and procedural due process rights of military personnel.[29] New provisions designed to ensure a fair trial included the right against self-incrimination; equal processes for the defense and prosecution to obtain witnesses and depositions; the prohibition on receiving guilty pleas in capital cases; the requirement that both prosecution and defense counsel be legally trained; the right for an enlisted accused to be tried by a panel that included enlisted members; the requirement that the law officer (now the military judge) instruct the panel members on the record regarding the elements of the offense, presumption of innocence, and burden of proof; the provision mandating that voting on findings and sentencing be conducted by secret written ballot; and an automatic review of the trial record.[30]

The ideological change behind the UCMJ is just as significant. With a large portion of the effort devoted to safeguarding the rights of military members facing trial by court-martial, Congress created a code that sought to change military law from its status as a tool of command[31] into a legal system that acknowledged that the citizen soldiers are entitled to enjoy the fundamental rights that they swore to defend.[32]

B. The Expansion of Military Jurisdiction

Since the founding of the United States, the exercise of military jurisdiction has proven to be flexible and responsive. Starting in the Revolutionary War era, armed conflicts and incidents of espionage exposed holes in existing law. Military law, the law of the military government, martial law, and the law of war provided the framework to fill those gaps and implement new types of tribunals or prosecute newly codified offenses. Thus,

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[28] The UCMJ was intended to be the sole statutory authority for: the listing and definition of offenses; the infliction of limited disciplinary penalties in nonjudicial actions; pretrial and trial procedure; constitution of three classes of courts-martial; establishing the eligibility and qualifications of court-martial panel members; the review of findings and sentence; and the creation of a court of appeals with civilian-appointed judges. S. REP. NO. 81-486, at 1-2, *reprinted in* 1950 U.S.C.C.A.N. 2222, 2223.

[29] *Id.* at 2-3, 1950 U.S.C.C.A.N. 2224. The UCMJ also changed the role of the law officer from that of a deliberating and voting member to one that is more consistent with the function of a judge in civil practice. *Id.* at 6, 1950 U.S.C.C.A.N. 2228.

[30] *Id.* at 2-3, 1950 U.S.C.C.A.N. 2224.

[31] *See Establishment of Military Justice Hearings, supra* note 13, at 23-25 (testimony of Maj. J.E. Runcie, U.S. Army, (Retired) (describing how the basis for the Articles of War was military command and not a cogent concept and system of military law).

[32]

> [W]e must move to correct a system which is not organically sound and which permits continued injustice to some. . . . [T]he system needs a complete and thorough overhauling in order to bring it in line with our concepts of judicial procedure and our ideas of the administration of justice, and our long-established principles safeguarding the rights of individuals as citizens of this great Republic who happen to be in the armed forces.

95 CONG. REC. H5726 (daily ed. May 5, 1949) (statement of Rep. Philbin).

since the first Articles of War were enacted, the exercise of military jurisdiction has expanded both in breadth and depth. This expansion occurred by utilizing all four forms of military jurisdiction.

1. *Sources of Military Jurisdiction and Authority*

Today's Manual for Courts-Martial lists the circumstances in which the military may exercise its jurisdiction: under military law,[33] a military government,[34] martial law,[35] and the laws of war.[36] Each has a distinct origin of authority and range of application. Military law, or the soldier's code, derived from congressional authority in the form of the Articles of War.[37] As a statutory grant of authority, military law covered only those persons and offenses described in the Articles of War (and now described in the UCMJ). A military government (or occupation government) may be exercised at the direction of the President, with the express or implied authorization of Congress,[38] as a part of military operations in non-U.S. territory. By its nature, the military government was limited in territorial scope and continued only as long as the occupation existed.[39] The United States or a state government may resort to the use of martial law over portions of its own territory as a form of self-defense in response to a justifiable emergency.[40] The imposition of martial law allows the military to prosecute both common crimes within that territory as well as violations of orders promulgated by military authority. Because martial law cannot co-exist with civil liberty, its jurisdiction ends once the civil

[33] Colonel William Winthrop referred to military law as "the code of the soldier." WINTHROP, s*upra* note 13, at 817. The current definition of military law is the exercise of military jurisdiction by a "government in the exercise of that branch of the municipal law which regulates its military establishment." MCM, *supra* note 10, pt. I, at 1.

[34] A military government is defined as the belligerent occupation of the enemy's territory. 1928 MCM, *supra* note 11, at 1; MCM, *supra* note 10, pt. I, at 1.

[35] The Constitution implicitly grants Congress the authority to impose martial law through its power to "provide for calling forth the Militia to execute the Laws of the Union." U.S. CONST. art. I, § 8, cl. 15. Martial law exists when a portion of the United States exercises military rule over its own citizens and inhabitants in a justifiable emergency. WINTHROP, *supra* note 13, at 817. Unfortunately, the MCM was not as clear as Mr. Winthrop in limiting the application of martial law to areas of the United States and its territories. The MCM merely noted that martial law existed when "a government temporarily govern[s] the civil population of a locality through its military forces, without the authority of written law, as necessity may require . . . ." 1928 MCM, *supra* note 11, pt. I, at 1. This definition was unchanged in the 1951 MCM, but later the words "without the authority of written law" were removed. *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES 1 (1951 edition) [hereinafter 1951 MCM] *with* MCM, *supra* note 10, pt. I, at 1.

[36] MCM, *supra* note 10, pt. I, at 1.

[37] Louis Fisher, *CRS Report for Congress*: *Military Tribunals: Historical Patterns and Lessons* 1 (2004).

[38] *Ex parte* Milligan, 71 U.S. 2, 142 (1866) (Chase, J., dissenting).

[39] WINTHROP, *supra* note 13, at 818.

[40] *Id.* at 817, 820.

courts are open and acting.[41] The exercise of military jurisdiction under the law of war is distinct from the other three forms of military jurisdiction. The exercise of military jurisdiction over violations of the laws of war has its roots in the early Articles of War, custom, and international law.[42]

2. *The Historical Development of Military Tribunals*

Early military codes focused heavily on the exercise of jurisdiction under statutory military law. They granted court-martial jurisdiction over a narrow range of offenses and class of persons. The Articles of War were frequently amended during the Revolutionary War period as situations arose that did not fit squarely within the existing Articles. Later, as military operations moved beyond the borders of the thirteen colonies, new threats to military effectiveness, command, and credibility drove the need to utilize the other forms of military jurisdiction. This led to the creation of other military tribunals, including military commissions. Because these other military tribunals were aimed at filling in gaps left open by statutory military law, especially with respect to persons who were not in the U.S. Army, they were not intended to supplant the court-martial. Instead, the court-martial and military commission reflected the development of distinct sources of jurisdiction, and the two classes of military tribunals continued to complement one another.

The Articles of War of 1775 governed all soldiers, as well as civilians who served with the continental army in the field.[43] The Articles were the primary vehicle for prosecuting specified offenses committed by persons described in the Articles, especially continental soldiers. Compared to the modern UCMJ, the 1775 Articles of War focused exclusively on offenses that affected military command and discipline[44] and did not directly codify common crimes as part of military law.[45]

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[41] Duncan v. Kahanamoku, 327 U.S. 304, 327-35 (1946). The Court in *Duncan* set a high standard: "the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended." *Id.* at 330.

[42] The fourth area of military jurisdiction exercised "by a government with respect to offenses against the law of war" was first listed in the MCM in 1951. *Compare* 1951 MCM, *supra* note 35, at 1, *with* MCM, *supra* note 10, pt. I, at 1.

[43] AM. ARTS. OF WAR OF 1775, arts. I, XXXII, XLVIII, June 30, 1775, *reprinted in* WINTHROP, *supra* note 13, at 953-57.

[44] The 1775 Articles of War included at least thirty purely military offenses.

[45] The general article (Article L) in the 1775 Articles of War authorized the trial by court-martial of all non-capital crimes that negatively impacted military order and discipline. AM. ARTS. OF WAR OF 1775, art. L, June 30, 1775, *reprinted in* WINTHROP, *supra* note 13, at 957. As noted, *supra* note 17 and accompanying text, General Washington may have used this general article to import those local crimes into military trials when those acts affected the military in some way. Thus, although these crimes were not directly codified in the Articles of War, the continental army had some capacity to incorporate into military law certain civil offenses that directly affect military discipline.

The first revisions of the Articles of War dealt with the offenses of spying and aiding the enemy. The 1775 code initially limited the authority of the continental army to try non-military traitors or spies. Article XXVIII of the 1775 Articles of War authorized a trial by court-martial for corresponding with or providing intelligence to the enemy when the offense was committed by a person "belonging to the continental army,"[46] but was silent about other categories of persons mentioned in the Articles. This left an obvious hole in the jurisdiction derived from military law. The provision was amended later in 1775 to cover "all persons,"[47] and thus extended court-martial jurisdiction over enemy soldiers as well as civilians with no military affiliation. Similarly, prior to 1775 the separate offense of aiding the enemy was limited to members of the continental army only,[48] but in 1776 it was amended to provide jurisdiction over any person.[49]

The continental congress intended to extend military law to non-continental forces in August 1776 when it passed a resolution stating that all persons who did not owe allegiance to America and who were found "lurking as spies in or about the fortifications and encampments of the armies of the United States" shall be penalized with death or punishment as directed by a court-martial.[50] Although this resolution was not directly incorporated into the Articles of War of 1776 that were enacted a month later, the resolution's premise was used in 1780 to try spies by a military rather than civil tribunal.[51] Recognizing the success of military trials of spies during the Revolutionary War period, Congress incorporated the language of the 1776 resolution directly into the Articles of War of 1806 and granted general courts-martial the express

[46] AM. ARTS. OF WAR OF 1775, art. XXVIII, June 30, 1775, *reprinted in* WINTHROP, *supra* note 13, at 955.

[47] Additional Article 1 of November 7, 1775 not only broadened personal jurisdiction over the offense, it also expressly authorized the court-martial to sentence the offender to death. AM. ARTS. OF WAR OF 1775, Addt'l Art. 1, Nov. 7, 1775, *reprinted in* WINTHROP, *supra* note 13, at 959.

[48] AM. ARTS. OF WAR OF 1775, art. XXVII, June 30, 1775, *reprinted in* WINTHROP, *supra* note 13, at 955. The enactment of November 7, 1775, did not affect this article.

[49] AM. ARTS. OF WAR OF 1776, sec. XIII, art. 18, Sep. 20, 1776, *reprinted in* WINTHROP, *supra* note 13, at 967.

[50] *See* Fisher, *supra* note 37, at 2 (citing 5 JOURNALS OF THE CONTINENTAL CONGRESS 693 (1905)). The British had similar provisions for dealing with spies, and the month after the resolution was passed British forces apprehended a member of the continental army behind British lines, dressed in civilian clothes, and carrying information about British fortifications. *Id.* Captain Nathan Hale was tried by a British military court and hanged. *Id.*

[51] Fisher, *supra* note 37, at 2 (Major John Andre was captured in civilian clothes and had papers in his boots that contained information on West Point, which he had received from American General Benedict Arnold); *see* WINTHROP, *supra* note 13, at 832 (Joshua Hett Smith was also tried by court-martial in 1780 for assisting Gen. Benedict Arnold).

authority to try non-citizens and enemy spies for espionage during wartime.[52] Soon after the Articles of 1806 were adopted, the military used this authority—sometimes with questionable latitude—to bring spies and traitors before courts-martial during the War of 1812[53] and the Seminole War of 1818.[54]

During later operations, jurisdiction derived from statutory military law again revealed its limitations. Under the Articles of War, the military lacked jurisdiction to try civilians in occupied territory. In time of war, commanders felt the need for a tribunal that could exercise jurisdiction over criminal acts, especially when committed by civilian inhabitants of the occupied territory.[55]

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[52] AM. ARTS. OF WAR OF 1806, art. 101, § 2, *reprinted in* WINTHROP, *supra* note 13, at 985. This addition was founded on principles of the law of nations and law of war:

> [I]n time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.

Id. By this time Congress was acting under its constitutional authority to make rules governing the land and naval forces and to define and punish spying under the laws of nations. U.S. CONST., art. I, § 8, cl. 10, cl. 14. Where the British King was the sole authority for regulation of his military, the U.S. Constitution specifically empowered Congress, not the executive, to make rules governing the land and naval forces.

[53] The trial of Louis Louallier is an interesting account of the use of a court-martial. In late 1814, after General Andrew Jackson imposed martial law in New Orleans, Louallier published an article in the newspaper that questioned Jackson's policy of trying persons accused of a crime before a military tribunal instead of a civil judge. Fisher, *supra* note 37, at 6-7. Jackson had Louallier arrested on charges for inciting mutiny and disaffection in the army. *Id.* at 7. The civil courts were open, and Louallier's lawyer obtained a writ of habeas corpus after a U.S. District Court judge determined that the martial law could no longer be authorized following the defeat of the British. *Id.* Jackson responded by having the judge arrested and jailed for his alleged complicity in aiding and abetting mutiny. *Id.* At trial, Louallier challenged the court-martial's jurisdiction to try someone who was not in the army or militia; he was also accused of spying, but "the court considered it a stretch that a spy would publish his views in a newspaper that circulated in Jackson's camp." *Id.* The court-martial acquitted him, but Jackson kept Louallier in jail until he received official confirmation of successful peace negotiations. *Id.* After General Jackson rescinded martial law, the formerly jailed judge cited Jackson for contempt of court and fined him $1000. WINTHROP, *supra* note 13, at 822.

Although Congress passed legislation to remit General Jackson's $1000 fine thirty years later, this cannot be construed as a complete ratification of his imposition of military and martial law in New Orleans. *See* Fisher, *supra* note 37, at 8. The issue was strenuously debated "because lawmakers differed sharply on whether more credit was due to Jackson for defending the city or to [the judge] for defending the Constitution." *Id.*

[54] General Jackson created a "special court" to try two British subjects, Alexander Arbuthnot and Robert Christy Ambrister, for inciting Creek Indians to wage war against the United States; Arbuthnot was also accused of spying and inciting the Indians to murder two men. Fisher, *supra* note 37, at 8. The court found Arbuthnot guilty on all charges and ordered him to be hanged. *Id.* at 9. After Ambrister was found guilty of most charges, Jackson directed him to be shot, despite the fact that the court's sentence did not include the penalty of death. *Id.* The next year, the House Committee on Military Affairs criticized Jackson for disregarding the court's decision, but the full House on a majority vote supported the trials and declined to censure Jackson. *Id.* at 10. A Senate report criticized Jackson for imposing his will arbitrarily, but took no action on the report. *Id.* at 11.

[55] WINTHROP, *supra* note 13, at 831; *see* Fisher, *supra* note 37, at 11.

Similarly, when rebellions erupted within the territory of the United States and martial law was imposed, the Articles of War lacked express authority to prosecute common crimes by courts-martial, especially when committed by persons with no military connection.[56] This gap in military law during times of war[57] led to the creation and use of a new type of tribunal: the military commission.

The first mention of the military commission appeared in 1847 during the war with Mexico[58] after the U.S. Army implemented a military government in the conquered provinces.[59] General Winfield Scott issued a general order[60] authorizing trials before a military commission for:

> Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing.[61]

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[56] *See* Fisher, *supra* note 37, at 16. During the 1916 hearings on revising the Articles of War, Brigadier General Enoch H. Crowder, Judge Advocate General of the Army, acknowledged that the jurisdiction of the military commission or "war court" was primarily limited to trials of persons in the theater of hostilities for criminal offenses that were cognizable by civilian courts during peacetime. S. REP. NO. 64-130, at 40 (1916).

[57] S. REP. NO. 64-130, at 41(1916) (testimony of General Crowder, noting that the war court grew out of "usage and necessity").

[58] WINTHROP, *supra* note 13, at 832.

[59] *Id.* at 800.

[60] *Id.* at 832. General Scott based his order on the principles of martial law, which he wanted to use to maintain order within his ranks, avoid guerilla warfare, and provide some protection for Mexican property rights and respect for religious buildings. Fisher, *supra* note 37, at 12. Although the order functioned well, General Scott was not successful in persuading Congress to add a corresponding Article of War. *Id.* at 12-13.

[61] WINTHROP, *supra* note 13, at 832. The trials that arose from the general order included additional offenses that, although not expressly contained in the order, were common crimes in a civilian system: pick-pocketing, burglary, fraud, carrying a concealed weapon, and manslaughter. *Id.* Some of the non-specified offenses tried were aimed at imposing punishment when the victim or target of the crime was the U.S. government or its soldiers: attempting to defraud the United States, introducing liquor into U.S. barracks, threatening the lives of soldiers, and attempting to pass counterfeit money. *Id*.

The nature of this order necessarily contemplated the trial of both civilians[62] and military members by the military commission. At this time, the army was still operating under the 1806 Articles of War, which did not directly vest courts-martial with jurisdiction over these offenses.[63] General Scott's order did not describe violations of the laws of war, but a separate tribunal called the council of war was utilized on a few occasions to prosecute violations of the laws of war, such as acts of guerilla warfare and attempts to entice U.S. soldiers to desert.[64] The main distinction between the council of war and the other military commissions was found in the classes of offenses each tribunal covered,[65] but the council of war and the military commission used similar procedures.[66] By the Civil War, the term "council of war" fell into disuse, and trials under the law of war, martial law, and military occupation governments all fell under the term "military commission."

Overall, the military commission "represented a blend of executive initiative and statutory authority . . . ."[67] The tribunal provided an efficient means to execute both congressional war powers and the president's directives as Commander-in-Chief.[68] Yet, General Scott recognized how this legislative-executive blend differed from an exercise of jurisdiction under statutory military law. His order prohibited military commissions from trying any case that was "clearly cognizable" by a court-martial.[69] Just as General Scott's order provided the historical foundation for the military commission, it also established a preference to try members of the U.S. armed forces by court-martial over a military commission when offenses were cognizable by both tribunals. This preference remains intact today.

Military commissions were soon widely used as department commanders issued general orders outlining the scope and jurisdiction of military tribunals.[70] In 1863, Congress formally recognized the military commission and expanded its jurisdiction to allow certain serious crimes

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[62] At least one scholar has opined that the military commissions were established to try civilians for war crimes. Douglass Cassel, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 431 n.46 (2001).

[63] However, under the existing Articles of War, the army could prosecute persons subject to the Articles of War for non-capital crimes through the application of the general article. *See, e.g., supra* note 17 and accompanying text.

[64] WINTHROP, *supra* note 13, at 832-33.

[65] The creation of the council of war necessarily acknowledged that its jurisdiction differed from those military commissions that effectively stood in for civilian courts during periods of military governments or martial law. *See* WINTHROP, *supra* note 13, at 832-33. For an excellent discussion on the different species of military commissions, see John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 902-13 (2003).

[66] WINTHROP, *supra* note 13, at 832-33.

[67] Fisher, *supra* note 37, at 13.

[68] Colonel Winthrop described the military commission in a similar way, describing it as "simply an instrumentality for the more efficient execution of war powers vested in Congress and the power vested in the President as Commander-in-chief in war." WINTHROP, *supra* note 13, at 831.

[69] Fisher, *supra* note 37, at 13.

[70] WINTHROP, *supra* note 13, at 833.

(including murder, robbery, and assault with intent to commit rape) committed by U.S. soldiers in time of war or rebellion to be punished either by a court-martial *or* a military commission.[71] Spies, too, became triable either by court-martial or military commission.[72] In 1864, Congress statutorily authorized trials of guerillas by military commission as well.[73] Through the Civil War the military commission proved to be a versatile tool, and by the end of the Reconstruction period more than 2,000 such cases were tried.[74]

After the Civil War, the exposure of members of the U.S. armed forces to trials by military commission lessened with a corresponding expansion of court-martial jurisdiction. When Congress revised the Articles of War in 1874, it codified in the new Article 58 those serious offenses which had been previously punishable by military commission under the 1863 legislation.[75] Where U.S. military members could previously be tried by military commission under the 1863 law for murder or assault with intent to commit rape, they were now tried under the Articles of War by court-martial.[76] In practice, the new article restricted the reach of the military commission over U.S. soldiers.[77]

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[71] Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736. These offenses included murder, manslaughter, robbery, larceny, assault and battery with intent to kill or commit rape. This legislation formed the basis of what later became later the fifty-eighth Article of War. WINTHROP, *supra* note 13, at 833. However, when these offenses formally became part of the Articles of War, the text of the statute no longer authorized the trial of U.S. soldiers by military commission for these offenses. *See infra* text accompanying notes 76-77.

[72] WINTHROP, *supra* note 13, at 833.

[73] *Id.*

[74] U.S. DEP'T OF ARMY, PAM. 27-173, TRIAL PROCEDURE para. 7-5(a)(2)(b) (31 Dec. 1992). Among the most notable Civil War military commissions is the trial of Captain Henry Wirz, the officer in charge of the prisoner of war camp at Andersonville, where more than 25,000 POWs were subjected to horrendous living conditions. *See generally* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 783-98 (Leon Friedman ed., 1972). The first charge alleged that Captain Wirz aided in the rebellion against the United States by conspiring to injure the health and destroy the lives of U.S. soldiers; the second charge alleged thirteen specifications in violation of the laws of war, including murder, subjecting prisoners to torture, and furnishing inadequate food and shelter. *Id.* at 784. With these charges, it appears that the military commission derived its authority based on two sources of law: under military law through Article 56 of the 1806 Articles of War and under the customary laws of war.

[75] The Articles of War of 1874 are reprinted in WINTHROP, *supra* note 13, at 986-96.

[76] Article 58 limited the temporal jurisdiction of Article 58 to a "time of war." This did not substantively differ from the temporal jurisdiction of the military commission. When a military commission tried offenses under an exercise of jurisdiction of a military government, the temporal jurisdiction of the commission began with the military occupation and ended with the signing of the peace treaty or other termination of the conflict. *Id.* at 837.

[77] Winthrop suggested that when Congress incorporated the Act of March 3, 1863 into the Articles of War of 1874, it apparently inadvertently omitted the words "or military commission" from the new Article. *Id.* at 833 n.71. This interpretation does not square with military practice and other portions of Colonel Winthrop's text. The use of a military commission to try the U.S. military member was intended to cover crimes not referenced in the soldier's code. Once incorporated into the Articles of War, the offense would be tried by court-martial. This interpretation is supported by the intent of General Scott's initial order to maintain the distinction between the competing court-martial and military commission jurisdictions, as well as Winthrop's own observations. First, earlier in his work Winthrop described the omission of the

During the war in the Philippines, the military continued to exercise jurisdiction over U.S. soldiers and law of war violations through the use of courts-martial.[78] Once, when the Articles of War and customs involving the laws of war did not provide jurisdiction over a wartime offense of a former U.S.

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words "or military commission" from Article 58 as "an omission proper for the reason that a military commission is not the appropriate tribunal for the trial of military persons." *Id.* at 667 n.15. Second, according to Winthrop, military commissions could not legally try "purely military offences specified in the Articles of war and made punishable by sentence of court-martial; and in repeated cases where they have assumed such jurisdiction their proceedings have been declared invalid in General Orders." WINTHROP, *supra* note 13, at 841. Although jurisdiction of the military commission was upheld in cases involving the offenses of spying and aiding the enemy, these limited exceptions make sense because 1) these are the only two areas that, consistently since 1776, were not limited to members of the continental army and civilians accompanying the military in the field, and 2) these are the only two offenses in the UCMJ's punitive articles (Articles 104 and 106) that expressly authorize the use of a military commission. 10 U.S.C. §§ 904, 906 (2005).

[78] In 1903, Senate Document 213 transmitted a report to the President on the trials of U.S. soldiers conducted in relation to the war in the Philippines. The document stated that Brigadier General Jacob H. Smith was tried under the general article for conduct prejudicial to good order and discipline for instructing his soldiers that he "wanted no prisoners" and "[t]he more you kill and burn, the better you will please me . . . ." S. DOC. NO. 57-213, at 2 (1903). He was found guilty of the charge, with some exceptions and substitutions, and was sentenced to be admonished. *Id.* at 3.

Major Edwin Glenn and First Lieutenant Julien Gaujot were also tried by court-martial under the general article for conduct prejudicial to good order and military discipline for subjecting prisoners to a form of punishment called the "water cure." *Id.* at 17-18. The officers were suspended from command for one and three months, respectively, and ordered to forfeit $50 of their pay for the same period. *Id.*

First Lieutenant Norman Cook was tried for manslaughter under Article 58 for allegedly ordering three of his soldiers to unlawfully shoot three Philippine natives. *Id.* at 19. Conflicting testimony at trial resulted in Lieutenant Cook's acquittal. *Id.* at 19, 30-33. Upon review, the President disapproved the proceedings and findings. *Id.* at 19.

First Lieutenant Edwin Hickman was tried under the general article for immersing the heads of two detained natives under water several times for the purpose of extorting information. *Id.* at 33. He was also acquitted, and the President also disapproved the findings. *Id.* at 34.

Major Littleton Waller and First Lieutenant John Horace Arthur Day were both tried and acquitted of murder of Philippine natives. *Id.* at 44, 46. The natives were cargo bearers for a detachment stranded in rugged terrain; after a rescue was mounted and many U.S. soldiers were found to have died, the major ordered and lieutenant implemented a firing detail to shoot the natives in retaliation. *Id.* at 44-48. The Assistant Adjutant General sharply criticized the wrongfulness of the major's summary justice when there was no evidence of wrongdoing by the natives (except for some cases of desertion) and when the major was in telephonic contact with his brigade commander. *Id.* These findings for both officers were disapproved. *Id.* at 46, 48. Through World War I, a commander could send a case back for reconsideration on an acquittal. *1949 House Hearings, supra* note 23, at 608. The President's disapproval was a form of censure that expressed disagreement with the result and sometimes commented on the court-martial's failure to appreciate the gravity of the offense. WINTHROP, *supra* note 13, at 453.

First Lieutenant Preston Brown was charged with the murder of a native in his custody; the court-martial found him guilty of a lesser offense and sentenced him to five years at hard labor and a dismissal from the Army. S. DOC. NO. 57-213, at 48-49 (1903). However, the President reduced the sentence by mitigating the imprisonment to a forfeiture of pay and a reduction in lineal rank. *Id.* at 49.

soldier, the use of the military commission was considered.[79] World War II saw a resurgence of the use of the military tribunals to try Nazi saboteurs as unlawful combatants,[80] violations of the law of war committed by non-U.S. forces,[81] offenses committed by civilians in foreign territories under U.S. military occupation,[82] and offenses committed by civilians in areas under martial law.[83] Absent was the application of the military commission to U.S. service members. Instead, U.S. service members continued to be tried by courts-martial for crimes that could also be considered law of war violations.[84]

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[79] Captain Cornelius Brownell was implicated in the death of a local priest suspected of sympathizing with insurgents. *Id.* at 80-92. The priest died after Captain Brownell subjected him to the "water cure" in an attempt to extract information. *Id.* at 83. The problem for the Army was that Captain Brownell had been discharged from the service. *Id.* at 88. The Judge Advocate General wrote a letter to Senator Henry Cabot Lodge to request referral of the report to the Attorney General for an opinion on whether he could be brought to trial. *Id.* at 92. The letter discussed three possible procedures: a trial by military commission, trial by court-martial, and trial by civilian authorities.

Starting with the military commission, the Judge Advocate General wrote, "A resort to torture in order to obtain either confessions or information from a prisoner of war is, in view of what has been said, a violation of the laws of war and, as such, is triable by military commission." *Id.* at 87. However, he noted that the jurisdiction of this type of military commission existed only within the confines of the occupied territory and ceased with the termination of the war, and the President had already proclaimed peace. *Id.* Today, criminal tribunals will likely find that such temporal jurisdiction continues to exist and allows trials for violations of the laws of war and other atrocity crimes after hostilities end. The international war crimes tribunals for Rwanda and the former Yugoslavia, both created in the mid-1990s, have been trying offenders long after the active hostilities have ceased.

Next, the Judge Advocate General analyzed the fifty-eighth Article of War and determined that, because the text of the article limited its application to wartime, the prosecution could not be instituted under this Article. S. DOC. NO. 57-213, at 87 (1903). Then, he considered whether the general article provided continuing military jurisdiction following a discharge from military service and concluded that it could not. *Id.* at 87-88.

Finally, he considered whether the local laws of the occupied territory could provide jurisdiction and concluded that U.S. soldiers in wartime were answerable only to their own government. *Id.* at 89. Finding that criminal accountability could and should not be determined by the War Department, the Judge Advocate General asked Senator Lodge to seek out other options. *See id.* at 87-88.

[80] *Ex parte* Quirin, 317 U.S. 1 (1942). Two other would-be Nazi saboteurs were tried by a military tribunal in early 1945. Fisher, *supra* note 37, at 46-47.

[81] Allied military tribunals conducted in the Far East during World War II yielded at least 3,000 sentences to confinement and 920 death sentences. Fisher, *supra* note 37, at 52. *See also, e.g.,* Johnson v. Eisentrager, 339 U.S. 763 (1950); In re Yamashita, 327 U.S. 1 (1946).

[82] *See, e.g.,* United States v. Schultz, 4 C.M.R. 104 (C.M.A. 1952) (although a U.S. civilian with no current military affiliation was tried by court-martial by the U.S. Army for vehicular homicide in occupied Japan, the findings were upheld because he could have been tried by a military occupation court); Madsen v. Kinsella, 343 U.S. 341 (1952) (dependent wife of U.S. service member was lawfully tried by the U.S. Army in occupied Germany for the murder of her active duty husband).

[83] *See, e.g.,* Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte* White, 66 F. Supp. 982 (D. Haw. 1944); *Ex parte* Spurlock, 66 F. Supp. 997 (D. Haw. 1944).

[84] *See, e.g.,* United States v. Lee, 13 C.M.R. 57 (C.M.A 1953) (soldier convicted of unpremeditated murder under Article 118 for shooting two Korean civilians to prevent a theft of government property); United States v. Griffen, 39 C.M.R. 586 (A.B.R. 1968) (soldier convicted

III. ARTICLE 18: PROVIDING TWO SPHERES OF COMPETENCE FOR THE GENERAL COURT-MARTIAL

Surprisingly little of the legislative history of the UCMJ discusses the intent of the drafters or whether the new legislation allowed U.S. armed forces personnel to be tried by a military commission instead of a court-martial for law of war violations. The drafters generally discussed how Article 18 provided the general court-martial with two roles: 1) to try persons subject to the UCMJ for offenses defined in the new code; and 2) to act as a military tribunal under the law of war. Yet, despite the general focus of the UCMJ as a system of newly guaranteed substantive rights for the U.S. service member, there was little effort to address whether or how the use of the military commission applied to members of the U.S. armed forces.

The text of Article 18 describes the jurisdiction of general courts-martial:

> Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. . . .[85]

The dual competence of the general court-martial is supported by Article 21, which generally preserves concurrent jurisdiction between a general court-martial acting as such and a general court-martial operating as a military tribunal.

By the language of Article 18, Congress assigned multiple functions to the general court-martial. The first sentence of Article 18 describes the jurisdiction of the general court-martial when it acts under statutory U.S.

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of murder under Article 118 for shooting—under orders from his commanding lieutenant—a Vietnamese prisoner whose hands were tied behind his back); United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973) (officer convicted of crimes relating to the massacre of civilians at My Lai). Lieutenant William Calley was tried by a general court-martial and was convicted of murder and assault with intent to kill. *Calley*, 46 C.M.R. at 1138. Although the underlying incidents have been described as war crimes, Lieutenant Calley was charged under enumerated UCMJ articles, namely Articles 118 and 134. One author explains that it generally takes an extraordinary event capturing significant public attention to spur the military into prosecutions of its own military members for war crimes. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 775 (Leo Friedman ed., 1972). One international scholar suggests that states may be reluctant to prosecute international crimes, including war crimes, which may have been carried out with the tacit approval of state authorities out of concern that the proceedings might involve state organs. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 279 (2003).

[85] Article 18, 10 U.S.C. § 818 (2005).

military law contained in Title 10. In this first sphere of competence, the general court-martial tries offenders for offenses that are defined by the UCMJ. Regarding personal jurisdiction, the words "persons subject to this chapter" in the first sentence of Article 18 refers to Article 2 of the UCMJ. Under Article 2, active duty military members, retired members of the armed forces, and prisoners of war, among other categories, are persons subject to the UCMJ and included in the scope of jurisdiction of the court-martial.[86] When a general court-martial acts under the jurisdictional grant of the first sentence of Article 18, i.e., under statutory military law, the subject matter jurisdiction of the general court-martial is limited to the UCMJ itself. The offenses covered in the first sentence of Article 18 are those contained in Articles 77-134.

Where the first sentence of Article 18 describes general court-martial jurisdiction by reference to the code, the second sentence looks outside the UCMJ to define jurisdiction. In its second sphere of competence, the general court-martial does not operate within the direct framework of Title 10 or under the Rules for Courts-Martial and Military Rules of Evidence. Instead, it acts under a different grant of authority—the law of war, allowing for trial by military tribunals, including military commissions.[87] The second sentence of Article 18 provides different definitions of personal jurisdiction and subject matter jurisdiction. Instead of trying persons defined by Article 2 of the UCMJ, the general court-martial acting in this second sphere of competence tries persons who are subject to a military tribunal by an application of the laws of war. As for subject matter, the focus is likewise outside of the UCMJ. The second sentence of Article 18 grants authority to the general court-martial in its capacity as a military commission to try offenses cognizable under the law of war.

The military tribunals referenced in the second sentence of Article 18 differ from courts-martial in their nature, the punishments available to each type of proceeding, and the classes of offenders each forum covers. More than once during the UCMJ hearings, Congress specifically distinguished the jurisdiction and function of a general court-martial from that of a military tribunal.[88] Congress underscored this distinction by discussing how

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[86] For a full list of persons subject to the code, see Article 2 of the UCMJ. 10 U.S.C. § 802 (2005).

[87] The "military tribunal" is a general term that includes military commissions, occupation courts, and courts of inquiry. *See 1949 House Hearings*, *supra* note 23, at 975. In this article, the term "military tribunal" generally refers to proceedings other than courts-martial.

[88] During an article-by-article analysis of the proposed code, the Assistant General Counsel, Office of the Secretary of Defense, explained the second sentence of Article 18:

> [T]hat [language] is provided, Mr. Chairman, so that a general court martial [sic] can act as a military tribunal if necessary and when it does so act that it will operate under the laws of war. It is a precautionary type of provision. It rarely happens, I take it, but in the event it ever became necessary, that jurisdiction would be provided.

1949 House Hearings, *supra* note 23, at 958 (testimony of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense). *See also infra* note 92 and accompanying text.

punishments imposed by a court-martial and military tribunal differ.[89] There is no doubt that Congress intended to preserve the two spheres of competence that the general court-martial had long held. What is not clear, however, is whether Congress intended to allow the U.S. service member to be tried by a general court-martial acting under the laws of war and not under the statutory provisions of the UCMJ.

Lawmakers were concerned about the broad scope of the second sentence of Article 18 and the application of military commissions to U.S. service members. The following exchanges from the legislative history highlight two important points in analyzing congressional grants of jurisdiction to general courts-martial. First, these passages provide support to show that, as discussed above, Congress intended to give general courts-martial competence in two areas. One area strictly applies the UCMJ as classic military law and the other flows from a separate authorization to exercise military jurisdiction under martial law, a military government, or the laws of war. Second, when the general court-martial operated as a military tribunal, it was intended to affect U.S. military members differently than other persons subject to military tribunals.

During the hearings, Mr. Felix Larkin, Assistant General Counsel in the Office of the Secretary of Defense, had discussed in general terms how the second sentence in Article 18 would enable the general court-martial acting as a military tribunal to impose punishments under the law of war, including the death penalty. Mr. Larkin implied that, when acting *as a military tribunal*, a general court-martial would not be constrained by the limitations on punishment imposed either by the UCMJ itself (Articles 77-134) or by the first sentence of Article 18 because the general court-martial would be acting within its second sphere of competence. The military tribunal was in essence free to impose any punishment authorized by the law of war. Colonel John Dinsmore, Office of the Judge Advocate General for the Army, generally agreed, citing an example of the trial of spies and saboteurs and suggesting that under the law of war a military tribunal could impose the death penalty. However, he immediately inferred that U.S. military members were excluded from the scope of this rule:

> Mr. LARKIN: Well, [the second sentence of Article 18] enables the court-martial then to impose the same kind of punishments that a military tribunal could impose under the laws of war.
> Mr. RIVERS: On civilians, too.
> Mr. LARKIN: That is right[.]
> Mr. BROOKS: Do you interpret that to mean cruel and unusual punishment—any type?
> Mr. LARKIN: Well, I do not believe cruel and unusual punishments are permitted under the laws of war.

[89] *See 1949 House Hearings*, *supra* note 23, at 959.

> Can you answer that, Colonel Dinsmore?
> Colonel DINSMORE: Those are set out very specifically, Mr. Chairman, in the laws of war. It is well settled what punishment you can adjudge. This is primarily designed for the trial of spies, saboteurs, and people like that, and not military personnel.[90]

Representative Brooks, concerned that the jurisdiction granted by the second sentence of Article 18 appeared to be "a catch-all that will just about cover anything[,]"[91] asked for clarification about whether U.S. service members would be subject to military tribunals:

> Mr. LARKIN: [That second sentence] is designed to enable the courts martial [sic], when it is acting not as a courts martial but as a military tribunal, to follow the laws of war.
> Mr. BROOKS: Does it not nullify what we just said above there?
> Mr. LARKIN: No, because it is used as a military tribunal in only a very limited number of cases, usually a case like spying or treason.
> Mr. BROOKS: But it says "any person who by the law of war is subject to trial." Would that not include any man in any branch of the service?
> Mr. LARKIN: Well, any man in any branch of service, I suppose who violated the law of war would be triable by a military tribunal or a courts martial which is not acting as a courts martial but a military tribunal.
> Mr. BROOKS: I will not make it a point, but it does just seem to me that covers everybody and it renders null the preceding provision which limits the type of punishment. That is not true, is it?
> Mr. LARKIN: I do not think so, Mr. Chairman.
> ….
> Colonel DINSMORE: . . . . Now I would like to say . . . I conceive of no situation in which military personnel of our own forces would be tried under the laws of war as distinguished from the Articles of War we are writing.

A classical example of the military tribunal is the trial of the Lincoln conspirators.[92]

Congress intended the general court-martial to act in two ways. Article 18 does not contain language suggesting the primacy of one exercise of general

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[90] *1949 House Hearings*, *supra* note 23, at 959.
[91] *Id.* at 961.
[92] *Id.* at 961-62.

court-martial jurisdiction over the other. Article 21 grants concurrent jurisdiction between the general court-martial acting as such and a military commission, but history shows that U.S. military members have been tried by court-martial over a military commission whenever the statutory military law provided a means for prosecution.[93]

IV. THE MECHANICS OF ARTICLE 134: HOW THE GENERAL ARTICLE WORKS

Under Article 18, the general court-martial acting as such is vested with jurisdiction to try offenses described in the UCMJ, including certain conduct that is not expressly defined in Title 10. From the earliest days, the Articles of War authorized a court-martial to try offenses that were not specifically listed elsewhere in the articles.[94] This provision, handed down from the 1775 Articles of War and known as the general article, appears in the modern UCMJ as Article 134:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces [clause 1 offenses], all conduct of a nature to bring discredit upon the armed forces [clause 2 offenses], and crimes and offenses not capital [clause 3 offenses], of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.[95]

Article 134 thus serves as a kind of catch-all for offenses that are not specifically defined as part of codified military law.

There are two types of Article 134 offenses. The first type includes crimes that are defined through the exercise of presidential authority. Article 36 allows the President to prescribe pretrial, trial, and post-trial procedures,

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[93] *See supra* notes 77-78, 84 and accompanying text.

[94] The fiftieth Article of War, the general article in effect from June 30, 1775, stated:

> All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

The general article appears in every later version of the Articles of War. AM. ARTS. OF WAR OF 1776, sec. XVIII, art. 5; AM. ARTS. OF WAR OF 1806, art. 99; AM. ARTS OF WAR OF 1874, art. 62; ARTS. OF WAR OF 1928, art. 96. These codes through 1874 are reprinted in WINTHROP, *supra* note 13, at 953-96. *See also* note 17 and accompanying text (noting reports of military trials for common crimes during the Revolutionary War period).

[95] 10 U.S.C. § 934 (2005).

including modes of proof,[96] and he has used this authority to create and define more than fifty criminal offenses within Article 134 itself.[97] This is how the Manual for Courts-Martial came to contain offenses such as writing bad checks,[98] disorderly conduct,[99] and fraternization,[100] among others.

The second type of Article 134 offense uses the general article to allege crimes that are not specifically listed within the pages of the Manual for Courts-Martial. When a violation is not expressly covered by congressional enactment (Articles 77-133) or by an exercise of presidential authority (offenses listed under Article 134), military practitioners may draft a new specification to allege a violation of the general article.[101] In these cases, the general article allows prosecutors to charge certain federal crimes (such as violations of the War Crimes Act) and state violations (such as underage drinking laws when committed in the United States) in trials by courts-martial. It also allows prosecutors to reach conduct that affects the discipline within the military or its reputation. The result is that the UCMJ, despite its short text, can often accommodate a broad range of law.

When an offense is not defined by Congress or the President, it is considered a non-enumerated offense that falls under one of three clauses contained in the general article.[102] These non-enumerated offenses can be placed into two baskets of crimes: those that are already crimes in their own right *outside* of the military context (clause 3) and those that are criminal offenses *because* of their military context (clauses 1 and 2). Clause 1 describes neglects and disorders that are prejudicial to good order and military discipline, clause 2 offenses are those which are of a nature to bring discredit to the armed forces, and clause 3 allows for the charging of all other non-capital crimes that apply under state or federal law.[103]

The proof required for conviction of any clause 1, 2, or 3 offense depends on the nature of the charged misconduct.[104] Under clauses 1 and 2 the proof must establish that 1) the accused did or failed to do certain acts, and 2)

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[96] 10 U.S.C. § 836 (2005). For a recent example of the exercise of presidential authority, see Exec. Order No. 13,365, 69 Fed. Reg. 71,333 (Dec. 3, 2004).

[97] MCM, *supra* note 10, pt. IV, ¶¶ 61-113. The President's list is neither exhaustive nor exclusive. *Id.*, Appendix 23, at 17; United States v. Saunders, 56 M.J. 930, 933-34 (Army Ct. Crim. App. 2002), *aff'd,* 59 M.J. 1 (2003).

[98] MCM, *supra* note 10, pt. IV, ¶ 68.

[99] *Id.* ¶ 73.

[100] *Id.* ¶ 83.

[101] *See id.* ¶¶ 60.c(5)(a), (6)(c).

[102] *Id.* ¶ 60.c(1).

[103] Certain violations of state law can be assimilated into federal jurisdiction and into Article 134 through the application of the Assimilative Crimes Act, 18 U.S.C. § 13 (2005). MCM, *supra* note 10, pt. IV, ¶ 60.c(4)(c)(ii). This article does not analyze the applicability of state crimes under the UCMJ and does not discuss the Assimilative Crimes Act in detail. Where court opinions frequently use the word "assimilate" to describe the incorporation of either federal or state law into Article 134, this article uses the word "import" or "incorporate" to describe the application of federal criminal statutes to Article 134.

[104] MCM, *supra* note 10, pt. IV, ¶ 60.b.

that, under the circumstances, the accused's conduct was prejudicial to good order and discipline within the armed forces or was of a nature to bring discredit upon the armed forces.[105] In contrast, when a federal statute is imported under clause 3, the elements of the federal law *become* the elements of the Article 134 offense; the proof must establish every element of the offense as required by the imported law.[106]

A. Clause 3 Offenses: Importing Crimes from Federal Law

Clause 3 offenses are those that already constitute criminal violations outside of the military. They are distinct from clause 1 and 2 offenses in three ways. First, because a federal crime is completely imported as a clause 3 offense, each element of the federal statute must be alleged expressly or by necessary implication.[107] Second, not every federal statute is eligible to be imported in every circumstance. Practitioners must be aware of the territorial jurisdiction of the federal statute when drafting clause 3 charges. Some federal statutes have worldwide application,[108] others do not.[109] The imported federal law must apply at the location where the offense occurs,[110] or the court-martial will lack subject matter jurisdiction to try the clause 3 offense.[111] (See Figure 1). Finally, Article 134 was not intended to provide a streamlined procedure for charging every violation that is codified in a law. Foreign laws are excluded from the definition of "crimes not capital," and may not be incorporated through clause 3.[112]

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[105] *Id.*
[106] *Id.*
[107] United States v. Mayo, 12 M.J. 286, 288 (C.M.A. 1982); MCM, *supra* note 10, pt. IV, ¶ 60.c(6). Failure to allege every element can be fatal to the charge. The *Mayo* court used fairly strong language to get its point across: "A specification fatally flawed because it does not contain an allegation of fact essential to proof of the offense charged is not restored to legal life by the government's production at trial of evidence of the fact." *Id.* The imported statute should be identified, but this is more a recommendation than a directive; failure to identify the federal statute is not fatal to the specification. *Mayo*, 12 M.J. at 289; MCM, *supra* note 10, pt. IV, ¶ 60.c(6).
[108] One example cited in the MCM is counterfeiting. MCM, *supra* note 10, pt. IV, ¶ 60.c(4)(b). Another example is the War Crimes Act, 18 U.S.C. § 2441 (2005).
[109] For example, the federal anti-torture statute limits its jurisdiction to acts that occur outside of the United States, its possessions, commonwealths, and territories. 18 U.S.C. § 2340(3) (2005).
[110] MCM, *supra* note 10, pt. IV, ¶ 60.c(4)(c)(i).
[111] United States v. Williams, 17 M.J. 207 (C.M.A. 1984). The offense will lack subject matter jurisdiction because the conduct will not technically constitute a "crime" at that location if the statute lacks territorial application. This highlights the distinction between clause 3 offenses and offenses under clauses 1 and 2—clause 3 covers "crimes and offenses" found in the civilian legal systems, and not merely disorders that are unique to military society.
[112] MCM, *supra* note 10, pt. IV, ¶ 60.c(4)(a).

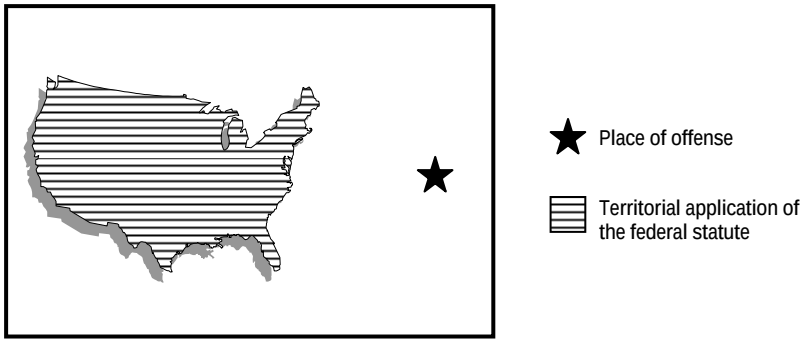

Figure 1. *Territorial application is a prerequisite to importing an offense under clause 3:* When the territorial application of a federal statute (shown with horizontal lines) is limited to confines of the United States, only those offenses that occur within that territory may be prosecuted under federal law. These federal crimes of local application may be charged under clause 3 of Article 134 of the UCMJ. However, when an offense occurs outside of the area where the federal statute applies (shown above by a star), the federal statute lacks local application and may not be imported under clause 3. However, despite the bar to direct importation under clause 3, the federal statute may form the basis of a clause 1 or 2 offense under Article 134 (discussed below in subsection B).

These clause 3 features, however, do not necessarily limit the military's overall ability to prosecute an offense. If the conduct itself is detrimental to military discipline or the reputation of the armed forces, clause 1 or 2 may provide an avenue for charging substantially similar misconduct.[113]

In the context of offenses that occur during armed conflicts, one statute that is foreseeable as an imported offense under clause 3 of Article 134 is the War Crimes Act. This statute criminalizes, among other conduct, grave breaches of the Geneva Conventions.[114] By the express language of the statute, its territorial application is worldwide[115] and thus on its face will always satisfy the clause 3 prerequisite of local application. Barring any other jurisdictional obstacles,[116] the War Crimes Act could be imported as an Article 134, clause 3 offense to prosecute conduct of a U.S. military member that takes place anywhere on the globe. Another federal law discussed in connection to the ongoing operations in Afghanistan and Iraq[117] is the statute implementing the

[113] *See infra* Part IV.B.
[114] 18 U.S.C. § 2441(c) (2005).
[115] In one of the clearest statements of unlimited territorial application, section 2441(a) is applicable "whether inside or outside the United States . . . ." *Id.*
[116] The impact of federal capital crimes on the jurisdiction of a court-martial is discussed *infra* Part V.A.
[117] *See, e.g.*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, HUMAN RIGHTS STANDARDS APPLICABLE TO UNITED STATES' INTERROGATION OF DETAINEES, 59 THE RECORD 271 (2004).

Convention Against Torture.[118] The anti-torture statute criminalizes conduct that occurs outside of the United States and the District of Columbia, the commonwealths, territories, and possessions of the United States.[119] Because the reach of the statute is aimed a locations abroad, this statute may also be imported under clause 3 when an offense occurs in a foreign theater.

B. Clause 1 and 2 Offenses: The Crimes of Disorder and Discredit

Clause 1 and 2, describing the uniquely military "disorder" and "discredit" offenses under the general article, can be applied in two ways. First, these clauses can be used to draft standalone charges. And, as case law demonstrates, clause 1 and 2 offenses can also be used as lesser offenses of clause 3 offenses.

1. *As Charged Offenses*

Clause 1 and 2 offenses encompass two theories of criminality. First, clause 1 and 2 violations may be based on state or foreign law, but proof of a violation of that state or foreign law does not create a *per se* violation under clause 1 or 2 of Article 134.[120] Acts that are generally recognized by society as illegal tend to create the discredit to the service or the prejudice to military discipline *because of their unlawful nature*.[121] Therefore, the violation of the state or foreign law is only one factor in determining whether the military member's conduct was prejudicial to good order and discipline or service discrediting.[122] Second, clause 1 and 2 offenses cover acts affecting the military that "however eccentric or unusual—would not be viewed as criminal outside of the military context."[123] Conduct under this second theory *becomes* unlawful in the military *because of its effect* on internal discipline or the reputation of the service.[124]

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[118] 18 U.S.C. §§ 2340-40B (2005).
[119] 18 U.S.C. §§ 2340(3), 2340A(a) (2005).
[120] United States v. Sadler, 29 M.J. 370, 374-75 (C.M.A. 1990). The court was particularly concerned that without appropriately tailored instructions from the military judge, a service member would be found guilty of the Article 134 offense solely because of the violation of state or foreign law. *Id.* at 375. Conduct can be service discrediting regardless of whether or not it consists of a violation of local laws. As such, it is not necessary to include a reference to the state or foreign law in a clause 1 or 2 specification, and such a reference could be unhelpful if it requires the government to present evidence on additional elements. *See* United States v. Vines, 57 M.J. 519, 527 (A.F. Ct. Crim. App. 2002).
[121] United States v. Davis, 26 M.J. 445, 448 (C.M.A. 1988). *See also* United States v. Holt, 23 C.M.R. 81 (C.M.A. 1957) (cheating at calling out bingo numbers and splitting the prize with the winners was prejudicial to good order within the military). Although the language of the general article is broad, the Supreme Court held that it was not so vague that military members could not understand what conduct was prohibited. Parker v. Levy, 417 U.S. 733, 756-57 (1974).
[122] *Sadler*, 29 M.J. at 375.
[123] *Davis*, 26 M.J. at 448.
[124] *Id.* (although not illegal under any civilian statute and despite a gender-identity disorder, the wear of women's clothing and makeup by a male sailor on a military installation was sufficiently

To qualify as a clause 1 offense, an act must be *directly* prejudicial to good order and discipline.[125] For example, a breach of a military custom may constitute a clause 1 offense, but the custom alleged must be more than frequently occurring behavior or a procedural method.[126] "Custom arises out of long established practices which by common usage have attained the force of law in the military . . . ."[127] Of course, the custom itself must be lawful.[128]

Where clause 1 punishes conduct that internally affects military discipline and order, clause 2 punishes conduct that may affect how others view the armed forces. For the conduct to be criminal under clause 2, it must be of a nature to tarnish the reputation of the service.[129] To satisfy the due process requirement of fair notice that the conduct is of the type that may bring discredit to the U.S. military, courts may draw on a variety of sources and consider federal and state laws as well as military law, including the Manual for Courts-Martial, case law, customs and usage, and regulations.[130]

It is not necessary to expressly specify whether the conduct was a disorder or whether it was of a nature to bring discredit to the armed forces,[131]

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criminal under clause 1 due to the prejudice to good order and discipline). *See also* United States v. Sadinsky, 34 C.M.R. 343, 346 (C.M.A. 1964) (holding that jumping from an aircraft carrier on a wager, although not specifically prohibited, was directly inimical to good order and discipline); United States v. Sanchez, 29 C.M.R. 23, 29 (C.M.A. 1960) (bestiality was not a local crime *per se*, but copulation with a chicken was an indecent act that was of a nature to tarnish the reputation of the service); United States v. Blevens, 18 C.M.R. 104 (C.M.A. 1955) (membership or an affiliation with a group advocating violence overthrow of the U.S. government was "definitely discrediting to the armed forces").

[125] "Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects." MCM, *supra* note 10, pt. IV, ¶ 60.c(2)(a). *See, e.g.,* United States v. Herron, 39 M.J. 860 (N.M.C.M.R 1994) (mere use of profanity per se or language that the listener finds offense does not constitute an offense under Article 134); United States v. Henderson, 32 M.J. 941 (N.M.C.M.R. 1991), *aff'd,* 34 M.J. 174 (C.M.A. 1992) (finding evidence insufficient at trial that private sexual intercourse between the appellant recruiter and high school students of consenting age, although morally reprehensible, constituted an Article 134 offense; at the time custom, regulations, and local laws did not prohibit the conduct); United States v. Wilson, 32 C.M.R. 517, 518 (A.B.R. 1962) (sexual intercourse between unmarried persons, absent any aggravating circumstances, is not an offense under the UCMJ).

[126] MCM, *supra* note 10, pt. IV, ¶ 60.c(2)(b).

[127] *Id.*

[128] *Id.* Customs that have been more formally incorporated into regulations should be charged as a dereliction of duty under Article 92 instead of under the general article. *Id.*

[129] *Id.* ¶ 60.c(3).

[130] United States v. Vaughan, 58 M.J. 29, 31 (2003). In this case, the appellant challenged her guilty plea, claiming that child neglect (leaving a forty-seven-day-old baby at home alone for six hours) that did not harm the child was not a UCMJ offense. Because the crime occurred overseas, the military could not assimilate any state offense under clause 3; however, the court of appeals found that statutes describing neglect in more than half of the states, coupled with military case law and military regulations, were sufficient to satisfy fair notice and support a clause 2 conviction. *Id.*

[131] Sometimes conduct can constitute more than one type of Article 134 offense. MCM, *supra* note 10, pt. IV, ¶ 60.c(6)(a).

but omission of the element of wrongfulness, i.e., prejudicial or service discrediting conduct, may be fatal to a clause 1 or 2 specification.[132]

2. *Using Clause 1 and 2 Offenses as Related or Lesser Offenses of Clause 3*

Clause 1 and 2 offenses can also be considered related or lesser offenses of a crime charged under clause 3 of Article 134. If a clause 3 specification is inartfully drafted,[133]or if the evidence at trial is lacking to support an element,[134] or if there was a challenge to constitutionality of the statute that renders an element invalid,[135] developing the facts that support clause 1 and 2 may allow for a conviction of the lesser offense.[136] However, if the prosecution bases its theory solely on clause 3 "and the case was submitted to the trier of fact solely on that premise, then appellate courts will not affirm an included offense under the first or second clauses" even though such offenses are otherwise generally authorized.[137] Because the government carries the burden of proving every element of every offense, prosecutors establishing clause 3 offenses should consider it part of their trial preparation to include evidence of service discredit or impact to good order and discipline to preserve the possibility of conviction of a clause 1 or clause 2 offense, whenever the facts of the case permit it.[138]

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[132] *See* United States v. Regan, 11 M.J. 745, 746 (A.C.M.R. 1981) (dismissing an offense charged under clause 1 or 2 because the specification alleging that the accused threw butter on the ceiling of the mess hall failed to include words importing criminal intent).

[133] United States v. Mayo, 12 M.J. 286, 287-89, 294 (C.M.A. 1982) (upholding a finding of guilt on a related clause 1 offense when, although the clause 3 specification omitted a necessary element, sufficient evidence was presented at trial and the jury received instruction on conduct prejudicial to good order and discipline).

[134] United States v. Williams, 17 M.J. 207, 215 (C.M.A. 1984) (declining to uphold a clause 3 offense because proof was insufficient to show that the offense occurred within the jurisdiction of the imported federal kidnapping statute). At trial, the military judge instructed the panel that prejudice to good order and discipline or service discredit was an element of the offense. *Id.* at 210. As a clause 3 offense, this element was unnecessary, but it would have been an essential element of a clause 1 or 2 offense. *Id.* at 216. Although the military judge did not specifically instruct the court-martial panel on the availability of a finding of guilt on a lesser offense, the fact that he had provided instruction about prejudice to discipline or service discredit allowed the court to affirm a finding of guilty under the first two clauses. *Id.* at 217-18.

[135] The Supreme Court decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), affected the appellate review of military cases that relied on the definition of unconstitutionally broad definition of child pornography. *See, e.g.,* United States v. Anderson, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), *rev. denied,* 60 M.J. 403 (2004); United States v. Irvin, 60 M.J. 23 (2004).

[136] United States v. Perkins, 47 C.M.R. 259 (A.F.C.M.R. 1973). *See also* United States v. Gould, 13 M.J. 734 (C.M.R. 1982) (upholding a finding of guilt as a lesser offense under clauses 1 and 2 of Article 134 for drug use—before Article 112a was enacted—because sufficient evidence was developed at trial, the parties acknowledged the lesser offense, and the military judge provided relevant instructions).

[137] *Gould*, 13 M.J. at 739.

[138] Two cases that involved a set aside of clause 3 offenses in the wake of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, had different outcomes on appeal. *Compare* United States v. O'Connor, 58 M.J. 450, 454 (2003), *aff'd,* 60 M.J. 118 (2003), *and reh'g granted,* 60 M.J. 119 (2004) (declining to find a plea of guilty provident on a clause 2 lesser included offense because,

V. THE LIMITATIONS OF ARTICLE 134: HOW CAPITAL PUNISHMENT AVAILABLE UNDER THE FEDERAL STATUTE AFFECTS MILITARY PROSECUTIONS

As a further limitation on the scope of the UCMJ's general article, capital offenses may not be charged under any clause of Article 134.[139] Although clause 3 contains the reference to non-capital offenses, the restriction to solely non-capital crimes has been found to apply to all three clauses of the general article. This stems from *United States v. French*,[140] in which the court wrestled with the interpretation and application of the words "crimes and offenses not capital."

A. *United States v. French*: Civil Statutes Authorizing the Death Penalty Fall Outside of the Scope of the General Article

Captain French was charged with a violation of Article 134 for attempting to communicate national defense secrets from New York and Washington D.C. for use by the Soviet Union.[141] It was unclear from the trial record which clause of Article 134 applied. The specification did not include reference to a federal statute or the element alleging that the conduct was service discrediting or prejudicial to good order and discipline.[142] Captain French asserted that the charge imported an offense under clause 3 from the federal Espionage Act and, because the underlying federal offense was capital, the military court-martial lacked jurisdiction.[143] The government argued that because the charge made no specific reference to a federal statute, it properly alleged serious misconduct under clause 2; in other words, because it was not an imported offense, the court-martial had jurisdiction over the offense.[144] The appellate court partially agreed with both sides. It found that the specification alleged a violation under clause 2, but disagreed that the court-martial had

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although the appellant stipulated to service discrediting character of his conduct, there was no discussion of this element during the guilty plea inquiry), *with* United States v. Mason, 60 M.J. 15 (2004) (finding that the military judge's discussion of service discrediting and prejudicial conduct rendered the appellant's guilty plea provident with respect to the lesser offense). Where a trial is before a military judge alone, the prosecution still carries the burden of proving the elements of clause 1 and 2 offenses either by developing the evidence, ensuring coverage of clause 1 and 2 elements during a guilty plea inquiry or, at a minimum, incorporating the requisite elements as part of the theory of the case. United States v. Gallo, 53 M.J. 556, 566-67 (A.F. Ct. Crim. App. 2000), *aff'd,* 55 M.J. 418 (2001).

[139] MCM, *supra* note 10, pt. IV, ¶ 60.c(5)(b).

[140] 27 C.M.R. 245 (C.M.A. 1959). The analysis of the punitive articles lists *French* as the case which established the rule listed in paragraph 60.c(5)(b) of the MCM. MCM, *supra* note 10, Appendix 23, at 17.

[141] *French*, 27 C.M.R. at 250.

[142] *Id.*

[143] *Id.* at 249-50.

[144] *French*, 27 C.M.R. at 250.

jurisdiction over the offense.[145] Based on the elements alleged in the specification, the court ultimately found that the charged conduct described a clause 2 violation based on the federal Espionage Act, an offense which carried the death penalty.[146] As a civil capital offense, the violation alleged was beyond the reach of Article 134 under any of its clauses. (See Figure 2).

To support its conclusion that the capital nature of the offense deprived the court-martial of jurisdiction under all three clauses, the court traced the history of Article 134 back to the British Code of James II of 1686[147] and compared the language to the fiftieth Article of War of 1775.[148] The court found that the general article in the Code of James II allowed trial for any offenses but prohibited a sentence that included capital punishment where, in contrast, "the Article of War denies to American military courts jurisdiction to entertain capital cases under what has become known as the general Article."[149]

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[145] *Id.*

[146] *Id.* at 252. The court noted that the specification, if drafted differently, could have described a violation of the Atomic Energy Act, which was a non-capital offense carrying a maximum confinement penalty of ten years. *Id.* Had this charge reflected a violation of the Atomic Energy Act, the court would not have dismissed the charge for lack of jurisdiction, because the underlying offense would have been non-capital. At that time, the UCMJ did not contain Article 106a.

[147] Article LXIV of the Code of James II allowed for prosecution of all misdemeanors, faults, and disorders not otherwise specified in the code, "[p]rovided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War." *French, 27 C.M.R.* at 250 (citing WINTHROP, *supra* note 13, at 928).

[148] *French,* 27 C.M.R. at 250 (citing WINTHROP, *supra* note 13, at 957). For the text of the fiftieth article, see *supra* note 94.

[149] *French*, 27 C.M.R. at 250. Curiously, the court of appeals made no reference to the British Articles of War of 1765, which also appear in Winthrop's book, and which include an article in section XX that is identical in language to the fiftieth Article of War of 1775. WINTHROP, *supra* note 13, at 946. Reference to the British Articles of War of 1765 would have shown that Britain departed from the sentence limitation principle before the Americans adopted their Articles of War from the British, and it would have shown that the American Articles of War were actually *similar* to the most current British Articles of War. However, this omission is not a fatal flaw in the court's reasoning. Regardless of when and where the language cited by the *French* court first appeared, it supports the argument that the newer clause intended to abandon the sentence limitation in favor of the bar to subject matter jurisdiction when the underlying offense is capital.

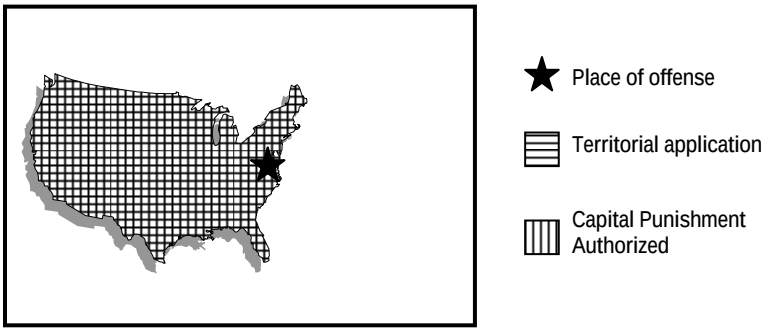

Figure 2. *Despite a statute's territorial applicability, the capital nature of the federal crime bars prosecution in courts-martial:* The intersecting lines in this figure represent the area in which military authorities are precluded from using the UCMJ's general article to charge a federal capital offense. When the offense (shown by a star) occurs within the territorial application of a federal statute (shown with horizontal lines), it has met the first prerequisite for use in a trial by court-martial under Article 134 of the UCMJ. The second prerequisite under the general article allows prosecutions only for non-capital offenses. When capital punishment might be authorized for a federal crime (shown with vertical lines) at the place where the crime occurred (the star), this second prerequisite is not met and the federal criminal statute may not be used to charge any offense under the general article.

The court relied heavily on Colonel William Winthrop's *Military Law and Precedents* for more than historical guidance and completely adopted one particular passage as part of its legal opinion and rationale:

> *"Not Capital."* The Article, by these words, expressly excludes from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death by the common law, or by a statute of the United States applicable to the case,—as, for example, murder, arson, or rape.
>
> The exclusion being absolute, the capital crime, however nearly it may have affected the discipline of the service, cannot be any more legally adjudicated *indirectly* than *directly.*[150]

Where the earlier British law allowed the charging of any civil offense as long as the punishment in the military trial did not include death, the *French* court rejected the argument that the "crimes and offenses not capital" language

[150] *French,* 27 C.M.R. at 251 (citing WINTHROP, *supra* note 13, at 721-22).

served as a sentencing limitation. Instead, the court found that the general article and its predecessors were intended to preclude trials of civil capital offenses unless specifically authorized by Congress. As further support, the *French* court also considered the practice of denying military courts the power to impose the death penalty unless it was specifically authorized.[151]

The *French* court found the jurisdictional limitations on subject matter were applicable to all three general article clauses based on a two-part rationale. First, military legal history showed that "Congress has denied to military courts the power to try capital offenses which are civilian in nature and which can be tried by civilian courts."[152] But this limitation on military jurisdiction does not bind the hands of the U.S. government. The statutes are imported under clause 3 from federal law; the lack of court-martial jurisdiction does not deprive the U.S. federal government of the ability to prosecute the offense in a federal court under federal law. Second, treating clauses 1 and 2 differently from clause 3 would create a bypass around the limitations Congress placed in the general article. Allowing a capital offense that is barred under clause 3 to be prosecuted as a non-capital violation of clause 2 would render the "non-capital" limitation meaningless because it would "permit[ ] the Government to proceed indirectly when it is barred from advancing directly."[153] Therefore, the court ruled that Article 134, under all clauses and as currently drafted, raises an "absolute barrier against military courts trying peacetime offenses which permitted the imposition of the death penalty in civilian courts."[154]

B. Bypassing the General Rule: Crimes Occurring Outside a Statute's Territorial Jurisdiction Are Not Affected by *U.S. v. French*

Shortly after *French* was decided, the courts were faced with determining whether Article 134's jurisdictional limitation on charging capital offenses operated in areas outside of the territorial application of federal statutes. In *United States v. Northrup*, the accused was found guilty of violating Article 134 by attempting to deliver a top secret document to a foreign government.[155] As in *French*, this offense was based on the Espionage Act,

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[151] The court noted that general courts-martial first were expressly authorized in 1863 to impose the death penalty for the civilian capital offenses of rape and murder, but only if the offenses occurred during war time. *French,* 27 C.M.R. at 251. Prior to the enactment of the UCMJ, military courts lacked jurisdiction to try offenses committed within the United States in peacetime. *Id.* The court then cited Articles 18 and 52 to demonstrate that the UCMJ "unquestionably den[ies] to general courts-martial the power to impose the death sentence except when specifically authorized by the Code." *Id*.

[152] *French,* 27 C.M.R. at 252.

[153] *Id.* at 251. The court further explained that if the language of Article 134 were viewed as a sentence limitation rather than a jurisdictional bar, this interpretation "would also render subsection (3) meaningless and would widen the sweep of military jurisprudence beyond the intent of Congress and the limitations of the Code." *Id.* at 252.

[154] *Id.* at 252-53.

[155] 31 C.M.R. 599, 601 (A.F.B.R. 1961).

which authorized the death penalty.[156] However, unlike the facts in *French*, the location of the crime was overseas,[157] where the federal statute lacked application.

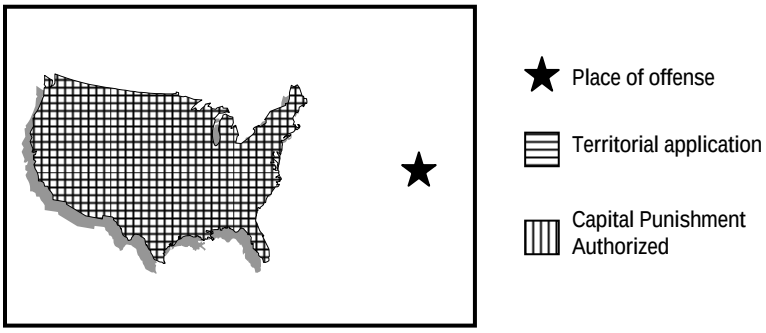

Figure 3. *When a crime occurs in an area where the federal statute is non-operative, there is no jurisdictional bar under the general article:* The intersecting lines in this figure represent the area in which military authorities are precluded from using the UCMJ's general article to charge a federal capital offense. Because the crime (shown by a star) was committed overseas, neither the territorial jurisdiction of the federal statute (shown with horizontal lines) nor its capital punishment provisions (shown with vertical lines) directly apply. Unlike the situation described in Figure 2, here the federal statute lacks territorial application at the location where the crime occurred, which means that the federal statute and its elements may not be imported under clause 3 of Article 134. However, the behavior criminalized by the federal statute can be used as a basis of an offense charged under clauses 1 or 2 (as in *U.S. v. Northrup*).

The *Northrup* court acknowledged that, under the ruling in *French*, the military would not have jurisdiction to try an accused for a capital offense which was committed "in an area where the federal civilian courts can operate."[158] However, where the statute is non-operative and the charged offense does not invade the province of the civilian courts, a military court-martial may have jurisdiction over the offense.[159] (See Figure 3).

This is where the distinction between clause 3 offenses and offenses under clauses 1 and 2 is most important. Applying the holding in *Northrup*, when there is no applicable federal statute to import under clause 3,[160] the illegal nature of the conduct proscribed by the federal law can supply the foundation for charging a violation of clause 1 or 2.

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[156] *Id.* at 606.
[157] *Id.* at 602.
[158] *Id.* at 606.
[159] *Id.* (citing *French,* 27 C.M.R. at 253).
[160] MCM, *supra* note 10, pt. IV, ¶ 60.c(4)(c)(i); *see supra* notes 110-111 and accompanying text.

VI. HOW THE ARTICLE 134 CAPITAL PUNISHMENT BAR AFFECTS PROSECUTIONS OF FEDERAL CRIMES: A LOOK AT TWO FEDERAL CRIMINAL STATUTES

A. The War Crimes Act

1. *Statutory Definitions and Legislative History*

The bill that evolved to become law as the War Crimes Act of 1996 was inspired by a Navy pilot who spent six years in the Hanoi Hilton as a prisoner of war.[161] Opening the hearings on the bill, the sponsor announced the legislation's two-fold purpose: to implement the Geneva Conventions and to protect Americans, particularly members of the U.S. armed forces.[162]

The current text of the War Crimes Act[163] criminalizes certain offenses committed by or against any U.S. national[164] or member of the U. S. armed forces[165] anywhere in the world.[166] The term "war crime" is further described as conduct that is either a violation of common Article 3 or a grave breach of the Geneva Conventions or conduct that is prohibited by other treaties listed in the statute.[167] The penalty for violating the War Crimes Act includes

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[161] *War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims*, 104th Cong. 5-6 (1996) [hereinafter *War Crimes Act Hearings*] (statement of Rep. Lamar Smith). House Bill 2587 was the predecessor bill to House Bill 3680, which was enacted into law on August 21, 1996, as the War Crimes Act of 1996. H.R. REP. NO. 104-698, at 9 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2174.

[162] *War Crimes Act Hearings*, *supra* note 161, at 2 (statement of Rep. Smith). *See also* H.R. REP. NO. 104-698, at 1, (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166. The text of the obligations referred to in the House Report may be found in Geneva Convention I, *supra* note 5, art. 49; Geneva Convention II, *supra* note 5, art. 50; Geneva Convention III, *supra* note 5, art. 129; Geneva Convention IV, *supra* note 5, art. 146.

[163] 18 U.S.C. § 2441 (2005).

[164] 18 U.S.C. § 2441(b) (2005). U.S. nationality is defined by section 101 of the Immigration and Nationality Act, 8 U.S.C. § 1101 (2005). Although 18 U.S.C. sec. 2441(b) covers crimes committed in which a U.S. armed forces member or national is a victim, this article focuses on the situation in which a U.S. military member is accused of crimes committed during an armed conflict.

[165] Initially, the legislation aimed at closing a gap in federal legislation to allow the United States to prosecute foreign nationals who commit crimes against service personnel. *War Crimes Act Hearings*, *supra* note 161, at 5 (statement of Rep. Walter B. Jones). The original House Bill 2587 was silent about the nationality of the perpetrator and proposed penal sanctions for grave breaches of the Geneva conventions where the *victim* was either a member of the U.S. armed forces or a citizen of the United States. *Id.* at 2. The Department of State advocated expansion of the bill, stating "we also have an interest in having the authority, if necessary, to prosecute any U.S. national or armed service member who commits such acts." *Id.* at 10 (testimony of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State). A later bill during the 104th Congress, House Bill 3680, expanded the scope of jurisdiction to cover United States nationals and service personnel who commit war crimes.

[166] 18 U.S.C. sec. 2441(a) (2005) both expansively and clearly intended jurisdiction to be of universal territorial application by proscribing war crimes committed "inside or outside of the United States . . . ."

[167] 18 U.S.C. sec. 2441(c) defines war crimes as conduct:

imprisonment for a term of years or life.[168] Capital punishment is authorized when the victim's death results from conduct prohibited by the statute.[169]

After the United States ratified the Geneva Conventions in 1955, the Eisenhower administration declined to implement specific legislation into U.S. domestic law. Instead, it expressed the view that existing law would provide an adequate means to prosecute grave breaches of the Geneva Conventions and found it unnecessary to enact specific implementing legislation.[170] By 1996, however, Congress found that the patchwork of legislation regarding war crimes was substantively and jurisdictionally incomplete, making prosecution impossible in certain circumstances.[171] For example, conduct that could constitute a grave breach of the conventions—torture, hostage-taking, use of weapons of mass destruction, terrorism, and genocide—were already proscribed by federal statutes.[172] However, the killing of a prisoner of war was not.[173] One area where Congress believed that jurisdiction was lacking was in prosecuting former military members who had committed war crimes while on active duty. Although the UCMJ provided an avenue to prosecute U.S. military

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> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
>
> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
>
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

When the War Crimes Act was initially enacted, subsection (a) criminalized a "grave breach of the Geneva Conventions" instead of war crimes, and subsection (c) contained a much shorter definition: "As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party." War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (1996). In 1997, Congress amended the War Crimes Act to expand the number and scope of crimes that would subject a person to criminal penalties. H.R. REP. NO. 105-204, at 2-5 (1997). No new hearings were held on the 1997 amendment; instead, the 1998 House Report referred to the hearings on the original bill. *Id.* at 7.

[168] 18 U.S.C. § 2441(a) (2005).

[169] *Id.*

[170] *War Crimes Act Hearings*, *supra* note 161, at 9 (statement of Michael J. Matheson); H.R. REP. NO. 104-698, at 3-4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2168-69 (*citing* S. EXEC. REP. NO. 84-9, at 27 (1955)).

[171] H.R. REP. NO. 104-698, at 4-5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2169-70.

[172] *Id.*

[173] *Id.* at 5.

members, members of an enemy's armed force, and others, the state of the law as of 1996 did not allow prosecutions of a military member once he or she had left the service.[174]

Congress was aware of at least one alternative to try war criminals: the use of military commissions. The hearings reveal that the original impetus for the bill was the desire for accountability over foreign nationals who commit war crimes against U.S. service personnel abroad.[175] Although international criminal tribunals and military commissions were considered as possible means to try perpetrators for grave breaches of the Geneva Conventions,[176] the administration felt that conflict-specific international tribunals were inadequate as the sole or primary means of accountability.[177] Instead, the proposed law would "establish clear jurisdiction" to directly prosecute war criminals in U.S. federal court.[178] This forum, in turn, would also provide an American perpetrator, specifically the former U.S. military member, the procedural protections of the U.S. domestic judicial system.[179] While not foreclosing the possibility of using a military commission under the right circumstances, the legislative history reflects unease with the general idea of trials by military commission.[180]

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[174] *Id.* Although Article 2 of the UCMJ allows for extensive jurisdiction over various classes of persons, including active duty and reserve service members, prisoners of war, and retirees, it does not provide jurisdiction over members of the military who are properly discharged from the military with no further service obligations. The Military Extraterritorial Jurisdiction Act of 2000 allows the United States to exercise jurisdiction over a former military member who has separated from the service, but only if the crimes were discovered after the person left the service. 18 U.S.C. §§ 3261-67 (2005).

[175] *War Crimes Act Hearings*, *supra* note 161, at 5 (statement of Rep. Walter B. Jones, referencing treatment of a Blackhawk pilot shot down in Somalia), 17 (statement of John H. McNeill, Office of General Counsel, Department of Defense, describing maltreatment of U.S. service members by Iraq during the first Gulf War).

[176] *Id.* at 5 (statement of Rep. Jones).

[177] *Id.* at 9 (statement of Michael J. Matheson).

[178] *Id.*

[179] 142 CONG. REC. H8620-21 (1996). *See also* H.R. REP. NO. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2172:

> The ability to court martial members of our armed forces who commit war crimes ends when they leave military service. H.R. 3680 would allow for prosecution even after discharge. This may not only be in the interests of the victims, but also of the accused. The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims home countries for prosecution.

[180] H.R. REP. NO. 104-698 at 5-6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2170-71.

> Many gaps in federal law relating to the prosecution of individuals for grave breaches of the Geneva conventions could *in principle* be plugged by the formation of military commissions. However, the Supreme Court condemned their breadth of jurisdiction to uncertainty in *Ex parte Quirin*, where it stated that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the laws of war."

Id. at 6, *reprinted in* 1996 U.S.C.C.A.N. 2171 (citing Quirin, 317 U.S. 1, 45-46 (1942)).

The DoD supported the War Crimes Act, noting that "the United States, as a political matter, should be seen as fully in conformity with its international obligations in this very sensitive area."[181] Regarding U.S. military members who commit war crimes, Congress was also aware of DoD's preference for and practice of using trials by courts-martial when U.S. service members violate the laws of war:[182]

> Violations of the laws and customs of war by [U.S. military] members during armed conflict ordinarily would be investigated and prosecuted as violations of the Uniform Code of Military Justice, and the accused members would be subject to trial and punishment by a court-martial. While charges and specifications against an accused normally would not specify that the accused is charged with a "war crime," nevertheless, the accused would be prosecuted for crimes specified, for example, as "grave breaches" of the Geneva Conventions of 1949. Such violations could include murder (Article 118, UCMJ), and rape (Article 120, UCMJ), waste destruction or spoilage of non-U.S. Government property (Article 109, UCMJ), or extortion (Article 127, UCMJ).[183]

Noticeably absent in the hearings was commentary about the need to adjust the UCMJ in the face of federal legislation that created the new domestic offense of war crimes and authorized a maximum penalty that would often be more severe than what the UCMJ allows. For example, although the UCMJ offenses of rape and murder authorize maximum punishments in the military system, which correspond to Title 18 maximum penalties, the other "war crimes" specifically mentioned in the DoD testimony carry significantly lower maximum punishments.[184] Despite the reference to war crimes as "the most

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[181] *War Crimes Act Hearings*, *supra* note 161, at 18 (testimony of John J. McNeill).

[182] The House Report cited the trial of Lieutenant William Calley as the "most famous example of a court martial for war crimes." H.R. REP. NO. 104-698, at 5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2170. Although the conduct for which he was convicted of is often referred to as war crimes, he was charged with the UCMJ common crimes of premeditated murder (Article 118) and assault with intent to commit murder (Article 134). U.S. v. Calley, 46 C.M.R 1131, 1138 (A.C.M.R 1973). At the beginning of the *Calley* opinion, the court wrote that "all charges could have been laid as war crimes" and cited as support the Army field manual on land warfare. *Calley*, 46 C.M.R. at 1138 (citing U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 507b (18 July 1956) [hereinafter FM 27-10]. Paragraph 507b itself is devoid of reference to black letter law on this point and states: "Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code." *Id.* Neither *Calley* nor the Army's Field Manual provides any further discussion on the amenability of U.S. personnel to trial by a military tribunal other than court-martial.

[183] *War Crimes Act Hearings*, *supra* note 161, at 15 (statement of John J. McNeill).

[184] A violation of Article 109 carries a maximum punishment of five years, and the offense of extortion under Article 127 authorizes a maximum of three years of confinement. MCM, *supra* note 10, ¶¶ 33.e(2), 53.e. The War Crimes Act authorizes any term of years to life imprisonment

heinous crimes that one could imagine[,]"[185] the DoD representative implied that courts-martial under the existing UCMJ articles are a sufficient measure of justice.[186]

2. *Possible Impact of the War Crimes Act on Article 18*

Although the applicability and scope of military commissions were discussed during the hearings, such comments were not made with U.S. military members in mind. At the time of the hearings, the proposed bill criminalized conduct when U.S. citizens or members of the U.S. armed forces were *victims* of war crimes. When Judge Robinson O. Everett advocated for an expansion of federal jurisdiction through the use of military commissions, he implicitly excluded U.S. service members because none of the three cases he referenced in support of the use of military commissions involved trials of U.S. military members.[187] Furthermore, as discussed above, discipline of U.S. military members was historically imposed through trials by court-martial. From the DoD perspective, expanding the definition of a perpetrator under the War Crimes Act to specifically cover U.S. military members would not change DoD practice. Technically, the new federal law would allow the U.S. military to prosecute additional crimes through the general article, but there was no need to consider using the military commission to try U.S. military members when courts-martial were deemed adequate.[188]

The language of the UCMJ leaves open the question whether Article 18 authorizes the trial of a U.S. military member by a military commission when: The offense is barred by application of the UCMJ; and the federal district

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for the same conduct, if it occurs within the context of a conflict covered by the Geneva Conventions. 18 U.S.C. § 2441(a) (2005).

[185] *War Crimes Act Hearings*, *supra* note 161, at 19 (statement of Michael J. Matheson).

[186] *Id.* at 14 (statement of John J. McNeill) (noting that military members were court-martialed for conduct occurring in Somalia and Panama that "might have amounted to grave breaches of the Geneva Conventions").

[187] *Id.* at 20, 22 (testimony and statement of the Hon. Robinson O. Everett) (citing *Ex parte* Quirin, 317 U.S. 1 (1942) (trial by military commission of German saboteurs arrested in the U.S.)); In re Yamashita, 327 U.S. 1 (1946) (trial by military commission of Japanese general for war crimes); Madsen v. Kinsella, 343 U.S. 341 (1952) (trial by occupation court in Germany of a American civilian for murder of her husband who was a member of the U.S. military)).

[188] *See War Crimes Act Hearings*, *supra* note 161, at 18 (statements of Rep. McCollum and Mr. John J. McNeill). When Mr. McNeill suggested that the statute did not need amending beyond adding classes of persons covered by the crime, he incorporated Judge Everett's view of the viability of the military commission in certain, limited contexts (comments which did not provide examples of the use of military commissions to try U.S. service personnel). *Id. See also supra* note 187 and accompanying text. Therefore, when Mr. McNeill described the extent of current UCMJ jurisdiction, he distinguished active duty members who may be tried by court-martial from others triable by military commissions: "we do have full jurisdiction over our active duty people; that is correct. We also have jurisdiction of general courts-martial under the UCMJ. And, if I understood the judge's proposal correctly, it's based on his view that there is some residual authority under the Constitution to exercise jurisdiction under the UCMJ . . . even now, without additional statutory authority." *War Crimes Act Hearings*, *supra* note 161, at 18.

courts have jurisdiction over the offense. The first sentence of Article 18 suggests that if a military member is on active duty status, he or she will be subject to trial by general court-martial.[189] Military practice follows this principle.[190] However, the second sentence of Article 18 does not expressly exclude military members from being tried under the laws of war through the use of other tribunals.

The War Crimes Act expanded U.S. federal criminal jurisdiction over law of war offenses but did not expressly broaden Title 10 military jurisdiction. Although Congress created in the UCMJ a means to try military members by court-martial for a broad range of offenses, when it passed the War Crimes Act it declined to add war crimes to Title 10 either directly by amending the punitive articles or indirectly by expanding the jurisdiction of Article 134 to incorporate the new Title 18 capital crimes.[191] Similarly, despite the invitation to amend Articles 18 and 21,[192] Congress chose not to comment on the reach of military tribunals.

Allowing a military commission to try a U.S. service member for a law of war offense that is punishable by death might circumvent Congress's intent to limit the circumstances in which persons described in Article 2 (e.g., active duty military members) are subject to capital punishment.[193] Congress prohibited the application of the death penalty to a U.S. service member except when expressly authorized by the UCMJ.[194] Because the restriction on capital punishment appears only in the first sentence of Article 18, does it limit the ability to impose the death penalty on a U.S. service member tried by a military commission?[195] In his testimony at the 1996 War Crimes Act hearings, Judge Everett implied that the bar in Article 134 to prosecuting capital offenses by courts-martial might equally apply to military commissions. Referring to the language that limits the application of Article 134 to non-capital crimes, he said, "It's a technical point, and . . . I would hope that would be dealt with somewhere along the line, because it would be unfortunate to deprive courts-martial *and military commissions* of an opportunity to try cases where they might be the only really realistic forum that could be used."[196]

The proponent in favor of using a military commission to try a U.S. service member may argue that the passage of the War Crimes Act did nothing

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[189] *See supra* note 86 and accompanying text.
[190] *See supra* notes 69, 78-79, and 84 and accompanying text.
[191] Prior to the passage of the War Crimes Act, breaches of the Geneva Conventions could be prosecuted as clause 1 or 2 offenses under Article 134. For a sampling of pre-UCMJ courts-martial that used the general article to prosecute law of war offenses, see *supra* notes 78-79. Still, the mere passage of the Act provided military authorities with a greater range of non-capital offenses that can be incorporated through clause 3 of Article 134.
[192] *See War Crimes Act Hearings*, *supra* note 161, at 18, 20-21, 49.
[193] *See infra* Part VIII.E.
[194] Article 18, 10 U.S.C. § 818 (2005).
[195] *See supra* note 90 and accompanying text.
[196] *War Crimes Act Hearings*, *supra* note 161, at 40 (emphasis added) (testimony of Hon. Robinson O. Everett).

to affect the jurisdiction to try a U.S. soldier by military commission.[197] Many crimes described in the War Crimes Act were considered violations of the law of war long before the legislation was drafted. The legislative history does not suggest that Congress intended the War Crimes Act to fully occupy and criminalize violations of the law of armed conflict. To implement the provisions of the Geneva Conventions in a way that restricts the military from prosecuting its own members is a paradox.

When evaluating Congress's intent toward the continuing application of military commissions, it is crucial to separate U.S. military personnel from the other classes of persons historically eligible for trial by military commission. The legislative history of the UCMJ and the War Crimes Act both suggest that, at least in the modern context, military commissions were aimed at covering classes of persons *other than* U.S. armed forces. The War Crimes Act authorizes the United States to try a military member in federal district court for his or her conduct overseas in an armed conflict. From this perspective, the traditional purpose of a military commission—to fill a jurisdictional gap or the vacuum left by non-operational courts that would otherwise have jurisdiction—would weigh against its use.

3. *Importing the War Crimes Act into Article 134*

To what extent may the War Crimes Act be imported into a trial by court-martial through Article 134? Prosecution of severe War Crimes Act offenses in a trial by court-martial may be barred by the application of *U.S. v. French*.[198] Because the subject matter jurisdiction of the general article is limited to non-capital crimes, only those Title 18 crimes that do not authorize the death penalty may be imported through clause 3. Under the War Crimes Act, the death of the victim causes the violation to become a capital offense. Applying the holding in *French*, although the War Crimes Act applies worldwide, conduct that causes the victim's death pushes the federal statute outside of the limits of the subject matter jurisdiction of Article 134. (Compare Figures 4 and 5). As a result, a capital offense under the War Crimes Act can neither be an imported offense under clause 3 nor be alleged as prejudicial to good order and discipline or service discrediting under clauses 1 and 2. The same conduct, however, could be charged under the UCMJ as murder,[199] manslaughter,[200] or other applicable UCMJ article.

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[197] Judge Everett had also recommended that House Bill 2587 include the following language: "Enactment of this Law shall not repeal or diminish in any way the jurisdiction of any court-martial, military commission, or other military tribunal under Articles 18 and 21 . . . or any other Article of the Uniform Code of Military Justice, or under the law of war or the law of nations." *Id.* at 49.
[198] *See supra* Part V.A.
[199] Article 118, 10 U.S.C. § 918 (2005).
[200] Article 119, 10 U.S.C. § 919 (2005).

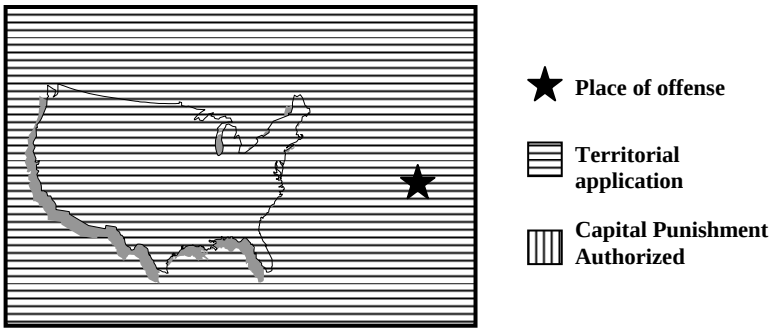

Figure 4. *Application of the War Crimes Act, Part I (without the death of the victim):* Because the War Crimes Act has worldwide territorial application (shown with horizontal lines), the first prerequisite for importation under clause 3 is met (compare with Figure 1). Capital punishment is not authorized under the War Crimes Act unless the victim dies as a result of the accused's conduct; in this situation, there is no applicable capital punishment and thus no subject matter jurisdictional bar to bringing the offense before a trial by court-martial under any clause of the general article.

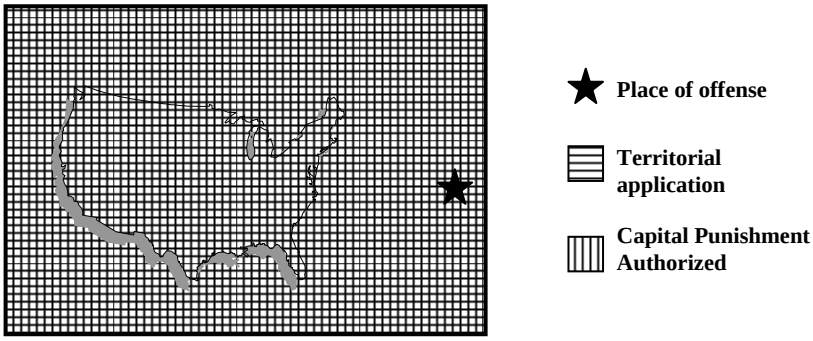

Figure 5. *Application of the War Crimes Act, Part II (when the conduct results in the victim's death):* The first prerequisite, territorial application (shown with horizontal lines), is readily met in this situation, because the federal War Crimes Act applies worldwide (compare with Figure 1). Regarding the second prerequisite, capital punishment is authorized (shown with vertical lines) when the victim dies as a result of the accused's proscribed conduct. As shown in Figures 2 and 3, the intersecting lines here represent the area in which military authorities are precluded from using the UCMJ's general article to charge a federal capital offense. Wherever the War Crimes Act authorizes capital punishment for qualifying offenses, the military is precluded from trying offenses based on it. Applying the holding in *U.S. v. French,* with the general article limited to non-capital crimes, this principle precludes the importation of the War Crimes Act under clause 3, as well as the use of the War Crimes Act to support clause 1 or 2 offenses when the victim of the crime has died.

Congress was aware of the obstacle posed by Article 134 for military prosecutions of capital War Crimes Act offenses. During the 1996 hearings, Judge Everett highlighted the problem that would exist if the death penalty were authorized under the federal criminal statute. The discussion on the death penalty prompted Judge Everett to remark: "If there is a capital offense authorized, I fear that it might have the practical effect of ousting court-martial jurisdiction that would otherwise exist, and I think that would be a very important and unfortunate byproduct."[201]

Unfortunately, Judge Everett's remarks were relegated to the periphery. The comment was not part of Judge Everett's prepared testimony,[202] Congress did not follow up on his remarks with any questions or further discussion,[203] and the House Report lacked any reference to this issue in its discussion about the impact of the proposed legislation and the ability to prosecute grave breaches of the Geneva Conventions.[204] Although Judge Everett sent a follow-up letter to the subcommittee's assistant counsel shortly after the hearings concluded, he did not address this issue in detail.[205] The 1997 Expanded War Crimes Act did not include new hearings, and the inability to prosecute Title 18 war crimes within the military justice system was not revisited.[206]

The issue raised by *French* still exists. (Compare Figures 2 and 5). The limitations of the general article will continue to partially frustrate the purpose of the War Crimes Act as long as the DoD takes the lead in trying U.S. military members by courts-martial.[207] Because active duty military members are the primary actors in prosecuting a war, they are also inherently among the class of potential offenders in every conflict. As we have seen from the cases arising out of the recent conflicts in Afghanistan and Iraq, many of the violations do not involve the death of the victim.[208] In these cases, the War Crimes Act remains available for importation through Article 134.

However, the victim's death triggers the availability of capital punishment under the statute and, in turn, also triggers Article 134's jurisdictional bar on trying capital offenses. This creates the undesirable result that the most egregious offenses cannot be tried and punished by a court-martial as war crimes. Although the existing punitive articles provide a mechanism to charge the accused with *a* crime in most cases, they do not necessarily allow for

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[201] *War Crimes Act Hearings*, *supra* note 161, at 40 (testimony of the Hon. Robinson O. Everett).
[202] *See id.* at 20-24.
[203] *Id.* at 40-48.
[204] H.R. REP. NO. 104-698, at 5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2170.
[205] *War Crimes Act Hearings*, *supra* note 161, at 49-50 (letter to George M. Fishman regarding H.R. 2587, June 17, 1996).
[206] H.R. REP. NO. 105-204, at 7 (1997).
[207] *See infra* notes 228-232 and accompanying text.
[208] Appendix 2 to this article contains a non-exclusive list of incidents in which members of the U.S. armed forces have been suspected, accused, or convicted of offenses related to the conflicts in Afghanistan and Iraq.

charging the *most appropriate* crime or expose the accused to the maximum penalty that the War Crimes Act would authorize.[209]

B. The Anti-Torture Statute

In the wake of detainee abuse scandals emerging out of Afghanistan, Iraq, and Guantanamo Bay, the subject of torture is, regrettably, linked to U.S. military activities. The UCMJ does not contain an article expressly prohibiting the "torture" of persons detained during an armed conflict.[210] However, Title 18 criminalizes acts or attempted acts of torture[211] that take place outside of the United States.[212]

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[209] Consider the following scenario: a detainee dies as a result of unjustified rough treatment by a military member, but the circumstances do not support a charge of premeditated murder. In a federal prosecution for a War Crimes Act violation, the accused could receive the death penalty or imprisonment for any term of years, including life. 18 U.S.C. § 2441(a) (2005). Under the UCMJ, potential charges include unpremeditated murder (Article 118(2) or 118(3)), manslaughter (Article 119), aggravated assault (Article 128), or willful dereliction of duty (Article 92), but such charges may fail to reflect the gravity of the acts and the resulting death. Although the maximum confinement authorized under the UCMJ for unpremeditated murder aligns with the federal statute (life imprisonment), capital punishment is not authorized under Article 118(2) or (3). Also, compare the maximum penalty available under the War Crimes Act (life imprisonment) with the maximum confinement authorized for voluntary manslaughter (15 years), involuntary manslaughter (10 years), aggravated assault where grievous bodily harm is intentionally inflicted (5 years; if committed with a firearm, the maximum rises to 10 years), assault with means likely to cause grievous bodily harm or death (3 years; if committed with a firearm, 8 years), assault consummated by a battery (six months), or a willful dereliction of duty (six months). MCM, *supra* note 10, Appendix 12, at 3-4.

One group has suggested considering torture as cruelty chargeable under Article 93. COMMITTEE ON INTERNATIONAL HUMAN RIGHTS AND THE COMMITTEE ON MILITARY AFFAIRS AND JUSTICE, HUMAN RIGHTS STANDARDS APPLICABLE TO THE UNITED STATES' INTERROGATION OF DETAINEES, 59 THE RECORD 183, 213 (2004). For a discussion questioning the appropriateness of using Article 93 to prosecute detainee maltreatment offenses, see *infra* notes 274-282 and accompanying text.

[210] Despite the lack of a specific article, military prosecutions have addressed allegations of detainee abuse. Allegations that could be charged as violations of the anti-torture statute in federal district courts have been charged in courts-martial as maltreatment of a subordinate (Article 93), various forms of assault (Article 128), indecent assault (Article 134), or derelictions of duty (Article 92). For examples of the types of offenses that may correspond to the federal crime of torture, see Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

[211] Torture is defined in 18 U.S.C. § 2340 (2005):

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;

The anti-torture statute is relevant to the discussion of war crimes and how to integrate them into the military justice system. First, the War Crimes Act criminalizes grave breaches of the Geneva Conventions, and one of the grave breaches found in all four of the Geneva Conventions is torture of a person protected by the conventions.[213] Second, the anti-torture statute has an implied connection to the conduct of military operations. Although the anti-torture statute does not expressly list members of the U.S. armed forces in its definition of perpetrators as the War Crimes Act does, acts committed by military members reasonably fall within the reach of the statute. The anti-torture statute targets acts that take place outside of the United States. Because military operations involving hostilities or armed conflict occur primarily overseas and because the military necessarily has a role in capturing and detaining belligerents during such conflicts, the anti-torture statute could apply to misconduct of U.S. military members during these operations.[214]

1. *Territorial Application of the Anti-Torture Statute*

The anti-torture statute may be imported for use in military prosecutions under Article 134 in the same way as the War Crimes Act. If a federal statute applies territorially at the location where the crime occurred and if there is no bar to subject matter jurisdiction, the UCMJ allows military authorities to prosecute the offense in a trial by court-martial. Wherever federal authorities have jurisdiction over an act of torture, then the prerequisite of territorial application under clause 3 of Article 134 is satisfied.

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .

[212] 18 U.S.C. § 2340A(a) (2005).

[213] Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art. 147.

[214] See *supra* note 78 for a summary of courts-martial of military members for unlawful treatment of Philippine nationals. See also *supra* note 79 for a discussion of how the Army Judge Advocate General denounced the use of the "water cure" to extract information as "torture" that violates the law of war. *See also, e.g.,* Golden, *supra* note 210. For examples, see *infra* notes 488-490, 497-499, 520-530, 557-561 and 566-570 and accompanying text.

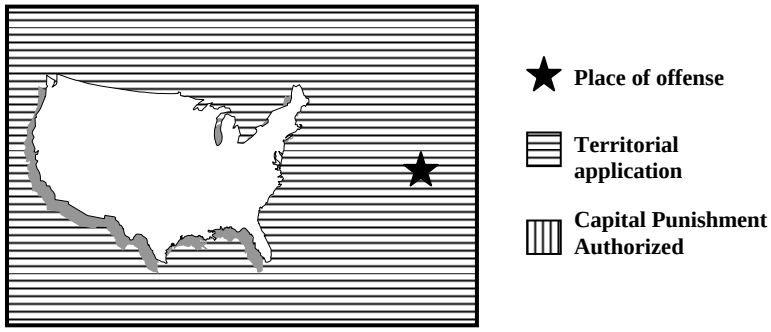

Figure 6. *Application of the Federal Anti-Torture Statute I (Territorial Application):* The federal statute implementing the Convention Against Torture applies only outside of the United States (territorial application is shown with horizontal lines). Compare the territorial application here with Figure 1.

The anti-torture statute covers acts that occur outside of the "several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States."[215] (See Figure 6). It would

[215] 18 U.S.C. § 2340(3) (2005). Prior to October 28, 2004, the territorial application of the anti-torture statute was much more limited, and the anti-torture statute might have lacked application on a military installation in Germany, a temporary base established in Iraq, or other buildings used or leased by the United States for military operations. Subsection 3 of 18 U.S.C. § 2340 defined the jurisdictional scope to include "all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49." 18 U.S.C. § 5 refers to "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone." Under 18 U.S.C. § 7 (2004), U.S. jurisdiction included:

> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
> . . . .
> (5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
> . . . .
> (7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.
> (8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

appear that any question of territorial application would be easily resolved. Yet, in light of the Supreme Court's 2004 decision in *Rasul v. Bush*,[216] future litigation is possible on the question of whether the U.S.-operated base at Guantanamo Bay qualifies as part of the United States under the anti-torture statute.[217]

2. *The Barrier to Importing Certain Torture Violations Under the General Article*

Satisfying the prerequisite of territorial application is only half of the analysis. As discussed above in Part 0, judicial precedent precludes a federal statute with territorial application from forming the basis of a charge under any clause of Article 134 when the crime is a capital offense. In this way, Article 134's limitations affect the anti-torture statute in the same way as the War Crimes Act.

> (9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 U.S.C. § 1101]—
> (A) the *premises of United States* diplomatic, consular, *military* or other United States Government missions or entities in foreign States*, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and*
> (B) *residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.*

(Emphasis added). Finally, 49 U.S.C. § 46501(2) (2004) defines the special aircraft jurisdiction of the United States to include civil and armed forces aircraft of the United States in flight regardless of location, other aircraft regardless of affiliation in flight within the United States, and other aircraft outside of the United States under certain additional conditions.

The prior definition of special jurisdiction potentially included the premises of U.S. military missions and buildings and land used by those missions. *Compare* United States v. Corey, 232 F.3d 1166 (9th Cir. 2000), *cert. denied*, 534 U.S. 887 (2001) (finding that an overseas military installation and housing complex leased by the U.S. government fell within the definition of special and maritime jurisdiction), *with* United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000) (finding no such jurisdiction), *superseded by statute as stated in In re Ski Train Fire in Kaprun, Austria*, PROD. LIAB. REP. (CCH) ¶ 16850 (S.D.N.Y. Dec. 8, 2003). Until this loophole was closed, the statute might have exempted from jurisdiction precisely those areas where the U.S. military conducted operations and where maltreatment of detainees was found to occur. *See, e.g.,* Golden, *supra* note 210 (describing a U.S. Army investigation into severe abuse that contributed to the deaths of two detainees in Bagram, Afghanistan).

[216] 542 U.S. 466 (2004) (holding that the writ of habeas corpus is available to detainees at the U.S. military base at Guantanamo Bay, Cuba).

[217] This is a potential argument for the defense in a prosecution under the anti-torture statute. If territorial application is lacking, federal prosecutors will lack jurisdiction to try the offense and military prosecutors will be barred from importing the offense into a court-martial under clause 3 of Article 134.

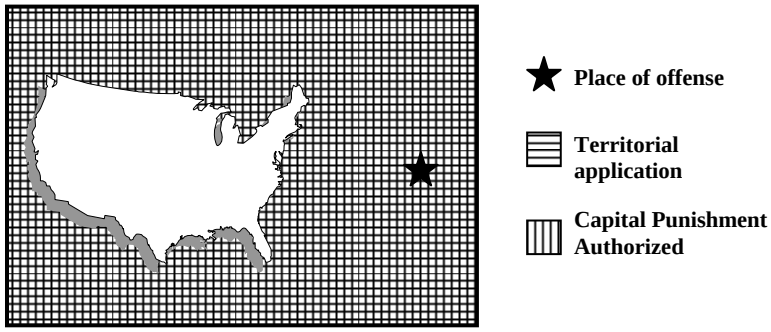

Figure 7. *Application of the Federal Anti-Torture Statute II (when capital punishment is triggered by the victim's death)*: Capital punishment is authorized when the victim dies as a result of the accused's conduct. Because the Title 18 statute applies (shown with horizontal lines) where the offense occurred and because the death penalty is authorized (shown with vertical lines), the federal statue cannot be imported under clause 3, nor may a clause 1 or 2 offense either be charged as a standalone offense or used to form a lesser offense. (Compare with Figure 5). However, if the same conduct occurred within the jurisdiction of the United States, where the statute lacks territorial application, the crime could be charged as a clause 1 or 2 standalone offense. (Compare with Figure 3).

Similar to the punishment authorized under the War Crimes Act,[218] the anti-torture statute allows the death penalty when the victim's death results from the accused's prohibited conduct.[219] (Compare Figures 5 and 7). Under *United States v. French*, when the death penalty is available as a punishment for a violation of the federal criminal statute, that statute may neither be incorporated under clause 3 of Article 134 nor charged as a standalone offense under clause 1 or 2.[220] When the federal crime is a capital offense, it falls completely outside the subject matter jurisdiction of Article 134 and the competence of courts-martial. Once again, under such circumstances, military authorities are required to rely on existing UCMJ articles to prosecute offenses that amount to torture.

VII. THE INADEQUACY OF STATUS QUO

A. General Considerations

A court-martial could prosecute a military member for murder of a person protected by the Geneva Conventions without mentioning the conventions or using the term "war crime." Supporters of the status quo may

[218] 18 U.S.C. § 2441(a) (2005).
[219] 18 U.S.C. § 2340A(a) (2005). The statute authorizes imprisonment for twenty years for conspiracy to torture, attempted torture and torture not resulting in death. 18 U.S.C. § 2340A(a), (c) (2005).
[220] *See supra* Part V.A.

argue that it is not necessary to amend the UCMJ to pursue justice and prosecute offenses that take place within the context of an armed conflict. If the goal is to ensure that the fact finder is aware of the wartime context, this is already satisfied by existing rules that allow prosecutors to present evidence of the facts and circumstances of the offense during the findings phase[221] and to provide evidence of aggravating factors during the sentencing phase.[222]

Would codifying war crimes in Title 10 create a distinction without a real difference? During the Vietnam conflict, 122 military members were convicted by courts-martial of killing noncombatants.[223] Other countries have recently used the court-martial process to prosecute their soldiers for murder and abuse.[224] Under this view, the UCMJ provides an adequate mechanism to hold offenders accountable for crimes committed during armed conflicts.

However, the current system significantly undervalues the severity of war crimes and creates a catch-22. The military is the body primarily responsible for day-to-day operations in armed conflict, and the Geneva Conventions were designed to regulate the conduct during armed conflicts based on evolving norms of international humanitarian law. Yet, a court-martial lacks jurisdiction to try *as war crimes* the most serious breaches that occur during such conflicts. Because of the prohibition on trying capital offenses under the general article, the War Crimes Act and federal anti-torture statute are shut out of military prosecutions when the victim's death results from the crime.[225] Instead, commanders must rely on specific UCMJ offenses to charge the most serious crimes of the armed conflict. Thus, an unlawful killing might be charged as murder (Article 118), voluntary manslaughter (Article 119), or assault with intent to commit murder (Article 134).[226] Title 18 codifies murder and war crimes separately, a distinction that does not exist in Title 10 prosecutions.[227]

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[221] *See generally* MCM, *supra* note 10, MIL. R. EVID. 401.
[222] *Id.*; MCM, *supra* note 10, R.C.M. 1001(b)(4).
[223] Edmund Sanders et al., *The Conflict in Iraq: Killings Sting Proud Battalion*, L.A. TIMES, Dec. 13, 2004, at A1.
[224] *See, e.g.,* Ian Bruce, *Army May Halve Combat Tours in Move to Boost US Recruitment*, HERALD (Glasgow), Sep. 28, 2004, at 10 (describing charges of murder in a civilian court against a British solider and charges against a Dutch marine for violating the rules of engagement and negligence resulting in the death of a civilian); *Charged with Killing Those They Were Sent to Protect*, DAILY TELEGRAPH, Feb. 4, 2005, at 30 (reporting on seven British soldiers facing courts-martial for punching and hitting an Iraqi man with rifle butts and three British soldiers facing courts-martial for abuse of Iraqi civilians).
[225] *See supra* Figures 5 and 7 and accompanying text.
[226] *See, e.g.,* Brian Donnelly & Matt Spetalnick, *US Soldier Jailed One Year for Murder of Injured Iraqi*, HERALD (Glasgow), Jan. 15, 2005, at 1; Edmund Sanders, *The Conflict in Iraq: U.S. Soldier Pleads Guilty in 'Mercy' Killing of Iraqi*, L.A. TIMES, Dec. 11, 2004, at A13; Kate Zernike, *U.S. Soldier Found Guilty in Iraq Prison Abuse Case,* N.Y. TIMES, Jan. 15, 2005, at A5; *Charges Reduced in Iraq Killings: A Captain Will Stand Court-Martial on Counts of Dereliction of Duty Instead of Murder in What Was Called "A Mercy Killing,"* L.A. TIMES, Dec. 8, 2004, at A3.
[227] For example, the federal criminal statute describes the common crime of murder or manslaughter differently from an intentional killing in violation of the Geneva Conventions.

Unfortunately, the current system creates its own inertia to maintain the status quo. According to a memorandum of understanding (MOU) between the Department of Justice (DoJ) and the DoD, most crimes committed by persons subject to the UCMJ, i.e., military personnel, will be investigated and prosecuted by the DoD.[228] For example, the DoD is the lead agency for prosecuting crimes related to scheduled military activities, including organized maneuvers away from a military base.[229] When the MOU was written in 1984, grave breaches of the Geneva Conventions were not yet incorporated into Title 18. It made sense to prosecute offenses committed by U.S. service personnel during an armed conflict through the military justice system.

The anti-torture statute and War Crimes Act altered the landscape behind the MOU when they became part of the federal criminal code. The new laws defined offenses that could either explicitly (in the case of the War Crimes Act) or implicitly (under the definitions of the anti-torture statute) describe the conduct of members of the U.S. armed forces during military operations. Title 10 was not amended to ensure that the DoD would be able to prosecute these federal offenses to the same extent as the DoJ. Thus, the DoD became constrained in prosecuting war crimes under Title 10 in a way that the DoJ under Title 18 was not. The MOU did not change, and the presumption contained in the MOU continues to weigh in favor of allowing the DoD to prosecute common crimes under the UCMJ through the use of courts-martial.[230] Regrettably, DoD policy[231] and rules governing courts-martial[232] have yet to

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Compare the elements of 18 U.S.C. § 1111 (murder) and §1112 (manslaughter) with the offense described in the War Crimes Act at 18 U.S.C. § 2441(c) (2005).

[228] U.S. DEP'T OF DEFENSE, DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES Enclosure 1 (22 Jan. 1985), *reprinted in* MCM, *supra* note 10, Appendix 3. Specifically, the memorandum of understanding assigns primary investigative and prosecutorial responsibility to the DoD for crimes of U.S. armed forces personnel that occur 1) on military installations, or 2) away from military installations when the offenses are "normally tried by court-martial." *Id.* ¶ C.2. As an exception to the general rule, the memorandum of understanding requires referral to the Federal Bureau of Investigations of any cases in which military members are suspected of "significant" allegations of conflicts of interest, bribery, and frauds against the United States. *Id.* ¶ C.1.

[229] *Id.* ¶¶ C.2, C.3b. However, the DoJ may assume jurisdiction with the concurrence of the Attorney General or the Criminal Division of the DoJ.

[230] As suggested in *supra* note 229, the DoJ could assume jurisdiction over war crimes and violations of the federal statutes. This article does not advocate the transfer of all war crimes cases to DoJ. The military justice system remains the most appropriate primary investigative and prosecutorial agency with respect to war crimes committed by U.S. service members. Expanding the military justice system to allow courts-martial prosecutions of war crimes to the extent allowed under federal law would bring a greater overall benefit at a lower administrative cost than transferring all prosecutorial responsibilities to DoJ.

[231] *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 5.5.4 (9 Dec. 1998) [hereinafter DOD DIR. 5100.77] (requiring service secretaries to provide for disposition of law of war violations under the UCMJ, where appropriate).

[232] The discussion following R.C.M. 307(c)(2) weighs against charging a U.S. service member with a law of war violation when a specific UCMJ offense is available: "Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation

acknowledge the change in the federal legal landscape that recognized the greater seriousness of war crimes and brought them into the domestic criminal framework.

B. The Impact of Double Jeopardy

Once the military prosecutes a soldier at a court-martial for murder of an Iraqi civilian, does the soldier face exposure to a U.S. federal criminal prosecution for a war crime as well? The differing elements between the federal and military criminal justice systems raise the question whether the current practice leaves the military member vulnerable for multiple U.S. prosecutions.

The prohibition against double jeopardy applies to military courts-martial. In 1907, the Supreme Court held that a soldier who had been acquitted at a trial by court-martial could not be subject to a trial in the federal civilian court for the same offense.[233] This holding has found its way into the Manual for Courts-Martial and court-martial practice.[234] The double jeopardy bar does not apply when the soldier is tried by both a court-martial and federal civilian court for different offenses that arise out of the same conduct.[235] "The double jeopardy clause is only implicated if the legislature intended that the crimes be treated as the same offense."[236] One court used the test promulgated under *United States v. Blockburger* to analyze the elements of each separately charged

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of the law of war." MCM, *supra* note 10, R.C.M. 307(c)(2) (Discussion). Unfortunately, the MCM lacks explicit direction on when the practitioner may depart from "ordinary" practice and charge the violation under the laws of war instead of under the UCMJ.

[233] Grafton v. United States, 206 U.S. 333 (1907). However, prosecution by a state or foreign court is not constitutionally barred. It is a matter of policy, and not the right of an accused, that a person who has been tried by a state court should not ordinarily be tried by court-martial for the same offense. *See* MCM, *supra* note 10, R.C.M. 201(d) (Discussion). *See also* Perry v. Harper, 307 P.2d 168 (Okla. Crim. App. 1957) (the state's jurisdiction was not destroyed where a soldier had been arraigned in state court for a drunk driving offense and later acquitted by court-martial; comity required only that the second sovereign postpone the exercise of jurisdiction until the first sovereign has exhausted its remedy). For crimes committed overseas, treaties or Status of Forces Agreements may affect the choice of sovereign exercising jurisdiction over the offense. *Id. See also* Wilson v. Girard, 354 U.S. 524 (1957) (holding that under an administrative agreement with Japan, the United States had waived its right to try the soldier for causing a Japanese civilian's death through negligence).

[234] Rule for Courts-Martial 907(b)(2)(C) notes that a prior court-martial or federal civilian trial for the same offense may be grounds for dismissal of a charge. The discussion following Rule for Courts-Martial 201(d) states: "Under the Constitution, a person may not be tried for the same misconduct by both a court-martial and another federal court." *See also* United States v. Smith, 912 F.2d 322, 324 (9th Cir. 1990) (noting that the "military tribunal and the federal court represent the same sovereign"). Similarly, Article 44 of the UCMJ precludes a second court-martial for the same offense. Article 44(a), 10 U.S.C. § 844(a) (2005).

[235] United States v. Ragard, 56 M.J. 852, 855 (Army Ct. Crim. App. 2002). After a Washington D.C. police officer discovered an active duty captain engaged in oral sex with another man in a public park and in front of five onlookers, the accused was charged with indecent exposure by the civilian court and tried for sodomy by a general court-martial. *Id.*

[236] *Id.*

offense and determine congressional intent regarding those offenses.[237] Under this test, the double jeopardy clause may be implicated either if the analysis shows that the two offenses contain the same elements or that one is a lesser offense of the other.[238]

For example, when the federal crime of torture is imported into Title 10 prosecutions through the use of clause 3 of the general article,[239] the elements of the Title 18 statute become the elements of the Article 134 offense charged in the court-martial. Because the elements are taken directly from federal law, the federal and military offenses are the same, and application of double jeopardy will likely preclude a federal civilian court from later trying the soldier for the Title 18 crime of torture. In contrast, when the soldier is tried for the same substantive conduct as an aggravated assault under Article 128 of the UCMJ, the elements between aggravated assault and torture may differ enough in their definitions to allow a judge to conclude that these are separate offenses. If so, then the soldier is vulnerable for trials both under military and federal law.

To use another example, if a U.S. soldier intentionally kills a person protected by one of the Geneva Conventions, the conduct falls under the prohibitions set forth by the War Crimes Act. Based on current DoD practice, the soldier would likely be tried by a court-martial for murder in violation of Article 118 of the UCMJ.[240] However, the common crime of murder lacks the prominent element contained in the War Crimes Act: that the conduct occurs in the context of a qualifying armed conflict. If a judge determines that murder under section 918 of Title 10 (Article 118) is a lesser included offense of the Title 18 War Crimes Act violation, then the federal civilian courts might be barred from trying the soldier for the war crime. In contrast, if the judge determines that Congress intended to define "intentional killing" under the War Crimes Act in a different manner than under Article 118, then a second trial by the federal civilian courts might be allowed. Because no U.S. military members have been tried in U.S. federal court for violations of the War Crimes Act or the anti-torture statute,[241] it is unclear whether federal courts would find Title 10 crimes to be lesser included offenses of these Title 18 crimes.

Furthermore, double jeopardy will not likely attach when a military member is tried for offenses under clauses 1 and 2 of Article 134. Although the federal statute may provide the framework for the charge, it is not necessary to reference the statute or use all of its elements to draft a standalone clause 1 or 2

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[237] *Id.* at 855-56 (citing U.S. v. Blockburger, 284 U.S. 299, 304 (1932)).
[238] *See id.* at 856.
[239] This assumes that the victim has not died as a result of the accused's conduct and that there is no subject matter jurisdictional bar to trying the offense under the general article.
[240] *See supra* notes 182-183, 186, 228, 231-232 and accompanying text.
[241] Two soldiers were subpoenaed to testify before a federal grand jury in the summer of 2005 regarding the beating and death of an Iraqi general in 2003. Arthur Kane, *Grand Jury Probes Events in Iraq: Two Fort Carson GIs Who Face Court-Martial Were Subpoenaed, But Neither Testified,* DENV. POST, Aug. 30, 2005, at A4. Neither soldier testified, and it is unclear whether the investigation was dropped. *Id.*

offense.[242] The heart of these offenses is the internal or external impact to the military; clause 1 and 2 offenses describe conduct that is criminal *because* of its military context. These offenses will always include the necessary element that the federal statute lacks: that the conduct is either prejudicial to military discipline or is of a nature to bring discredit to the armed forces.[243] Because this second element is unique to the military and finds no counterpart in federal law, offenses falling under clause 1 and 2 of Article 134 may evade double jeopardy concerns altogether.

The current legal situation leaves the United States between a rock and a hard place. If the DoD attempts to maximize the use of existing federal war crimes and anti-torture legislation, double jeopardy could bar any later federal civilian trials for crimes imported into a court-martial under clause 3 of Article 134. This policy, however, still leaves unresolved the fact that the more severe war crimes, those in which a victim has died as a result of illegal conduct by the accused, are out of reach of the UCMJ *as war crimes*. In those cases, only the federal civilian courts could pursue such prosecutions. As long as the DoD remains the lead agency to prosecute U.S. armed forces,[244] military authorities are left to resort to a codified scheme of common crimes to prosecute the most serious violations of international humanitarian law.[245]

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[242] *See supra* Part IV.B.

[243] MCM, *supra* note 10, pt. IV, ¶ 60.b(2).

[244] *See supra* notes 228-232 and accompanying text.

[245] Although the United States is currently not a party to the International Criminal Court (ICC), the vulnerability of U.S. service personnel to ICC jurisdiction should not be ignored. Under Article 13(2) of the Rome Statute, the ICC could exercise jurisdiction over offenses committed on the territory of a State party or if the accused is a national of a State party. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute]. Although the United States has been actively pursuing bilateral agreements under Article 98(2) of the ICC Statute to reduce the possibility of ICC prosecution of U.S. military members, 1) the validity of these agreements remains untested in ICC jurisprudence, and 2) these agreements may not necessarily cover every service member in every situation. It is still possible that a member of the U.S. armed forces may be accused of committing a crime in a country with which the United States does not have such an agreement, and the soldier could be called to appear before the ICC through the reach of non-U.S. nationality. Many members of the U.S. armed forces, particularly junior enlisted members, hold citizenship from other countries. As of July 2002, about 30,000 non-citizens served in the U.S. military. Kelly Wallace, *Bush Speeds Citizenship for Military*, CNN, July 3, 2002, *at* http://archives.cnn.com/2002/US/07/03/bush.military.citizenship/index.html (last visited Sept. 27, 2005). There are rare situations where unknown or "latent" citizenship creates unexpected obstacles for members of the U.S. armed forces. *See, e.g.,* Kelly Jeter, *Pilot Discovers He's Not an 'American' After All*, AIR FORCE LINK, July 20, 2004 *at* http://www.af.mil/news/story.asp?storyID=123008196 (last visited Sept. 27, 2005) (describing a U.S. Air Force pilot's scramble to obtain official U.S. citizenship after discovering that the citizenship paperwork filed during adoption proceedings when he was a German infant was incomplete; despite being raised as an American and more than a decade of U.S. military service, he was ultimately required to take the oath of citizenship before he was issued a U.S. passport needed for a deployment).

In the unlikely event a U.S. military member finds himself or herself under investigation by the ICC, jurisdiction over the offense might be overcome by the United States' ability and willingness to try the member in national courts, including military courts-martial. ICC Statute, art. 17(1)(a). The ICC may also lack jurisdiction under the principle of avoiding double jeopardy

C. The Role of State Responsibility

All four of the 1949 Geneva Conventions obligated state parties to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" defined in the Conventions.[246] In 1996, the implementation of the Geneva Conventions was a factor in pursuing passage of the War Crimes Act.[247] At the time, the administration viewed the legislation as an important demonstration that the United States was fulfilling its responsibilities as a party to the Geneva Conventions by closing "unfortunate jurisdictional gaps" in domestic law.[248] "Expansion of U.S. criminal jurisdiction over war crimes will serve not only the purpose of ensuring that the United States is able to comply fully with its obligations under international law, but will also serve as a diplomatic tool in urging other countries to do the same."[249]

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between national and international tribunals. ICC Statute, arts. 17(1)(c), 20(3). However, according to one scholar, the concept of international double jeopardy might not apply if there is a reluctance to try a person for international crimes, specifically when "the person was prosecuted and punished for the same fact or conduct, but the crime was characterized as an 'ordinary crime' (e.g. murder) instead of an international crime (e.g. genocide) with a view to deliberately avoiding the stigma and implications of international crimes . . . ." CASSESE, *supra* note 84, at 321. *See also* ICC Statute, art. 17(2) (describing factors to be used to determine a state's unwillingness to genuinely investigate or prosecute). Unfortunately, the codification in the UCMJ has not kept pace with the trends in international criminal law or the developments in international humanitarian law during the past sixty years. The constitutive statutes of the Iraqi Special Tribunal, International Criminal Tribunal for Rwanda, and International Criminal Tribunal for the Former Yugoslavia, as well as the ICC Statute, all contain articles prohibiting war crimes. Coalition Provisional Authority, the Statute of the Iraqi Special Tribunal**,** art. 13(a), Dec. 10, 2003, 43 I.L.M. 231, 242 (2003) [hereinafter IST Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, art. 6(3) (1994) [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., arts. 2-3, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter ICTY Statute]; ICC Statute, art. 8(a). The integration into Title 10 of recognized international crimes need not stop at war crimes. David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court,* 167 MIL. L. REV. 1, 16 (2001). The Iraqi Special Tribunal, a court created by the U.S. occupation authority, also codified genocide, crimes against humanity, and other serious violations of the laws and customs of armed conflict. IST Statute, arts. 11, 12, 13(b)-(c). For other examples of codification of atrocity crimes, see ICTY Statute, arts. 4 (genocide), 5 (crimes against humanity); ICTR Statute, arts. 2 (genocide), 3 (crimes against humanity); and ICC Statute, arts. 6 (genocide), 7 (crimes against humanity), 8(b)-(e) (other serious violations of laws of armed conflict). Strengthening Title 10 by codifying crimes already contained within Title 18, specifically crimes recognized internationally and contained the War Crimes Act and anti-torture statute, will certainly assist military prosecutors in seeking justice, and it may also provide the added benefit of protecting U.S. service members from international prosecutions.

[246] Geneva Convention I, *supra* note 5, art. 49; Geneva Convention II, *supra* note 5, art. 50; Geneva Convention III, *supra* note 5, art. 129; Geneva Convention IV, *supra* note 5, art. 146.

[247] *See supra* note 162 and accompanying text.

[248] *War Crimes Act Hearings*, *supra* note 161, at 20 (testimony of Judge Robinson O. Everett).

[249] *Id.* at 13 (testimony of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State).

The United States considers itself "to be among the most forceful advocates for the principle of accountability for war crimes, genocide and crimes against humanity."[250] The military pledges to hold its own personnel accountable for crimes committed during armed conflict,[251] but the efficacy of the military justice system is only as good as the laws that Congress provides. Unfortunately, the tension between Title 18 and Title 10 jurisdiction over war crimes leaves the full implementation of the Geneva Conventions into domestic law incomplete. It also leaves the U.S. military lacking in the full range of prosecutorial tools. Failure to provide the military justice system with the full means of prosecuting war crimes erodes the credibility of the United States as a leader in the field of international humanitarian law.

Until the UCMJ is amended to fully integrate war crimes into its criminal provisions, the status quo will continue to allow individuals to escape the stigma and full criminal liability for war crimes.[252] Charging war crimes as common crimes under the UCMJ blurs the distinction between the two categories in a way that contradicts the trend of imposing measurable international criminal responsibility for war crimes. When this happens, war crimes become ordinary crimes and the United States stumbles in fulfilling its state responsibility.

Today, the conduct of war faces greater scrutiny—both domestically and abroad—than ever before. Congress is becoming increasingly involved in providing the courts with the tools to prosecute international crimes. Starting more than thirty years ago with the federal statute prohibiting the killing of internationally protected persons,[253] Congress began to add international crimes

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[250] Press Release, U.S. Dep't of State, U.S. and Romania Sign Article 98 Agreement (Aug. 1, 2002), *at* http://www.state.gov/r/pa/prs/ps/2002/12393.htm.

[251] FM 27-10, *supra* note 182, at para. 498 ("Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."); *See also id.* para. 511 ("The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.").

[252] Conviction of a common crime will often carry a lesser stigma than a war crime conviction. In a case arising out of the first Gulf War, Airman First Class Manginell was court-martialed for looting in violation of Article 103 after appropriating a camera and four watches from a warehouse he was guarding. U.S. v. Manginell, 32 M.J. 891 (A.F.C.M.R. 1991). Although his guilty plea was affirmed, one concurring judge was uneasy about the ultimate fairness of the result when at least three other appellate cases involved similar conduct that was charged as simple larcenies. *Id.* at 894. The judge stated:

> I see nothing to distinguish today's case as factually more serious. What logical reason is there to treat similar accused in a dissimilar fashion? . . . At the end of the day, a court-martial order should reflect precisely what an accused did, not distort the record. Here others involved . . . will receive a court-martial order showing they were thieves. Manginell will have an order to inform potential employers that he was guilty of something akin to a war crime. His conduct differs little but his record now is facially far more reprehensible.

Id. at 894.

[253] 18 U.S.C. § 1116 (2005).

to the federal criminal code.[254] These crimes, by their nature, often overlapped with conduct described as grave breaches of the Geneva Conventions, allowing for federal prosecutions in some situations.[255] Yet, this overlap was coincidental,[256] and the incorporation of international crimes into the domestic framework was clumsy.[257]

The tide turned with the passage of the War Crimes Act. The Act specifically sought to implement the provisions of the Geneva Convention and directly focused on the conduct of U.S. military members *in their assigned role as a fighting force*. This statute differs from other U.S. laws criminalizing conduct that has a general nexus to armed conflict. Not only did Congress authorize federal civilian jurisdiction over law of war offenses, it expressly included the conduct U.S. military members within its reach.[258]

Recently Congress addressed the military's conduct in war when it formally condemned the abuse of detainees at Abu Ghraib prison. In a note added in October 2004 to Article 1 of the UCMJ, Congress directed military authorities to address systemic deficiencies[259] arising out of the abuse scandals and established a policy to investigate and prosecute "all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States."[260] Unfortunately, this

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[254] *See, e.g.,* 18 U.S.C. § 1091 (2005) (genocide); 18 U.S.C. § 1203 (2005) (hostage taking); 18 U.S.C. § 2332 (2005) (terrorism); 18 U.S.C. § 2332a (2005) (use of weapons of mass destruction); 18 U.S.C. § 2340A (2005) (torture).

[255] H.R. REP. NO. 104-698, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2169.

[256] *Id.*

[257] G.I.A.D. Draper, *The Modern Pattern of War Criminality, in* WAR CRIMES IN INTERNATIONAL LAW 141, 147 (Yoram Dinstein & Mala Tabory eds., 1996).

[258] 18 U.S.C. § 2441(b) (2005).

[259] Congress was fairly detailed in outlining its expectations:

> (a) Sense of Congress. It is the sense of Congress that—
>
> (1) the abuses inflicted upon detainees at the Abu Ghraib prison in Baghdad, Iraq, are inconsistent with the professionalism, dedication, standards, and training required of individuals who serve in the United States Armed Forces;
>
> . . . .
>
> (3) the abuse of persons in United States custody in Iraq is appropriately condemned and deplored by the American people;
>
> . . . .
>
> (5) the Department of Defense and appropriate military authorities must continue to undertake corrective action, as appropriate, to address chain-of-command deficiencies and the systemic deficiencies identified in the incidents in question;
>
> (6) the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States;
>
> . . . .
>
> (8) no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of United States.
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> Act of Oct. 28, 2004, Pub. L. No. 108-375, § 1091, 118 Stat. 2068 (2004).

[260] *Id.* § 1091(b)(2). Congress's policy focused on more than international obligations:

"sense of Congress" and the desire to fully implement the Geneva Conventions are aspirational goals because Congress has failed to give the DoD—the primary prosecutorial agency—the appropriate tools within Title 10 to directly prosecute grave breaches of the laws of war.

If Congress wants to address deficiencies at a systemic level, then it needs to evaluate the limitations of the military justice system. Every prohibition of the War Crimes Act describes conduct that typically occurs during an armed conflict.[261] Such conduct is no less criminal because it occurs in a military context, yet there are situations where the UCMJ lacks sanctions on par with the federal law. The military justice system lacks the ability to garner a *war crime* conviction at a court-martial. This is why the failure to acknowledge and fix the discrepancy within Title 10 is puzzling. Now that violations of the Geneva Convention are part of Title 18, and now that U.S. domestic law specifically regulates the conduct of military members during armed conflict, there is absolutely no reason not to integrate war crimes offenses as a codified part of the UCMJ. Failure to close this jurisdictional gap sends the message to the international community that United States is either apathetic toward its state responsibility, unwilling to meaningfully fulfill its obligations under the Geneva Conventions, or too distracted to bother with the details.

D. Analysis of Common Charges Stemming from Current Conflicts: Comparing the War Crimes Act to Common Crimes under the UCMJ

When the Articles of War were adopted by a very young United States, the hastily implemented code was founded on the exercise of military command as a means of maintaining discipline and efficiency of the fighting force.[262]

> (b) Policy. It is the policy of the United States to--
>
> (1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States;
>
> (2) investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States;
>
> (3) ensure that all personnel of the United States Government understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment of detainees in the custody of the United States;
>
> (4) ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal . . . .

Id. § 1091(b).

[261] *See, e.g., supra* notes 78-79; Golden, *supra* note 210.

[262] *Establishment of Military Justice Hearings, supra* note 13, at 25 (testimony of Maj. J.E. Runcie, U.S. Army (Retired)).

This "soldier's code" as tool of military discipline and efficiency[263] has largely survived. This focus makes the UCMJ, without further amendment, ill-suited to absorb the substantive violations of international laws of armed conflict that have now become part of federal law. Congress brought grave breaches of the Geneva Conventions into U.S. federal law by using the reference to the conventions themselves. In contrast, Title 10 continues to rely on definitions of its common crimes to prosecute "what might amount to"[264] grave breaches of the Geneva Conventions. Consequently, military prosecutors must attempt to stretch the existing UCMJ articles to accommodate the criminal liability that attaches to these international offenses.

The result is awkward. Article 92, which criminalizes failures to obey orders and regulations[265] as well as derelictions of duty,[266] has been used in many cases arising out of Iraq and Afghanistan to describe failures to prevent detainee abuse or properly supervise the treatment of detainees.[267] But the breadth of Article 92 is problematic because it fails to make a distinction between low-level disorders and the much more serious grave breaches of the Geneva Conventions.

The primary failing of Article 92 is that, when used to allege serious violations of the laws of armed conflict, its breadth tends to dilute the severity of underlying conduct. An article that is routinely used to prosecute abuse of the government travel card[268] hardly contains the inherent stigma deserving of a war crime. The maximum punishment allowed underscores this point. The penalty for willful dereliction of duty in violation of Article 92 is six months of confinement per offense.[269] By comparison, torture and war crimes carry twenty- and thirty-year maximum sentences under federal law.[270] Article 92 certainly has a continuing place in prosecutions of offenses that occur during

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[263] *See supra* notes 31, 38, 44 and accompanying text.

[264] *War Crimes Act Hearings*, *supra* note 161, at 14 (testimony of John H. McNeill) (describing where accused members of the U.S. military were prosecuted for "what might have amounted to grave breaches of the Geneva Conventions").

[265] To qualify as a general regulation, the order or regulation must be published by the President, the Secretary of Defense, a service secretary, an officer having general court-martial jurisdiction, a general or flag officer, or any officer superior to any persons in these categories. MCM, *supra* note 10, pt. IV, ¶ 16.c(1)(a). Regulations that provide general guidance or advice for conducting military functions may not necessarily be enforceable under this provision. MCM, *supra* note 10, pt. IV, ¶ 16.c(1)(e).

[266] A dereliction of duty can be willful, negligent, or as a result of culpable inefficiency. MCM, *supra* note 10, pt. IV, ¶ 16.c(3)(c). A person is not derelict if his or her attempts to perform are earnest but the failure is a result of ineptitude. *Id.* ¶ 16.c(3)(d).

[267] For a sample of cases in which dereliction of duty has been alleged, see *infra* text accompanying notes 443-446, 482-506, 514-517, 537-39, 543-546, 557-565, 571-572.

[268] *See, e.g.,* United States v. Mayton, No. 29743, 2001 CCA LEXIS 98 (A.F. Ct. Crim. App. Mar. 30, 2001) (unpublished).

[269] The lesser form of dereliction of duty through neglect carries half that amount. MCM, *supra* note 10, pt. IV, ¶ 16.e(3)(A)-(B).

[270] The crime of torture is punishable by twenty years. 18 U.S.C. § 2340A(a) (2005). If torture occurs during armed conflict in violation of the Geneva Conventions, the penalty rises to any term of years. *See* 18 U.S.C. §§ 2441(a), (c)(1) (2005).

armed conflict as an ancillary charge, but it should not be the mainstay charge that it has evolved into.[271]

Article 93 does not fare much better.[272] Since news broke about how U.S. military personnel handled detainees at Abu Ghraib in Iraq and Bagram, Afghanistan, the offense of maltreatment became a buzzword in prosecutions.[273] In the recent conflicts, the UCMJ offense of maltreatment of subordinates has been expanded to accommodate a new class of victims: detainees of the belligerent power or enemy.

Under the UCMJ, Article 93 violations have two elements. First, the victim must be subject to the orders of the accused and, second, it must be proven that the accused was cruel toward, abused, or maltreated the victim.[274] The explanation of the "nature of the victim" in the Manual for Courts-Martial most appropriately describes a military member who is under the accused's direct or immediate control.[275] However, the victim is not required to be in the same chain of command as the accused or even a member of the U. S. military.[276] Persons who are not under the formal supervision or in the direct

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[271] For one example of how a soldier avoided charges of maltreatment of detainees in exchange for a guilty plea on the dereliction of duty charge, see Douglas Jehl, *G.I. in Abu Ghraib Abuse Is Spared Time in Jail*, N.Y. TIMES, Nov. 3, 2004, at A4. *See also* Josh White, *Abu Ghraib Prison MP Pleads Guilty to Reduced Charge*, WASH. POST, Nov. 3, 2004, at A12.

[272] This offense was written into the UCMJ based on a Navy disciplinary article that prohibited the maltreatment of crews. Prior to the enactment of the UCMJ, the Army relied on the general article to prosecute this offense. *1949 House Hearings*, *supra* note 23, at 1227.

[273] News reports are unclear whether the word "maltreatment" is used a generic description of the conduct or a term of art to describe a violation of Article 93. However, the charge sheets from the courts-martial of some of the soldiers involved in the Abu Ghraib scandal contain allegations of violations of Article 93. U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, SGT Javal Davis, *available at* http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html (last visited Sept. 28, 2005) (listing one specification of an Article 93 violation); U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, SSG Ivan "Chip" Frederick, Jr., *available at* http://news.findlaw.com/hdocs/docs/iraq/ifred32004chrg.html (last visited Sept. 28, 2005) (five specifications); U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, SPC Charles Graner, *available at* http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html (last visited Sept 28, 2005) (four specifications); *and* SPC Jeremy Sivitz, U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, *available at* http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html (last visited Sept. 28, 2005).

[274] MCM, *supra* note 10, pt. IV, ¶ 17.b. Examples of maltreatment include assault, sexual harassment, or improper punishment. *Id.* ¶ 17.c(2). *See, e.g., Army E-7 Demoted for Maltreatment of Soldier, Lying to Investigators*, STARS & STRIPES, Oct. 29, 2004, *available at* http://www.estripes.com (last visited Sept. 28, 2005) (describing the special court-martial of Sergeant First Class Wallace Boone, who was convicted of maltreating a subordinate after he directed a soldier to write a letter to the soldier's father listing the soldier's deficiencies and saying that he had died because he was not focused on the mission; the soldier was required to carry the letter at all times).

[275] MCM, *supra* note 10, pt. IV, ¶ 17.c(1).

[276] In 1956, the U.S. Army Board of Review found that Article 93 covered the maltreatment of a civilian who was working under the supervision of the U.S. Army. United States v. Dickey, 20 C.M.R. 486 (A.B.R. 1956). The accused, a first lieutenant, was the commanding officer of one of three U.S. Army units at a compound in Korea. The victim was a Korean national with the Korean Service Corps, and in that capacity he performed manual labor for the U.S. Army on that

chain of command of the accused are subject to the accused's orders under Article 93 if they "by reason of some duty are required to obey the lawful orders of the accused . . . ."[277]

It is unclear whether a detainee of a non-friendly power is legally obligated to follow the orders of a U.S. military member. Neither the appellate courts nor the legislative history behind Article 93 indicate that the class of victims was intended to include POWs or detainees of an opposing force or entity.[278] Detainees and POWs are not required to take an oath promising to obey the lawful orders of the belligerent forces assigned to guard them.[279]

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compound. The Board noted that prior to the incident in which the lieutenant ordered enlisted men under his command to have their military working dogs attack the victim, the accused had exercised some administrative supervision. *Id.* at 487. Because of the nature of the employment and general service relationship between the accused and victim, the court found that the accused had "sufficient authority and jurisdiction" to place conditions on the accused's activities and that the victim had a duty to obey the orders of the lieutenant. *Id.* at 489. With the victim falling under the class of persons subject to the orders of the accused, the court explained that because Congress did not limit the coverage of Article 93 only to military members, it was immaterial whether the maltreated person be subject to the UCMJ. *Id.* The primary concern of the court was the nature of the relationship between the accused and victim. If a *de facto* superior-subordinate relationship exists and includes the legal obligation of the subordinate to follow orders of the superior, the relationship becomes—for purposes of Article 93—the equivalent of a *de jure* superior-subordinate relationship that is inherent in a command structure and among persons subject to the UCMJ. The reports on detainee abuse, however, appear to have glossed over this analysis.

The words "subject to the Code or not" were added to the explanation after the UCMJ was initially enacted. MCM, *supra* note 10, Appendix 23, at 6.

[277] MCM, *supra* note 10, pt. IV, ¶ 17.c(1).

[278] Compare the status of the victims from Abu Ghraib with the decision in *U.S. v. Dickey*, 20 C.M.R. 486 (A.B.R. 1956). First, the foreign national victim in *Dickey* was a member of an entity providing services to the U.S. military, not a detained member of a belligerent nation. Second, as the Board in *Dickey* noted, the Articles of War did not contain a provision corresponding to the modern UCMJ's Article 93, and offenses of maltreating subordinates were usually charged under the general article, the 96th Article of War. *Dickey*, 20 C.M.R. at 488. Then again, abuse of POWs and detainees was also tried under the general article. *See supra* note 78 (describing pre-UCMJ courts-martial under the general article involving abuse of detained persons). When Congress created the UCMJ, it took the offense of maltreatment of subordinates out of the scope of the general article and created a separate offense. Because there was virtually no debate surrounding Article 93, the question remains whether Congress intended to include abuse of enemy detainees in the new article or continue with the practice of using the general article. *See 1949 House Hearings*, *supra* note 23, at 1227. Third, the UCMJ was being drafted contemporaneously with the negotiations of the Geneva Conventions of 1949. Following on the heels of World War II, the treatment of POWs was certainly fresh in the minds of the legislators. If the drafters had intended to extend the protections of Article 93 to POWs, regardless of whether such protections were explicitly tied to the Geneva Conventions, they would have likely been more explicit either on the face of the statute or in the legislative history. Fourth, the *Dickey* Board opined that Article 93 was adopted at the suggestion of the Navy, which had an analogous provision in its pre-UCMJ governing code and which had handled cases of officers maltreating enlisted men aboard ship. *Dickey*, 20 C.M.R. at 488. Taking all of these factors together, the motivation behind Article 93 was to protect members of the friendly forces from maltreatment from within their own ranks.

[279] Under international treaty obligations, civilian detainees and POWs may not be forced to work for the war effort of a detaining power. Geneva Convention III, *supra* note 5, art 130; Geneva

Use of Article 93 appears to be a novel approach for criminalizing conduct toward detainees or prisoners of a belligerent state or entity.[280] Trial judges have accepted guilty pleas[281] and, in at least two litigated cases, the jury convicted the soldier after receiving instructions on the elements of the offense from the military judge.[282] As these cases make their way through the appeals process, appellate courts may add to the discussion about the scope of Article 93. Ultimately, the convictions based on Article 93 will either be set aside based on the current reach of the article or, as convictions are upheld, the appellate courts may also uphold the expansion of the class of victims to include detainees of a belligerent power.

Despite its recent use in courts-martial, Article 93 was not designed to punish war crimes. The maximum amount of confinement available for a conviction for maltreatment of subordinates under Article 93 is one year.[283] Treating the belligerent detainee in the same way as a U.S. subordinate-victim fails to take into account the unique and vulnerable status of a detainee or POW. Where the U.S. military subordinate/victim has avenues of redress,[284] the detainee does not. Using Article 93 to charge armed-conflict-connected detainee abuse devalues the nature and severity of the crime.

Much like Article 93, the crime of assault under Article 128 was not designed with offenses against POWs and detainees in mind. Article 128 describes and defines a variety of criminal assaults, but using this article to charge crimes of abuse occurring in the context of an armed conflict is also awkward. The midnight punch to the gut outside of a downtown bar carries the same maximum punishment as punching a detainee in the custody of U.S. armed forces, but the difference is that the latter victim likely was not free to

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Convention IV, *supra* note 5, art 147. Furthermore, the United States' Code of Conduct requires its members who are captured to "continue to resist by all means available." The Code of Conduct, Article III, *reprinted in* AIR FORCE MANUAL 10-100, AIRMAN'S MANUAL 193 (1 June 2004). Taken together, this suggests that the status of a POW or detainee and his relationship toward a captor materially differs from the status of a *de jure* "subordinate" as envisioned by Article 93.

[280] In an early case under the UCMJ, the Navy Board of Review found that a U.S. service member confined following a court-martial conviction is entitled to certain rights and treatment and is not to be subject to acts of cruelty, oppression or maltreatment. United States v. Finch, 22 C.M.R. 698 (N.B.R. 1956). Only with the recent allegations coming out of Iraq has this premise apparently been expanded to cover detainees of the belligerent nation.

[281] *See, e.g., infra* text accompanying notes 486-487, 497-499, 514-519.

[282] *See* John W. Gonzalez, *Reservist Receives 129-Day Sentence in Iraq Abuse Case: She Also Gets a Bad-Conduct Discharge and Has Her Rank Reduced*, HOUSTON CHRON., Mar. 18, 2005, at A11 (reporting on the conviction and sentencing of Specialist Sabrina Harman for cruelty and maltreatment toward detainees, among other charges); Gretel C. Kovach, *Reservist's Sentence: 10 Years*, DALLAS MORNING NEWS, Jan. 16, 2005, at 1A (reporting on the sentence of Specialist Charles Graner); *Camp Pendleton: Major Convicted in Iraqi Prison Abuse*, L.A. TIMES, Nov. 11, 2004, at B10 (reporting on the conviction of Major Clarke Paulus).

[283] MCM, *supra* note 10, pt. IV, ¶ 17.e.

[284] For example, the subordinate may file a complaint of wrong against the commander under Article 138, use his or her chain of command to include the first sergeant or persons above the abuser, write to his or her elected officials, or file a complaint with the Inspector General.

choose where he was that night. Crimes of assaulting detainees charged under Article 128 simply fail to account for the victim's status of being held in the custody of the accused.[285] Because of this, Article 128 cannot offer an adequate distinction between the common crime of assault and the war crime of cruel or degrading treatment of persons place *hors de combat* by detention.[286]

Relying on Article 128 to charge crimes of physical abuse of detainees conveys the unfortunate message that these violations of international obligations are no more serious than brawls between military members. Certain assault offenses carry greater punishments depending on the status of the victim,[287] but assaulting a detainee or POW is not one of them. To be sure, there is an anomaly within the domestic military code when the wartime assault of one's own superior commissioned officer can potentially carry life imprisonment, yet the same physical assault on a detained person may authorize

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[285] Another concern about charging allegations of detainee abuse is the potential overlap of Article 93 and Article 128. Because Article 93 includes assault as one example of prohibited maltreatment, a factually similar specification also charged under Article 128 might be viewed as multiplicious. Still, the courts are clear that not all maltreatment involving an assault will be found to be multiplicious. For example, where a soldier directs POW Group A to assault POW Group B, Group B would be considered victims under Article 128. United States v. Lee, 25 M.J. 703, 705 (A.C.M.R. 1987). Group A would be considered victims under Article 93 because the accused's actions of directing the assault puts the members of Group A at risk of physical or other harm, which is viewed as a form of cruelty. *Id.* Because the harm from the assault of Group B is distinct from the harm resulting from the cruelty toward Group A, separate factual findings of criminality are permitted. *Id.*

[286] *See* Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3.

[287] For each specification of an assault consummated by a battery, an accused may receive six months of confinement. MCM, *supra* note 10, pt. IV, ¶ 54.e(2). Compare this maximum penalty for the basic assault consummated by a battery with the penalties when the victim falls within certain categories:

1) U.S. or friendly foreign power commissioned officer: three years if the officer is *not* in the execution of his office (MCM, *supra* note 10, pt. IV, ¶ 54.e(3)); ten years per specification if the officer *is* in the execution of his office (MCM, *supra* note 10, pt. IV, ¶ 14.e(1)); life imprisonment or death if the offense occurs against an officer in the execution of his office in time of war (MCM, *supra* note 10, pt. IV, ¶ 14.e(3)).

2) A sentinel or security/military/civilian law enforcement personnel: three years (MCM, *supra* note 10, pt. IV, ¶ 54.e(6));

3) A child under the age of 16: two years (MCM, *supra* note 10, pt. IV, ¶ 54.e(7));

4) Warrant officer: one year and six months if the warrant officer is *not* in the execution of his office (MCM, *supra* note 10, pt. IV, ¶ 54.e(4)); five years if the warrant officer *is* in the execution of his office (MCM, *supra* note 10, pt. IV, ¶ 15.e(1));

5) Noncommissioned officer: six months if the noncommissioned officer is *not* in the execution of his officer (MCM, *supra* note 10, pt. IV, ¶ 54.e(5); when in the execution of his office, the maximum confinement rises to three years for assaults against a superior noncommissioned officer (MCM, *supra* note 10, pt. IV, ¶ 15.e(2)); and one year for other noncommissioned and petty officers (MCM, *supra* note 10, pt. IV, ¶ 15.e(3)).

only six months of confinement.[288] Only the latter might be a war crime,[289] but the penal sanction is much less severe.

Ironically, the conduct described above can properly come before a court-martial by reaching through clause 3 of Article 134 to charge violations of the War Crimes Act. So why is this not happening? Prosecutors may not wish to risk a ruling that the existing articles preempt the imported offenses charged under the general article.[290] The more likely answer is that the DoD policy to try U.S. military members under the UCMJ reflects a policy and preference to use UCMJ statutory provisions whenever possible and there is little motivation to change the status quo.

Military prosecutors have less choice under the UCMJ when charging crimes that cause the death of the victim. For the few soldiers who have been accused of murder of Iraqi civilians,[291] military authorities had to rely on the common crimes listed in the Manual for Courts-Martial to draft the court-martial charges. The War Crimes Act and anti-torture statute remain out of

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[288] Serious assaults authorize greater maximum punishments, without general regard to the status of the victim. If the assault is with a means likely to produce grievous bodily harm, the maximum punishment increases to three years (eight years, if a loaded firearm is used), MCM, *supra* note 10, pt. IV, ¶ 54.e(8). If grievous bodily harm is intentionally inflicted, the maximum amount of confinement rises to five years (ten years for offenses involving a loaded firearm). MCM, *supra* note 10, pt. IV, ¶ 54.e(9). Despite the greater military punishments for aggravated assaults, the disparity between common crimes charged under the UCMJ and war crimes as defined by federal law still exists. *See supra* note 270 and accompanying text.

[289] 18 U.S.C. § 2441(c)(3) (2005) (criminalizing violations of common Article 3 of the Geneva Conventions, which prohibits torture or cruel treatment of persons taken out of combat through sickness, injury, detention, or other reasons).

[290] The doctrine of preemption prohibits the use of the general article to charge criminal conduct already covered by Articles 80 through 132. MCM, *supra* note 10, pt. IV, ¶ 60.c(5)(a). Where Congress has already defined elements of an offense, the military does not have the authority to eliminate an element and create a new offense under Article 134. United States v. Norris, 8 C.M.R. 236, 239 (C.M.A. 1953). *See, e.g.,* United States v. Manos, 25 C.M.R. 238 (C.M.A. 1958) (finding that a conviction under Article 134 of negligent exposure of the accused's naked body was preempted by the Article 134 indecent exposure offense; simple negligence in the absence of a statute or "ancient usage" does not give rise to criminal liability). However, the preemption doctrine is not triggered simply because the offense charged under the general article contains all but one element of an offense under one of the punitive articles. United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979). In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. *Id. See, e.g.,* United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989) (declining to find that Article 112a [drug use] preempted an Article 134 offense involving MDMA or "ecstasy" before it was listed as a controlled substance.).

Using the War Crimes Act as an example, it is not likely that a clause 3 offense based on the federal statute would be preempted. The Act can be seen either as creating a distinct set of crimes or as *adding* an element to some existing UCMJ provisions, i.e., that the conduct must occur in the context of an armed conflict covered by one of the Geneva Conventions.

[291] *See infra* text accompanying notes 418-434, 443-446, 451-458,537-539, 595-601.

reach in these cases.[292] Such crimes will remain free of the label of "war crimes" as long as the military members are tried by courts-martial.

VIII. FIVE VIEWS ON ADDRESSING WAR CRIMES COMMITTED BY U.S. MILITARY MEMBERS

The following status quo needs a change: "We are certainly interested in bringing to justice those who commit war crimes against our nationals and our armed forces personnel, but we also have an interest in having the authority, if necessary, to prosecute any U.S. national or armed forces member who commits such acts."[293]

The question is how to best provide the U.S. military with the ability to prosecute its own members for war crimes. This section considers and analyzes five possibilities for closing the gap between the federal and military criminal justice systems.

A. Codify the War Crimes Act as an Enumerated Article of the UCMJ

Adding a new article[294] is the best option to align the provisions of Title 10 directly with the relevant provisions of Title 18. Appendix 1 herein provides a draft of a new article that proposes to integrate the War Crimes Act into the UCMJ.[295] This approach has several advantages.

First, adding a new article creates and maintains a distinction between war crimes and common crimes within Title 10. Making the distinction in the UCMJ that already exists within Title 18 is important in promoting uniformity within our domestic system of criminal laws. Why should civilians be subject to greater punishment than military members for the same conduct, especially when the underlying conventions that Title 18 implemented primarily address the conduct of the armed forces?

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[292] *See supra* Part VI. It appears that allegations falling short of murder but involving the death of the victim are similarly barred by Article 134's subject matter jurisdiction. *See infra* text accompanying notes 459-461, 464-466, 470-473, 551-556, 573-575.

[293] *War Crimes Act Hearings*, *supra* note 161, at 10 (statement of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State).

[294] In the alternative, Congress can amend existing UCMJ articles to correspond with specific provisions of the War Crimes Act. For example, Congress could amend Article 118 to provide an additional category of murder of a protected person under the UCMJ. It is this author's opinion that war crimes should receive prominent placement within or near the articles that directly address the conduct of military members during war.

[295] The proposed article is a starting point to re-examine the UCMJ and how it prosecutes war crimes and atrocity crimes within the military justice system. The War Crimes Act provides the most obvious framework for an amendment because, as discussed throughout this article, this Act was aimed directly at the military by the law's reference to 1) the conduct of wars and armed conflict, and 2) the personnel who participate in it. The anti-torture statute can be integrated into the UCMJ through the implementation of the War Crimes Act because the Geneva Conventions referenced in section 2441(a), (c)(1), and (c)(3) of Title 18 cite torture as a grave breach. *See supra* note 213 and accompanying text.

Second, adding a war crimes article to the UCMJ will encourage greater uniformity in prosecuting war crimes within the military justice system.[296] Once statutory provisions define war crimes within Title 10, military authorities may be more likely to charge serious battlefield misconduct as what it is: a war crime.

Third, such an amendment could yield greater uniformity in the range of available maximum punishments. Although the convening authority has the discretion to decide which charges are referred to trial, adding a new article aimed at war crimes can encourage the practice of distinguishing between war crimes and common crimes in courts-martial. As cases arising out of the Abu Ghraib scandal show,[297] the maximum punishment will vary greatly depending on the offenses charged.[298] Charging offenses under a new UCMJ war crimes article should encourage a more consistent range of maximum punishments when the cases are presented to the military judge or court-martial panel for sentencing.

Finally, adding the substance of the War Crimes Act is the only proposal that coherently balances statutory military law and the use of military commissions in a manner consistent with military custom and the intent of the UCMJ drafters. Traditionally, military commissions were used for U.S. service members only for offenses, with the exception of spying and aiding the enemy, that were not covered by the soldier's code.[299] Although military commissions have not been used to try American forces since the UCMJ was enacted, this option remains available. Adding a new war crimes UCMJ article would thus weigh against trying the U.S. service member by a military commission for violations of the Geneva Conventions.

1. *Congressional Practice of Adding New UCMJ Articles as Needed*

When the UCMJ was enacted, Congress saw the need for some administrative housekeeping. Proposed House Bill 2498 consolidated some offenses, deleted obsolete articles, and created new ones.[300] For example, the

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[296] For one court's commentary on the disparity of the conviction of the war crime of looting versus the common crime of larceny, see *supra* note 252.

[297] *See, e.g.,* Monte Morin, *The World: G.I. Gets Eight-Year Sentence After Guilty Plea in Abuse Scandal*, L.A. TIMES, Oct. 22, 2004, at A4 (describing charges against Staff Sergeant Ivan "Chip" Frederick); *Status of the Charges*, PITT. POST-GAZETTE, Dec. 21, 2004, at A8 (outlining charges against Specialist Sabrina Harman and the initial charges against Private First Class Lynndie England).

[298] *See supra* note 209 (describing the generally lower maximum punishments for enumerated UCMJ offenses compared to the maximum punishment authorized under the War Crimes Act).

[299] *See supra* notes 60-61, 69 and accompanying text.

[300] Article 103 created a hybrid out of Articles 79 and 80 of the 1928 Articles of War, which had distinguished wrongfully appropriating or failing to safeguard captured property from dealing in captured or abandoned property. United States v. Manginell, 32 M.J. 891, 892 (A.F.C.M.R. 1991). The offense of desertion, found in UCMJ Article 85, was consolidated from Articles of War 28 and 58 and Articles 4(6), 8(21), and 10 from the Articles for the Government of the Navy. *1949 House Hearings*, *supra* note 23, at 605 (testimony of Mr. Felix Larkin).

offenses of missing a movement and misconduct as a prisoner were drafted as Articles 87 and 105, respectively, following the experience of World War II.[301] Although this conduct was previously tried under the general article, Congress felt that the number and severity of these incidents made it "desirable and necessary to spell out those circumstances and facts in a specific article."[302]

From time to time Congress added offenses to Title 10. In 1983, it added drug abuse as Article 112a[303] in response to escalating drug use in the military in the 1970s and 1980s.[304] In 1985, Congress patterned a new UCMJ article after a Title 18 statute when it added Article 106a to create the capital offense of peacetime espionage.[305] Prior to this amendment, Article 106 allowed capital punishment for espionage only in time of war; the federal law prohibited espionage in peacetime but it could not be imported into military prosecutions because the Title 18 statute authorized the death penalty. To remedy the inconsistency, Congress patterned the new Article 106a after the federal statute "to ensure that the treatment of the substantive offense by courts-martial and military appellate courts will be guided by applicable civilian precedents, including such cases as may arise in the future in the federal

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[301] *1949 House Hearings*, *supra* note 23, at 605 (testimony of Prof. Edmund Morgan); *1949 House Hearings*, *supra* note 23, at 1258-59 (testimony of Mr. Larkin).

[302] *Id.* at 1258 (testimony of Mr. Larkin); *see also id.* at 605 (testimony of Prof. Edmund Morgan). In drafting the new Article 87, Congress wanted to distinguish the offense of being absent without authority from the more serious conduct of missing the ship or unit that was headed for possible combat. *Id.* at 1258.

In describing the offense of misconduct of a prisoner, Congress focused on the conduct of a Navy noncommissioned officer, who was accused of maltreating fellow POWs to gain more favorable treatment for himself. *Id.* at 605, 1259. The case involving Petty Officer Hirschberg undoubtedly was in the minds of Congress partly because the case was decided only weeks before the hearings and partly because the Supreme Court held that, despite the fact that Petty Officer Hirschberg re-enlisted with an hours-long break in service, his discharge from his previous enlistment barred trial by court-martial. United States ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949). Article 3 of the UCMJ ensured that a similar situation would not result in a bar to prosecution.

[303] Act of Dec. 6, 1983, Pub. L. No. 98-209, § 8(a), 97 Stat. 1403.

[304] Previously, drug offenses were tried under the general article or as a dereliction of duty. *See, e.g.,* United States v. Gould, 13 M.J. 734 (C.M.R. 1982). During the initial hearings on the addition of Article 112a, Senator Jepsen's opening statement described as "inconceivable to us" the continuing absence of a specific drug offense article within the UCMJ, considering that drug abuse posed "a most serious threat to military readiness and constitutes a significant percentage of all courts-martial." *The Military Justice Act of 1982, To Amend Chapter 47 of Title 10, United States Code (Uniform Code of Military Justice), To Improve the Military Justice System, and For Other Purpose: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Comm. on Armed Services*, 97th Cong. 14 (1982) [hereinafter *Hearings on S. 2521*] (opening statement by Sen. Roger Jepsen, Subcomm. Chairman), *reprinted in* UNITED STATES ARMY LEGAL SERVICES AGENCY, INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 1983, at 251 (1985). At the time, one-third of the cases before the Court of Military Appeals involved a drug offense. *See id.* at 108 (statement by Chief Justice Robinson O. Everett, Court of Military Appeals).

[305] United States v. Wilmoth, 34 M.J. 739, 741 (C.M.A. 1991).

system."[306] Most recently, Congress added Article 119a to make death or injury to a fetus a separate UCMJ offense under certain circumstances.[307]

The reasons for adding those articles are just as applicable here. The offenses prohibited by the War Crimes Act are serious enough to warrant a separate UCMJ article, and the advances in military justice at the trial and appellate level during the past fifty years demonstrate that the services are up to the task of prosecuting war crimes.[308] However, the War Crimes Act differs in one important way from other federal statutes that have been integrated into the UCMJ: the War Crimes Act expressly reaches the conduct of members of the U.S. armed forces in their role as soldiers, sailors, Marines, and Airmen. More than any other federal statute, the War Crimes Act is directly relevant to a core function of the U.S. military: fighting wars.

2. *Secondary Benefit*

Codifying war crimes as an enumerated article of the UCMJ yields secondary benefits beyond the prosecution of offenses under a new article. Consider the preventive value. Article 137 requires that each enlisted member receive an explanation of the UCMJ, including Articles 77-134, within 14 days after initial entry on active duty, after completion of six months of active duty service, and when the member reenlists for any additional term of service.[309] In addition, a copy of the UCMJ must be made available to any member who requests it.[310] Codifying the War Crimes Act as part of Title 10 will ensure that the prohibited conduct is incorporated into mandatory training on military law. Military members will know, without a doubt, that war crimes are serious offenses that carry substantial criminal penalties.

Not only would newly enlisted military members receive a briefing about war crimes early in their military service, other mandatory training will be reinforced. The DoD requires all military members to receive training on the law of armed conflict.[311] Such training necessarily focuses on the substance

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[306] *Id.* at 742 (quoting H.R. CONF. REP. NO. 99-235, at 424-25 (1985), *reprinted in* 1985 U.S.C.C.A.N. 571, 578).

[307] The new article is based in part on *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998), *aff'd,* 52 M.J. 159 (1999), in which an Air Force member was convicted of beating his eight-month pregnant wife, thereby causing the death of their child. Apparently there was concern that assimilation of state statutes, which were often silent on the protection of the unborn, would require prosecutors to rely on felony murder laws that Congress viewed as an inadequate response to the crime. *See* H.R. REP. NO. 108-420 (2004), at n.29, n.37.

Federal statutes have also provided a basis for crimes defined by the President under the authority granted by UCMJ Article 36. The elements and maximum penalty for the Article 134 offense of kidnapping that is now included in the MCM were based on a federal statute. United States v. Williams, 17 M.J. 207, 215 (C.M.A. 1984); MCM, *supra* note 10, Appendix 23, at 21.

[308] *See 1949 House Hearings*, *supra* note 23, at 644 (statement of Mr. Richard H. Wels, Special Committee on Military Justice, New York County Lawyers' Association).

[309] Article 137(a), 10 U.S.C. § 937(a) (2005).

[310] Article 137(b), 10 U.S.C. § 937(b) (2005).

[311] DOD DIR. 5100.77, *supra* note 231, ¶¶ 4.1-4.2.

of the Geneva Conventions and the other obligations referenced in the War Crimes Act. Responding to the abuse scandals emerging out of Iraq, Congress demanded that the DoD implement specific policies to ensure that U.S. personnel working in detention facilities receive adequate training.[312] Once the War Crimes Act is codified as a separate UCMJ article, the discussion of detained persons may receive greater emphasis within the law of war program[313] and would support Congress's intent.

Commanders and military legal practitioners will benefit from the addition to Title 10. The Manual for Courts-Martial was intended to provide lawyers and non-lawyers with sufficiently comprehensive and understandable guidance about military criminal laws and procedures without having to routinely consult other sources.[314] Every day, commanders turn to judge advocates for advice on how to properly investigate allegations of misconduct and hold members accountable for breaches of laws, regulations, and discipline. Adding new provisions to the UCMJ can only aid commanders in choosing a course of action and swiftly seeking justice. The new article would directly define the conduct and the maximum penalty and improve a commander's ability to realistically compare UCMJ war crimes with UCMJ common crimes. The judge advocate can quickly evaluate elements of Title 10 offenses and criminal penalties to make effective disciplinary recommendations. Under the current law, it is certainly possible to make this kind of comparison, but arriving at an answer is convoluted.

Finally, and no less significantly, adding the War Crimes Act to the UCMJ demonstrates to our own forces and to the world that the U.S. takes its international obligations seriously.[315]

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[312] Section 1092 states:

> The Secretary of Defense shall ensure that policies are prescribed . . . regarding procedures for Department of Defense personnel . . . [that are] intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b).

Pub. L. No. 108-375, § 1092, 118 Stat. 2068 (2004).

[313] The briefer can reinforce the gravity of breaches of the Geneva Conventions by highlighting the maximum penalties authorized for violations of a new war crimes article.

[314] MCM, *supra* note 10, Appendix 21, at 1.

[315] When he was the commanding general of the 1st Marine Division, Lieutenant General James N. Mattis directed investigations into numerous detainee abuse allegations and commented on prisoner abuse as a serious crime: "We cannot lose our humanity. . . . We are Americans and we should act like it at all times. Americans don't do things like this." *Troops Discharged for Beating Iraqis*, AUSTRALIAN (Queensland), Jan. 7, 2004, at 6.

B. The Blanket Sentence Limitation: Amend the General Article to Convert the Bar on Capital Offenses to a Sentencing Limitation

As a second possible way to align Title 10 with Title 18, Congress could amend clause 3 of Article 134 to authorize importation of *any* federal offense, capital or not, provided that the penalty imposed by a court-martial not include death. This change would convert the bar on prosecuting federal capital crimes into a sentencing limitation.[316]

One benefit is that this proposal requires little amendment to the text of the UCMJ.[317] By changing one sentence within clause 3 of Article 134, courts-martial would be empowered to try any violation of the War Crimes Act, regardless of whether the victim's death resulted from the accused's conduct. Other existing or future federal statutes could be incorporated into trials by courts-martial without the need for additional legislation.

The disadvantages of this approach may outweigh the advantages. First, under this proposal, crimes imported into Article 134 as a violation of War Crimes Act would automatically carry a lower maximum punishment under the UCMJ compared to prosecutions in federal courts. Where a federal prosecution could impose the death penalty, the trial by court-martial could not. This may cause the United States to face criticism for continuing with a policy of subjecting military members to a forum that provides a lower maximum punishment and failing to assess appropriate criminal responsibility.

Second, if the alleged war crime violation is serious enough, military authorities may find the new sentence limitation of Article 134 inadequate to fulfill prosecutorial goals. To compensate for the sentence limitation, the military may revert to the status quo. Instead of importing Title 18 offenses through the general article to charge war crimes, military authorities may favor prosecution of crimes defined by Title 10 to allow for the possibility of capital punishment. Therefore, the sentence limitation proposed under this view provides little incentive to try offenders as war criminals. The DoD may likely continue to rely on enumerated articles and the body of case law to charge common crimes, such as murder, manslaughter, or aggravated assault, even when the conduct "might amount to"[318] grave breaches of the Geneva Conventions.

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[316] An alternate possibility under this proposal is to build in a sentence "cap." If the conduct alleged would authorize the death penalty under the federal statute, the new clause 3 of Article 134 could authorize a maximum penalty of thirty years of confinement or life with the possibility of parole.

[317] The discussion following Rule for Courts-Martial 307(c)(2) would also need to be amended to reflect the possibility of charging certain law of war crimes as incorporated crimes under Article 134. MCM, *supra* note 10, R.C.M. 307(c)(2) (Discussion).

[318] *See supra* note 264.

C. A Partial Exemption for Title 18 Capital Offenses: Amend Article 134 to Lift the Bar on Capital Crimes Only for Clause 3 Offenses

Instead of transforming Article 134's jurisdictional prohibition on prosecuting capital offenses into a blanket sentencing limitation, another option could be to lift this bar only under certain qualifying circumstances. Instead of turning the "crimes and offenses not capital" provision into a broad sentencing limitation, Congress could amend the general article to authorize the incorporation of federal capital offenses into courts-martial *only* under clause 3 of Article 134. This differs from current law, which prohibits charging capital crimes under any of the three clauses of the general article. This also differs from the prior proposal in that prosecution of clause 1 and 2 violations that are based on Title 18 capital offenses would remain barred, *unless* they are lesser offenses of the clause 3 offense.

In drafting a *partial* exemption to accommodate federal capital crimes under clause 3, Congress must be aware of the potential for a conviction of a lesser offense under clause 1 or 2. If the jurisdictional bar were lifted only for clause 3 offenses without further comment, such an amendment may not necessarily permit the conviction of lesser offenses. Because the clause 1 or 2 offense would derive its subject matter from the imported Title 18 capital crime (the clause 3 offense), the lesser offense (under clause 1 or 2) would lack subject matter jurisdiction unless the amendment proposed here addresses the relationship between the parent charge and its related offenses.

Allowing convictions of the lesser offenses is not the same as lifting the jurisdictional bar altogether, nor does it expand Article 134's existing provision in clause 3 that allows the import of only those crimes of local application. If the federal statute lacks territorial application where the crime was committed, existing law precludes its importation under clause 3, but may allow prosecution under clause 1 or 2.[319] This does not change under this proposed option. When importation through clause 3 is unavailable, there would be no need to apply the proposed clause 3 exemption. Lifting the ban on charging capital crimes solely with respect to clause 3 offenses (and their clause 1 and 2 lesser offenses) would affect only those Title 18 crimes that: 1) authorize the death penalty; *and* 2) apply federal jurisdiction over the offense at the location where the offense was committed.

Using the statute implementing the Convention Against Torture as an example,[320] under existing law, the federal crime of torture occurring outside of the U.S. which did not result in the victim's death may be incorporated through Article 134 as a clause 3 offense. Because the clause 3 offense is importable, clauses 1 and 2 are available to derive lesser offenses. If the same act of torture occurs within the United States where the law does not apply, the Title 18 statute may not be incorporated under clause 3, but clause 1 and 2 remain

[319] *See supra* Part V.B.
[320] 18 U.S.C. § 2340A (2005).

available as standalone charges. If torture occurring outside of the United States results in the death of the victim—and triggers capital punishment under the Title 18 statute—existing military law precludes the statute's importation through clause 3, as well as its use as a basis for a standalone charge under clauses 1 and 2. The proposal in this section removes the limitation on subject matter jurisdiction derived from the federal capital offense. This same crime of torture that causes the victim's death would no longer be barred; the offense could be imported through clause 3, along with any clause 1 and 2 lesser offenses, and tried as a capital crime.

A partial exemption to the bar to importing Title 18 capital crimes into Title 10 through the general article would certainly broaden the field of federal crimes which are chargeable under the UCMJ. Without narrowing the exemption further, Congress may find that even a partial exemption is too broad. If the aim is to lift the existing restrictions on military trials and allow prosecutions of Title 18 capital war crimes versus other Title 18 capital common crimes, any UCMJ amendment could be sufficiently tailored to specifically list only those federal statutes to which the partial exemption applies.

This is similar to an idea proposed by Judge Everett when the War Crimes Act legislation was under review. After testifying at the 1996 hearings on the original bill that became the War Crimes Act, Judge Everett wrote a letter to the subcommittee recommending the addition of a fourth clause to Article 134.[321] His proposal reaches the same end as the partial exemption described in this section, but through a different means. Specifically, Judge Everett would give courts-martial jurisdiction under Article 134 to punish "any conduct which constitutes a violation of the War Crimes Act of 1996, as it may be at the enactment of this law or as it may be hereafter amended."[322] If Congress pursues this variation, it should be clear that the existing limitation on charging capital offenses under clauses 1, 2, and 3 would not apply to the new clause 4.

One final note, under either Judge Everett's proposal or the partial exception affecting clause 3, any changes to the limitation on capital punishment should be explicitly addressed. Article 18 limits a court-martial's imposition of the death penalty only to instances under the UCMJ where is it specifically authorized. Changing the general article or clauses 3 or 4 may not automatically allow for imposition of the capital punishment, unless Congress clearly expresses its intent.

D. Amend Title 18 to Eliminate Capital Punishment for War Crimes

When federal crimes do not authorize capital punishment, there is no subject matter barrier to incorporating federal criminal statutes into UCMJ

[321] *War Crimes Act Hearings*, *supra* note 161, at 50.
[322] *Id.*

prosecutions. If the War Crimes Act or anti-torture statute did not allow the death penalty, there would be no obstacle to charging these crimes through clause 3 of Article 134. Thus, one proposal to place military and federal prosecutions on similar footing is to eliminate the capital punishment provisions within the federal statutes.

This idea is not novel to the prosecution of war crimes. During the hearings on the War Crimes Act, Judge Everett recommended removing the provisions on capital punishment from the proposed legislation.[323] The objection stemmed from widespread international opposition to the death penalty and the obstacle it had created in delivering persons suspected of capital offenses to the authority of the United States.[324] Another witness made the same recommendation based on concerns that European countries have refused to extradite suspects because of objections to capital punishment.[325] Yet, in passing the War Crimes Act with the provision for capital punishment intact, Congress obviously felt that any disadvantages that may accrue were outweighed by the benefit of ensuring that the death penalty would serve both as a deterrent and as punishment.

The benefit under this approach is that it would require no amendment to Title 10. However, to fully accomplish the goals of bringing war crimes—whether defined in the War Crimes Act or other Title 18 provisions—into the jurisdiction of courts-martial, other Title 18 statutes would require similar amendments to remove the capital punishment provisions.[326]

Two major factors weigh against this proposal. First, it would remove a serious penalty for "the most heinous crimes that one could imagine."[327] Second, it would push war crimes downward in the hierarchy of offenses. By virtue of a lesser punishment, war crimes would become less severe than those domestic common crimes, such as murder, that still carry the death penalty.

E. Prosecute Military Members under the Laws of War by Military Commissions

The roots of Article 18 pre-date the War Crimes Act, the Geneva Conventions, and the UCMJ. The motivation for giving the general court-

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[323] *Id.* at 21-22.

[324] *Id.* at 23-24. Judge Everett specifically noted that, although there was ample law of war precedent for imposing the death penalty, the international criminal tribunals in Yugoslavia and Rwanda lack jurisdiction to impose the capital punishment. *Id.* at 23.

[325] *Id.* at 31, 41-43 (testimony of Mark Zaid, Chair, American Bar Association Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals).

[326] Included among the statues potentially affected by this proposal are: 18 U.S.C. § 1091(b) (2005) (genocide); 18 U.S.C. § 116(a) (killing an internationally protected person); 18 U.S.C. § 1203(a) (2005) (hostage taking); 18 U.S.C. § 2332(a) (2005) (terrorism); and 18 U.S.C. § 2332a(a) (2005) (use of certain weapons of mass destruction).

[327] *War Crimes Act Hearings*, *supra* note 161, at 19 (statement of Mr. Matheson, who went on to comment: "And if any crime deserves this penalty or the possibility of such penalty, then it's this one.").

martial the additional duty of functioning as a military commission appears to have been the desire to ensure that offenders would not escape appropriate punishment—especially for law of war violations—because of lack of coverage of local or military law. Thus, Article 18 in theory could be used to prosecute an offense against a U.S. military member independently of the federal statute or the limitations of Article 134.

Some scholars suggest that, under the UCMJ, U.S. military members may be tried by military commission as readily as other offenders under the law of war.[328] One argument notes that prisoners of war can be tried by a military commission for law of war offenses as long as Geneva Conventions requirements were met, and thus by analogy the use of the military commission would apply to U.S. service members, as long as those same Geneva Convention due process requirements are met.[329] Another argument is that *Ex Parte Quirin* allows the trial by military commission of any member of the U.S. military, particularly as a means of ensuring the United States has a response to an enemy's infiltration into our military.[330] Regrettably, these arguments fail to

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[328] Bickers, *supra* note 65, at 922 n.160; H. Wayne Elliot, *POWs or Unlawful Combatants: September 11th and Its Aftermath*, Crimes of War Project, Jan. 2002 at http://www.crimesofwar.org/expert/pow-elliott.html (last visited Sept. 28, 2005). *See also* UNITED STATES LEGAL HISTORY AND BASIS, MANUAL FOR COURTS-MARTIAL 14-15 (1951) (noting that the Army Judicial Council indicated that soldiers may be tried by military commissions for violations of the laws of war and citing 1915 congressional testimony of the Army Judge Advocate General to show that the concurrent jurisdiction embodied in the current Article 21 was intended to give field commanders a convenient choice to use a military commission or a court-martial).

[329] Lieutenant Colonel Elliot (Retired), the former Chief of the International Law Division at the U.S. Army Judge Advocate General School, wrote: "An American soldier can be tried before a military commission. Our policy is to try our soldiers accused of acts which violate the law of war in a court-martial, but that's all it is—a policy—not a matter of law. The military commission would have to meet the requirements of the Geneva Conventions, but the difference between a military commission and a court-martial is that a court-martial must meet all of the requirements of the US Constitution for a trial and that could include all of the evidentiary rules, while a military commission does not." Elliot, *supra* note 328.

[330] Bickers, *supra* note 65, at 922 n.160. In this context, Bickers refers to the fact that non-citizens may serve in the U.S. military; however, even recent history shows that espionage is not limited to non-U.S. citizens. In September 2004, a U.S. Army specialist was convicted of five specifications of attempting to provide aid and intelligence to Al Qaeda; he was sentenced to confinement for life with the possibility of parole, reduction to the rank of private, and a dishonorable discharge. Ray Rivera, *Fort Lewis Court-Martial Begins: Soldier Accused of "Betrayal," Trying to Help al-Qaida Terrorists, Defense Says Man Had Mental Problems*, SEATTLE TIMES, Aug. 31, 2004, at B3; *U.S. Soldier Gets Life for Aiding al-Qaida*, SUNDAY MAIL (Queensland), Sep. 5, 2004, at 46.

One U.S. district court went a step further than Bickers' discussion: "Under *Quirin*, citizens and non-citizens alike—whether or not members of the military, or under its direction or control, may be subject to the jurisdiction of a military commission for violations of the law of war. Mudd v. Caldera, 134 F. Supp. 2d 138, 145-46 (D.D.C. 2001), *appeal denied and case dismissed by* Mudd v. White, 309 F.3d 819 (U.S. App. D.C. 2002). The descendants of Dr. Samuel Mudd, who was convicted by a military commission and sentenced to death for his role in the assassination of President Lincoln, sought judicial review of the U.S. Army's refusal to overturn Dr. Mudd's conviction. However, the district court's remarks were later relegated to mere

acknowledge that the use of military commissions in this way is untested under modern military law, nor do they fully analyze the potential impact of the UCMJ as transformative law. Since *Quirin* was decided, Congress introduced sweeping and constitutionally significant reforms in the administration of military justice. Instead of asking whether the UCMJ bars the trial of U.S. service members by military commission, it may be more appropriate to consider whether Congress intended to give Title 10 court-martial jurisdiction primacy over military commissions for U.S. military personnel who commit war crimes.

The legislative history of the UCMJ distinguished U.S. service members from other categories of persons in two ways. First, the design behind the UCMJ was to provide an accused, primarily the U.S. soldier, with fairness in the administration of military justice and greater protections against arbitrary command control and influence.[331] The protections guaranteed by the UCMJ were intended to closely resemble those afforded under the U.S. civilian court system. The UCMJ was aimed at ensuring that U.S. military members receive the type of due process that flows from Constitution—the very document that all U.S. service members have sworn to support and defend. In short, Congress wanted to ensure that our soldiers received the benefit of what they were fighting for.[332] In contrast, POWs and the other categories of persons

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supposition when the appeals court declined to address the merits and dismissed the case for lack of standing. *Mudd*, 309 F.3d at 823-24.

[331] *See 1949 House Hearings*, *supra* note 23, at 616, 634-35.

[332] See Representative Philbin's comment, *supra* note 32, on the need for a uniform code that safeguards the rights of U.S. citizens "who happen to be in the armed forces." Even U.S. military members who have directly offended the oath of allegiance have been tried by a court-martial instead of a military commission. *See, e.g.,* U.S. v. French, 27 C.M.R. 245 (C.M.A. 1959); U.S. v. Northrup*,* 31 C.M.R. 599 (A.F.B.R. 1961); Rivera, *supra* note 330.

Despite the legislative history's lack of clear intent, Article 18 allows the prosecution of U.S. service members by a military commission for violations of Articles 104 and 106 because that possibility is specifically listed in the code. UCMJ Articles 104 (aiding the enemy) and 106 (spying) are the only punitive articles that criminalize the acts of "any person" rather than limit their scope to persons subject to the UCMJ. These are also the only two punitive articles that specifically authorize trial by either a court-martial or a military commission. Because these unique provisions appear in the same two articles, "[t]he logical conclusion from such language is that in these two offenses Congress wanted to give military commanders the authority to try accused persons by court-martial if they were subject to the jurisdiction of that forum and by military commission if they were not." Bickers, *supra* note 65, at 920.

The possible trial of a U.S. service member by military commission under these narrow circumstances does not *itself* support the proposition that U.S. military members are subject to trial by military commission without qualification. Such an argument compares apples and oranges. The two offenses singled out in the UCMJ, spying and aiding the enemy, are not offenses that violate the laws of war, and as such, they are ineligible to be tried by a military commission pursuant to military jurisdiction under *the laws of war.* However, as part of congressionally approved text of the UCMJ, trials are authorized as an exercise of jurisdiction under statutory military law. If Congress had intended to deprive U.S. military members of trials by courts-martial for these espionage offenses, it might have deleted altogether the language authorizing courts-martial for violations of Articles 104 and 106. Interpreting the UCMJ provisions in favor of protecting the U.S. military member through a trial by court-martial

traditionally covered by military tribunals are under no similar obligation of allegiance. This purpose and rationale behind the UCMJ protections do not apply in the same way to trials of prisoners of war, because the reasons for granting procedural protections for POWs derive from the laws of war and international custom, not from a desire to extend those due process protections found in the U.S. Constitution.

Second, although Article 21 expressly rejects the notion that general courts-martial preempt the use of military commissions,[333] the U.S. service member was the only class of persons for which there was doubt about the applicability of military commissions.[334] By custom, the military commission lacked jurisdiction over a purely military offense.[335] In theory, then, the military member remains vulnerable for trial by military commission for offenses not defined in Title 10. The authority of the military commission in this context is questionable considering that violations of the law of war may be covered by the War Crimes Act or the anti-torture statute, giving the federal government jurisdiction to try the offense. When there is an available avenue for prosecution of a U.S. service member, there seems to be little or no justification for resorting to the military commission. The absence of congressional debate on this issue leaves open the question whether military commissions provide a viable alternate prosecutorial forum in light of the protections the UCMJ sought to grant.

Congressional intent on this issue is murky, at best. The legislative history of the UCMJ shows that military commissions, at least under the post-UCMJ view, were intended to cover classes of persons other than U.S. armed forces. In 1949, Congress specifically discussed the possible contradictions contained in Article 18 as they potentially affected U.S. armed forces. To use one example, the comments about imposing the death penalty in military commissions was a specific concern if it applied to U.S. service members, but not to the other persons triable under the laws of war. The logical conclusion is that Congress intended to treat U.S. military members differently than other persons "who by the law of war [are] subject to trial by a military tribunal."[336]

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provides an adequate balance between protecting the rights of U.S. service members, as the UCMJ aimed to do, and the fulfilling desire to prosecute infiltrators and enemy agents, as military commissions were intended to do.

[333] Military law does not preempt the jurisdiction of civilian courts either. A military member's prosecution in civilian court is permissible even when the UCMJ would cover the same offense. Rudoll v. Colleran, 2003 U.S. Dist. LEXIS 14337 (E.D. Penn. 2003) (citing Caldwell v. Parker, 252 U.S. 376 (1920)).

[334] *See supra* text accompanying notes 90-92.

[335] UNITED STATES LEGAL HISTORY AND BASIS, *supra* note 328, at 15; WINTHROP, *supra* note 13, at 841.

[336] The conclusion on capital punishment is that Congress precluded a general court-martial, under either sphere of competence, from imposing the death penalty on a U.S. service member unless it is specifically authorized by the punitive articles in the UCMJ. Judge Everett echoed this conclusion in his 1996 testimony, s*upra* note 196 and accompanying text.

The protections afforded by the Bill of Rights, except those that are inapplicable by the text of the Constitution[337] or by "necessary implication," are available to members of the U.S. armed forces.[338] Using a military commission to try a military member for a violation of the Geneva Conventions—a violation that is otherwise unavailable as a chargeable offense under the UCMJ—is an end run around the limitations of Article 134 (and federal jurisdiction) and may deny rights that the UCMJ sought to ensure for the accused U.S. service member. If the military commission were used to circumvent those protections found in courts-martial and federal civil prosecutions that safeguard the basic rights of an accused, the chance that the use of a military commission would be upheld diminishes.[339]

The strongest argument against the use of military commissions to try U.S. military person requires a macro-level evaluation of the purpose and intent of the UCMJ. It would be misguided to focus on the second sentence of Article 18 when the major reforms of the UCMJ sought to remove command influence and provide rights to an accused that paralleled those enjoyed by civilian society: appointment of defense counsel who is a lawyer, the use of civilian courts as a model for courts-martial, and the review by a court of appeals comprised of civilian appointees.[340] The use of a military commission to try a U.S. service member, despite the capability of the federal courts to prosecute the offense, disregards the protections that Congress believed were crucial to the success of the military.[341]

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[337] The requirement of a grand jury indictment is not required for "cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger . . . ." U.S. CONST. amend. V.

[338] United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

[339] *See Jacoby*, 29 C.M.R. 244 (applying the Sixth Amendment right to confrontation to written depositions taken pursuant to Article 49 of the UCMJ); Burns v. Wilson, 346 U.S. 137 (1953) (suggesting that court-martial proceedings could be challenged in federal courts through a habeas corpus action).

[340] *See supra* notes 29-30 and accompanying text; *1949 House Hearings*, *supra* note 23, at 606 (testimony of Prof. Morgan); S. REP. NO. 81-486, at 104 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2222-26.

[341] In his testimony before Congress, Frederick P. Bryan, Chairman of the Special Committee on Military Justice of the Bar Association, linked the efficiency of the military to the morale of the individual soldier and tied both to the proposed legislation to create the UCMJ:

> [W]e have to realize, gentlemen . . . that the American armed services are no longer the old type of professional Army. They are citizen armed services. Their fighting capacity is dependent on morale. And those gentlemen of you who have heard some of the gripes . . . are familiar with the criticism that has arisen from men subject to the old court-martial system. In my judgment it was not conducive to the best morale. Morale will never be so high as when the individual American soldier or sailor or airman is convinced that he is going to get a fully square deal if he is accused of a crime or offense and that he is going to be tried under a system of justice which is in accord with the traditional philosophy to which he has been accustomed. That is not going to interfere with his military efficiency. Far from doing that, it is going to increase his military efficiency.

The impetus behind the first uses of the military commission, its targeted scope, and its customary application all support the proposition that the military commission was not intended as a forum to try U.S. service members when Title 18 or Title 10 defines crimes that have jurisdiction over the offense.[342] Perhaps the reason why the legislative history of the UCMJ failed to directly address the question of the continuing applicability of the military commission to active duty U.S. military personnel was because the answer was obvious. Authorizing unfettered executive-driven jurisdiction over a U.S. military member in a forum that could remove many congressionally created protections is the ultimate form of the command "domination and control"[343] of military justice that Congress sought to dismantle by enacting the UCMJ.

IX. CONCLUSION

Although Title 18 war crimes are available to military prosecutors to charge violations of the laws of war, only a change in the UCMJ will make this an effective tool for military practitioners. Fifty years after ratifying the Geneva Conventions and after the generation of multiple international criminal tribunals, it is clear that prosecutions of the laws of war receive serious international attention. It is time to apply the gains made in international humanitarian law to the code that regulates the conduct of our soldiers, sailors, Airmen, and Marines.

The goals of imposing individual criminal liability and encouraging state responsibility are best met by integrating the international crimes and war crimes of Title 18 directly into Title 10. First, codification of war crimes in the UCMJ allows Congress to specifically authorize the death penalty as a punishment, clearing the obstacles otherwise imposed by Articles 18 and 134. Second, adding new articles to the UCMJ aids commanders and judge advocates in making timely decisions about drafting charges and choosing a disciplinary forum that is appropriate to the offenses. Finally, this recommendation directly supports DoD's law of war program in a preventive way. Because the UCMJ articles must be periodically explained to every enlisted member, awareness of our international obligations can only increase.

When Congress passed the War Crimes Act, the focus was on the treatment of U.S. military members as victims of war crimes in armed conflicts.

1949 House Hearings, *supra* note 23, at 630. Richard B. Wells, Chairman of the Special Committee on Military Justice of New York County Lawyers' Association, echoed this comment a short time later, when he testified:

> We believe that discipline is dependent in large degree upon the morale of the men who make up the services, and we do not believe that there can be good morale when men feel that the service courts which are set up to do them justice are not real and fair courts as we think of them here in America.

Id. at 641.

[342] *See supra* Part I.B.2.

[343] *1949 House Hearings*, *supra* note 23, at 634.

With reports of detainee abuse, excessive use of force, and other misconduct of military members appearing in the news media, the reality is that the U.S. military member is sometimes portrayed as a perpetrator of war crimes. Federal law took a step in the right direction in showing the world that the U.S. is able and willing to seek appropriate justice when war crimes are committed. But Congress did not go far enough. It is time to get out the blue pencil and take a fresh look at the UCMJ. Congress now needs to update the military's toolbox to allow courts-martial to meaningfully try war crimes.

APPENDIX 1

Proposed New Article 102 of the UCMJ[344]

Article 102[345] – War Crimes

a. Text.[346]

(a) Any person subject to this chapter who commits a war crime as defined in subsection (b) shall be punished as a court-martial may direct, except that in cases of rape and cases in which the victim's death results from conduct described in subsection (d)(1)(A), the accused shall be punished with death or such other punishment as a court-martial may direct.[347]

(b) Definitions.[348] As used in paragraph (a), the term "war crime" means any conduct—[349]

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[344] The new Article 102 serves several purposes: 1) align the UCMJ with existing provisions in U.S. federal criminal law that address war crimes; 2) reflect within Title 10 the gravity of war crimes committed by U.S. service members; and 3) make a stronger showing of state responsibility within the international community by giving the U.S. armed forces the means to prosecute offenders as war criminals within the military justice system.

[345] Article 102 presently describes the offense of forcing a safeguard. 10 U.S.C. § 902 (2005). Two factors call into question the continuing relevance of the existing Article 102: 1) the lack of reported cases involving prosecutions under this article; and 2) the entrance of treaties into force that cover substantially the same subject matter. *Compare* WINTHROP, *supra* note 13, *at* 664 n.98 (describing how safeguards are protections given to foreign property or persons, usually hospitals, post offices, public institutions, museums, and "establishments of religion, charity, or instruction") *with* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, arts. 25 and 27, 36 Stat. 2277, 2303-09 [hereinafter Hague Convention] (generally prohibiting attacks on undefended buildings and hospitals, buildings dedicated to religion, art, science, or charitable purposes, and historic monuments that are not used for military purposes).

[346] In the Manual for Courts-Martial, the first section of a UCMJ article repeats the text of the Title 10 statute. *See generally* MCM, *supra* note 10, pt. IV.

[347] This text is modeled on the language of the War Crimes Act, 18 U.S.C. § 2441(a) (2005). Congress has previously promulgated new UCMJ articles based on existing federal statutes. *See, e.g.,* United States v. Wilmoth, 34 M.J. 739, 741 (C.M.A. 1991).

[348] Congress is not limited to a short paragraph in defining the UCMJ offense. Article 99 (misbehavior before the enemy) contains nine subparagraphs of prohibited conduct. In Articles 106a (espionage) and 119a (death or injury of an unborn child), two UCMJ articles patterned after federal statutes, Congress defined the offense in substantial detail within the text of the statute.

[349] This proposed subsection describes in further detail the offenses identified in the War Crimes Act, 18 U.S.C. § 2441(c) (2005). The MCM is intended to serve as a sufficiently comprehensive, accessible, and understandable source for lawyers and non-lawyers. *See* MCM, *supra* note 10, Appendix 21, at 1; *1949 House Hearings, supra* note 23 (testimony of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense). In this context, the greater detail and description of offenses in new Article 102 is warranted.

Prior codifications of grave breaches of the Geneva Conventions appear in: the Statute of the Iraqi Special Tribunal, which was enacted on December 10, 2003 through an order by the U.S. Administrator for the Central Provisional Authority; the Statute of the International Criminal Tribunal for the Former Yugoslavia, which was adopted in 1993 with a supporting vote by the United States and subsequently amended through a series of United Nations Security Council

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party,[350] including, but not limited to, the following acts against persons or property protected under these conventions:

(A) willful killing,[351] as described by sections 918 and 919(a) of this title;[352]

(B) torture,[353] as defined by 18 U.S.C. sec. 2340A,[354] or inhuman treatment, including biological experiments,[355] acts described by section 893 of this title,[356] and offenses defined under section 934 of this title promulgated

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resolutions; the Statute of the International Tribunal for Rwanda, adopted in 1994 with the support of the United States and subsequently amended through a series of United Nations Security Council resolutions; and the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002. IST Statute, *supra* note 245; ICC Statute, *supra* note 245; ICTR statute, *supra* note 245; ICTY Statute, *supra* note 245.

Prior to the enactment of any of these international statutes, the U.S. Army incorporated the protections found in the Geneva and Hague Conventions into its official publications as guidance for military personnel. *See generally* FM 27-10, *supra* note 182. The Field Manual provides portions of the text of ratified treaties, organized by subject, as well as statements of customary law, custom, and practice. *Id.* at paras. 1, 7. For a recent survey of customary international law of armed conflict, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS (2005).

[350] This language is repeated verbatim from 18 U.S.C. sec. 2441(c)(1).

[351] Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(1); ICTY Statute, *supra* note 245, art. 2(a); ICC Statute, *supra* note 245, art. 8(2)(a)(i); FM 27-10, *supra* note 182, para. 502.

[352] This draft Article incorporates existing UCMJ provisions that contain elements of offenses described by the Geneva Conventions. This approach is beneficial in two ways. First, many crimes in this proposed Article correspond to offenses that already exist in Title 10 or which have been promulgated under presidential authority. In such cases, the new Article 102 crimes primarily add the element that the conduct must occur within the context of a qualifying armed conflict. Thus, common crimes that exist in the current UCMJ become lesser included offenses of the crimes described in the new Article 102. Second, it allows practitioners to rely on existing UCMJ case law relevant to the underlying common crimes.

[353] Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(2); ICTY Statute, *supra* note 245, art. 2(b); ICC Statute, *supra* note 245, art. 8(2)(a)(ii); FM 27-10, *supra* note 182, para. 502.

[354] Definitions from federal statutes should be incorporated rather than repeated to allow for automatic incorporation of any amendments of the federal statute.

[355] Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(2); ICTY Statute, *supra* note 245, art. 2(b); ICC Statute, *supra* note 245, art. 8(2)(a)(ii); FM 27-10, *supra* note 182, para. 502.

[356] Inclusion of this language and reference to UCMJ Article 93 is intended to reach the type of conduct that was the subject of the Abu Ghraib prison scandal and charged under UCMJ Article 93. *See, e.g.,* U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, SGT Javal Davis, *available at* http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html (last visited Sept. 28, 2005); U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, SSG Ivan "Chip" Frederick, Jr., *available at* http://news.findlaw.com/hdocs/docs/iraq/

under an Executive Order[357] described as indecent acts with another, indecent assault, reckless endangerment, and assault with intent to commit murder, rape, or voluntary manslaughter;[358]

(C) willfully causing great suffering, or serious injury to body or health;[359]

(D) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;[360]

(E) compelling a prisoner of war or other protected person to serve in the forces of a hostile power;[361]

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ifred32004chrg.html (last visited Sept. 28, 2005) (five specifications); U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, SPC Charles Graner, *available at* http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html (last visited Sept 28, 2005) (four specifications); SPC Jeremy Sivitz, U.S. DEP'T OF DEFENSE, DD FORM 458, CHARGE SHEET, Mar. 20, 2004, *available at* http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html (last visited Sept. 28, 2005).

[357] The inclusion of Article 134 refers to offenses created by presidential authority under Article 36 of the UCMJ. *See generally* MCM, *supra* note 10, pt. IV, ¶¶ 61-113. It is unusual for a congressionally defined statute to include reference to offenses defined under an act of presidential authority, however such reference does not alter the elements of the Article 134 offenses.

[358] Inclusion of these offenses by specific reference is warranted following allegations that have surfaced during the recent conflicts in Iraq and Afghanistan which describe Article 134 offenses. *See, e.g.,* Monte Morin, *The World: G.I. Gets Eight-Year Sentence After Guilty Plea in Abuse Scandal*, L.A. TIMES, Oct. 22, 2004, at A4 (indecent acts charged in Abu Ghraib trial); *Charges Reduced in Iraq Killings: A Captain Will Stand Court-Martial on Counts of Dereliction of Duty Instead of Murder in What Was Called "A Mercy Killing,"* L.A. TIMES, Dec. 8, 2004, at A3 (assault with intent to commit murder referred to trial in the case of an Army captain accused of shooting wounded Iraqi); *U.S. Soldier Avoids Jail in Killing,* WASH. POST, Apr. 2, 2005, at A15 (reporting on the conviction of the Army captain for assault with intent to commit voluntary manslaughter). Using non-exclusive language and allowing any offense defined pursuant to Article 36 could make the new Article 102 too broad, because it could elevate even simple disorders to the status of war crimes.

It may be preferable to list the executive-defined Article 134 offenses in the statute to avoid including those offenses that carry a criminal responsibility lower than the threshold for war crimes. For example, reckless endangerment, another executive-created Article 134 offense, has a *mens rea* (reckless or wanton) commensurate with that of other listed war crimes, whereas the Article 134 offense of negligent homicide imposes criminal liability under a lower standard of culpability (simple negligence). The former may be appropriate for inclusion in a new UCMJ article governing war crimes, where the latter is not.

[359] Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(3); ICTY Statute, *supra* note 245, art. 2(c); ICC Statute, *supra* note 245, art. 8(2)(a)(iii); FM 27-10, *supra* note 182, para. 502.

[360] Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(4); ICTY Statute, *supra* note 245, art. 2(d); ICC Statute, *supra* note 245, art. 8(2)(a)(iv); FM 27-10, *supra* note 182, para. 502. Two UCMJ articles define conduct that could fall under this subsection: Article 109 (willful or reckless damage to or destruction of property other than property of the U.S. military) and Article 126 (arson).

(F) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;[362]

(G) unlawful deportation or transfer;[363]

(H) unlawful confinement,[364] including acts described by section 897 of this title,[365] or taking of hostages.[366]

(2) prohibited by Articles 23, 25, or 27[367] of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907,[368] including—

(A) the employment of poison or poisoned weapons;[369]

(B) killing or wounding treacherously individuals belonging to the hostile nation or army;[370]

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[361] Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art 147. *See* IST Statute, *supra* note 245, art. 13(a)(6); ICTY Statute, *supra* note 245, art. 2(e); ICC Statute, *supra* note 245, art. 8(2)(a)(v); FM 27-10, *supra* note 182, para. 502.

[362] Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art 147. *See* IST Statute, *supra* note 245, art. 13(a)(5); ICTY Statute, *supra* note 245, art. 2(f); ICC Statute, *supra* note 245, art. 8(2)(a)(vi); FM 27-10, *supra* note 182, para. 502.

[363] Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(8); ICTY Statute, *supra* note 245, art. 2(g); ICC Statute, *supra* note 245, art. 8(2)(a)(vii); FM 27-10, *supra* note 182, para. 502.

[364] Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(7); ICTY Statute, *supra* note 245, art. 2(g); ICC Statute, *supra* note 245, art. 8(2)(a)(vii); FM 27-10, *supra* note 182, para. 502.

[365] Again, the elements and explanation of the common crime of unlawful confinement under UCMJ Article 97 may be used to define the war crime of unlawful confinement. *See* MCM, *supra* note 10, pt. IV, ¶¶ 21.b-c. If the war crime of unlawful confinement is based on Article 97, the newly defined crime adds the element that the conduct occurs within the context of a qualifying armed conflict against a protected person. If all other elements remain the same, Article 97 can be a lesser included offense of the newly drafted war crime.

[366] Geneva Convention IV, *supra* note 5, art. 147. *See* IST Statute, *supra* note 245, art. 13(a)(9); ICTY Statute, *supra* note 245, art. 2(h); ICC Statute, *supra* note 245, art. 8(2)(a)(viii); FM 27-10, *supra* note 182, para. 502. Hostage taking is defined in U.S. federal criminal law at 18 U.S.C. sec. 1203 (2005), and the statute could be incorporated into the new UCMJ Article by reference. Although section (a) of the Hostage Taking statute provides a working definition of the crime, section (b) generally exempts conduct occurring outside of the United States. However, an exception under 18 U.S.C. sec. 1203(b)(1)(A) allows prosecution of the crime when the offender is a national of the United States, even when the conduct occurs outside of the United States. Thus, it appears that this language already covers a majority of U.S. service members through their nationality.

[367] As looting and pillaging of captured or abandoned property are covered by UCMJ Article 103(b)(3), this draft article omits specific references to Article 28 of the Hague Convention.

[368] With the exception of the omission discussed in note 367, *supra*, the language repeats verbatim the text of 18 U.S.C. sec. 2441(c)(2).

[369] Hague Convention, *supra* note 345, art. 23(a). *See* IST Statute, *supra* note 245, art. 13(b)(18); ICTY Statute, *supra* note 245, art. 3(a); ICC Statute, *supra* note 245, art. 8(b)(xvii); FM 27-10, *supra* note 182, paras. 37-38, and 504(a).

[370] Hague Convention, *supra* note 345, art. 23(b). *See* IST Statute, *supra* note 245, art. 13(b)(12); ICC Statute, *supra* note 245, art. 8(b)(xi); FM 27-10, *supra* note 182, para. 31.

(C) killing or wounding an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;[371]

(D) declaring that no quarter will be given;[372]

(E) employing arms, projectiles, or material calculated to cause unnecessary suffering;[373]

(F) improperly using of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention, resulting in death or serious injury;[374]

(G) destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;[375]

(H) declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party;[376]

(I) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;[377]

(J) attacking or bombarding, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited—[378]

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[371] Hague Convention, *supra* note 345, art. 23(c). *See* IST Statute, *supra* note 245, art. 13(b)(7); ICC Statute, *supra* note 245, art. 8(b)(vi); FM 27-10, *supra* note 182, para. 29.

[372] Hague Convention, *supra* note 345, art. 23(d). *See* IST Statute, *supra* note 245, art. 13(b)(13); ICC Statute, *supra* note 245, art. 8(b)(xii); FM 27-10, *supra* note 182, para. 28. Prior to the entry into force of the Hague Convention, under U.S. military law, the instruction by a commanding officer that he "wanted no prisoners" was found to constitute a violation of the general article (1874 ARTICLES OF WAR, art 62) as conduct prejudicial to good order and discipline. *See* S. DOC. NO. 57-213, at 2 (1903) (describing the court-martial of Brigadier General Jacob H. Smith, who was convicted of the offense and admonished).

[373] Hague Convention, *supra* note 345, art. 23(e). *See* ICTY Statute, *supra* note 245, art. 3(a); ICC Statute, *supra* note 245, art. 8(b)(xx); FM 27-10, *supra* note 182, para. 34. *See also* IST Statute, *supra* note 245, arts. 13(b)(19)-(20) *and* ICC Statute, *supra* note 245, arts. 8(b)(xviii)-(xix) (prohibiting the use of poisonous or asphyxiating gases and bullets which expand or flatten easily in the human body).

[374] Hague Convention, *supra* note 345, art. 23(f). *See* IST Statute, *supra* note 245, art. 13(b)(8); ICC Statute, *supra* note 245, art. 8(b)(vii); FM 27-10, *supra* note 182, paras. 467 and 504(e)-(g). Both the IST and the ICC Statue added the language "resulting in death or serious personal injury" to the articles cited here.

[375] Hague Convention, *supra* note 345, art. 23(g). *See* IST Statute, *supra* note 245, art. 13(b)(14); ICC Statute, *supra* note 245, art. 8(b)(xiii); FM 27-10, *supra* note 182, paras. 58-59 and 406-10. *See also* ICTY Statute, *supra* note 245, art. 3(b) and 3(d).

[376] Hague Convention, *supra* note 345, art. 23(h). *See* IST Statute, *supra* note 245, art. 13(b)(15); ICC Statute, *supra* note 245, art. 8(b)(xiv); FM 27-10, *supra* note 182, paras. 372-73.

[377] Hague Convention, *supra* note 345, art. 23(2). *See* IST Statute, *supra* note 245, art. 13(b)(16); ICC Statute, *supra* note 245, art. 8(b)(xv); FM 27-10, *supra* note 182, paras. 32 and 504(m).

[378] Hague Convention, *supra* note 345, art. 25. *See* IST Statute, *supra* note 245, art. 13(b)(6); ICTY Statute, *supra* note 245, art. 3(c); ICC Statute, *supra* note 245, art. 8(2)(b)(v); FM 27-10, *supra* note 182, paras. 39-40 and 504(d).

(i) An undefended place, within the meaning of this subsection, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance;

(ii) A place shall be considered undefended if all of the following criteria are met:

(a) armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of warfare shall be committed by the authorities or by the population; and

(d) no activities in support of military operations shall be undertaken.

(iii) The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.[379]

(K) Intentionally directing attacks against buildings that are dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.[380]

(3) that is prohibited under Article 3 of any of the four international conventions signed at Geneva, 12 August 1949,[381] committed during an armed

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[379] FM 27-10, *supra* note 182, para. 39. Note that the language in paragraph 39 of the Field Manual was added as part of the 1976 change.

[380] Hague Convention, *supra* note 345, art. 27. *See* IST Statute, *supra* note 245, art. 13(b)(10); ICC Statute, *supra* note 245, art. 8(b)(2)(ix); FM 27-10, *supra* note 182, para. 57. *See also* ICTY Statute, *supra* note 245, art. 3(d). The text of Article 27 of the 1907 Hague Convention requires parties to take "all necessary steps" to spare "as far as possible" the structures listed. The proposed language in this draft reflects language of modern customary law. *See* Henckaerts, *supra* note 349, at 19.

[381] The text of the War Crimes Act automatically incorporated any protocol the Geneva Conventions to which the United States is a party and which deals with a conflict of a non-international character, likely in anticipation of eventual ratification of Additional Protocol II to the Geneva Conventions, which was sent to the Senate by President Reagan in 1987. 18 U.S.C. § 2441(c)(3) (2005); President's Message to the Senate Transmitting the Protocol (Geneva Conventions Protocol II), 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987). As House Report 204 noted, Additional Protocol I (Relating to the Protection of Victims of International Armed Conflicts) and Additional Protocol II (Relating to the Protection of Victims of Non-International Armed Conflicts) were opened for signature in 1977, but neither protocol has been ratified by the United States. H.R. REP. NO. 105-204, at 3 n.4 (1997). Instead of referencing the non-ratified protocols, proposed UCMJ legislation could incorporate certain provisions from those protocols which constitute serious violations of the laws and customs applicable to international and

conflict not of an international character occurring in the territory of one of the parties to the Geneva Conventions and against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de* combat by sickness, wounds, detention or any other cause, including, but not limited to:

(A) Violence to life and person, in particular—

(i) murder of all kinds,[382] as described by sections 918 and 919(a) of this title;[383]

(ii) mutilation,[384] including acts described in section 924 of this title;[385]

(iii) torture,[386] as defined by 18 U.S.C. sec. 2340A,[387] or cruel treatment,[388] including conduct of a nature described in section 893, 920(a), 925, or 928 of this title,[389] and acts defined under section 934 of this title promulgated under an Executive Order,[390] including specifically offenses described as indecent acts with another, indecent assault, reckless endangerment, and assault with intent to commit murder, rape, or voluntary manslaughter;[391]

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internal armed conflict, and which the United States has either expressly or implicitly acknowledged comprise international law. *See infra* note 397.

[382] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(1); ICTR Statute, *supra* note 245, art. 4(a); ICC Statute, *supra* note 245, art. 8(c)(i); FM 27-10, *supra* note 182, para. 11.

[383] *See supra* note 352.

[384] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(1); ICTR Statute, *supra* note 245, art. 4(a); ICC Statute, *supra* note 245, art. 8(c)(i); FM 27-10, *supra* note 182, para. 11.

[385] Article 124 of the UCMJ states:

> Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—
>
> (1) seriously disfigures his person by any mutilation thereof;
>
> (2) destroys or disables any member or organ of his body; or
>
> (3) seriously diminishes his physical vigor by the injury of any member or organ;
>
> is guilty of maiming . . . .

10 U.S.C. § 924 (2005). See *supra* notes 352 and 365 for a brief discussion on the treatment of the existing UCMJ offense as a lesser included offense of a new UCMJ war crimes offense.

[386] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(1); ICTR Statute, *supra* note 245, art. 4(a); ICC Statute, *supra* note 245, art. 8(c)(i); FM 27-10, *supra* note 182, para. 11.

[387] *See supra* note 354.

[388] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(1); ICTR Statute, *supra* note 245, art. 4(a); ICC Statute, *supra* note 245, art. 8(c)(i); FM 27-10, *supra* note 182, para. 11.

[389] *See supra* note 356.

[390] *See supra* note 357.

[391] *See supra* note 358.

(B) Committing outrages upon personal dignity, in particular humiliating and degrading treatment,[392] including conduct of a nature described in section 893, 920(a), 925, or 928 of this title,[393] and offenses defined under section 934 of this title promulgated under an Executive Order, including offenses described as indecent acts with another and indecent assault;[394]

(C) Taking of hostages;[395]

(D) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court that affords all judicial guarantees which are generally recognized as indispensable.[396]

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996) willfully kills or causes serious injury to civilians.[397]

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[392] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(2); ICTR Statute, *supra* note 245, art. 4(e); ICC Statute, *supra* note 245, art. 8(c)(ii); FM 27-10, *supra* note 182, para. 11; *see also* ICTY Statute, *supra* note 245, art. 5(i) (other inhumane acts can constitute a crime against humanity).

[393] *See supra* note 356.

[394] *See supra* note 358.

[395] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(3); ICTR Statute, *supra* note 245, art. 4(c); ICC Statute, *supra* note 245, art. 8(c)(iii); FM 27-10, *supra* note 182, para. 11.

[396] Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3. *See* IST Statute, *supra* note 245, art. 13(c)(4); ICTR Statute, *supra* note 245, art. 4(g); ICC Statute, *supra* note 245, art. 8(c)(iv); FM 27-10, *supra* note 182, para. 11.

[397] The text of 18 U.S.C. sec. (c)(4) included language that would automatically incorporate Protocol II of this conviction as amended "when the United States is a party to such Protocol . . . ." Protocol II entered into force for the United States on November 24, 1999. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, S. TREATY DOC. NO. 105-1(A) (1999).

This proposed UCMJ Article contains only those violations specifically referenced directly and by implication in the federal criminal statute. 18 U.S.C. § 2441(c) (2005). Although the United States has not ratified Protocols I and II Additional to the Geneva Conventions, it has acknowledged that certain articles contained in those protocols reflect customary international law. *See generally* President's Message to the Senate Transmitting the Protocol (Geneva Conventions Protocol II), 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987) (transmitting Protocol II); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y, 419 (1987). As one witness stated during the hearings on the War Crimes Act, the list of war crimes in the federal legislation "is not an exclusive list of the possible crimes that the United states can address through legislation" but rather serves as a starting point for further development. *War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims*, 104th Cong. 29 (1996) (statement of Monroe Leigh, Former Assistant General Counsel for International Affairs, Department of Defense, and Chairman, American Bar Association Task Force on War Crimes in Yugoslavia).

These other customary laws of war recognized by the United States but not specifically referenced in the War Crimes Act should be considered for codification in the new UCMJ Article

102. *See* FM 27-10, *supra* note 182; U.S. DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK 11-56 (2005); U.S. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INST. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4 (Mar. 25, 2002), *citing* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 4.1 (Dec. 9, 1998); *War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims*, *supra*, at 10 (recommendation to add to the War Crimes Act "a more general category of war crimes" to include rules governing civil wars and other internal armed conflicts, testimony of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State).

These provisions could be listed as subsections (b)(5) and (b)(6) of the proposed draft:

(5) that constitutes other serious violations of the laws and customs applicable in international armed conflict, namely, any of the following acts:

(A) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(B) Intentionally directing attacks against civilians objects, that is, objects which are not military objectives;

(C) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(D) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(E) Intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(F) The deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(G) Subjecting persons of another nation to physical mutilation, including acts described in section 924 of this title, or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(H) Committing outrages upon personal dignity, in particular humiliating and degrading treatment, including conduct of a nature described in section 893, 920(a), 925, or 928 of this title, and offenses defined under section 934 of this title promulgated under an Executive Order, including offenses described as indecent acts with another and indecent assault;

(I) Committing rape, as described by section 920(a) of this title, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;

(J) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(K) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(L) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under international law; and

(M) Using children under the age of fifteen years to participate actively in hostilities.

(c) "Persons protected under the convention" shall include a child in utero of any woman protected by the conventions and conduct under subsection (b)(1) that causes the death or bodily injury to a child in utero shall be liable for a separate offense under this subsection;[398]

(d)(1) No person may be sentenced by court-martial to suffer death for an offense under this article, unless the members of the court-martial unanimously find that—[399]

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(6) that constitutes serious violations of the laws and customs applicable in armed conflict not of an international character, namely, any of the following acts:

(A) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(B) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(C) Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in humanitarian assistance missions, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(D) Intentionally directing attacks against buildings that are dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(E) Committing rape, as described by section 920(a) of this title, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;

(F) Using children under the age of fifteen years to participate actively in hostilities;

(G) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; and

(H) Subjecting persons who are in the power of another party to the conflict to physical mutilation, including acts described in section 924 of this title, or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.

These provisions are based on the subparagraphs of Articles 13(b) and 13(c) of the IST Statute that are not already codified as part of subsection (b)(2) of the proposed UCMJ Article (violations of 1907 Hague Convention). *See* IST Statute, *supra* note 245, art. 13(b)(1)-(5), (8)(9), (11), (21)-(26) and art. 13(c)(1)-(4), (6)-(8), (11); Antonio Cassese*, Crimes Against Humanity, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 374-75 (Antonio Cassese et al. eds., 2002) (noting the recognition of sexual slavery as violative of customary law); Matheson, *supra*. One issue that still appears to be emerging is the treatment of the natural environment during armed conflict. Compare Matheson, *supra*, at 424 (objecting to Article 35(3) of Additional Protocol I as too broad and ambiguous) *with* OPERATIONAL LAW HANDBOOK, *supra*, at 241 (describing a less vague interpretation of "long-term," "severe," and "widespread" in relation to environmental damage).

[398] This language incorporates the language implemented in Article 119a. 10 U.S.C. § 919a (2005).

[399] This provision is modeled after the text of Article 106a. MCM, *supra* note 10, pt. IV,

(A) in the case of the death of the victim—

(i) the death of the victim resulted, directly or indirectly, from an act or omission of the accused, as described in this subsection (b);

(ii) the killing was unlawful; and

(iii) at the time of the killing, the accused had a premeditated design to kill or was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, torture, or aggravated arson.[400]

(B) in all qualifying cases, any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

b. *Elements.* [Under Article 36, Congress has delegated to the President the authority to prescribe modes of proof. The sections found in Part IV of the Manual for Courts-Martial that describe the elements of the offenses, provide further explanation and definitions, enumerate lesser included offenses, set the maximum punishment, and provide a sample specification are promulgated by

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¶ 30a.a(b). This recommended language takes into consideration the comparative severity of offenses committed under the proposed Article and applies the safeguards built into Article 106a.

[400] This proposed language is narrower than that of the federal statute. The War Crimes Act authorizes capital punishment "if death results to the victim" because of a war crime. 18 U.S.C. § 2441(a). Without further clarification, using such broad language could lead to the imposition of the death penalty for manslaughter or negligent homicide that occurs in the context of a qualifying armed conflict. The proposed language in this subsection reserves capital punishment only for the most serious war crimes—those involving premeditated murder, felony murder, and rape. The UCMJ authorizes the death penalty for rape, MCM, *supra* note 10, pt. IV, ¶45.a(a), premeditated murder, and felony murder, MCM, *supra* note 10, pt. IV, ¶43.a(1) and (4). The offense of torture is added to the felony murder provision in this proposed article to: 1) maintain the possibility of capital punishment for the offense of torture as reflected in the federal anti-torture statute; and 2) place it in the context of an armed conflict. 18 U.S.C. § 2340A. The federal crime of torture under 18 U.S.C. sec. 2340A can occur only outside of the United States, and thus adding torture to a UCMJ felony murder rule that realistically applies *solely* to war crimes does not unreasonably expand criminal liability of the U.S. military member.

If capital punishment for the war crimes of rape and the offenses described in this subsection is *not* authorized, then these newly defined UCMJ war crimes would be less severe than common crimes. If capital punishment is authorized for a *greater* range of war crimes than what currently exists in the UCMJ, it could encourage the perpetuation of the status quo, because military authorities may deliberately charge war crimes as common crimes in order to avoid proceedings involving the death penalty. A balance is best achieved by aligning the federal statute in a manner most consistent with existing UCMJ provisions.

Executive Order.[401] To the extent that existing UCMJ articles are referenced in this proposed Article, elements of those offenses should be incorporated.].

c. *Explanation*. [Explanations, as contained in the Manual for Courts-Martial, include descriptions of the nature of the offense, examples of conduct constituting or not constituting an offense, differences among subcategories of offenses, discussion of the required mens rea, defenses, and other relevant information.].[402]

d. *Lesser included offenses.* [The general nature of war crimes generally places their severity above common crimes and makes the corresponding common crimes lesser included offenses. If the offenses described in paragraph b of the draft article reference offenses contained in the punitive articles, then those punitive articles should be listed as lesser included offenses. For example, the war crime of premeditated murder described in subsections (b)(1)(A)(i) and (b)(3)(A)(i) could include the lesser *war crimes* of unpremeditated murder and voluntary manslaughter as well as the lesser *common offenses* listed in the Manual for Courts-Martial: unpremeditated murder, voluntary and involuntary manslaughter, assault (simple, aggravated, consummated by a battery, with intent to commit murder or voluntary manslaughter), and negligent homicide.[403] The lesser included offenses allow for a conviction of the underlying offense (common crime) if, for example, proof is lacking to support the element that the person is protected under one of the Geneva Conventions.].[404]

e. *Maximum punishments*.[405]

(1) *Premeditated murder and felony murder of a person protected by the Geneva Conventions*. Death; Mandatory minimum—imprisonment for life with eligibility for parole.[406]

(2) *Rape of a person protected by the Geneva Conventions.* Death or such other punishment as a court-martial may direct.[407]

(3) *All other offenses.* Any punishment, other than death, that a court-martial may direct.[408]

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[401] For a recent example of the exercise of such presidential authority, see Executive Order No. 13365, Dec. 3, 2004.
[402] *See supra* note 401 and accompanying text.
[403] MCM, *supra* note 10, pt. IV, ¶43.d.
[404] *See supra* note 401 and accompanying text.
[405] Under Article 56, Congress has delegated to the President the authority to place limits on maximum punishments for offenses under the UCMJ.
[406] This recommendation is based on the maximum punishment authorized for premeditated murder under Article 118(1) or (4) as well as the federal anti-torture statute. MCM, *supra* note 10, pt. IV, ¶ 43.e(1); 18 U.S.C. § 2340A(a) (2005).
[407] This recommendation is based on the maximum punishment authorized for rape under Article 120(1). MCM, *supra* note 10, pt. IV, ¶45.e(1). As long as the death penalty continues to be authorized for the common crime of rape under Article 120, the war crime constituting the same conduct should carry the same maximum punishment.

f. *Sample specifications.* [Usually sample specifications are provided for each separately listed offense. For example, Article 99 (misbehavior before the enemy) describes nine situations that would constitute violations of the article and provides nine corresponding sample specifications.[409]].

[408] This recommendation is based on the federal statute's maximum penalty of any term of years to life imprisonment for the commission of a war crime. 18 U.S.C. § 2441(a) (2005). Because Congress specifically named members of the U.S. armed forces as within the class of offenders covered by the War Crimes Act, the maximum punishment authorized under a new UCMJ article should closely follow the federal statute. 18 U.S.C. § 2441(b). In addition, existing UCMJ offenses related to war authorize comparable maximum punishment: misbehavior before the enemy (Article 99), subordinate compelling surrender (Article 100), improper use of a countersign (Article 101), forcing a safeguard (Article 102), looting and pillaging (Article 103), and misconduct as a prisoner (Article 105). Articles 99, 100, 101, and 102 also authorize the death penalty.

[409] *See supra* note 401 and accompanying text.

APPENDIX 2:

POTENTIAL WAR CRIMES FROM THE CURRENT CONFLICTS

Over the past two years, the media have reported many incidents that could qualify for prosecution under the War Crimes Act, either under current law or if the UCMJ were amended. By mid-March 2005, at least 26 detainees died in U.S. custody in Iraq and Afghanistan in acts that Army and Navy officials suspect or allege to be criminal homicide.[410] Army criminal investigators have looked into more than 300 cases involving detainee maltreatment.[411] About twenty percent of those cases were death investigations.[412]

This appendix summarizes open source reports of some of these investigations, courts-martial, and administrative actions involving U.S. military members deployed to Afghanistan and Iraq. The summaries include allegations of detainee abuse as well as other war-related crimes. This list is meant to be illustrative of the type and range of incidents and crimes that have historically occurred during armed conflicts. These summaries serve as a starting point for discussing the range of war crimes and violations of international humanitarian law that should be fully integrated into the UCMJ.

A. Iraq

Staff Sergeant Johnny Horne Jr. pled guilty to one charge of unpremeditated murder for shooting an unarmed, severely wounded 16-year-old Iraqi on August 18, 2004.[413] Staff Sergeant Horne's unit fired on a dump truck carrying more than a dozen young men and teenagers hired as trash collectors; the unit believed the truck carried insurgents.[414] Although Staff Sergeant Horne claimed that the killing was intended to end the teen's suffering, media interviews reported that witnesses to the shooting said that the wounds were not serious and the boy's life might have been saved.[415] A pretrial agreement capped the maximum amount of confinement at 10 years in exchange for the guilty plea; the court-martial panel sentenced Staff Sergeant

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[410] Douglas Jehl & Eric Schmitt, *U.S. Military Says 26 Deaths May Be Homicide*, N.Y. TIMES, Mar. 16, 2005, at A1.
[411] *Id.*
[412] *Id.*
[413] Paul Garwood, *Soldier Jailed for Iraq Killing,* SUNDAY MAIL (Queensland), Dec. 12, 2004, at 48; Edmund Sanders, *The Conflict in Iraq: U.S. Soldier Pleads Guilty in 'Mercy' Killing of Iraqi*, L.A. TIMES, Dec. 11, 2004, at A13. SSG Horne was originally charged with premeditated murder and conspiracy to commit murder. Garwood, *supra*.
[414] Sanders, *supra* note 413.
[415] *Id.*

Horne to three years of confinement, reduction to the lowest enlisted grade (E-1), forfeitures of pay, and a dishonorable discharge.[416]

Second Lieutenant Erick Anderson, Staff Sergeant Horne's platoon leader, was charged with premeditated murder for his role in the shooting.[417] According to Staff Sergeant Horne's testimony, he turned to Second Lieutenant Anderson for guidance on what to do with the badly wounded teen "whose internal organs had been blown away."[418] After Staff Sergeant Horne reportedly told Second Lieutenant Anderson, "I don't want to leave him like that," the lieutenant responded with "Do it," which Staff Sergeant Horne understood to mean that Staff Sergeant Horne should shoot the teen.[419] As of January 19, 2005, the charges against Second Lieutenant Anderson were dismissed without prejudice, but the officer potentially faced additional allegations of misconduct.[420]

Staff Sergeant Jonathan J. Alban-Cardenas was also charged with premeditated murder for his role in the killing of the wounded Iraqi teen.[421] He claimed that after consulting with Second Lieutenant Anderson, he fired a burst of bullets.[422] On January 14, 2005, Staff Sergeant Alban-Cardenas was convicted of murder and conspiracy to murder; he was sentenced to one year in confinement, reduction to E-1, and a bad-conduct discharge.[423]

Corporal Dustin Berg faced charges of murder, false swearing, and wearing of an unauthorized award[424] after Army officials reported that Corporal Berg had shot himself and killed a civilian member of the Iraqi police with whom he had been on patrol in November 2003.[425] Corporal Berg received a Purple Heart for combat injuries that he may have sustained from that incident.[426] Testimony at the preliminary hearing in February 2005 suggested that Corporal Berg shot himself in the abdomen with the Iraqi's weapon after he shot the Iraqi police officer.[427] Under a plea agreement, Corporal Berg pled guilty in July 2005 to negligent homicide, self-injury, and making two false

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[416] *Id.*
[417] Sanders, *supra* note 413.
[418] *Id.*
[419] *Id.*
[420] Brian E. Albrecht, *Army Dismisses Murder Charges: Twinsburg Soldier Still Faces Probe*, PLAIN DEALER (Cleveland), Jan. 19, 2005, at A1.
[421] Kate Zernike, *U.S. Soldier Found Guilty in Iraq Prison Abuse Case,* N.Y. TIMES, Jan. 15, 2005, at A5; Sanders, *supra* note 413.
[422] Sanders, *supra* note 413.
[423] Albrecht, *supra* note 420; Brian Donnelly & Matt Spetalnick, *US Soldier Jailed One Year for Murder of Injured Iraqi*, HERALD (Glasgow), Jan. 15, 2005, at 1.
[424] Jon Murray, *Hoosier Faces Trial in Killing of Iraqi: Hearing Thursday Could Lead to Court-Martial for Guardsman Accused in Death of Citizen*, INDIANAPOLIS STAR, Feb. 9, 2005, at 1A.
[425] Michael Lindenberger, *Guardsman Is Charged with Murder, Lying About Incident that Led to Award*, COURIER-J. (Louisville, KY), Feb. 9, 2005, at 3B.
[426] *Id.*
[427] Terry Horne, *Indiana Soldier to Be Tried in Death of Iraqi Policeman*, INDIANAPOLIS STAR, Mar. 5, 2005, at 8A.

official statements.[428] Although a military judge sentenced him to six years of confinement and bad-conduct discharge, the terms of the plea agreement limited his confinement to 18 months.[429]

Specialist Brent W. May, along with co-accused Sergeant Michael P. Williams, is accused of fatally shooting an Iraqi man in his home during house-to-house searches on August 28, 2004, and attempting to cover up the crime.[430] After soldiers found a revolver and AK-47 in the man's house, Sergeant Williams brought the Iraqi and Specialist May inside while the man's family remained outside.[431] After a brief exchange between the two soldiers, Specialist May shot the man twice in the head.[432] Specialist May claimed that Sergeant Williams ordered him to shoot the Iraqi.[433] At trial in May 2005, he was convicted of unpremeditated murder and sentenced to five years of confinement and a dishonorable discharge.[434]

Staff Sergeant Michael P. Williams faces multiple charges of premeditated murder for killing three Iraqis, as well as charges of obstruction of justice and making a false official statement.[435] On August 18, 2004, Staff Sergeant Williams fired on a man running from a dump truck that the unit believed was carrying insurgents.[436] Another member of Staff Sergeant Williams' unit said that he saw the man waving a white flag and heard him shouting, "Baby! Baby!"[437] On August 28, 2004, Staff Sergeant Williams was involved in the shooting deaths of two Iraqi men, the first of which is described in the previous paragraph. In the second August 28 incident, after soldiers discovered an AK-47 during a house search, Staff Sergeant Williams ordered

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[428] John Murray, *Berg Pleads Guilty to Lesser Charge in Iraqi Killing: Indiana Guardsman Given up to 18 Months in Prison in Shooting of Iraqi Police Officer,* INDIANAPOLIS STAR, July 26, 2005, at 5A.

[429] *Id.*

[430] Edmund Sanders, *Troops' Murder Cases in Iraq Detailed*, L.A. TIMES, Dec. 7, 2004, at A1.

[431] *Id.*

[432] *Id.* Staff Sergeant Williams allegedly told Specialist May, "You know what to do" to which SPC May replied by asking excitedly, "Can I shoot this one?" *Id.*; Edmund Sanders et al., *The Conflict in Iraq: Killings Sting Proud Battalion*, L.A. TIMES, Dec. 13, 2004, at A1; Karl Vick, *Two Days in August Haunt Charlie Company*, WASH. POST, Dec. 14, 2004, at A1. Compare these and other allegations involving U.S. soldiers killing civilians with summaries of findings of guilt for grave breaches of the Geneva Conventions, including the war crime of murder, *in* HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 113-19 (2004), *available at* http://hrw.org/reports/2004/ij/ (last visited Sept. 28, 2005).

[433] Sanders, *supra* note 430. Specialist May allegedly took a digital photo of the victim and labeled the file "evidence" on his personal computer. *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, L.A. TIMES, Sept. 23, 2004, at A7.

[434] Monica Davey, *An Iraqi Police Officer's Death, A Soldier's Varying Accounts*, N.Y. TIMES, May 23, 2005, at A1.

[435] *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 433.

[436] Sanders, *supra* note 413. Another article refers to Staff Sergeant Williams' order for another soldier to fire on an Iraqi standing in the street as the basis of the murder charge. *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 433.

[437] Sanders, *supra* note 413.

the soldiers to bring the Iraqi, who had been kept outside on his knees in plastic handcuffs, inside the house.[438] Next, Staff Sergeant Williams allegedly cut the handcuffs off, laid the weapon near the man, said aloud to the other soldiers that he felt threatened, and shot the Iraqi.[439] After another soldier said that the man was still alive, and Staff Sergeant Williams shot the Iraqi a second time.[440] Later, prosecutors alleged that Staff Sergeant Williams ordered his troops to "stick to the story" that the Iraqis had reached for their guns before being shot.[441] Convicted of one count each of premeditated and unpremeditated murder, Staff Sergeant Williams was sentenced to life with the possibility of parole.[442]

Captain Rogelio Maynulet was charged with murder and dereliction of duty for shooting an Iraqi on May 21, 2004.[443] At the Article 32 pretrial hearing, witnesses testified that the man was badly wounded and missing part of his skull after a firefight and that Captain Maynulet told a fellow officer that he shot the man out of compassion.[444] After the pretrial hearing, the division commander decided not to go forward with the murder charge and instead referred the charge to trial as assault with intent to commit murder.[445] At the court-martial that began in late March 2005, Captain Maynulet was convicted of the lesser offense of assault with intent to commit voluntary manslaughter; facing a maximum of ten years of imprisonment, he was sentenced to a dismissal from the U.S. Army.[446]

Captain Shawn L. Martin faced eight counts of assault and one count each of obstruction of justice and conduct unbecoming an officer for his

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[438] Sanders, *supra* note 430.

[439] *Id.* Before his squad left for Iraq, Staff Sergeant Williams was reported to have told his unit that they would take no prisoners. Sanders et al., *supra* note 432. A soldier in Staff Sergeant Williams' unit testified at a pretrial hearing that the accused talked about killing any Iraqi males of military age and any Iraqi found with a weapon. *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 433.

[440] Sanders et al., *supra* note 432.

[441] *Id.* Military authorities launched an investigation after a fellow soldier slipped a note about the killings to his superior officers; the solider was then transferred out of the unit after Staff Sergeant Williams threatened to kill him. *Id.*; *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 433.

[442] John Milburn, *Fort Riley Soldiers Begin Appeals*, LAWRENCE J.-WORLD (Lawrence, KS), June 14, 2005, *available at* http://www2.ljworld.com/news/2005/jun/14/fortrileysoldiers (last visited Sept. 28, 2005).

[443] *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 433. The man was reportedly the driver for the militant Shiite cleric Muqtada al-Sadr. Editorial, *A Slippery Slope We'd Best Avoid*, CHI. SUN-TIMES, Dec. 9, 2004, at 35.

[444] *Charges Reduced in Iraq Killings: A Captain Will Stand Court-Martial on Counts of Dereliction of Duty Instead of Murder in What Was Called "A Mercy Killing,"* L.A. TIMES, Dec. 8, 2004, at A3.

[445] *Id.*

[446] *U.S. Soldier Avoids Jail in Killing,* WASH. POST, Apr. 2, 2005, at A15. A dismissal is a punitive discharge of a commissioned officer and imposable only through trial by court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(A) (2002).

treatment of Iraqi civilians during patrols from May to July 2003.[447] Captain Martin allegedly screamed at and kicked civilian detainees, ordered at gunpoint an enlisted soldier to fire over the head of a detainee, ordered another enlisted soldier to beat up a detainee, and fired his pistol at the feet of a suspect during an interrogation.[448] Facing a maximum of 44 years in prison if found guilty on all counts,[449] Captain Martin was acquitted of all but three assault charges and was sentenced to 45 days in confinement, forfeitures of pay totaling $12,000, and a reprimand.[450]

Second Lieutenant Ilario Pantano, a veteran from the first Gulf War, faced charges of premeditated murder of two unarmed Iraqi men on April 15, 2004.[451] The incident began when the unit fired upon a sedan speeding away from an insurgent hideout and disabled the car.[452] The two men in the car were initially handcuffed, but Second Lieutenant Pantano had the cuffs removed and ordered the men to remove the seats of the car to check for weapons.[453] Second Lieutenant Pantano maintained that he shot the men in self-defense after they pivoted toward him.[454] A sergeant from the platoon claimed that after the lieutenant shot two men in the back, he placed a sign above the men's bodies with the division's motto, "No better friend, no worse enemy."[455] Following a pretrial hearing in late April 2005,[456] the investigating officer found the shooting justified, recommended that the criminal charges be dropped, and suggested that Second Lieutenant Pantano receive nonjudicial punishment for lesser charges.[457] In late May 2005, the convening authority dropped all charges and decided not to pursue any punishment.[458]

Private First Class Edward L. Richmond Jr. was charged with shooting an Iraqi handcuffed arrestee in the head during a roundup of suspected insurgents on February 28, 2004.[459] At trial Private First Class Richmond

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[447] *Nation in Brief*, WASH. POST, Mar. 15, 2005, at A24; Robert Weller, *Officer Denies Abusing Citizens of Iraqi Town*, ARMY TIMES, Mar. 16, 2005, *available at* http://www.armytimes.com (last visited Mar. 17, 2005).
[448] *Weller*, *supra* note 447.
[449] *Id.*
[450] Erin Emery, *Officer Sentenced to Prison: Convicted Army Captain Gets 45 Days, Cut in Salary*, DENV. POST, Mar. 18, 2005, at B5.
[451] Brian Kates, *Warrior Faces Toughest Battle: Hero Leatherneck Facing Charges He Killed Two Iraqis*, N.Y. DAILY NEWS, Mar. 6, 2005, at 28.
[452] *Id.*
[453] *Id.*
[454] Kates, *supra* note 451.
[455] *Id.*
[456] Brian Kates, *Stunner at Iraq Hearing*, N.Y. DAILY NEWS, Apr. 28, 2005, at 14. The investigating officer interrupted the proceedings to advise the main prosecution witness of his right against self-incrimination after defense counsel elicited testimony from the witness about failing to obey orders not to talk to the press. *Id.*
[457] *Marine's Shooting of Iraqis Justified, Probe Concludes*, Wash. POST, May 15, 2005, at A24.
[458] Tom Foreman Jr., *Marine Officer Cleared of Killing Two Iraqis*, WASH. POST, May 27, 2005, at A19.
[459] Jason Chudy, *GI Faces Court-Martial in Death of Suspected Insurgent,* STARS & STRIPES, Aug. 1, 2004, *available at* http://www.estripes.com (last visited Sept. 28, 2005).

testified that he fired after he thought the man lunged at another solider and said that he did not know the man's hands were secured.[460] Convicted of voluntary manslaughter, the soldier was sentenced to three years of confinement and a dishonorable discharge.[461]

Sergeant First Class James H. Williams was convicted on July 29, 2004, of armed robbery for stealing an Iraqi SUV.[462] The court-martial panel rejected the defense argument that SFC Williams commandeered the vehicle for the war effort and imposed a sentence that included a bad-conduct discharge and a reduction to E-1.[463]

Sergeant First Class Tracy Perkins was court-martialed in January 2005 for forcing two Iraqis to jump from a bridge into the Tigris River in January 2004 and for the resulting death of one of the men.[464] He was convicted of obstruction of justice, assault consummated by a battery, and two specifications of aggravated assault, but he was acquitted of involuntary manslaughter and making a false official statement.[465] The sentence included six months of confinement and a one-grade reduction to the rank of staff sergeant.[466]

Several other military members were also disciplined for their role in the drowning. Major Robert Gwinner received nonjudicial punishment in 2004 for impeding the homicide investigation.[467] Lieutenant Colonel Nathan Sassaman received nonjudicial punishment for ordering the cover-up of the death.[468] First Lieutenant Jack Saville faced charges of manslaughter, aggravated assault, conspiracy, making false statements and obstruction of justice.[469] On March 15, 2005, First Lieutenant Saville pled guilty to two assault charges and one charge each of dereliction of duty and obstruction of justice for his role in forcing the two men into the Tigris River.[470] After a brief

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[460] *Iraq Digest*, SEATTLE TIMES, Aug. 8, 2004, at A7.
[461] *Id*.
[462] Michelle Boorstein, *Virginia Native Convicted of Stealing SUV in Iraq*, WASH. POST, July 30, 2004, at B5. For a discussion of varying viewpoints on the trial, see James Dao, *Two Views at Court-Martial on Seizing Iraqi Vehicle*, N.Y. TIMES, July 29, 2004, at A12.
[463] Boorstein, *supra* note 462. Prosecutors called witnesses who testified that the accused and other soldiers tried to conceal the theft. *Id.* Sergeant First Class Williams was also convicted of dereliction of duty for allowing his soldiers to consume alcohol in theater, which was prohibited by regulations. *Id.* At the time of his trial, Sergeant First Class Williams was two years shy of retirement eligibility; his bad-conduct discharge will make him ineligible for retirement and many veterans' benefits. *Id.*
[464] Suzanne Goldenberg, *US to Try 20 More Troops for Iraq Abuse*, GUARDIAN (London), Jan. 17, 2005, at 2.
[465] *GI Sentenced to Six Months in Iraq Drowning Case*, CHI. TRIB., Jan. 9, 2005, at 18.
[466] Goldenberg, *supra* note 464; John W. Gonzalez, *Five More Who Served in Iraq Have Fort Hood Court Dates*, HOUSTON CHRON., Jan. 16, 2005, at A6.
[467] *Army Punishes Commanders in Drowning of Iraqi Civilian*, ORLANDO SENTINAL, July 8, 2004, at A5.
[468] *Id.;* Goldenberg, *supra* note 504.
[469] Erin Emery & Arthur Kane, *Former Carson GI Faces Murder Charge: The Soldier Is the Seventh from the Colorado Base to Be Charged in Connection with Iraqis' Deaths*, DENV. POST, Nov. 25, 2004, at A1.
[470] *Platoon Leader Pleads Guilty in Assault Case*, L.A. TIMES, Mar. 15, 2005, at A16.

trial, he was also found guilty of battery based on a separate incident that took place in Balad, Iraq, in December 2003; the manslaughter charge was not strongly prosecuted and resulted in a not guilty finding.[471] Although the charges could have carried a maximum punishment of more than nine years, a plea agreement capped his potential confinement at fifteen months.[472] The military judge sentenced First Lieutenant Saville to 45 days of confinement and a forfeiture of approximately two-thirds of his pay for six months.[473]

Major Gregory McMillion, an Air Force maintenance officer, was convicted of illegally shipping to the United States hundreds of items from Iraq, including six rocket-propelled grenade launchers, eight uniforms, more than 1,000 Iraqi military berets, around 30 automatic rifles, and a statue looted from a museum.[474] He was sentenced to one year of confinement and a dismissal.[475]

Specialist Donald E. Gentry was convicted in July 2004 at a general court-martial of larceny, conspiracy, obstruction of justice, and making false statements.[476] The charges stemmed from an incident in which Specialist Gentry stole more than $67,000 from an Iraqi bank in Kirkuk while on guard duty on August 18, 2003.[477] After noticing that a bank teller left a drawer of cash unsecured, four soldiers initially talked about taking the money but abandoned the drawer and idea.[478] Later that night, after Specialist Gentry went back to the drawer, each of the other three soldiers took $300 and Specialist Gentry kept the rest of the money.[479] He and a fellow soldier tried to conceal the crime by attempting to destroy the container that held the money.[480] Specialist Gentry was sentenced to two years of confinement, reduction to E-1, forfeiture of all pay, and a bad-conduct discharge.[481]

Specialist Megan Ambuhl pled guilty in October 2004 to a single charge of dereliction of duty through her willful failure to protect detainees from abuse while serving at Abu Ghraib prison.[482] In exchange for her plea, the

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[471] John W. Gonzalez, *Officer Gets Confinement in River Incidents: He Expresses Remorse for His Role in Forcing Three Iraqi Detainees into the Tigris*, HOUSTON CHRON., Mar. 16, 2005, at A13.
[472] *Id.*
[473] *Id.*; *Platoon Leader Pleads Guilty in Assault Case*, *supra* note 470.
[474] *Nation in Brief,* WASH. POST, May 21, 2005, at A20.
[475] *Id.*
[476] Jessica Inigo, *1st ID GI Gets Jail Time for Stealing Nearly $68,000 from Iraqi Bank*, STARS & STRIPES, July 14, 2004, *available at* http://www.estripes.com (last visited Sept. 28, 2005). Specialist Gentry could have been charged with the crime of looting under Article 103(b)(3). *See* U.S. v. Manginell, 32 MJ 891 (A.F.C.M.R. 1991). Looting is already defined as a war crime under the War Crimes Act through reference to Article 28 of the Hague Convention. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 28, 36 Stat. 2277, 2309.
[477] Inigo, *supra* note 476.
[478] *Id.*
[479] *Id.*
[480] Inigo, *supra* note 476.
[481] *Id.*
[482] Douglas Jehl, *G.I. in Abu Ghraib Abuse Is Spared Time in Jail*, N.Y. TIMES, Nov. 3, 2004, at A4.

more serious charges of conspiracy, maltreatment of detainees, and indecent acts were dropped.[483] Her sentence included a reduction to E-1 and forfeiture of pay;[484] she also received a less than honorable discharge.[485]

Specialist Armin J. Cruz was accused of ordering three naked Abu Ghraib prisoners to crawl along a concrete floor, handcuffing them, and stepping on at least one prisoner.[486] After pleading guilty in September 2004 to conspiracy and maltreatment of prisoners, he was sentenced to eight months of confinement, reduction to E-1, and a bad-conduct discharge.[487]

Sergeant Javal Davis pled guilty on February 1, 2005, to abusing detainees at Abu Ghraib prison by stomping on the fingers and toes of several naked, hooded, and handcuffed prisoners.[488] Under a plea agreement, Sergeant Davis pled guilty to dereliction of duty, assault consummated by a battery, and making false official statements in exchange for dropping charges of conspiracy and maltreating detainees and a confinement cap of 18 months.[489] A military jury sentenced him to six months of confinement and a bad-conduct discharge.[490]

Private First Class Lynndie England was convicted in September 2005 by a court-martial for her conduct toward prisoners at Abu Ghraib in Iraq. The original charges included indecent acts with soldiers and detainees, assault of detainees, conspiracy to commit maltreatment of a detainee, conduct prejudicial to good order and discipline for posing in photographs with detainees, and violation of an order restricting contact with Specialist Charles Graner.[491] The original charges carried a maximum confinement penalty of nearly 30 years, but were dropped to allow the trial to be moved from North Carolina to Texas.[492] A second set of charges carried a maximum penalty of 16½ years and included two specifications each of conspiracy and indecent acts, four specifications of cruelty and maltreatment of detainees, and one charge of dereliction of duty.[493] At trial, a day after entering a guilty plea under a pretrial

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[483] Josh White, *Abu Ghraib Prison MP Pleads Guilty to Reduced Charge*, WASH. POST, Nov. 3, 2004, at A12.
[484] Jehl, *supra* note 482.
[485] Sarah Baxter, *A Trail of Torture at Hands of U.S. Forces*, AUSTRALIAN, Jan. 17, 2005, at 14. It is unclear whether Specialist Ambuhl's separation resulted from a punitive discharge adjudged by the court or an administrative discharge under other than honorable conditions.
[486] Norimitsu Onishi, *Military Specialist Pleads Guilty to Abuse and Is Jailed*, N.Y. TIMES, Sept. 12, 2004, at 9.
[487] *Id.*
[488] John W. Gonzalez, *Abu Ghraib Soldier Gets Six-Month Prison Term: Sergeant Said He Abused Inmates for Ten Seconds*, HOUSTON CHRON., Feb. 5, 2005, at A21. A copy of the charge sheet is available at http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html (last visited Sept. 28, 2005).
[489] Gonzalez, *supra* note 471; David Abel, *Reservist from Randolph Sentenced*, BOSTON GLOBE, Feb. 2, 2005, at A11.
[490] *Soldier Gets Six Months for Prisoner Abuse*, CHI. TRIB., Feb. 5, 2005, at 12.
[491] *Status of the Charges*, PITT. POST-GAZETTE, Dec. 21, 2004, at A8.
[492] Josh White, *Military Files New Charges in Scandal: Pfc. England Faces Less Prison Time*, WASH. POST, Feb. 18, 2005, at A25.
[493] *Id.*

agreement and after former Specialist Graner testified that the conduct in the photographs was not abuse, the military judge rejected Private First Class England's guilty plea and declared a mistrial.[494] A trial with new charges began in late September 2005, at which Private First Class England faced a maximum of 11 years of confinement.[495] Following her convictions on one specification of conspiracy to maltreat prisoners, four specifications of maltreatment, and of committing an indecent act, she was sentenced to three years of confinement and a dishonorable discharge.[496]

Staff Sergeant Ivan "Chip" Frederick, Jr. pled guilty in October 2004 to conspiracy, dereliction of duty, maltreatment of Abu Ghraib detainees, assaulting a detainee, and indecent acts.[497] The charges stemmed from incidents that included punching a prisoner, ordering a prisoner to masturbate in front of others, and placing wires on a prisoner's finger to threaten electrocution if the prisoner fell off of a box.[498] He was sentenced to confinement for ten years (reduced to eight years under a plea agreement), reduction to E-1, forfeiture of pay, and a dishonorable discharge.[499]

Specialist Charles Graner's court-martial in January 2005 was one of the most publicized trials of the Iraqi conflict and the first fully litigated court-martial from of the Abu Ghraib trials. The charge sheet showed that he was accused of conduct that took place in October and November 2003 and violated the following UCMJ articles:[500]

- Article 81 (two specifications): conspiracy to maltreat detainees resulting in the 1) photograph of PFC England leading a detainee by a leash and 2) photograph of the pyramid of naked detainees.
- Article 92: willful dereliction of duty for failing to protect detainees from abuse.
- Article 93 (four specifications): maltreatment of subordinates for 1) making naked detainees form a human pyramid and being photographed with them, 2) ordering detainees to strip and perform sexual acts in front of other soldiers and detainees, 3) being photographed with an armed raised as if ready to strike a detainee in the head or neck, and 4) encouraging Private First

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[494] Geoff Elliott, *Mistrial as Judge Rejects England's Plea*, AUSTRALIAN, May 6, 2005, at 9.
[495] *Witnesses Clash over Soldier's Mental State*, L.A. TIMES, Sept. 24, 2005, at A24.
[496] David S. Cloud, *Private Gets 3 Years for Iraq Prison Abuse*, N.Y TIMES, Sept. 28, 2005, at A20.
[497] Monte Morin, *The World: G.I. Gets Eight-Year Sentence After Guilty Plea in Abuse Scandal*, L.A. TIMES, Oct. 22, 2004, at A4. A copy of the charge sheet is available at http://news.findlaw.com/hdocs/docs/iraq/ifred32004chrg.html (last visited Sept. 28, 2005).
[498] *Id.*
[499] *Id.*
[500] The charge sheet is available at http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html (last visited Sept. 28, 2005).

Class England to drag a detainee by a leash and photographing the incident.

- Article 128 (four specifications): assault consummated by a battery for 1) jumping on a pile of detainees and 2) stomping on detainee's hands and feet; aggravated assault for 3) punching a detainee with enough force to knock him unconscious and 4) hitting a detainee on existing injuries with an expandable metal baton. The first two specifications of simple battery were dropped.[501]
- Article 134 (three specifications): 1) adultery; 2) indecent acts for watching detainees attempt to masturbate; and 3) obstruction of justice for influencing a witness. The adultery and obstruction specifications were dropped before the case went to the panel during the findings phase.

On January 14, 2005, the court-martial panel found Specialist Graner guilty of most of the remaining specifications[502] and sentenced him to ten years confinement, reduction to E-1, and a dishonorable discharge.[503]

Specialist Sabrina D. Harman, who was accused of taking the infamous picture of the human pyramid at Abu Ghraib prison,[504] was also charged with conspiracy to commit offenses against detainees, dereliction of duty for failure to protect detainees from abuse, cruelty and maltreatment of detainees, and indecent acts with Iraqi detainees.[505] Following her court-martial and conviction on most of the charges, Specialist Harman faced a maximum confinement of 5 years; the military panel sentenced her to six months of confinement, reduction to the rank of private, and a bad-conduct discharge.[506]

Specialist Roman Krol admitted in February 2005 that he ignored his specialized training and abused a naked Abu Ghraib prisoner by pouring water on him; he also acknowledged ignoring the October 2003 abuses that later turned up in photographs.[507] After accepting Specialist Krol's guilty plea, the

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[501] Sig Christenson, *Fort Hood Jury Set to Hear Abu Ghraib Case*, SAN ANTONIO EXPRESS-NEWS, Jan. 8, 2005, at 6A.
[502] Baxter, *supra* note 485. SPC Graner was apparently acquitted of the conspiracy charges. *See id.*
[503] T.A. Badger, *Soldier Gets Ten Years for Iraq Prison Abuse*, DETROIT NEWS, Jan. 16, 2005, at 1A.
[504] Goldenberg, *supra* note 464.
[505] *Status of the Charges*, *supra* note 491.
[506] John W. Gonzalez, *Reservist Receives 129-Day Sentence in Iraq Abuse Case: She Also Gets a Bad-Conduct Discharge and Has Her Rank Reduced*, HOUSTON CHRON., Mar. 18, 2005, at A11.
[507] John W. Gonzalez, *Two Soldiers Plead Guilty to Abuses at Abu Ghraib*: *One Receives Ten Months in Jail and Is Discharged, the Other will Seek a Light Sentence*, HOUSTON CHRON., Feb. 2, 2005, at A13.

military judge sentenced him to ten months of confinement and a bad-conduct discharge.[508]

Specialist Jeremy C. Sivits pleaded guilty in May 2004 to charges that he took pictures of detainees at Abu Ghraib prison in Iraq, including the infamous pictures of a pile of naked and hooded detainees, and failed to stop prisoners from being punched and stomped by fellow soldiers.[509] The plea was part of a pretrial agreement in which Specialist Sivits pleaded guilty to abusing detainees and agreed to testify against fellow soldiers in exchange for referral of his case to a special court-martial.[510] He was sentenced to one year in prison (the maximum amount of confinement allowed in a special court-martial), reduction to E-1, and a bad-conduct discharge.[511]

U.S. Marines were prosecuted for incidents of detainee abuse dating back to the summer of 2003. Three Marines received sentences ranging from thirty days of hard labor without confinement to 14 days of confinement for offenses that included spraying suspected looters with a fire extinguisher and ordering Iraqi juveniles to kneel and then discharging a pistol in the air as a "mock execution."[512] Another Marine was convicted of assault for throwing a lighted match at a detainee as the detainee used an alcohol-based hand sanitizer; the Iraqi suffered second-degree burns on his hands and the Marine was sentenced to confinement for 90 days.[513]

Private First Class Andrew J. Sting was among a group of four Marines who, in April 2004, shocked an Iraqi prisoner with wires from a 110-volt electric transformer.[514] After pleading guilty in May 2004 to charges of assault, cruelty and maltreatment, dereliction of duty, and conspiracy to commit assault, Private First Class Sting was sentenced to one year in confinement, reduction to E-1, and a bad-conduct discharge.[515] In connection with this same incident, Sergeant Matthew K. Travis pleaded guilty to dereliction of duty and cruelty and maltreatment of prisoners.[516] He was sentenced in September 2004 to fifteen months of confinement, reduction to E-1, and a bad-conduct discharge.[517] Private First Class Jeremiah J. Trefney was also involved in the incident and pled guilty to charges of cruelty and maltreatment, dereliction of

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[508] *Id.*
[509] Helen Kennedy, *G.I. Sentenced to Year in Jail Abuse Scandal*, N.Y. DAILY NEWS, May 20, 2004, at 10.
[510] Garald D. Skoning, *Torture Cases Test Military Justice*, CHI. TRIB., May 23, 2004, at 9; Kennedy, *supra* note 509.
[511] Onishi, *supra* note 486.
[512] Gail Gibson, *Marines Abused Detainees in Iraq, Documents Show: Penalties Mostly Lighter than in Abu Ghraib Case*, BALT. SUN, Dec. 15, 2004, at 1A.
[513] *Id.*
[514] Sewell Chan, *Marine Sergeant to Face Court-Martial in Abuse: Four Charged in Case of Iraqi Prisoner Receiving Electric Shocks at Makeshift Detention Facility*, WASH. POST, June 12, 2004, at A18.
[515] *Id.;* Sewell Chan, *Two Marines Guilty of Abusing Prisoner*, WASH. POST, June 4, 2004, at A18.
[516] Tony Perry, *Marine Sentenced For Beating Iraqi Captives*, L.A. TIMES, Sept. 4, 2004, at B8.
[517] *Id.*

duty, making a false official statement, violating a lawful order, and conspiracy to commit assault.[518] Private First Class Trefney was sentenced to eight months in confinement, reduction to E-1, and a bad-conduct discharge.[519]

By the fall of 2004, seven Navy SEALs were investigated for abusing Iraqi prisoners.[520] One SEAL was tried in October 2004 and acquitted of abuse charges, and the charges for two other SEALs were set for pre-trial hearings.[521] One of the two SEALs, a medical corpsman, was accused of dereliction of duty and assault, to include pointing a loaded firearm at a prisoner.[522] In exchange for the corpsman's admission of wrongdoing and testimony against another SEAL, the charges against him were disposed of in a lesser forum.[523] Charges against the other Navy SEAL, a boatswain's mate first, were referred to a court-martial in November 2004 on charges of dereliction of duty, maltreatment, making a false official statement, and assault for the beating of an Iraqi (Al-Jamadi) who later died at Abu Ghraib prison.[524] Mr. Al-Jamadi reportedly was subjected to a "Palestinian hanging" in which his hands were cuffed behind him and he was suspended from his wrists.[525] The boatswain's mate is accused of beating several prisoners and encouraging another SEAL to strike a detainee.[526] By January 11, 2005, a Navy SEAL, Lieutenant Andrew Ledford**,** had been charged with assault, maltreatment, and conduct unbecoming an officer for his treatment of detainees;[527] he was later acquitted.[528] One October 2004 report indicated that some of the remaining three members may face charges of

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[518] Chan, *supra* note 514.
[519] *Id.;* Chan, *supra* note 515.
[520] Tony Perry, *A Navy SEAL Is Cleared of Abuse Charges*, L.A. TIMES, Oct. 28, 2004, at A3.
[521] *Id.*
[522] *Id.* The SEAL admitted that he posed for a picture while holding the loaded gun to a hooded prisoner's head. Alex Roth, *SEAL Takes Stand in Abuse Hearing: Corpsman Testifies Prisoner Was Beaten*, SAN DIEGO UNION-TRIB., Oct. 30, 2004, at B1.
[523] The corpsman received a one-grade rank reduction, forfeiture of one-half of his pay for two months, 45 days of restriction to his base, and 45 days of extra duty. Roth, *supra* note 522. Based on the punishment imposed, the corpsman received nonjudicial punishment. Unlike courts-martial, results of nonjudicial punishment are not usually released. The Navy has not released the names of the SEALs.
[524] Rick Rogers, *Navy Seal to Face Trial in Iraqi's Death*, SAN DIEGO UNION-TRIB., Nov. 18, 2004, at B3. The investigating officer had recommended that the boatswain's mate first receive nonjudicial punishment. *Id.*
[525] R. Jeffrey Smith, *Army Files Cite Abuse of Afghans: Special Forces Unit Prompted Senior Officers' Complaints*, WASH. POST, Feb. 18, 2005, at A16. An Army sergeant and prison guard told investigators that Mr. Al-Jamadi's arms were so badly stretched that he was surprised the man's arms "didn't pop out of their sockets." *Id.* The sergeant also reported that, as Al-Jamadi was lowered from the hanging position, blood ran from his mouth "as if a faucet had been turned on." Conor O'Clery, *New Prisoner Abuse Claims*, IRISH TIMES, Feb. 19, 2005, at 11. Compare these allegations with the finding of torture as recognized in common Article 3 of the Geneva Conventions in *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 10, 1998).
[526] Roth, *supra* note 522.
[527] Ned Parker, *Iraqi P.M. Defiant Amid New Bloodshed*, ADVERTISER (Queensland), Jan. 12, 2005, at 31.
[528] *Seal Acquitted in Beating of Iraqi Prisoner Who Died*, WASH. POST, May 27, 2005, at A13.

aggravated assault with intent to cause death,[529] but another media report indicated that, as of mid-February 2005, eight Navy personnel received nonjudicial punishment while two yet await further action.[530]

Lieutenant Andrew K. Ledford, a Navy SEAL, faced charges of assault, maltreatment of an Iraqi detainee,[531] and lying to investigators.[532] The lieutenant was accused of punching the detainee, who was delivered to CIA interrogators at Abu Ghraib prison in Iraq and who was later found dead, in the arm and posing for a photograph with him.[533] After a litigated trial, he was acquitted of all charges.[534] Lieutenant Ledford was one of at least ten members of the platoon who were investigated for unlawful treatment of detainees.[535]

Major Jessica Voss, who headed the 66th Military Intelligence Unit, received a reprimand following the November 2003 death of an Iraqi general at the hands of U.S. soldiers under her supervision.[536] Chief Warrant Officer Lewis Welshofer Jr. was charged with murder and dereliction of duty relating to the suffocation of the Iraqi general.[537] He was accused of sitting on the general's chest while the man was bound and covered in a sleeping bag.[538] Chief Warrant Officer Welshofer was convicted on the lesser charge of negligent homicide and was sentenced to a reprimand, forfeiture of $6,000 in pay and restriction to Fort Carson or his place of worship for two months.[539]

Lieutenant Colonel Steve L. Jordan, former director of the Joint Interrogation and Debriefing Center at Abu Ghraib, was reprimanded and relieved of his command for problems at Abu Ghraib prison.[540] Brigadier General Janis Karpinski, commander of the 800th Military Police Brigade, was reprimanded and relieved of her command for problems at Abu Ghraib.[541] In May 2005, Brigadier General Karpinski was administratively demoted to the rank of colonel, however, the demotion action was only partly based on dereliction of duty and it is unclear whether the allegation related directly to the

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[529] Perry, *supra* note 520.
[530] Smith, *supra* note 525. A May 2005 newspaper report indicates that nine members of the platoon have received nonjudicial punishment. *See* T.R. Reid, *Trial Starts in Abu Ghraib Death: Navy SEAL Faces Charges, CIA Agents Not Named in Case*, WASH. POST, May 25, 2005, at A2.
[531] Ned Parker, *Iraqi P.M. Defiant Amid New Bloodshed*, ADVERTISER (Queensland), Jan. 12, 2005, at 31.
[532] Reid, *supra* note 530.
[533] *Id.*
[534] *Seal Acquitted in Beating of Iraqi Prisoner Who Died, supra* note 528.
[535] Reid, *supra* note 530. According to the report, nine platoon members received nonjudicial punishment for their involvement.
[536] Arthur Kane, *Witness Says Brass Complicit in Abuse*, DENV. POST, Mar. 31, 2005, at A1.
[537] *January 30 Election Won't Be Delayed, Bush Says*, ST. PETERSBURG TIMES, Dec. 3, 2004, at 2A.
[538] Erin Emery & Dave Curtin, *Iraqi's Kin Calls GI's Penalty Too Light*, L.A. TIMES, Jan. 25, 2006, at A1
[539] *Id*.
[540] John W. Gonzalez, *Prosecutions Wind Down at Fort Hood: No One Ranked Higher than Staff Sergeant Faces Charges in the Abu Ghraib Case*, HOUSTON CHRON., Apr. 4, 2005, at B1.
[541] *Id.*

Abu Ghraib scandal.[542] Colonel Thomas Pappas, commander of the 205th Military Intelligence Brigade, was administratively reprimanded for problems related to the prisoner abuse scandal.[543] In May 2005 the Army disclosed that Colonel Pappas waived his right to trial by court-martial and accepted nonjudicial punishment on two counts of dereliction of duty for failing to adequately inform, train, and supervise subordinates on the application of proper interrogation techniques and for failing to obtain prior approval before allowing military working dogs to be present during detainee interrogations.[544] His punishment consisted of forfeitures of a half of his pay for two months and an official reprimand.[545] Unlike the other officers, Colonel Pappas was not initially relieved of his command.[546] Lieutenant Colonel Jerry L. Phillabaum, 320th Military Police Battalion commander, was reprimanded and relieved of his command for problems at Abu Ghraib.[547] Captain Donald J. Reese, the commander of the 372th Military Police Company that was tasked to guard prisoners at Abu Ghraib in Iraq, was relieved of his command and reprimanded for failing to supervise his soldiers and for failing to enforce the Geneva Conventions.[548]

First Lieutenant Glenn A. Niles Jr. pled guilty to conduct unbecoming an officer after striking three Iraqi prisoners on July 30, 2003, following their failed escape attempt.[549] Under a plea agreement, three counts of mistreatment of prisoners were dropped; on July 1, 2004, First Lieutenant Niles was fined more than $12,000 and reprimanded.[550]

Lance Corporal Christian Hernandez faced charges of negligent homicide and assault after a 52-year-old Ba'ath Party official died in June 2003 at Camp Whitehorse near Nasiriyah, Iraq.[551] Charges were dropped without comment in April 2004.[552] Major Clarke Paulus was also charged in the case. He was originally charged with negligent homicide of the official, who had been handcuffed, beaten, and left for hours in the sun despite experiencing difficulty in breathing and diarrhea.[553] One of eight Marines facing charges in

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[542] Josh White, *General Demoted, But Cleared in Abuse Probe*, WASH. POST, May 6, 2005, at A8.
[543] *See* Gonzalez, *supra* note 540.
[544] Jeffrey Smith, *Abu Ghraib Officer Gets Reprimand: Non-Court-Martial Punishment for Dereliction of Duty Includes Fine*, WASH. POST, May 12, 2005, at A16.
[545] *Id.*
[546] Gonzalez, *supra* note 540.
[547] *Id.*
[548] *Id.*
[549] Steve Liewer, *MP Reprimanded in Iraqi Prison Abuse Trial*, STARS & STRIPES, July 3, 2004, *available at* http://www.estripes.com (last visited Sept. 28, 2005).
[550] *Id.*
[551] Rick Rogers, *Abuse Charges Against Marine Reservist Are Dismissed: He Was Accused in Death of Iraqi at Detention Center*, SAN DIEGO UNION-TRIB., Apr. 13, 2004, at B1.
[552] *Id.*
[553] Baxter, *supra* note 485.

the detainee's death,[554] Major Paulus was acquitted of assault and battery but found guilty of dereliction of duty and of maltreatment of prisoners for not stopping the abuse by his subordinates.[555] He was punished with dismissal from the Marine Corps,[556] which is the officer's equivalent of a dishonorable discharge.

Sergeant Gary Pittman**,** a Marine reservist who worked as a prison guard in New York, was also accused of kicking, kneeing, and beating prisoners in Iraq in 2003, including the 52-year-old Iraqi man.[557] Facing charges of assault and dereliction of duty, Sergeant Pittman faced a maximum confinement of two years.[558] Sergeant Pittman was convicted in early September 2004 of a majority of the charges and was sentenced to 60 days of hard labor and a reduction to E-1.[559] Private First Class William Roy avoided prosecution for his involvement in the death of the prisoner in exchange for his testimony against Sergeant Gary Pittman.[560] At Sergeant Pittman's trial, Private First Class Roy admitted to kicking the prisoner in the foot and shins and described how Sergeant Pittman kicked and hit the man in the chest.[561]

Major William Vickers, a Marine Corps reservist, was charged with one specification of willful dereliction of duty for failing to prevent his men from mistreating Iraqi prisoners at the Nasiriyah detention facility.[562] The charge stemmed from reports of forcing detainees to stand in the heat for 50 minutes out of every hour, handcuffing detainees awaiting interrogations, and allowing bags to be placed over their heads.[563] Although he was no longer the commander of the facility in June 2003 when the Ba'ath official died, Major Vickers was alleged to have trained or failed to properly supervise the guards who took part in the later abuse; his defense counsel had stated that Major

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[554] Gibson, *supra* note 512. The charges against six other Marines, including Major Michael Froeder, were dismissed. Rick Rogers, *Main Charge Is Reduced in Court-Martial: Assault and Battery Count Could Net Officer 21 Months*, SAN DIEGO UNION-TRIB., Nov. 6, 2004, at B2.

[555] *Camp Pendleton: Major Convicted in Iraqi Prisoner Abuse*, L.A. TIMES, Nov. 11, 2004, at B10. For a summary of Major Paulus's testimony at trial, see David Hasemyer, *Officer Says Harm to Iraqi Prisoner Was Unintentional: Marine Ordered the Man Dragged from Cell by Neck*, SAN DIEGO UNION-TRIB., Nov. 9, 2004, at B1.

[556] *Camp Pendleton: Major Convicted in Iraqi Prisoner Abuse*, *supra* note 555.

[557] Jeff McDonald, *Beatings Used to Show Who Was in Charge, Witness Says: Marine's Court-Martial in Iraqi's Death Goes On*, SAN DIEGO UNION-TRIB., Aug. 31, 2004, at B1.

[558] *Id.* Sergeant Pittman was acquitted of the assault against the Iraqi man who was later found dead; with the acquittal on that count, the possible maximum confinement fell to six months. Perry, *supra* note 516.

[559] Tony Perry, *The State: Officer's Trial in Abuse of Iraqi Inmate Is Delayed*, L.A. TIMES, Sept. 17, 2004, at B8.

[560] Michelle Caruso & Corky Siemaszko, *I Also Kicked Prisoner—G.I.*, N.Y. DAILY NEWS, Aug. 26, 2004, at 38.

[561] *Id.*

[562] Rick Rogers, *Case Opens in Treatment of Iraqis: Marine Major First to Face Charges Over Prisoners*, SAN DIEGO UNION-TRIB., Dec. 18, 2003, at B1.

[563] *Id.*

Vickers received no training on how to run a detention facility.[564] His charges were dismissed in April 2004.[565]

Lieutenant Colonel Allen B. West, the most senior American officer to be charged with direct prisoner abuse,[566] faced potential charges of excessive use of force against an Iraqi in August 2003.[567] Lieutenant Colonel West dragged an uncooperative detainee, who was an Iraqi policeman suspected of planning attacks against U.S. forces, outside to an area used for clearing weapons, gave the man a count to five to start cooperating, then fired two shots near the detainee's head.[568] He also allowed soldiers from his unit to beat the detainee.[569] Lieutenant Colonel West was relieved of his command and, after a pretrial hearing under Article 32 of the UCMJ, the commanding general disposed of the charges through nonjudicial punishment instead of referring them to trial by court-martial.[570]

Sergeant First Class Jorge L. Diaz was arraigned in February 2005 on charges of premeditated murder, maltreatment of a prisoner, assault, making a false official statement, and impeding an investigation.[571] During a search operation in October 2004, Sergeant First Class Diaz punched and choked a blindfolded Iraqi teenaged detainee, pointed a pistol at his head, and forced him to hold a smoke grenade with the pin pulled.[572] The next day, Sergeant First Class Diaz fatally shot an Iraqi who had his hands cuffed.[573] He allegedly told a soldier to lie about the incident and falsely told an Army investigator that he fired at the Iraqi after the man had made a threatening move toward him.[574] At trial, after hearing testimony from Sergeant First Class Diaz, the military judge found him guilty of unpremeditated murder.[575] He was also convicted of maltreating the Iraqi teen and impeding the investigation, but acquitted of the

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[564] Daniel Evans, *Defender: Marine Did Best Job He Could in Iraq: Closing Arguments Heard in POW Case*, SAN DIEGO UNION-TRIB., Dec. 20, 2003, at B10.
[565] Rogers, *supra* note 551.
[566] Richard Beeston, *U.S. Officer Admits Role in Mock Execution*, TIMES (London), Nov. 20, 2003, at 22.
[567] *Report: West Will Not Face Court-Martial,* STARS & STRIPES, Dec. 14, 2003, *available at* http://www.estripes.com (last visited Sept. 28, 2005); Beeston, *supra* note 566.
[568] *Report: West Will Not Face Court-Martial, supra* note 567; Beeston, *supra* note 566.
[569] Beeston, *supra* note 566.
[570] *Report: West Will Not Face Court-Martial, supra* note 567. According to documents obtained by the American Civil Liberties Union, four enlisted soldiers received nonjudicial punishment for their role in the interrogation, three of whom were punished with a rank reduction and forfeitures of pay. U.S. Army Crim. Invest. Cmd., Report of Investigation – Final 3 (Feb. 6, 2004) (unpublished report no. 0512-03-CID469-60212-5C1A/5C2/5T1), *available at* http://www.aclu.org/torturefoia/released/105_167.pdf (last visited Sept. 28, 2005).
[571] Steve Liewer, *1st ID Soldier Charged with Killing One Iraqi Prisoner, Mistreating Others*, STARS & STRIPES, Feb. 26, 2005, *available at* www.estripes.com (last visited Sept. 28, 2005).
[572] *Id.*
[573] *Id.*
[574] *Id.*
[575] Steve Liewer, *1st ID Soldier Found Guilty in Shooting Death of Iraqi During Interrogation*, STARS & STRIPES, May 19, 2005, *available at* www.estripes.com (last visited Sept. 28, 2005).

charge of making a false statement.[576] The military judge imposed a sentence that included a dishonorable discharge, reduction to the rank of E-1, and eight years of confinement, which was reduced to seven years through a plea agreement.[577]

Sergeant David Fimon, an Army National Guardsman, pled guilty at a court-martial in Baghdad in September 2005 to multiple charges related to abuse of Iraqi detainees.[578] He was sentenced to one year of confinement, reduction to E-1, and a bad-conduct discharge.[579]

B. Afghanistan

Sergeant James P. Boland was charged in August 2004 with assault, maltreatment of a detainee, and dereliction of duty for alleged conduct in connection with treatment of a detainee on December 10, 2002, at Bagram, Afghanistan.[580] He was charged with a second specification of dereliction of duty in the death on December 3, 2002 of another detainee.[581]

Private First Class Willie Brand was also charged with offenses related to the December 10, 2002 death of the detainee at Bagram, Afghanistan.[582] PFC Brand was charged with involuntary manslaughter, aggravated assault, simple assault, maiming, maltreatment, and making a false sworn statement.[583] Following his conviction on the charges, the reservist was reduced to the lowest enlisted rank.[584]

Specialist Brian E. Cammack was charged with assault and other crimes related to the abuse and death of two detainees at Bagram, Afghanistan.[585] On May 20, 2005, SPC Cammack pleaded guilty to assault and two specifications of making a false official statement and agreed to testify in related cases in exchange for a dismissal of the charge of maltreating

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[576] *Id.*
[577] *Id.*
[578] *Guardsman Sentenced in Iraq Abuse Case*, CHI. TRIB., Sept. 11, 2005, at 24.
[579] *Id.*
[580] *Nation in Brief*, WASH. POST, Mar. 8, 2005, at A16.
[581] *Id.*
[582] Douglas Jehl, *Army Details Scale of Abuse in Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, at A1; *Nation in Brief, supra* note 580.
[583] *Nation in Brief, supra* note 580Compare these and other allegations of U.S. soldiers beating detainees with the finding of guilt for the crime of administering cruel treatment for administering several beatings to detainees in *Prosecutor v. Jelesic.*, Case No. IT-95-10, Judgment (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999).
[584] *U.S. Digest: News from Services*, ST. LOUIS POST-DISPATCH, Aug. 19, 2005, at A9.
[585] Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1. Specialist Cammack was likely charged in connection with the death of one of the Afghan detainees at Bagram. *See id.*

detainees.[586] He was sentenced to three months of confinement, reduction to E-1, and a bad-conduct discharge.[587]

Sergeant Anthony M. Morden was charged with assault and other crimes related to detainee abuse at Bagram, Afghanistan.[588] He was sentenced to 75 days of confinement, reduction to E-1, and a bad-conduct discharge.[589]

Captain Carolyn Wood**,** one of 28 soldiers investigated in connection with detainee deaths at Bagram Air Base, Afghanistan, may yet face disciplinary action.[590] An initial investigation found that Captain Wood, who oversaw interrogators at detention facilities in Abu Ghraib and Bagram, failed to implement appropriate safeguards to prevent detainee abuse and failed properly review interrogation plans that allowed for the improper use of isolation and nudity.[591] Army investigators have recommended that Captain Wood be charged with conspiracy, maltreatment of detainees, and making a false official statement related to death of detainees at the facility she supervised.[592]

Specialist Joshua R. Claus has been charged with assault, maltreatment of a detainee, and making a false statement to investigators for his participation in interrogations that led to the death of an Afghan detainee at Bagram in December 2002.[593]

Specialist Damien M. Corsetti remains under investigation for assault, maltreatment of detainees, and indecent acts related to abusive interrogation techniques used toward detainees at Bagram, Afghanistan.[594] While serving at Abu Ghraib, SPC Corsetti allegedly forced an Iraqi woman to strip during questioning; he was fined and demoted.[595]

Sergeant Selena M. Salcedo was tried on charges of assaulting an Afghan detainee, dereliction of duty, and lying to investigators.[596] A former interrogator at Bagram, Afghanistan, Sergeant Salcedo is suspected of stepping

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[586] *The Nation in Brief: Soldier Gets Jail Time in Prisoner's Death*, L.A. TIMES, May 23, 2005, at A11.
[587] *Id.*
[588] Golden, *supra* note 585. Specialist Morden is also likely charged with connection with the death of one of the Afghan detainees at Bagram. *See id.*
[589] Harold J. Adams, *Guardsman from Clark Is Cleared of Abusing Afghan Detainee: Detainee Died at Bagram Air Base*, COURIER-J. (Louisville, KY), Sept. 9, 2005, at A1.
[590] Jehl, *supra* note 582; *see* Golden, *supra* note 585.
[591] Jehl, *supra* note 582.
[592] Elise Ackerman, *Soldier: Superiors OK'd Tactics: Charged in the Death of 2 Afghan Detainees, He Says 'Compliance Blows' Are Used Often*, HOUSTON CHRON., Mar. 26, 2005, at A19.
[593] Golden, *supra* note 585.
[594] *Id.* [595] *Id.*
[596] Golden, *supra* note 585.

on the detainee's bare foot, grabbing his beard, kicking him, and then ordering the detainee to remain chained to the ceiling.[597] The detainee later died of heart failure caused by "blunt force injuries" to his lower legs.[598] At trial Sergeant Salcedo pled guilty and received a sentence of a one-grade reduction in rank, $1000 fine, and a written reprimand.[599]

Specialist Glendale C. Walls II was charged in early May 2005 with assault, maltreatment of a detainee, and failure to obey a lawful order.[600] The charges stemmed from allegations of using abusive interrogation techniques at Bagram, Afghanistan.[601] One of the detainees interrogated by Specialist Walls in December 2002 died a short time later at the detention facility.[602] At trial in August 2005, Specialist Walls admitted to abusing the detainee and was sentenced to a reduction to E-1, two months of confinement, and a bad-conduct discharge.[603]

C. Guantanamo Bay

At Guantanamo Bay an unnamed Army specialist was charged with assaulting a detainee by attempting to spray the man with a hose.[604] His punishment, apparently nonjudicial, consisted of a rank reduction to E-2, seven days of restriction to specified limits, and a reassignment to other duties on the base.[605] In an April 2003 nonjudicial punishment action, another Army specialist was charged with dereliction of duty and assault for striking a subdued detainee with a radio; the detainee, prior to being subdued, had assaulted and bit a guard. The specialist was reduced to the rank of private first class, given 45 days of extra duty, and reassigned to part of the base.[606] In a third case, an Army staff sergeant turned down an offer of nonjudicial punishment and demanded trial by court-martial for an allegation of using pepper stray on a detainee during a disturbance; the soldier was acquitted.[607]

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[597] *Id.*
[598] *Id.*
[599] Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1.
[600] Golden, *supra* note 585.
[601] *Id.*
[602] *Id.*
[603] *GI Busted, Jailed in Prisoner Abuse*, PHILADELPHIA DAILY NEWS, Aug. 24, 2005, at 10.
[604] *Two Guantanamo Guards Disciplined*, CNN, May 7, 2004, *available at* http://www.cnn.com/2004/US/South/05/07/guantanamo.force/index.html (last visited Jan. 28, 2006).
[605] *Id.*
[606] *Id.*
[607] *Id.*

THE UNITED STATES AGENCY-LEVEL BID PROTEST MECHANISM: A MODEL FOR BID CHALLENGE PROCEDURES IN DEVELOPING NATIONS

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I. INTRODUCTION

The benefits to a developing nation of structuring its procurement policies, rules, and institutions in a manner that ensures public funds are used efficiently are well understood.[1] When a government is consistently able to acquire the right item, at the right time, and at the right price, it can make more effective use of limited taxpayer funds–both to buy needed goods and services and to direct social and economic development. Nonetheless, outside of the successes of a few nations that are more aptly categorized as transitional rather than developing, the progress of procurement reform efforts in emerging and developing nations has been slow.[2]

Among the least successful initiatives in procurement reform has been the effort to establish mechanisms by which disappointed offerors[3] can challenge the actions of public procurement officials that do not comply with established procurement rules.[4] Despite robust public procurement development efforts, few developing nations have produced effective bid protest systems.[5] Such public procurement development includes: efforts by the World Bank, the World Trade Organization, and other international organizations; incentives to gain membership in the Agreement on Government

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[1] *See generally* Simon J. Evenett & Bernard M. Hoekman, *International Cooperation and the Reform of Public Procurement Policies*, Centre for Economic Policy Research, Discussion Paper No. 4663 (2004); Simon J. Evenett, *Can Developing Countries Benefit from Negotiations on Transparency in Government Procurement in the Doha Round?*, United Nations Millennium Project (2003), *at* http://www.ycsg.yale.edu/documents/papers/Evenett.doc (last visited Jan. 5, 2006).

[2] *See* Robert R. Hunja, *Obstacles to Public Procurement Reform in Developing Countries*, *in* PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 13, 16 (Sue Arrowsmith & Martin Trybus eds., 2003). This article was also presented at the WTO-World Bank Regional Workshop on Procurement Reforms and Transparency in Public Procurement for Anglophone African Countries, held in Dar Es Salaam, Tanzania on Jan. 14-17, 2003, *available at* http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/hunja2a2_e.doc (last visited Jan. 5, 2006).

[3] In the words of Professor Steven L. Schooner: "The term 'disappointed offeror' is somewhat of a misnomer. Some protests, such as an allegation that the government's solicitation is ambiguous or defective, are sufficiently proactive that the potential offeror has not yet become disappointed at the time the matter is commenced." Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 639 n.36 (2001). Nonetheless, the term will be used throughout this article to identify the putative plaintiff in bid protest actions.

[4] Interview with Jean-Jacques Verdeaux, Senior Procurement Specialist, the World Bank, in Washington, D.C. (Apr. 27, 2005) [hereinafter Verdeaux Interview]. For example, according to Mr. Verdeaux, there are only two or three effective bid protest systems in Africa. *Id.*

[5] *See generally* Hunja, *supra* note 2. For the sake of clarity, the term "bid protest system" will be used throughout this article to describe any national system established for the purpose of providing review procedures and/or legal remedies as an enforcement mechanism for those affected by a violation of established procurement rules. This will be done even in the context of discussing national and international systems which use different terms (such as "challenge procedures" or "review procedures") to describe their systems.

Procurement and other regional trade agreements that address government procurement;[6] and assistance offered by the United Nations Committee on International Trade Law (UNCITRAL)[7] in the form of its Model Law on public procurement.

The reasons for the lack of success in this field are diverse. In some cases, national leaders, although reform-minded, do not have the political capital or will to take on the economic and bureaucratic powers that benefit from a public procurement status quo characterized by favoritism and/or corruption.[8] Thus, they do not pursue efforts to establish bid protest systems that are sufficiently strong and independent to consistently reveal and disrupt existing corrupt practices. In other cases, there is simply a dearth of people with the type of public procurement experience necessary to take on the task of establishing and running a centralized bid protest system.[9] Or, in nations that are able to establish seemingly stable bid protest systems, there may be difficulties finding the balance of efficiency and fairness (grounded in independence and due process) necessary to encourage bidders to invest the time and money required to challenge government decision makers.

Despite the project's inherent difficulties, however, the quest to establish successful bid protest systems has proceeded apace. Why? Because, as Sue Arrowsmith notes, in order to have an effective procurement system "it is not sufficient that appropriate rules are in place: steps must be taken to ensure that they are applied."[10] Bid protest systems fill this important enforcement role. In the process, they also provide systemic transparency by giving disappointed offerors, independent third parties, and attorneys an opportunity to examine procuring agency records and decisions. From this enforcement and transparency come the fruit of increased contractor participation in the procurement marketplace, more competition, and, ultimately, better products and services for the government buyer.

At a conceptual level, the fundamental considerations for designing effective bid protest systems are fairly well understood. Such systems are characterized by their speed and efficiency, the meaningfulness and independence of their review processes, and their ability to provide meaningful relief in appropriate cases.[11] When it comes to the task of actually devising and implementing systems that incorporate these elements, however, the path to success is less clear–as evidenced by the wide variation in the form, structure

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[6] These agreements generally require member states to establish effective bid protest systems.

[7] UNCITRAL's mandate is to harmonize and unify the law of international trade. In pursuing its mandate, UNCITRAL has created various model laws and legal guides. *See* http://www.uncitral.org/uncitral/en/about/origin.html (last visited Jan. 5, 2006).

[8] *See id.* at 17-18.

[9] *See generally id.* at 18.

[10] SUE ARROWSMITH ET AL., THE REGULATION OF PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 749 (2000).

[11] *See generally id.* at 761-803.

and success of the bid protest systems employed by the world's developed nations. Simply put, a developing nation faces a plethora of difficult choices at the design and implementation stage: How will it ensure overall efficiency and, in particular, speedy remedies? Who will have standing to file protests? What process will be afforded disappointed offerors? Which remedies will be available? How will these remedies be enforced?

The most important of these choices, however, may well be that relating to forum structure–that is, who (procuring agency personnel, administrative board members, judges) will actually hear and decide bid protests? This structural element is significant for several reasons. First, the manner in which the review process is structured has great bearing on its overall speed and efficiency. For example, courts and administrative boards simply do not produce results as quickly as more informal, agency-level review bodies. Agency-level reviewers have direct access to the relevant data and decision makers, and they are usually empowered to take immediate action to correct improper agency actions. Moreover, unlike courts and boards, the agencies themselves have an economic incentive to resolve protests quickly and at the least possible cost. Second, the various forum options offer differing degrees of independence (i.e., immunity from external influence)–or at least perceived independence. Third, the nature of a protest forum or, more accurately, the makeup of its membership, can determine the extent to which its reviews are truly meaningful. For example, because courts and administrative boards often have diverse dockets, their members may be less likely to have the same public procurement expertise as procuring agency personnel who handle procurement matters on a daily basis.

The decisive question for a developing nation, which this article examines, is which of the available structural options best integrates the essential elements of an effective bid protest system *in the context of* existing legal, political, cultural, and economic circumstances "on the ground"? The answer almost invariably given by the international organizations working on procurement reform is that nations should focus their efforts on developing review bodies that are external to the procuring agencies themselves–because such bodies are more likely to be independent. However, while the "independence is paramount" perspective is intuitively inviting, it may not be practically expedient for a developing nation. For while independence is a key component of any effective review system, it does not necessarily follow that the relative benefit of increased independence offered by courts and boards outweighs the benefits of speed, efficiency, expertise, and non-adversarialism offered by agency-level review mechanisms.

The discussion below proceeds in six parts. Part II considers the purposes and fundamental requirements of an effective bid protest system. Part III examines the challenges that developing nations face in attempting to establish protest mechanisms. Parts IV and V discuss the bid protest systems enforced by various international public procurement agreements as well as those promoted by the World Bank and UNCITRAL. Part VI provides

background on the agency-level bid protest procedures employed in the United States under the Federal Acquisition Regulation (FAR), Part 31.103.[12] Part VII considers whether an agency-level review mechanism modeled after the U.S. system can suitably serve as a developing nation's primary forum for resolving bid protests and, at the same time, meet the demands of membership in the various international public procurement agreements. The article concludes that although the U.S. agency-level system is flawed in some respects, it offers a superb solution for developing nations.

II. THE PURPOSES AND ESSENTIAL ELEMENTS OF AN EFFECTIVE BID PROTEST SYSTEM

In order to appreciate the challenges developing nations face in their efforts to establish effective bid protest systems, it is helpful to consider first why bid protest systems exist and what essential elements are required to make them work.

A. Purpose of Bid Protest Systems

Fundamentally, bid protest systems, like audit systems, serve a procurement oversight function.[13] They provide a means of monitoring the activities of government procurement officials, enforcing their compliance with procurement laws and regulations, and correcting incidents of improper government action. A bid protest mechanism typically accomplishes the oversight function by means of third-party monitoring.[14] Actual and prospective bidders are "deputized as private attorneys general"[15] and given broad authority to challenge the actions of procurement officials before specially-designated agency officials or administrative or judicial bodies empowered to remedy violations of the procurement rules.[16] Because protestors are motivated by direct economic interests in specific procurement actions, they generally provide more vigorous oversight than do auditors.[17]

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[12] Federal Acquisition Regulation, 48 C.F.R. § 33.103 (2006) [hereinafter FAR].
[13] *See* Robert C. Marshall et al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 HOFSTRA L. REV. 1 (1991); Schooner, *supra* note 3, at 682.
[14] William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 486 (1995).
[15] Schooner, *supra* note 3, at 680.
[16] "The notion that private parties should be encouraged to litigate to advance public goals that coincide with their private interests has long been recognized in such areas as antitrust, securities law, and derivative actions." Marshall et al., *supra* note 13, at 4.
[17] *Id.* at 29-30.

> Despite uncovering occasional sensational procurement blunders in the realm of federal procurements, audits, as currently implemented, do not systematically constrain the discretion of [procurement officials]. A major factor is the limited

Practically speaking, bid protest systems provide oversight by way of both deterrence and correction.[18] The deterrent effect plays out when procurement officials are discouraged from circumventing the procurement rules by the threat of bid protests that could uncover their improper or illegal actions and impose potentially substantial sanctions on them and their agencies.[19] Deterrence is necessary for a variety of reasons. First and foremost, procurement officials, regardless of how highly (or lowly) placed, are not immune to being influenced by outside incentives[20] to make decisions that are neither economically optimal nor consistent with the interests of their agencies or the public.[21] The range of potential external incentives is considerable. The most notorious are those aimed directly at the financial self-interest of procuring officials–bribes and gratuities of various shapes and forms. The inevitable result of this sort of blatant corruption is, of course, that procurement officials improperly favor certain suppliers over others for reasons other than the merits of their products or services, to the detriment of the competitive process.[22] Other incentives, however, are just as commonly encountered and

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> enforcement power available to auditors. [Procuring officials] cannot be deterred from abuse of discretion if sanctions are insubstantial and improbable. . . .
>
> Even if audits were supported by sanctions comparable to protests, audits have less deterrent power because auditors are not profit motivated and are likely to be at an informational disadvantage as compared to protestors because they come to a procurement as outsiders. The informational advantages of protests mean that violations of procurement law are detected more effectively, and the profit incentive of the protesters assures more vigorous prosecution of violators.

Id.

[18] *Id.* at 21.

[19] *See id.*; Kovacic, *supra* note 14, at 486-87; Schooner, *supra* note 3, at 682-86.

[20] The recent well-publicized procurement fraud case involving Darlene Druyun, the Air Force's top procurement official, well illustrates the point. *See generally* Jeffrey Branstetter, *Darlene Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 PUB. CONT. L.J. 443 (2005).

[21] *See* Marshall et al., *supra* note 13, at 11 ("In the vernacular of economics, there is a 'principal-agent' problem. The government (the principal) wants the procurement official (its agent) to undertake a task on its behalf. The problem stems from the fact that the agent does not have the same objectives as the principal, and some aspects of the agent's behavior cannot be monitored.").

[22] The results of corruption at the contract formation phase are seen in various ways:

> The evaluation criteria in the request for proposals or tender documents could be drafted to favor a particular supplier or service provider or likewise could be drafted to emphasize weaknesses of a particular competitor. Later during the evaluation of the proposals or tenders, the evaluation criteria could be misapplied or otherwise further defined or amended after proposal or tender receipt. During this phase it is also possible that advance information could be provided to a particular favored supplier. Other techniques such as failing to solicit proposals or tenders from the competitors of a favored supplier, wrongfully restricting the tender pool, soliciting offerors known to be inferior to a favored supplier, simply mis-addressing tender documents, accepting late proposals or rejecting legitimate proposals are techniques that can be utilized to corrupt the procurement process.

result in similar anti-competitive favoritism. For example, a procurement official may be motivated to satisfy his superiors (i.e., high-ranking government officials) or his customers by selecting a particular product regardless of the specified evaluation and award criteria.[23]

Second, procurement officials, like all public employees, are susceptible to the temptation to save time and effort by "cutting corners," either because of slothfulness, insufficient incentives to maximize taxpayer interests (due to the lack of a profit motive or otherwise), a lack of resources,[24] or the perception that complying with cumbersome regulatory requirements will not add value to the procurement process.[25] In each case, the result is usually a less than optimal procurement.

The corrective function of the bid protest system plays out in a more obvious manner. Pursuant to the procedural rules of the selected protest review tribunal, a disappointed offeror may file a formal protest challenging the decision of a procurement official. When the reviewing body deems the bidder's protest meritorious, it may recommend or enforce a remedy that includes corrective action, such as requiring the procuring agency to set aside or re-compete the procurement. So, too, the parties may engage in discussions, negotiations, or some other form of alternative dispute resolution with the result that the procuring agency agrees to take corrective action in order to avoid a formal, external bid protest. The corrective function applies more broadly than the deterrent function in the sense that bidders are able to protest inappropriate actions of procurement officials that are not generally "deterrable"–such as inadvertent mistakes by procuring officials resulting from poor training, lack of experience, or simple ineptitude.

In view of the central role bid protest systems play in enforcing appropriate decision-making by procurement officials at the contract formation stage, one can hardly overstate the importance of having an effective protest system.[26] No matter how thorough and modern a procurement system's regulatory scheme may be, the system itself will break down if it has no effective mechanism for ensuring that the regulations are fairly applied and

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Jason P. Matechak, *Fighting Corruption in Public Procurement*, Center for International Private Enterprise, *available at* http://www.cipe.org/ pdf/publications/fs/matechak.pdf (last visited Jan. 6, 2006).

[23] *See* Schooner, *supra* note 3, at 683 n.183.

[24] *See* Marshall et al., *supra* note 13, at 15-16.

[25] *See id.* at 14.

[26] *See* Schooner, *supra* note 3, at 682 n.180 (stating that enforcing compliance with procurement laws "implicates not just high standards of integrity, but also the maintenance of system transparency, the maximization of competition, and the furtherance of a host of . . . social policies"); Hunja, *supra* note 2, at 15 ("[E]xperience has shown that the most successful procurement systems are those that provide bidders a legal basis to challenge the actions of procurement officials when they breach the rules.").

enforced.[27] The simple reality of this proposition is seen across the spectrum of human endeavor–where there is a dissonance between the written rules and what actually occurs in practice, people will be less interested in "playing the game" and there will be a concomitant decline in the level of competition. In the arena of public procurement, where the competitive process generates the incentives for contractors to maximize the value of their products and services to the government (in terms of price and quality),[28] the decline in competition that inevitably results from lax enforcement of the procurement rules produces the systemic breakdown. The ultimate result is that the public pays considerably more for less.

B. Elements of an Effective Bid Protest System

The measure of a bid protest system's effectiveness as an oversight mechanism primarily turns on the degree to which the system engenders confidence in disappointed offerors that their efforts to challenge the actions of procuring officials will be worthwhile. In other words, if contractors are reasonably confident that their protests will receive due consideration and that their meritorious protests will actually result in meaningful corrective action, then they will be more likely to challenge inappropriate procurement official decisions. In turn, increased levels of successful protest litigation will, in theory, deter further inappropriate governmental acts.[29]

Beyond the obvious requirement that a bid protest system provide standing for disappointed offerors to bring protests to a reviewing forum of some type, the elements or considerations that are required to generate confidence in a system can be broken down into four categories:

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[27] *See* Kenneth B. Weckstein & Michael K. Love, *Bid Protest System Under Review; FASA II is the Administration's Answer to the "Abuse*," LEGAL TIMES, June 12, 1995, at S29 ("If those adversely affected by the breach of rules cannot protest in a meaningful way, the rules have no teeth, and competition is stifled. Without the constraints of bid protests, government contracts will be let based on favoritism, undisclosed evaluation factors, and bribery. . . .").

[28] *See* Schooner, *supra* note 3, at 710; *see also* Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175-1203 (1984) (codified in various sections of 10 U.S.C., 31 U.S.C., 40 U.S.C., and 41 U.S.C.) (requiring that executive agencies of the federal government attain "full and open competition" in the conduct of sealed bid or competitive proposal procurements except when specifically exempted from doing so). Most government procurement systems now operate on the principle of open competition. *See generally* Jean-Jacques Verdeaux, *Public Procurement in the European Union and in the United States: A Comparative Study*, 32 PUB. CONT. L.J. 713, 726-729 (2003) (discussing the role of open competition in public procurement by European Union member states).

[29] Of course, there are various potential negative ramifications of excessive bid protest litigation. This topic has been thoroughly discussed by various authors. See SUE ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW 305 (1988); Marshall et al., *supra* note 13, at 23-28; Kovacic, *supra* note 14, at 489-491.

speed/efficiency, meaningful review, independent review, and meaningful relief.[30] These categories will be discussed in turn.

(1) Speed/efficiency. By its nature, the public procurement process is a time-sensitive endeavor. Generally speaking, once the award process is completed, the contract will be awarded and performance will begin within a relatively short period of time.[31] Thus, both the procurement system and the bid protest process within it must be arranged in a manner that permits disappointed offerors to quickly identify[32] and respond to inappropriate decisions by procurement officials. Once a project begins, protest reviewers will be reluctant to impose the costs of delay on either the public or the winning bidder.[33] To put it somewhat differently, if a protest system is inordinately slow, then disappointed offerors will have little likelihood of ultimately gaining meaningful relief. Although a protest system can obviate this problem by granting reviewing bodies authority to suspend procurements while protests are pending, lengthy suspensions impinge on the public interest and the rights of winning bidders.[34] Thus, the bottom line is that a bid protest system has to be capable of quickly producing both a decision and, if required, a remedy for the protestor.[35] The most obvious means of ensuring systemic speed is to impose time limits both on disappointed offerors for the bringing of protests and on reviewing bodies for publishing decisions.[36] Such time limits must, of course, take account of and balance a variety of factors, to include the extent that discovery will be available to unsuccessful bidders and any requirements relating to the exhaustion of remedies.

Almost as important as speed in the efficiency equation is the often overlooked matter of cost. A bid protest system that moves relatively quickly may yet prove useless if its procedures make the cost of participation too high

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[30] Colloquium, Daniel Gordon, *UNCITRAL and the Road to International Procurement Reform*, George Washington University Law School, Nov. 10, 2004. These categories, and much of the content within them, are drawn from Mr. Gordon's presentation. Mr. Gordon is Managing Associate General Counsel, U.S. Government Accountability Office (GAO) and is also a Professorial Lecturer in Law at the George Washington University Law School. He made a similar (although much lengthier) presentation, *Review of Bid Protests in National Procurement Systems: The U.S. Federal Model*, at the World Bank on the same day. His World Bank presentation is available in on-line video form at http://info.worldbank.org/etools/bspan/PresentationView.asp?PID=1340&EID=661 (last visited Jan. 4, 2006).

[31] ARROWSMITH ET AL., *supra* note 10, at 761.

[32] In competitive negotiated procurements, debriefings given by procuring agencies to unsuccessful bidders are generally the best method of providing such bidders with the information necessary to evaluate the fairness and integrity of the procurement process. For a very thorough review of the debriefing requirements and practices in the United States public procurement system, see Steven W. Feldman, *Legal and Practical Aspects of Debriefings: Adding Value to the Procurement Process*, 25 ARMY LAW. 17 (2001).

[33] *See* ARROWSMITH ET AL., *supra* note 10, at 761.

[34] *See generally id.* at 761-62.

[35] *See id.*

[36] *See id.*

relative to the potential benefits of filing a protest. A bid protest system that imposes some limitations on the extent to which disappointed offerors have to resort to full-blown litigation to gain relief will be more likely to keep protest costs to a reasonable level.

(2) Meaningful review. Although a bid protest system may give disappointed offerors an efficient means of filing protests, if the reviewing body receiving the protests does not or cannot consider them in a meaningful manner, then bidders will have little incentive to challenge procuring agency decisions. Ordinarily, a review will be meaningful if two elements are present: (a) the reviewing body is composed of persons who have some expertise in the field of public procurement, and (b) the reviewing officials are able to review and consider the relevant portion of the "record" of the procurement (i.e., the procuring agency's files). Along these lines, the reviewing tribunal's procedural rules relating to the extent to which disappointed offerors have access to the record and are able to present evidence or argument before a decision is rendered will impact the perceived meaningfulness of the review.[37] Further, the standard of review employed by the reviewing body provides a relevant indicator of its meaningfulness.[38]

(3) Independent review. Independence in this context refers to the extent to which a protest reviewing body is secure from all types of external influence and is not biased in favor of either the procuring agency or the government.[39] Independence generally ensures both fairness and the appearance of fairness. The underlying expectation, of course, is that if those conducting a bid protest review have no personal or professional stake in its outcome then they will be more likely to provide the disappointed offeror meaningful relief when such relief is warranted. Although reviewers outside of the procuring agencies are more likely to be independent, procuring agencies can construct internal review mechanisms that operate in a reasonably independent manner.[40]

(4) Meaningful relief. A bid protest system must provide its protest reviewing officials or tribunals adequate authority to fashion and enforce both

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[37] *See generally* ARROWSMITH ET AL., *supra* note 10, at 764-69.

[38] *See id.* at 803-04 ("It can be argued that for review bodies wholly to abdicate responsibility over [factual and discretionary judgments] would leave too much latitude for procuring entities to abuse the rules, by disguising discriminatory decisions behind false factual and discretionary assessments.").

[39] The concern about bias in favor of the government exists, of course, because bid protest reviewing bodies (whether they be judicial, quasi-judicial, or administrative) are invariably "governmental" entities. The pressure to "toe the government line" can come from any number of sources. For example, a reviewing body member might feel beholden to the government official who appointed or hired him for the position.

[40] In the U.S. system, the agency-level bid protest systems operated by the Army Material Command (AMC) and the United States Army Corps of Engineers offer independence insofar as protest reviews are conducted by a cadre of attorneys who are not involved in the procurement process itself.

interim relief and final remedies that correct inappropriate procuring agency actions and make whole aggrieved disappointed offerors. As discussed above, because the procurement process is time-sensitive, procuring agencies are usually interested in staying on schedule during the contract evaluation and award stages, and both the agencies and their winning bidders generally wish to proceed with contract performance as soon as possible after award. However, if a contract is awarded and performance proceeds for any significant period during the pendency of a bid protest, then the disappointed offeror might well be deprived of any opportunity to obtain its sought-after relief–such as award of the contract.[41] Thus, a protest review body must be vested with the power to suspend (or "stay") the award of a contract or to stop work on a contract in appropriate circumstances pending resolution of a disappointed offeror's protest in order to maintain the status quo and preserve the protestor's commercial opportunities.[42] Then, if the reviewing body sustains the protest, it must also have the power to compel the procuring agency either to set aside the specific improper decision or the procurement itself or to award some measure of damages in the form of compensation to the complaining bidder.[43]

At the same time, a bid protest system is also well served if both its procedural rules and the decisions of its protest reviewing bodies are published. Published decisions are particularly useful in lending transparency to the protest process (and the underlying procurement practices that are the subject of protests), which in turn educates contractors (and the public) and builds systemic trust.[44]

III. CHALLENGES IN CREATING EFFECTIVE BID PROTEST SYSTEMS

Regardless of the extent of a nation's political and economic development, the task of establishing an effective bid protest system can be very challenging. Even the most developed nations have struggled (and still struggle) to balance the competing demands of independence, speed and efficiency, and due process. For example, the Canadian national bid protest

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[41] *See* ARROWSMITH ET AL., *supra* note 10, at 773.

[42] *See id.* These are commonly referred to as "interim measures," that is, measures that "seek to ensure that a complainant's position is not prejudiced by events occurring before the trial" or hearing. Sue Arrowsmith, *The Character and Role of National Challenge Procedures Under the Government Procurement Agreement*, 4 PUB. PROCUREMENT L. REV. 235, 237 (2002).

[43] *See* ARROWSMITH ET AL., *supra* note 10, at 796.

[44] *See* Evenett & Hoekman, *supra* note 1, at 28-29.

> Not only will transparency have to be complemented by a variety of other actions and policies, to be effective any transparency norms need to be enforceable. Of particular importance here are domestic challenge procedures . . . In discretionary, non-transparent procurement systems losing firms have little incentive to protest against irregularities because of the power of procuring entities to black list them.

Id.

reviewing authority, the Canadian International Trade Tribunal (CITT),[45] has been regularly criticized by both contractors and government officials for its inconsistent decisions and failure to see the "big picture" issues of public procurement in resolving individual cases.[46] Both sides believe the CITT's bid protest decisions have actually resulted in "a risk-averse and more costly procurement system."[47] A Parliamentary Secretary's Task Force, chartered for the purpose of reviewing the federal government's procurement system and making recommendations for improvement, recently recommended the Parliament thoroughly review the existing bid protest system.[48]

In light of the difficulties experienced in Canada, it is not hard to imagine that the project of establishing an effective protest system in an emerging or developing nation is particularly fraught with pitfalls and challenges. As a basic proposition, the very notion of government oversight, let alone oversight by private citizens, is foreign to the legal traditions of many such nations. Thus, in some cases, the specialized project of establishing oversight mechanisms for government procurement systems cannot proceed very far absent progress in the greater effort to establish, among other things, traditions of respect for the rule of law and transparency in government decision-making.[49]

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[45] The CITT was established in 1993 in order to bring Canada in compliance with the NAFTA requirement that signatory nations have a national bid protest system. The CITT is an independent, quasi-judicial body that is not a part of any federal government department or agency. The Tribunal reports to the Canadian Parliament through the Minister of Finance. Decisions of the CITT may be appealed to the Federal Court of Canada, but only if they are found to be "patently unreasonable." *See* David M. Attwater, *Policy-Making by Choice at the Canadian International Trade Tribunal*, 16 CAN. J. ADMIN. L. PRAC. 263, 264-67 (2003).

[46] *See generally id.* at 271-274.

[47] WALT LASTEWKA, MINISTRY OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, PARLIAMENTARY SECRETARY'S TASK FORCE: GOVERNMENT-WIDE REVIEW OF PROCUREMENT 31 (2005), *available at* www.pwgsc.gc.ca/prtf/text/final_report-e.pdf (last visited Jan. 6, 2005).

[48] *See id.* at 46.

[49] On the general topic of transparency in government, see TRANSPARENCY INTERNATIONAL, THE GLOBAL COALITION AGAINST CORRUPTION at http://www.transparency.org. Although the issue of basic governmental reform is discussed in this article only in passing (as it is somewhat peripheral to this article's purpose), it is clearly a matter of substantial import when it comes to the entire project of establishing and maintaining effective public procurement systems. Simply put, when a nation has a weak tradition of respect for the rule of law and its government does not conduct its business in a transparent manner, it will have great difficulty operating an effective procurement system–let alone an effective bid protest mechanism. *Cf.* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 104-106 (2002) (identifying transparency as one of the "pillars" of a successful procurement system). For example, in a nation with no tradition of transparency, government procurement officials may be quite resistant to the notion that they should disclose information from their procurement files to protesting unsuccessful bidders. For an excellent overview of the impact transparency has on a public procurement system, see Wayne Wittig, International Trade Centre, Presentation at the Joint WTO-World Bank Regional Conference on Procurement Reforms and Transparency in Public Procurement for Anglophone African Countries (Jan. 14-17, 2003), *available at* http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/

Nonetheless, many developing nations have recognized that a well-organized public procurement system can be a significant component of their overall national economic development efforts.[50] Hence, they have undertaken efforts to reform their procurement systems generally and, more specifically, to build effective bid protest mechanisms to provide enforcement and transparency. These efforts have met with varying degrees of success.[51] In those nations that are transitioning from planned to market-based economies, the results have been somewhat encouraging.[52] However, reform efforts have been considerably less successful in the world's "middle income"[53] and truly "developing" nations.[54]

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itcdemo2_e.pdf (last visited Jan. 6, 2005). Wittig defines transparency, in the context of public procurement, as "the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed." *Id*. at 3.

[50] *See generally*, Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, *in* PUBLIC PROCUREMENT: GLOBAL REVOLUTION 3 (Sue Arrowsmith & Arwel Davies eds., 1998); Victor Mosoti, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?*, 25 U. PA. J. INT'L ECON. L. 593, 599-602 (2004). The correlation between procurement reform and economic development has undergirded the substantial efforts of the World Bank and WTO to develop and reform public procurement systems worldwide. *See* THE WORLD BANK, PROCUREMENT, *at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK:84266,00.html (last visited Jan. 10, 2006); WORLD TRADE ORGANIZATION, GOVERNMENT PROCUREMENT, *at* http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (last visited Jan. 10, 2006).

[51] *See* Hunja, *supra* note 2, at 16.

[52] *See id.* Primarily, these are the nations of Eastern and Central Europe. For an excellent overview of the procurement reform developments in Poland, the Czech Republic, Hungary, Slovakia, and Estonia, see Paul J. Carrier, *Analysis of Public Procurement Authorities in Central European Countries*, 3 PUB. PROCUREMENT L. REV. 131 (2003). While the procurement reform efforts in Central and Eastern Europe have been a qualified success, they have certainly not come easily. The current reform efforts in Uzbekistan provide a good case study. Although leaders in the Uzbekistan central government have been supportive of procurement reform efforts, World Bank procurement officials recently identified numerous remaining obstacles to the establishment of sound public procurement practices, to include:

> (1) a weak legal and regulatory framework and an absence of regulatory coverage of a range of issues relating to procurement methods and practices;
> (2) a shortage of personnel trained in procurement matters;
> (3) an underdeveloped private sector resulting in inadequate competition for public contracts;
> (4) government ownership of some components of the procurement system; and
> (5) a low level of awareness of the legislation applicable to public procurement.

See WORLD BANK, UZBEKISTAN–COUNTRY PROCUREMENT ASSESSMENT REPORT 6-7 (2003), *available at* http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_03052204062262 (last visited Jan. 6, 2006).

[53] *See* Hunja, *supra* note 2, at 14. Hunja includes countries such as Argentina, India, Indonesia, and Chile in this group, noting that:

> [T]hese countries have had market based procurement systems in place but are in the process of modernizing such systems. The push toward modernizing . . . is motivated by a number of factors, most of which can be traced to the need to satisfy

Beyond the significant challenges presented by weakness in the rule of law and a lack of systemic transparency, emerging and developing nations commonly face several other impediments to establishing effective bid protest systems. First, in many cases, there are individuals and organizations in both the public and private sectors that have a vested interest in maintaining the public procurement status quo.[55] Whether they benefit from corruption in the existing legal and enforcement regimes or simply from the existence of entrenched practices of favoritism (such as the practice of denying market access to foreign firms), those who have an economic stake in the procurement process will almost inevitably oppose change.[56] Where such opposition is strong, national leaders may not have the political will to overcome it.[57] Moreover, even where leaders are able to reform national procurement laws and policies to inject greater systemic transparency and competition, they are not always immediately able to root out entrenched corrupt practices.[58] In this environment, resistance to the establishment of enforcement mechanisms, such as viable bid protest systems, can be particularly vigorous.[59] The challenge for nations facing such circumstances is found both in creating the framework for a bid protest system and in establishing within that system a set of rules that will actually result in efficient, meaningful, and independent reviews of protests and the provision (and enforcement) of meaningful relief when such protests are sustained.

A second challenge for developing nations is that they very often lack a sufficiently large contingent of well-trained procurement specialists capable of handling the broad spectrum of tasks associated with a fully functioning public procurement system.[60] For example, while a nation may have a number of procurement personnel working within its various agencies to monitor the

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the demands of a more enlightened citizenry for more efficient and transparent systems of service delivery by government and for greater accountability in the management of public expenditures.

[54] *See id.*; Verdeaux Interview, *supra* note 4.

[55] Hunja, *supra* note 2, at 17.

[56] *See id.*

[57] *Id.*

[58] The general issue of corruption in government and its impact on public procurement is amply addressed in the legal and economic literature. *See, e.g.*, John Linarelli, *Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspective*, *in* PUBLIC PROCUREMENT: GLOBAL REVOLUTION 125 (Sue Arrowsmith & Arwel Davies eds., 1998).

[59] *See* Hunja, *supra* note 2, at 20 (noting that some governments will go to considerable lengths to "create a semblance of formal compliance with procedural and other requirements while seriously compromising the intent and spirit of such rules").

[60] "A good framework of policies, procedures and documents is essential, but the quality of procurement depends on the people who implement the system, their competence, training, intelligence, objectivity, motivation, and ethics." WORLD BANK, INDIA–COUNTRY PROCUREMENT ASSESSMENT REPORT 16 [hereinafter INDIA] (2003), *available at* http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20040402111746 (last visited Jan. 6, 2006).

bidding, evaluation, and contract award functions, it may not have the "extra" personnel needed to handle post-award contract administration matters or to serve in oversight roles, such as on bid protest review bodies. Compounding the problem is the fact that, in many developing nations, procurement officials do not have "professional" standing but are rather classified as "clerical" workers. Thus, they are not well paid.[61] One result of this arrangement is that government procurement personnel, once trained and experienced, often leave the government to take more lucrative positions in the private sector.[62]

Along similar lines, and more specific to the issue of establishing bid protest mechanisms, the existing judicial and administrative systems in many emerging and developing nations are simply not well suited to the business of resolving bid protests. In the first instance, the sitting judges and administrators in such nations may not have had significant exposure to public procurement concepts and legal requirements and the economic and market principles that underlie them.[63] Thus, they may be predisposed to question the validity of protests which, as a general rule, allege that the government has failed to comply with requirements intended to foster open-market competition. Second, the judicial systems in many developing nations are prone to inefficiency–that is, they are costly, slow, and, in some instances, corrupt.[64] As discussed *infra*, where a reviewing body cannot consistently resolve bid protest cases in a relatively prompt manner (i.e., before contract performance is very far along),

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[61] *See* OECD/DAC, WORLD BANK ROUNDTABLE ON STRENGTHENING PROCUREMENT CAPACITIES IN DEVELOPING COUNTRIES (2003), *available at* http://www.oecd.org/dataoecd/35/5/2488602.pdf (last visited Jan. 6, 2006).

[62] *Id.*; Interview with Gulnara Suyerbayeva, Senior Lawyer, Business-Inform Corporation of Almaty, Kazakhstan, in Washington, D.C. (Mar. 15, 2005) [hereinafter Suyerbayeva Interview].

[63] This problem is not necessarily unique to developing nations. Even in the most developed countries, judges and other officials who review procurement protests oftentimes have little experience in the field. Nevertheless, in developing nations, the degree of unfamiliarity with concepts like transparency and competition and other market principles is likely to more acute.

[64] Suyerbayeva Interview, *supra* note 62. Again, these problems are not the sole province of emerging and developing nations. However, they do appear as a common thread in the Country Procurement Assessment Reports produced by World Bank. *See, e.g.*, WORLD BANK, MALAWI - COUNTRY PROCUREMENT ASSESSMENT REPORT 31 (2004), *available at* http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000160016_20040609124611 (last visited Jan. 11, 2006) ("The court system is perceived as costly [and] cumbersome, and . . . it is a common perception that the lower Magistrate Courts are riddled with corruption . . . ."); WORLD BANK, REPUBLIC OF AZERBAIJAN–COUNTRY PROCUREMENT ASSESSMENT REPORT 21 (2003), *available at* http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000112742_20030930122244 (last visited Jan. 11, 2006) ("[T]here appears to be some way to go before the general public . . . [where they] will have sufficient confidence in the court system to make it a suitable forum for the resolution of procurement disputes."). It is also worth noting that, in many emerging and developing nations, the mere thought of filing a lawsuit or protest against the government, justified or not, is still beyond the imagination of many private businesses (for more than just good public relations reasons).

unsuccessful bidders will see little use in expending the resources required to bring protests to the forum.

Finally, it is often the case that developing nations lack a coherent, over-arching system of procurement laws and a national-level office dedicated to policy-making and the oversight of public procurement.[65] The common, debilitating results, as Robert Hunja, Senior Procurement Specialist at World Bank, puts it, are "diverse interpretations and implementation of existing [procurement] rules across various public agencies" and gaps in enforcement.[66] Under these conditions, a bid protest system may have little practical utility to disappointed offerors due to its lack of predictability.[67]

IV. BID PROTEST PROCEDURES IN THE MAJOR INTERNATIONAL PUBLIC PROCUREMENT AGREEMENTS

Bid protest procedures are now well-established as a key feature of every major national procurement regime as well as the international trade agreements that address government procurement–such as the Agreement on Government Procurement, the North American Free Trade Agreement, and the European Union Procurement Directives.[68] The rationale for the inclusion of these enforcement provisions, as discussed above, is straightforward: "[A]n effective means to review acts and decisions of the procuring entity and the procurement procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system."[69] While the international agreements are largely the domain of the world's developed nations, the attractions of membership, to include the promise of both increased international market access for domestic products and services and the liberalization of the domestic markets themselves,[70]

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[65] Hunja, *supra* note 2, at 15; *see* INDIA, *supra* note 60, at 20-21; WORLD BANK, REPUBLIC OF CHILE–COUNTRY PROCUREMENT ASSESSMENT REPORT 17 (2004), *available at* http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20041119095309 (last visited Jan. 11, 2006).

[66] Hunja, *supra* note 2, at 15.

[67] *Id.*, at 15, 21.

[68] ARROWSMITH ET AL., *supra* note 10, at 750.

[69] UNCITRAL Model Law on Procurement of Goods, Construction and Services, Official Records of the General Assembly, U.N. Commission on International Trade Law, 49th Sess., Supp. No. 17, Annex I, U.N. Doc. A/49/17, Ch. VII (1994) [hereinafter UNCITRAL Model Law], *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html (last visited Jan. 6, 2006).

[70] *See* Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha*, 5 J. INT'L NAT'L ECON. L. 761, 769 (2002); *but see* Simon J. Evenett & Bernard M. Hoekman, *Transparency in Government Procurement: What Can We Expect From International Trade Agreements?*, *in* PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 269 (Sue Arrowsmith & Martin Trybus eds., 2003) (arguing that the efficacy of using international

encourage developing nations to craft protest systems consistent with those called for by the agreements.[71] As such, the agreements have provided a backdrop, or template, for some of the current development in national bid protest systems.

Having said that, because the primary purpose of these agreements is to promote international trade by prohibiting discriminatory treatment, the agreements do not necessarily offer a complete "blueprint for achieving domestic [procurement reform] objectives."[72] In other words, the agreements do not provide the sort of comprehensive rules and procedures that may be useful to nations that are just beginning to reform their public procurement systems.[73] Nonetheless, the agreements are very relevant when it comes to the project of identifying the key characteristics of a model bid protest system for developing nations, because the developing nations themselves will at some point be interested in gaining accession to the agreements–and in order to do so, they will be required to have "compliant" bid protest systems.

A. Agreement on Government Procurement

The Agreement on Government Procurement (GPA),[74] is a plurilateral agreement[75] of the World Trade Organization (WTO) designed to subject the procurement of goods and services by government agencies to international competition by bringing it under the purview of internationally agreed upon trade rules. The GPA primarily meets this objective by requiring member

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trade agreements as an instrument to improve the transparency of procurement regimes may be overstated).

[71] Robert J. Hunja, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform in* PUBLIC PROCUREMENT: GLOBAL REVOLUTION 106 (Sue Arrowsmith & Arwel Davies eds., 1998).

[72] Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, 53 INT'L & COMP. L.Q. 17, 19 (2004).

[73] *See id.*

[74] Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter GPA], Annex 4(b), *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (last visited Jan. 6, 2006).

[75] The GPA is "plurilateral" because not all WTO members are bound by it. The current parties to the GPA are Canada, the European Communities (including its twenty-five member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxemburg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, and the United States. Seven countries are currently negotiating accession to the GPA. They include Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, and Taiwan. In addition to these nations, eleven other nations hold "observer" status: Argentina, Australia, Cameroon, Chile, China, Colombia, Croatia, Mongolia, Republic of Armenia, Sri Lanka, and Turkey. *See* http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited Jan. 11, 2006).

states to eliminate the discriminatory procurement procedures and practices nations have historically used to favor domestic industries, such as denying foreign products and services access to their markets.[76]

In its earliest form, the GPA did not require its signatories to establish mechanisms by which private parties could directly challenge or protest alleged breaches of the GPA.[77] Instead, disappointed offerors were required to seek redress through the WTO's broad-based inter-governmental dispute settlement system.[78] This enforcement system quickly proved to have limited use in remedying specific breaches, primarily because it did not permit sufficiently rapid action on protests.[79] Accordingly, the original parties to the GPA added a requirement that member states make national bid protest procedures available to disappointed offerors.[80] The requirement was added to the GPA in 1994 as Article XX and became effective on January 1, 1996.

Article XX of the GPA gives modest treatment to each of the fundamental requirements of an effective bid protest system,[81] although with

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[76] WORLD TRADE ORGANIZATION, OVERVIEW OF THE AGREEMENT ON GOVERNMENT PROCUREMENT, *available at* http://www.wto.org/english/tratop_e/gproc_e/over_e.htm (last visited Jan. 11, 2006).

[77] The first Agreement on Government Procurement was concluded during the Tokyo Round of GATT negotiations and was signed in 1979. It entered into force in 1981. The standard practice in most WTO agreements is not to provide private parties the right to enforce WTO rules. *See* SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 385 (2003).

[78] *Id.*; *see also* Mary Footer, *Remedies Under the New GATT Agreement on Government Procurement*, 4 PUB. PROCUREMENT L. REV. 80, 81 (1995).

[79] The proverbial "straw that broke the camel's back" was a WTO Dispute Settlement panel's decision in the so-called "Trondheim case." In that case, the panel found that a Norwegian entity's failure to use competitive selection procedures to award a contract violated the Tokyo Round procurement agreement. However, the panel refused to require that Norway annul or re-bid the contract, stating that it did not consider such a remedy within its purview and, further, that the remedy would be too injurious to both the public and the successful bidder. *See generally* ARROWSMITH, *supra* note 77, at 38.

[80] *Id.* at 39-40. In the GPA, these procedures are referred to as "challenge procedures," but this article will refer to them as bid protest procedures for the sake of consistency with other parts of this article.

[81] Although Article XX's purpose is to require member states to establish procedures for suppliers to challenge alleged breaches *of the GPA itself* rather than breaches of domestic procurement rules, the implicit assumption is that a member state's domestic procurement rules will include a similar mechanism for challenging procuring officials' decisions. In the words of Sue Arrowsmith:

> [I]t is unlikely that a State will deliberately confer on other GPA firms rights in the tendering process that are more extensive than those enjoyed by domestic firms . . . the GPA's requirements will normally be incorporated into general national tendering rules and the whole system made enforceable in the same way by both domestic firms and benefiting third country firms.

ARROWSMITH, *supra* note 77, at 392.

some potentially troublesome gaps in the details.[82] As an initial matter, the GPA provides that member states should "encourage" disappointed offerors to first seek resolution of complaints by bringing those complaints directly to the procuring agencies themselves.[83] When such "consultations" take place, procuring agencies are to give bidder complaints "impartial and timely consideration."[84] Beyond this, however, member states that use agency-level review mechanisms are not required to afford disappointed offerors any particular measure of due process to ensure fair and just outcomes, nor are they required to compel procuring agencies to negotiate evenhandedly with protestors in order to settle disputes.[85] Thus, while the requirement for impartiality suggests that agencies are supposed to use procedures that ensure some measure of independence in this review,[86] GPA member states are not legally obligated to see to it that their procuring agencies do anything more than superficially review bidder complaints.

Instead, the GPA favors external review bodies that are judicial in nature. Specifically, the GPA's Article XX requires that member states permit "suppliers"[87] to bring their complaints before either a court or an "impartial and independent review body."[88] A member state may employ a reviewing tribunal that does not have the status of a court only if the tribunal's decisions are subject to judicial review or if its rules provide participants with certain minimum due process protections. For example, the forum's rules must permit disappointed offerors to be heard, to be represented, to present witnesses, and to attend all proceedings.[89] In addition, the "impartial and independent reviewing

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[82] The existence of these "gaps" (or perhaps more appropriately, ambiguities) is principally attributable to the fact that the GPA's initial signatories wished to "recognize the diversity of national legal traditions." They did so by writing Article XX in a manner that allows member states broad discretion in determining how to construct their bid protest forums and review procedures. *Id.* at 394.

[83] GPA, *supra* note 74, art. XX, para. 1 ("In the event of a complaint by a supplier . . . each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity.").

[84] *Id.*

[85] As discussed below, the GPA explicitly relies on the prospect of third-party enforcement as the disciplinary "stick" to encourage candid and straightforward agency behavior at the complaint resolution stage. *See* ARROWSMITH, *supra* note 77, at 387-88.

[86] For example, independence might be achieved by giving complaints to an official or officials who did not participate in the original procurement decision. *See id.*

[87] The GPA does not define the term "suppliers."

[88] GPA, *supra* note 74, art. XX, para. 6 (stating that a review body must have "no interest in the outcome of the procurement" and its members must be "secure from external influence"). The GPA does not, however, account for other safeguards that may be necessary to ensure the independence of the reviewing body's members. For example, as Sue Arrowsmith points out, "it is not clear what safeguards must exist against [the] dismissal or other termination of the term of office [of members of the body], or the extent to which pay and other conditions must be guaranteed." ARROWSMITH, *supra* note 77, at 394.

[89] GPA, *supra* note 74, art. XX, para. 6.

body" must have the power to access pertinent documents relating to the procurement, must open all of its proceedings to the public, and must reduce its decisions to writing.[90]

The GPA's approach here, while undoubtedly conducive to the establishment of review bodies that are independent, holds two potential shortcomings. First, the GPA does not demand that those who serve on the external, "non-judicial" reviewing bodies have government procurement expertise.[91] Second, the GPA does not specify the extent to which such reviewing bodies may compel government agencies to fully disclose the contents of their procurement files, or the extent to which suppliers may gain access to such documents.[92] Thus, although the rules guarantee suppliers an independent and procedurally fair review, they do not necessarily guarantee that the review will be meaningful. If, for example, a supplier does not have access to certain core documents from a procuring agency's files,[93] then the supplier will not be able to show that procuring officials made an inappropriate or unlawful decision, and any review provided could be superfluous. So, too, if the members of the reviewing body have limited government procurement expertise, they may fail to identify or appreciate the nuances of improper government actions.

On the matter of ensuring systemic speed and efficiency, the GPA recommends that member states impose timeliness requirements both on disappointed offerors and on the reviewing bodies themselves. First, member states may require disappointed offerors to file protests "within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known."[94] Second, member states must ensure that the bid protest process as a whole is "completed in a timely fashion."[95] The problem with this second provision is manifest–it is too vague to be enforceable.[96] Thus, it gives no real assurance that a national system will be inherently capable of resolving protests quickly enough to protect the rights of suppliers to obtain meaningful remedies.

With respect to remedies, Article XX requires that member states grant their bid protest tribunals authority to provide disappointed offerors specific types of relief, such as: interim measures, the correction of improper procuring

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[90] *Id.*

[91] Where the reviewing court is not specialized, it can be expected that its judges will have varying degrees of familiarity with government procurement matters.

[92] A supplier does have the right to request that a procuring agency provide it an explanation of the reasons why its bid was rejected and what characteristics and advantages of the winning bid favored its selection. GPA, *supra* note 74, art. XVIII, para. 2. However, this debriefing process does not include the disclosure of procurement documents.

[93] The core procurement documents might include, for example, bid evaluation documents.

[94] GPA, *supra* note 74, art. XX, para. 5. The time limit cannot be less than ten days.

[95] *Id.* art. XX, para. 8.

[96] *See generally* ARROWSMITH, *supra* note 77, at 397.

agency decisions, and compensation for losses or damages.[97] In the case of interim measures, the GPA specifically identifies suspension of the procurement process pending resolution of a supplier's protest as one remedial option that must be available to reviewing bodies.[98] The GPA does not, however, impose a requirement for mandatory suspensions. In order to prevent excessive costs to third parties and the public in cases where interim measures are imposed, the GPA permits member states to provide a mechanism by which procuring agencies may override suspensions or other interim measures.[99]

Article XX does not indicate how far member states must go in giving their reviewing bodies authority to grant corrective and compensatory relief, except that it provides that member states may restrict compensatory awards to the "costs for tender preparation or protest."[100] As such, the GPA's remedial provisions, like other of its provisions, may be too imprecise to prevent practices that might negate the overall effectiveness of a nation's bid protest system. Notably, a GPA member state could arguably restrict its system's available remedies to such an extent that disappointed offerors would have little incentive to pursue protest actions.[101]

B. North American Free Trade Agreement (NAFTA)[102]

NAFTA, like many of the regional international trade agreements, includes a chapter on government procurement. Because of its limited geographic scope, NAFTA is not itself an agreement that will attract the interest of developing nations that hope to enjoy the benefits of international trade. However, it offers a model for the type of bid protest systems required under regional trade agreements, which developing nations may be inclined to emulate.

The NAFTA bid protest framework, like that set out in the GPA, generally addresses each of the essentials of an effective protest system−with a similar lack of precision in certain particulars. On the matter of speed and efficiency in resolving protests, NAFTA makes three general pronouncements.

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[97] GPA, *supra* note 74, art. XX, para. 7.
[98] *Id.*
[99] *Id.* A procuring agency must provide the reviewing body with a written justification of the "overriding adverse consequences" upon which it based its override decision. *Id*.
[100] *Id.* Thus, a system need not permit disappointed offeror's to receive compensation for lost profits or other damages. *See* ARROWSMITH, *supra* note 77, at 401.
[101] *See id.*
[102] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993), 32 I.L.M. 605(1993) [hereinafter NAFTA], *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited Jan. 11, 2006). While the analysis here focuses on NAFTA, the United States has entered into other bilateral trade agreements that also carry requirements regarding bid protest mechanisms. *See* http://www.ustr.gov/Trade _Agreements/Section_Index.html.

First, it provides that member states may limit the amount of time disappointed offerors have to initiate bid protests.[103] Second, the bid protest reviewing bodies established by member states must "expeditiously" investigate bid protests.[104] Third, the reviewing bodies must provide their findings and recommendations "in a timely manner."[105] As is the case with the GPA's treatment of overall protest processing efficiency, what constitutes "timeliness" at the decisional stage is subject to broad interpretation. As such, NAFTA leaves the door open for member states to establish and operate bid protest systems that do not move quickly enough to provide truly meaningful relief to disappointed offerors.

NAFTA addresses the principles of independent and meaningful review somewhat less formally than does the GPA. Instead of requiring member states to afford disappointed offerors access to either courts or tribunals that employ procedures commonly associated with courts, NAFTA simply requires that member states establish reviewing bodies that have "no substantial interest in the outcome of procurements."[106] NAFTA provides no further details regarding either the structure of reviewing bodies or the extent to which they must afford disappointed offerors due process. In this respect, NAFTA is similar to the GPA. While it plausibly ensures that suppliers will have their protests heard by reviewing bodies that are independent, it is not at all clear that the reviews themselves will be sufficiently meaningful to engender supplier confidence.

As for the "placement" of member states' reviewing bodies, NAFTA does not specifically require that they be external to the procuring agencies themselves. However, NAFTA implies a preference for external arrangements by providing that member states may encourage disappointed offerors to seek review of their complaints "*with the entity concerned* prior to initiating a bid challenge."[107] In other words, it appears that member states may create informal mechanisms by which disappointed offerors may bring their protests to the procuring agencies themselves for resolution, but such mechanisms need not be considered part of the formal national bid protest system. NAFTA offers no guidance regarding these agency-level review mechanisms.

NAFTA identifies two methods by which disappointed offerors may obtain relief. First, protest reviewing bodies may apply interim measures to

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[103] NAFTA, *supra* note 102, art. 1017(1)(f). The time limit may not be less than ten working days from the time the basis for the protest becomes known or reasonably should become known to the supplier. *Id.*

[104] *Id.* art. 1017(1)(h). The agreement provides no definition for "expeditiously," which creates some danger that a NAFTA-compliant bid protest system could be ineffective in the sense that it reviewing bodies might move too slowly to hold open the possibility of meaningful relief for suppliers bringing meritorious protests.

[105] *Id.* art. 1017(1)(n).

[106] *Id.* art. 1017(1)(g).

[107] NAFTA, *supra* note 102, art. 1017(1)(b) (emphasis added).

suspend or otherwise delay procurements pending resolution of protests.[108] Suspensions are by no means mandatory. Moreover, even where a suspension might otherwise appear appropriate, reviewing bodies may take account of urgent circumstances (e.g., where delay would be "contrary to the public interest") to refrain from effecting a suspension.[109] Unlike the GPA, NAFTA does not prescribe the method by which reviewing tribunals are to take notice of such circumstances. Second, reviewing bodies may sustain protests and then "recommend" that the relevant procuring agency provide specified relief to the protestor.[110]

On this point, NAFTA differs drastically from the GPA. Whereas the GPA requires that reviewing bodies have the authority to issue binding decisions against procuring agencies,[111] NAFTA allows its signatories to use reviewing bodies that are merely admonitory in nature. Although NAFTA further provides that "entities normally shall follow the recommendations of the reviewing authority,"[112] the obvious implication of the provision as a whole is that member states may operate systems in which the procuring agencies are free to decide whether or not to follow reviewing tribunal recommendations. One ramification of this formulation, of course, is that if procuring agencies make it a practice to ignore reviewing body recommendations, then disappointed offerors will have little incentive to file protests (and, concomitantly, less incentive to participate in the public procurement marketplace). Consequently, the protest system may cease to function as an effective deterrent to improper agency actions.[113]

Finally, NAFTA takes the interesting step of opening the door for protest reviewing bodies to take up a policy-making role. Member states are apparently obliged to grant their reviewing authorities power to "make additional recommendations in writing to an entity respecting any facet of the entity's procurement process that is identified as problematic during the investigation of [a] challenge."[114] This provision clearly envisions protest

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[108] *Id.* art. 1017(1)(j) ("[I]n investigating the challenge, the reviewing authority may delay the awarding of the proposed contract pending resolution of the challenge. . . .").

[109] *See id.* It is not clear whether a reviewing body may *sua sponte* determine that circumstances surrounding a procurement are sufficiently urgent to warrant foregoing interim measures or whether it is the obligation of the procuring agency to raise such concerns.

[110] *See* NAFTA, *supra* note 102, art. 1017(1)(k).

[111] *See* GPA, *supra* note 74, art. XX, para. 7 ("Challenge procedures *shall* provide for . . . correction of the breach of the Agreement or compensation. . . .") (emphasis added).

[112] NAFTA, *supra* note 102, art. 1017(1)(*l*).

[113] With that said, this type of system has been successful in the United States. The recommendations of the GAO are followed by the procuring agencies in ninety-eight percent of all cases. *See* Jason Miller, *OPM Rejects GAO Advice on Portal Contract*, GOV'T COMPUTER NEWS (July 28, 2003), *at* http://appserv.gcn.com/22_20/news/22919-1.html (last visited Jan. 6, 2006).

[114] NAFTA, *supra* note 102, art. 1017(1)(m).

reviewing bodies with considerable public procurement expertise–answering one of the GPA's potential shortcomings.

C. European Union

For the transitional nations of Eastern and Central Europe, membership in the European Union (EU) (or the prospect thereof) has been a primary driving force behind public procurement reform, including reforms aimed at establishing effective bid protest systems.[115] Thus, the EU Procurement Directive's "remedies" provisions[116] have supplied the framework for a number of nascent bid protest systems.[117]

An immediately noteworthy feature of the EU Directives is their emphasis on speed–that is, on establishing protest mechanisms that are capable of quickly resolving protests.[118] In fact, the first paragraph of each Directive calls for member states to put in place procedures that ensure contracting agency decisions "may be reviewed effectively and, in particular, as rapidly as possible."[119] Nevertheless, despite their rhetorical emphasis on efficiency, the Directives suffer from the same potentially debilitating malady that afflicts both the GPA and NAFTA: while the Directives' general intentions regarding timeliness are clear, their lack of specificity on the matter leaves room for member states to utilize protest systems that do not, in fact, move quickly enough to provide either meaningful relief for disappointed offerors or an effective deterrent for procuring agencies. For example, the Directives do not require member states to impose time constraints on either potential protestors (relating to how promptly they must bring complaints) or reviewing bodies (relating to how promptly they must render decisions).[120] The timeliness

[115] *See* Carrier, *supra* note 52, at 131-32 ("An important part of accession negotiations with the candidate countries . . . is the harmonization of public procurement laws and practices including the development of an effective and rapid national review procedure.").

[116] Council Directive 89/665, 1989 O.J. (L 395) 33 [hereinafter 1989 Directive] (relating to the award of public supply and public works contracts); Council Directive 92/13, 1992 O.J. (L 076) 14 [hereinafter 1992 Directive] (relating to the award of public service contracts).

[117] The EU bid protest procedures are substantially similar to those found in the GPA, as Article XX of the GPA was modeled after the EU Directives. Carrier, *supra* note 52, at 89.

[118] In the preamble to the 1989 Directive alone, there are multiple references to the fact that, because of the time-sensitive nature of public procurement actions, EU member states must establish national bid protest mechanisms that can "urgently" and "rapidly" deal with alleged infringements of the procurement rules at "a stage when [they] can be corrected." 1989 Directive, *supra* note 116. This emphasis is largely attributable to the EU's previous experience with review procedures that were both cumbersome and ineffective. *See* Footer, *supra* note 78, at 88.

[119] 1989 Directive, *supra* note 116, art. 1, ¶ 1.

[120] The reason for the lack of time constraints is apparently grounded in the notion, common to the GPA, that nations must be given freedom to fit their bid protest mechanisms within their existing judicial or administrative systems. While this is undoubtedly a commendable goal, it can

problem is especially acute in those EU nations that rely on their oftentimes slow-moving administrative courts as the primary forum for the consideration of bid protests. In those nations, it is not uncommon for disappointed offerors to receive decisions on complaints well after the opportunity for meaningful relief has passed.[121]

The EU Directives take much the same approach as the GPA when it comes to ensuring the independence of reviewing bodies. First, the Directives explicitly encourage the use of reviewing bodies that are judicial in character.[122] If a member state uses a reviewing body that is not a court, the body must reduce its decisions to writing and those decisions must then be subject to review by either a court or another body that is "independent of both the contracting authority and the [initial] review body."[123] The Directives take the additional step of requiring that such independent "appellate" bodies be composed of members who are appointed to and leave office under conditions similar to those applied to judges and that they utilize pre-decisional procedures that, at a minimum, permit both sides to the dispute to be heard.[124] As with both the GPA and NAFTA, the Directives fail to speak to the qualifications of those who would serve on established protest-reviewing bodies.

Regarding remedies, the Directives require that each member state's review procedures provide for interim relief, including "measures to suspend or to ensure the suspension of the procedure for the award of a public contract or

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ultimately undermine the entire project of establishing effective bid protest systems. As the EU Directives well establish by their introductory language, speed is paramount in the world of bid protests. And, yet, speed, or at least consistent speed, is the first thing sacrificed when strict procedural rules are foregone.

[121] *See generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PUBLIC PROCUREMENT REVIEW PROCEDURES, (2000), *available at* http://appli1.oecd.org/olis/2000doc.nsf/linkto/ccnm-sigma-puma(2000)114 (last visited Jan. 12, 2006). The problems caused by slow-moving courts are exacerbated because, in many EU member states, public contracts are binding on the parties upon signing and cannot be challenged even if specific acts prior to the signing violated the governing procurement rules. *Id.* at 11; *see also* ARROWSMITH ET AL., *supra* note 10, at 786. On a similar note, it is worth considering that a number of EU member states have given public procurement entities at the central government level independent authority to challenge improper actions by procuring agencies. In fact, the Commission of the European Community (Commission) has taken the view that all member states should appoint a national authority that would be responsible for the "surveillance of contracting entities' compliance with procurement law." *See* COMMISSION OF THE EUROPEAN COMMUNITY, INTERNAL MARKET STRATEGY 17 (2003), *available at* http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0238en01.pdf (last visited Jan. 12, 2006). This may indicate that the Commission is dissatisfied with the extent to which disappointed offerors have been willing to take on the enforcement function – which might be attributable to suppliers' lack of confidence in their respective systems' ability to provide timely remedies. Notably, the Commission has expressed concern that "[l]itigation at [the] national level can be slow and expensive and is therefore not always a viable option." *Id.* at 28.

[122] 1989 Directive, *supra* note 116, art. 2, ¶ 8; 1992 Directive, *supra* note 116, art. 2, ¶ 9.

[123] 1989 Directive, *supra* note 116, art. 2, ¶ 8; 1992 Directive, *supra* note 116, art. 2, ¶ 9.

[124] 1989 Directive, *supra* note 116, art. 2, ¶ 8; 1992 Directive, *supra* note 116, art. 2, ¶ 9.

the implementation of any decision by the contracting authority."[125] The Directives do not require that member states automatically suspend procurement actions upon a disappointed offeror's initiation of bid protest proceedings.[126] Further, the Directives authorize member states to permit their reviewing bodies to consider the economic and public policy consequences interim measures might have when deciding whether to impose them.[127]

In addition to requiring that reviewing bodies have the authority to impose interim measures, the Directives also require that reviewing bodies have the power to correct or set aside improper procurement decisions and to award compensatory damages as appropriate.[128] The Directives identify the particular potential corrective action of setting aside "discriminatory technical, economic or financial specifications in the invitation to [bid], the contract documents or in any other document relating to the contract award procedure."[129] In cases where a contract that is the subject of a protest has already taken effect, the Directives permit member states to limit the available remedy to compensatory damages only.[130] Unfortunately, this limitation can have the effect of encouraging procuring agencies to rush into contracts to avoid challenges.[131] The consequence of such behavior, of course, is that a protest system can be rendered ineffective. This is particularly true when disappointed offerors are not otherwise able to obtain interim relief in meritorious cases.[132]

V. BID PROTEST PROCEDURES IN THE UNCITRAL MODEL PROCUREMENT LAW AND WORLD BANK DEVELOPMENT PROGRAM

The international public procurement agreements have undoubtedly played an influential role in procurement reform efforts in developing nations. However, their influence falls well short of that attributable to the UNCITRAL

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[125] 1989 Directive, *supra* note 116, art. 2, ¶ 1(a); 1992 Directive, *supra* note 116, art. 2, ¶ 1.
[126] 1989 Directive, *supra* note 116, art. 2, ¶ 3; 1992 Directive, *supra* note 116, art. 2, ¶ 3.
[127] 1989 Directive, *supra* note 116, art. 2, ¶ 4; 1992 Directive, *supra* note 116, art. 2, ¶ 4.
[128] 1989 Directive, *supra* note 116, art. 2, ¶ 1(b-c); 1992 Directive, *supra* note 116, art. 2, ¶ 1.
[129] 1989 Directive, *supra* note 116, art. 2, ¶ 1(b); 1992 Directive, *supra* note 116, art. 2, ¶ 1(b).
[130] 1989 Directive, *supra* note 116, art. 2, ¶ 6; 1992 Directive, *supra* nota 116, art. 2, ¶ 6.
[131] *See* ARROWSMITH ET AL., *supra* note 10, at 787. This is not a theoretical issue. The European Commission has brought more than one EU member state before the European Court of Justice to challenge national laws the Commission believed improperly permitted procuring agencies to simultaneously award and sign public contracts – thereby denying unsuccessful bidders the possibility of challenging the validity of the award decision and taking legal action at a stage when the matter could still be rectified. *See* Press Release, European Commission, Public Procurement: Commission Acts to Enforce EU Law in Germany, Greece, Spain, Italy, Austria, Portugal, and Finland (Jan. 14, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/44&format=HTML&aged=0&language=EN&guiLanguage=en (last visited Jan. 11, 2006). The Commission most recently took such action against Spain. *Id.*
[132] *See* ARROWSMITH ET AL., *supra* note 10, at 787.

Model Law on Procurement of Goods, Construction, and Services[133] and the World Bank's development programs. Notably, most of the nations of Central and Eastern Europe and the former Soviet Union as well as some nations in Africa and elsewhere have, at least in some measure, built their procurement systems around the Model Law.[134] For its part, the World Bank has fostered reforms in a host of nations by requiring they adopt competitive and transparent procurement procedures in order to qualify for development funds dedicated to public infrastructure projects. In many cases, the World Bank has encouraged nations to use the UNCITRAL Model Law as a framework for reform.[135] For these reasons, the bid protest procedures set out in the Model Law and promoted by the World Bank carry great currency in the world's developing nations.

A. UNCITRAL Model Procurement Law

Unlike most of the rest of its provisions, the Model Law's section on bid protest systems is fairly basic in the sense that it provides a broad outline for structuring protest systems rather than a comprehensive set of procedures and rules for running them. The drafters took this approach in order that the section might be "accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world."[136] Although laudable for its deference to existing national legal systems, the approach arguably leaves too much room for maneuvering.[137] For example, the Model Law gives limited treatment to such matters as efficiency, independence, and the provision of meaningful relief, particularly as these matters relate to reviews conducted outside of the procuring agencies themselves. As a result, this spare approach means in, in practice, that nations using the Model Law's review procedures may not establish truly effective bid protest systems.

As for the structure it does provide, the Model Law immediately takes a much stronger stance on the usefulness of agency-level reviews than do the international trade agreements. The UNCITRAL Model Law incorporates an agency-level review mechanism as a mandatory component of its bid protest

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[133] *See* UNCITRAL Model Law, *supra* note 69. According to its preamble, the Model Law is primarily designed to help nations reform and/or develop their national public procurement laws (grounded in the principles of competition, fair treatment, integrity, and transparency) and to promote open international markets. *Id*.

[134] *See* Arrowsmith, *supra* note 72, at 20; *see also* Hunja, *supra* note 71, at 105-108.

[135] Arrowsmith, *supra* note 72, at 21.

[136] United Nations Commission on International Trade Law (UNCITRAL), *Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services*, 49th Sess., Supp. No. 17, Annex I, U.N. Doc. A/49/17 (Feb. 17, 1995) [hereinafter *Guide to Enactment*], available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html (last visited Jan. 6, 2006).

[137] *See generally* Arrowsmith, *supra* note 72, at 41-42.

system: except in cases where the underlying procurement contract has already taken effect, disappointed offerors are required initially to submit their complaints in writing to the procuring agency for review and consideration.[138] The UNCITRAL Model Law's approach thus requires review, in the first instance, in the procuring agencies.

The Model Law's approach is grounded in the notion that agency-level reviews provide an efficient means of winnowing out, short of the litigation stage, those protests that can be easily resolved by the parties–such as cases involving obvious procuring agency mistakes or oversights.[139] In order to preserve this efficiency, the Model Law imposes time limits on the agency-level review process. First, a disappointed offeror must submit its protest to the procuring agency within twenty days of when it became aware of or should have become aware of the circumstances giving rise to the protest.[140] Second, if the protest is not resolved by mutual agreement of the parties, the head of the procuring agency must issue a written decision on the protest within thirty days after its submission by the disappointed offeror.[141]

The Model Law also takes the unique step of requiring procuring agencies to *automatically* suspend procurements for a period of seven days upon a disappointed offeror's timely submission of a non-frivolous protest to the agency.[142] The goal, again, is to promote efficiency. In addition to preserving the possibility of meaningful relief for disappointed offerors, automatic suspensions (or the threat thereof) create an incentive for procuring agencies to quickly resolve bidder complaints–even before they are formally presented for review.[143] The Model Law does, however, recognize that suspension may be inappropriate in some cases. To this end, it grants procuring agencies the right to "override" suspensions where urgent or compelling circumstances favor such action.[144]

The Model Law is silent on the procedural aspects of its agency-level review mechanism. For example, it does not address whether disappointed offerors should be granted a hearing or should be able to "discover" the procuring agency's files. It does, however, recognize the desirability of

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[138] UNCITRAL Model Law, *supra* note 69, art. 53(1). This is what is often termed an "exhaustion" requirement. That is, a disappointed offeror must exhaust its right to review at the procuring agency level before proceeding to other protest review fora.
[139] *See id*. art. 53(1).
[140] UNCITRAL Model Law, *supra* note 69, art. 53(2).
[141] *Id.* art. 53(4). If the procuring agency fails to issue a written decision within the prescribed time, the disappointed offeror may institute protest proceedings at another reviewing forum. *Id.* art. 53(5).
[142] *Id.* art. 56(1). The head of the procuring agency may extend the suspension, pending disposition of the review proceedings, so long as the total suspension period does not exceed 30 days. *Id.* art. 56(3).
[143] *See Guide to Enactment*, *supra* note 136, art. 56(1).
[144] *See* UNCITRAL Model Law, *supra* note 69, art. 56(4).

independence in the review process by calling for the heads of procuring agencies, rather than contracting officers or other lower level procurement personnel, to determine whether protests have merit. Although this arrangement provides no guarantee of independence, agency heads are arguably more likely to see the systemic benefits of taking a fair look at bidder complaints than are those who are directly involved in the individual procurements themselves. Further, on the matter of remedies, as the Model Law's Guide to Enactment explains, procuring agencies are empowered to correct irregularities in procurement practices by whatever means they deem appropriate.[145]

The Model Law requires that disappointed offerors have recourse to a review forum outside of the procuring agency itself if the underlying contract has already taken effect or if the head of the procuring agency fails to issue a timely decision or issues an unfavorable decision.[146] Nations may use already existing administrative or judicial review fora to accomplish this review, or they may create new fora.[147] For nations with legal systems that ordinarily provide hierarchical administrative reviews of agency decisions, the Model Law's Guide to Enactment emphasizes that review bodies employed to consider bid protest "appeals" should be "independent of the procuring entity."[148] However, the Guide to Enactment does not offer further guidance on the concept of independence, in terms of how administrative board members might be protected from the influence of government interests generally.

In fact, the Model Law largely leaves nations to their own devices when it comes to running administrative and judicial bid protest review processes, for it imposes only three specific requirements for administrative reviews and none for judicial reviews. The requirements for administrative review are as follows: First, administrative tribunals considering bid protests must be empowered to suspend the procurement process for at least seven days and up to thirty days after a disappointed offeror files a timely and non-frivolous protest.[149] Second, they must be competent to grant or recommend remedial relief for disappointed offerors. The Model Law specifically lists,

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[145] *See Guide to Enactment*, *supra* note 136, art. 54(8). The Guide states:

> The approach of [article 54], which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 53(4)(b)). The policy underlying the approach in article 53(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority.

[146] *See* UNCITRAL Model Law, *supra* note 69, art. 54(1).
[147] *See Guide to Enactment*, *supra* note 136, art. 54(3).
[148] *Id.*
[149] *See* UNCITRAL Model Law, *supra* note 69, art. 56(1)-(3).

among other things, the remedies of (a) prohibiting procuring agencies from acting on unlawful decisions, and (b) annulling unlawful procuring agency acts and decisions.[150] The Guide to Enactment suggests, regarding the remedy-granting requirement, that "a State may include all of the remedies listed . . . or only those remedies than an administrative body would normally be competent to grant in the legal system of that State."[151] Third, administrative review bodies must issue written decisions on protests within thirty days.[152]

Beyond these requirements, the Model Law leaves administrative bodies to consider bid protests using whatever procedures they normally employ in cases involving private party appeals from government agency decisions. The obvious weakness to this non-directive approach is that nations may continue using systems that deprive disappointed offerors of important due process protections.

Finally, on the matter of judicial review, the Model Law simply provides that nations may use their existing judicial systems to consider bid protests (whether directly or on appeal from some administrative body) and offers no specific recommendations on the conduct of such reviews.

B. World Bank Procurement Reform Efforts

As discussed above, the World Bank often encourages nations to utilize the UNCITRAL Model Law in constructing or updating their procurement systems. That said, the World Bank takes a somewhat different tack than the Model Law on the matter of developing bid protest systems. In practice, the Bank is less willing to rely primarily on agency-level review mechanisms.[153] The World Bank strongly encourages its borrowing nations to use bid protest reviewing bodies that are external to procuring agencies because of concerns that agency personnel at procuring agencies may be tied to their agencies' agendas–and thus not disposed to make independent judgments.[154]

VI. AGENCY-LEVEL BID PROTESTS IN THE U.S. PUBLIC PROCUREMENT SYSTEM

As the discussion above reflects, many systems, at least to some extent, permit disappointed offerors to bring protests to the procuring agencies for review and resolution.[155] What is uncommon, however, is to find an agency-level system that possesses both a well-developed procedural framework and,

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[150] *See id.* art. 54(3).
[151] *Guide to Enactment*, *supra* note 136, art. 54(8).
[152] *See* UNCITRAL Model Law, *supra* note 69, art. 54(4).
[153] Verdeaux Interview, *supra* note 4.
[154] *Id.*
[155] *See* ARROWSMITH ET AL., *supra* note 10, at 763-64.

more importantly, the confidence of the government contractor community.[156] The agency-level system used in the United States appears to come close to satisfying these criteria.[157]

In the United States, disappointed offerors have long engaged in the practice of bringing bid protests to the procuring agencies.[158] However, until the mid-1990s, the practice had no formal statutory or regulatory foundation. Procuring agencies considered protests on an ad hoc basis, usually at the level of the contracting officer.[159] In 1995, then-President Bill Clinton issued an Executive Order requiring all federal government agencies to establish agency-level bid protest systems.[160] The impetus behind the Executive Order was the administration's "reinventing government" initiative,[161] which sought to make all government operations, including public procurement activities, more efficient. The idea was that an agency-level forum would provide a more efficient means of resolving bid protests because of its emphasis on informal protest resolution rather than the adversarial and litigation-style methods utilized in the other protest fora.[162] The concern at the time was that bid protests had become too confrontational and expensive and that, as a result, procuring agencies were reducing their interactions with bidders in order to avoid giving them grounds upon which to lodge protests, all to the detriment of the public procurement system as a whole.[163]

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[156] As discussed throughout, the common source of this lack of confidence is contractor skepticism about the ability of procuring agencies to consider protests in an independent and unbiased fashion.

[157] Contractors have sufficient trust in the system that they annually bring hundreds of protests to the various federal agencies. *See* Erik Troff, *Agency Level Bid Protest Reform: Time for a Little Less Efficiency?*, THE CLAUSE, Summer 2005, at 20. This compares favorably with the sparse use that agency-level review mechanisms see in some countries. Suyerbayeva Interview, *supra* note 62.

[158] *See, e.g.*, JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1484 (3d ed. 1998).

[159] *Id.*

[160] Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (Oct. 27, 1995).

[161] *See generally* NATIONAL PERFORMANCE REVIEW, REINVENTING FEDERAL PROCUREMENT PROC06 (1993), *available at* http://govinfo.library.unt.edu/npr/library/nprrpt/annrpt/sysrpt93/reinven.html (last visited Jan. 12, 2006).

[162] In the United States, in addition to bringing protests to the agency, disappointed bidders may also bring protests to the Government Accountability Office (GAO), whose jurisdictional statute is 31 U.S.C. § 3551 et. seq., and the United States Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. § 1491(b). For a thorough discussion of the fora and their roles in the U.S. bid protest system, see Jonathon R. Cantor, Note, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CON. L.J. 155 (1997). There is no exhaustion requirement in the U.S. system. In other words, bidders may initially bring their protests to any one of the available fora.

[163] *See* NATIONAL PERFORMANCE REVIEW, REINVENTING FEDERAL PROCUREMENT PROC06 (1993), *available at* http://govinfo.library.unt.edu/npr/library/nprrpt/annrpt/sysrpt93/reinven.html (last visited Jan. 12, 2006).

Pursuant to the requirements of the Executive Order, the relevant regulatory bodies drafted a comprehensive policy, now found in Federal Acquisition Regulation (FAR) 33.103, to guide procuring agencies in the development of their agency-level bid protest programs.[164] Informed by the efficiency and economy mandates of the Executive Order, FAR 33.103 emphasizes open communication and informality as a means of avoiding the delays and expenses associated with litigation. The emphasis on communication is seen, among other places, in the regulation's first substantive paragraph, which encourages agencies to pursue "open and frank discussions" with aggrieved suppliers even before they have filed formal protests.[165] The system's preference for an informal approach to dispute resolution is clearly seen in its recommendation that agencies consider using alternative dispute resolution techniques to settle protests.[166]

In addition to the aforementioned general inducements to speed and efficiency, FAR 33.103 incorporates several specific provisions to achieve this end. First, the rule clearly identifies the filing requirements for disappointed offerors.[167] Second, the rule does *not* incorporate formal discovery procedures and does not use standard litigation procedures such as pleadings, briefs, or motions. As a result, disappointed offerors can, and sometimes do, bring protests without the assistance of legal counsel. Third, FAR 33.103(e) requires that contractors file their protests in a timely manner. Protests based on apparent solicitation improprieties must be filed before bid opening or the closing date for the receipt of proposals.[168] In all other cases, contractors must file protests no later than ten days after the basis for the protest is known or

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[164] The Civilian Agency Acquisition Council and the Defense Acquisitions Regulations Council issued the final rule on January 2, 1997. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 33 (1997).

[165] *See* FAR 33.103(b).

[166] FAR 33.103(c) ("The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.").

[167] *See* FAR 33.103(d)(2), which states:

> Protests shall include the following information: (i) Name, address, and fax and telephone numbers of the protestor. (ii) Solicitation or contract number. (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor. (iv) Copies of relevant documents. (v) Request for a ruling by the agency. (vi) Statement as to the form of relief requested. (vii) All information establishing that the protestor is an interested party for the purpose of filing a protest. (viii) All information establishing the timeliness of the protest.

[168] FAR 33.103(e).

should have been known.[169] Finally, the regulation sets a thirty-five-day goal for resolving protests.[170]

FAR 33.103 also addresses the other fundamental requirements of an effective bid protest system. First, on the matter of ensuring independence in the reviewing process, the regulation requires agencies to provide disappointed offerors an opportunity to present their protests to an agency official who is senior to the contracting officer in the agency hierarchy.[171] The notion is that there will be less likelihood of institutional bias in the review process if the review function is kept out of the hands of the person who was directly involved in making the original allegedly improper decision. To this end, each agency is obligated to pre-identify the official or officials who will conduct bid protest reviews and, "when practicable," to ensure that theses officials have not had previous personal involvement in the procurement.[172] The obvious shortcoming of this arrangement is that agencies may still put protest decision-making authority in the hands of agency officials who are not very far removed from the protested procurement decisions and who thus may have difficulty conducting objectively fair reviews.

Second, regarding remedies, the regulation contemplates that agencies will grant relief via interim measures,[173] the correction of improper procurement decisions,[174] and the payment of protest costs to prevailing parties.[175] On the matter of interim measures, the FAR's agency-level procedures grant disappointed offerors substantially greater rights than would be required under any of the international public procurement agreements reviewed above. Notably, when a bidder files a timely protest, the procuring agency is *required* to put the procurement on hold until the protest is resolved.[176] This mandate applies to both pre- and post-award protests. In

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[169] *Id.*

[170] FAR 33.103(g). The provision states that agencies should "make their best efforts" to resolve protests within thirty-five calendar days after the protest is filed. Because few agencies maintain statistics regarding their agency-level bid protest programs, there is no way to determine if this goal is regularly attained. At least one agency, the Army Material Command (AMC), has shown a consistent ability to complete protest reviews in well under thirty-five days. However, AMC's achievement is probably the exception rather than the rule. *See* Troff, *supra* note 157, at 32.

[171] *See* FAR 33.103(d)(4) (stating that "interested parties may request an independent review of their protest at a level above the contracting officer").

[172] *Id.*

[173] *See* FAR 33.103(f).

[174] *See* FAR 33.102(b)(1). Agencies are empowered to take any action or grant any remedy that could be recommended by the Comptroller General if the protest were to be filed with the GAO. For example, they may terminate a contract, re-compete a contract, or issue a new solicitation. For a full listing of the remedies available to the Comptroller General in GAO bid protest cases, see 4 C.F.R. § 21.8 (2003).

[175] *See* FAR 33.102(b)(2).

[176] *See* FAR 33.103(f). In order to gain entitlement to a "stop work order" (that is, agency action to stop work on an already existing contract), a disappointed bidder must file his protest within

other words, not only must a procuring agency refrain from awarding a contract while a protest it pending, it must also stop performance if the contract has already taken effect in the hands of another bidder.

In cases in which the procuring agency believes proceeding with contract award or performance is justified by "urgent and compelling reasons" or the "best interests of the government," the agency may override the stop work requirement–so long as the override action is approved at "a level above the contracting officer."[177] The news is not all positive for disappointed offerors when it comes to interim measures, however. If a contractor initially protests to the agency, it may well lose out on its right to have the procurement suspended when it "appeals" an unfavorable agency decision to the Government Accountability Office (GAO),[178] as the GAO imposes strict filing timeliness requirements on bidders who hope to benefit from its authority to suspend procurements.

Finally, on the matter of ensuring that agency-level reviews are actually conducted in a meaningful manner, FAR 33.103 takes something of a "middle-ground" approach. On the one hand, by the very nature of its arrangement, it assures disappointed offerors that their protests will be reviewed by persons who have considerable public procurement expertise and who have complete access to the record pertaining to the particular protested procurement. On the other hand, as already discussed, because of the forum's efficiency-based emphasis, it does not require either that disappointed offerors be given access to the procurement record themselves or that they be given opportunity to formally present evidence or argument to the decision authority. Accordingly, the extent to which reviews are meaningful largely depends on how far individual agencies go in instituting internal practices that enforce fairness in the review process.

VII. VIABILITY OF THE U.S. AGENCY-LEVEL BID PROTEST SYSTEM AS A MODEL FOR DEVELOPING NATIONS

There is little question that a well-organized agency-level bid protest system can provide benefits not always seen in the "external" administrative and judicial bid protest fora: speedy and inexpensive results, reviews conducted by highly experienced procurement personnel, and an informal and non-

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ten days after contract award or within five days after his debriefing. FAR 33.103(f)(3). This rule differs from the general timeliness rule of FAR 33.103(e) for the filing of protests.

[177] FAR 33.103(f)(1), (3). Override actions are not common in practice. *See* Troff, *supra* note 157, at 26.

[178] A protestor who is not satisfied with a procuring agency's resolution of its complaint may renew its case at either the GAO or COFC. In either case, the agency's decision will have no bearing on the new proceeding–thus, a protestor's resort to either fora does not truly constitute an "appeal."

adversarial review format. Nonetheless, at least in the United States, agency-level systems have been relegated to a position of low esteem in the eyes of many in the public procurement community because of one intrinsic shortcoming: their relative lack of independence, or the perception thereof. Agency reviewing officials, no matter how highly placed, are subject to untold potential influences to shade their decisions in favor of their agencies, and agency-level systems usually do not have a mechanism for managing or countering this built-in potential for bias. Thus, regardless of whether an agency reviewing official gives in to these influences, his decisions are bound to be viewed with some degree of suspicion.

So, where does this legitimate concern about independence leave agency-level bid protest systems in general, and the U.S. system in particular, in terms of their viability as models for developing nations? Out in the cold? Not necessarily, for the benefits of efficiency, experienced reviewers, and non-adversarialism of the U.S. system may well be more valuable to developing nations than the marginal benefits of independence.

A. Effectiveness of the U.S. Agency-Level Bid Protest System

Taking a step back, when it comes to judging whether a particular proposed "model" public procurement practice or system can be successfully transferred from one nation to another, among the first considerations must be whether the practice or system actually works in its "home" country. This question is certainly legitimate here, as the U.S. agency-level bid protest system is not without its defects or detractors. Although some federal government agencies in the United States have developed exceptionally efficient bid protest programs, the forum has seen declining use in recent years and has never garnered overwhelming contractor support.[179] In fact, a number of attorneys who practice in the field of public procurement have been critical of the overall usefulness of the agency-level system as currently constructed.[180] By and large, these criticisms derive from concerns about systemic shortcomings relating to independence and transparency.[181] Regarding independence, contractors and attorneys have voiced doubts about the general ability of procuring agency

[179] *See generally* Troff, *supra* note 157; *see also* Ralph C. Nash, Jr. & John Cibinic, Jr., *Dateline January 2005*, 19 NASH & CIBINIC REP. 5 (2005) (stating that "it is our impression that many agencies have not adopted effective procedures to carry out [the] mandate [to create agency-level bid protest systems]").

[180] *See* Troff, *supra* note 157, at 21.

[181] *Id.* Although disappointed offerors make use of the system in fairly large numbers, it appears that they are willing to do so only in those cases where the alleged procuring agency errors are easily discernable from the face of the solicitation or bid documents or relate to clearly defined procedural requirements.

personnel to render fair and impartial protest decisions.[182] Regarding transparency, they have identified the system's lack of an enforceable discovery mechanism as an impediment to the openness and information sharing necessary to guarantee that reviews are both fair and meaningful.

In response to these concerns and others, the U.S. Congress has considered (but not yet approved) several proposals to reform the agency-level forum.[183] The reform efforts have focused primarily on bolstering the forum's independence–its capacity to produce unbiased outcomes–rather than on improving its transparency. For example, one proffered reform would require agencies to vest decision-making authority regarding both protests themselves and any procurement suspension/"stay" override requests at the highest possible levels within the agencies.[184] Another proposal would require agencies to continue automatic procurement suspensions/"stays" during the pendency of both the initial agency-level protest and any follow-on "appeals" to the GAO.[185]

Although they have not been broached in any of the procurement reform bills, reforms aimed at improving the agency-level forum's transparency are also probably warranted. As things stand, most government agencies have implemented the rules of FAR 33.103 in a manner that favors decisional speed and efficiency over openness and due process. For example, agencies rarely open their procurement files to agency-level protestors because, in their view, doing so would undermine the system's efficiency. This arrangement, although permitted by the rules, ultimately causes contractors to question whether agencies are giving their protests fair and impartial consideration. With such concerns, contractors are more comfortable bringing their more important or complex protests, such as those challenging the bid evaluation process and other subjective agency decisions, to the other protest fora. As such, the agency-level system would likely benefit from the enforced transparency of discovery (in some limited form) and the publishing of protest decisions.[186]

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[182] *Id.* The practice of lower-level personnel handling protest reviews is permitted in the U.S. system in the sense that the rules permit agencies to vest review authority as low as one level above the contracting officer.

[183] The most recent reform effort is included in the pending bill known as the Acquisition System Improvement Act. H.R. 2067, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.2067.IH:. The bill has not yet been the subject of Congressional hearings.

[184] *See id*. §§ 2305b(b). FAR 33.103(d)(4) and (f) currently give agencies fairly broad discretion in identifying who will handle these tasks. *See supra* notes 171 and 177 and accompanying text.

[185] *Id.* at § 2305b(c). The proposal would enforce "stay" carry-overs in cases where protestors file follow-on protests with the GAO within five days after issuance of the agency decision. Although this reform would not address independence head on, it would likely encourage agencies to build a measure of independence (and the fairness that usually follows) into their systems in order to avoid "appeals" to the GAO and the prospect of lengthy "stays."

[186] *See generally*, Troff, *supra* note 157. The transparency producing effects of the discovery process can also beget greater independence in the review process. If disappointed offerors have access to the same information as the agency-level protest decision-makers, they are better positioned to cry foul when the decision-makers render decisions biased in favor of their

Despite these deficiencies, the U.S. agency-level bid protest system still capably processes a great number of protests, and some agency programs have shown flashes of the system's considerable potential. Most notably, at least one agency has demonstrated a consistent ability to resolve protests in a matter of weeks (rather than the months required by the other protest fora) and at a very low cost.[187] So, too, various agencies have made significant strides in reducing the level of adversarialism in the protest process (through the use of alternative dispute resolution techniques) and in taking advantage of the "repeat player" nature of the public procurement marketplace. In this regard, the agency-level forum has provided procuring agencies and their regular suppliers a means of resolving problems without driving the potentially destructive wedge of litigation into their mutually-beneficial relationships.

B. Basis for Transferability to Developing Nations

The bottom line regarding the U.S. agency-level system is that, despite doubts about its current effectiveness, its undeniable strengths–efficiency, professionalism, and non-adversarialism–warrant the attention of any nation interested in constructing a successful national bid protest system. They are all coveted systemic characteristics, for obvious reasons. For a developing nation, however, the solutions offered by the U.S. system may well be of considerably greater value because of their practical utility in an arena of potentially debilitating constraints.

This reality plays out in several ways. First, both the procuring agencies and their suppliers in developing nations may be operating from a base of very limited resources because of existing national fiscal and economic circumstances. As such, they are in no position to absorb the direct and indirect costs inflicted by slow-moving, litigation-based bid protest systems–costs which other nations might take more or less for granted. In this setting, efficiency in resolving disputes and protests is paramount. To take it a step further, where there is no efficient protest reviewing option, procuring agencies and their suppliers may be incentivized to engage in practices that undermine the effective working of the procurement system as a whole. In other words, if existing courts and boards are taking many months to resolve protests, agencies and suppliers will look elsewhere for relief. For the procuring agencies this may mean finding ways to limit their communications with bidders in order to restrict their vulnerability to protests and the accompanying delays.[188] For

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agencies. Such "negative publicity" may then serve to encourage unbiased, independent thinking. The potential beneficial effect is amplified, of course, if disappointed offerors have recourse to appeal agency-level decisions to other protest fora.

[187] *See supra* note 170.

[188] The unintended side effect of this practice is that it discourages potential suppliers from competing for government contracts by causing them to distrust the procuring agencies.

suppliers, it may mean choosing to forego the protest process altogether even in meritorious cases in order to pursue more concrete business opportunities. The result in both cases is a breakdown in the effectiveness of the bid protest system as a viable oversight mechanism. Conversely, a fast-moving protest process, so long as it provides meaningful and enforceable results, can build great confidence in the viability of the review mechanism and bolster the entire public procurement enterprise.

Second, because it harnesses the incumbent talent and experience of procuring agency personnel to conduct protest reviews, the agency-level option has the potential to be immediately effective, particularly in nations where the number of non-agency personnel with expertise in the public procurement field is limited. Although a national bid protest system could just as well immediately steer bid protest cases to existing courts and boards, the sitting judges and board members would likely be unfamiliar with fundamental public procurement concepts.[189] As such, they would be ill-prepared to give protests meaningful consideration. The struggles encountered with the emergent Canadian bid protest system lend tangential support to this point. There the members of the national bid protest tribunal,[190] while all well-educated and capable, have very limited experience in public procurement matters. In contrast, persons internal to the procuring agencies, with their expertise and access to the procurement records, can provide supremely meaningful reviews. This benefit may carry particular value in nations where the legal system and its incumbent jurists are not regarded with great esteem.

Third, the agency-level system's non-adversarialism, which is the basis for many of its efficiencies, also carries the capability of circumventing potential supplier concerns about "taking on" their own governments in a litigation atmosphere. In nations where the concept of enforcing one's rights against the government is not ingrained as a societal value, the informal procedures of the agency-level protest system may offer the best (and possibly only) means of drawing disappointed offerors into their important oversight role.

Still, despite the great potential of the U.S. model, local suppliers (and outside observers) may have well-founded reservations about the wisdom of allowing procuring agencies essentially to police themselves. No matter how well an agency constructs its review system and how sincerely it proclaims its impartiality and fairness, if it resides in an environment characterized by corrupt practices, a lack of accountability, and weakness in the rule of law, it is bound to struggle to produce fair results–both in practice and perception. Thus,

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[189] Another option is to create specialized courts or boards to handle bid protests. The problem, however, remains: there will probably not be enough "extra" people experienced in public procurement to staff these fora.

[190] *See supra* note 45. Information regarding the CITT's members can be found at its website http://www.citt-tcce.gc.ca/about/members_e.asp (last visited Jan. 16, 2006).

developing nations would be well advised, in adopting the U.S. model, to bolster their independence and transparency in the manner of the reforms discussed in Part VII.A above.

In fact, when it comes to addressing concerns about independence, developing nations could go one step further than the proposed U.S. Congressional reforms and vest protest decision-making authority in the hands of a dedicated core of "incorruptible" procurement experts dispersed within the various procuring agencies. If a nation did not have enough experienced public procurement personnel to fill these roles, it could initially look to international organizations, universities, or other nations to lend assistance while it worked to select and train native personnel. Regardless of the chosen approach, however, insulating the reviewers from outside influences while keeping them within the procuring agencies and close enough to the procurement process to benefit from the fundamental efficiencies of the agency-level system would be a prerequisite to long-term success.[191] A developing nation could then cement this outward assurance of independence with the transparency-producing elements of a limited discovery mechanism and a requirement for publishing decisions. Both practices would serve to encourage impartial reviews and the enforcement of appropriate remedies. Finally, if these measures do not satisfy the concerns of a sufficient percentage of contractors, developing nations could implement another element of the U.S. system: make the agency-level system an alternative choice that disappointed offerors could avoid if they doubted its equity.

C. Conformity with the International Public Procurement Agreements

The final test of the U.S. agency-level option's viability as a model for developing nations arguably comes in evaluating its "fit" with the bid protest requirements of the international public procurement agreements. As discussed, although developing nations will not often be immediately eligible for membership in these agreements, membership may well be a long-term goal. Thus, the extent to which the agency-level model can move developing nations toward conformity with the pertinent agreements may be a factor in determining its ultimate acceptability. That said, developing nations might be

[191] Establishing such an arrangement could be extraordinarily difficult in some nations. Among other things, the reviewers would need to be compensated well enough to shield them from most temptations associated with corruption. They would also need to be protected from discriminatory and retaliatory employment practices both from within their agencies and from other government officials. In the U.S. system and elsewhere, civil service systems which guarantee government employees' due process rights to challenge employment actions taken against them serve this function. Regarding the U.S. bid protest systems specifically, some of the most successful agency-level programs vest protest decision-making authority in the hands of procurement attorneys who are both outside of the contracting officer's chain of command and outside of agency acquisition channels. *See* Troff; *supra* note 157, at 36.

better served by focusing their procurement development efforts on building effective systems (including bid protest systems), whatever their form, rather than on tailoring their efforts to meet the demands of the GPA and other international agreements.

As noted, the international agreements, as a general rule, give their stamp of approval to bid protest systems that are judicial in nature–meaning that they formally guarantee disappointed offerors broad due process protections. The GPA and EU Directives are quite explicit on the matter, specifically requiring that member states send bid protest cases to either courts or court-like tribunals. The EU Directives do leave some room for less formal agency-level systems; however, they require that the decisions of review bodies that are not judicial in character must be subject to appeal to tribunals that enforce court-like due process rules.[192] NAFTA is considerably less formalistic in its approach, requiring only that the reviewing authority have "no substantial interest in the outcome of procurements."[193] Thus, under NAFTA, a member state could potentially use a non-judicial protest review tribunal. However, the state would probably be hard-pressed to show that an agency reviewing its own procurement actions had "no substantial interest" in them.

Although each of the agreements considered in this article permits its member states to encourage disappointed offerors to initially bring their protests to the procuring agencies, none of them considers the agency-level bid protest forum to be a satisfactory alternative to independent, external protest fora. Accordingly, a developing nation interested in membership in these agreements will need to provide disappointed offerors with an alternative to the agency-level option. However, if a developing nation can build a successful agency-level program, it will have all of the components in place–trained/experienced protest reviewers, a foundation of respect for government impartiality, a willingness by procuring agencies to implement meaningful remedies, and an understanding of the value of efficiency–to more readily establish an alternative bid protest tribunal (whether it be administrative or judicial) that will satisfy the requirements of the international agreements. Accordingly, developing nations should not disdain the U.S. agency-level model because of its apparent incompatibility with the international public procurement agreements. Rather, they should embrace it for its flexibility and capacity to provide objective, inexpensive, and efficient solutions and to bolster mutually beneficial market relationships.

[192] *See supra* notes 123-124 and accompanying text.
[193] *See supra* note 106.

VIII. CONCLUSION

Developing nations face tremendous challenges as they struggle to establish efficient, economical, and ethical government procurement systems. While many procurement models exist, an agency-level review mechanism modeled after the U.S. system can suitably serve as a developing nation's primary forum for resolving bid protests and, at the same time, meet the demands of membership in the various international public procurement agreements. As the U.S. agency-level system continues to improve, it will also continue to offer a superb solution for developing nations.

CIVILIANS AT WAR: REEXAMINING THE STATUS OF CIVILIANS ACCOMPANYING THE ARMED FORCES

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I. INTRODUCTION

Until the last century, the infliction of violence during war was an intimately personal experience. Warriors fighting with sword and spear could not be far removed from their opponents. The advent of gunpowder and later of aircraft stretched the physical dimensions of the battlefield, but still kept combatants in close proximity to the targets of their attack.

New technologies available to states have expanded the zone of conflict while at the same time allowing personnel engaged in hostilities to be far removed from the battlefield. This remotely conducted combat may take forms such as attacking an enemy's computer networks with worms and viruses or using remotely controlled unmanned aircraft to launch missiles onto the battlefield. Utilizing these methods, combatants sitting before computer screens can launch attacks against an enemy hundreds or even thousands of miles away.

A second development in the realm of armed conflict is the widespread practice of states shifting activities previously performed by military personnel to civilian employees and contractors. States increasingly are integrating civilians into their military forces, relying on them to operate and maintain sophisticated military equipment and to support combat operations. While this practice offers substantial benefits to states, which may be able to save money and gain access to superior technical expertise, it brings with it the risk of violating the law of war by inappropriately involving civilians in combat operations.

The law of war attempts to regulate state utilization of civilians in combat operations in the course of international armed conflicts by prohibiting civilians from directly participating in combat. The policy behind this prohibition is the desire to protect civilians from being targeted for attack. The effectiveness of this prohibition has been substantially undercut, however, by the failure of the law of war to provide a clear definition of what constitutes direct participation in combat. A prohibition that may have been easy to apply with simple weapons systems operating at short range does not provide clear guidance about the legality of civilians providing essential services in support of a state's warfighting efforts. States are aware of this ambiguity and have taken advantage of it to increase civilian participation in military activities.

The intersection of states making increased use of civilians and the development of remotely conducted combat operations forms a useful lens through which to analyze the inadequacies of the law of war in regulating civilian participation in combat in international conflicts. Currently, civilians are significantly involved in maintaining and operating the technologically complex systems used in remotely conducted combat operations. Definitional ambiguities and inadequacies in law of war prohibitions against civilians directly participating in combat are accentuated when applied to civilians

situated far away from any battlefield, but who are nonetheless supporting or engaging in combat activities.

The issue of whether civilian employees and contractors may participate lawfully in combat activities and, in turn, be the subject of a lawful attack is relevant for four reasons. First, states are increasing the role civilians play in their armed forces to the point that civilians play an indispensable role in the ability of many states to use military force. Second, clear and logical guidelines concerning what combat related activities these civilians may engage in are necessary to prevent a blurring between civilians and combatants that may endanger the general civilian population. Third, civilians who do engage in combat activities in violation of the law of war may become unlawful combatants and face criminal liability for their actions. Fourth, a state using civilians in violation of the law of war will be in breach of its responsibilities under that law.

The law of war concerning civilians accompanying the armed forces needs to be changed to better protect these civilians and to maintain the general distinction between combatants and civilians unaffiliated with the military, while also acknowledging and legitimizing the fact that civilians are so integrated into many armed forces that they have become an indispensable and inseparable part of them. To accomplish these goals, the law of war should be modified in three ways: 1) direct participation in combat should be defined clearly and narrowly to enable states and individuals to determine when civilians are engaging in combat; 2) states, after complying with appropriate notification requirements, should be able to designate civilian employees as combatants for the purpose of engaging in remotely conducted combat operations, and 3) civilian contractors and employees who provide direct and essential support to combat operations should be acknowledged as legitimate targets for attack.

The proposed changes in the law of war will be explored in six sections, beginning with Section II, which discusses the range of activities involved in two primary types of remotely conducted combat operations: computer network attack and exploitation; and the use of remote-controlled vehicles.

Section III then examines provisions in the law of war relevant to civilian employees and contractors. This examination includes a discussion of how civilians and combatants are defined under the law of war and the treatment accorded civilians accompanying the armed forces. This section discusses the meaning of the prohibition on civilians taking direct part in hostilities and how ambiguity over what civilian activity falls within this prohibition undercuts its effectiveness.

Section IV provides an overview of how states currently are integrating civilian employees and contractors into their militaries and using them in combat operations. Section V then examines the extent to which civilian employees and contractors may participate in remotely conducted combat operations under the law of war.

Section VI discusses problems with how the law of war regulates civilian participation in remotely conducted combat operations. The article will conclude in Section VII by recommending changes to the law of war to better regulate the combat-related activities of civilians accompanying the armed forces.

In the course of discussing these issues, a particular, although not exclusive, focus will be placed on how the United States uses civilian employees and contractors. This emphasis reflects the fact that the United States has significant capabilities to conduct combat remotely, has engaged in several international armed conflicts in recent years, and uses large numbers of civilian employees and contractors.

II. TYPES OF REMOTELY CONDUCTED COMBAT OPERATIONS

A. The Spectrum of Computer Network Attack and Exploitation Activities

Computers are indispensable components of a modern economy and military. The benefits computers provide, however, come at a cost. The same computers that process financial transactions for a bank, monitor maintenance of military aircraft, or control the flow of natural gas through a pipeline are vulnerable to computer network attack and exploitation (CNAE) and this threat is growing.[1]

Computer network attack (CNA) involves operations that target an enemy's computer systems for the purpose of destroying, altering, or denying the systems or the information they contain.[2] Computer network exploitation (CNE) involves operations intended to obtain information from an enemy's computer systems.[3] Three characteristics of CNAE are: 1) they may be carried out from almost any location, 2) they may achieve many of the same results of conventional weapons, and 3) states have a widespread interest in developing the capacity to engage in CNAE. CNAE operations are well-suited to being conducted remotely because a targeted computer network can be attacked from any computer or other device with which it can communicate.[4] Some computer networks are connected to larger computer networks, such as the Internet, that

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[1] THE WHITE HOUSE, THE NATIONAL STRATEGY TO SECURE CYBERSPACE (2003), *available at* http://www.whitehouse.gov/pcipb/ [hereinafter NATIONAL STRATEGY].

[2] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS GL-5 (1998).

[3] *See* JOINT CHIEFS OF STAFF, JOINT INST. 6510.01D, INFORMATION ASSURANCE AND COMPUTER NETWORK DEFENSE A-2 (15 JUNE 2004) (defining CNE and its relevance to information operations).

[4] Tim Gibson, *What You Should Know About Attacking Computer Networks*, UNITED STATES NAVAL INSTITUTE: PROCEEDINGS, Jan. 2003, *available at* 2003 WL 12258933. *See also* Maria O'Daniel, *Differences in Computer Networks*, NEW STRAITS TIMES-COMPUTIMES, Oct. 21, 1999, at 41 (defining computer networks as a set of computers linked together by some means of communication such as cables or satellite links that can communicate with one another).

are accessible to the public.[5] These publicly accessible networks are susceptible to being attacked from any computer linked to the network, no matter where in the world it is located.[6] Other computer networks reside on private networks where access to publicly accessible networks is either nonexistent or controlled.[7] Private computer networks are more difficult to penetrate in a CNAE operation, but they, too, are subject to attack.[8]

After a computer network has been penetrated, the basic concept of a CNAE operation involves inserting special types of software code into it. These types of code, often referred to as malicious code because of the purposes for which they are used, include viruses,[9] worms,[10] Trojan horses, [11] logic bombs,[12] spyware,[13] and back doors.[14] Successful insertion of these codes into a computer network may allow a CNAE operator to control the network,

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[5] Gibson, *supra* note 4.

[6] *See generally Cyber Terrorism: The New Asymmetric Threat: Hearing Before the Subcomm. on Terrorism, Unconventional Threats and Capabilities of the House Comm. on the Armed Services*, 108th Cong. (2003) (statement of Richard Dacey, Director, Information Security Issues, Gen. Accounting Office), *reprinted in* U.S. GEN. ACCOUNTING OFFICE, GAO-03-1037T, INFORMATION SECURITY: FURTHER EFFORTS NEEDED TO FULLY IMPLEMENT STATUTORY REQUIREMENTS IN DOD (2003), *available at* http://www.gpoaccess.gov/aoreports/index.html (discussing how British computer administrator scanned tens of thousands of U.S. military computers from his home, eventually breaking in to almost 100 U.S. networks) [hereinafter *Dacey Cyber Terrorism Statement*]; *see also* Andrea Stone, *Cyberspace is the Next Battlefield: U.S., Foreign Forces Prepare for Conflict Unlike Any Before*, USA TODAY, June 19, 2001, at 1A (discussing how U.S. military computer networks have been penetrated on numerous occasions, including by hackers from Russia and others who at first appeared to come from the United Arab Emirates but were later traced to California).

[7] Gibson, *supra* note 4.

[8] *See id.*

[9] Viruses are pieces of software code that can be inserted into software programs. When an infected program is executed, the virus replicates itself and spreads. *Cyber Terrorism: The New Asymmetric Threat: Hearing Before the Subcomm. on Terrorism, Unconventional Threats and Capabilities of the House Comm. on the Armed Services,* 108th Cong. (2003) (statement of Eugene H. Spafford, Professor and Director, Center for Education and Research and Information Assurance and Security, Perdue University), *available at* http://www.house.gov/hasc/schedules/2003.html#jul03 (last visited Jan. 10, 2006) [hereinafter *Spafford Cyber Terrorism Statement*].

[10] Worms are software programs that contain some similarities to viruses. Worms can run independently and can travel throughout a network. Worms may change other programs or contain other software code, such as a virus, that does. *Id*.

[11] Trojan horses are software programs that conceal their true function behind the guise of a benign one. A trojan horse program may appear as a game available for download. While the user plays the game, the trojan horse sets about performing its true purpose, destroying or altering information on the user's computer system. *Id.*

[12] Logic bombs are software code contained in programs that activate when predetermined triggering conditions are met. The bombs are typically created when the software is being developed. When triggered, the logic bomb may cause the system to stop or may damage or destroy data within it. *Spafford Cyber Terrorism Statement*, *supra* note 9.

[13] Spyware software can monitor activity on a computer and then send that information to a desired location. *Id.*

[14] Back doors are shortcuts written into software programs allowing entry into the program without following normal authentication requirements. *Id*.

damage it, retrieve information from or place false information into it, or to shut it down.[15] The effects of an attack, and the choice of which CNAE tools to use, depend on the purpose served by the targeted computer network.[16]

There are two types of computer networks: information systems and infrastructure control systems.[17] Information systems process information but do not control anything tangible other than themselves.[18] These systems may contain documents, databases, and other types of information, and include the numerous local area networks operated by governments, businesses, and other organizations to help them transact their affairs.[19] Successful attacks against information systems do not cause direct physical damage, but may still cause significant harm.[20] Examples of the type of damage such attacks can cause are provided by viruses and worms that have spread through the Internet. In 2000, a single worm, known as the "ILOVEYOU" worm, spread to more than 500,000 computer systems in one day and caused an estimated ten billion dollars in damage.[21] Multiple other incidents involving worms and viruses have each caused a billion dollars or more in damages.[22] Even unsuccessful attacks may have a significant impact because computer network users may be reluctant to rely on the network for fear it may have been corrupted.[23]

The second type of computer network, infrastructure control systems, interacts with and controls tangible equipment.[24] The most common type of this system is the supervisory control and acquisition (SCADA) system.[25] These systems are used to control transportation, water, power, and manufacturing facilities throughout the world.[26] SCADA systems monitor data and operations at the facility they control and send instructions to equipment.[27] SCADA systems represent an attractive military target because important

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[15] *See id.;* Gibson, *supra* note 4.
[16] *See* Gibson, *supra* note 4.
[17] *Id*.
[18] Gibson, *supra* note 4.
[19] *Id*.
[20] *Dacey Cyber Terrorism Statement*, *supra* note 6 (discussing how one worm, the SQL Slammer worm, infected ninety percent of all vulnerable computers in the world in ten minutes and caused network outages, resulting in canceled airline flights and ATM outages). *See also* Gibson, *supra* note 4 (indicating how such attacks could include transferring money out of domestic banks to accounts abroad).
[21] *Spafford Cyber Terrorism Statement, supra* note 9.
[22] *Id. (*discussing the Code Red and Nimda worms, which caused several billion dollars in damage in 2001, and the Sapphire/Slammer worms, which caused over a billion dollars in damage in 2003).
[23] David A. Fulghum & Douglas Barrie, *Cracks in the Net*, AVIATION WK & SPACE TECH., June 30, 2003, at 52 (discussing growing concern that small, precise attacks on military computer networks, even if unsuccessful, may make military leaders unsure whether the data within them is false or corrupted, meaning they would be unable to rely on the information during potentially crucial moments of a military operation).
[24] Gibson, *supra* note 4.
[25] *Id.*
[26] *Id.*
[27] Gibson, *supra* note 4.

industrial infrastructure supporting military operations may be damaged without the use of physical weapons.[28] At least one documented attack on a SCADA system, albeit by a private individual, has occurred. In this attack, the SCADA system of a sewage treatment plant in Australia was penetrated on multiple occasions for the purpose of releasing raw sewage into nearby parks and rivers.[29]

States' ability to engage in CNAE is not just theoretical. While the exact details are intentionally kept secret, the United States possesses both the capability and strategy for using CNAE.[30] The United States is believed to have used some form of CNA in Iraq[31] and to have considered its use in the Balkans.[32] China may have used CNA against Taiwan[33] and during the first Gulf War a group of Dutch hackers apparently offered to sell Iraq information that had been retrieved from Department of Defense computer systems.[34]

CNAE is establishing itself as an important tool in military arsenals throughout the world. As many as a hundred states are pursuing CNAE capabilities, attracted by the many advantages offered by this type of combat.[35] CNAE can be developed at a relatively low cost, can inflict significant damage,

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[28] *Id*. *See also Dacey Cyber Terrorism Statement, supra* note 6 (noting the types of potentially vulnerable infrastructure systems that may be the subject of CNA attack, including power grids, gas and oil distribution pipelines, water treatment and distribution systems, hydroelectric and flood control dams, oil and chemical refineries).

[29] Gibson, *supra* note 4. The attacker in this case was a technician who had helped install the wireless system controlling valves at the sewage plant. He subsequently used a two-way radio, a laptop computer, and some telemetry equipment to access this wireless SCADA system and, on more than forty occasions, cause the release of raw sewage by opening and closing valves. *See id*.; *see also* Tony Wilson, *Cybercrimes the New Foe*, GOLD COAST BULLETIN (Australia), Oct. 25, 2002, at 14.

[30] *See* Bradley Graham, *Bush Orders Guidelines for Cyber-Warfare; Rules for Attacking Enemy Computers Prepared as U.S. Weighs Iraq Options*, WASH. POST, Feb. 7, 2003, at A1. The United States is maintaining even more secrecy over its arsenal of CNA and other cyberweapons than with its nuclear capabilities. *Id*. *See also* David A. Fulghum, *Network-Centric Warfare*, AVIATION WK & SPACE TECH., Oct. 25, 2004, at 90; David A. Fulghum et al., *Black Surprises*, AVIATION WK & SPACE TECH., Feb. 14, 2005, at 68 (discussing several CNAE programs and planned uses for them).

[31] Dawn S. Olney, *U.S. Aims to Make War on Iraq's Networks*, GOV'T COMPUTER NEWS, Feb. 24, 2003, *available at* 2003 WL 10986759 (quoting U.S. intelligence official stating information operations against Iraq had commenced). *See also Cyber War Bombardment Begins*, AUSTRALIAN, Mar. 20, 2003, at 25 (indicating likelihood U.S. forces have been planting viruses and corrupting databases in Iraqi computer networks).

[32] Stone, *supra* note 6, at 1A (discussing how the United States considered taking money from Serbian leader Slobodan Milosevic's bank accounts).

[33] *UPI Hears . . .*, UPI, Nov. 4, 2003, LEXIS, Nexis Library, UPI File (discussing how China may have used twenty or more Trojan Horse programs to attack computer networks in Taiwan).

[34] Josh Martin, *Virtually Helpless*, VILLAGE VOICE, Sep. 17, 2002, at 46.

[35] *Protecting America's Critical Infrastructures: How Secure Are Government Computer Systems? Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 107th Cong. (2001) (statement of Ms. Sallie McDonald, Assistant Commissioner, Office of Information Assurance and Critical Infrastructure: U.S. General Services Administration), *available at* http://energycommerce.house.gov/107/Hearings/04052001hearing153/McDonald229.htm.

can be engaged in anonymously, and may reduce physical damage and casualties in a conflict.[36] As long as the economic health and security of modern states fully depend on computer networks, this interest in CNAE is unlikely to wane.[37]

B. Unmanned Vehicles

Unmanned vehicles currently in use or in the process of being developed will be in the air, on the ground, and in and under water, making future battlefields as much the domain of machines as men. A future conflict could start with military technicians in a facility within their state thousands of miles away from the site of combat operating unmanned aerial vehicles (UAVs) as they fly over an enemy's territory. There they attack anti-aircraft systems with missiles and launch CNA attacks against wireless SCADA systems to shut down power plants and disrupt rail traffic. A naval task force then approaches the enemy's coast, using unmanned underwater vessels (UUVs) to destroy mines and find a safe passage for an amphibious landing. After a landing is made and a beachhead secured, armed unmanned ground vehicles (UGVs) carry supplies and ammunition toward a target of attack, an enemy city a hundred miles away, saving task force soldiers from facing the danger of traveling in a convoy for several days through hostile territory. Once the UGVs arrive at their destination, the soldiers will be ferried to this location by helicopter, where they will take ammunition and supplies from the UGVs and commence to attack their target.

The idea of unmanned vehicles on, or above, the battlefield, can be dated back to at least World War I, when the United States built a UAV that could be launched from a track to fly over enemy lines.[38] This first UAV, which never saw combat service, could not be controlled from the ground; rather, it contained a device engineered to stop the flow of gasoline to the engine after the propeller had made a predetermined number of revolutions, at

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[36] *See* Stone, *supra* note 6, at 1A.

[37] *See generally* NATIONAL STRATEGY, *supra* note 1. This publication indicates the utter reliance the United States places on computer networks.

> By 2003, our economy and national security became fully dependent upon information technology and the information infrastructure. A network of networks directly supports the operation of all sectors of our economy—energy (electric power, oil and gas), transportation (rail, air, merchant marine), finance and banking, information and telecommunications, public health, emergency services, water, chemical, defense industrial base, food, agriculture, and postal and shipping. The reach of these computer networks exceeds the bounds of cyberspace. They also control physical objects such as electrical transformers, trains, pipeline pumps, chemical vats, and radars.

Id. at 6.

[38] John DeGaspari, *Look, Ma, No Pilot*, MECHANICAL ENGINEERING, Nov. 2003, *available at* http://www.memagazine.org/backissues/nov03/features/lookma/lookma.html.

which time the UAV would fall to the ground and explode.[39] By the Vietnam War, technology had progressed to the point where UAVs could be used for reconnaissance work, and UAVs flew more than 3500 sorties during the war, although technological limitations hampered their effectiveness.[40]

Developments such as the creation of the Global Positioning System and improvements in information transmission made UAVs more attractive in the 1990s. UAVs could now handle more complicated intelligence and reconnaissance missions and be controlled with greater precision over greater distances.[41] The United States has spent billions of dollars on UAVs and now has about 250 UAVs in its inventory, a number that may increase to 1400 by 2015.[42] These UAVs, including the Global Hawk and the Predator, have been used in reconnaissance and intelligence missions in conflicts ranging from the Balkans to Afghanistan and Iraq.[43] The Predator has been modified to carry missiles and has used them in Yemen, Afghanistan, and Iraq.[44]

While several UAVs are in current use, more than sixty separate UAV programs are under development.[45] These programs include two UAVs being designed by the Air Force and Navy for combat bombing missions.[46] The Army and the Marines are each developing unmanned helicopters for carrying

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[39] *Id*.

[40] Matthew Brzezinski, *The Unmanned Army*, N.Y. TIMES, Apr. 20, 2003, at 38. *See also* DeGaspari, *supra* note 38. The UAVs used in Vietnam suffered from at least two serious technological problems: they were difficult to navigate from the ground and they did not provide real-time information because they typically carried cameras which could only be examined upon completion of a mission. *Id*.

[41] Michael Kilian, *Unmanned Planes Show Mixed Results; Craft Can Be Balky, Easy to Shoot Down*, CHI. TRIB., Mar. 2, 2003, at C4. The Predator UAV has a range of 500 miles and can be controlled through a satellite link. *Id*. The Global Hawk has a range of over 5000 miles. *See Testimony Before the Subcomm. on Tactical Air and Land Forces of the House Comm. on the Armed Services*, 108th Cong. (2003) (statement of Dyke Weatherington, UAV Planning Task Force, Defense Systems, Air Warfare, Office of the Secretary of Defense), *available at* http://armedservices.house. gov/schedules/2003.html#mar03.

[42] David A. Fulghum, *Unmanned Unknowns*, AVIATION WK & SPACE TECH., Aug. 15, 2005, at 18.

[43] Kilian, *supra* note 41. *See also Bale Out Flyer, Your Days are Numbered*, MERCURY (Australia), Dec. 4, 2003. The United States alone used ten separate UAV systems during the 2003 war in Iraq. *See Testimony Before the Subcomm. on Tactical Air and Land Forces of the House Comm. on the Armed Services*, 108th Cong. (2004) (statement of Dr. Glen Lamartin, Director, Defense Systems, Office of the Secretary of Defense), *available at* http://armedservices.house.gov/openingstatementsandpressreleases/108thcongress/04-03-17lamartin.html (providing general overview of the state of U.S. UAV programs).

[44] *See* Brzezinski, *supra* note 40 (discussing Predators firing missiles at a convoy in Afghanistan and anti-aircraft batteries in Iraq); *see also* Kilian, *supra* note 41 (discussing Predator being used to kill six Al-Qaeda terrorists in Yemen).

[45] Justin Ewers, *2003: The Next Frontier*, U.S. NEWS & WORLD REPORT, July 21, 2003, at 45. For a general overview of current and planned UAV activities by the Department of Defense, see OFFICE OF THE SECRETARY OF DEFENSE, UNMANNED AIRCRAFT SYSTEMS ROADMAP 2005-2030 (2005), *available at* http://www.acq.osd.mil/uas/ (last visited Jan. 15, 2006).

[46] Brzezinski, *supra* note 40.

supplies and combat missions. A UAV is even being developed to engage in computer network attack.[47]

Unmanned ground vehicles and naval vessels are also under development. The Department of Defense and Congress have established a goal of having one third of the Army's operational ground combat vehicles being unmanned by 2015 and are prepared to spend billions of dollars to achieve it.[48] Two Army programs involving unmanned ground combat vehicles include the Stryker combat vehicle and the Future Combat System (FCS). The Stryker combat vehicle, which may become the focal point for the Army to reorganize around, will be produced in manned and unmanned versions.[49] The unmanned version will contain an autonomous navigation system and be connected to a command center that can control the vehicle if it encounters problems.[50] The FCS is the Army's top procurement priority.[51] The FCS involves creating at least three UGVs that between them will carry supplies, perform surveillance and intelligence missions, and engage in combat.[52] The Marines are developing UGVs to perform similar missions.[53] While UGVs are primarily still in the development stage, they have received limited use from United States forces in Afghanistan and Iraq.[54]

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[47] *War From 60,000 Feet*, AVIATION WK & SPACE TECH., Sep. 8, 2003, *available at* 2003 WL 63473518. UAVs could be used when line-of-sight access is needed to penetrate computer networks through a microwave antenna or air defense radar. *Id*.

[48] *See* Lane Harvey Brown, *Tireless Workers for Dangerous Jobs; Robotics Making Strides On and Off the Battlefield*, RECORD, Feb. 10, 2004, at Z13 (discussing the Department of Defense's goal and how DoD has already spent 27.6 billion dollars for researching, developing, and demonstrating unmanned technologies); *see also* Mike Toner, *Robots Far From Leading the Fight; Machines with Smarts Needed on Front Lines*, ATLANTA J.-CONST., Mar. 14, 2004, at 3B (discussing the goal set by Congress and how the Army is planning on spending almost fourteen billion dollars over the next five years on robotic and related systems).

[49] *See* Frank Oliveri, *At Enormous Cost, the New Look Army will be Bullet-proof and Remote Controlled*, GOLD COAST BULL. (Australia), Mar. 13, 2004. S*ee also* Andrea Shalal-Esar & Justin Pope, *Military Technology; War Without Death*, ADVERTISER (Australia), Feb. 8, 2003, at 29.

[50] Brown, *supra* note 48.

[51] Darrell Hassler & Tony Capaccio, *GAO Hoists Red Flag Over Costly Boeing Army Project*, SEATTLE TIMES, Apr. 2, 2004, at E1. Production of the FCS will cost an estimated ninety-two billion dollars by 2020, making it the second largest ongoing military procurement. *Id.*

[52] Roxana Tiron, *Lack of Autonomy Hampering Progress of Battlefield Robots*, NAT'L DEF., May 1, 2003, at 33. These three unmanned vehicles are: the Multifunctional Utility Logistics Equipment, a 2.5 ton reconnaissance and transport/supply vehicle; the Armed Reconnaissance Vehicle, a six-ton vehicle armed with missiles and a gun; and the Soldier Unmanned Ground Vehicle for reconnaissance and surveillance. *Id.* For information about the FCS, see the Defense Advanced Research Projects Agency website *at* http://www.darpa.mil/tto/PROGRAMS/fcs.html.

[53] Toner, *supra* note 48. The Marines are developing a small thirteen pound robot called the Dragon Runner to perform surveillance missions and a larger vehicle named the Gladiator that could be armed and used for scouting and identifying targets. *See id*.; Byron Spice, *Marines Seeking a Few Good Robots*, SCRIPPS-HOWARD NEWS SERVICE, May 29, 2003, *available at* LEXIS, News Library, SCHWRD File.

[54] *One of Their Own Robots Blown Up-They're Thrilled*, CANBERRA TIMES, Apr. 19, 2004, at A13. Fifty to one hundred PackBots are being used in Iraq and Afghanistan for tasks such as battlefield reconnaissance and handling explosives. *See also Unmanned Vehicle Soon Will*

Unmanned surface and subsurface vessels are planned as well. The Navy has developed and deployed for testing the Spartan, a fast armed boat with a range of up to a thousand miles that would be armed with missiles.[55] Underwater unmanned vehicles are more difficult to develop because of the technical challenges presented when operating underwater, but they do exist.[56] A UUV was used in Iraq to look for mines in the port at Um Qasar.[57] Other UUVs are being developed to engage in intelligence and demining operations and future Navy ships are being designed to carry them.[58]

This interest in unmanned vehicles is not limited to the United States. Countries such as Russia,[59] China,[60] France,[61] Israel,[62] Australia,[63] the United Kingdom,[64] and India[65] have established or are developing their own

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Deploy to War Zone, ARMY TIMES, Sept. 19, 2005, at 40 (discussing car-sized amphibious UGV being sent to Iraq to perform perimeter security and surveillance missions).

[55] *See Fiscal 2005 Budget: Terrorism Defense Plans: Hearing Before the Subcomm. on Terrorism, Unconventional Threats and Capabilities of the House Comm. on the Armed Services,* 108th Cong. (2004) (testimony of Rear Admiral Jay M. Cohen, U.S. Navy, Chief of Naval Research) (noting that a Spartan USV is currently deployed to the Middle East), *available at* http://armedservices.house.gov/openingstatementsandpressreleases/108thcongress/04-03-25cohen.html (last visited Jan. 20, 2006); Roxana Tiron, *High-speed Unmanned Craft Eyed for Surveillance Role; Under Development for Navy*, NAT'L DEF., May 1, 2002, at 27 (discussing range, payload, and potential missions of Spartan).

[56] *Fiscal Year 2005 Budget Request for Navy Research and Development, Transformation and Future Navy Capabilities: Hearing Before the Subcomm. on Projection Forces of the House Comm. on the Armed Services* 108th Cong. (2004) (testimony of Rear Admiral Jay Cohen, Chief, Naval Research), *available at* http://armedservices.house.gov/openingstatementsandpressreleases/108thcongress/04-03-11young.html (last visited Jan. 20, 2006).

[57] *Id*.

[58] Robert Little, *Expanding Missions for Military's Drones*, BALTIMORE SUN, Feb. 2., 2003, at 1D. *See* J.R. Wilson, *Virginia-class Submarines Usher in a New Era in Undersea Electronics*, MIL. & AEROSPACE ELECTRONICS, Jan. 1, 2004 (noting new Virginia-class submarines have a communications system designed to communicate with UUVs); *see also* E. R. Hooten, *Security to 100 Atmospheres*, ARMADA INT'L, Aug. 1, 2005, at 80 (discussing UUV and USV programs in the U.S. Navy and worldwide).

[59] Nikolai Khorunzhii, *The Skat Took Off and Hovered Over the Enemy*, IZVESTIA (Moscow), Apr. 7, 2004, at 6 (providing overview of extensive Soviet and Russian use of UAVs).

[60] Linda de France, *China Believed Progressing Toward UCAV Development*, AEROSPACE DAILY, Dec. 12, 2000, at 397.

[61] Christina Mackenzie, *French UAV Shares Airspace with Airbus*, FLIGHT INT'L, Dec. 16, 2003, at 22 (indicating France has completed development of its second-generation UAV).

[62] Hilary Leila Krieger, *The Creation Story*, JERUSALEM POST, Jul. 11, 2003, at 12. Israel has developed its own UAVs and sold them, in turn, to at least twenty-six countries. *Id*.

[63] *See* Ben Woodhead, *Underwater Vehicles on a Virtual Battlefield*, AUSTRALIAN FIN. REV., Feb. 6, 2004, at 16 (discussing development of UUVs by Australian Defence Force). S*ee also* John Kerin, *Pilotless Spy Planes Prove Their Worth*, AUSTRALIAN, June 20, 2003, at 26 (indicating expectation Australia will buy a range of UAVs).

[64] John Fricker, *MOD Shortlists NG, Thales for Watchkeeper UAV Program*, AEROSPACE DAILY, Feb. 10, 2003, at 3 (discussing 1.3 billion dollar UAV program). *See also* Rich Tuttle, *'Robust' Approach to Watchkeeper Backed by Parliament Committee*, AEROSPACE DAILY, Mar. 18, 2004, at 4. During the 2003 Iraq conflict, the British deployed eighty-nine Phoenix UAVs, twenty-three of which were destroyed during the course of flying 138 missions. *Id.*

[65] Bulbul Singh, *India to Produce Israeli UAVs*, AEROSPACE DAILY, Jan. 15, 2004, at 4. India has deployed 150 UAVs and wants to acquire in excess of 250 more. *Id*.

capabilities in unmanned vehicles. Almost half of all states possess at least one of the more than 500 UAV systems that have been developed to date, and at least forty-three of those states can manufacture a UAV.[66] These UAVs have been employed for decades, with two examples including Israel using UAVs to help destroy Syrian artillery in Lebanon in 1982[67] and Pakistan sending Chinese-made UAVs into India to perform reconnaissance in 2002.[68]

Several factors drive this interest in unmanned vehicles. They can reduce casualties, be less expensive to build and operate than manned vehicles, and offer capabilities manned vehicles do not possess. Unmanned vehicles can reduce casualties by replacing manned systems performing hazardous combat related duties such as attacking anti-aircraft batteries, destroying mines, and resupplying troops in the field. When an unmanned vehicle is destroyed, the only damage is to equipment, a factor casualty-averse states find attractive.[69]

Unmanned vehicles are less expensive to build and operate than their manned counterparts because they do not need to provide space, protection, or life support for a crew.[70] In addition to the initial savings when making unmanned vehicles, training and maintenance costs may also be lowered. The X-45 UCAV bomber illustrates the potential for savings. Each X-45 will cost from 15 to 20 million dollars, one-third to one-half of what a new manned combat aircraft costs.[71] The X-45 can be stored for up to twenty years in its own climate controlled facility, reducing the need for maintenance.[72] The expense of training pilots, which includes pilots continuously needing to fly training missions to keep their skills intact, can also be avoided.[73] Manpower costs can be reduced even further because one operator can simultaneously control up to four X-45s.[74]

Finally, unmanned vehicles can offer superior performance because they are not subject to limitations imposed by the presence of a crew. Unmanned vehicles can engage in long missions without concern about fatigue

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[66] J.R. Wilson, *UAV Worldwide Roundup--2005*, AEROSPACE AMERICA, Sept. 2005, at 26. *See also Nonproliferation: Assessing Missile Technology Export Controls: Hearing Before the Subcomm. on Nat'l Security, Emerging Threats, and Int'l Relations of the House Gov't Reform Comm.*, 108th Cong. (2004) (testimony of Lieutenant General Tome Walters, Jr., Def. Security Cooperation Agency) (noting widespread use of UAVs throughout the world).

[67] U.S. GEN. ACCOUNTING OFFICE, GAO-04-342, IMPROVED STRATEGIC PLANNING CAN ENHANCE DOD'S UNMANNED AERIAL VEHICLES EFFORTS 4 (2004), *available at* http://www.gpoaaccess.gov/gaoreports/index.html (last visited Jan. 23, 2006).

[68] *Govt Clears Induction of LLTRs to Screen Air Intrusions*, PRESS TRUST OF INDIA, Dec. 8, 2002, LEXIS, Nexis Library, PTI File.

[69] *See* Shalal-Esar & Pope, *supra* note 49; Brown, *supra* note 48; Brzezinski, *supra* note 40.

[70] Brzezinski, *supra* note 40. *See also* David A. Fulghum & Robert Wall, *Small, Fast, Cheap*, AVIATION WK. & SPACE TECH., Feb. 16, 2004, at 24 (discussing cost benefits driving Israeli and Indian forces to greater use of UAVs).

[71] Brzezinski, *supra* note 40.

[72] *Id*.

[73] *Id*. This savings may not be universal, however; in a few countries, such as Russia, pilot training may be relatively inexpensive. *See* Khorunzhii, *supra* note 59.

[74] Brzezinski, *supra* note 40.

and engage in maneuvers such as rapid acceleration that are beyond the tolerance of a human.[75]

III. THE TREATMENT OF CIVILIAN EMPLOYEES AND CONTRACTORS UNDER THE LAW OF WAR

A. The Divisions Amongst Combatants, Noncombatants, and Civilians

The modern battlefield presents a taxonomic challenge. Combatants, unlawful combatants, noncombatants, civilians accompanying the armed forces, and civilians from the general population may all be present and all are treated differently under the law of war. Understanding the meaning of these terms makes it possible to understand the status of civilian contractors and employees under the law of war.

1. *Combatants Defined*

Under the modern conception of the law of war, almost everyone involved in an international armed conflict is classified as having either of two primary statuses: combatant or civilian.[76] Combatants are entitled to participate directly in hostilities while civilians cannot.[77] Beyond this fundamental distinction, different protections and responsibilities belong to the members of each category.[78]

While war has been a constant presence in human history, the notion of separating out combatants from civilians is of surprisingly recent vintage. Soldiers and sailors existed before the nineteenth century, but not until then did scholars begin to write about combatants as the class of people entitled to take part in combat.[79]

The first international effort at forming a definition of combatant occurred in the Brussels Conference of 1874.[80] This definition was adapted with modifications during the Hague Peace Conferences of 1899 and 1907 and

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[75] *Id. See also* Kilian, *supra* note 41.

[76] Knut Ipsen, *Combatants and Non-Combatants, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 65 (Dieter Fleck ed., 1995). There is a third primary status for medical and religious personnel. *Id*. at 69.

[77] *See* 1977 Geneva Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, arts. 43 and 51, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. *See also* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996).

[78] *See generally* Ipsen, *supra* note 76.

[79] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 104-5 (2nd ed. 2000).

[80] *Id*. *See also* D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICT 22-34 (1988) (reprinting the provisions adopted by the Brussels Conference). The Brussels Conference articles are also available at http://www.icrc.org/ihl.nsf/WebFULL?OpenView.

codified in the Hague Convention Respecting the Laws and Customs of War on Land (Hague Convention).[81]

The Hague Convention provides a two-part test for determining combatant status.[82] The first part requires a combatant to be part of the armed forces or of a militia or volunteer corps. Such a requirement reflects the fact that a state involved in an armed conflict acts through its armed forces however categorized.[83]

The second part of the test contains four criteria that must be met to achieve combatant status. Potential combatants must: 1) be commanded by a person responsible for his subordinates; 2) have a fixed distinctive emblem recognizable at a distance; 3) carry arms openly; and 4) conduct their operations in accordance with the laws and customs of war.[84] The Hague Convention also provides that a state's armed forces may consist of combatants and noncombatants.[85]

Over forty years passed before the coming into force of the next significant treaty dealing with combatants—the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III).[86] This treaty, one of a series of four treaties concerning the law of war drafted under the auspices of the International Committee of the Red Cross, was signed in Geneva in 1949.[87] Geneva Convention III, as may be surmised from the title, deals with the protection to be afforded prisoners of war (POWs). Because POWs are, in most circumstances, simply combatants who fall into the hands of the enemy, the definition of who is entitled to POW status is all but synonymous with who is a combatant.[88] Geneva Convention III adopted the Hague Convention definition of combatant with very little change.[89]

By the 1970s, enough states felt the need to update the 1949 Geneva Conventions that they met in a conference, which resulted in the adoption of two protocols, the first of which was Protocol I Additional to the Geneva Convention of 1949 (Protocol I).[90] Protocol I supplements and updates the 1949 Geneva Conventions.[91] Protocol I has been ratified by over 160 states[92]

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[81] *Id*. *See also* The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention IV].
[82] Annex to Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Annex to Hague Convention IV].
[83] Ipsen, *supra* note 76, at 71.
[84] Annex to Hague Convention IV, *supra* note 82, art. 1.
[85] *Id*. art. 3.
[86] 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 Geneva Convention III].
[87] W. Hays Park, *Air War and the Law of War*, 32 A.F. L. REV. 1, 55-57 (1990).
[88] Ipsen, *supra* note 76, at 81.
[89] *See* Geneva Convention III, *supra* note 86, art. 4(A)(2).
[90] *See* GREEN, *supra* note 79, at 50.
[91] *See generally* Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949, in* THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL LAW 3-20 (Helen Durham & Timothy L.H. McCormack eds., 1999).

and much of Protocol I is considered a codification of existing international law.[93]

Two aspects of the definition of "combatant" in Protocol I have provoked debate. First, members of national liberation movements can qualify for combatant status. Second, in some circumstances Protocol I appears to blur the distinction between civilian and combatant status. Analyzing these issues begins with the definition of combatant in Protocol I:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.[94]

The impetus for this expansion was the interest of many Third World countries in having the legitimacy of armed conflict with colonial powers recognized.[95] This definition does broadly extend eligibility for combatant status to nonstate parties, to include liberation movements, and has, accordingly, been controversial.[96] A particular concern has been that this article offers protection to terrorist groups.[97] The better argument, however, supports the conclusion that terrorists are not entitled to combatant status because the traditional criteria required for combatant status spelled out in Geneva Convention III still apply.[98] As one commentator has stated,

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[92] The International Committee of the Red Cross maintains a list of countries that have ratified Protocol I. One hundred and sixty-two countries had ratified Protocol I as of May 7, 2004. An additional five states, including the United States, have signed but not ratified it. This list is available at http://www.icrc.org/ ihl.nsf/WebNORM?OpenView (last visited Jan. 26, 2006).

[93] *See* GREEN, *supra* note 79, at 51 (discussing how the Institute of International Law prepared a resolution that embodied what the Institute considered to be customary international law and significantly influenced the terms of Protocol I); INGRID DETTER, THE LAW OF WAR 143 (2nd ed. 2000) (arguing that states that have not ratified Protocol I may be bound by the many parts of it that reflect existing law).

[94] Protocol I, *supra* note 77, art. 43(1).

[95] Greenwood, *supra* note 91, at 6.

[96] *See* Abraham D. Sofaer, *AGORA: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*, 82 AM. J. INT'L L. 784, 785-86 (1988) (discussing U.S. concerns over granting irregulars the status of combatants). *See also* Greenwood, *supra* note 91, at 16-18.

[97] *See* Sofaer, *supra* note 96, at 785-86; Douglas J. Feith, *Law in the Service of Terror*, 1 NAT'L INTEREST 36 (1985).

[98] Hans-Peter Gasser, *The U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 918-23 (1987). Gasser argues terrorists are not protected because they must belong to the armed forces, which, in turn, must comply with the laws of war or lose their status under Article 43 of Protocol I. *Id.*

"Protocol I does not really reduce the four conditions in the Geneva Conventions but rephrases them."[99] Protocol I, therefore, requires adherence to the law of war for combatant status, which means terrorists will not qualify as combatants.[100]

The second contested issue concerning combatant status involves Article 44 of Protocol I, which appears to allow combatants to switch back and forth between civilian and combatant status. Article 44 states:

> [C]ombatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[101]

The language in this article suggests that combatants can carry concealed weapons while wearing civilian clothes, only brandishing their weapons as they carry out an attack. As a result, concern has been expressed that this article endangers civilians by breaking down the distinction between civilians and combatants.[102] The more logical interpretation of Article 44, however, is that it is meant to be narrowly construed.[103] The requirements from Article 43 of Protocol I must still be met and weapons must be carried openly well before any attack begins.[104]

Even after the advent of Protocol I, the definition of a combatant today is still almost completely derived from the definition of a combatant in the Hague Convention from 1907. The definition of a combatant has changed little in the last hundred years, despite the significant changes in the manner in which warfare is conducted.

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[99] DETTER, *supra* note 93, at 142.
[100] *See* Gasser, *supra* note 98, at 918-23.
[101] Protocol I, *supra* note 77, art. 44(3).
[102] *See* Sofaer, *supra* note 96.
[103] *See* Greenwood, *supra* note 91, at 17-18. The official commentary to Article 44 makes clear that the criteria for POW (and hence combatant) status are still retained. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 522 (Y. Sandoz et. al eds., 1957) [hereinafter PROTOCOL I COMMENTARY].
[104] Gasser, *supra* note 98, at 920 (indicating the generally accepted rule appears to be that weapons should be carried openly once a combatant makes any movement toward a place from where an attack is to be launched).

Two aspects of combatant status are of particular importance. First, combatants are authorized to take direct part in hostilities.[105] Second, as has been alluded to, combatants are entitled to prisoner of war status if captured.[106] POWs receive a variety of protections, but one of particular relevance is that POWs may not be punished for taking part in hostilities as long as the requirements of the law of war have been met.[107] Unlawful combatants, who are people who do not have combatant status but take direct part in hostilities, receive no such protection and may be criminally prosecuted for their actions.[108]

There are at least three situations where civilians can be considered lawful combatants: the levee en masse, police agencies incorporated into the armed forces, and as commanders. The levee en masse consists of a spontaneous uprising against an enemy before a territory is occupied.[109] As long as the participants in the levee en masse obey the law of war and have not had time to organize themselves into a militia, they are entitled to combatant and, if captured, POW status.[110]

Civilian paramilitary and law enforcement agencies may be incorporated into the armed forces and receive combatant status upon notice to the other parties to the conflict.[111] The mechanism for making this notification is by submitting written notice to the government of Switzerland.[112]

Finally, the Commentary to Geneva Convention III indicates civilians may lawfully lead partisan combat units.[113] Presumably, these leaders would then be entitled to the same combatant status as the partisans they lead.

2. *Noncombatants Defined*

"Noncombatant" and "civilian" are terms that may be used interchangeably in common parlance, but under the law of war they have distinct meanings. Noncombatants are members of the armed forces[114] who have primary status as combatants, not civilians, but do not take part in

[105] Protocol I, *supra* note 77, art. 43(2). *See also* Ipsen, *supra* note 76, at 67.
[106] *See* Geneva Convention III, *supra* note 86, art. 4(A).
[107] Ipsen, *supra* note 76, at 68 (discussing how POWs cannot be punished for the 'mere fact of fighting' although they are still liable for criminal acts they commit outside the scope of their protected combat activities).
[108] *Id*.
[109] *See* Geneva Convention III, *supra* note 86, art. 4(A)(6).
[110] Ipsen, *supra* note 76, at 79.
[111] Protocol I, *supra* note 77, art. 43(3).
[112] *See* PROTOCOL I COMMENTARY, *supra* note 103, at 517, 1113 (discussing how notice can be made through the depositary, the Swiss government).
[113] INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 59 (Jean de Preux ed., 1960) [hereinafter GENEVA CONVENTION III COMMENTARY].
[114] Annex to the Hague Convention IV, *supra* note 82, art. 3.

hostilities because their own state prohibits them from doing so.[115] Since noncombatant status derives only from the decision of their state, not the requirements of the law of war, noncombatants are, in fact, treated as combatants under the law of war.[116] They may be targeted as combatants and noncombatants may take part in hostilities without becoming unlawful combatants.[117] If captured, noncombatants are entitled to POW status.[118]

Medical and religious personnel may be referred to as noncombatants but that misconstrues their actual status because they do not have primary status as combatants. They have primary status as medical and religious personnel.[119] While noncombatants do not fight because of the domestic decision of their state, the law of war prohibits medical and religious personnel from engaging in combat. [120]

3. *Civilians Defined*

Protocol I defines civilians as those persons who are not part of the armed forces.[121] When there is ambiguity over whether someone is a combatant or civilian, they should be considered a civilian.[122] This definition of civilian includes civilians who accompany the armed forces.[123] Simply

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[115] Ipsen, *supra* note 76, at 84. Ipsen offers, as historical examples of such noncombatants, quartermasters and members of legal services. *Id*. at 82.

[116] *Id*. at 84.

[117] *Id*. at 85, 90-91. *See also* PROTOCOL I COMMENTARY, *supra* note 103, at 515.

[118] Ipsen, *supra* note 76, at 84. A good example of how the distinction between noncombatants and civilians can become blurred is the civilian air reserve technician program used by the U.S. Air Force. An air reserve technician (ART) is a civilian employee who is a member of the Air Force Reserves or Air National Guard. ARTS typically maintain and operate military aircraft. The ART must, in many circumstances, wear his military uniform even when reporting to work in civilian status. Any observer seeing uniformed ART personnel working on military aircraft would logically assume they are combatants, although they are actually civilians under the law of war who may not engage in combat until converted to active duty status. *See* U.S DEP'T OF AIR FORCE, INSTR. 36-108, AIR RESERVE TECHNICIAN PROGRAM (July 1994) (providing details of ART program); U.S DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL 124 (Sept. 2002) (concerning wear of uniform by ART personnel when in civilian status).

[119] Ipsen, *supra* note 76, at 89 (discussing the special primary status medical and religious personnel have under the Geneva Conventions).

[120] *Id*. at 90-92 (noting medical personnel may be armed and can use force to protect themselves and their patients, while religious personnel should not be armed but can defend themselves when attacked).

[121] Protocol I, *supra* note 77, art. 50.

[122] *Id*.

[123] *Id.* Protocol I provides in art. 50 that a "civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol." *Id.* Civilians accompanying the armed forces are referred to in Geneva Convention art. 4(A)(4), which states:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the

performing work for the armed forces is not sufficient to be considered a civilian accompanying the force. Only those civilians who have been authorized to accompany the armed forces and received an identification card can be considered civilians accompanying the armed forces.[124]

While civilians accompanying the force have civilian status, they do receive different treatment from other civilians because, unlike almost anyone else with civilian status, they are entitled to POW status when captured.[125] However, like other civilians, civilian employees and contractors who take part in hostilities will be considered unlawful combatants.[126] Civilian employees and contractors also face the risk of losing the protection from attack civilians are owed under the law of war because of their proximity to military objectives.[127]

While the law of war does not draw a distinction between civilian employees and contractors, they have different relationships with the armed forces. Civilian employees are hired and supervised by the armed forces and have an employment relationship with them.[128] Contractors work independently or for a private company and have a contractual relationship with the armed forces.

4. *Mercenaries Defined*

States have a long tradition of employing mercenaries.[129] Mercenaries are generally considered to be professional soldiers who serve for money, not loyalty, typically in the service of a foreign country.[130] Prior to the 1970s, there was no prohibition in international law against their use and mercenaries could qualify for combatant status if they met the requisite combatant criteria.[131]

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armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

[124] See U.S. DEP'T OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS para. 5.2 (Jan. 1974) for an example of the procedures used for issuing identification cards to civilians accompanying the armed forces. Cards are issued to emergency essential DoD employees and contractors who may accompany U.S. military forces to areas of conflict. *Id.*

[125] Geneva Convention III, *supra* note 86, art. 4(4). *See also* Ipsen, *supra* note 76, at 95.

[126] *See* Ipsen, *supra* note 76, at 95.

[127] *See id*. at 65; GREEN, *supra* note 79, at 229.

[128] *See* U.S. DEP'T OF DEFENSE, DIR. 1400.32, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING AND EXECUTION para. 3.1 (Apr. 1995).

[129] *See* P.W. SINGER, THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 20-39 (2003). For a brief history of the use of mercenaries, see Todd S. Millard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003).

[130] A mercenary is defined as "one that serves merely for wages, especially a soldier hired into foreign service." WEBSTER'S NINTH COLLEGIATE DICTIONARY 742 (1991). *See also* Millard, *supra* note 129, at 6.

[131] Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW (Jiri Toman ed., 1988) (noting neither the

By the 1960s, many countries undergoing decolonization or experiencing national liberation movements, particularly in Africa, became concerned with the use of mercenaries. These countries successfully lobbied to have a ban on mercenaries placed into Protocol I, where Article 47 provides that:

> A mercenary is any person who:
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) does, in fact, take a direct part in the hostilities;
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) is not a member of the armed forces of a Party to the conflict; and
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[132]

These requirements are sequential and cumulative: all must be met for someone to be considered a mercenary.[133]

This definition is so narrowly drawn that few people are likely to fall within its terms.[134] Proving someone fights for material gain as opposed to an ideological, moral, or religious motivation may be difficult.[135] In addition, the prohibition can be circumvented easily by a state incorporating potential mercenaries into its armed forces, as the United Kingdom has done with the Nepalese Gurkhas serving in its army.[136]

Hague Regulations of 1907 or the Geneva Conventions of 1949 contained any prohibitions against the use of mercenaries).

[132] Protocol I, *supra* note 77, art. 47.

[133] Baxter, *supra* note 131, at 114.

[134] Greenwood, *supra* note 91, at 6. The unlikelihood of being deemed a mercenary under this definition has been captured by one commentator as follows: "any person who cannot avoid being characterized as a mercenary under this definition deserves to be shot and his defence lawyer with him." GEOFFREY BEST, HUMANITY IN WARFARE 374-5 (1980).

[135] HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 145-48 (2nd ed. 1998). Examples of soldiers fighting for such moral or ideological reasons would include U.S. citizens fighting for Allied forces in the First and Second World Wars before the United States entered the war. *Id*.

[136] *Id. See also* UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES*:* OPTIONS FOR REGULATION 2002, 7 (2002) [hereinafter UK GREEN PAPER], *available at* www.fco.gov.uk/Files/kfile/mercenaries,0.pdf (discussing example of Papua New Guinea arranging for mercenaries to become special constables).

The main effect of being a mercenary under the Protocol I definition is becoming ineligible for lawful combatant or POW status.[137] As such, a mercenary engaging in combat is an unlawful combatant who can be held criminally liable for his actions. While not entitled to POW status, mercenaries are still entitled to the minimal due process standards guaranteed civilians in Geneva Convention IV and Article 75 of Protocol I.[138]

There have been several attempts subsequent to Protocol I to further regulate mercenaries, although these have not met with widespread success.[139] The end result of all these regulatory efforts is a limited ban on the small category of mercenaries who can fit within the parameters of the Protocol I definition. This lack of regulation does not mean, however, that mercenaries can engage in combat.[140] Unless they are incorporated into a state's armed forces they remain civilians who may not engage in combat. Signing a contract with a state is, by itself, insufficient to convert a civilian to a combatant.[141]

B. Determining What Constitutes Direct Participation in Hostilities

Consider a helicopter gunship attacking enemy soldiers during the course of the battle. An UAV circling above the battlefield operated by a civilian employee from a remote location provides targeting information to the helicopter. A crewman onboard the helicopter uses this information to direct the fire of a machine gun toward enemy soldiers on the ground. The helicopter receives minor damage from small arms fire and lands a short distance from the battlefield. Civilian contractors are brought to the helicopter to perform emergency repairs on it, allowing the helicopter to return to the battlefield. In this scenario the crewman firing the machine gun is clearly a combatant, but the status of the contractors and employees is more ambiguous as reasonable arguments could be made for and against the proposition they directly participated in hostilities and so lost their status as civilians.

Combatants are entitled to engage in combat, that is, to participate directly in hostilities.[142] This rule is codified in Article 43(2) of Protocol I.[143] The logical corollary of this prohibition is that civilian employees and

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[137] "A mercenary shall not have the right to be a combatant or a prisoner of war." Protocol I, *supra* note 77, art. 47.
[138] GREEN, *supra* note 79, at 115.
[139] *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 528-32 (2004) (discussing two conventions and their limitations: the Convention for the Elimination of Mercenarism in Africa established by the Organization of African Unity in 1977 and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries).
[140] Ipsen, *supra* note 76, at 69.
[141] *Id.*
[142] *See* Hans-Peter Gasser, *Protection of the Civilian Population, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 209, 210 (Dieter Fleck ed., 1995).
[143] Protocol I, *supra* note 77, art. 43(2).

contractors can actively engage in noncombat activities, i.e., those activities falling short of direct participation in hostilities, without becoming unlawful combatants.[144] Before the full distinction between combatants and civilians can be discerned, therefore, the difference between combat and noncombat activities must be determined.

Military operations depend on a wide range of activities from firing a gun to providing intelligence about enemy targets to making bullets. Where the law of war requires the drawing of a line to distinguish between direct and indirect participation in hostilities is unclear. The Commentary to Protocol I suggests a narrow interpretation of direct participation in hostilities, limiting it to those activities where there is a, "direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[145]

The Commentary to Article 77 of Protocol I provides a further gloss to what constitutes direct participation in hostilities. This article, which deals with the obligation of states to keep children from direct participation in hostilities, lists examples of activities which do not constitute direct participation as including, "gathering and transmission of military information, transportation of arms and munitions, [and] provision of supplies."[146] Protocol I, with its Commentary, suggests direct participation is limited to actions that directly cause damage to an enemy's personnel or equipment. This view would include only actions such as planting bombs to destroy an enemy's convoy of trucks or engaging in a firefight with enemy soldiers.[147]

This restrictive view of what constitutes direct participation in hostilities does not reflect state practice.[148] Between undoubted combat activities described in Protocol I and activities such as feeding and sheltering combatants that are acknowledged as not equating to direct participation in hostilities there is uncertainty.[149] Examples of the type of activity that may cause a civilian to be considered a combatant include intelligence gathering,

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[144] *Id*. art. 51. *See also* Gasser, *supra* note 142, at 232.
[145] PROTOCOL I COMMENTARY, *supra* note 103, at 516.
[146] *Id*. at 901.
[147] *See* Frits Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law 99 (2001), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList526/8DDA382303475B2DC1256C550047B1AA.
[148] *See* Jean-Marie Henckaerts, *The Conduct of Hostilities: Target Selection, Proportionality and Precautionary Measures Under International Humanitarian Law*, *in* PROTECTING CIVILIANS IN 21ST-CENTURY WARFARE 13-14 (Mireille Hector & Martine Jellema eds., 2001); Park, *supra* note 87, at 130-135.
[149] *See* Henckaerts, *supra* note 148, at 13-14. *See also* DETTER, *supra* note 93, at 146 ("There is no doubt that there is still confusion as to who is a combatant and who is a civilian as a result of the lack of stringent criteria for qualifications as a combatant."); Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 160 (1999) (discussing the blurring between civilians who work for the armed forces and combatants); Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 U. CHI. J. INT'L L. 511, 531-534 (2005) [hereinafter Schmitt, *War*] (noting ambiguity about what constitutes direct participation in hostilities and the need for a case by case determination of whether it has occurred).

performing mission-essential work at a military base, or providing logistical support.[150]

The lack of certainty over what activities constitute direct participation in hostilities may simply reflect the fact there is no consensus about where to draw the line between combat and noncombat activities. The British government described this difficulty in a policy paper:

> The distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operation as those who do the shooting. At one remove the same applies to those who help with maintenance, training, intelligence, planning and organisation-each of these can make a vital contribution to war fighting capability. Other tasks such as demining or guarding installations may be more or less distant from active military operations according to the broader strategic picture.[151]

This language captures an essential point of modern military conflicts, which is that the combatants shooting guns or dropping bombs are only capable of engaging in combat because of the support they have received. While it is easy to label the gun-toting soldier a combatant, it is harder to determine the status of those who transport him to the battlefield, gather intelligence about the location of enemy military positions, or repair and maintain the sophisticated weapons systems he uses to fight.

Two principles can be extracted from the various views on what constitutes direct participation in hostilities. The first principle is that the closer an activity occurs to the physical location of fighting, the more likely

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[150] *See* Gasser, *supra* note 142, at 232. Gasser states:

> A civilian who . . . gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians.

See also Park, *supra* note 87, at 118, 134; Park, *supra* note 400 (indicating logistical support, intelligence gathering, and being a mission-essential civilian on a military installation make civilians lawful subjects of attack). On the other hand, DoD has recently taken the position that many of these functions are permissible as "indirect participation in military operations." *See* U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES para. 6.1.1. (Oct. 2005) [hereinafter DODI 3020.41] (stating that "contractor personnel may support contingency operations through the indirect participation in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services according to subparagraph 6.3.5. and providing logistic services such as billeting, messing, etc.").

[151] *See* UK GREEN PAPER, *supra* note 136, at 8.

it will be considered combat.[152] This principle captures the idea that activity near the battlefield can usually be more closely linked to the infliction of harm on an enemy. An example of a civilian driving a truck loaded with ammunition illustrates this point. If the civilian is driving the truck in his home country from a munitions factory to a nearby port from where the munitions will be shipped to an area of conflict 4000 miles away, then his transporting the munitions would not normally be considered a combat activity.[153] Once the ship arrives at its destination, the ammunition is loaded onto a truck and a civilian driver drives the truck to resupply an artillery unit shelling enemy soldiers as part of an ongoing battle. At some point as the truck approaches the battlefield, driving the truck would appear to become a combat activity.[154]

This general rule does not, however, provide clear guidance on what locations should be considered so close to fighting as to elevate certain civilian support activities from noncombat to combat participation. Being physically present on the battlefield where fighting is occurring appears to qualify, but beyond that the exact geographic scope where participation in support activities may equate to combat activity has not been decisively determined.[155]

The second general rule looks at the nature of the combat-related activity itself and how closely the activity is related to the infliction of violence. This type of rule makes sense because the modern battlefield has been stretched to proportions far beyond what existed a century ago. Just as a sniper firing a bullet at a target a mile away is by any definition a combatant, no one would contest that whoever presses the button to launch a missile that travels a thousand miles to hit its target is a combatant. Physical distance from the point of impact is irrelevant because the person launching the missile directly caused the damage caused by the missile.

The rule that participation in activities closely associated with the direct infliction of violence is more likely to be labeled combat explains why activities such as gathering intelligence for targeting purposes and servicing a weapons system may be considered direct participation in hostilities.[156] These activities are indispensable to and closely connected with the infliction of violence. By contrast, other activities, such as providing combatants with

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[152] *See* Gasser, *supra* note 142, at 232. The activities Gasser identified as prohibited to civilians all share a nexus of proximity to the area of military operations.

[153] *See* ROGERS, *supra* note 77, at 8-9 (discussing a similar hypothetical regarding a civilian truck driver). *See also* PROTOCOL I COMMENTARY, *supra* note 103, at 516 (discussing how simply supporting the war effort is insufficient to lose civilian status).

[154] ROGERS, *supra* note 77, at 9. *See also* Schmitt, *War*, *supra* note 149, at 544-45 (indicating that performing immediate battlefield logistics and local repair of minor battle damage would constitute direct participation in combat because of the proximity to the battle zone).

[155] Henckaerts, *supra* note 148, at 13 (noting much of the state practice in this area consists of assessing combatant status on a case by case basis or relying on a general proscription against direct participation in hostilities without further defining it).

[156] *See* Gasser, *supra* note 142, at 232.

food and water, are considered sufficiently removed from the infliction of violence that civilians providing such services to combatants are unlikely to be considered to have taken a direct part in hostilities.[157]

The net effect of the unsettled nature of what constitutes combat activity is that while civilian employees and contractors accompanying the armed forces are entitled to status as civilians under the law of war, the range of activities they may lawfully engage in has not been clearly delineated. This ambiguity does not mean civilians are being kept from participating in military operations. Civilian participation and integration into military activities has grown rapidly in recent years. Examination of current civilian involvement in combat activities will indicate how states are interpreting where this line should be drawn in battlefields around the world.

C. Law of War Constraints on the Use of Force Affecting Civilians Accompanying the Armed Forces

States engaging in international armed conflicts are not entitled to use force indiscriminately. The three underlying principles of the law of war most directly affecting targeting decisions are military necessity, distinction, and proportionality.[158] Each of these principles works to protect civilians and limit the scope of violence during a conflict.[159]

The first restraint a commander must consider when selecting a target for attack is military necessity, which requires limiting attacks to targets of military significance using only those weapons or means needed to achieve military purposes.[160] The purpose of this principle is to ensure that every military action is driven by a military requirement and is intended to subjugate the enemy in the shortest amount of time and at the least possible expense of men and materiel.[161] Under this principle, acts which lack any direct military

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[157] *See* PROTOCOL I COMMENTARY, *supra* note 103, at 619.

[158] ROGERS, *supra* note 77, at 3. Several additional principles include those of humanity and chivalry. *See id.* at 3, 6.

[159] *See generally id*. at 3-25.

[160] *See* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998) (defining military necessity and discussing its historical evolution). DETTER, *supra* note 93, at 392-98 (discussing how military necessity has been used in the past to justify violating the law of war, but this particular use of military necessity appears to have fallen out of favor).

[161] ROGERS, *supra* note 77, at 5-6. The definition used by the Air Force is almost identical. *See* THE JUDGE ADVOCATE GENERAL SCHOOL, U.S. AIR FORCE, THE MILITARY COMMANDER AND THE LAW 549 (2004). This definition states that military necessity:

> Permits the application of only that degree of regulated force, not otherwise prohibited by the law of war, required for the partial or complete submission of the enemy with the least expenditure of life, time, and physical resources. Attacks must be limited to military objectives, i.e., any 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, under the circumstances ruling at the

purpose, such as indiscriminate bombing of civilian dwellings or food supplies, are prohibited.[162]

This principle can be difficult to apply because it contains subjective elements, particularly when a commander must use his judgment to determine what actions will, in fact, further the purpose of subjugating the enemy in light of the goals of the conflict. While some civilian objects such as museums or churches will never, barring their misuse, be the lawful subject of an attack, the military necessity to attack many objects such as dams or factories may wax and wane during the course of a conflict.[163]

When selecting targets for attack, the principle of distinction prohibits direct attacks on civilians and civilian objects.[164] To achieve this aim, states are under an obligation to distinguish civilians and civilian objects from their military counterparts. This principle has been codified in Articles 48, 51(2), and 52(1) of Protocol I, which require states to avoid targeting civilians and instead, "direct their operations only against military objectives."[165] Military objectives, in turn, are defined in Article 52(2) of Protocol I:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military 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, offers a definite military advantage.[166]

The Commentary for this article indicates military objectives are also meant to encompass combatants.[167]

Many of the obligations placed on states by the law of war flow from this principle of distinction. Combatants are obliged to carry weapons openly and wear uniforms so they may be distinguished from civilians.[168] Military facilities are to be placed apart from civilians and civilian objects.

While there is general agreement that Protocol I accurately summarizes customary international law concerning the principle of distinction, there is disagreement over how this principle should be

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> time, offers a definite military advantage. Examples include troops, bases, supplies, lines of communications, and headquarters.

Id.

[162] ROGERS, *supra* note 77, at 7.

[163] *See* Carnahan, *supra* note 160, at 229 (discussing how military necessity for attacking irrigation dams during Korean War grew towards the end of conflict and how targets in Vietnam were bombed after peace negotiations broke down in 1972).

[164] Schmitt, *supra* note 149, at 148.

[165] Protocol I, *supra* note 77, art. 48. Article 51(2) states, "The civilian population as such, as well as individual civilians, shall not be the object of attack." Article 52(1) provides that, "Civilian objects shall not be the object of attack or of reprisals." *Id*.

[166] Protocol I, *supra* note 77, art. 52(2).

[167] PROTOCOL I COMMENTARY, *supra* note 103, at 635.

[168] *See supra* note 184.

implemented on the field of battle.[169] There are at least two reasons for this problem: 1) the subjective nature of the test for determining what is a lawful military objective, and 2) the increasing intermingling of military and civilian objects.[170]

The subjective nature of applying the principle of distinction results from two aspects of the definition of a military objective: the determination of what makes an "effective contribution" to military action and what constitutes a "definite military advantage." In the midst of the stresses and strains of a conflict, different commanders are likely to reach different determinations about these matters, particularly as there are significant disagreements over issues as basic as whether economic facilities providing indirect but important support to the military may even be targeted.[171]

The principle of distinction can be difficult to apply when civilian and military objects, including personnel, are intermingled.[172] When objects such as airports, buildings, or telecommunications systems have dual military and civilian purposes, even the most precise weapons may cause harm to civilians. The principle of distinction does not provide civilians with absolute immunity from attack or clear guidance on how to deal with situations where the distinction between civilian and military has become blurred.[173] The laws of war have long acknowledged that injury to civilian objects incidental to attack on lawful military objectives may be legitimate if not excessive, as determined through use of the third principle—proportionality.[174]

The principle of proportionality must be used to determine how to proceed when directing attacks against military objectives that will likely cause harm to civilians and civilian objects. Proportionality calls for a balancing test to weigh military advantage against civilian harm. States have

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[169] Several examples of this requirement are located within Protocol I. Article 58 requires states to remove civilians from the vicinity of military objects and to avoid placing military objects in densely populated areas. Protocol I, *supra* note 77, art. 58. Article 53 prohibits using cultural objects or places of worship for military purposes. Protocol I, *supra* note 77, art. 53.

[170] *See* Schmitt, *supra* note 149, at 148-49. *See also* Henckaerts, *supra* note 148, at 14 (discussing how this definition of military objective has been adopted in at least five other treaties).

[171] *See* Schmitt, *supra* note 149, at 149.

[172] *See* Tom Boyle, *Proportionality in Decision Making and Combat Actions, in* PROTECTING CIVILIANS IN 21ST-CENTURY WARFARE 33 (Mireille Hector & Martine Jellema eds., 2001). Boyle, a military officer and bomber pilot who handled targeting issues for the U.K. armed forces, provides details about the practical and procedural aspects of ensuring targeting decisions comply with the law of war. He notes how making the distinction between military and civil objects is becoming increasingly difficult, particularly when targeting communications infrastructure. *Id*.

[173] *See* Schmitt, *supra* note 149, at 159-60 (discussing problems in the concept of what constitutes a military objective when civilian activities become militarized and military activities become civilianized); DETTER, *supra* note 93, at 146 (discussing current state of confusion over who should be considered a combatant).

[174] *See* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 397-98 (1993) (summarizing history and current status of principle of proportionality).

an obligation to use the means and methods of attack that will cause the least amount of collateral damage while still achieving the military objective.[175] This principle is codified by Protocol I in Article 51(5)(b), which prohibits, "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."[176]

When performing this balancing test, collateral damage to civilians is allowed to the extent that it is not excessive in relation to the "concrete and direct military advantage."[177] The determination of when civilian losses should be considered excessive is subjective in nature and has not been resolved.[178] Although the extent of protection offered civilians by this principle is uncertain, two types of attacks do appear to be inherently disproportionate: those that intentionally target civilians and attacks that have been so negligently prepared or conducted that they amount to targeting civilians directly.[179]

These principles of military necessity, distinction, and proportionality work to protect civilians, but they are only principles. They provide general guidelines, not detailed regulations, for states to follow when planning attacks and selecting targets. These principles have not been clearly defined and proper implementation of them involves making subjective calculations about whether targets are military objectives, the value of attacking them, and the acceptable toll of civilian casualties from collateral damage.

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[175] Schmitt, *supra* note 149, at 152.

[176] Protocol I, *supra* note 77, art. 51(5)(b). Articles 35 and 57 of Protocol I also contain language relating to proportionality. Article 35(2) states, "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." Article 57(2)(b) states, "an attack shall be canceled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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." On the issue of whether this article codifies customary international law, see Henckaerts, *supra* note 148 (noting how state practice establishes the rule in this article is customary international law).

[177] Disagreement exists over the meaning of "concrete and direct military advantage." *See* Gardam, *supra* note 174, at 406 (noting the language in Protocol I appears to require a determination whether individual parts of an attacks are proportional). *See also* Henckaerts, *supra* note 148, at 17 (indicating many states disagree with this interpretation and calculate proportionality based on the military advantage to be derived from the whole attack).

[178] Gardam, *supra* note 174, at 400.

[179] *Id*. at 410.

IV. CIVILIAN INVOLVEMENT WITH THE ARMED FORCES IN COMBAT

The two types of civilians accompanying the armed forces, employees and contractors, have different relationships with the armed forces. The distinction between these relationships, at least in the United States, is that the armed forces, as an employer, may control the detailed physical performance of civilian employees but not contractors.[180] Civilian employees fall under the command of a military commander and are subject to supervision, control, and discipline by the commander or his subordinate.[181] Contractors work for themselves or a private company. They are not subject to being controlled and supervised by a military commander to the same degree as civilian employees.[182]

A. Armed Forces Utilization of Civilian Employees

Civilian employees are directly employed by armed forces throughout the world. In the United States, the Department of Defense employs almost 700,000 civilian employees.[183] These employees work in key areas such as weapons systems maintenance, logistics, and intelligence and form an integral part of the Department of Defense.[184] While the majority of these employees work within the United States, many are stationed overseas or have deployed abroad in support of military operations.[185]

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[180] *See* Logue v. United States, 412 U.S. 521, 527-528 (1973).

[181] *See* Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 35-36 (2001).

[182] *See id*. at 36-38.

[183] U.S. GEN. ACCOUNTING OFFICE, GAO-03-475, DOD PERSONNEL: DOD ACTIONS NEEDED TO STRENGTHEN CIVILIAN HUMAN CAPITAL STRATEGIC PLANNING AND INTEGRATION WITH MILITARY PERSONNEL AND SOURCING DECISIONS 1 (2003), *available at* http://www.gpoaccess.gov/gaoreports/index.html.

[184] *See id*. (listing functions performed by civilian employees). *See also* Diane K. Morales, *DOD Maintenance Depots Prove Their Worth: The Global War on Terrorism has Allowed the Department of Defense's In-House Maintainers to Demonstrate Their Vital Role in Supporting Combat in Afghanistan and Iraq*, ARMY LOGISTICIAN, Mar. 1, 2004, at 3 (discussing the work performed by 60,000 workers at military depots).

[185] *See The Defense Transformation Act for the 21st Century Act: Hearing Before the Subcomm. on Civil Service and Agency Organization of the House Comm. on Gov't Reform,* 108th Cong. (2003) (statement of David S. C. Chu, Under Secretary of Defense for Personnel and Readiness), *available at* http://reform.house.gov/CSA/Hearings/EventSingle.aspx?EventID=365 [hereinafter *Chu Statement*] (indicating 1500 civilian employees have deployed to the Iraqi theater of operations). *See also* U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-97-127BR, DEFENSE BUDGET: OBSERVATIONS ON INFRASTRUCTURE ACTIVITIES 29 (1997), *available at* http://www.gpoaccess.gov/gaoreports/index.html [hereinafter 1997 GAO REPORT] (discussing civilian deployments during First Gulf War); *Deployment of Civilians Increasing*, FDCH FED. DEP'T AND AGENCY DOCUMENTS, Oct. 28, 1999, *available at* LEXIS, News Library, FEDDOC File (noting 43000 Army civilians deployed to overseas locations, including some who have provided direct support to military operations in areas such as Haiti, Bosnia, and Kosovo).

Civilian employees are directly involved in supporting the operation of weapons systems throughout the U.S. military. The Department of Defense maintains an extensive network of industrial facilities to perform weapons systems maintenance, including Naval shipyards, Army depots and arsenals, and Air Force logistics centers.[186] These facilities employ tens of thousands of civilian employees who repair, maintain, manufacture, and upgrade weapons systems ranging from ships to missiles to aircraft.[187]

Civilian employees also play an important role in the logistics of shipping personnel and materiel in support of military operations.[188] Civilians operate ports, load airplanes, drive trucks and sail ships to assist in transporting the massive amount of supplies combat operations require.[189]

Civilian employees may deploy to areas where combat operations are occurring and they have deployed in the thousands to areas of conflict around the world.[190] The Department of Defense has determined that certain positions, designated as emergency essential (E-E), must be subject to deployment. An E-E position is one that is, "required to ensure the success of combat operations or to support combat-essential systems . . . . That position cannot be converted to a military position because it requires uninterrupted performance to provide immediate and continuing support for combat operations and/or support maintenance and repair of combat-essential systems."[191] Although this definition indicates civilian employees only deploy when there is a military necessity for their presence, the recent trend in deployments has been for civilian contractors to displace civilian employees.[192] Contractors have become

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[186] *See* George Cahlink, *Erasing Bases; The Hit List Taking Shape Today may be the Biggest Ever*, GOV'T EXECUTIVE, Oct. 2003, at 29 (discussing size of DoD industrial facilities and noting they perform twenty billion dollars of work annually).

[187] *See id.;* Morales, *supra* note 184.

[188] *See* John R. Moran, Letter to Editor, *Honoring Civilians*, WASH. POST, Jan. 8, 1992 (noting efforts of civilians employees during Operation Desert Storm operating thirty-three ports, loading 560 ships with almost one million pieces of equipment, and sending 37,000 containers to Persian Gulf); Jack Dorsey, *Transporting People, Goods to War a Big Job, General Says*, VIRGINIAN PILOT, Mar. 8, 2003 (noting efforts of civilians assisting in shipment of men and materiel to Afghanistan and Iraq).

[189] *See USS COLE-Implications and Implementation of Lessons Learned: Hearing Before the Senate Armed Services Comm.*, 107th Cong. (2001) (statement of General Charles T. Robertson, Jr., USAF Commander in Chief of U.S. Transportation Command), *available at* http://armed-services.senate.gov/hearings /2001/f010503.htm (discussing broad range of transport activities); Katherine McIntire Peters, *Line in the Sand; Launching a Bold Military Sweep Through Iraq Required a Supply Line Stretching from Depots in the United States to Fast-moving Forces in the Desert*, GOV'T EXECUTIVE, May 2003, at 69; Dorsey, *supra* note 188.

[190] *See Chu Statement, supra* note 185; 1997 GAO REPORT, *supra* note 185, at 29.

[191] U.S. DEP'T OF DEFENSE, DIR. 1400.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES para. E2.1.5 (Apr. 1992) (indicating that only U.S. citizens may hold E-E positions). For Air Force and Army guidance on when and how to deploy civilian employees, see U.S. DEP'T OF AIR FORCE, INSTR. 10-231, FEDERAL CIVILIAN DEPLOYMENT GUIDE (Apr. 1999) and U.S. DEP'T OF ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE GUIDE (Nov. 1995).

[192] *Transforming the Department of Defense Personnel System: Finding the Right Approach: Hearing Before the Senate Comm. on Governmental Reform*, 108th Cong. (2003) (testimony of Donald H. Rumsfeld, Secretary of Defense) (indicating that because of perceived difficulties in

favored for at least two reasons: the expertise they may provide and the difficulties commanders experience in managing civilian employees.[193]

There are several reasons to expect that civilian employees may become more deployable. Changes in the civilian personnel system may eliminate some of the personnel rules that made military commanders reluctant to deploy civilians.[194] The Department of Defense has indicated a desire to shift up to 300,000 positions currently occupied by military members to civilian employees.[195] Shifting military to civilian positions would result in a larger pool of employees offering additional skills and save the government billions of dollars as civilian employees are substantially less expensive to employ than military members.[196]

B. Armed Forces Utilization of Civilian Contractors

Civilian contractors working for private military companies (PMCs) are involved in almost every aspect of military activity. The United States makes significant use of contractors, but is not unique in doing so. Countries throughout the world make use of these contractors and the dollar value of their services runs into the tens of billions of dollars annually.[197]

1. *Range of Services*

Civilian contractors can be hired to perform almost any service a state requires. Contractors can train, feed, equip, and house an army. During a conflict, contractors can maintain weapons, gather intelligence, provide security at forward locations, and even fight.[198] Three categories of private military companies predominate: security provision firms, military consulting firms, and military support firms.[199] All three types of PMCs have the capability to provide services that may be considered direct participation in hostilities.

Provider firms offer contractors who can provide or direct the use of force, whether in the form of security, peacekeeping operations, controlling

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managing employees, eighty-three percent of civilians deployed to Central Command for Operation Iraqi Freedom were contractors while only seventeen percent were civilian employees).

[193] *See id.*

[194] *Id.*

[195] *Id*. *See also* Stephen Barr, *Pentagon Plan Would Shift 10,000 Military Jobs to Civilians*, WASH. POST., Oct. 7, 2003, at B2 (discussing that the Defense Department is ready to convert 10,000 jobs performed by military members to civilian positions in fiscal year 2004 alone).

[196] *See* 1997 GAO REPORT, *supra* note 185, at 21 (stating manning a position with a civilian costs on average $15,000 less than manning with a military member).

[197] Chalmers Johnson, *The War Business: Squeezing a Profit from the Wreckage in Iraq*, HARPER'S MAG., Nov. 1, 2003, at 53.

[198] *See* SINGER, *supra* note 129, at 9-17.

[199] *See id*. at 92-97. *See also Comment & Analysis*, FIN. TIMES, Aug. 12, 2003, at 15; UK GREEN PAPER, *supra* note 136, at 8-9.

units engaged in combat, or engaging directly in combat.[200] Because of the nature of their work, they are often armed and may wear some type of uniform.[201]

States may hire provider firms directly or they may contract with companies that in turn subcontract to provider firms for security services. The situation in Iraq illustrates how this may happen. The United States has contracted directly with provider firms to provide protection to facilities and personnel.[202] The United States has also contracted with companies engaged in the reconstruction effort and these companies have, in turn, subcontracted protection services out to provider firms.[203]

Security contractors have become an integral part of the occupation and reconstruction of Iraq. An estimated 20,000 security contractors were in Iraq as of April 2004 and, while accurate numbers are difficult to compute, the number may have grown as high as 25,000 by August 2005.[204] Although these contractors work for many different companies, they do communicate with and assist one another and amount, in many ways, to the largest private army in the world.[205] They provide protection for military facilities and convoys, government ministries, oil facilities, and other contractors.[206] Security contractors have engaged in combat, killed, and been killed.[207]

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[200] *See* SINGER, *supra* note 129, at 92-94.

[201] *See* U.S. DEP'T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE App. B-1, para. 5-1, (1998) (authorizing issuance of uniforms to deploying contractors). *See also* Christian Bourge, *Can Private Firms Bring Peace?*, UPI, Aug. 26, 2003, available at LEXIS, News Library, UPI File (stating contractor bodyguards for head of the U.S. civilian authority in Baghdad wear uniforms resembling those worn in Army).

[202] *See* Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29. *See also* Seth Borenstein & Scott Dodd, *Private Security Companies in Iraq See Big Paychecks, Big Risks*, KNIGHT RIDDER/TRIB. NEWS SERVICE, Apr. 2, 2004, available at LEXIS, News Library, KRTNWS File (discussing contracts Coalition Provisional Authority in Iraq has made with private security companies).

[203] *See* Borenstein & Dodd, *supra* note 202. *See also* T. Christian Miller, *Soaring Security Costs Burden Iraq Reconstruction Efforts; For Contractors in a High-Risk Zone, Cash and Manpower are Being Diverted from Projects*, L.A. TIMES, Apr. 9, 2004, at A10 (noting as much as four billion dollars may be spent on security as some companies involved in reconstruction efforts are spending twenty percent of the contract price for protection).

[204] *See* Dana Priest & Mary Pat Flaherty, *Under Fire, Security Firms Form an Alliance*, WASH. POST, Apr. 8, 2004, at A1; Bergner, *supra* note 202. *See also* GEN. ACCOUNTING OFFICE, GAO-05-737, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 8 (2005) [hereinafter 2005 GAO REPORT ON PRIVATE SECURITY PROVIDERS], *available at* http://www.gpoaccess.gov/gaoreports/index.html (last visited Jan. 23, 2006).

[205] *Id*.

[206] *See* Bourge, *supra* note 201 (contractors providing security to CPA); Borzou Daragahi, *Contractors Lighten Load on Troops; For Profit, Private Firms Train Iraqi Soldiers, Provide Security and Much More*, PITTSBURGH POST-GAZETTE, Sep. 28, 2003, at A6 (discussing role of contractors in guarding the Baghdad airport and oil fields); Oliver Poole, *On Patrol with Baghdad's Hired Guns*, DAILY TELEGRAPH (London), May 4, 2004, at 12 (discussing contractors providing protection for convoys of military equipment); 2005 GAO REPORT ON PRIVATE SECURITY PROVIDERS, *supra* note 204, at 9.

[207] Bergner, *supra* note 202 (indicating 160 to 200 security contractors are estimated to have been killed as of August 2005 and describing a number of instances of contractors engaging in combat

While the scale of contractor involvement in Iraq is unparalleled, contractors have been providing security forces for protection throughout the world.[208] On occasion, security contractors have been hired for the explicit purpose of engaging in combat operations.[209] Countries where PMCs have engaged in combat directly include Sierra Leone, Angola, and Ethiopia.[210] PMCs in these, and other countries, have used helicopters, fighter and bomber aircraft, armored vehicles and other sophisticated weapons along with trained soldiers to carry out their contract with the hiring state.[211]

The second category of PMCs—consulting firms—offers advice and training.[212] They differ from security provision firms in that they do not, typically, participate in battlefield operations.[213] The nature of this advice and training covers the spectrum from explaining how to operate sophisticated equipment or conduct large and small scale combat operations to advising how a state's armed forces should be organized.[214] Consulting contractors may train one unit or an entire army and, in fact, contractors are providing training for the Iraqi and Afghani armies as well as the Saudi Arabian National Guard.[215] Training and advice is not limited to teaching soldiers how to fight, but also addresses how they should be used in active military operations. Consulting contractors are often hired to provide advice on how to conduct actual military operations.[216]

Contractors from consultant PMCs can become closely involved in combat operations in at least two ways: contractors may accompany the units they train or advise into combat, and contractors may become actively involved

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in Iraq). *See also* Poole, *supra* note 206 (providing examples of casualties inflicted by security contractors).

[208] SINGER, *supra* note 129, at 9-15, 93 (providing overview of private security contractor operations in Africa, Europe, Asia and the Americas). *See also 'Who Takes Responsibility if One of These Guys Shoots the Wrong People?' The Hiring of Contractors for Military Tasks Extends to Their Use in Peacekeeping Operations*, FIN. TIMES, Aug. 12, 2003, at 15 (discussing contractors guarding U.S. Embassy in Liberia fighting rebels besieging embassy).

[209] SINGER, *supra* note 129, at 92-94.

[210] *Id*. at 107-110 (discussing Angola), at 110-115 (discussing Sierra Leone), and 158 (discussing Ethiopia). *See also* International Consortium of Investigative Journalists, Marketing the New Dogs of War, Oct. 30, 2002, *available at* http://www.publicintegrity.org/bow/ (last visited Jan. 23, 2006) (discussing details of private military firm operations in Africa).

[211] SINGER, *supra* note 129, at 4, 113 (discussing Sierra Leone and how PMC contractors killed several hundred people in one operation).

[212] *Id*. at 95. *See also* UK GREEN PAPER, *supra* note 136, at 8.

[213] SINGER, *supra* note 129, at 95.

[214] *See id.* at 95-97; UK GREEN PAPER, *supra* note 136, at 8. *See also* GEN. ACCOUNTING OFFICE, GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 7, 10 (2003) [hereinafter 2003 GAO REPORT ON MILITARY OPERATIONS], *available at* http://www.gpoaccess.gov/gaoreports/index.html (noting role of contractors in training soldiers how to use equipment that is either specialized or utilizes newer technologies).

[215] *See* Johnson, *supra* note 197. Contractors training the Saudi National Guard were one of the main targets when Al Qaeda terrorists attacked a housing compound in Riyadh in May 2002, killing thirty-four people, including eight Americans. *Id.*

[216] *See* SINGER, *supra* note 129, at 95-97.

in planning combat operations. Even though the mission of consulting contractors is to train or advise, they may be expected to remain with their units when the units take to the field.[217] This event happened during the first Gulf War when contractors from Vinnell Corporation, who were teaching the Saudi National Guard how to use heavy weapons systems, accompanied the Guard into battle against Iraqi forces in the battle of Khafji.[218] An example of consulting contractors planning military operations allegedly occurred in the Balkans, where contractors with MPRI reportedly helped prepare Croatia's plans for a successful offensive in 1995 against the Serbs in Krajina.[219]

The third category of PMCs—support firms—provides a vast array of services such as logistics, intelligence, and technical support and maintenance of military equipment and systems.[220] Many support firms are large companies capable of handling extremely challenging support needs during the midst of a large scale conflict. The United States Army has awarded a multi-billion dollar contract to a major PMC, Kellogg Brown & Root, to provide for the logistical and maintenance needs of the Army in Iraq for two years.[221] Altogether, twenty to thirty percent of the essential military support services in Iraq are provided by contractors.[222]

These support activities include building and operating military bases, as well as bringing in fuel, food, and other needed material. While perhaps more extensive than before, this type of activity is the same type contractors have traditionally provided the armed forces.[223] Providing logistical assistance to the armed forces is not without risk, however, as contractors may be placed in dangerously close proximity to combat.[224]

A major source of business for contractors is maintaining sophisticated military systems. Some of the equipment militaries use is so complicated that

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[217] *See id*. at 95 (quoting a contractor who stated, "If we do operate in civil wars, we are there as 'advisers' or 'trainers.' But, of course we are on the frontline, and the excuse is so that we can see if our training is working.").

[218] Esther Schrader, *Companies Capitalize on War on Terror*, L.A. TIMES, Apr. 14, 2002, at A1.

[219] *See* SINGER, *supra* note 129, at 125-127 (discussing how MPRI's CEO, a former Army four-star general, met with the Croat general planning the offensive at least ten times in the five days before the offensive began). *See also* Eric Pape et al., *Dogs of Peace*, NEWSWEEK, Aug. 25, 2003, at 22. Both Singer and Pape note MPRI has denied the allegations. *Id.*

[220] SINGER, *supra* note 129, at 97.

[221] *See* Johnson, *supra* note 197 (noting the potential value of the contract is seven billion dollars and that Kellogg Brown & Root has provided similar services in Kuwait, Turkey, Uzbekistan, and the Balkans).

[222] Anthony Bianco et al., *Outsourcing War*, BUS. WK., Sep. 15, 2003, at 68.

[223] *See* Geneva Convention III, *supra* note 86, art. 4 (referring to supply contractors). See *Military Contractors: an Old Story*, U.S. NEWS & WORLD REP., Nov. 4, 2002, at 41, for figures on the number of civilians who have accompanied U.S. forces in past conflicts, including 200,000 in the Civil War and 734,000 in World War II.

[224] *See What is KBR?*, DALLAS MORNING NEWS, May 10, 2004, at 2A (stating thirty-four KBR employees have died in Iraq and seventy-four have been wounded); Eric Pape et al., *supra* note 219 (relating how contractors flying transport helicopters in Liberia and Sierra Leone in support of Nigerian peacekeepers were fired upon and returned fire).

militaries rely on contractors to maintain it even during a conflict.[225] Examples of weapons in the United States inventory dependent on contractor maintenance include the F-117 Stealth fighter, the M1-A1 tank, the Patriot missile, the B-2 stealth bomber, the Apache helicopter, and many naval surface warfare ships.[226] For some systems, there may not even be military members capable of providing maintenance.[227] The result of this dependence on contractor support is that contractors will need to go where their services are needed, even if that brings them in close proximity to the battlefield.[228]

Contractors even operate some military systems. Contractors flew on targeting and surveillance aircraft and operated Global Hawk and Predator UAVs in Afghanistan and Iraq.[229] This type of participation does not appear anomalous as new systems, such as a Marine truck and an Army surveillance aircraft, are designed to be operated by contractors.[230]

Support contractors have also become active in providing services in information related fields including military intelligence and information warfare.[231] Intelligence may come in the form of interrogating prisoners and detainees, performing analysis, maintaining and supporting intelligence computer and electronic systems, or providing intelligence in the form of aerial reconnaissance and satellite imagery.[232] PMCs have become involved in

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[225] Bianco et al., *supra* note 222.

[226] *See id*.; Singer, *supra* note 139, at 522. *See also* 2003 GAO REPORT ON MILITARY OPERATIONS, *supra* note 214, at 8-9 (discussing Apache helicopters and Predator UAVs).

[227] *See* 2003 GAO REPORT ON MILITARY OPERATIONS, *supra* note 214, at 8-9, 16 (discussing reliance on contractors to provide maintenance for various systems is unavoidable because the armed forces simply lack any internal capacity to maintain the equipment).

[228] *See* Thomas Adams, *The New Mercenaries and the Privatization of Conflict*, PARAMETERS, Summer 1999, at 103, 115, *available at* http://www.carlisle.army.mil/usawc/parameters/99summer/adams.htm (last visited Jan. 23, 2006) ("Even the U.S. Army has concluded that in the future it will require contract personnel, even in the close fight area, to keep its most modern systems functioning.").

[229] *See* Peter W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, *available at* http://www.brookings.edu/views/articles/fellows/singer20040415.htm.; Victoria Burnett et al., *From Building Camps to Gathering Intelligence, Dozens of Tasks Once in the Hands of Soldiers Are Now Carried Out by Contractors*, FIN. TIMES, Aug. 11, 2003, at 13 (discussing contractors operating UAVs used in Iraq and Afghanistan).

[230] *See* Victoria Burnett et al., *supra note* 229, at 13.

[231] *See* 2003 GAO REPORT ON MILITARY OPERATIONS, *supra* note 214, at 2-10, 17 (discussing contractor-provided intelligence services); Linda Robinson & Douglas Pasternak, *A Swarm of Private Contractors Bedevils the U.S. Military*, U.S. NEWS & WORLD REP., Nov. 4, 2002, at 38 (noting prevalence of contractors, and lack of control over them, in U.S. military intelligence in Balkans); UK GREEN PAPER, *supra* note 136, at 29-38 (charting various operations around the world where contractors have provided intelligence services); Adams, *supra* note 228, at 115 (discussing information warfare). For an indication of how related intelligence and information warfare can be to one another, see Anthony Lisuzzo, *Data Sharing on the Battlefield*, GOV'T COMPUTER NEWS, Jun. 16, 2003, available at LEXIS, News Library, GOVCMP File (discussing how the Army has fused intelligence and information warfare together into the Intelligence and Information Warfare Directorate).

[232] *See* SINGER, *supra* note 129, at 99.

information warfare, including the provision of defensive and offensive operations that would include CNAE.[233]

No matter what type of assistance accompanying contractors provide, they may run the risk of crossing the line into taking part in hostilities. Even contractors providing support services may find themselves in danger of becoming unlawful combatants, whether because their activities take them into close proximity of the battlefield or because their support is of such a nature as to become closely tied to use of a weapons system.

2. *Reasons for Use*

While the United States is the largest consumer of PMC services, PMC services are widely used around the world.[234] States engage the services of PMCs for a variety of reasons. Contractors may be hired because: 1) of their expertise, 2) they can provide a needed service more cheaply or efficiently than the military can accomplish with its internal resources, 3) their use is politically expedient, or 4) of military restructuring.[235]

Contractors can provide expertise not found within a state's armed forces. PMCs provide a mechanism through which skills developed at significant cost in sophisticated militaries such as those possessed by the United States, the United Kingdom or South Africa can be transferred relatively cheaply to states with inefficient or poorly trained militaries.[236] Contractors can also provide expertise in areas where militaries do not have the requisite competence.[237]

A second reason states use PMCs is to allow them more control over the number of uniformed military personnel. After the Cold War, many states made substantial cuts in the size of their militaries.[238] The United States military alone shrank by one third.[239] At the same time, however, the United States has faced an increasing number of deployment commitments.[240] Using contractors allows states to engage in extensive military activity with a smaller

[233] *Id.* at 62-63, 100. *See also* Dawn S. Onley, *Air Force Picks Information Warfare Contractors*, GOV'T COMPUTER NEWS, Aug. 28, 2003, available at LEXIS, News Library, GOVCMP File (discussing pending $252 million Air Force contract for information warfare techniques).
[234] *See* Bianco et al., *supra* note 222.
[235] *See id.*; SINGER, *supra* note 129, at 49-70; and UK GREEN PAPER, *supra* note 136, at 12-14.
[236] *See* SINGER, *supra* note 129, at 96 ("The primary advantage of using outside consultants is access to and delegation of a greater amount of experience and expertise than almost any standing public military force in the world can match."); Robinson & Pasternak, *supra* note 231, at 38 (discussing former Soviet bloc countries using consultants to make their militaries reach NATO standard). Even a modern military such as the U.K.'s is heavily reliant on training from contractors. *See* UK GREEN PAPER, *supra* note 136, at 13.
[237] *See supra* notes 226-27 and accompanying text.
[238] SINGER, *supra* note 129, at 53.
[239] *Id.*
[240] *Id.*

uniformed force.[241] States may benefit from using contractors because they can be substantially cheaper to use than military members.[242] In addition, some states simply believe that many military functions can be performed better if outsourced to the private sector.[243]

Finally, states can use PMC contractors to reduce the political costs of military operations and to avoid domestic or international constraints on the use of their own armed forces. The use of contractors can reduce political costs because the public tends to be more concerned with military members deploying and facing harm than contractors.[244] This lowered concern can be seen reflected in the reduced attention paid to contractor casualties versus those suffered by the military.[245]

States use contractors to avoid legal and policy constraints on the use of armed forces. Congress may impose limitations on the numbers of troops who may deploy to a location or the activities they may engage in. Congress imposed such limitations in Colombia and the Balkans and contractors were used in each case to circumvent them.[246] The United Kingdom allowed a PMC to ship arms to Sierra Leone in circumvention of a United Nations arms embargo.[247]

C. Legal Status of Current Civilian Employee and Contractor Activities

Civilian employees and contractors share the same status under the law of war as civilians accompanying the armed forces.[248] Because of their civilian status, they are not authorized to take direct part in hostilities. The treaties containing this prohibition were ambiguous about its scope. The practice of states indicates this prohibition against engaging in combat is being read very narrowly so as to widen the scope for civilian participation in military

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[241] *See Dangerous Work; Private Security Firms in Iraq*, ECONOMIST, Apr. 10, 2004, available at LEXIS, News Library, ECON File.

[242] *See 'Who Takes Responsibility if One of These Guys Shoots the Wrong People?' The Hiring of Contractors for Military Tasks Extends to Their Use in Peacekeeping Operations*, FIN. TIMES, Aug. 12, 2003, at 15 (discussing PMC position that it could perform a military operation at one-fifteenth of what it would cost the U.S. military); Bianco et al., *supra* note 222, at 68 (discussing cost savings accruing to PMCs because they do not bear the cost of training and deploying soldiers and may be able to subcontract with local labor for significant cost savings).

[243] *See* SINGER, *supra* note 129, at 66-70.

[244] *Id*. at 58. *See also* Ed Timms, *In Iraq, Advances and Setbacks: Private Firms Pick up the Slack in Conflict, but at What Price?*, DALLAS MORNING NEWS, Apr. 13, 2004, at 1A.

[245] Even though estimates of contractor casualties in Iraq since the beginning of the war in 2003 range from several dozen to as high as one hundred, many companies do not release casualty figures, nor has the U.S. government. *See* Miller, *supra* note 203, at A10. *See also* SINGER, *supra* note 129, at 208 (noting lack of outcry over contractor deaths in Colombia).

[246] *See* 2003 GAO REPORT ON MILITARY OPERATIONS, *supra* note 214, at 8 (discussing the Balkans); SINGER, *supra* note 129, at 206-7 (discussing Colombia).

[247] Bourge, *supra* note 201.

[248] *See* Geneva Convention III, *supra* note 86, art. 4(A)(4).

activities. Even with this narrow interpretation, the prohibition against civilians participating in combat rule has been violated numerous times.[249]

Faced with this ambiguously narrow rule, states are employing civilians in an assortment of activities that may not involve civilians directly using weapons for combat but strain the distinction between combat and noncombat activities. Armed civilians provide security, while other civilians maintain weapons systems in combat areas and operate intelligence-gathering systems.[250]

While engaging civilians to conduct offensive combat operations appears to be frowned upon, states openly employ civilians for all other military activities, even where the legal status of such participation is unclear. This uncertainty over when civilians become combatants has been widely acknowledged.[251] A publication of the U.S. Army discussing deployment of civilians notes:

> Civilians who take part in hostilities may be regarded as combatants and are subject to attack and/or injury incidental to an attack on a military objective. Taking part in hostilities has not been clearly defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting. Since civilians augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants.[252]

The U.S. military has even authorized the issuance of weapons to civilian contractors and employees because they may be regarded as combatants by an enemy.[253]

This review of state practice indicates that the ambiguity over what constitutes direct participation in hostilities has not been resolved. Civilians are being integrated more deeply into states' armed forces and many of them are engaging in activities that could well be considered combat.

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[249] *See supra* notes 209-11 and accompanying text.
[250] *See supra* notes 200-31 and accompanying text.
[251] *See supra* notes 149-51 and accompanying text. *See also* INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 36 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/73BA3908D5B7E2F7C1256E6D0034B5CE (noting need for clarification about what constitutes direct participation in hostilities). *See also* David Barstow et al., *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1 (discussing how Iraqi insurgents are targeting contractors and how contractor duties are blurring with those of soldiers).
[252] U.S. DEP'T OF ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE GUIDE, para. 1-22 (Nov. 1995).
[253] *See* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-0, DOCTRINE FOR PERSONNEL SUPPORT FOR JOINT OPERATIONS O-2, (1998). *See also* Turner & Norton, *supra* note 181, at 20. Under new DoD guidance, the geographic Combatant Commander may authorize contingency contractor to be armed for individual self-defense. DODI 3020.41, *supra* note 150, para. 6.3.4.1.

V. CIVILIAN PARTICIPATION IN REMOTELY CONDUCTED COMBAT OPERATIONS UNDER THE LAW OF WAR

Just as with traditional military operations, the legality of civilian involvement in remotely conducted combat operations depends on whether it constitutes direct participation in hostilities.[254] Accompanying civilians who directly participate in remotely conducted combat operations resulting in actual harm to enemy personnel or equipment may be unlawful combatants.[255]

Accompanying civilians participating in remotely conducted combat operations involving unmanned vehicles performing missions that may not be considered direct participation in hostilities, such as gathering intelligence or providing logistical support have an unsettled status under the law of war. The potential for accompanying civilians to participate in these activities will grow as increasing numbers of unmanned vehicles begin to arrive on the battlefield.[256] If the truck driver taking ammunition to a front line unit may be considered an unlawful combatant, the civilian operator of a remote controlled truck performing the same mission may be deemed a combatant as well. Whether the civilian's distance from the battlefield prevents him from being considered an unlawful combatant cannot be decisively determined.

The law of war provides limited guidance to help determine when computer network attack and exploitation actions are considered combat.[257] No treaties specifically regulate CNAE, but it is governed by the law of war.[258] Those aspects of CNAE which cause physical damage can be treated like attacks with more conventional weapons, with the consequence that carrying out such attacks is limited to combatants.[259] Other types of CNAE, particularly those involving attacks on networks to steal, destroy, or alter information within them, do not necessarily constitute direct participation in hostilities and are arguably open to lawful civilian participation.[260]

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[254] Protocol I, *supra* note 77, arts. 43(1) and 51(3). *See also supra* notes 142-44 and accompanying text.
[255] *See supra* notes 146-47 and accompanying text.
[256] *See supra* notes 45-66 and accompanying text.
[257] *See* Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INT'L REV. OF THE RED CROSS 365, 368 (2002) (noting the absence of any humanitarian law instruments discussing CNA). *See also* DETTER, *supra* note 93, at 273 (noting lack of any systematic approach to regulating information warfare).
[258] *See id.* at 369-71 (arguing CNA is regulated by international humanitarian law).
[259] *See* Schmitt, *supra* note 257, at 374-75 (arguing for a consequence-based approach under which CNA causing injury, death, damage, or destruction is covered by international humanitarian law).
[260] *See id.* at 374.

VI. INADEQUACIES IN THE LAW OF WAR CONCERNING THE REGULATION OF ACCOMPANYING CIVILIANS PARTICIPATING IN COMBAT OPERATIONS

The law of war inadequately regulates civilian participation in combat operations for four reasons: 1) direct participation in hostilities is defined too ambiguously to establish a clear demarcation between civilians and combatants; 2) lack of clarity over what activities are within the exclusive province of combatants undermines the principle of distinction by promoting the civilianization of military forces; 3) failure to differentiate between civilian employees and contractors promotes increased use of contractors; and 4) the complete ban on civilians directly participating in remotely conducted hostilities can be easily circumvented and may decrease adherence to the law of war.

A. The Law of War Fails to Adequately Separate Combatants from Civilians

The determination as to what activities constitute direct participation in hostilities is challenging because the rules are often ambiguous and arguably defective. Consequently, many accompanying civilians run the risk of being considered unlawful combatants.[261] In addition, the risks to the general civilian population increase as the application of the principle of distinction becomes more difficult. Likewise, many accompanying civilians are unable to determining whether the activities in which they are engaged are jeopardizing their legal status, resulting in criminal liability and lawful direct attack.

The uncertainty over what constitutes direct participation in hostilities undermines the principle of distinction, which is built upon the premise of being able to distinguish and separate civilian and military personnel and objects from each other.[262] Civilians are performing many tasks now which may be considered direct participation in combat.[263] When civilians appear to be engaging in combat activity, particularly if they are not wearing any type of uniform or distinguishing emblem, then the protective power of the principle of distinction is weakened because they may be difficult to distinguish from the rest of the civilian population.

Accompanying civilians are inadequately protected by the current standard for determining unlawful combatant status because they cannot readily determine their criminal liability and status as lawful targets. By virtue of their status, accompanying civilians may not be directly targeted; however, they may lose this immunity if they become unlawful combatants as a result of their actions, and they may lose their POW status if captured.[264] Even accompanying

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[261] *See* DETTER, *supra* note 93, at 146. *See also supra* note 149 and accompanying text.
[262] *See supra* notes 164-72 and accompanying text.
[263] *See supra* notes 204-11 and accompanying text.
[264] Geneva Convention III, *supra* note 86, art. 4(4); Protocol I, *supra* note 77, arts. 50(1), 51(2). *See also supra* note 125 and 165 and accompanying text. It is important to note that

civilians engaged in remotely conducted combat operations who do not face a serious risk of being targeted or captured during a conflict may still be affected, as the prospect of criminal liability may continue for years after the conflict ends. Accompanying civilians may fear leaving their employing state lest they face the risk of criminal prosecution when abroad.[265]

Even more significant, states employing accompanying civilians as unlawful combatants are in breach of their obligations under international law. Such breaches of the law can have a number of ramifications, including alienation of public opinion, sanctions, and legal action before tribunals such as the International Court of Justice.[266] Individuals responsible for making civilians serve as combatants or targeting accompanying civilians may also face criminal liability before national courts or the International Criminal Court.[267]

The current definition of direct participation in hostilities contains an inherent flaw on two accounts: 1) it fails to encompass changes in warfare since the standard was formulated over one hundred years ago; and 2) it fails to come to a logical accommodation with the concept of military necessity. The current standard was constructed to define and limit direct participation in combat to the ultimate acts causing death or destruction, such as a soldier firing a rifle or a pilot launching a missile from his aircraft. The standard ignores the penultimate and other anterior acts of indispensable support provided to the soldier or pilot. The solider or pilot occupies the top of a pyramid, supported by the broad-based efforts of support personnel. These support personnel are often accompanying civilians acting as intelligence analysts, logisticians, and weapons systems maintainers. Their efforts are essential in allowing combatants to inflict damage to the enemy.

The law of war prevents intentional targeting of accompanying civilians as long as they retain their status, no matter how militarily important their work. The result is considerable tension between the targeting standards employed for making direct and indirect attacks against civilians. The standard for making direct attacks against civilians is that they must be participating directly in hostilities, at which point they become unlawful combatants and may be targeted directly.[268] This is a narrowly drawn standard, particularly when compared with the second standard, which provides that attacks against military objectives causing collateral injury to civilians are allowed if the civilian casualties will be proportionate to the concrete and direct military advantage anticipated.[269]

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accompanying civilians are always subject to indirect attack if they are in close proximity to an otherwise lawful target.

[265] DEP'T OF DEF. OFF. LEGAL COUNSEL, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS 46-47 (1999), *available at* downloads.securityfocus.com/library/infowar/reports/dodio.pdf.

[266] *See* DETTER, *supra* note 93, at 415-19.

[267] *Id*. at 423-27.

[268] *See supra* notes 142 and 164-66 and accompanying text.

[269] *See* Protocol I, *supra* note 77, art. 51(5)(b).

Accompanying civilians will almost always be covered by the latter standard because, while the general civilian population must be segregated from military objectives, accompanying civilians work in them.[270] Accompanying civilians working at a maintenance depot repairing aircraft illustrate this point. They are unlikely to be considered unlawful combatants because of their work on the aircraft, so they cannot be directly targeted because of their civilian status.[271] Yet their status as civilians offers them scant protection because the depot is unquestionably a legitimate military objective that may be attacked.[272] Any protection provided to them by the law of war depends on the enemy's subjective conception of the advantage to be derived from attacking the depot and what constitutes a proportional amount of collateral damage. The presence of large numbers of workers does not necessarily shift the balance toward reducing the scope of an attack either, because more workers may only mean the depot has greater military significance—and more civilian casualties will be acceptable in an attack.[273]

B. The Narrow Definition of What Constitutes Direct Participation in Hostilities Promotes the Civilianization of Military Forces

A fundamental concern of the law of war is protecting civilians.[274] Consistent with this aim, civilians cannot be targeted for attack unless they forfeit their civilian status by participating directly in hostilities. The presumption exists that even a person whose conduct makes his claim to civilian status ambiguous should still be considered a civilian.[275] A narrow, albeit ambiguous, definition of what constitutes direct participation in hostilities sufficient to turn a civilian into a combatant appears consistent with this aim. By construing who is a combatant narrowly, civilians supporting the war effort by working in armaments factories, chemical plants, or other installations vital to a state's capability to wage a conflict successfully retain their status as civilians and may not be targeted, though they may suffer injury when their workplace is attacked.

The current definition of direct participation in hostilities, however, has the opposite of its intended effect because it allows the civilianization of a state's military force. Because civilians are only prohibited from direct participation in combat, the allowable scope of civilian participation in military

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[270] *See id.* art. 58 and *supra* notes 184-191 and 203-232 and accompanying text.
[271] Even if they could be directly targeted, the most logical place to attack them would be at the depot, where they would be concentrated together.
[272] *See* GREEN, *supra* note 79, at 49 n.186. Green indicates the paucity of protection accorded civilians at a military objective in this example: "There can be little doubt that a munitions factory as well as the barracks within its compound in which the workers reside is a military objective. It is questionable, however, whether their houses outside the factory would also qualify, even in the absence of any barracks."
[273] *See supra* notes 174-79 and accompanying text.
[274] *See supra* note 159 and accompanying text.
[275] Protocol I, *supra* note 77, art. 50(1).

operations is inversely proportional to how narrowly combat is defined. If direct participation in hostilities is defined broadly, then all the activities within its scope become forbidden to accompanying civilians. Conversely, if direct participation is defined narrowly, then the range of positions that may be filled by civilians increases.

States have a strong interest in defining direct participation in hostilities narrowly so as to increase their flexibility in determining the exact mix of military personnel, civilian employees, and contractors they want in their forces.[276] State practice reinforces this notion because accompanying civilians are increasingly performing duties once reserved for military personnel and becoming increasingly intertwined with, and essential for, combat operations.[277]

The law of war further encourages civilianization by prohibiting civilians from being targeted for direct attack, as opposed to combatants who are legitimate targets in and of themselves. While this protection has limits because civilians working in proximity to military objectives may suffer from collateral damage, the presence of accompanying civilians at a military objective may serve to shield a site by preventing or reducing the scope of an attack.

This increasing civilianization of military forces poses a threat to the general civilian population by weakening the principle of distinction between combatant and civilian. When accompanying civilians become deeply involved in military operations, an enemy may feel no choice but to target them specifically, which places other civilians at risk as they may be mistaken for accompanying civilians.[278] This situation may have developed in Iraq, where all contractors find themselves in danger as the distinction between accompanying contractors and combatants has all but disappeared. The demise of distinction in Iraq was aptly captured by a Coalition Provisional Authority official who stated that in Iraq's reconstruction, "the military role and the civilian-contractor role are exactly the same."[279]

C. The Law of War Does Not Distinguish Between Civilian Employee and Contractor Participation in Combat Operations

The law of war treats civilian employees and contractors identically. States may choose to favor contractors over employees when staffing positions without legal impediment.[280] Treating these two groups the same, however, undermines the obligation belligerents have to ensure their forces obey the law of war during the course of hostilities. This undermining occurs because civilian contractors are under substantially less control than civilian employees,

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[276] *See supra* note 249 and accompanying text.
[277] *See supra* notes 195-196 and 198-99 and accompanying text.
[278] *See* DETTER, *supra* note 93, at 144-46.
[279] Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1.
[280] *See supra* note 248 and accompanying text.

meaning their opportunities to engage in misconduct are correspondingly greater.

Because employees and contractors are engaging in activities that reasonably could be construed as constituting direct participation in combat, the disciplinary requirements established for lawful combatant status in Geneva Convention III and Protocol I should be met.[281] Lawful combatants must be subject to an internal disciplinary system sufficient to ensure compliance with the law of war.[282] To meet these criteria, states must be able to punish grave breaches of international law through criminal sanctions, although lesser infractions may be handled through non-penal disciplinary measures.[283]

States can more readily supervise, control, and discipline civilian employees than contractors. Within the U.S. military, civilian employees are considered to be under the control of a military commander, while civilian contractors are not.[284] Civilian employees are also subject to a comprehensive supervisory and disciplinary scheme that allows a commander many options to prevent and punish misconduct.[285]

These options are not available with respect to civilian contractors because they do not have an employment relationship with the armed forces but with a private company. Because this relationship is contractual, control over contractor behavior is greatly attenuated.[286] The armed forces may not even be aware of how many contractors are present within an area of operations or what jobs they are doing, as has been the recent U.S. experience.[287] If contractors misbehave, the armed forces may have limited options for dealing with the misconduct.[288] By ignoring the limited supervisory control armed forces exert over the contractors they hire, the probability of conduct inconsistent with the law of war increases.[289]

D. The Prohibition Against Civilian Participation in Remotely Conducted Combat Operations is Subject to Circumvention

The nature of remotely conducted combat actions makes circumvention of the prohibition against civilians engaging in combat easy to achieve.

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[281] *See* Geneva Convention III, *supra* note 86, art. 4(a), (b); Protocol I, *supra* note 77, art. 43(1).
[282] Protocol I, *supra* note 77, art. 43(1).
[283] *See* Rudiger Wolfrum, *Enforcement of International Humanitarian Law, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 530-42 (Dieter Fleck ed., 1995) (outlining some of the requirements of the disciplinary system).
[284] *See* Turner & Norton, *supra* note 181, at 35.
[285] *Id*. at 35-36.
[286] *Id*. at 36-37. *See also* DODI 3020.41, *supra* note 150, at para. 6.3.3.
[287] *See* 2003 GAO REPORT ON MILITARY OPERATIONS, *supra* note 214, at 33.
[288] Turner & Norton, *supra* note 181, at 35-41. *See also Dangerous Work; Private Security Firms in Iraq*, ECONOMIST, Apr. 10, 2004, available at LEXIS, News Library, ECON File (noting contractors in Iraq working outside military chain of command).
[289] *See* Cha & Merle, *supra* note 279 (discussing possible misbehavior by loosely supervised civilian contractors interrogating Iraqis at Abu Ghraib prison).

Combatants engaging in remotely conducted combat do so with their identities concealed from the opponent. This secrecy does not excuse intentional violations of the law of war, but it does give states more of an opportunity to interpret the ban on direct participation narrowly to increase the scope of civilian participation. States also know their decisions on this matter are unlikely to ever be reviewed.

Under such a narrow interpretation, accompanying civilian participation in remotely conducted combat activities can be almost unlimited. Accompanying civilians can participate directly in all activities not resulting in the infliction of damage, meaning they could engage in activities including operating UAVs or conducting CNAE operations that target information residing in an enemy's computer network.

With respect to operations that inflict actual harm, remotely conducted combat activities could be structured in such a way as to comply with the technical requirements of the law of war while maintaining extensive civilian participation. A fleet of armed UAVs could be flown to a battlefield under the control of civilian operators who would notify a military member whenever a target for attack was spotted. The military member would then press the button to launch a missile. A CNAE operation could be structured in a similar fashion. For example, a military CNAE operator could seize control of the SCADA computer system controlling a power plant for the purpose of inducing a major malfunction in the power-generating turbines. The military member would be supported by a team of civilians including a contractor linguist and civil and computer engineers. The computer engineer would explain how to access the SCADA system, the contract linguist would translate the computerized control menus, and the civil engineer would instruct on how to induce a malfunction in the turbines. In both of the above situations, minimal military participation legitimizes the accompanying civilian support of these combat operations.

In sum, a narrow but ambiguous definition of what constitutes combat means states have extensive leeway to structure their remotely conducted combat activities in such a way that civilians can be used for almost every remotely conducted combat operation. Even clear-cut combat operations can be performed with extensive civilian participation as long as a military member takes the action that directly causes harm to the enemy.

VII. MODIFYING THE LAW OF WAR

The law of war restraints placed on accompanying civilian participation in combat related activity must take into account the fact states will not abandon or substantially reduce their reliance on accompanying civilians. States rely on these civilians to save money, reduce the political costs of military operations, increase the competence of their armed forces, and ensure vital weapons systems function.[290] An overly broad ban on the activities in

[290] *See supra* notes 196, 234-47 and accompanying text.

which accompanying civilians may participate would adversely impact states' vital interests and would likely meet with resistance. Recent history indicates that if a state engaged in conflict is forced to choose between rigid adherence to the law of war or mission accomplishment, it will not allow the law of war to constrain its actions.[291]

The problems with how the law of war regulates accompanying civilians can be resolved by making three separate changes: 1) clarifying which activities constitute direct participation in hostilities, 2) allowing civilian employees to be designated as remote combatants, and 3) legitimizing targeting of accompanying civilians when they provide direct essential support. These changes should be made through two separate mechanisms. First, major military states should jointly issue a non-binding statement of principles containing their views on which specific activities constitute direct participation in hostilities. Second, a convention concerning the status of accompanying civilians should be negotiated under the auspices of the International Committee of the Red Cross to codify the new rules on remote combatant status and on the targeting of accompanying civilians.

A. Establishing Which Activities Constitute Direct Participation in Hostilities

1. *Clarifying the Meaning of Direct Participation in Hostilities*

Direct participation in hostilities should be defined as consisting of direct participation in the following four activities: 1) direct infliction of damage to enemy personnel or equipment; 2) operation of a weapons system; 3) gathering intelligence for the immediate purpose of selecting targets for attack or assisting in the planning of imminent or ongoing military combat operations; and 4) directing or advising on the conduct of imminent or ongoing combat operations. Under the current standard of what constitutes direct participation in hostilities, only the first category of activities, the direct infliction of damage, unambiguously qualifies as a combat activity.[292] All four of these activities belong together, however, because they capture the indispensable and immediate precursors to the delivery of violence.

The concept of what constitutes damage to enemy personnel and equipment needs to be broadened to explicitly cover damage to information residing within computer networks. Attacks on information processing computer systems that destroy, damage, or alter information can result in significant damage to an economy or military.[293] Acknowledging that attacks on information systems do cause damage recognizes the central role played by computer networks and ensures attacks on them during the course of an

[291] *See supra* notes 209-11 and accompanying text.
[292] Even this category may be subject to qualification because contractors are widely used in situations where they may need to use force for defensive purposes. *See supra* notes 204-06 and accompanying text.
[293] *See supra* notes 20-23 and accompanying text.

international armed conflict are restricted to combatants and regulated by the law of war.

The second type of activity that should be considered direct participation in hostilities is participation in the operation of a weapons system. The rule would establish that when a weapons system requires more than one person to operate it, all personnel share combatant status. While this rule is an implication of the prohibition against the direct infliction of violence, making it explicit prevents a bifurcation in status amongst the members of a weapons crew. For instance, if an accompanying civilian operates an armed UAV, but a military member presses the button to fire a missile from it, then the civilian operator cannot disclaim combatant status by arguing he did not fire the missile.

Third, anyone gathering intelligence for the direct and immediate purpose of finding targets to attack or to direct combat operations against should also be considered a combatant. The classic example of such activity is an artillery spotter serving as the eyes for artillery that can shoot their rounds beyond the line of sight. With modern technology, these spotters may be able to find targets and direct fire from the vantage point of a UAV circling over a battlefield. Because this information may be directly relied upon to direct attacks, the UAV operators should be held responsible for adhering to the standards of the law of war.

The last type of activity that should be considered direct participation in hostilities is providing advice to or directing a state's armed forces concerning the conducting of an imminent or ongoing military operation. This type of activity may not involve firing weapons, but it is closely connected to decisions about choosing targets and methods of attack. While a single soldier may do considerable damage by himself, the person planning an attack involving a hundred or a thousand soldiers may cause much more significant violations in the law of war because of the greater scale of forces responsive to his advice or orders.

Specifying that these activities be reserved for combatants is consistent with and encourages compliance with the law of war. Combatants receive the privilege of being entitled to use force lawfully, while they also shoulder the responsibility of complying with the law of war. Individuals participating in all four types of activities may face situations where they will have to make judgments impacting the use of force. The law of war can best serve its purpose of protecting the general civilian population if the people making decisions about when and how to attack an enemy receive combatant status with its attendant heightened obligation to respect and be trained in the principles of military necessity, distinction, and proportionality.[294]

[294] *See supra* notes 100, 161-77 and accompanying text.

2. *Procedure for Specifying Which Activities Constitute Direct Participation in Hostilities*

Major military states should issue a non-binding statement of principles wherein they state which activities constitute direct participation in hostilities. Using these principles as guidance, states can modify their military doctrines consistent with these principles. Domestic laws and regulations could also be changed where appropriate to ensure enemy civilians captured in a conflict are only labeled unlawful combatants if they engaged in direct participation in hostilities as defined within the statement of principles. In addition, states could also issue internal guidance to their forces to ensure combatant roles are not filled by civilians. Actions such as these will begin to establish a pattern of state practice that could, in time, ripen into customary international law.[295]

This method for addressing what constitutes direct participation in hostilities possesses several advantages. First, this process can be handled much more quickly than going through a treaty process.[296] Second, this method retains flexibility over defining participation in hostilities. A disadvantage of a treaty is that once the definition has been codified it can be difficult to change. This can be seen in the current standard for direct participation which has been essentially unchanged for more than one hundred years despite the numerous changes in the methods of warfare and civilian participation in them. In contrast, a non-binding statement can be supplemented or altered whenever changes in the conduct of warfare so warrant.

Finally, this method can be used without conflicting with states' obligations under Geneva Convention III or Protocol I. Neither of these treaties define direct participation in hostilities and the Protocol I Commentary contains only a brief discussion of the issue.[297] The activities proposed for inclusion on the statement of principles are consistent with the terms of the treaties because they focus on activities closely associated with the infliction of violence. In addition, by better defining what constitutes direct participation in hostilities states will be complying with and promoting the purposes of these two treaties, particularly as they will make the line between combatants and civilians clearer, and so strengthen the principle of distinction.

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[295] *See generally* INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW ch. 4 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/459B0FF70176F4E5C1256DDE00572DAA (noting consensus of experts participating in conference on need to research and clarify issue of what constitutes direct participation in hostilities, but lack of consensus on how this clarification should be achieved).

[296] Nine years passed from the time the International Committee of the Red Cross proposed the convention that became Protocol I in 1968 until it was opened for signature in 1977. *See* Park, *supra* note 87, at 68-86 (discussing drafting history of Protocol I).

[297] *See supra* notes 143-47 and accompanying text.

B. Readdressing the Status of Accompanying Civilians

The legal status of accompanying civilians must be altered to better fit the roles they have assumed within states' armed forces. States should be able to designate civilian employees as remote combatants. Remote combatants would be authorized to participate in combat away from the battlefield once they met the applicable criteria for combatant status and provided notification to the opposing state. Accompanying civilians who provide direct and essential support for combat operations should be recognized as legitimate targets for attack. These changes should be accomplished through the mechanism of a convention on the status of civilians accompanying the armed forces.

1. *Designating Civilian Employees as Remote Combatants*

States should be authorized, after providing appropriate notice to an opponent state, to designate civilian employees who are nationals as remote combatants who may operate unmanned vehicles or engage in CNAE from within a state's territory or onboard a military aircraft or ship. Allowing civilian employees to be designated as remote combatants confers three advantages: 1) it protects employees from becoming unlawful combatants; 2) it recognizes the principle that civilian employees should be able to play a greater role in combat activities than contractors; and 3) it addresses the legitimate state need for civilian expertise in the conduct of remotely conducted combat operations.

Accompanying civilian employees designated as remote combatants do not have to worry about the possibility of being considered unlawful combatants. As a result, they will not be subject to criminal liability for their actions that otherwise comply with the law of war.[298] Neither will designation as remote combatants place them at a significantly greater risk of being attacked because, working at military objectives as they do, accompanying civilian employees already face much greater danger of attack than the general civilian population.[299]

The ability to designate civilian employees as remote combatants may increase the attractiveness of civilian employees relative to contractors when states determine the composition of their armed forces. It may also establish the principle that civilian employees should be allowed greater participation in combat activities than contractors. Because civilian employees are subject to more direct control and supervision from the military than contractors receive, any shift in the composition of accompanying civilians that raises the

[298] *See supra* note 107 and accompanying text.
[299] *See supra* notes 270-73 and accompanying text.

proportion of civilian employees compared to contractors will increase compliance with the law of war.[300]

Disciplinary concerns are also addressed by restricting designation of remote combatants to employee nationals who are only authorized to directly participate in hostilities within a state's territory. These limitations will ensure states have a sound basis for asserting jurisdiction over an employee who may engage in behavior in violation of the law of war.[301] States may also, during times of conflict, make civilian employees submit to military jurisdiction.[302]

Allowing civilian employees to serve as remote combatants recognizes states' interest in accessing civilian expertise. Because states rely on accompanying civilians to help support and operate remotely conducted combat operations, refusing to permit employees to be designated remote combatants may give states an incentive simply to hide what their civilians are doing. If remotely conducted combat operations are driven further into concealment, the chances of them being conducted in violation of the law of war will increase because of the difficulty in monitoring state actions and assigning responsibility for any breaches of the law.[303]

The main argument against designating civilian employees as remote combatants is that it undercuts the principle of distinction. This argument does not withstand scrutiny. Even though the principle of distinction has been eroded between accompanying civilians and combatants, designating civilian employees as remote combatants will not cause this principle any further deterioration. Civilian employees engaging in remote combat do so away from the battlefield while operating from military sites that states are required to keep segregated from the general civilian population.[304]

This separation from the scene of conflict and the general civilian population makes the actions of remote combatants different than the actions of civilians who fight with combatants at close quarters. When this proximity exists, the actions of some civilians can place others in danger if combatants repelling an attack from civilians cannot, when returning fire, distinguish between civilians who are and are not participating in hostilities.

Designating civilian employees as remote combatants will not reduce adherence to the laws of war by sowing confusion over when civilians may be

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[300] *See supra* notes 283-88 and accompanying text.

[301] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS 402 (1987) (noting bases for state jurisdiction to prescribe law).

[302] See AIR FORCE GENERAL COUNSEL GUIDANCE DOCUMENT, THE DEPLOYMENT OF CIVIL SERVICE EMPLOYEES 8 (2004) for a discussion on disciplinary issues and criminal and court-martial jurisdiction over civilian employees. This document asserts *Reid v. Covert*, 354 U.S. 1 (1957) may not bar the military from asserting assert court-martial jurisdiction over civilian employees.

[303] *See* Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. OF THE RED CROSS 401, 404 (2002) (noting indispensable predicate for assigning responsibility to a state for a breach of international law is being able to attribute the violation to it).

[304] *See supra* notes 165-67, 270-73 and accompanying text.

targeted. The desire to keep the law of war targeting rules simple to promote adherence to them is legitimate. Allowing civilian employees to be designated remote combatants does not add complexity to the system. Additionally, the prohibition against targeting civilian objectives will not be violated because they will be operating from military objectives segregated from the general civilian population.[305]

Permitting the designation of civilians as remote combatants will not allow terrorists to garner combatant status.[306] Terrorists are not members or employees of the armed forces and do not comply with the law of war.[307] While civilian employees are not members of the armed forces, they do work directly for the state and serve under the supervision and control of military commanders for whose actions states are responsible.[308]

2. *Accompanying Civilians Providing Essential and Direct Support Should Be Lawful Targets for Attack*

The vital role accompanying civilians play in the military capacity of states' armed forces should be acknowledged by authorizing the targeting of accompanying civilians who provide direct and essential support to military combat operations. This change will protect the principle of distinction, remove an incentive for civilianizing militaries, and promote adherence to the law of war.

The principle of distinction is under distress because accompanying civilians are grouped together with the general civilian population.[309] When accompanying civilians provide direct and essential support to military operations, they become logical targets for attack, even if the attack is against their workplace.[310] The law of war has not resolved the tension between the protection owed civilians and the military necessity for attacking accompanying civilians providing direct and essential support.[311] Authorizing the targeting of this subclass of accompanying civilians resolves this tension with a logical rule that accepts that this particular group of civilians needs to be treated differently than the general civilian population.

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[305] *See* ROGERS, *supra* note 77, at 9 ("If there is any hope that the law will be complied with, the rules must be as simple and straightforward as possible.").
[306] *See* DETTER, *supra* note 93, at 145; *cf.* Abraham Sofaer, *Terrorism and the Law*, FOREIGN AFFAIRS, Summer 1986, at 901.
[307] *See* DETTER, *supra* note 93, at 145.
[308] *See* AIR FORCE GENERAL COUNSEL GUIDANCE DOCUMENT, THE DEPLOYMENT OF CIVIL SERVICE EMPLOYEES 8 (2004); Sassoli, *supra* note 303, at 405 (arguing state responsibility for military members).
[309] *See supra* notes 261-73 and accompanying text.
[310] See Park, *supra* note 87, n.402, for a discussion about what he terms quasi-combatants or quasi-civilians, civilians whose direct military contributions warrant their being targeted for attack. For a contrary position, see ROGERS, *supra* note 77, at 8-9.
[311] *See supra* notes 170-79 and accompanying text.

This change in targeting status will have two additional effects. It removes the incentive for states to favor staffing positions with civilians rather than military members and it promotes adherence to the law of war by making the prohibition against attacking the general civilian population stronger.[312]

3. *Procedure for Authorizing Change in Civilian Status*

The procedure for changing the status of accompanying civilians should be through a treaty negotiated under the auspices of the International Committee of the Red Cross, which has expertise in this matter and a long history of participation in the development of the law of war and, in particular, the Geneva Conventions and Protocol I.[313] The proposed changes in accompanying civilian status should not, at a procedural level, be difficult to codify, including the process by which states notify one another if they will use accompanying civilian employees as remote combatants. This procedure can mirror the one already established for switching civilian members of police agencies to combatant status.[314]

A treaty is the preferred method of action because these changes alter the terms of Protocol I, to which the vast majority of states belong. An elemental part of international law is that treaties are binding on parties to them and they must carry out their terms in good faith.[315] However, states interested in establishing these new rules concerning civilians can, amongst themselves, use a new treaty to change that rule[316]

A treaty is also the preferred course of action because unilateral national action cannot make effective changes to the status of accompanying civilians. An international armed conflict will by definition involve at least two states, neither of which will be bound by any domestically initiated alterations concerning the treatment of accompanying civilians in the absence of a binding agreement between them. If one state designates accompanying civilians as remote combatants or targets them for attack when they provide direct and essential support, the opposing state may treat the accompanying civilians as unlawful combatants and the combatants who targeted accompanying civilians directly as war criminals.[317]

States do share a broad interest in addressing the status of accompanying civilians. States throughout the world and at all levels of

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[312] *See supra* notes 274-79 and accompanying text.
[313] *See* DETTER, *supra* note 93, at 163-64.
[314] *See supra* notes 111-12 and accompanying text.
[315] *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 8 I.L.M. 679, 690.
[316] *See id.* art. 30.
[317] *See* Protocol I, *supra* note 77, art. 85(3)(a) (making the targeting of civilians a grave breach of Protocol I). *See also* Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, U.N. Doc. A/CONF.183/9 (2002), available at http://www.un.org/law/icc/statute/english/romestatute(e).pdf (making intentional attacks against civilians not taking direct part in hostilities a war crime).

military power have become increasingly dependent on their use and would benefit from a reexamination of their status under the law of war.

VIII. CONCLUSION

The waging of modern war has changed significantly in recent decades both in terms of who participates and how they fight. The battlefield is becoming less the domain of the soldier as accompanying civilians and remotely operated vehicles take his place. New frontiers for conflict are being opened as states develop the means to attack each other through cyberspace.

The law of war has not yet accommodated these changes in the way states wage war. No suitable standards exist for determining what civilians accompanying the armed forces may do and when they may be targeted for attack. These failures to properly regulate the status of an increasingly important component of states' armed forces diminishes the protection the law of war provides the general civilian population.

States need to establish the status of accompanying civilians in a way that maintains the principle of distinction but also takes into account that accompanying civilians are an essential element of military power. Allowing civilian employees to be designated as remote combatants and legitimizing the targeting of those accompanying civilians who provide direct and essential support of combat operations are critical first steps in the process.

REGULATING THE BATTLEFIELD OF THE FUTURE: THE LEGAL LIMITATIONS ON THE CONDUCT OF PSYCHOLOGICAL OPERATIONS (PSYOP) UNDER PUBLIC INTERNATIONAL LAW

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There are but two powers in the world, the sword and the mind. In the long run the sword is always beaten by the mind.

- Napoleon Bonaparte

I. INTRODUCTION

In the new world order, power and control lie not in preserving territorial integrity, but in the ability to control information.[1] Military psychological operations (PSYOP) are a vital component of national security.[2] PSYOP allows the military to more effectively achieve its strategic and tactical goals while minimizing loss of life. For this reason alone, PSYOP will play a larger role in future conflicts and be a more attractive option to leaders and politicians.[3] As the famous Chinese military thinker Sun Tzu once said, "[o]ne need not destroy one's enemy. One need only destroy his willingness to engage."[4]

During the Persian Gulf War in 1991, PSYOP units dropped over 29 million leaflets to Iraqi soldiers encouraging them to surrender, usually by stressing the inevitability of their defeat.[5] Estimates show that "nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender."[6] Of the estimated 100,000 soldiers who deserted or surrendered, many were found carrying leaflets in their hands or carrying them in their clothes.[7]

In the war on terror, America's influence on the hearts and minds of its adversaries and the associated civilian populations will be more important than

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[1] *See* Sean P. Kanuck, *Information Warfare: New Challenges for Public International Law*, 37 HARV. INT'L L.J. 272, 272-74 (1996) (describing communications technology and its effects on the global economy and international borders).

[2] *See* Major Angela Maria Lungu, War.com: The Internet and Psychological Operations 13-15 (Feb. 5, 2001) (unpublished Graduate Student paper, U.S. Naval War College) (discussing the various uses of the Internet by industry, countries, and political groups), *at* http://www.au.af.mil/au/awc/awcgate/PSYOP/e-PSYOP.pdf (last visited Jan. 23, 2006).

[3] *See* Commander Randall G. Bowdish, *Information-Age Psychological Operations,* 78 MIL. REV. 28 (1998/1999) (arguing that PSYOP warfare, more than any other military instrument, allows us to pursue national interests with minimal bloodshed), *available at* http://www.au.af.mil/au/awc/awcgate/milreview/bowdish.pdf (last visited Jan. 23, 2006).

[4] Gary L. Whitley, *PSYOP Operations in the 21st Century*, STRATEGIC RESEARCH PROJECT 1 (US Army War College 2000).

[5] HEALTH EMERGENCY MANAGEMENT NEW ZEALAND, BULLETIN NO. 69, PSYOP: AN ORWELLIAN MONSTER DRESSED AS A CASUALTY REDUCER 2 (2003) [hereinafter BULLETIN NO. 69], *available at* http://ics.leeds.ac.uk/papers/pmt/exhibits/356/psyoporwell.pdf#search='psyops%20orwellian%20monster%20new%20zealand' (last visited Jan. 23, 2006). Estimates show that ninety-eight percent of Iraq's 300,000 soldiers saw the leaflets. *Id.*

[6] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 25 (2005) [hereinafter HANDBOOK] (citing Robert B. Adolf Jr., *PSYOP: The Gulf War Force Multiplier*, 42 ARMY MAG. 16, 16 (1992)).

[7] BULLETIN NO. 69, *supra* note 5, at 2.

ever. Since the events of September 11, 2001, the United States has placed new emphasis on the realm of public diplomacy and has put together the "most coordinated, best-funded, U.S. strategic perception-management program since the 1980s."[8] The United States has now committed more than 750 million dollars to perception management in the Middle East.[9] With the urban concentration in developing nations growing, the use of force in these heavily populated areas poses an even greater risk to civilians, making armed force a less attractive option.[10] Often operating as an occupying force, the United States will need to utilize PSYOP extensively to win over the hearts and minds of the local population. This is essential to the building of democracies around the globe. Even America's enemies that lack extensive wealth and technology, such as Al Qaeda, are learning to utilize the American media as a psychological weapon against the American people.[11] While beheading a single person on television may appear to have no strategic military value, it is intended to sap popular support for the war in Iraq and further scare other nations into withdrawing their forces from the Middle East. The populations of Western nations are particularly susceptible to this type of intimidation-PSYOP because Westerners are particularly appalled by such acts. This was illustrated when Spain and the Philippines withdrew from Iraq.[12] Such uses of PSYOP are likely to continue.

The Western response to terrorism must include the effective use of PSYOP.[13] The stated goals of the United States in conducting counter-terror PSYOP include: countering the psychological effects of a terrorist act; attacking support for the terrorist cause; publicizing incentives for informing on terrorist groups; deterring terrorists from attacks by convincing them of the futility of their actions; and promoting the legitimacy of the United States.[14]

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[8] Lieutenant Colonel Steven Collins, *Mind Games*, NATO Review (2003), *at* http://www.nato.int/docu/review/2003/issue2/english/art4.html. The creation and execution of the plan was a result of the combined efforts of the White House Office of Global Communications, the U.S. National Security Council Policy Group, the State Department's Office of Public Diplomacy and the Pentagon. *Id.*

[9] *Id.*

[10] Lungu, *supra* note 2, at 3. Using force in areas with large civilian populations would draw international criticism and receive ample news coverage from today's critical media. *Id.* at 3.

[11] Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 476 (1991).

[12] *See* Mark Danner, *The War on Terror: Four Years on*, N.Y. TIMES, Sep. 11, 2005, at 45. In December 2003, a document entitled "Jihadi Iraq: Hopes and Dangers," materialized on the Internet, purportedly written by Al Qaeda. *Id.* It contained a plan for isolating the United States by picking off its allies one by one. The plan identified Spain as "truly ripe fruit" because it suggested the Spanish government could not tolerate more violence. *Id.* Three months later, a terrorist cell attacked the Atocha Train Station in Madrid, killing one hundred ninety-one people. Shortly thereafter the Spanish government was defeated and the successor government withdrew Spanish troops. *Id.*

[13] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS VI-11 (5 Sept. 2003) [hereinafter JOINT PUB. 3-53], *available at* http://www.iwar.org.uk/PSYOP/.

[14] *Id.*

Along with this increase in the use and scope of PSYOP, the United States and any other nation relying on PSYOP must act in a way that is consistent with international law. With little law written or discussed on the subject, any precedent set will be crucial to the development of this area of law. Unlike other areas of military tactics, there are competitors on par with or arguably even more sophisticated than the United States in PSYOP.[15] It is clearly in the interest of the United States to work with the international community to establish standards for PSYOP.

Currently there is precious little international treaty law or customary law restricting the uses of PSYOP.[16] The principles of the laws of war contain two main sets of rules governing PSYOP: rules applicable to offensive uses of PSYOP and rules governing defensive PSYOP measures. The legal principle governing offensive PSYOP is the law of stratagems, or chivalry. The limitations on defensive applications of PSYOP are addressed mainly by restrictions on targeting, such as proportionality and necessity. But these rules are not enough.

In the future, PSYOP laws must change along with the technology utilized to conduct PSYOP. For example, PSYOP laws must take into consideration such tools as the Internet. As PSYOP becomes a more powerful and influential tool, it is likely to see heavier restrictions. On the other hand, it is possible that the international community may embrace PSYOP as a nonviolent means of achieving certain objectives and shy away from heavy restrictions.[17]

This article addresses the legal limitations on PSYOP as used on group audiences, both civilian and military. The international community must address conclusively whether a nation may legally target the morale of a civilian population through PSYOP. Traditional notions of sovereignty should be expanded to include the hearts and minds of the people, thus limiting the abilities of states to influence or control the people of another state through PSYOP.

This article will begin by defining the terms modern commanders use to describe their deployment of PSYOP. A discussion of the history of PSYOP will follow, illustrating the critical role this unique weapon of war has played in armed conflict. The article will then cite examples of modern unclassified PSYOP and will outline the current international legal restrictions on PSYOP.

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[15] OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY & LOGISTICS, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE, THE CREATION AND DISSEMINATION OF ALL FORMS OF INFORMATION IN SUPPORT OF PSYCHOLOGICAL OPERATIONS (PSYOP) IN TIME OF MILITARY CONFLICT 7 (2000) [hereinafter DEFENSE SCIENCE BOARD]. The Defense Science Board attributed this increased sophistication to the fact that, "foreign rivals are often more flexible, less restricted by outdated equipment and policy, and better able to take advantage of changes in the manner in which people communicate." *Id.*

[16] *See infra* Parts III & IV.

[17] *See* Bowdish, *supra* note 3, at 36. In the words of Commander Bowdish: "In the face of diminishing defense budgets and increasing conflict around the world, information-age PSYOP may prove to be a valuable foreign policy instrument . . . ." *Id.*

Finally, it will conclude by proposing additional methods to govern the use of PSYOP.

II. AN OVERVIEW OF PSYOP

A. Definitions

PSYOP is as old as warfare itself. With the possible exception of its overall PSYOP campaign in Vietnam,[18] the United States has successfully utilized PSYOP in its military operations throughout history.[19] The role of PSYOP in warfare continues to increase and in the operations in Kosovo and Bosnia was credited with much of the success.[20]

PSYOP is a subclass of Information Operations, or Information Warfare (IW).[21] IW includes "actions taken to achieve information superiority by affecting adversary information, information-based processes, information systems, and computer-based networks while defending one's own information . . . ."[22] PSYOP is defined by the U.S. military as "operations planned to convey selected information and indicators to influence the emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals."[23] PSYOP can be used on the offensive to confuse, scare and demoralize enemy groups.[24] It can also be used defensively to counter enemy propaganda and misinformation. This is accomplished by correctly portraying events and intentions and denying the enemy the opportunity to influence friendly populations or forces.[25] Just because military actions have a psychological impact or effect is not enough for them to be considered PSYOP. Rather, PSYOP is intended to have the primary purpose of influencing the emotions, motives, reasoning and decision making

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[18] *Id*. at 19-20. One of the pioneers of American PSYOP was Air Force Brigadier General Edward G. Lansdale. Jon Elliston, *Psywar Terror Tactics*, *available at* http://www.parascope.com/ds/1096/psy.htm (last visited Jan. 23, 2006). One tactic he used involved playing on the superstitious fears of the Viet Cong and North Vietnamese. In the "eye of God technique," PSYOP units used loudspeakers in the villages to broadcast the names of guerillas and to warn the people that they were under constant surveillance. *Id*. At night, PSYOP soldiers would sneak into the village and spray paint a giant eye on the wall facing the hut of each rebel. *Id*. General Landsdale reported that "[t]he mysterious presence of these malevolent eyes the next morning had a sharply sobering effect." *Id*. In 1962, President Kennedy gave Lansdale the task of designing Operation Mongoose, a secret campaign to undermine Cuba's communist government. *Id.*

[19] *See generally* Lieutenant Colonel Susan L Gough, *The Evolution of Strategic Influence*, STRATEGIC RESEARCH PROJECT (U.S. Army War College 2000).

[20] DEFENSE SCIENCE BOARD, *supra* note 15, at 7.

[21] Whitley, *supra* note 4, at 3.

[22] JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, JOINT DOCTRINE FOR COMMAND AND CONTROL WARFARE (C2W) I-3 (7 Feb. 1996).

[23] JOINT PUB. 3-53, *supra* note 13, at xiii.

[24] Alfred H. Paddock, Jr., *Military Psychological Operations, in* POLITICAL WARFARE AND PSYCHOLOGICAL OPERATIONS*:* RETHINKING THE U.S. APPROACH 45 (1989).

[25] JOINT PUB. 3-53, *supra* note 13, at x.

of the target.[26] PSYOP is used before fighting starts, during the campaign, and after hostilities conclude.[27]

Propaganda is one of the most common applications of PSYOP and, consequently, a significant focus of this article. The U.S. military defines propaganda as "[a]ny form of communication in support of national objectives designed to influence the opinions, emotions, attitudes, or behavior of any group in order to benefit the sponsor, either directly or indirectly."[28] There are different categories of such propaganda, or PSYOP, which are classified according to the source from which they originate. This classification is important to understanding PSYOP and applying the law.

1. *White, Black and Gray*

PSYOP is classified according to the source of the message: white, black, or gray.[29] First, overt messages are called "White propaganda" or "White PSYOP."[30] White PSYOP are those messages issued from an open and acknowledged source, targeting a specific audience and not hiding the source from the enemy or indeed the world.[31] White messages are truthful in nature and are based on objective fact.[32] An example would be a printed handbill that intimidates Iraqi soldiers into surrendering by bragging of U.S. military capabilities. Second, covert messages, known as "Black propaganda" or "Black PSYOP" are the opposite.[33] Black PSYOP consist of messages from an unknown source,[34] and are often based on lies or fabrications.[35] This is accomplished by purposely misleading the target audience or by simply withholding the identity of the source of the message or both.[36] Finally, "Gray Propaganda" or "Gray PSYOP" activities fall between the two extremes and are neither completely true nor completely false,[37]and do not specifically identify the source.[38] All three types of messages can be effective against a target

[26] *Id.* at I-2. PSYOP should not be confused with psychological impact. Actions such as air strikes may have psychological effects, but these operations are not PSYOP unless their *primary purpose* is to influence "emotions, motives, objective reasoning, decision making, or behavior." *Id.*
[27] PAUL M.A. LINEBARGER, PSYCHOLOGICAL WARFARE 1 (1948).
[28] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 427-428 (12 Apr. 2001) [hereinafter JOINT PUB. 1-02].
[29] *Id*. at 226.
[30] LINEBARGER, *supra* note 27, at 44.
[31] *Id.*
[32] Major Lee-Volker Cox, Planning for Psychological Operations: A Proposal 6 (Mar. 1997) (unpublished Graduate Student paper, Air Force Air Command and Staff College).
[33] LINEBARGER, *supra* note 27, at 44.
[34] JOINT PUB. 1-02, *supra* note 28, at 68; LINEBARGER, *supra* note 27, at 44.
[35] Cox, *supra* note 32, at 6.
[36] *See id.*
[37] Cox, *supra* note 32, at 6.
[38] JOINT PUB. 1-02, *supra* note 28, at 226.

audience, and all three types of messages are disseminated across a spectrum of operations.

2. *Levels of Operation*

PSYOP employs these different types of messages over three main areas of operation. The first area of operation is called Strategic PSYOP.[39] Strategic PSYOP is the broadest use of PSYOP and is conducted primarily outside the military; however, it can be conducted in coordination with the military and by using Department of Defense assets.[40] These operations include the dissemination of information internationally by different U.S. government agencies, in both war and peacetime, to influence "foreign attitudes, perceptions, and behavior" in a manner favorable to the United States.[41] Strategic PSYOP is employed before *and* after a conflict.[42] PSYOP used before conflict helps shape the military context in a favorable fashion for U.S. forces.[43] PSYOP after a conflict shapes the way U.S. military actions are perceived by people in the region and helps to achieve the desired end state.[44]

The second area of PSYOP use is called Operational PSYOP. Operational PSYOP is conducted in a defined area during peacetime and war, to increase the effectiveness of a military campaign.[45] Operational PSYOP has a broader and more regional focus.[46] The operational tactics involve "regionally oriented efforts prior to, during, and after conflict in support of a commander's plans."[47]

The third and most narrowly targeted area of PSYOP is called Tactical PSYOP. This is essentially a military battlefield use of PSYOP conducted in a specific geographical area under the control of a tactical commander. [48] Tactical PSYOP is used to support the tactical mission commander and his military operations.[49] For PSYOP, supporting a commander during a conflict means employing such methods and devices as broadcasting sounds or messages over loudspeakers, using radio and television transmissions, distributing leaflets, or other locally focused activities.[50] The broadcasting of messages over radio and TV is often done by the use of an EC-130 cargo plane outfitted with electronic equipment that has the capability of broadcasting AM and FM radio and VHF and UHF TV signals from an altitude of 18,000 feet.[51]

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[39] JOINT PUB. 3-53, *supra* note 13, at ix.
[40] *Id.*
[41] *Id.*
[42] Cox, *supra* note 32, at 5.
[43] DEFENSE SCIENCE BOARD, *supra* note 15, at 8.
[44] *Id.*
[45] JOINT PUB. 3-53, *supra* note 13, at ix-x.
[46] Cox, *supra* note 32, at 4.
[47] *Id.*
[48] JOINT PUB. 3-53, *supra* note 13, at x.
[49] *Id.*
[50] Cox, *supra* note 32, at 4.
[51] DEFENSE SCIENCE BOARD, *supra* note 15, at 14.

The U.S. Army employs 10- and 50-kW radio and TV broadcast transmitters, print systems for leaflet dissemination, and mobile and audiovisual vans.[52] The U.S. Air Force uses the EC-130 *Commando Solo* aircraft for TV and radio broadcasts.[53] The U.S. Navy is capable of producing "audiovisual products from a host of imaging commands, but its broadcast capability is limited to a van-configured 10.6 kW AM radio transmitter."[54] Finally the U.S. Marine Corps tactical PSYOP units employ loudspeaker broadcasting, aerial and artillery leaflet distribution and audiovisual equipment.[55] By using these devices and methods in support of military operations, the various branches of the U.S. military have four strategies or tactics to influence the behavior of an enemy.

3. *Tactical Operations*

The four main tactics employed in PSYOP are Persuasive Communication, Command Disruption, Counterinformation, and Intelligence Shaping.[56] Persuasive Communications are any communications that "systemically convey information with the intent of affecting the perceptions and behaviors of the foreign [target audience]."[57] These are messages or indicators meant to change or reinforce the target audience's attitudes, beliefs and behavior.[58] Command Disruption is the interference with an adversary's command, control and communications network in order to disrupt an enemy's "morale, cohesion, discipline, and public support"[59] for its military operations.[60] Counterinformation is the systematic protection of sensitive information and the denial of enemy access to information activities, capabilities and intentions of friendly forces.[61] Finally, Intelligence Shaping is shaping an adversary's judgments, perceptions and ultimately decision making through the systematic releasing or suppression of information to cause opposing analysts to derive desired judgments.[62]

As mentioned earlier, these tactics are employed through dissemination of information via newspapers, magazines, leaflets, the Internet, radio and television.[63] For example, in Iraq, the United States broadcasts an FM radio

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[52] Bowdish, *supra* note 3, at 28.
[53] *Id.* These aircraft are assigned to the Pennsylvania Air National Guard. *Id*.
[54] *Id.*
[55] Bowdish, *supra* note 3, at 28.
[56] JOINT PUB. 3-53, *supra* note 13, at IV-3 to IV-4.
[57] *Id.* at IV-3.
[58] *Id.*
[59] JOINT PUB. 3-53, *supra* note 13, at IV-3.
[60] *Id.*
[61] *Id.* at IV-4.
[62] JOINT PUB. 3-53, *supra* note 13, at IV-4.
[63] Whitley, *supra* note 4, at 7; DEFENSE SCIENCE BOARD, *supra* note 15, at 13.

station called "Voice of Freedom," which plays Arab music and discusses the goals for the new Iraqi government.[64]

American soldiers often employ creative tactics such as using loud and aggressive American pop-culture at the tactical level to frighten or intimidate enemy fighters. During the first ground campaign in Afghanistan, American soldiers played the heavy metal song "Let the Bodies Hit the Floor" by the heavy metal band Drowning Pool as they were being deployed via helicopter.[65] During the November 2004 battle of Fallujah, Marine Humvees with loudspeakers blasted the song "Back in Black," by the heavy metal band AC/DC, during the fighting.[66] There were also reports that the Americans "played the cavalry charge and loud sonar pings, along with the sounds of maniacal laughter and babies wailing."[67] Another tactic employed in the battle for Fallajah was disrupting the insurgents ability to rally their troops by playing high-pitched whines from loudspeakers whenever the insurgents issued their calls to arms over their own loudspeakers.[68] These often ad hoc tactics are meant to frighten and disrupt the minds of the enemy and may be especially effective among certain cultures.[69] For example, during interrogations of Iraqi fighters, American interrogators played the song "Enter Sandman" by the heavy metal group Metallica.[70] The interrogators reported that this was an especially effective interrogation tool.[71]

Whatever the means used, "[t]he overall function of PSYOP is to cause selected foreign audiences to take actions favorable to the objectives of the United States and its allies or coalition partners."[72] Generally, the commander of U.S. Special Forces Command exercises command authority over PSYOP forces. [73] As a result, some PSYOP methods are classified and cannot be analyzed in this article. Those methods that are unclassified, however, raise the question of what legal restrictions, if any, apply? With the growing importance of PSYOP and the rapid development of communications technology, there is a growing need for a legal framework.

The current legal restrictions on PSYOP are limited. Even though PSYOP has played a crucial role in the outcome of armed conflicts throughout

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[64] Robert F. Worth, *Sides in Falluja Fight for Hearts and Minds*, N.Y. TIMES, Nov. 17, 2004, at 13.
[65] *See* VH1.COM NEWS, SOUNDTRACK TO WAR, *available at* http://www.vh1.com/shows/dyn/vh1_news_presents/85439/episode_about.jhtml (last visited Jan. 23, 2006).
[66] Worth, *supra* note 64.
[67] *Id.*
[68] *Id.*
[69] *See Iraqi POW's "Tortured" With Heavy Metal Music*, JAPAN TODAY, May 21, 2003, *available at* http://www.japantoday.com/e/?content=news&cat=8&id=260535 (last visited Jan. 23, 2006).
[70] Jon Wiederhorn, *Ulrich Blasts Military For Blasting Metallica At Prisoners*, VH1.com, *available at* http://www.vh1.com/news/articles/1472566/06112003/metallica.jhtml (last visited Jan. 23, 2006).
[71] *Iraqi POW's "Tortured" With Heavy Metal Music*, *supra* note 69.
[72] JOINT PUB. 3-53, *supra* note 13, at xii.
[73] *Id.* at III-1. U.S. Special Operations Command can only transfer command authority if directed to do so by the Secretary of Defense. *Id*.

history, it is often overlooked and overshadowed. As a result, the international community may be largely unaware of the need for a legal framework. Because PSYOP is most effective on an oblivious target audience, it is easy to overlook or underestimate its importance.

B. History of PSYOP

The history of PSYOP can be traced throughout the history of warfare. Propaganda, deception, and intimidation go hand in hand with armed combat and have been used throughout the ages by some of history's most successful armies. One of the earliest recorded examples of PSYOP is Gideon's use of lamps and jars against the Midianites in 1245 B.C., which is recorded in the Book of Judges in the Bible.[74] According to the Book of Judges, God commanded Gideon to release all but three hundred of his 22,000 soldiers, leaving Gideon severely outnumbered by the Midianites.[75] During this time period, it was customary for each century[76] of men in an army to have only one torchbearer at night.[77] Gideon cleverly created the illusion at night that his men numbered 30,000 by giving all three hundred of his men torches.[78] He also gave his men horns and jars.[79] Gideon's men surrounded the Midianites' camp, concealing their torches in the jars to mask their movement through the night.[80] Once Gideon's army was in position, they blew their horns and shattered their jars, revealing their torches and their supposed numbers.[81] The Midianites were woken suddenly, and were so frightened that they fought amongst themselves and fled in utter panic without putting up any opposition.[82]

Another example of PSYOP comes from the tactics used by Ghengis Khan. In fact, Ghengis Khan used PSYOP in conjunction with his fighting tactics so successfully that he was able to conquer most of Asia. It is often believed that the Mongol horsemen poured into various territories of Eurasia and conquered by sheer numbers alone.[83] In truth, the Mongols rarely won by numerical superiority.[84] In fact, the Asian steppes were so sparsely populated that they could not have produced a population large enough to overwhelm the densely populated areas they conquered.[85] The Mongols instead used spies to

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[74] 7 *Judges* 7:1-25; LINEBARGER, *supra* note 27, at 3.
[75] 7 *Judges* 7:1-7. The Minianites were too many to be counted, "as numerous as locusts." 7 *Judges* 7:12.
[76] A century is a series of 100 like things. THE WEBSTER'S NEW COLLEGIATE DICTIONARY 181 (Henry B. Woolf ed. 1977).
[77] LINEBARGER, *supra* note 27, at 3.
[78] 7 *Judges* 7:16.
[79] *Id*.
[80] LINEBARGER, *supra* note 27, at 3-5.
[81] *Id*. at 5.
[82] *Id.*
[83] LINEBARGER, *supra* note 27, at 14.
[84] *Id*.
[85] *Id*.

plant rumors of their "huge numbers, stupidity, and ferocity"[86] among enemy populations to lower morale and frighten the enemy before an attack.[87] To this day, the numerical inferiority of the Mongols is often unappreciated.[88] The Mongols are still thought of as numberless hordes by those they conquered, showing the effectiveness of their PSYOP.[89]

Finally, the Americans demonstrated a very creative use of PSYOP very early in their military history. At the Battle of Bunker Hill, Americans used printed handbills to distribute to the British soldiers.[90] The Americans used the sharp class distinction between British officers and enlisted men to persuade British soldiers to defect.[91] Deserters were promised "Seven Dollars a Month, Fresh Provisions, and in Plenty, Health, Freedom, Ease, Affluence and a good farm."[92] These promises were juxtaposed with conditions inside the British Army: "Three Pence a Day, Rotten Salt Pork, The Scurvy, Slavery, Beggary and Want."[93] The ways in which PSYOP is used today are not that dissimilar from how they were used in the past.

C. Current uses of PSYOP

1. *Command Structure*

When a modern army such as the U.S. military engages in PSYOP, authorization and planning is coordinated through a chain of command. Within the U.S. military, this coordination begins at the top with the President. The Executive Branch has command and control of PSYOP.[94] The President's intelligence powers are rather broad.[95] By Executive Order, the President has the authority to conduct global broadcasting in any region in the President's discretion to promote U.S. policies, achieve U.S. objectives and promote Democracy.[96] Creating radio stations that promote the United States abroad is a common method used by the President. In fact, the United States currently has radio broadcasts in every region of its national interest including Europe, the Middle East, South America and Asia.[97] Radio Free Afghanistan, a radio station used to promote the United States in Afghanistan, is an example of a

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[86] LINEBARGER, *supra* note 27, at 15.
[87] *Id*.
[88] *Id*.
[89] LINEBARGER, *supra* note 27, at 15.
[90] *Id.* at 21.
[91] *Id*.
[92] LINEBARGER, *supra* note 27, at 21.
[93] *Id*.
[94] 10 U.S.C.A. § 167 (1994) (Unified combatant command for special operations forces).
[95] National Security Act of 1947, 50 U.S.C. § 413 (1947) (President has power to engage in "significant" intelligence activities without Congressional approval).
[96] NATIONAL SECURITY DIRECTIVE 51, US GOVERNMENT INTERNATIONAL BROADCASTING (calling for consolidation of U.S. foreign broadcasting efforts into one entity).
[97] *See generally* Gough, *supra* note 19, at 29-30.

commonly used strategic or operational PSYOP employed in both peace and wartime.[98] The coordination of all of the United States' information efforts is handled by International Public Information (IPI), a unified agency responsible for the coordination at all levels of government of public information and policy.

Below the President, the Secretary of State has general guidance over another agency critical to America's reputation abroad during peacetime—the United States Agency for International Development (USAID).[99] USAID is used to promote the interests of the United States through efforts to aid in economic development and humanitarian assistance[100] in peacetime. But the IPI and USAID must limit PSYOP to overseas. The Foreign Relations Authorization Act of 1972 bans the IPI from disseminating "any information about the U.S., its people, and its policies . . . prepared for dissemination within the United States."[101]

During wartime, the combatant commander is responsible for the direction and conduct of PSYOP in the combatant commander's area of responsibility, and is accountable to the President and Secretary of Defense through the Chairman of the Joint Chiefs of Staff.[102] The responsibility of any PSYOP deployment could potentially lie with these people. Thus, when PSYOP is used, the legal ramifications could be significant.

2. *Afghanistan*

After the attacks of September 11, 2001, the U.S.-led invasion of Afghanistan known as Operation Enduring Freedom employed PSYOP in a variety of ways. The PSYOP conducted, often in the form of mass propaganda, served several purposes. Before and during hostilities, PSYOP created fear in the minds of the Taliban and Al Qaeda fighters, drove a wedge between the Taliban and the Afghan people, and created a favorable attitude toward the United States and its allies among the Afghan people. Finally, PSYOP was essential in preventing the Afghan people from becoming hostile toward the coalition forces.

The psychological warfare included radio broadcasts from the U.S. Air Force's EC-130-E *Command Solo* aircraft of the 193rd Special Operations Wing.[103] These broadcasts were aimed at and sought to win the trust of the local people by conveying a positive image of the United States.[104] These broadcasts also served to inform the Afghan people of the purpose of the

[98] 22 U.S.C. § 6215 (2002) (authorizing the broadcasting board of governors to make grants to support the creation of RFA).
[99] Cox, *supra* note 32, at 16.
[100] *Id.*
[101] 22 U.S.C. § 1461(a).
[102] JOINT PUB. 3-53, *supra* note 13, at xi.
[103] Herbert A. Friedman, *Psychological Operations in Afghanistan, Operation Enduring Freedom*, PSYWar.Org, *at* http://www.psywar.org/afghanistan.php (last visited Jan. 23, 2006).
[104] *Id.*

invasion and to convince them that the United States wanted to destroy only Al Qaeda and the Taliban.[105] These radio broadcasts consisted of news and popular music.[106] To facilitate the reception of these broadcasts and to make certain the greatest possible number of people had access to these radio transmissions, cargo planes dropped radios with batteries.[107]

Radio broadcasts were also aimed at the Taliban. One example of a broadcast designed to instill fear among the Taliban and sap their will to fight stated:

> Attention Taliban! You are condemned. Did you know that? The instant the terrorists you support took over our planes, you sentenced yourselves to death...our helicopters will rain death down upon your camps before you detect them on your radar. Our bombs are so accurate we can drop them through your windows...you have only one choice, surrender now and we will give you a second chance. We will let you live.[108]

One day after the United States broadcast messages warning of the U.S.-led invasion, two hundred American special forces soldiers attacked a Taliban fortress in Kandahar, home of the Taliban's spiritual leader Mullah Omar.[109] This attack was part of the American psychological warfare campaign, showing the Taliban that nowhere was safe.[110]

In addition to radio broadcasts, the U.S.-led coalition sought to achieve its objectives by dropping leaflets from C-130 cargo planes.[111] Over eighteen million leaflets were dropped in the country of Afghanistan, which has a population of twenty-six million.[112] These leaflets, depending on the mission, sought to intimidate, frighten, coerce, or win hearts and minds.[113] Some of the leaflets tried to drive a wedge between the Afghan people and the mostly Pakistani Taliban with text that read "Expel the foreign rulers and live in peace."[114] Another leaflet featured a picture of Taliban religious police whipping a woman in a burqa which read "Is this the future you want for your women and children?"[115] The role of PSYOP in Afghanistan was significant. It was not long before PSYOP units were called on again to operate in another Middle Eastern nation.

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[105] *Id.*
[106] Friedman, *supra* note 103.
[107] *Id.*
[108] *Id.*
[109] Friedman, *supra* note 103.
[110] *Id.* The Americans left behind two million leaflets bearing a picture of New York City firemen raising the American flag over the ruins of the World Trade Center with the words "Freedom Endures." *Id*.
[111] *Id.*
[112] Friedman, *supra* note 103.
[113] *Id.*
[114] *Id.*
[115] Friedman, *supra* note 103.

3. *Iraq*

Both sides of the Iraqi invasion of 2003 recognized the power of perception-management.[116] From the very beginning of the conflict, the coalition decision to embed journalists within the fighting units was an attempt to portray the operations in a favorable light to the American public.[117] Embedding reporters with the soldiers gave the reporters a sense of appreciation for the soldiers. It also allowed the reporters to bond with their comrades in arms, which in turn resulted in positive coverage by those journalists.[118] The Iraqi Information Agency had similar motives when it infiltrated the Arab news organization "Al Jazeera" to affect news coverage of the Iraqi conflict.[119] The coalition also tried to take pro-Saddam Iraqi TV news service off the air through electronic jamming and bombing.[120]

Other applications of PSYOP were also used. Tactical psychological operations were employed to support fighting units, such as using loudspeakers mounted on humvees to encourage Iraqi forces to surrender and playing helicopter and vehicle sounds to deceive enemy fighters.[121] Around forty million leaflets were dropped on Iraq before the U.S.-led ground invasion began, and another forty million were dropped during hostilities.[122] The United States approached the invasion with psychological intentions in mind.[123] The "shock and awe" campaign was intended to smash Saddam Hussein's regime by demonstrating the might of the U.S. military and the futility of fighting against it.[124] The United States expected the Iraqi military to essentially give up after witnessing America's military capabilities.[125] When this did not work, the United States had to change its strategy to a more steady application of pressure.[126]

One component of this strategy was a steady dose of propaganda. Several radio stations were created such as "Information Radio," a radio station with news broadcasts, announcements and local popular music.[127] The Central Intelligence Agency also set up a deceptive or Black PSYOP radio station called "Radio Tikrit."[128] Radio Tikrit was purported to have been managed by local Iraqis and at first ran news editorials that were loyal to Saddam

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[116] Collins, *supra* note 8.
[117] *Id.*
[118] *Id.*
[119] Collins, *supra* note 8.
[120] *Id.*
[121] *Id.*
[122] Collins, *supra* note 8.
[123] *Id.*
[124] *Id.*
[125] *See* Collins, *supra* note 8.
[126] *Id.*
[127] *Id.*
[128] Collins, *supra* note 8.

Hussein.[129] After a few weeks, the radio station grew more and more critical of the dictator.[130] These efforts were designed to undermine the legitimacy of the Hussein regime and to discourage those loyal to it from fighting.

Whether through radio broadcasts, leaflet drops or loudspeaker messages, PSYOP units played a significant role supporting the fighting units in both Iraq and Afghanistan. PSYOP units planned and created messages based on their target audience and specific to their goal. When operating in both wartime and peace, PSYOP units must abide by the laws of war like the rest of the military. To understand the legality of PSYOP missions it is important to understand the applicable international law. This article will now examine the laws of war and outline the law applicable to PSYOP in the international arena.

III. SOURCES OF PSYOP

International law is the body of law that governs the conduct and relations of nation states as well as certain international organizations. The sources of international law are laid out in Article 38 of the Statute of the International Court of Justice (ICJ)[131] as follows:

> a. international conventions, whether general or particular, establishing rules expressly recognized by contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.[132]

International law has traditionally been divided into two broad types of law: the laws governing nations during peacetime and the laws governing nations during times of war.[133] This second area of law is known collectively as "the laws of war" or jus in bello[134] and is the focus of this article. Treaty law and customary international law are the main sources of law concerning the laws of war, or the law of armed conflict.[135] Treaty law includes written or oral agreements between nation states or certain international bodies executed by

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[129] *Id.*
[130] *Id.*
[131] Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031 (entered into force Oct. 24, 1945).
[132] *Id.*
[133] DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 226 (2001).
[134] *Id.*
[135] For a discussion of the history and sources of the law of armed conflict, see LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 20-53 (2d ed. 2000). *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

authorized representatives or diplomats of those states or bodies.[136] Treaty law is binding only on signatories of the treaty; however, customary international law is binding on all nations.[137] The United States is a party to thirteen international conventions or treaties addressing warfare.[138]

Treaty law forming the law of armed conflict can generally be divided into two bodies of law: Hague Law and Geneva Law.[139] Hague Law deals with the means and methods by which warfare is conducted,[140] and Geneva Law is generally concerned with the protection of people involved in armed conflicts.[141]

Customary international law is the common practice of nations, which becomes legally binding over time.[142] For state practice or custom to become customary international law, the practice or behavior must be followed as a general practice over time and be carried out by the nation state out of a sense of legal obligation.[143] The international standards governing the behavior of nation states during war come from both treaty and custom.[144]

A. Principles of the Law of War

The most basic tenet of international military law is that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[145] The law of war (LOW) regulates the conduct of war and the status, rights, and duties of enemy nations and of enemy individuals.[146] The principles of the LOW seek to reduce the horrors of war to the greatest extent possible in light of the political

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[136] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (1987).
[137] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, 1-I(7) [hereinafter MANUAL 27-10]. Also, parties may expressly make reservations to certain parts of treaties as long as those reservations are agreed upon by other signatories and do not frustrate the object of the convention. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).
[138] *Id.* at 1- I(5).
[139] GREEN, *supra* note 135, at 33-53.
[140] *See* Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539; Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War. These treaties were negotiated at the Hague in the Netherlands in 1899 and 1907. GREEN, *supra* note 135, at 33-36.
[141] The United States has not ratified the 1977 Protocols Additional to the Geneva Conventions. Roughly 150 nations have ratified the Protocols. The Protocols will bind nations in most international operations. "U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law." HANDBOOK, *supra* note 6, at 2-4.
[142] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).
The time it takes for customary international law to develop from state practice varies, sometimes forming after many years of practice, and sometimes forming instantaneously.
[143] BEDERMAN, *supra* note 133, at 15.
[144] MANUAL 27-10, *supra* note 137, at 1-I(4).
[145] Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 112 (2001).
[146] 78 AM. JUR. 2D *War* § 1 (2006).

purpose of the conflict.[147] This naturally includes the protection of civilians. The LOW applies to all cases of declared war or any other armed conflicts that arise between the United States and other nations, even if the state of war is not recognized by one of them.[148] It also applies to cases of partial or total occupation.[149] This is codified in Article 2 of the Geneva Conventions.[150]

The LOW applies four general principles to the legality of any military operation.[151] The four principles are: the distinction between combatants and non-combatants; proportionality; necessity; and avoidance of unnecessary suffering.[152] There is an additional custom or component of the LOW known as chivalry, which is particularly important to PSYOP.[153] This article will address each of these four principles, as well as chivalry, and then will discuss their applicability to PSYOP.

It should be noted that these LOW principles were developed with physical warfare in mind.[154] As PSYOP is usually not a form of physical warfare, the principles of LOW may not smoothly translate into rules governing PSYOP. The most applicable sources of law governing PSYOP are those regarding chivalry and the legality of "ruses" because the goal of PSYOP is to influence or even change the thinking of the enemy.[155]

1. *Distinction between Combatants and Non-Combatants*

The first principle of the LOW distinguishes between combatants and non-combatants and states that only lawful combatants are entitled to engage in armed conflict.[156] The principle of distinction "requires lawful combatants distinguish themselves from noncombatants by wear of a uniform, training in the LOW, and must serve under effective discipline and responsible command."[157] As PSYOP can easily be viewed as a combatant act, it should only be performed by uniformed personnel. Any nation using non-uniformed personnel to conduct PSYOP could be violating the principle of distinction.

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[147] GREEN, *supra* note 135, at 15. "[I]n no case may the force used exceed at any time the necessities of the situation or be directed towards any other object than the desired coercion of the enemy." *Id*. at 348.
[148] *Id*. at 80. For example, see Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].
[149] Third Geneva Convention, *supra* note 148, art. 2.
[150] *Id.*
[151] GREEN, *supra* note 135, at 347-57.
[152] *Id.*
[153] *Id.* at 348.
[154] Captain Robert G. Hanseman, *The Realities and Legalities of Information Warfare*, 42 A.F. L. Rev. 173, 184-85 (1997).
[155] Telephone Interview with Colonel Harold Youmans, Ret., Chief, Policy & Concepts Division, Headquarters, United States Special Operations Command, U.S. Army (Feb. 15, 2005) [hereinafter Youmans Interview]; Wingfield, *supra* note 145, at 113.
[156] The 1977 Protocols Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, art. 43(2) [hereinafter Geneva Protocol I].
[157] *See* Third Geneva Convention, *supra* note 148, art. 13.

This principle of distinction also applies to targeting. It requires military objectives to be distinguished from non-military and protected property or protected places.[158] Civilian populations, as well as individual civilians, "shall enjoy general protection against dangers arising from military operations."[159] Further, "[p]arties to a conflict shall direct their operations only against combatants and military objectives."[160] The 1977 Protocols Additional to the Geneva Conventions (Geneva Protocol I) prohibits "indiscriminate attacks," which are those "not directed at a specific military objective."[161] Geneva Protocol I defines "attacks" as "acts of violence against the adversary, whether in offence or in defence."[162]

The question remains whether civilian populations may be the target of strategic PSYOP. Some PSYOP actions are clearly prohibited by Geneva Protocol I: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[163] Beyond that, the law is not clear whether other PSYOP messages directed at civilian populations are in violation of the principle of distinction. The U.S. military directs many of their messages at civilians, as it is often necessary for the safety of those civilians.[164] Using Article 51 of the Geneva Protocol I as a guide, states should look at the purpose and effect of the message to determine its legality.[165]

2. *Proportionality*

The second guiding principle of the LOW is the idea of proportionality.[166] Frequently, when military targets are attacked, collateral damage results and civilian casualties are unavoidable. Proportionality does not bar attacks when civilian casualties are foreseeable unless the likely civilian casualties are disproportionately large compared to the military advantage likely to be gained.[167] Proportionality is the idea that "incidental injuries caused to such persons or objects in the course of a legitimate attack must be

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[158] GREEN, *supra* note 135, at 125.
[159] Geneva Protocol I, *supra* note 156, art. 49(1).
[160] *Id.* art. 48.
[161] *Id.*
[162] Geneva Protocol I, *supra* note 156, art. 49(1).
[163] *Id.* art. 51(2).
[164] Friedman, *supra* note 103. When it dropped food packets to the Afghanis, the U.S. military also dropped leaflets explaining the contents and instructing them on how to open the packets. *Id.* Leaflets directed to civilians also warned Afghanis to stay away from mines. *Id.* The leaflets contained a skull and crossbones and showed seven different types of explosives. *Id.* The leaflet text read "Danger! Unexploded ordinance can kill! Do not touch! Help us keep you safe." *Id.*
[165] "Acts or threats of violence the *primary purpose of which* is to spread terror among the civilian population are prohibited." Geneva Protocol I, *supra* note 156, art. 51(2) (emphasis added).
[166] U.S. DEP'T OF DEFENSE, OFFICE OF GENERAL COUNSEL, AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS 6-7 (1999) [hereinafter OFFICE OF GENERAL COUNSEL].
[167] *Id.* at 6.

proportionate to the purpose of the attack."[168] When considering military advantage, "[t]he military advantage to be gained from an attack refers to an attack considered as a whole rather than only from isolated or particular parts of an attack."[169] Geneva Protocol I prohibits attacks where the collateral damage to civilians would be "excessive in relation to the concrete and direct military advantage anticipated."[170] Collateral damage per se is not unlawful, as long as it is "incidental" and satisfies the requirements of proportionality.[171] This requires a military commander to act reasonably in considering and planning an operation.[172]

Proportionality could be applied to PSYOP where an actor uses PSYOP to cause unnecessary death and destruction, such as using propaganda or rhetoric to destabilize a population or region, or cause a civil war. With developments in communications technology, it may be possible through "video morphing and communications spoofing"[173] for another country "to manipulate the perceptions of its adversary's leaders and populace. The country may spread confusion or disaffection by covertly altering official announcements or news broadcasts, or it may confuse or frighten leaders by spoofing intelligence or other government communications."[174] This danger is "more than theoretical. Some observers believe that 'hate radio' contributed to, or even sparked, genocide in Rwanda and the former Yugoslavia."[175] If PSYOP caused more destruction than needed to accomplish an objective, the principle of proportionality could be violated.[176]

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[168] GREEN, *supra* note 135, at 124.
[169] OFFICE OF GENERAL COUNSEL, *supra* note 166, at 7.
[170] Geneva Protocol I, *supra* note 156, art. 57(2)(a)(iii).
[171] *Id.*
[172] GREEN, *supra* note 135, at 125. Proportionality may also be applied when using force against a target that is conducting PSYOP, as NATO did in 1999 in the former Yugoslavia. *See* Alexandre Balguy-Gallois, *Propaganda-Oriented Media and International Humanitarian Law*, Reporters Without Borders, January 2003, *at* http://www.damocles.org/IMG/pdf/Memorandum_uk.pdf. NATO attacked a communications and broadcasting center which had both strategic military as well as questionable objectives. *See id.*
[173] Lawrence T. Greenberg et al., *Information Warfare and International Law* 13 (National Defense University Press, 1998).
[174] *Id.*
[175] *Id.* Incitement of violence based on ethnic hatred "seemed to be a big player in getting people ready to kill, mutilate, and torture people they had grown up with in the former Yugoslavia." Colonel Brenda J. Hollis, *The Thomas P. Keenan, Jr. Memorial Lecture: The International Criminal Tribunal For Yugoslavia*, 39 A.F. L. REV. 37, 40 (1996). Colonel Hollis continues, "[t]he prosecution of persons for incitement to commit genocide would certainly add significantly to international law." *Id.*
[176] This assumes the propaganda used to incite the violence was a proximate cause of the actual damage done.

3. *Necessity*

The third principle of the LOW is necessity.[177] Enemy forces that are declared hostile[178] may be attacked at will, subject to the other two principles.[179] Attacks can only be made against military objectives.[180] Military objectives are defined as "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, offers a definite military advantage."[181]

This can include civilians and civilian property when the civilians and civilian property make a direct contribution to the war effort.[182] Civilian media broadcasts that directly interfere with military objectives may present grounds for the use of force to shut them down. It is unclear, however, whether civilian media stations that broadcast enemy propaganda may be targeted.

In 2000, the International Criminal Tribunal for the Former Yugoslavia (ICTY) applied the principles of proportionality and military necessity and questioned the grounds upon which NATO selected its targets.[183] In April of 1999, during hostilities in the former Yugoslavia, NATO warplanes intentionally bombed the headquarters of the Serbian state Television and Radio facility (RTS) in Belgrade[184] killing sixteen of the 120 civilians working in the studio and injuring another sixteen.[185] NATO justified this bombing on the grounds that the media center was being used as command, control and communications (C3) for the Serbian military, as well as a weapon for Serbian propaganda.[186]

For NATO's actions to be lawful, the media station must have met the criteria of proportionality and must have been a military target within the definition in Article 52 of Geneva Protocol I.[187] There are two ways in which the station could have met these criteria. First, "its nature, purpose or use must [have made] an effective contribution to military action."[188] Second, "its total

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[177] OFFICE OF GENERAL COUNSEL, *supra* note 166, at 6.
[178] JOINT PUB. 1-02, *supra* note 28, at 240. Hostile is defined as "[i]n combat and combat support operations, an identity applied to a track declared to belong to any opposing nation, party, group, or entity, which by virtue of its behavior or information collected on it such as characteristics, origin, or nationality contributes to the threat to friendly forces." *Id.*
[179] OFFICE OF GENERAL COUNSEL, *supra* note 166, at 6.
[180] GREEN, *supra* note 135, at 124.
[181] Geneva Protocol I, *supra* note 156, art. 52(2).
[182] OFFICE OF GENERAL COUNSEL, *supra* note 166, at 6.
[183] FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, para. 71-79 (2000) [hereinafter FINAL REPORT], *available at* http://www.un.org/icty/pressreal/nato061300.htm#IVB3.
[184] Balguy-Gallois, *supra* note 172, at 4.
[185] *Id.*
[186] *Id*.
[187] FINAL REPORT, *supra* note 183, para. 75.
[188] *Id.*

or partial destruction must [have offered] a definite military advantage in the circumstances ruling at the time."[189] As long as the NATO strikes "were aimed at disrupting the communications network, it was legally acceptable."[190] If however, the attacks were made to disrupt Milosevic's propaganda machine, "the legal basis was more debatable."[191] NATO's primary justification was to disrupt the C3 network, but the attacks were probably in part executed to disrupt Milosovic's propaganda, as NATO stated:

> [We need to] directly strike at the very central nerve system of Milosovic's regime. This of course are those assets which are used to plan and direct and to create the political environment of tolerance in Yugoslavia in which these brutalities can not [sic] only be accepted but even condoned. [….] Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosevic's control mechanism."[192]

But the bombings probably would not have been legal if the justification for bombing a civilian media center was to "help to undermine the morale of the population and the armed forces."[193] This would fall short of the two requirements called for by the Geneva Conventions.[194] The ICTY adopts the interpretation that "definite military advantage anticipated" excludes "an attack which only offers potential or indeterminate advantages,"[195] and that the expression "concrete and direct" as "intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term."[196] The ICTY conceded that the media was used to support the war effort and even to spread hatred and propaganda, but the danger was not immediate or concrete enough to justify an armed attack.[197]

The ICTY did not need to discuss the danger caused by the propaganda because it found that the primary justification for attacking the civilian media outlet was to disable Milosovic's command and control network, an objective which meets the definition of a military target under the Geneva Conventions.[198] Because the Serbian government made dual-use of the media center, the ICTY found the attacks on the propaganda machine as only

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[189] *Id.*
[190] FINAL REPORT, *supra* note 183, para. 75.
[191] *Id.*
[192] *Id.* para. 74.
[193] FINAL REPORT, *supra* note 183, para. 76.
[194] *Id.* (effective contribution to military action and definite military advantage criteria).
[195] *Id.* (quoting ICRC Commentary on the Additional Protocols of 8 June 1977, para. 2209).
[196] *Id.*
[197] FINAL REPORT, *supra* note 183, para. 76.
[198] *Id.*

incidental to the C3 military objectives.[199] However the question still remains: can propaganda ever be considered part of the military or government communications network? More importantly, can undermining the morale of a nation ever be seen as a military objective? The ICTY seemed to suggest that the answer might be, at least in part, yes.

In its opinion, the ICTY discussed how radio broadcasts were used to propagate violence in Rwanda. In the Rwanda massacres, a radio station allied to the government, Radio-Télévision Libre des Mille Collines (RTLM)**,** urged the Hutu majority to kill the Tutsi, about fifteen percent of the population, as well as thousands of Hutu moderates who favored a peace deal with invading Tutsi-controlled Rwanda Patriotic Army.[200] Documents show the genocide was planned well in advance, and that a list of names of those who should be killed was broadcast over the radio.[201] Some would argue that incitement to commit genocide is an international war crime[202] because the incitement of violence through propaganda could be the proximate cause of the genocide or violence that occurs.[203] But the ICTY did not address the question of propaganda as a war crime. The ICTY did suggest that the Rwanda radio station would have been a legitimate military target, justified largely by a strong causal link between the messages being broadcast and the acts of violence perpetrated.[204] The ICTY distinguished the media station in the former Yugoslavia from the one in Rwanda when it stated "it was not claimed that [RTS] were being used to incite violence akin to [RTLM] during the Rwandan genocide, which might have justified their destruction."[205] As suggested by the ICTY, the use of propaganda to spur violence and further war crimes may be illegal, making it justifiable to stop such messages by force. The International Criminal Tribunal for Rwanda (ICTR) addressed this question directly.

In December 2003, the ICTR sentenced Jean Bosco Barayagwiza to thirty-five years in prison for his role in the RTLM propaganda campaign.[206] The ICTR established "[a] specific causal connection between the RTLM

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[199] *Id.*

[200] Samantha Power, *Rwanda Information Exchange*, *at* http://www.rwanda.net/english/News/2004/news042004/news04072004.htm (last visited Jan. 23, 2006).

[201] *Id.*

[202] Hollis, *supra* note 178, at 40. When the U.N. Security Council created the (spell-out) ICTY, it enumerated the offenses over which the Tribunal has jurisdiction. Articles 2, 3, 4, and 5 set forth the categories of punishable offenses. Article 4 covers the offense of genocide, "attempts" to commit genocide, "conspiracy" to commit genocide, and "complicity" in genocide. *Id.* at 37-40.

[203] *See* Greenberg et al., *supra* note 173, at 13.

[204] *See* FINAL REPORT, *supra* note 183, para. 76.

[205] *Id.* para. 47. "If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target." *Id.* The Final Report gave no further explanation, failing to elaborate on the distinction between permissible propaganda, and propaganda dissemination that may be a military target.

[206] Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Summary, PP 5-7 (Dec. 3, 2003), *available at* http://www.ictr.org/ENGLISH/cases/Ngeze/judgement/mediach1.pdf (last visited Jan. 23, 2006) [hereinafter Nahimana Judgment and Sentence].

broadcasts and the killing of [Tutsi and their supporters]—either by publicly naming them or by manipulating their movements and directing that they, as a group, be killed—has been established."[207]

Barayagwiza was a member of the steering committee of RTLM.[208] According to the ICTR, he "knew that the hate being spewed by these programs was of concern and failed to take effective measures to stop their evolution into the deadly weapon of war and genocide that was unleashed in full force after 6 April 1994."[209] The ICTR found Baraygwiza guilty of genocide and "direct and public incitement to genocide."[210]

According to the ICTR, propaganda that leads to genocide can be a war crime. It is still unclear, however, whether the outlets disseminating propaganda may become a target for use of force. The ICTY has suggested that propaganda may reach a point that justifies its destruction, but this specific issue has not been addressed directly. If such propaganda can indeed constitute a war crime, stopping the signal may be justified. Jamming is a non-violent means of interrupting a target broadcast; however jamming may not always work,[211] necessitating the use of armed force and possibly the taking of human life to stop a particular broadcast. The legality of using force in such a circumstance is still highly questionable. Before a PSYOP unit can be lawfully targeted under the principle of necessity, the international community must conclusively address this issue.

4. *Unnecessary Suffering or Humanity*

The prohibition against unnecessary suffering prohibits the use of weapons designed or intended to cause unnecessary suffering.[212] This principle bans certain types of weapons and also prohibits the use of lawful weapons used with the intent and in a manner to cause unnecessary suffering.[213] Unfortunately, this principle will not apply to PSYOP unless the means used by PSYOP units can be classified as lawful weapons. To date, information or messages are not considered weapons.[214]

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[207] *Id.* para 63.
[208] *Id*. para 79.
[209] Nahimana Judgment and Sentence, *supra* note 206, para. 80.
[210] *Id.*
[211] Ground-based jamming of broadcasts on the FM band requires the local deployment of transmitters and is dependent on the good will of local authorities or neighboring countries. It is also dependent on the availability of electric power to operate the equipment. Jamming might also involve deploying troops on the ground to protect the jamming equipment and its operators. *See* "Overcoming the Radio Broadcast Jamming Facilities Bought and Installed by the Chinese Authorities at Huge Expense," *available at* http://www.clearharmony.net/articles/200411/23117.html (last visited Jan. 23, 2006). Airborne jamming is not always feasible. It is very costly and usually depends on the possibility of deploying aircraft in dangerous airspace, and requiring additional resources to protect the jamming aircraft.
[212] GREEN, *supra* note 135, at 126.
[213] *Id.*
[214] *See generally* HANDBOOK, *supra* note 6, at 2-1.

5. *Chivalry & Stratagems*

The final principle of the LOW is chivalry or stratagems, which encompass both legal and illegal deceptions.[215] Chivalry is the principle that prohibits certain types of deceptions called perfidy, or treachery, in military operations.[216] Ruses are the legally permissible acts of deception.[217]

a. Perfidy

There are two variants of perfidy, or unlawful deception. One variant of perfidy prohibited by Article 37 of Geneva Protocol I are acts which "kill, injure or capture an adversary" using "[a]cts 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 . . ."[218] Essentially, this first type of perfidy involves injuring the enemy by his adherence to the law of war, or actions taken in bad faith. Clever, lawful tactics can become perfidious if the actor "creates a false impression regarding his or her reliability or the safety of his or her adversary."[219] Acts of perfidy erode the protections afforded by the laws of war because combatants will not respect the immunity of designated persons if their experience has taught them that the enemy is abusing these designations to gain an advantage.

Geneva Protocol I gives examples of perfidy including: "feigning of an intent to negotiate under a flag of truce or of a surrender,"[220] "feigning incapacitation by wounding or sickness,"[221] "feigning civilian [] status,"[222] and finally "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."[223] Thus, Article 37 of the Protocol only prohibits perfidious acts that result in killing, wounding, or capturing.[224] The United States believes that this includes "breaches of moral, as well as legal obligations" as also being a violation.[225]
The second variant of perfidy prohibits nations from misusing internationally

[215] Wingfield, *supra* note 145, at 132.
[216] *Id*. at 112.
[217] *Id.* at 132.
[218] Geneva Protocol I, *supra* note 156, art. 37(1).
[219] John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 120 (2004).
[220] Geneva Protocol I, *supra* note 156, art. 37(1)(a).
[221] *Id.* art. 37(1)(b).
[222] *Id.* art. 37(1)(c).
[223] *Id.* art. 37(1)(d).
[224] Geneva Protocol I, *supra* note 156, art. 37(1).
[225] MANUAL 27-10, *supra* note 137.

recognized symbols. The Protocol prohibits nations from:

> Mak[ing] improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.[226]

The convention also prohibits the "[misuse] of the distinctive emblem of the United Nations, except as authorized by that Organization."[227] Article 39 adds national symbols, flags, and emblems to the list of symbols that cannot be misused in war, prohibiting uses of these items "to shield, favour, protect or impede military operations."[228] The United States does not consider this article reflective of customary law.[229]

In the context of perfidy, feigning and misuse have different legal meanings. Feigning in Article 37 is treachery that results in killing, wounding, or capture of the enemy.[230] Misuse in Article 38 is an act of treachery that results in some other advantage to the enemy, such as gaining precious time or a tactical advantage.[231] Both are illegal in the context of war. "The underlying rationale is to avoid dilution of the absolute nature of these symbols when encountered, reinforcing the legal protections which they bestow and exact."[232]

It should also be mentioned that espionage, acting clandestinely or acting under false pretenses to relay information to one's comrades is not prohibited by the laws of war.[233] But the Geneva Conventions do not provide protection for "any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage."[234] The Protocol states that such persons "shall not have the right to the status of prisoner of war and may be treated as a spy."[235] In fact, if a spy is captured, he may be tried under the laws of the capturing nation. But, persons engaged in intelligence gathering activities are not considered spies if acting while in uniform.[236] PSYOP personnel not in uniform who conduct information

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[226] Geneva Protocol I, *supra* note 156, art. 38(1).
[227] *Id.* art. 38(2).
[228] Geneva Protocol I, *supra* note 156, art. 39.
[229] HANDBOOK, *supra* note 6, at 2-14.
[230] Geneva Protocol I, *supra* note 156, art. 37.
[231] *Id.* art. 38.
[232] Wingfield, *supra* note 145, at 135.
[233] HANDBOOK, *supra* note 6, at 2-14. This area of law would apply when PSYOP is conducted inside hostile territory.
[234] Geneva Protocol I, *supra* note 156, art. 46(1).
[235] *Id.*
[236] *Id*. art. 46(2).

operations in enemy territory could lose their protection. Therefore it is imperative that only uniformed personnel conduct PSYOP.

b. Ruses

Perfidy is an unlawful battlefield deception. Lawful deceptions in war are called "ruses." Ruses are defined in Geneva Protocol I as "acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law."[237] Article 37 then goes on to give examples of permissible ruses: "the use of camouflage, decoys, mock operations and misinformation."[238] Further examples[239] of legitimate ruses include:

> Counted surprises, ambushes, feigning attacks, retreats, or flights, simulating quiet and inactivity, use of small forces to simulate large units, transmitting false or misleading radio or telephone messages, deception of the enemy by bogus orders purporting to have been issued by the enemy commander, making use of the enemy's signals and passwords, pretending to communicate with troops or reinforcements which have no existence, deceptive supply movements, deliberate planting of false information, use of spies and secret agents, moving landmarks, putting up dummy guns and vehicles or laying dummy mines, erection of dummy installations and airfields, removing unit identifications from uniforms, use of signal deceptive measures . . .[240]

As such, the difference between unlawful deception (perfidy), and lawful deception (ruses), lies in whether the deception involves "gain[ing] [an] advantage by falsely convincing the adversary that applicable rules of international law prevent engaging the target when in fact they do not."[241]

In the context of PSYOP, deception becomes the main area of legal concern. For any PSYOP message, it becomes critical to identify which symbols are internationally protected from combat and thus may not be used for

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[237] Geneva Protocol I, *supra* note 156, art. 37(2).
[238] *Id.*
[239] One recent example of a lawful ruse employed by the United States occurred during the Persian Gulf War in 1991. By cleverly using the media, the U.S. military convinced Iraqi generals that the U.S. Marines were going to drive Hussein's army out of Kuwait with an amphibious landing into Kuwait from the Persian Gulf. With the Iraqi army massing on the Kuwaiti eastern shore poised for an invasion, U.S. forces came into Kuwait from Saudi Arabia, not from the Persian Gulf, taking the Iraqi army completely by surprise. Greenberg et al, *supra* note 173, at 13.
[240] Wingfield, *supra* note 145, at 134.
[241] HANDBOOK, *supra* note 6, at 20-6.

purposes of deception.[242] Deceptive PSYOP messages that cause death are probably not illegal. PSYOP messages involving the misuse of an internationally recognized symbol to gain an advantage, whether they cause death or not, are perfidious and thus illegal.

The principles of the LOW derived from Geneva and Hague Law, as well as international custom, provide some legal guidance for PSYOP in the conduct of war. UN Treaty law also provides a real and theoretical basis for governing PSYOP. Before examining the theoretical basis for PSYOP restrictions, the more concrete prohibitions must be addressed.

B. UN Treaty Law

1. *The UN Convention on the Law of the Sea (UNCLOS)*[243]

UNCLOS contains provisions that may apply to PSYOP conducted by navies in limited circumstances. Article 17 allows any nations' ships the right of innocent passage.[244] Passage is innocent so long as it is not "prejudicial to the peace, good order, or security of the coastal State."[245] Article 19 enumerates a list of activities that would not be protected as innocent passage.[246] The list includes any threats of force, intelligence gathering "to the prejudice of the defence or security of the coastal State," acts of propaganda aimed at the security of the coastal State and finally any acts which are "aimed at interfering with any systems of communication or any other facilities or installations of the coastal State."[247] Article 109 of the Convention also may prevent the broadcast of propaganda from the high seas, as it provides that all states shall cooperate in the "suppression of unauthorized broadcasting from the high seas."[248] Transmissions are unauthorized if they are "intended for reception by the general public contrary to international regulations."[249] Unfortunately, this definition is not particularly helpful in determining what is unauthorized.

While UNCLOS restricts PSYOP broadcasts conducted by navies, the UN Charter does not as clearly address information operations as UNCLOS. The definitions in the UN Charter however may provide an important theoretical basis for the creation of a more definite legal framework to govern psychological operations.

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[242] Youmans Interview, *supra* note 155. The United States interprets the "improper use" of a national flag as permitting the use of national colors and insignia of the enemy as a ruse as long as they are not employed during actual combat. HANDBOOK, *supra* note 6, at 2-13.
[243] The UN Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (10 Dec. 1982) [hereinafter Convention on the Law of the Sea].
[244] *Id*. art. 17.
[245] *Id*. art. 19.
[246] *Id.*
[247] Convention on the Law of the Sea, *supra* note 243, art. 19(2)(k).
[248] *Id*. art. 109(1).
[249] *Id*.

2. *UN Charter*

Although the UN Charter does not contain provisions that are as directly applicable to PSYOP as UNCLOS, the Charter may nonetheless provide some guidance for the future development of general principles of law and psychological operations. Article 2(4) forbids the threat or use of "armed force" against the territorial integrity of another state.[250] This prohibition on the threat to use armed force is echoed in Geneva Protocol I: "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[251] It is not completely clear what constitutes a "threat" under UN Charter Article 2(4) in actual practice, but it likely indicates that states have a duty not to engage in certain types of intimidating behavior that may lead to the use of armed force.[252]

But besides mere threats, the use of psychological means to achieve a military objective probably does not fall under the definition of "armed force."[253] The prohibition against armed force has only been construed as to apply to actual, physical force.[254] During the drafting of the Charter, Brazil proposed that economic sanctions be included in the definition of "force," but was rejected by a vote of 26-2.[255] The UN Security Council, however, may use military force to restore the peace when it has determined a threat to or a breach of the peace exists.[256] A threat to or breach of the peace need not take the form of an armed attack, but it is up to the UN Security Council to determine if such a threat exists.[257]

Under the Charter, a nation's right to self-defense probably does not include attacking a media outlet responsible for disseminating propaganda. Nations have an inherent right to self-defense, but it is limited. Imagine a scenario in which one nation, Nation A, tries to destabilize a fundamentalist Muslim state, Nation B, through the use of propaganda broadcasted over the radio by Nation A PSYOP operators in a nearby neutral nation.[258] Imagine also that the Muslim state decides that this action is a threat to its sovereignty and attacks the source of the broadcast, such as a small radio station, killing the operators. Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security

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[250] UN CHARTER art. 2(4).
[251] Geneva Protocol I, *supra* note 156, art. 51(2).
[252] BEDERMAN, *supra* note 133, at 215.
[253] UN CHARTER art. 39; Greenberg et al., *supra* note 173, at 14-15.
[254] Greenberg et al., *supra* note 173, at 14-15; BEDERMAN, *supra* note 133, at 215.
[255] Definition of Aggression, G.A. Res. 3314 (XXIX) GAOR, 30th Sess., (December 14, 1974); Greenberg et al., *supra* note 173, at 14.
[256] UN CHARTER arts. 39, 42.
[257] *Id*. art. 39.
[258] Neutrality issues of the neutral state aside.

Council has taken measures necessary to maintain international peace and security."[259] It would seem reasonable to allow a nation to defend itself from concerted efforts of another to destabilize its government. The Charter's language, however, is very specific. Instead of using the word "force," it uses the phrase "armed attack,"[260] which would not allow a nation to use military force against another unless it was first attacked by actual physical force.

But the actions of Nation A in this scenario would not escape scrutiny. Non-intervention in the internal affairs of another sovereign nation state is a basic premise in international law.[261] During peacetime, efforts to coerce or control the government or people of another state may be illegal,[262] but all actions may not justify the use of force. Threats to use force to intimidate a population, which are sometimes utilized in PSYOP, are specifically prohibited.[263] But beyond that, it is unclear what messages aimed at a civilian population are illegal. "Territorial integrity" and "political independence" are currently understood to apply only to military action that interferes with a nation's "political autonomy" or "practical sovereignty."[264] Though this may change, the UN Charter was designed for the purpose of preventing aggressive war.[265] Some applications of PSYOP used to control a population may lie beyond the categories of "force" and "armed attack" articulated by the Charter under current standards. It is conceivable that the definition of force may be expanded to include information attacks, especially with advances in communications technology and an increase in the use of PSYOP.

IV. CONCLUSION

The current international law on PSYOP is limited. There are two main categories of law currently governing psychological operations. The first set of law deals with the use of PSYOP defensively, which includes denying the enemy information and countering an enemy's use of information or propaganda. Using armed force to destroy, disable or otherwise disrupt an adversary's PSYOP will be guided by laws governing targeting: the principles of necessity and proportionality.[266] The lawful targeting of a source disseminating propaganda depends on whether the target provides an effective military contribution.[267] This issue has not been addressed directly and will

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[259] UN CHARTER art. 51.
[260] *Id.*
[261] *Id.* art. 2, paras. 4, 7; *see* BEDERMAN, *supra* note 133, at 215.
[262] Kanuck, *supra* note 1, at 276-77.
[263] UN CHARTER, art. 2(4).
[264] BEDERMAN, *supra* note 133, at 215.
[265] *Id.*
[266] *See supra* Part III.A.
[267] *Id.*

likely be debated in the future "[a]s information evolves into the target itself . . . the entire concept of warfare will be revolutionized."[268]

The other category of law governing PSYOP addresses offensive applications of psychological warfare, mainly at the tactical and operational level. The main principle of customary international law that applies is the body of law governing stratagems.[269] Whether it be radio or television broadcasts, leaflet drops, electronic images, or any other use of PSYOP, the main limit upon the use of offensive PSYOP is the prohibition of perfidy in international law.[270] It is illegal to use, in bad faith, internationally recognized symbols, or the national markings of another state actor to gain an advantage in combat by falsely convincing an adversary that applicable rules of international law prevent an adversary from attacking a target when in fact they do not.[271] So for PSYOP, it becomes critical to identify which symbols are internationally protected from combat and those that are fair game.[272]

The area of international law applicable to PSYOP has been scarce. Given the potential uses that exist, the international community must act before the absence of international standards is exploited. There are two main problems that need to be addressed.

First, it is not clear at what point the spreading of propaganda becomes illegal. At least one international body, the ICTR, has found that disseminating propaganda can be the basis of a war crime if the end result was a war crime and the propaganda disseminated was the proximate cause of the acts.[273] This is a reasonable approach. Inciting violent acts and war crimes should be no less of a crime than the physical violence itself. Those responsible for disseminating messages that cause violence, like the *Radio Milles Collines* in Rwanda, should be held accountable for the harm they cause. If not, then perception management can be an effective means for one to inflict war crimes on a group without getting their hands dirty. This needs to be addressed by the international community and handled similar to the ICTR, by punishing anyone who contributes to violence through mass propaganda.

Finally, the international community needs to broaden the justifications for self-defense. The principle of national sovereignty is at the heart of international law. But at the strategic level of PSYOP (regional, often non-military shaping of foreign attitudes), the law is non-existent on how the principles of non-intervention and sovereignty (both politically and generally)

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[268] Kanuck, *supra* note 1, at 283.
[269] *See supra* Part III.A.
[270] Youmans Interview, *supra* note 155; *see* Part III, A.
[271] HANDBOOK, *supra* note 6, at 20-6; Youmans Interview, *supra* note 155.
[272] Colonel Youmans poses the hypothetical case in which one state's PSYOP unit strategically placed land-mine markings in certain areas for the purpose of channeling its enemy into its kill zone. Youmans Interview, *supra* note 155. Such PSYOP would be perfidious, and hence illegal, if there was an internationally agreed-upon land-mine marking and the application amounted to a "misuse." Unless the symbol of a land-mine is an internationally recognized and agreed upon symbol, using it in this manner would be a legal and clever tactic. *Id.*
[273] *See supra* Part III.A.

could restrict the uses of PSYOP to control or influence another nation or people. Advances in technology make it possible for a country to manipulate the perceptions of its adversary's populace, and spread confusion by altering official announcements, news broadcasts, or intelligence reports.[274] It is not inconceivable for a nation to attempt this. Therefore, the legal definition of a nation's right to sovereignty must be expanded to include the hearts and minds of its people, and the law must protect them from hostile outside attempts to influence its population.

But for now, the law restricting a nation's use of information to influence the behavior of the target audience remains scarce. PSYOP remains a powerful and often-used tool of military forces worldwide. Advances in technology will surely have an effect on the way in which PSYOP is conducted.[275] Countries like the United States will become more reliant on sophisticated, near real-time data dissemination,[276] video and image editing and morphing to confuse, frighten and mislead the enemy.[277] Likewise, the television and the internet will surely play a larger role.[278] The United States will continue to battle a tide of anti-American sentiment around the world.

Not long ago, the world was immersed in the Cold War, an ideological showdown between two competing economic and societal models. So too is the current "war on terror." This current struggle is as much of an informational battle for the control of the Middle Eastern hearts and minds as it is a battle to defeat enemy forces with bullets and bombs. Public diplomacy and PSYOP will be heavily utilized. It is predicted that we will see a "fourth generation battlefield"[279] which will "envelop entire societies . . . and military objectives would no longer involve annihilating enemy lines, but rather eroding popular support for the war within the enemy's society . . . collapsing the enemy internally rather than physically destroying him."[280] Perception management could be the battlefield of the future. And as of right now, with some limited exceptions, the lack of an international legal framework could lead to uncontrolled propaganda, where everyone is a potential target. Clearly, a legal framework is needed to control the informational battlefield of the future.

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[274] Greenberg et al., *supra* note 173, at 13
[275] DEFENSE SCIENCE BOARD, *supra* note 15, at 33.
[276] *Id*. at 8.
[277] *See id*. at 10-11.
[278] Lungu, *supra* note 2, at 13.
[279] *Id.* at 9.
[280] *Id.*