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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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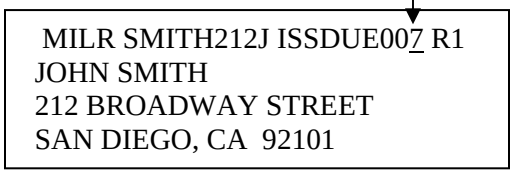

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MILITARY LAW REVIEW

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PREVENTING THE EMASCULATION OF WARFARE: HALTING THE EXPANSION OF HUMAN RIGHTS LAW INTO ARMED CONFLICT

MAJOR MICHELLE A. HANSEN*

> *The reasons why the United States has maintained its distance from the international human rights agreements are not obvious . . . . [T]here is resistance to accepting international standards, and international scrutiny, on matters that have been for the United States to decide.*[1]

I. Introduction

The United States ratified the International Covenant on Civil and Political Rights (ICCPR)[2] fifteen years after President Jimmy Carter

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[1] Louis Henkin, *The Age of Rights, in* INTERNATIONAL LAW CASES AND MATERIALS 626 (3d ed. 1993).

[2] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

signed it, and twenty-six years after the United Nations General Assembly unanimously adopted it.[3] The reluctance to join the ICCPR was partly rooted in fears that costs to U.S. sovereignty would be too high.[4] When eventually ratifying the ICCPR in 1992, the United States entered several reservations, declarations, and understandings to ensure that its obligations under the ICCPR would not conflict with U.S. domestic law.[5] Fears that ratifying the ICCPR would threaten American institutions and practices at home were never realized.[6] However, a growing trend toward expanding the reach of international human rights law (human rights law) into armed conflict endangers U.S. sovereignty in a way that few could have envisioned. The United States needs to object to this expansion and take the lead in influencing the international community to join in preserving the importance of state sovereignty and consent in international humanitarian law (humanitarian law).

Humanitarian law has been the primary regulator of armed conflict for U.S. Soldiers since the American Civil War,[7] when President Abraham Lincoln issued the *Instructions for the Government of Armies of the United States in the Field*, commonly referred to as the Lieber Code.[8] Humanitarian law, which is often called the law of armed

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[3] *See generally* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 7 (2005) (providing an overview of the history of U.S. ratification of the ICCPR, global reactions to U.S. reservations to the ICCPR, and the effect those reservations have had on U.S. foreign relations).

[4] Henkin, *supra* note 1, at 626. For an interesting perspective on U.S. treaty practices, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (offering perspectives on U.S. practices of non-ratification, ratification with reservations, and the non-self-executing treaty doctrine).

[5] *See* ICCPR, *supra* note 2. For example, the United States included reservations regarding capital punishment, criminal penalties, and the prohibition on war propaganda and inciting speech; declarations regarding the non-executing nature of the ICCPR and derogations in times of emergency; and understandings regarding rights to counsel, equal protection, and compensation for illegal arrests. *Id.* For a compilation of all ICCPR party declarations and reservations, see Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, Declarations and Reservations, http://www2.ohchr.org/english/bodies/ratification/4.htm#reservations (last visited Feb. 11, 2008).

[6] Henkin, *supra* note 1, at 626.

[7] *See* Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000). For an overview of the development of humanitarian law, see Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4.

[8] U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) [hereinafter Lieber Code], *reprinted in*

conflict,[9] delineates the obligations of states toward one another as contracting parties, and often these obligations afford protections to the victims of armed conflict.[10] It is based upon the "direct imposition of obligations on the individual," rather than "the granting of rights to the individual."[11]

Conversely, human rights law historically has governed the relationship of a state and its own citizens.[12] It is premised upon the notion that citizens hold individual rights, which often may be enforced against the state.[13]

The reasons proponents espouse for expanding human rights law into armed conflict are varied. Although humanitarian law has effectively balanced the demands of military necessity against the desire to minimize human suffering in past armed conflicts,[14] some advocate the increasing applicability of human rights law in war to further reduce

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THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

[9] Some consider international humanitarian law to be a subset of the law of war or the law of armed conflict. *See, e.g.*, Geoffrey S. Corn, *Filling the Void: Providing a Framework for the Legal Regulation of the Military Component of the War on Terror Through Application of Basic Principles of the Law of Armed Conflict*, 12 ILSA J. INT'L & COMP. L. 481, 489 n.3 (2006); Alexander R. McKlin, *The ICRC: An Alibi for Swiss Neutrality?*, 9 DUKE J. COMP. & INT'L L. 495, 503 (1999). Using the term "humanitarian law" synonymously with, and instead of, the term "law of armed conflict" arguably shows the influence of human rights law on the regulation of warfare and could be viewed as support for further expanding the role of human rights law in armed conflict. However, for the sake of clarity and ease in comparison, this author prefers the term "international humanitarian law" or "humanitarian law" to refer to the entire body of the law of armed conflict, encompassing both treaties and customary law.

[10] *See* LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW CASES AND MATERIALS 1025 (3d ed. 1993). *See generally* Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003) (providing an explanation of the nature and theory of humanitarian law).

[11] RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 13 (2002).

[12] *See id.* at 18–24.

[13] *See id.*

[14] *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. RED CROSS 175, 176 (2005) (stating that: "The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.").

human suffering and protect human dignity.[15] Theodore Meron, Chief Judge of the International Tribunal for the Former Yugoslavia, refers to the developments in humanitarian law that are driven by human rights and principles of humanity as the "humanization of humanitarian law."[16]

Undoubtedly, the reduction of human suffering in all contexts is a laudable goal. However, moderating warfare through the application of the human rights regime, if not filtered through the lens of humanitarian law and tempered by reference to the realities of modern armed conflict, will result in the eventual "emasculation of warfare."[17] That is, it will unnecessarily restrict warfighters to a point never envisioned by those who framed and ratified the major instruments designed to regulate warfare. It could make winning wars nearly unachievable for those who try to comply with its strict requirements, and "'[e]xcessive' humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules."[18] Furthermore, humanization also could serve to unnecessarily prolong armed conflict, and thereby increase the evils of war that it purports to eradicate.[19] Therefore, the unconstrained expansion of human rights law into matters of war must be stopped, for the sake of Soldiers and humanity alike.

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[15] *See, e.g.*, Karima Bennoune, *Towards a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 180 (2004); David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT'L L.J. 231 (2005); Meron, *supra* note 7.

[16] Meron, *supra* note 7.

[17] The use of the gendered-term "emasculation" is deliberate here and in the title of this article. Professor Hilary Charlesworth, the Director of the Centre for International and Public Law at the Australian National University, proposes that stereotypical imagery matters in international law and that society "giv[es] priority to things that are coded culturally as masculine traits. *See* Amanda Morgan, *The State and International Law* (May 31, 2004), http://info.anu.edu.au/MAC/Media/Research_Review/_articles/_Charlesworth.asp (quoting Professor Hilary Charlesworth). "Society codes certain attributes as masculine or feminine, and current events—for example tough leadership, taking action and military security—are coded as 'masculine' traits . . . . Conciliation, negotiation and human security, associated with 'feminine' traits, are seen as weak." *Id.* (paraphrasing the words of Professor Hilary Charlesworth). This writer agrees that gendered-discourse matters in international law and believes that warfare is "emasculated" when humanitarian law, which is rooted in military necessity, is displaced by human rights law, which is ill-equipped for the harsh realities of war.

[18] Meron, *supra* note 7, at 241.

[19] *Id.* (quoting Francis Lieber from Lieber Code, *supra* note 8, art. 29: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.").

Part II of this article provides general information regarding the frameworks of human rights law and humanitarian law. Both are highly developed bodies of public international law, consisting of international agreements and customary international law, the latter of which is born of the consent and consistent practice of states. Traditionally, the two were viewed as distinct legal regimes; human rights law applied during peacetime, and humanitarian law applied during armed conflict.[20] An emerging approach views human rights law as applying at all times, with humanitarian law acting as the *lex specialis*, or specific law, during periods of armed conflict.[21] *Lex specialis* is a principle of interpretation in international law that "suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."[22] A more radical view urges that human rights law should displace humanitarian law as the preferred method of regulating the battlefield.[23]

It is undeniable that parallels exist between human rights law and humanitarian law. For example, some provisions of the Geneva Conventions of 1949[24] (Geneva Conventions), and their Additional

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[20] *See* JEAN PICTET, HUMANITARIAN LAW AND PROTECTIONS OF WAR VICTIMS 15 (1975) (stating that "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime").

[21] *See, e.g.*, Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9) (stating that "[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. [T]he Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.").

[22] Report of the International Law Commission on the Work of Its Fifty-eighth Session, U.N. GAOR, 61st Sess., Supp. No. 10, at 408, U.N. Doc. A/61/10 (2006), *available at* http://www.un.org/law/ilc/. The principle may apply to conflicting terms in a single treaty or between two or more treaties, between conflicting provisions of customary law, or between conflicting provisions of customary and treaty law. *Id.* The rationale for the principle is that "special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may often create a more equitable result and it may often better reflect the intent of the legal subjects." *Id.* at 409.

[23] *See, e.g.*, Bennoune, *supra* note 15, at 180; Koller, *supra* note 15.

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

Protocols[25] contain protections that are also contained in human rights instruments or recognized as fundamental human rights.[26] Despite the commonalities, Part III argues that the normative frameworks of human rights law and humanitarian law should remain distinct based upon two foundational arguments. First, state sovereignty and consent are paramount in the formation of international law. With few exceptions, states are bound by international law only to they extent that they agree to be bound.[27] Therefore, if states have not agreed to apply human rights law during armed conflict, either through treaty formation or the development of customary law, there should be no room to debate whether such expansion is appropriate.

The second argument for distinct regimes is the underlying theory of human rights law as a rights-based system and humanitarian law as an obligations-based system.[28] The dissimilar structures of both frameworks make them incompatible for simple merger.[29] To apply human rights law in armed conflict consistent with the structural constraints of humanitarian law, states have two choices. States could agree to incorporate human rights law into existing humanitarian law by converting individual rights afforded by human rights law into direct obligations imposed upon states and those fighting their wars.[30] Alternatively, states could displace humanitarian law with a human rights regime.[31] The first approach is preferable in that it preserves the framework of humanitarian law, along with its ability to consider military necessity as a relevant factor in determining the obligations of states and Soldiers to protect individuals during times of war.[32]

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

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[26] *See infra* Part I.C.

[27] *See infra* Part III.A.

[28] *See generally* PROVOST, *supra* note 11 (providing detailed analysis of the concept of rights under human rights and humanitarian law).

[29] *See infra* Part III.B.

[30] *See infra* Part III.A–B.

[31] *Id.*

[32] *See infra* Part V.

Part IV demonstrates that, despite strong arguments against applying human rights law in armed conflict, such expansion has already begun. Opinions of the International Court of Justice (ICJ) and decisions of human rights tribunals have held that human rights law applies during armed conflict, and in some cases, that the obligations of states assumed under human rights instruments apply extraterritorially during armed conflict and occupation.[33]

Part V relates the dangers posed by expanding the application of human rights law in armed conflict. Regulating armed conflict through a human rights regime will tend to grant more protections to the victims of war. Warfighters will bear the costs of these increased protections as additional constraints on how they accomplish the mission and as increased risks to their lives.

Key areas of conflict between human rights law and humanitarian law include the use of force, detention of enemy prisoners of war and internment of civilians, security restrictions imposed on civilian populations, and occupation.[34] If this trend toward expansion continues unchecked, military commanders and Soldiers will face an exceedingly complex set of rules for conducting military operations. This overregulation of the battlefield may prolong conflict rather than facilitate a quick end to wars.

Part VI argues that the expansion of human rights law into armed conflict must be halted. The United States should actively recruit its allies to join in preventing such expansion from ever developing into customary law. Simultaneously, it must become a "persistent objector" to preclude becoming bound to apply human rights norms in armed conflict, should those norms eventually develop into customary law. Furthermore, the United States needs to vigorously pursue the issue of expansion with the Human Rights Committee, the monitoring body of the ICCPR, and capitalize on the authority of the U.N. Security Council to direct in its resolutions that humanitarian law alone regulates armed conflicts and occupations.

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[33] *See infra* Part IV.A–B.
[34] *See infra* Part V.

II. Background

Human rights law and humanitarian law developed distinctly, each having different core goals and philosophies.[35] Human rights law traditionally sought to grant positive rights to individuals and to ensure that a state respected the rights of its own people, whereas humanitarian law historically endeavored to form compacts between states regarding the permissible justifications for waging war and the delineation of acceptable methods and means for conducting it.[36] While the issue of the overlap or interplay of the two diverging regimes has generated moderate interest in the past, it has been thrust into the spotlight with the advent of the war on terrorism and the armed conflict and occupation in Iraq.[37]

A. International Human Rights Law

Human rights law developed from custom and flourished after World War II, largely in response to the atrocities inflicted upon populations prior to and during the war.[38] The United Nations Charter acknowledged the field of human rights in its preamble, stating its determination "to reaffirm faith in fundamental human rights"[39] and expressing a purpose "[to] achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[40] Human rights law is comprised of treaty law and customary international law, and fundamental human rights law forms the core of customary human rights law.[41]

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[35] Bennoune, *supra* note 15, at 180.
[36] *See generally* PROVOST, *supra* note 11 (providing a history of the development of human rights law and humanitarian law).
[37] *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 3 (2004) (explaining that "[t]he events of September 11 have focused attention on the potential overlap between international armed conflict, noninternational armed conflict, and law enforcement"). *See generally* Ralph Wilde, *Iraq: Ad Bellum Obligations & Occupation: The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence In Iraq*, 11 ILSA J. INT'L & COMP. L. 485 (2005).
[38] *See* Sonja Starr, *Extraordinary Crimes At Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1259 (2007).
[39] U.N. Charter pmbl.
[40] *Id.* art. 1, para. 3.
[41] *See* Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8 (1996).

1. Customary Human Rights Law

Customary human rights law is formed through the consent and consistent practice of states.[42] It stemmed most notably from the Universal Declaration of Human Rights of 1948.[43] This Declaration, which was adopted by the United Nations General Assembly, espouses human rights of universal application.[44] It was fashioned as a guide to the United Nations Charter, rather than a legally binding treaty to be ratified by individual states.[45] However, it is regarded to some degree as having attained the status of customary international law.[46]

Fundamental human rights law is a subset of customary human rights laws.[47] It consists of a body of non-derogable human rights that are

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[42] *See id.* at 8. There is an argument that customary law also could be formed though the wide ratification of human rights treaties by states. *See* Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 790 (2006).

[43] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights]. For an overview of the development and importance of customary international human rights law, see Lillich, *supra* note 41, at 1.

[44] *See* Lillich, *supra* note 41, at 1.

[45] *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 589 (2006); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (stating that "the Declaration does not of its own force impose obligations as a matter of international law").

[46] *See* Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 34 (2005) (referencing Hurst Hammum, *The State and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995–96)); Lillich, *supra* note 41, at 1–7. United States federal courts have held that the Universal Declaration of Human Rights, as customary international law, provides actionable rights. For example, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Filartigas, who were citizens of Paraguay, sued the Inspector General of Police in Asuncion, Paraguay, under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), which provides federal courts with jurisdiction over civil actions by aliens for torts committed in violation of U.S. treaties or the law of nations. The Filartigas alleged that the inspector general caused the wrongful death of their family member through kidnapping and torture, in violation of the Universal Declaration of Human Rights, *supra* note 43, and other declarations, documents, and practices they claimed evidenced customary international human rights law. *Filartiga*, 630 F.2d at 879. The Second Circuit Court of Appeals held that the right to be free from torture was a violation of customary international law, "as evidenced and defined by the Universal Declaration of Human Rights," and that it provided an actionable right under the Alien Tort Claims Act. *Id.* at 882, 887.

[47] *See* Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5–21 (1986).

binding upon all states.[48] Its application is not conditioned upon a state's consent to be bound, and it need not be codified to have universal application.[49]

The international community has not reached a consensus on which human rights are considered to be fundamental, or even that fundamental human rights are superior to ordinary human rights.[50] Theodore Meron addressed this issue in *On a Hierarchy of International Human Rights* and concluded that "the international community should direct its efforts to defining the distinction between ordinary and higher rights and the legal significance of this distinction, steps that would contribute significantly to resolving conflicts between rights."[51] Attempts have been made to identify the fundamental rights, and the *Restatement (Third) of the Foreign Relations Law of the United States* is one such work that lists human rights purported to be fundamental, and therefore universally applicable.[52] It asserts that fundamental human rights are violated when a state practices, encourages, or condones: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; violence to life or limb; hostage taking; punishment without fair trial; prolonged arbitrary detention; failure to care for and collect the wounded and sick; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights.[53]

Fundamental human rights have been the subject of litigation in the United States. In *Sosa v. Alvarez-Machain*,[54] a Mexican citizen filed suit in the U.S. District Court in California, alleging that the U.S. Drug

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[48] *Id*.
[49] *Id*.
[50] *Id*. at 5.
[51] *Id.* at 22.
[52] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (2003) [hereinafter RESTATEMENT (THIRD)]. The American Law Institute (ALI) publishes this and many other restatements of the law, model codes, and legal studies "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." *See* The American Law Institute, http://www.ali.org (last visited Feb. 11, 2008). Founded in 1923, its members are judges, lawyers, and legal scholars from the United States and abroad. *Id.* The ALI's restatements of the law are created through a deliberative process with the goal of producing clear statements of the current status of the law or how courts may likely state the law. *Id.*
[53] RESTATEMENT (THIRD), *supra* note 52, § 701.
[54] 542 U.S. 692 (2004).

Enforcement Agency prompted his abduction from Mexico for a criminal trial in the United States.[55] He claimed that the United States was liable under the Federal Tort Claims Act[56] and the Alien Tort Claims Act[57] (ATCA) for violating international law by abducting him.[58] The ATCA provides U.S. courts with jurisdiction over civil actions by aliens for torts committed in violation of the law of nations or U.S. treaty.[59]

The Supreme Court analyzed whether transborder abduction violated a U.S. treaty or the law of nations. Part of Mr. Alvarez-Machain's claim was that his abduction constituted an arbitrary arrest in violation of the ICCPR.[60] The Court found that because the United States had ratified the ICCPR with the understanding that it was not self-executing, its protections were not enforceable in federal courts.[61]

The Court then looked to whether the abduction violated the law of nations, and in doing so, provided an explanation of what constitutes the "law of nations."[62] After a detailed discussion of the type of violations of the law of nations that were actionable under the ATCA, the Court held that "federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."[63] It then determined that transborder abduction did not violate any international norms that had attained the requisite certainty and acceptance level.[64] Therefore, the claim was not actionable.[65]

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[55] *Id.* at 718. Mr. Alvarez-Machain was alleged to have tortured and murdered an agent of the U.S. Drug Enforcement Agency. *Id.* at 698.

[56] 28 U.S.C. §§ 1346(b)(1)–2671 (2000). The Federal Tort Claims Act removes the sovereign immunity of the United States to permit civil actions against the United States for property damage or loss, personal injury, and death caused by the negligent or wrongful acts or omissions of U.S. government employees acting within the scope of their employment. *Id.* § 1346(b)(1).

[57] *Id.* § 1350.

[58] *Sosa*, 542 U.S. at 697.

[59] *Id.*

[60] *Id.* at 734 (referencing ICCPR, *supra* note 2, art. 9).

[61] *Id.* at 735.

[62] *Id*. at 712–734.

[63] *Id.* at 732.

[64] *Id.* at 738.

[65] *Id. Filartiga v. Pena-Irala* provides another example of the use of human rights law in litigation in U.S. courts. 630 F.2d 876 (2d Cir. 1980). For a comprehensive discussion of whether fundamental human rights law operates as U.S. federal common law and, thereby, provides a cause of action under U.S.

2. Treaty-based Human Rights Law

Shortly after the United Nations General Assembly adopted the Universal Declaration of Human Rights, a number of human rights treaties emerged. The European Convention for the Protection of Human Rights and Fundamental Freedoms[66] (ECHR) was adopted by the Council of Europe in 1950 to protect basic human rights.[67] The ICCPR[68] and the International Covenant on Economic, Social and Cultural Rights[69] (ICESCR) followed in 1966. Like the ECHR, the ICCPR addresses basic rights, such as the rights to life, freedom from torture, freedom from slavery, due process in criminal proceedings, and privacy.[70] The ICESCR, to which the United States is not a party, sought to provide equality in the enjoyment of economic, social, and cultural rights, and specifically recognized rights to employment, healthcare, and education.[71] Several treaties aim to eradicate violations of certain categories of human rights, such as the Convention on the Elimination of All Forms of Racial Discrimination,[72] the Convention on the Prevention

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domestic law when it is violated, see Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

[66] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

[67] *See id.* The European Court of Human Rights is responsible for adjudicating issues arising under the ECHR from member states and individual applicants. *See* European Court of Human Rights, Historical Background, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/ (last visited Feb. 11, 2008). Since 1998, the Court has been comprised of a number of judges equal to the number of ECHR member states, currently forty-six. *Id.* Judges are elected by the Parliamentary Assembly of the Council of Europe, serve for six years, and may be re-elected. *Id.* They do not represent individual states and must maintain their neutrality. *Id.*

[68] ICCPR, *supra* note 2. The ICCPR currently has 160 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, New York, 16 Dec. 1966, http://www2.ohchr.org/english/bodies/ratification/4.htm.

[69] International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR has 157 parties. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, http://www2.ohchr.org/english/bodies/ratification/3.htm. The United States has signed, but not ratified, the ICESCR. *Id.*

[70] *See* ICCPR, *supra* note 2, arts. 6–27.

[71] *See* ICESCR, *supra* note 69, arts. 3, 6, 12, 13.

[72] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195. The International Convention on the Elimination of All Forms of Racial Discrimination has 173 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights,

and Punishment of the Crime of Genocide,[73] and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment.[74]

To permit enforcement of the rights contained in human rights treaties, such treaties may create monitoring institutions and judicial or quasi-judicial mechanisms. For example, the ICCPR established a Human Rights Committee of eighteen members to monitor implementation of the ICCPR and resolve complaints from state parties against one another regarding alleged violations of the ICCPR.[75] Additionally, if a state becomes a party to an Optional Protocol to the ICCPR, individuals who are subject to the party's jurisdiction may file complaints with the Human Rights Committee against the party for violating rights protected by the treaty.[76] The Human Rights Committee then considers the allegation, notifies the offending party, and endeavors to bring the party into compliance with the ICCPR through communications.[77] As discussed in the preceding subsection regarding *Sosa v. Alvarez-Machain*, violations of human rights law may also be actionable under domestic legal systems.

International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 Mar. 1966, http://www2.ohchr.org/english/bodies/ratification/2.htm.

[73] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The Genocide Convention has 140 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, New York, 9 Dec. 1948, http://www2.ohchr.org/english/bodies/ratification/1.htm.

[74] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, Dec. 10, 1984, 1988 U.S.T. 202, 1465 U.N.T.S. 85. The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment has 145 parties, including the United States. *See* Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, New York, 10 Dec. 1948, http://www2.ohchr.org/english/bodies/ratification/9.htm.

[75] *See* ICCPR, *supra* note 2, arts. 28–42.

[76] Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 302 [Optional Protocol]. The Optional Protocol has been ratified by 110 parties, but not the United States. *See* Office of the United Nations High Commissioner for Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 Dec. 1966, http://www2.ohchr.org/english/bodies/ratification/5.htm.

[77] Optional Protocol, *supra* note 76, arts. 2–5.

B. International Humanitarian Law

Similar to human rights law, humanitarian law consists of treaties, such as the Geneva Conventions,[78] and customary international law.[79] As with other bilateral and multinational treaties, humanitarian law treaties bind states to the extent that they agree to be bound, subject to reservations, understandings, and declarations.[80] Customary law binds all states, except those that persistently object to being bound by a given principle as it develops.[81] While customary international law may eventually be codified, much of it is evidenced by state practice.

1. Treaty-based International Humanitarian Law

The term "humanitarian law" originally referred to the Geneva Conventions,[82] which were designed to protect those who found

[78] GC I, *supra* note 24; GC II, *supra* note 24; GC III *supra* note 24; GC IV, *supra* note 24.

[79] *See* Jean-Marie Henckaerts**,** *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*, 13 HUM. RTS. BR. 8, 8–9 (2006).

[80] *See* North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20) (North Sea Continental Shelf Cases) (holding that the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S., did not bind the Federal Republic of Germany as it had not ratified the Convention and, even if it had, the Federal Republic of Germany could have entered reservations to certain articles of the Convention); *see also* Vienna Convention on the Law of Treaties art. 26, Mar. 23, 1969, 1155 U.N.T.S. [hereinafter Vienna Convention] (stating "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith," a principle known as *pacta sunt servanda*, Latin for "pacts must be respected"). The United States has not ratified the Vienna Convention, but it views the Convention as an authoritative guide to principles of treaty interpretation. *See, e.g.*, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001) (stating that the Vienna Convention is "an authoritative guide to the customary international law of treaties").

[81] *See* North Sea Continental Shelf Cases, 1969 I.C.J. at 19 (explaining that state practice that has been "both extensive and virtually uniform in the sense of the provision invoked" and that has occurred "in such a way as to show a general recognition that a rule of law was involved" is required to demonstrate that a provision has formed a new rule of customary international law); *see also* Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993 (stating that the Court uses international custom, as evidence of a general practice accepted as law, as one source of international law). *See generally* Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99 (1996) (explaining the criteria for determining the existence of customary international law and the impact of customary law on human rights treaties).

[82] *See* Meron, *supra* note 7, at 239.

themselves in the hands of their enemy and to minimize human suffering during war. Several treaties preceded the Geneva Conventions, including the Hague Conventions[83] and the 1929 Geneva Convention.[84] The Hague Conventions were aimed primarily at restricting the methods and means of warfare, by prohibiting certain types of weapons, tactics, and munitions.[85]

Since the signing of the Geneva Conventions in 1949, a number of additional treaties followed to further regulate the battlefield, including the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I);[86] the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II);[87] and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[88]

While humanitarian law instruments aspire to induce acceptable conduct during warfare, they also provide the justification for holding individuals accountable for violations of treaty obligations. War crimes tribunals of Nuremberg and Tokyo convicted many leaders of the German and Japanese militaries after World War II for war crimes and crimes against humanity.[89] These tribunals punished violations of

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[83] Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 [hereinafter Hague II]; Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 598 Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV].

[84] Convention of Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 342.

[85] *See* Christopher Puckett, *In This Era of "Smart Weapons," Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?*, 18 EMORY INT'L L. REV. 645, 672-73 (2004); Manuel E. F. Supervielle, *The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World: Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT'L L. REV. 191, 198 (2005).

[86] Protocol I, *supra* note 25.

[87] Protocol II, *supra* note 25.

[88] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S.

[89] Charter of the International Military Tribunal of Nuremberg, Aug. 8, 1945, 566 Stat. 1544, 82 U.N.T.S. 279.

international treaties and violations of customary international law, as well.[90]

2. Customary International Humanitarian Law

While treaty-based humanitarian law develops from the express, written consent of states, customary humanitarian law develops from the consent and consistent practice of states.[91] On occasion, portions of humanitarian law instruments that are not universally ratified may develop into customary humanitarian law. For instance, although the United States has not ratified Protocol I and Protocol II, it regards many provisions of the Protocols to be customary law.[92]

The International Committee of the Red Cross (ICRC) conducted a ten-year study on customary humanitarian law and published its findings in 2005.[93] In determining whether a practice had arisen to the level of customary law, the ICRC looked for the presence of two elements: "namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitatis*)."[94] In other words, state practice born of mere convenience or self-interest does not give rise to customary international law; practice out of a sense of legal obligation is required.[95]

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[90] *Id.* art. 6 (listing as crimes within the Tribunal's jurisdiction: crimes against the peace; war crimes, including violations of the law or customs of war; and crimes against humanity).

[91] *See* North Sea Continental Shelf Cases, 1969 I.C.J. 4, 19 (Feb. 20) (explaining that state practice that has been "both extensive and virtually uniform in the sense of the provision invoked" and has occurred "in such a way as to show a general recognition that a rule of law was involved" is required to demonstrate that a provision has formed a new rule of customary international law).

[92] *See* Memorandum, W. Hays Parks, Chief, International Law Branch, U.S. Army, et al., to John H. McNeill, Assistant General Counsel (International), U.S. Office of the Secretary of Defense, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986); *see also* Michael J. Matheson, *Continuity and Change in the Law of War: 1975 to 2005: Detainees and POWs*, 38 GEO. WASH. INT'L L. REV. 543, 546 (2006) (explaining that the Reagan administration accepted various provisions of Protocol I as part of customary international law and indicated as such in a public statement in 1987 by the State Department on behalf of the U.S. government).

[93] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts et al. eds., 2005).

[94] Henckaerts, *supra* note 14, at 178.

[95] *See* North Sea Continental Shelf Cases, 1969 I.C.J. 4, 19 (Feb. 20) (finding that customary international law had not been formed when fifteen states agreed to draw

Once a principle has developed into customary law, all states are bound by it,[96] except those that persistently objected to its application as it emerged.[97] However, a state cannot object to certain principles of international law that are regarded as *jus cogens*, meaning "compelling law," as these principles are deemed to be peremptory norms that can never be derogated.[98]

The persistent objector doctrine applies to the formation of customary human rights law, as well as customary humanitarian law.[99] It parallels the use of reservations, declarations, and understandings in treaty formation, in that it too acknowledges the importance of state sovereignty and consent in the formation of international law and provides a method by which states may opt out of an emerging norm of international law.[100]

The persistent objector doctrine has two requirements. First, a state must object while the rule is developing and continue to object after it has gained acceptance as customary law.[101] Second, the state must consistently object to the rule.[102] Furthermore, evidence of the objection must be clear;[103] failure to object may be deemed consent.[104]

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national boundaries in the North Sea according to the principle of equidistance, as there was "no evidence that they had so acted because they had felt legally compelled to draw them in that way").

[96] *See* Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993 (stating that the Court uses international custom, as evidence of a general practice accepted as law, as one consideration in deciding disputes).

[97] *See generally* Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 150 (1996) (providing an overview of the persistent objector doctrine in international law and its origins in the sovereign autonomy of states).

[98] *See* Vienna Convention, *supra* note 80, art. 53 (stating that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

[99] *See generally* Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495 (2005).

[100] *See* Loschin, *supra* note 97. The persistent objector doctrine is not universally accepted. For criticisms of the doctrine, see, for example, Lau, *supra* note 99 at 495.

[101] Loschin, *supra* note 97, at 150 (citing MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 16 (1985)).

[102] *Id.* at 151 (citing VILLIGER, *supra* note 101, at 12).

[103] *Id.* at 150–51 (citing IAN BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10 (2d ed. 1973)).

Because international treaties do not address every issue that may arise during armed conflict, and not all international treaties are universally ratified, customary humanitarian law is useful in closing gaps that may exist. The "de Martens clause" is considered by some to further fill any voids. It first appeared in the Preamble to the Hague Convention on the Laws and Customs of War on Land in 1899,[105] and in its 1907 revised form it stated:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the law of humanity, and the dictates of the public conscience.[106]

This clause was intended to provide "residual humanitarian rules for the protection of the population of occupied territories, especially armed resisters in those territories."[107] A version of the clause appears in the Geneva Conventions,[108] and its goal was to

> make it clear that if [High Contracting Parties] denounce the Conventions, the parties will remain bound by the principles of the law of nations, as they result from the usages established among civilized peoples, the laws of humanity, and the dictates of public conscience[,] . . . [thereby guaranteeing] that international customary law

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[104] *Id.* (citing Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 532 (1993)).

[105] Hague II, *supra* note 83.

[106] Hague IV, *supra* note 83. Frederic de Martens was a renowned Russian jurist who was the primary drafter of the 1899 Hague Convention. Lieutenant Commander Gregory Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 196 (2000).

[107] Theodore Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 79 (2000).

[108] *See* GC I, *supra* note 24, art. 63(4); GC II, *supra* note 24, art. 62(4); GC III, *supra* note 24, art. 142(4); GC IV, *supra* note 24, art. 158(4). In the Geneva Conventions, the Martens Clause is contained in substantive provisions, *id.*, while in the Hague Conventions, it appears in the preambles. *See* Hague II, *supra* note 83, pmbl.; Hague IV, *supra* note 83, pmbl.

> will still apply for states no longer bound by the Geneva Conventions as treaty law.[109]

There is no consensus on the modern meaning of the de Martens clause, and Theodore Meron demonstrates this through reference to the ICJ's advisory opinion *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case)*,[110] discussed in Part III of this article. Most states conceded to the ICJ that, as a baseline interpretation, the clause means that adoption of a conventional norm does not displace customary international law.[111] The United Kingdom argued that the de Martens clause does not, by itself, outlaw the use of nuclear weapons, and that the clause requires reference to customary international law to determine the issue, since no treaty exists on point.[112] Additionally, the United Kingdom explained that customary law cannot be discovered through resort to general humanitarian principles alone.[113] The United States concurred, adding that the de Martens clause does not transform public opinion into customary law.[114]

Conversely, some states argued that the de Martens clause could indeed transform general principles of international law and humanity into prohibitions on conduct, without those principles having ascended to customary international law through consent of states and consistent state practice.[115] In other words, "actions that are not explicitly prohibited by treaty or customary rule are not *ipso facto* permitted and . . . the conduct of the parties . . . is judged not only in accordance with treaties and custom, but also in light of the principles of international law referred to in the clause."[116] While the ICJ held that the de Martens clause was relevant to its analysis of the lawfulness of nuclear weapons, it did not resolve the debate over its interpretation.[117]

Given the lack of clarity in the meaning of the de Martens clause, some scholars have found room to argue that human rights law becomes

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[109] Meron, *supra* note 107, at 80.
[110] *See id.* at 85–88 (discussing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809 (July 8, 1996)).
[111] *Id.* at 85.
[112] *Id.*
[113] *Id.* at 86.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 87.

applicable to armed conflict through the clause's invocation of the "law of nations, the laws of humanity, and the dictates of public conscience."[118] To make such arguments ignores the context of the de Martens clause. In the version appearing in the Hague Conventions, the clause begins with the words: "Until a more complete code of the laws of war has been issued . . . ."[119] Given the reference to "laws of war," it appears that when resorting to the "principles of the law of nations," one should be looking for principles relating to war. While principles of the law of nations regarding a host of international legal issues, from environmental protection to global commerce, may exist, only the law of nations regarding conduct in war should be relevant to the inquiry under a contextual and logical interpretation of the clause.

If gaps exist in humanitarian law, they should be filled by uncodified humanitarian law, rather than uncodified or codified human rights law. Additionally, gaps are best filled by states manifesting their consent through treaty formation, or through consistent state practice that develops into customary international law. Ultimately, states may choose to fill voids by applying norms borrowed from human rights law. However, the process of incrementally filling gaps in this manner is preferable to squeezing an entirely new legal regime into the fissures of humanitarian law, via the amorphous language of the de Martens clause. This is especially true, given that the human rights regime was not originally intended to regulate warfare.

C. Parallels and Differences Between International Human Rights Law and International Humanitarian Law

Early traces of human rights law can be seen in the Lieber Code, which contained prohibitions on rape, slavery, and disparate treatment of captured combatants based upon race.[120] As human rights law developed as a body of law, it influenced or informed contemporary humanitarian

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[118] *See id.* at 84 (noting that in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809, Australia argued that "international standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience" and that Judge Weeramantry in a dissenting opinion also emphasized a place for human rights in shaping "the dictates of public conscience.").

[119] Hague IV, *supra* note 83, pmbl.

[120] *See* Lieber Code, *supra* note 8.

law treaties. Provisions of the Geneva Conventions[121] aimed at providing protections to individuals embody that influence.[122] These include the protections of life and due process, and prohibitions against torture; cruel, inhuman, or degrading treatment or punishment; arbitrary arrest or detention; and discrimination on grounds of race, sex, language, or religion. While some scholars characterize these protections as creating "rights,"[123] these obligations are not true rights for many reasons.[124] Part III of this article analyzes the distinction between rights and obligations and how the "rights" created under humanitarian law are best characterized as standards of treatment or obligations.

Article 72 of Protocol I[125] goes further than the Geneva Conventions' allusion to human rights law. It asserts that fundamental human rights are recognized during an international armed conflict, as it states that it is additional to the Fourth Geneva Convention, "as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict."[126] Furthermore, Article 75 of Protocol I[127] and Article 6 of Protocol II[128] are drawn directly from the ICCPR.[129] These articles demonstrate how human rights law can be incorporated into humanitarian law without displacing the human rights regime.

Similarly asserting a role for human rights in armed conflict, the United Nations General Assembly has issued resolutions calling for the implementation of fundamental human rights in armed conflict and occupation.[130] In 1968, the General Assembly called for Israel to permit former inhabitants of Arab territories subsequently occupied by Israel to "return home, resume their normal life, recover their property and

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[121] GC I, *supra* note 24; GC II, *supra* note 24; GC III, *supra* note 24; GC IV, *supra* note 24.
[122] *See* Roberts, *supra* note 45, at 590.
[123] *See, e.g.*, Meron, *supra* note 7, at 251–53.
[124] *See generally* PROVOST, *supra* note 11 (providing detailed analysis of the concept of rights under human rights and humanitarian law).
[125] Protocol I, *supra* note 25, art. 72.
[126] Roberts, *supra* note 45, at 591 (citing Protocol I, *supra* note 25, art. 72).
[127] Protocol I, *supra* note 25, art. 75.
[128] Protocol II, *supra* note 25, art. 6.
[129] *See* Roberts, *supra* note 45, at 591 (referring to the ICCPR, *supra* note 2, arts. 6–27).
[130] *See, e.g.*, Respect for and Implementation of Human Rights in Occupied Territories, G.A. Res. 2443, U.N. G.A.O.R., 23d Sess., 1748th plen. mtg. (Dec. 19, 1968), Basic Principles for the Protection of Civilian Populations in Armed Conflict, G.A. Res. 2675, U.N. G.A.O.R. 2675, 25th Sess. 1922d plen. mtg. (Dec. 9, 1970).

homes, and rejoin their families according to the provisions of the Universal Declaration of Human Rights."[131] In 1970, the General Assembly affirmed that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."[132]

Some scholars view the parallels between human rights law and humanitarian law as support for uniting the two regimes.[133] One way to unite the regimes is by contending that human rights law applies at all times and that humanitarian law is a subset of human rights law; during armed conflict, humanitarian law becomes the *lex specialis*, meaning specific law, and the requirements of human rights law are then determined by reference to humanitarian law.[134] A more radical faction advocates displacing humanitarian law and regulating armed conflict purely through a human rights regime.[135]

Despite the commonalities between human rights law and humanitarian law, there are important pragmatic differences between the two. Theodore Meron emphasizes some of these differences:

> Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons. It permits far-

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[131] Respect for and Implementation of Human Rights in Occupied Territories, G.A. Res. 2443, U.N. G.A.O.R., 23d Sess., 1748th plen. mtg.

[132] Basic Principles for the Protection of Civilian Populations in Armed Conflict, G.A. Res. 2675, U.N. G.A.O.R. 2675, 25th Sess. 1922d plen. mtg.

[133] *See, e.g.*, Meron, *supra* note 7, at 240 (remarking that "[n]ot surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law").

[134] *See* Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9) (stating that: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. [T]he Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.").

[135] *See, e.g.*, Bennoune, *supra* note 15; Koller, *supra* note 15.

> reaching limitations of freedoms of expression and assembly.[136]

Inherent differences, such as the focus of human rights law on the granting of rights to the individual and the focus of humanitarian law on imposing obligations on the individual, also discourage convergence.[137] The reason is that, "[w]hile contemporary [humanitarian law] is rooted in statist conceptions of rights, human rights law requires any action to be justified in terms of individual rights, thus creating a tension between the two legal frameworks."[138] One scholar vividly describes this as the two regimes "rub[bing] up against each other like two tectonic plates."[139] Part III of this article discusses these differences.

D. When International Human Rights Law and International Humanitarian Law Apply

Another justification for the bifurcation of human rights law and humanitarian law is the context in which they traditionally have applied. Historically, human rights law governed the relationship between a state and its own nationals who were located within its territory and jurisdictional reach.[140] It primarily applied during peacetime, and some human rights treaties, such as the ICCPR and ECHR, made this principle clear by including provisions that permit derogations from the treaties to temporarily suspend the operation of rights in times of public emergency or war.[141] Derogation provisions essentially permit a state engaged in war to take away some of the rights of its own nationals to facilitate winning the war or preserving the state.[142] For example, the ICCPR permits a state to derogate from the right to liberty of movement in

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[136] *Id.*

[137] *See* PROVOST, *supra* note 11, at 13; *see also* Hessbruegge, *supra* note 46, at 25 (noting universal versus conditional application of rights under human rights law and humanitarian law).

[138] Koller, *supra* note 15, at 231–32.

[139] CHARLES GARRAWAY, THE "WAR ON TERROR": DO THE RULES NEED CHANGING? 3 (Chatham House 2006), http://www.chathamhouse.org.uk/pdf/research/il/BPwaronterror.pdf.

[140] Major Richard Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3, 23.

[141] *See* ECHR, *supra* note 66, art. 15; ICCPR, *supra* note 2, art. 4.

[142] Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15—A Domestic Power of Derogation from Human Rights Obligations*, 11 MSU-DCL J. INT'L L. 261, 262-63 (2002).

Article 12.[143] In time of war or emergency, the state could prevent its citizens from entering or leaving certain areas or impose curfews for their safety and security.[144]

Human rights treaties do not permit derogations from rights regarded as fundamental. For example, the ICCPR does not allow derogations from the rights not to be arbitrarily deprived of life; to be free from torture and other cruel, inhuman, or degrading treatment or punishment; to be free from slavery and servitude; not to be imprisoned for failure to fulfill a contractual obligation; not to be punished under ex post facto laws; to be recognized as a person before the law; and to have freedom of thought, conscience, and religion.[145] These rights would remain protected even in times of war, given their universal nature.

Critics could use the universality of fundamental human rights to argue that such human rights apply during armed conflict, regardless of whether they are incorporated into humanitarian law. This argument is flawed. Given that human rights law was designed to protect individuals from their own state, fundamental human rights law would continue to operate during armed conflict regarding a state and its own citizens. However, states would not be required to provide fundamental human rights to citizens of enemy states unless such requirement exists under humanitarian law.[146]

Although fundamental rights are universal, they are not absolute; they may be qualified or interpreted differently in times of peace and war. For example, the right to life is considered a fundamental human right, but it is not unconditional.[147] It protects individuals from "arbitrary," but not all, deprivations of life. During peacetime, this right may be "limited by competing interests such as the right to self-defense, acting to defend others, the prevention of serious crimes involving a grave threat to life or serious injury, and the use of force to arrest or prevent the escape of persons presenting such threats."[148] Deprivations of life under these circumstances are not arbitrary.

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[143] ICCPR, *supra* note 2, arts. 4, 12.
[144] *Id.*
[145] *Id.* arts. 4, 6, 7, 8, 11, 15, 16, 18.
[146] *See* Mark Gibney, Katarina Tomasevski & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 267–68 (1999).
[147] *See* RESTATEMENT (THIRD), *supra* note 52, § 701.
[148] Watkin, *supra* note 37, at 10.

During armed conflict, the right to life is similarly and further qualified. For example, the ECHR permits the deprivation of life in self-defense or defense of another, in the course of a lawful arrest or to prevent escape of a lawfully detained person, or in action taken to quell a riot or insurrection.[149] It also provides that deaths resulting from lawful acts of war are not prohibited.[150] One may commend the architects of the ECHR for attempting to draft a comprehensive instrument applicable in both peacetime and armed conflict. However, other articles of the ECHR fail to account for measures that are prohibited during peacetime but permitted during war.[151] For example, in listing instances in which a person may be deprived of liberty, Article 5 fails to mention the capture of prisoners of war or the internment of civilians during periods of war.[152]

In contrast to the principle that human rights law applies at all times, with certain permitted limitations, humanitarian law applies only when certain thresholds are met. For example, armed conflict between two or more states is necessary to trigger the entirety of the Geneva Conventions.[153] Internal state strife must reach a certain level of intensity before Common Article 3 of the Geneva Conventions[154] will apply, and humanitarian law has no role when internal disturbances do not attain the requisite intensity characteristic of an armed conflict.[155]

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[149] *See* ECHR, *supra* note 67, art. 2.
[150] *Id.* art. 15.
[151] *See, e.g.*, *id.* art. 5.
[152] *See id.* art. 5.
[153] GC I, *supra* note 24, art. 2; GC II, *supra* note 24, art. 2; GC III, *supra* note 24, art. 2; GC IV, *supra* note 24, art. 2. The writer uses the phrase "entirety of the Geneva Conventions" loosely, as certain portions of the Geneva Conventions apply only when triggered by certain events, such as occupation or internment. *See, e.g.*, GC IV, *supra* note 24, arts. 47–141.
[154] GC I, *supra* note 24, art. 3; GC II, *supra* note 24, art. 3; GC III, *supra* note 24, art. 3; GC IV, *supra* note 24, art. 3.
[155] Theodore Meron noted that the ICRC study on customary humanitarian law "seeks broader recognition that many rules are applicable to both international and non-international armed conflicts," thereby blurring the threshold methodology of the Geneva Conventions and Additional Protocols. Meron, *supra* note 7, at 261. This view has been gaining support. *Id.* at 262 (noting that "recent regulations promulgated by the Secretary-General of the United Nations on the observance by United Nations forces of international humanitarian law restate a broad set of protective norms distilled from humanitarian treaties without making any distinction between the international and noninternational conflicts in which U.N. forces are involved," referring to U.N. Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13, *reprinted in* 38 I.L.M. 1656 (1999)). As evidence of this trend, Meron cites the U.S. Law of War Policy in effect when he

III. International Humanitarian Law and International Human Rights Law Should Remain Distinct Regimes

Humanitarian law and human rights law began as separate, distinct regimes and should maintain their independent natures. Each is partly comprised of peremptory norms, by which all states are bound, regardless of their concurrence. However, a large volume of the legal tenets of both regimes was formed by state consent through a treaty process or through the development of customary international law. The importance of state consent in the development of international law cannot be overstated, and it provides a strong foundational argument against displacing humanitarian law with human rights law or merging the two regimes.

A. The Importance of State Consent in Determining a State's Obligations under International Law

To understand the role of state consent in humanitarian law and human rights law, it is helpful to examine the underlying theory and history of international law. In the Western World, the early origins of international law can be traced to Greece and the Roman Empire.[156] Prior to the Macedonian conquest, Greece developed rules to regulate the dealings of its numerous city-states.[157] Although these rules did not apply to relationships between Greek city-states and non-Greek states, they closely resembled modern international law in their regulation of diplomatic practices, formation of alliance treaties, and rudimentary rules of war.[158]

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wrote the article, which stated that U.S. forces will comply with the law of war in all conflicts, no matter how characterized, and comply with principles and spirit of law of war in all operations. *Id.* (referring to U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998)). The DOD Law of War Program was revised in 2006. *See* U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006). The revised program contains the language: "Members of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." *Id.* para. 4.1; *see* Major John T. Rawcliffe, *Changes to the Department of Defense Law of War Program*, ARMY LAW., Aug. 2006, at 23 (providing an overview of the revised program).

[156] HENKIN ET AL., *supra* note 10, at xxii; *see also* Noone, *supra* note 106, at 183–84.

[157] HENKIN ET AL., *supra* note 10, at xxii; *see also* Noone, *supra* note 106, at 183–84.

[158] HENKIN ET AL., *supra* note 10, at xxii.

While the Roman Empire did not develop a system of rules to govern relationships within its borders, it is credited with developing *jus gentium*, a system of laws regulating the relationship between Roman citizens and foreigners.[159] "The *jus gentium* contained many principles of general equity and 'natural law,' some of which are similar to certain 'general principles of law recognized by civilized nations'—one of the sources of contemporary international law listed in Article 38 of the Statute of the International Court of Justice."[160]

The emergence of multiple separate states, such as England and France, followed the end of the Roman Empire and necessitated a system of rules to govern relations among the states, kingdoms, and principalities of this new political landscape.[161] In Europe, increases in international trade, improvements in navigation and military techniques, and the discovery of new lands spurred the creation of the law of nations.[162] In the thirteenth century, German city-states founded the Hanseatic League, which regulated commercial and diplomatic relations among over 150 trading cities and centers.[163] Additionally, Italy's practice of sending ambassadors to other states prompted the development of rules regarding diplomatic relations, and trade growth in Europe encouraged the formation of commercial treaties.[164] Disputes by European states arose over issues of sovereignty, jurisdiction, trade, and navigation rights with the discovery of new lands, and issues surfaced over relations of the indigenous populations.[165]

By the early seventeenth century, international treaties and customs had developed a complexity that compelled their collection and codification.[166] One such collection is Hugo Grotius's *De Jure Belli, Ac Pacis Libri Tres* ("On the Laws of War and Peace"), a treatise which is widely regarded as the keystone of contemporary international law.[167]

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[159] *Id.*
[160] *Id.*; *see* Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993.
[161] HENKIN ET AL., *supra* note 10, at xxii.
[162] *Id.* at xxiii.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at xxiv.
[167] *Id.*; *see* HUGO GROTIUS, DE JURE BELLI, AC PACIS LIBRI TRES (Francis W. Kelsey trans., 1925) (1623–1624); *see also* Noone, *supra* note 106, at 187.

In addition to this acclaim, Grotius is credited as one of the most renowned natural law theorists.[168] Under his natural law theory, law and legal principles originate from universal reason.[169] The concept that law is derived by, rather than created by, mankind was shared by an equally famous natural law philosopher, St. Thomas Aquinas.[170] However, Aquinas believed that law was derived from divine authority rather than reason.[171]

Several principles of early natural law theory exist in modern international law. The principle of *pacta sunt servanda*, which requires that promises given through treaty or otherwise must be kept, was part of Grotius's system of the law of nations.[172] It is articulated in the Vienna Convention on the Law of Treaties.[173] Another example that has survived since Grotius's time is the basic principle of the freedom of the seas.[174]

In compiling his treaty on the law of nations, Grotius also recognized the importance of *jus gentium*,[175] the customary law of nations first developed by the Roman Empire. Although the Roman version contained many principles of natural law, *jus gentium* is regarded as an offspring of positive law theory. Positivism is described as "whatever is enacted by the lawmaking agency is the law in society,"[176] and positivism's "essential meaning in the theory and development of international law is reliance on the practice of states and the conduct of international relations as evidenced by customs or treaties, as against the derivation of norms from basic metaphysical principles."[177] Positivism gradually became the dominant theory of international law, "through

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[168] HENKIN ET AL., *supra* note 10, at xxiv. For an overview of natural law principles in international law, see Robert John Araujo, *International Law Clients: The Wisdom of Natural Law*, 28 FORDHAM URB. L.J. 1751 (2001).
[169] *See* GROTIUS, *supra* note 167.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] Vienna Convention, *supra* note 80, art. 26 (stating "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").
[174] HENKIN ET AL., *supra* note 10, at xxv.
[175] *Jus gentium* is also called *jus voluntarium*, which means a body of law formed by the conduct and will of nations. *Id.*
[176] MARTIN P. GOLDING, PHILOSOPHY OF LAW 25 (1975).
[177] HENKIN ET AL., *supra* note 10, at xxv.

increasing emphasis on the voluntary law of nations built up by state practice and custom."[178]

Between the eighteenth and early twentieth centuries, the concept of state sovereignty permeated the majority of international legal theory.[179] In 1927, the Permanent Court of International Justice articulated the importance of state sovereignty and consent as follows: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."[180]

To positivists such as English jurist John Austin, who viewed law as requiring a command from a superior and a punitive sanction for violations of the command, the concept of state sovereignty was troubling.[181] In international law, no definite superior was dictating commands to states; rather, states with equal authority were voluntarily accepting norms as binding.[182] Therefore, Austin deemed international law to be "positive morality" rather than true law.[183]

The debate over whether international law is truly law, positive morality, or something else, appeared to have cooled following the end of the Cold War.[184] However, contemporary issues have renewed interest in the question of how international law becomes law and the importance of state sovereignty and consent. Professor Duncan Hollis points to terrorism, hegemony, and globalization as three such issues. [185] Since September 11th, some have argued for "the primacy of national security interests—particularly, efforts to combat terrorism and the

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[178] *Id.*
[179] *Id.*
[180] John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 437 (1997) (quoting S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7)).
[181] HENKIN ET AL., *supra* note 10, at xxv.
[182] *Id.*
[183] GOLDING, *supra* note 176, at 25.
[184] Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 137 (2005) (referencing Jose Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303, 303 (1998)) ("An ever increasing number of scholars are going beyond well-worn debates about whether international law is truly 'law' to undertake 'post-ontological' inquiries appropriate to the new 'maturity' of the international legal system.").
[185] *Id.*

proliferation of weapons of mass destruction—even if pursuing those interests requires discarding or dismissing existing regimes of international law."[186] In other words, national interests trump the state's obligations under international treaties and customary international law. Some view the U.S. invasion of Iraq in 2003 and U.S. predominance in global affairs as evidence of international hegemonic law.[187] "Such a system would replace the rule of equally sovereign states creating law through consent and practice with a system whereby a single actor, the hegemon, dictates new rules of law."[188] Finally, some scholars argue that globalization's tendency to decentralize power has lessened the importance of sovereign states in international law, as corporations, organizations, and individuals exert growing influence in the formation and enforcement of international law.[189]

These arguments are part of a broader debate over "legitimacy" versus "justification" in international law.[190] Legitimacy regards as most important the source of claim of legal obligation rather than the obligation's justification, and the source of claim in international law is state consent.[191] Justification looks to the moral principles or common values that inform the specific provisions of the law.[192]

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[186] *Id.* at 138.

[187] *See, e.g.*, *id.* at 137; Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691 (2004); Michael T. Wawrzycki, *The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT'L & COMP. L. 579 (2006).

[188] Hollis, *supra* note 184, at 138 (referencing, for example, Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003); Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001)).

[189] *Id.* (citing, for example, Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 959 (2000)) (acknowledging that some perceive "national sovereignty . . . to have diminished significantly in the past half century as a result of economic globalization" and other manifestations of globalization); Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 235–36 (2002) (discussing the debate over globalization's impact on sovereignty in terms of the decrease in subjects excluded from international regulation and the increase in non-state actors' participation); Phillip Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty*, 95 MICH. L. REV. 1944, 1946 (1997) (citing "globalism" as a "visible challenge[] to national sovereignty")).

[190] *See* Paul W. Kahn, *Nuclear Weapons and the Rule of Law*, 31 N.Y.U. J. INT'L L. & P. 349, 367–68 (1999).

[191] *Id.*

[192] *Id.*

Professor Paul Kahn illustrated the operation of these competing perspectives and the primacy of state sovereignty in the ICJ's *Nuclear Weapons Case*.[193] In this case, the U.N. General Assembly asked the ICJ for an advisory opinion regarding the legality of the threat or use of nuclear weapons under international law.[194] To decide the issue, the Court analyzed treaties, the U.N. Charter, and customary international law and concluded that, generally, the threat or use of nuclear weapons would be unlawful.[195] However, it could not definitively conclude "whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[196] The ICJ found itself

> unable to state as a matter of law what may seem an obvious proposition of common sense: If international law protects any common values of humanity, it must prohibit weapons that threaten to destroy civilization itself. The Court cannot reach this conclusion because the arguments from legitimacy, which insist on the primacy of the sovereign state, cannot be subordinated to this argument from justification, even when civilization hangs in the balance.[197]

At a minimum, this opinion illustrates that "as long as states maintain a policy of nuclear self-defense, it is difficult to argue that the age of state sovereignty is over."[198]

Many international lawyers regard Article 38 of the Statute of the International Court of Justice as providing the list of modern sources of international law.[199] Article 38 lists treaties, customs, and recognized general principles as the sources.[200] At the core of each of these sources

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[193] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809 (July 8, 1996).
[194] *Id.*
[195] *Id.* ¶ 105.
[196] *Id.*
[197] Kahn, *supra* note 190, at 413.
[198] *Id.* at 380.
[199] *Id.* at 142 (referencing the Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993).
[200] Statute of the International Court of Justice art. 38, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993. Some cite "General Assembly resolutions, the work of the International Law Commission, and even aspirational texts such as the American Declaration of the Rights of Man" as sources of international law. *See* Hollis, *supra* note 184, at 143 (referencing,

of law is the principle of state sovereignty and consent.[201] Given the importance of state consent, the parameters and conditions of the consent should matter when determining a state's obligations under international law.

This contention is supported by states' use of reservations and objections in multilateral treaty formation.[202] Under current reservations law, a state may enter reservations when signing a treaty so long as the reservations are compatible with the object and purpose of the treaty.[203] Furthermore, if another signatory state enters an official objection to another state's reservation, the objection affects the treaty relationship only between those two states.[204]

If it is permissible for a state to exempt itself from certain treaty obligations through reservations, then the plain language and reasonable interpretation of a treaty should constitute the outer boundaries of what a state has agreed to undertake or provide; a state should not have to fear that it may later incur a broader, unforeseeable obligation under the treaty through reinterpretation of the treaty's terms by an international tribunal or otherwise. For example, if states have agreed that a given human rights treaty applies only within a state's own borders, no party should be forced to provide rights enumerated in the treaty outside its

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for example, T. Olawale Elias, *Modern Sources of International Law*, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 34 (1972)).

[201] Lau, *supra* note 99, at 495 (explaining that "[a]ccording to its traditional conceptionalization, international law derives from agreement among sovereign states"); *see also* Kahn, *supra* note 190, at 380 (noting that "[r]egardless of the development of human rights law and multiple international legal regimes, as long as states maintain a policy of nuclear self-defense, it is difficult to argue that the age of state sovereignty is over"). For a discussion of the importance of state consent in treaty-making and the new trend of treaty formation involving sub-state, supranational, and extra-national actors into treaty formation, see Hollis, *supra* note 184.

[202] *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 19 (May 28) (stating "[i]n its treaty relations, a State cannot be bound without its consent").

[203] *Id.* ¶ 66 (noting that reservations are permissible under the Genocide Convention, *supra* note 73, so long as they are not incompatible with the object and purpose of the Convention); *see also* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002) (discussing the I.C.J.'s opinion in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) and the Vienna Convention, *supra* note 80, art. 26).

[204] *Id.*

borders.[205] Exceptions should occur under very limited circumstances. For example, if the treaty protects some rights considered to be fundamental, these fundamental rights would apply extraterritorially because of their nature as peremptory norms, not due to their delineation in the treaty. Additionally, if extraterritorial application of certain rights found in the treaty develops into customary law, a state could be bound to provide those rights outside its borders as a matter of customary law, if it had not perfected its status as a persistent objector.

State consent is paramount in the formation of customary international law, as well. Customary law develops from the consistent practice of states, acting out of a sense of legal obligation. States engaging in the consistent practice may be deemed to have "consented" to the developing norm. However, a state may become bound by customary law even if it did not engage in the consistent practice of the developing norm.[206] In that case, a state would not have, in fact, "consented" to the application of the norm.

However, the persistent objector doctrine permits a state to voice its objections to a developing norm, attempt to influence other states to depart from a developing norm, and remove itself from binding application of the norm. In this manner, the sovereignty and consent of the objector state remain important.

If a state has consented to apply only humanitarian law during armed conflict and human rights law in all other contexts, how does the expansion of human rights law into armed conflict occur? The importance of state sovereignty and consent should prevent courts and tribunals from taking the entirety of human rights law, or pieces of it, and thrusting it upon states as binding obligations in armed conflict. The primacy of state consent, along with the important distinction between the normative frameworks of human rights and humanitarian law,

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[205] This was the issue in the *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136 (July 9), *infra* Part IV.A.

[206] *See* Loschin, *supra* note 97, at 150 (explaining that "situations may arise when a practice has gained the status of customary law, although some states may disagree" with being bound by the norm); *see also* Kahn, *supra* note 190, at 371 (stating that "[e]ven the state that refuses to join a multilateral convention may find itself in a situation in which others are arguing that it is bound by a customary law rule 'crystallized' in the process of creating the convention").

appears to have been forgotten or ignored by those who advocate the expansion of human rights law.

B. The Normative Frameworks of Human Rights and Humanitarian Law

In addition to state consent, the structural dissimilarity of the normative frameworks of humanitarian law and human rights law provides another basis for rejecting a convergence of the two in the absence of incorporation. In *International Human Rights and Humanitarian Law*, René Provost compares the systems of human rights and humanitarian law and meticulously deconstructs each.[207] His analysis of the primary difference between the normative frameworks, in that human rights law is founded upon the granting of rights to the individual and that humanitarian law is rooted in the imposition of obligations on the individual, demonstrates the incompatibility of the two.[208]

A right is a "claim[] grounded in the interest of a holder."[209] Under human rights law, individuals are the holders of rights, and the potential offender of the rights is usually the individual's state of nationality.[210] The pivotal issue is whether humanitarian law creates rights in this same sense.

Provisions of the Geneva Conventions prohibiting protected persons from renouncing the "rights secured to them under the present Convention"[211] and those prohibiting special agreements adversely affecting the rights of protected persons[212] have been interpreted as providing rights to individuals.[213] To the contrary, these provisions demonstrate that, despite the label of "rights," they are not in the nature of rights at all. If the Geneva Convention created "rights," then the holder of those rights, whether the holder is the individual or the state,

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[207] PROVOST, *supra* note 11.
[208] *Id.*
[209] *Id.* at 18.
[210] *Id.*
[211] *See* GC I, *supra* note 24, art. 7; GC II, *supra* note 24, art. 7; GC III, *supra* note 24, art. 7; GC IV, *supra* note 24, art. 8.
[212] *See* GC I, *supra* note 24, art. 6; GC II, *supra* note 24, art. 6; GC III, *supra* note 24, art. 6; GC IV, *supra* note 24, art. 7.
[213] *See* PROVOST, *supra* note 11, at 28.

would be able to waive those rights.[214] The prohibition on waivers suggests that "the Convention actually sought to decree standards of treatment of individuals rather than 'rights' similar in nature to human rights."[215]

Provost provides further evidence of this by referencing initial International Committee of the Red Cross drafts that permitted protected persons to waive their rights.[216] Waiver provisions were rejected, because "claims of waiver from the state under whose power protected persons find themselves would have been easy to make and hard to disprove."[217] Similarly, Article 85 of the Third Geneva Convention[218] supports the notion that rights in the Geneva Conventions are best understood to be standards existing independent of individuals and their actions. Article 85 states the prisoners of war convicted of war crimes retain the benefits of the Convention.[219] This provision was contrary to customary law prevailing at the time the Conventions were drafted, which held that a war criminal renounced the benefit of the protections of humanitarian law.[220]

Skeptics could quickly point out that, under the Fourth Geneva Convention, protected persons who commit hostile acts "shall not be entitled to claim such rights and privileges under the present Convention" and are deemed to have "forfeited rights of communication under the present Convention."[221] However, suspension of a protected person's rights "is not justified by their presumed forfeiture, but rather by reference to the security of the state."[222]

The universality of human rights law and the conditionality of humanitarian law is another key difference between the normative frameworks.[223] Under human rights law, rights are given to all,

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[214] *Id.* at 29.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] GC I, *supra* note 24, art. 85.
[219] *Id.*
[220] PROVOST, *supra* note 11, at 30.
[221] *Id.* at 31 (referring to GC IV, *supra* note 24, art. 5).
[222] *Id.*
[223] *Id.* at 24–42; *see also* Hessbruegge, *supra* note 46, at 25 (noting as a "crucial difference" between human rights law and humanitarian law that "whereas human rights law is universal . . . the protection offered by international humanitarian law is general limited to the opponent's soldiers and civilians").

"including nationals of states not bound by the same norm and stateless individuals;" state of nationality is irrelevant.[224] In contrast, many of humanitarian law's protections are linked to nationality[225] or membership in groups, such as combatants.[226]

Another distinction between the regimes is that many human rights norms have been found to be directly applicable, meaning that they are self-executing and create a private cause of action before national legal systems without the need for further legislation.[227] In contrast, humanitarian norms are generally not self-executing.[228]

Rather than granting rights, humanitarian law creates direct obligations on individuals and states.[229] An individual who violates humanitarian law may face prosecution for his actions, as the Nuremberg trials illustrate.[230] Human rights law does not impose obligations on individuals.[231] If an agent of the state violates human rights law, the offended individual's recourse is with the state, not the individual agent.[232]

The differences between the normative frameworks of human rights law and humanitarian law show that a simple merger of human rights into humanitarian law is unworkable. While it is possible to incorporate human rights law into humanitarian law, the process of converting rights

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[224] PROVOST, *supra* note 11, at 25.
[225] *See* GC IV, *supra* note 24.
[226] *See* GC I, *supra* note 24.
[227] PROVOST, *supra* note 11, at 23; *see*, *e.g.*, *supra* Part II.A.1 (discussing Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004)).
[228] *See* Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005) (holding that the Third Geneva Convention does not confer a right to enforce its provisions in U.S. federal court), *rev'd*, 126 S. Ct. 2749 (2006), *remanded to* 2006 U.S. App. LEXIS 20943 (D.C. Cir. Aug. 11, 2006), *superseded by statute,* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 476 F.3d 981, 2007 U.S. App. LEXIS 3682 (D.C. Cir. 2007); *see also* Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. Ct. App. 1978) (holding that there was no evidence that the Geneva Conventions were intended "to create private rights of action in the domestic courts of the signatory countries").
[229] PROVOST, *supra* note 11, at 13.
[230] *See generally* Theodore Meron, *Reflections on ohe Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551 (2006) (providing analysis of the post-World War II tribunals).
[231] *See* Antenor Hallo De Wolf, *Modern Condottieri In Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 346 (2006).
[232] *Id.*

into direct obligations must be accomplished through state consent and give deference to military necessity.

IV. International Human Rights Law Should Not Apply During Armed Conflict, But Such Expansion Is Already Underway

Given the importance of state consent in forming international law and the essential differences between the regimes of human rights and humanitarian law, human rights law should apply in armed conflict only if states consent to incorporating it into existing humanitarian law or agree to completely replace humanitarian law with a human rights regime. However, a subtle, ominous shift towards displacing humanitarian law with human rights law is underway, absent state consent. Opinions of the ICJ and decisions of human rights tribunals show evidence of this change. This shift has taken two basic forms: the extraterritorial application of human rights treaties and the application of human rights law, aside from that which is incorporated into humanitarian law or recognized as fundamental, during armed conflict and occupation. While the United States, Britain, and other nations object to this move,[233] proponents are advocating the increasing expansion of the human rights regime into armed conflict.

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[233] *See* Wilde, *supra* note 37, at 487. To support his position, Wilde cites the U.S. Dep't of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Consideration (2003), *available at* http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf (stating "[t]he U.S. has maintained consistently that the [ICCPR] does not apply outside the U.S. or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during international armed conflict") and the Rt. Hon. Adam Ingram MP, Ministry of Defence, Letter to Adam Prince MP (on file with Ralph Wilde) (stating that "[t]he ECHR is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not a signatory to the Convention. The ECHR can have no application to the activities of the U.K. in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces. Further, although the U.K. Armed Forces are an occupying power for the purposes of the Geneva Convention, it does not follow that the U.K. exercises the degree of control that is necessary to bring those parts of Iraq within the United Kingdom's jurisdiction for the purposes of article 1 of the Convention.").

A. International Court of Justice Opinions

In two opinions, the ICJ made clear its position on the role of human rights law during armed conflict: human rights law does not cease to apply during armed conflict, and human rights treaties apply extraterritorially in certain contexts during armed conflict. In the *Nuclear Weapons Case,* discussed in Part III of this article, the ICJ stated that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency."[234] To its credit, the court qualified this statement by explaining that whether a particular loss of life is considered to be an arbitrary deprivation of life in violation of the ICCPR would have to be determined by reference to humanitarian law, as *lex specialis*.[235]

In another advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case),*[236] the ICJ affirmed its view that human rights law does not cease to apply during armed conflict. More controversial though, when determining whether Israel's construction of a security barrier violated the human rights of civilians living in the occupied Palestinian Territory, it held that the ICCPR applies extraterritorially.[237]

A brief summary of the facts is necessary to put the issue in context. A 1949 general armistice agreement between Jordan and Israel fixed a demarcation line between Arab and Israeli forces in the territory of Palestine.[238] This demarcation line was later called the "Green Line."[239] In 1967, Israel occupied all the territories that had previously constituted Palestine, including the areas that were on the Arab side of the Green Line, known as the West Bank.[240] Israel has continuously occupied the West Bank since 1967.[241]

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[234] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 35 I.L.M. 809, ¶ 25 (July 8, 1996).
[235] *Id.*
[236] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).
[237] *Id.*
[238] *Id.* ¶ 72.
[239] *Id.*
[240] *Id.* ¶ 73.
[241] *Id.* ¶ 78.

Israel planned to construct a security barrier in the West Bank to stop infiltration from the central and northern portions of that area, as it maintained that this infiltration was largely responsible for terror attacks.[242] Israel had completed work on sections of the barrier in 2003.[243] The final project was to consist of a fence with electronic sensors, a ditch, a paved patrol road, a sand strip to detect footprints, and coils of barbed wire.[244] Palestinians living between the Green Line and the barrier would have to obtain a permit issued by the Israeli authorities to remain in the area, and access to and from the area would be restricted through gates.[245]

After determining that Israel was bound to apply the Fourth Geneva Convention[246] to the occupied Palestinian Territory, the ICJ turned to the issue of whether Israel was required to apply obligations under international human rights treaties, as well.[247] Israel had previously ratified the ICCPR, the ICESCR, and the United Nations Convention on the Rights of the Child, and it remained a party to those instruments.[248]

Article 2, paragraph 1 of the ICCPR states that "each State Party to the present Convention undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind . . . ."[249] While the plain language of this provision seems to clearly indicate that it protects only individuals who are both located within a state's territory and subject to its jurisdiction, the ICJ determined that it was plausible to construe the "and" between "territory" and "subject" in Article 2, paragraph 1, as an "or," thereby giving the protections of the ICCPR to individuals located within a state's territory and also to those located outside the state's territory, but subject to its jurisdiction.[250]

Michael Dennis, U.S. Department of State legal advisor, delved into the preparatory work of the ICCPR and found that the phrase "within its

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[242] *Id.*
[243] *Id.* ¶¶ 79–84.
[244] *Id.*
[245] *Id.* ¶ 85.
[246] GC IV, *supra* note 24.
[247] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶ 102.
[248] *Id.* ¶ 103.
[249] ICCPR, *supra* note 2, art. 2 (emphasis added).
[250] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶¶ 108–09.

territory" was deliberately included to clarify that the Convention did not obligate states to provide rights in occupied territory.[251] Eleanor Roosevelt was the U.S. representative and chair of the Commission on Human Rights when the phrase was added, and she explained:

> The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without [the proposed] addition the draft Covenant might be construed as obliging the contracting State[] to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be a question of conflicting authority between the lessor nation and the lessee nation.[252]

France and other delegations opposed the insertion of the territorial limitation, but it was ultimately adopted in 1950 by a vote of 8 to 2.[253] Two years later, France proposed to delete the phrase "within its territory," but when put to a vote, the proposal was rejected.[254]

Despite the literal meaning of the phrase "within its territory" and the preparatory work available to aid the ICJ in discerning the phrase's intended meaning, the ICJ concluded that "the [ICCPR] is applicable in

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[251] Michael Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?*, 12 ILSA J. INT'L & COMP. L. 459, 463 (2006).

[252] *Id.* at 463–64 (citing Summary Record of the Hundred and Thirty-Eighth Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg. at 10, U.N. Doc. E/CN.4/SR.138 (1950)).

[253] *Id.* at 464 (referencing Summary Record of the Hundred and Ninety-Third Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193d mtg., at 21, U.N. Doc. E/CN.4/SR.193 (1950)).

[254] *Id.* (referencing U.N. GAOR, 3d Comm., 18th Sess., 1259th mtg., at 30, U.N. Doc. A/C.3/SR.1259 (1963)).

respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[255] In reaching its conclusion, it referenced observations of the Human Rights Committee regarding "the long-standing presence of Israel in the [occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli forces therein."[256]

Critics have noted the ICJ's utter lack of detail concerning the interaction of human rights law and humanitarian law under the circumstances of the case and its lack of objectivity concerning the facts. Accordingly, these critics urge that the opinion be given no weight.[257] Michael Dennis analyzed the ICJ's opinion and concluded that the court based its opinion on the extended duration of Israel's occupation of the Palestinian territory.[258] In trying to reconcile the ICJ's holding with the plain language of the ICCPR, he stated: "Thus, arguably the best reading of the Court's opinion is that it was based only on the view that the West Bank and Gaza were part of the 'territory' of Israel for purposes of the application of the Covenant."[259] Whether the ICJ would apply the ICCPR extraterritorially in any other context is unclear, as "the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it . . . extremely difficult to see what exactly has been decided by the Court."[260]

After determining that the ICCPR applied, the ICJ turned to the issue of whether Israel's construction of a security barrier violated the ICCPR's provisions. It noted that Israel had exercised its right of derogation under Article 4 of the ICCPR, but only with respect to Article 9, which deals with rights to liberty and security of persons and sets forth rules applicable to detention and arrest.[261] Other provisions of the

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[255] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶ 111.
[256] *Id.* ¶ 110.
[257] *See, e.g.*, Michael J. Kelly, *Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier*, 29 FORDHAM INT'L L.J. 181 (2005).
[258] *See* Michael Dennis, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 122 (2005).
[259] *Id.* at 123.
[260] Kelly, *supra* note 257, at 188 (citing Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (separate opinion of Judge Higgins)).
[261] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 127. It is unclear from the text of the opinion

ICCPR, such as Article 12, paragraph 1, which provides for liberty of movement and freedom to choose residence, and Article 17, paragraph 1, which provides for freedom from unlawful interference with privacy, family, and home, were implicated by the facts of the case. The ICJ held that Israel's security barrier breached these and other provisions of the ICCPR.[262]

Michael Kelly, who served in the Office of the General Counsel in the Coalition Provisional Authority in Iraq, has pointed out the ICJ's apparent disregard for its previous adherence to humanitarian law as the *lex specialis* in matters of war.[263] The Hague Regulations[264] and the Fourth Geneva Convention[265] contain numerous provisions regarding the power and obligations of occupants. Article 43 of the Hague Regulations gives the occupant the authority to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety,"[266] and Article 52 provides authority for requisitioning private property to satisfy needs of the occupant's army.[267] Article 78 of the Fourth Geneva Convention permits internment or assigned residence for security reasons.[268] These provisions directly contradict Article 12, paragraph 1 of the ICCPR, which provides a right to liberty of movement and freedom to choose one's residence.[269] However, the court made no attempts to reconcile these and numerous other conflicting provisions in human rights law and humanitarian law treaties.

The United States has rejected the assertion that its obligations under the ICCPR apply extraterritorially. Regarding the applicability of the ICCPR to the U.S. presence in Iraq, "[t]he U.S. has maintained consistently that the Covenant does not apply outside the U.S. or its special maritime and territorial jurisdiction, and that it does not apply to

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whether Israel's request to derogate from Article 9 was to apply to Israelis within Israel's border, to Arabs in occupied Palestine, or both. *See id.* However, since Israel argued that the ICCPR did not apply in occupied territories, the derogation apparently related to Israelis within Israel and not individuals in the occupied territories. *See* Kelly, *supra* note 257, at 210.

[262] Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 163.

[263] Kelly, *supra* note 257, at 188.

[264] *See* Hague IV, *supra* note 83.

[265] GC IV, *supra* note 24.

[266] *See* Hague IV, *supra* note 83, art. 43.

[267] *Id.* art. 52.

[268] GC IV, *supra* note 24, art. 78.

[269] ICCPR, *supra* note 2, art 12.

operations of the military during an international armed conflict."[270] Michael Dennis captured the U.S. position as follows:

> The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms.[271]

B. Decisions of Human Rights Tribunals

Unlike the ICCPR, the ECHR has no territorial limitation; it obligates states to secure rights "to everyone within their jurisdiction."[272] "Jurisdiction" is not defined, so the ECHR leaves open the possibility that, when a state sends military forces to a foreign country, the inhabitants of the foreign country are within the jurisdiction of the sending state for the purposes of the ECHR. The European Court of Human Rights (European Court) has considered this issue on several occasions.

In cases involving Cyprus and Turkey, the European Court held that a state may be bound to apply its obligations under the ECHR extraterritorially when it exercises "effective control" outside its national territory as part of a military operation.[273] However, the court departed from the "effective control" rationale in later decisions.

The Grand Chamber of the European Court considered the application of the ECHR during armed conflict in *Bankovic v.*

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[270] Wilde, *supra* note 37, at 487 (quoting U.S. DEP'T OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATION (2003), *available at* http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf).
[271] Dennis, *supra* note 258, at 141.
[272] ECHR, *supra* note 66, art. 1.
[273] Dennis, *supra* note 251, at 468.

Belgium.[274] In *Bankovic,* when determining whether victims of NATO's bombing of Radio Television Serbia's headquarters were "within the jurisdiction" of the NATO member states, the court stated that: "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[275] Under this reasoning, the Court found that the victims were not within the jurisdiction of member states for the purposes of the ECHR.[276] In rejecting the "effective control" rationale employed in earlier cases, the Court stated that "[t]he wording of Article 1 does not provide any support for the applicant's suggestion that the positive obligation in Article 1 . . . can be divided in accordance with the particular circumstances of the extraterritorial act in question."[277]

A few years later in *Issa v. Turkey*,[278] a Chamber of the European Court considered the application of the ECHR in Iraq in a case involving a raid by a large contingent of Turkish forces into northern Iraq.[279] Departing from the *Bankovic* decision and its rejection of the effective control test, the Court held that Turkey was bound to apply the EHCR when conducting military operations outside its national territory.[280] In reaching its decision, the Court relied upon the decisions of the Human Rights Committee regarding the ICCPR in *Lopez Burgos v. Uruguay*[281] and *Celiberti v. Uruguay*,[282] even though these cases predated *Bankovic* by twenty years.

The ICCPR created the Human Rights Committee as a means to implement and enforce the Covenant.[283] In *Lopez Burgos* and *Celiberti*, the Committee found that it had jurisdiction to hear cases involving

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[274] Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333.
[275] Dennis, *supra* note 251, at 468 (quoting Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333).
[276] *Id.*
[277] *Id.* at 469.
[278] Issa v. Turkey, 2004 Eur. Ct. H.R. 71.
[279] Dennis, *supra* note 251, at 469 (discussing Issa v. Turkey, 2004 Eur. Ct. H.R. 71).
[280] *Id.*
[281] U.N. Human Rights Committee, Lopez Burgos v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981).
[282] U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/199 (1981).
[283] *See* ICCPR, *supra* note 2, arts. 28–39.

Uruguay's abduction of its own citizens who were living abroad.[284] The ICJ and the European Court have relied on these decisions as authority for applying human rights instruments extraterritorially.[285] However, these cases do not clearly support the proposition that the ICCPR applies extraterritorially in armed conflict and occupation, as the applicants in *Lopez Burgos* and *Celiberti* were citizens of the offending state, and the decisions involved neither armed conflict nor occupation.[286] Furthermore, as Committee member Christian Tomuschat explained: "[Occupation of a foreign territory is an] example of situations which the drafters of the Covenant had in mind when they confined the obligation of State parties to their own territory."[287]

Most recently, the Human Rights Committee stated that a "State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[288] It further remarked that "this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation."[289] In response to the United States' adherence to "its position that the [ICCPR] does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war," the Committee remarked that this was contrary to the opinions and established

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[284] U.N. Human Rights Committee, Lopez Burgos v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/199 (1981).

[285] *See, e.g.*, Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 163 (July 9); Issa v. Turkey, 2004 Eur. Ct. H.R. 71.

[286] U.N. Human Rights Committee, Lopez Burgos v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/199 (1981).

[287] Dennis, *supra* note 251, at 465.

[288] Bennoune, *supra* note 15, at 174 (citing Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Hum. Rts. Comm., 80th Sess., General Comment No. 31, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)).

[289] *Id.* The future will show whether peace-keepers are actually required to provide the protections of the ICCPR, and if so, if this will deter states from providing Soldiers to U.N. peace-keeping and peace-enforcement missions.

jurisprudence of the Committee and the ICJ.[290] The Committee admonished the United States to:

> (a) acknowledge the applicability of the [ICCPR] with respect to individuals under its jurisdiction but outside its territory as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the [ICCPR]; and (c) consider in good faith the interpretation of the [ICCPR] provided by the Committee pursuant to its mandate.[291]

These cases illustrate that activist international tribunals are eager to expand the application of human rights law into the domain of armed conflict. This trend is evidence of the tension between legitimacy and justification in international law, discussed in Part III of this article. While legitimacy vests states with the authority to determine whether to apply human rights law in armed conflict, justification permits judicial and quasi-judicial bodies to claim the ability to do so by invoking a sense of justice or morality.

C. Military Cases from Iraq

Courts and tribunals do not bear all the responsibility for commingling human rights law and humanitarian law. Further entanglement occurs when lawyers speak in terms of human rights law in cases where humanitarian law clearly applies. For example, the Attorney General of Britain declined to charge British soldiers with killing an Iraqi in Basra, Iraq, on 24 March 2003.[292] The Iraqi had thrown rocks at soldiers guarding a checkpoint and persisted when the commander employed various non-lethal means to persuade him to stop.[293] The soldiers eventually shot and killed the Iraqi.[294] In explaining his decision not to charge the soldiers, the Attorney General told the House of Lords

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[290] U.N. Hum. Rts. Comm., 87th Sess., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, at 2, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).
[291] *Id.* at 2–3 (responding to U.S. periodic report).
[292] *See* GARRAWAY, *supra* note 139, at 8.
[293] *Id.*
[294] *Id.*

on 27 April 2006 that the soldiers were acting in self-defense.[295] As explained by Charles Garraway, Associate Fellow, International Law and International Security, at Chatham House:

> This is classic human rights law. But the incident was taking place during an international armed conflict. Under the law of armed conflict, the right to use lethal force would depend on whether or not the Iraqi was a legitimate target. If he was a combatant, or a civilian taking an active part in hostilities, he was, as such, a legitimate target and there was no need to justify the soldiers' actions by reliance on self-defence, or the defence of anyone else.[296]

This case illustrates the problems associated with trying to evaluate the use of force during armed conflict under a human rights regime; it subjects soldiers to greater scrutiny than necessary.

The manner in which U.S. Soldiers are trained to evaluate threats from those who do not appear to be traditional combatants can add to the confusion over which legal standards apply. The *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces* state that when forces are declared hostile, Soldiers may target or use force against them based upon their hostile status alone.[297] However, Soldiers may use force against other individuals only when they display hostile intent or commit a hostile act.[298] This is a useful methodology for training Soldiers. However, as rules of engagement are based upon policy, political objectives, and mission considerations, as well as legal concerns, they are often more constraining than legal principles.[299] When evaluating the lawfulness of the Soldier's use of force under international law, reference should be made to humanitarian law alone.

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[295] *Id.*

[296] *Id.* Civilians are lawful targets if, and for such time as, they are taking a direct part in hostilities. *See* Protocol I, *supra* note 25, art. 51.

[297] *See* JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES encl. A, para. 2b (13 June 2005).

[298] *See id.* para. 3.

[299] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 85 (2006).

The United Nations appoints rapporteurs, or experts, to report on specific human rights, or to focus on the human rights situations in a particular country. The Special Rapporteur on Iraq, Andreas Mavrommatis, stated that for those detained by coalition forces for security crimes or terrorist acts, "strict compliance with the [ICCPR], and in particular with Article 14, is mandatory."[300] Article 14 guarantees, among other rights, equality before courts and tribunals, fair and public criminal hearings by an impartial tribunal, prompt notice of the nature of pending criminal charges, trial without undue delay, and appellate review.[301] The Rapportuer's statement is troubling, as Article 14 is one of the articles of the ICCPR that permits derogation.[302] Furthermore, the Fourth Geneva Convention contains specific provisions regarding detention during occupation that are very similar to, and sometimes more restrictive than, those contained in Article 14 of the ICCPR.[303] To illustrate: Article 68 of the Fourth Geneva Convention provides that when a protected person commits an offense which is intended only to harm the Occupying Power and which does not attempt to kill, seriously wound, or cause serious property damage, the protected person may be punished only by internment or simple imprisonment.[304] Article 14 of the ICCPR does not restrict the punishment for such offenses to internment or imprisonment.[305] Theoretically, the protected person could be subject to harsher punishment, such as hard labor while confined, or additional penalties, such as monetary fines, for such offenses under the ICCPR. Therefore, disregarding humanitarian law as the *lex specialis* may also operate to deprive individuals of protections guaranteed by humanitarian law treaties that exceed the protections of human rights law.

D. Cases Involving Terrorism

Commentators have highlighted the difficulty that has arisen in determining which legal regime applies when responding to non-state actors who commit acts of terrorism in a foreign state. Charles Garraway

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[300] Bennoune, *supra* note 15, 174 (citing Situation of Human Rights in Iraq, Report submitted by the Special Rapporteur, Andreas Mavrommatis, U.N. ESCOR, Hum. Rts. Comm., 60th Sess., para. 13, U.N. Doc. No. E/CN.4/2004/36 (2004)).
[301] ICCPR, *supra* note 2, art. 14.
[302] *See id.* art. 4.
[303] *See, e.g.*, GC IV, *supra* note 24, arts. 64–78.
[304] GC IV, *supra* note 24, art. 68.
[305] ICCPR, *supra* note 2, art. 14.

illustrated this challenge with the example of the 2002 attack in Yemen on a senior member of Al-Qaeda.[306] The operative was killed with a missile from an unmanned Predator drone.[307]

> If this was governed by the law of armed conflict, then the identification of the operative as a belligerent was sufficient to justify the use of lethal force. On the other hand, if it was governed by law enforcement rules then the killing could only be justified if it could be shown that there was no other option available and the use of lethal force was absolutely necessary.[308]

In *Hamdan v. Rumsfeld*,[309] the U.S. Supreme Court determined that the conflict between the United States and fighters of Al-Qaeda was governed by Common Article 3 of the Geneva Conventions.[310] Ironically, such approach may be viewed as an expansion of humanitarian law by those who view conflicts between state and non-state actors as purely law enforcement matters.

Sorting out the difficulties in determining whether responses to terrorism are properly classified as armed conflicts or law enforcement actions is beyond the scope of this article. However, if the proper role of human rights law in conventional armed conflict is not resolved, regulating lawful responses to terrorism will not be any easier.

E. Advocacy for Expansion

Commentators have advocated an increasing role of human rights law in armed conflict. Some urge the application of certain aspects of human rights law, such as its accountability framework,[311] and others see merit in increasing the role of human rights law in particular contexts,

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[306] GARRAWAY, *supra* note 139, at 9.
[307] *Id.*
[308] *Id.*
[309] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
[310] GC I, *supra* note 24, art. 3; GC II, *supra* note 24, art. 3; GC III, *supra* note 24, art. 3; GC IV, *supra* note 24, art. 3.
[311] *See, e.g.*, Watkin, *supra* note 37, at 34 (asserting that "[I]ncorporation of human rights principles of accountability can have a positive impact on the regulation of the use of force during armed conflict. Given the close interface between these two normative frameworks in some types of armed conflict, their mechanisms of accountability will inevitably need to be reconciled . . . .").

such as military occupation.[312] Many of the arguments, such as those from international law professor Karima Bennoune, focus on reducing the death and destruction of war through application of a human rights framework. For example, she takes issue with the number of young conscripts killed in combat and the non-"excessive" killings of civilians in attacks on military targets that are discriminate.[313]

Her first assertion is that the number of combatant deaths is too high from a human rights perspective, and that a state sending its young people to be killed or wounded by the enemy creates the ultimate threat of arbitrary deprivation of life.[314] State sovereignty inherently requires that a state assume responsibility for the protection of its citizens, and part of a system for ensuring national security is the raising of armies.[315] The number of volunteer or conscripted soldiers required for national security will vary according to a host of factors, including the state's population and geographic size, the temperament of its neighbors, whether it has entered collective defense agreements, and the type of threats it faces regionally and globally.[316]

What Bennoune proposes is that human rights law should have a voice in determining the number of soldiers that a state may send to war.[317] If human rights law could have such power, it would effectively constrain a state's decision to enter or continue armed conflict and hinder its ability to defend itself from outside threats and aggression. As self-defense is recognized as an "inherent right" in the U.N. Charter,[318] Bennoune's proposed use of human rights law would pierce state

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[312] *See, e.g.*, Roberts, *supra* note 45.
[313] Bennoune, *supra* note 15, at 186–87; *see* Karima Bennoune, Rutgers School of Law – Newark – Faculty – Bio, http://law.newark.rutgers.edu/facbio/bennoune.html (last visited Feb. 11, 2008).
[314] Bennoune, *supra* note 15, at 186–87.
[315] *See* John R. Cook, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: Senior Administration Officials Voice Varying Perspectives on International Law*, 101 AM. J. INT'L L. 195, 196 (2007) (stating in regards to Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), "the court was relatively dismissive of . . . a very compelling, fundamental attribute of state sovereignty—the right to protect your citizens from being killed by people coming in from outside").
[316] *See, e.g.*, STRUCTURING THE ACTIVE AND RESERVE ARMY FOR THE 21ST CENTURY, Congressional Budget Office, § 4 (Dec. 1997), http://www.cbo.gov/ftdoc.cfm?index=301&type=0&sequence=3.
[317] *Id.*
[318] U.N. Charter art. 51.

sovereignty at its vital core and displace not only the *jus in bello* aspect of humanitarian law, but the *jus ad bellum* aspect, as well. Such threat of encroachment demonstrates why humanitarian law must remain the *lex specialis* during armed conflict; it protects the integrity of states.

Humanitarian law was developed by warfighters who understand the principles and realities of war.[319] War is not a sporting event in which both sides should be constrained to a precise and equal number of players to ensure a fair game. Overwhelming the enemy with superior weapons and outmatching him with a disproportionately high number of soldiers on the battlefield are sound military tactics.[320] Furthermore, the principle of overwhelming force, part of the "Powell Doctrine" of the 1990s,[321] may achieve a quick end to hostilities and minimize casualties as a result.

Bennoune also erroneously believes that the principle of collateral damage, meaning the non-"excessive" killing or injuring of innocent civilians, permits too many casualties.[322] Under humanitarian law, whether a certain level of collateral damage is excessive is determined by comparing it to the direct military advantage gained.[323] Commanders do not employ military force for their enjoyment; they do it to obtain a tangible, concrete military goal.[324] The permissible level of incidental civilian death and civilian property damage will vary, depending on the

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[319] *See* Morris, *supra* note 7.

[320] *See* Luis Mesa Delmonte, *Economic Sanctions, Iraq, and U.S. Foreign Policy*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 345, 371 n.136 (stating that the Powell Doctrine proposes that military operations should be "undertaken in the fastest and most efficient way possible with a very clear superiority"); Lieutenant Colonel Jeffrey K. Walker, *The Demise of Nation-State, the Dawn of the New Paradigm Warfare, and a Future for the Profession of Arms*, 51 A.F. L. REV. 323, 334 (2001).

[321] *See* Walker, *supra* note 320, at 334 (stating that the Powell Doctrine required that "no Commander-in-Chief should send the military anywhere unless he gave them the overwhelming force and *carte blanche* authority to win quick and win big").

[322] Bennoune, *supra* note 15, at 187–90; *see also* Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1 (2002) (arguing that the principle of collateral damage permits too many civilian deaths from aerial bombings, as it allows the military to excuse the deaths too easily as unanticipated or unavoidable).

[323] *See* GC I, *supra* note 24, art. 50; GC II, *supra* note 24, art. 51; GC III, *supra* note 24, art. 130; GC IV, *supra* note 24, art. 147; Protocol I, *supra* note 25, art. 51(5)(b).

[324] *See* Geoffrey S. Corn, *Filling the Void: Providing a Framework for the Legal Regulation of the Military Component of the War on Terror Through Application of Basic Principles of the Law of Armed Conflict*, 12 ILSA J. INT'L & COMP. L. 481, 484 (2006) (noting the truism in war that "those who engage in mortal combat do not do so for profit or personnel vendetta, but because they have been called upon to do so by the authority they serve").

importance of the military goal. For example, an aerial bombardment in a location where civilians are residing may not be permitted if the military objective is to kill one enemy combatant passing though the area. However, if the bombardment will destroy all of the enemy's air defense capabilities and induce the surrender of the enemy, the incidental deaths may not be excessive.

The principles of proportionality[325] and collateral damage[326] are necessary in war, as even the most advanced weapons and munitions are not infallibly precise,[327] and modern wars are rarely fought in open, uninhabited fields. Additionally, permitting some collateral damage removes the incentive for a ruthless enemy to use human shields and protected civilian property unlawfully to deter an opposing force that complies with the law.

Assuming, *arguendo,* that killing an innocent person is an arbitrary deprivation of life in violation of human rights law, how will a human rights standard prevent such arbitrary deprivations in armed conflict? Requiring the military advantage to outweigh the collateral damage by an outrageously high percentage, such as a thousand-fold, still would not prevent all arbitrary deprivations of innocent life. Arguments for prohibiting all collateral damage are essentially calls for pacifism, as such absolute requirements are unrealistic in war.

V. Humanitarian Law Is Uniquely Equipped to Regulate Armed Conflict

Humanitarian law was developed specifically to deal with the realities of war. It recognizes that war is sometimes necessary and useful. Regulating armed conflict purely through a human rights perspective will erode the usefulness of war. Rather than abolishing war

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[325] For an overview and history of the principle of proportionality, see Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

[326] *See generally* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1 (2005) (providing an overview of collateral damage and targeting).

[327] *See generally* Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?*, 26 GEO. WASH. J. INT'L L. & ECON. 109, 111 (1992) (providing an overview of the relationship of precision-guided munitions and collateral damage and how such munitions may cause more collateral damage than conventional bombs in certain circumstances).

or achieving global peace, the "humanization" of war may serve to prolong armed conflict, provide more opportunities for a less than honorable enemy to exploit a force's compliance with rules of war,[328] and unnecessarily restrict soldiers to a point where they disregard the rules completely out of frustration with their impossible rigidity.

Human rights law lacks the framework of humanitarian law, especially the Geneva Conventions' design of providing tailored protections and rights to "protected persons."[329] For example, under the Fourth Geneva Convention and Protocol I, a civilian remains protected from intentional attack if, and for such time as, he does not take a direct part in hostilities.[330] Additionally, civilians who find themselves in the hands of their nation's enemy enjoy greater protections under the Fourth Geneva Convention.[331]

The Fourth Geneva Convention provides selective protection to civilians, based upon their nationality and their geographical location.[332] A civilian located within his own nation's territory is afforded some basic protections.[333] A civilian located within the territory of his nation's enemy is provided additional protections.[334] Civilians location within territory occupied by their nation's enemy and those subjected to internment are afforded the most protections.[335] The escalating degrees of protection are tied to the increasing need for protection—the more control an enemy nation has over an individual, the greater his protections. Under human rights law, no comparable system exists; affording selective protections is directly at odds with the universality of human rights.

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[328] *See* Reynolds, *supra* note 326, at 79 (stating that "[A]dversaries operating unrestricted by the [law of armed conflict (LAOC)] gain a strategic advantage over states that value compliance with LOAC. Adversaries deriving little or no benefit from LOAC seek to provoke a conflict that challenges its principles, assails moral uncertainty, and exploits public sympathy.").

[329] *See* GC IV, *supra* note 24; Protocol I, *supra* note 25.

[330] GC IV, *supra* note 24; Protocol I, *supra* note 25, art. 51(3).

[331] *Id.*

[332] *See* Lieutenant Colonel Paul E. Kantwill & Major Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons": How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 724–731 (2005) (providing a detailed analysis of the complex protection arrangement of the Fourth Geneva Convention).

[333] *See* GC IV, *supra* note 24, arts. 13–26.

[334] *See id.* arts. 35–45.

[335] *See id.* arts. 47–141.

Another key concept of humanitarian law is combatant immunity, which shields a soldier from prosecution for acts that would be unlawful outside of war.[336] Displacement of humanitarian law with human rights law could jeopardize combatant immunity. John Keegan, in *A History of Warfare*[337] captures the essence of combatant immunity:

> The bounds of civilised warfare are defined by two antithetical human types, the pacifist and the "lawful bearer of arms." The lawful bearer of arms has always been respected, if only because he has the means to make himself so; the pacifist has come to be valued in the two thousand years of the Christian era . . . . Pacifism has been elevated as an ideal; the lawful bearing of arms—under a strict code of military justice and within a corpus of humanitarian law—has been accepted as a practical necessity.

A soldier may fight for many reasons.[338] He may fight out of a sense of patriotism or a sense that he is fighting for a just cause.[339] He may fight if ordered to do so out of a sense of duty or fear of the consequences he will endure for disobeying the order.[340] He may fight in self-defense when face-to-face with an enemy soldier. However, a soldier will be less inclined to fight if he is not certain that his conduct

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[336] *See* Major Geoffrey S. Corn, *"To Be or Not to Be, That is the Question": Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, 14 (explaining that, before capture, "many prisoners of war participate in activities that are, during times of peace, generally considered criminal. For example, it is foreseeable that soldiers will be directed to kill, main, assault, kidnap, sabotage, and steal in furtherance of their nation state's objectives. In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts.").

[337] JOHN KEEGAN, A HISTORY OF WARFARE 4–5 (1993).

[338] For a perspective on combat motivators in Operation Iraqi Freedom, see Wong et al., *Why They Fight: Combat Motivation in the Iraq War*, Strategic Studies Institute, *available at* http://www.strategicstudiesinstitute.army.mil/pdf files/pub179.pdf (2003).

[339] *Id*. at 19 (explaining that "many soldiers in this study reported being motivated by notions of freedom, liberation, and democracy.").

[340] *See* Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 168 (2005) (stating that "soldiers fight because they are so ordered, not because they so choose"). During Operation Iraqi Freedom, Iraqi Regular Army soldiers were motivated by coercion and fear. Wong et al., *supra* note 338, at 6–7.

will be protected from prosecution by his nation, the enemy nation, or an international tribunal.[341]

The use of force under the human rights regime is highly regulated, and the permissible level of force that may be employed is situation-dependent.[342] One writer believes that the standard for taking a life under a human rights-based system is that "individuals may be killed intentionally if their expected death is compensated by more than an equivalent expected increase in enjoyment of human rights."[343] Lawyers could argue for weeks over the meaning of that standard and how it would apply to specific situations. Expecting soldiers to understand and distill such complex rules is unrealistic. In the heat of battle, rules for using force must be simple; soldiers must make split-second decisions to kill or be killed. The convoluted nature of human rights standards would permit too much second-guessing of a soldier's decision to use force, thereby weakening the protection of combatant immunity.

A. Use of Force

Under humanitarian law, the taking of human life is lawful in several circumstances. Enemy combatants may be killed, unless they are *hors de combat*.[344] Civilians may be intentionally killed if, and for such time as, they are taking a direct part in hostilities.[345] Civilians may also be incidentally killed as a result of collateral damage.[346]

When combatants and civilians are targeted, warfighters are permitted to implement a "shoot-to-kill" policy; there is no duty to minimize the amount of force used in an effort to preserve the lives of lawful targets.[347] However, under human rights law, law enforcement

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[341] *See, e.g.*, Sean Rayment, *British Troops in Iraq Are Afraid to Open Fire, Secret MOD Report Confirms*, TELEGRAPH, Apr. 29, 2006, *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/04/30/nirq30.xml (reporting that British soldiers were afraid to fire their weapons in Iraq for fear of prosecution).
[342] *See* discussion *supra* Part II.D.
[343] Koller, *supra* note 15, at 251.
[344] GC I, *supra* note 24, art. 3; GC II, *supra* note 24, art. 3; GC III, *supra* note 24, art. 3; GC IV, *supra* note 24, art. 3.
[345] Protocol I, *supra* note 25, art. 51(3).
[346] *Id.* art. 51(5)(b).
[347] The U.S. Army policy is to train Soldiers to shoot to kill, rather than shoot to wound. *See* Mark S. Martins, *Deadly Force is Authorized, but Also Trained*, ARMY LAW., Sept./Oct. 2001, at 1.

personnel are required to minimize the amount of force used and are typically trained to shoot to wound.[348]

If armed conflict is regulated under a human rights regime, a logical evolution of its influence will be the erosion of rules that permit shooting to kill, as killing would be permitted only as a last resort. Soldiers may be permitted to kill only when absolutely necessary, such as when faced with the threat of death or when protecting another from such threat. In other situations, they may be required to allow the enemy an opportunity to surrender, employ only non-lethal force, or shoot to wound, rather than to kill. While these rules may be more easily implemented by ground troops with small arms, they would be impossibly difficult to employ by soldiers in aircrafts, tanks, and artillery batteries.

The human rights regime will require revising the principles of proportionality and collateral damage to inflict very low levels of incidental civilian death and civilian property damage. The standard may be articulated as: "An action may be taken if the anticipated enjoyment of human rights by all individuals outweighs the anticipated human rights enjoyment of all alternative courses of action."[349] As fuzzy and impractical as this appears, it is the logical extension of the human rights regime, as "[a]cquiescence to 'collateral damage' [is an] anathema to human rights principles and [a] basic challenge to the right to life."[350]

This illustrates exactly why human rights law is ill-suited to regulate warfare: human rights law lacks the stomach to deal with the harsh realities of modern warfare. "War is an ugly thing . . . ."[351] It accepts that lives, even innocent ones, may be lost in pursuit of a collective goal of the state. Any legal regime attempting to regulate war must have the fortitude to balance the needs of military necessity against the principle of humanity without cringing.

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[348] *See* Basic Principles of the Use of Force and Firearms by Law Enforcement Officials, UN Doc. A/CONF.144/28/Rev.1 (1990), *available at* http://www.unhchr.ch/html/menu3/b/h_comp43.htm (stating in Article 5, "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life . . . .").

[349] Koller, *supra* note 15, at 255.

[350] Bennoune, *supra* note 15, at 174.

[351] John Stuart Mill, *The Contest in America*, *in* DISSERTATIONS AND DISCUSSIONS 26 (1868), *available at* http://www.bartleby.com/73/1934.html (last visited Feb. 18, 2008).

Under human rights law, a use of force that causes a death usually requires an investigation.[352] The objective of the investigation is to produce "eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death."[353] While this strict scrutiny of the use of force may be necessary and useful for evaluating actions of law enforcement officers, it is highly unrealistic in the context of armed conflict. Ulysses S. Grant succinctly explained the nature of battle: "The art of war is simple enough. Find out where your enemy is. Get at him as soon as you can. Strike him as hard as you can, and keep moving on."[354] After an engagement with enemy forces, soldiers do not linger. They collect the wounded and dead of their own and enemy forces to the extent that military necessity permits, and then they move out to find or avoid the next battle. There is little time for collecting evidence and witness statements, without potentially sacrificing more lives.

B. Security Restrictions

The ICJ's *Wall* opinion demonstrated the tension between human rights law and humanitarian law in terms of security restrictions.[355] Israel attempted to build a fence to protect itself from terrorists infiltrating its country through the occupied territory of Palestine. Under the Fourth Geneva Convention, a state is permitted to use such measures in armed conflict and occupation to protect its forces and maintain public order and security.[356]

In contrast, the ICCPR grants liberty of movement and freedom to choose residence.[357] The ICCPR permits derogation from this right during times of public emergency that threaten the life of the nation. However, there may be situations during occupation where it is necessary for operational reasons to construct security barriers, and yet the imposing force's state may not be facing a threat to the life of its nation. This creates a direct conflict between human rights law and

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[352] Watkin, *supra* note 37, at 19.
[353] *Id.* (citing McKerr v. United Kingdom, 34 Eur. H.R. Rep. 553, 599, para. 113 (2001)).
[354] LOUIS A. COOLIDGE, ULYSSES S. GRANT 54 (1917) (quoting Ulysses S. Grant).
[355] *See* Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).
[356] *See* GC IV, *supra* note 24.
[357] ICCPR, *supra* note 2, art. 12.

humanitarian law, and this conflict demonstrates why humanitarian law should remain the *lex specialis*.

Humanitarian law sometimes provides greater individual protections than does the ICCPR. Consider again the ICCPR's grant of liberty to choose one's residence in the context of occupation.[358] If the ICCPR applies and the war is severe enough to permit derogations, the occupant could suspend the right to choose one's residence and force an individual to reside in a place designated by the occupant. Under the ICCPR, the individual does not have the right to request reconsideration of the occupant's decision; he would have to pursue relief from the Human Rights Committee, if the occupant was a party to the Optional Protocol to the ICCPR[359] or the occupant's domestic courts, provided they allow for such causes of action.[360]

However, if humanitarian law applied, an individual placed in an assigned residence is entitled to have that assignment "reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."[361] Furthermore, if assigned residence is continued, the court or board must periodically, at least twice a year, reconsider the case "with a view to the favorable amendment of the initial decision, if circumstances permit."[362]

This demonstrates that the struggle against expanding human rights law into armed conflict is not simply about state resistance to providing additional rights to individuals. It shows that, while humanitarian law accounts for military necessity and the needs of the state, it also considers the fact that protected persons under the authority of an occupant may need more protection from that occupying, enemy state than from their own state of nationality. To state it bluntly: Human rights law distrusts the state, so it set limits on state power by granting rights to individuals for their protection. Humanitarian law has even less trust for a state when it happens to be wielding power over its enemy's citizens. Therefore, it provides even more protections for individuals under those circumstances.

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[358] *Id.*
[359] *See* Optional Protocol, *supra* note 76.
[360] *See, e.g.*, discussion *supra* Part II.A.1.
[361] GC IV, *supra* note 24, art. 43.
[362] *Id.*

C. Detention

Humanitarian law permits the detention of enemy combatants until the end of hostilities.[363] It also permits the internment of civilians. "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[364]

The ICCPR protects the right to liberty and security of person.[365] Article 9 states that: "Anyone who is arrested shall be . . . promptly informed of any charges against him."[366] It does not provide any express exceptions from its protections in the case of lawful acts permitted by humanitarian law.[367] While the ICCPR permits derogation from Article 9 during times of public emergency, an armed conflict may not rise to, or remain at, a level of intensity required to permit derogation.[368]

To further complicate the issue, the Human Rights Committee contends that the list of nonderogable provisions in Article 4 of the ICCPR is not exclusive.[369] Regarding detention, the Committee states that "in order to protect nonderogable rights, the rules [under Article 9(4)] to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a state's decision to derogate from the Covenant."[370] This would further burden military forces by requiring greater due process in detention and internment, well beyond that which is required by humanitarian law.[371]

Michael Dennis explained the problems that multilateral forces pose regarding derogations.[372] Would every state sending forces to a conflict need to be in a state of public emergency to request derogation? When considering this dilemma, a British High Court concluded that the provision of U.N. Security Council Resolution 1546 applied in lieu of

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[363] GC III, *supra* note 24. art. 118.
[364] GC IV, *supra* note 24, art. 78.
[365] *See* ICCPR, *supra* note 2, art. 9.
[366] *Id.*
[367] *Id.*
[368] *Id.* art. 4.
[369] *See* Dennis, *supra* note 251, at 477.
[370] General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, at 13 (Aug. 31, 2001).
[371] *See* GC IV, *supra* note 24.
[372] Dennis, *supra* note 251, at 476–77.

Article 5 of the ECHR.[373] The court noted that all states sending troops to Iraq may not face a public emergency that would permit derogation from human rights instruments. "Participating states need to know where they stand when faced with making decisions on very short notice."[374]

D. Occupation

The issues of the use of force, security restrictions, and detention are further complicated during occupation. Adam Roberts argues in *Transformative Military Occupation: Applying the Laws of War and Human Rights*[375] that there is a stronger case for applying human rights law in occupation than in armed conflict. He cites problems such as discrimination in employment, discrimination in education, and the importation of educational materials that can arise, which he believes are addressed more thoroughly in human rights instruments than in humanitarian law.[376] He cites two ways in which human rights law could be advocated or applied in occupation:

> (1) Inhabitants, or outside bodies claiming to act on their behalf, may invoke human rights standards so as to bring pressure to bear on the occupant—*e.g.*, to ensure the human rights of inhabitants, internees, and others; and (2) an occupant with a transformative project may view human rights norms as constituting part of the beneficent political order being introduced into the territory, which has been the U.S. position in the U.N. Security Council from 2003 onward as far as Iraq has been concerned, but it is not clear how far it has percolated through the U.S. government.[377]

If humanitarian law does not sufficiently address issues of occupation, the use of human rights law to inform or influence humanitarian law is not objectionable. However, the methodology for developing humanitarian law norms to address new issues needs to

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[373] *Id.* at 476.
[374] Al Jedda v. Sec'y of State for Defense, [2005] EWHC (Admin) 1809, (Eng), 91.
[375] Roberts, *supra* note 45.
[376] *Id.* at 594.
[377] *Id.*

respect the sovereignty of states and the importance of state consent; to do so, it should permit states to decide how best to incorporate into humanitarian law new protections drawn from human rights law. Incorporation through treaty formation or the development of customary international law provides legitimacy for the norm, which may encourage wider acceptance of it than would occur if the norm were forced upon a state by a judicial or quasi-judicial body.

VI. Halting the Expansion of International Human Rights Law

To halt the expansion of human rights law into the realm of armed conflict, the United States must continue to insist that human rights treaties do not apply extraterritorially during armed conflict and occupation and that armed conflict is regulated solely through humanitarian law. Its approach should be two-fold. First, it needs to become a persistent objector to prevent the entire body of human rights norms from becoming binding in armed conflict as a matter of customary international law. It should persuade its allies to join in this endeavor. Second, the United States needs to engage international groups, such as the Human Rights Committee, in discourse regarding the expansion of the human rights regime to make its position known and attempt to persuade others to support its position.

The ICJ, the European Court of Human Rights, and the Human Rights Committee have declared their views on the role of human rights in armed conflict. It is foreseeable that states will begin to apply human rights law consistent with these pronouncements. Over time, the application of human rights law in war could grow into a consistent state practice, born out of a sense of legal obligation. If the United States has not made its objections known while this practice is developing, it could be bound to apply human rights law in armed conflict as a matter of customary international law.

To protect itself from such occurrence, the United States must accept the role of the persistent objector. While the United States appears comfortable with taking minority positions in international law,[378] it is in

[378] For example, while a large majority of states agree that deep seabed mining may occur only in accordance with the 1982 Law of the Sea Convention, the United States disagrees. *See* David Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 967 (1986); United Nations Convention on the Law of the Sea, U.N.

its interest to persuade it allies to join the fight against the expansion of human rights law. If the United States prevents itself from being bound by human rights norms in armed conflict, but its allies are bound to apply those norms, coalition forces could face interoperability problems. For example, if allied forces capture enemy prisoners of war, they could be precluded from transferring those prisoners to a U.S. detention facility if new human rights norms dictate providing greater rights to prisoners than humanitarian law requires. Also, if U.S. and coalition forces are jointly securing a populated area, problems could arise if U.S. forces want to impose a curfew for security reasons but allied forces are prohibited from doing so under a human rights norm guaranteeing greater freedom of movement.

Since the expansion of human rights law is still in a formative stage, the U.S. position is not necessarily unpopular. Therefore, it may be easier at this time to sway states to concur with limiting the role of human rights law in armed conflict.

In addition to recruiting allies to join in objecting to the expansion of human rights as a matter of customary law, the United States should actively challenge the Human Rights Committee's declaration that the ICCPR applies extraterritorially and in armed conflict. Under the ICCPR, the United States and other parties submit reports to the Human Rights Committee regarding their implementation of the rights contained in the ICCPR.[379] In its most recent reports, the United States clearly articulated its position that the ICCPR does not apply extraterritorially.[380] The United States should continue to object to the expansion of human rights law, through these reports, to assist in asserting its position as a persistent

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Doc. A/Conf. 62/122 (1982), *reprinted in* U.N., The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index at 1, U.N. Doc. LOS/Z/1, U.N. Sales No. E.83.V.5 (1983). Additionally, although 155 states have ratified the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction (Ottawa Treaty), Sept. 18, 1997, 36 I.L.M. 1507 (as of Aug. 15, 2007), 167 states have ratified Protocol I, *supra* note 25 (as of Jan. 14, 2007), and 163 states have ratified Protocol II, *supra* note 25 (as of Jan. 14, 2007), the United States has not ratified any of these. *See* International Campaign to Ban Landmines, States Parties, http://www.icbl.org/treaty/members (last visited Feb. 11, 2008); 30th Anniversary of Additional Protocols I and II, http://www.icrc.org/web/eng/siteeng0.nsf/html/additional-protocols-30-years (last visited Feb. 11, 2008).

[379] *See* ICCPR, *supra* note 2, art 40.

[380] U.N. Hum. Rts. Comm., 87th Sess., *Second and Third Periodic Reports of the United States America*, ¶ 469, Annex I, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

objector and in attempting to persuade other parties to support is position.

The issue of whether to request derogations from the ICCPR during armed conflict and occupation is a tactical one. If the United States does not request derogations, some will view this as a concession that the Convention applies in its entirety.[381] Also, the United States risks having an international tribunal find that it was bound to apply the ICCPR in a given armed conflict and that it violated its provisions, a finding that could be prevented through the use of derogations. The ICJ treated Israel in such a fashion in the *Wall Case*,[382] where it held that Israel was obligated to apply provisions of the ICCPR from which it had not requested derogation. To protect itself in any event, the United States could request derogations from all derogable provisions, while explicitly stating that it does not concede the applicability of the ICCPR in armed conflict or occupation.

To further preclude the operation of human rights law in a specific armed conflict or occupation, the United States needs to harness the power of the U.N. Security Council. The Security Council has a crucial role in resolving the conflict over which regime, human rights law or humanitarian law, governs military operations.[383] Article 103 of the U.N. Charter states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[384] As the Security Council is authorized under Chapter VII to authorize measures "necessary to maintain or restore international peace and security,"[385] its resolutions could include language stating that member states participating in the given armed conflict must comply with their obligations under only humanitarian law.[386] While such deference to the U.N. Security Council

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[381] *See, e.g.*, Bennoune, *supra* note 15, at 206 (stating in reference to Operation Iraqi Freedom that: "Significantly, neither the U.S. nor the U.K. registered any derogations related to the Iraq war. This means that the application of the full range of ICCPR provisions was not so precluded.").

[382] *See* Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

[383] Dennis, *supra* note 251, at 474.

[384] U.N. Charter art. 103.

[385] *Id.* art 42.

[386] Dennis, *supra* note 251, at 474. Dennis illustrates the authority of the U.N. Security Council to declare the law applicable to forces in U.N. operations: A British citizen was detained by British forces in Iraq for nine months for security reasons. He challenged his

may appear to diminish the importance of state sovereignty in international law,

> [s]overeignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonable good standing in the regimes that make up the substance of international life . . . . In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.[387]

Finally, the United States should evaluate the conduct of its own forces through the lens of humanitarian law and domestic law. While rules of engagement are important for regulating the use of force in armed conflict, they are not the legal standard for evaluating a Soldier's conduct. Speaking in terms of human rights standards provides support for displacing humanitarian law with a human rights regime.

VII. Conclusion

The issue of when human rights law and humanitarian law apply was once clear; human rights law applied in times of peace, and human rights law applied in times of war. However, the dividing line between the two regimes has been blurred by decisions of the ICJ and human rights tribunals, advocacy by scholars who favor an expansive role for human rights law, and the complexities of modern warfare and terrorism.

The incompatible frameworks of human rights law and humanitarian law preclude a merger of the two, and the primacy of state sovereignty in international law requires that human rights law be incorporated into

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detention as inconsistent with Article 5 of the ECHR, as implemented by the United Kingdom's domestic law. The United Kingdom's High Court of Justice held that the relevant U.N. Security Council Resolution, U.N.S.C.R. 1546, authorized the multi-national forces "to continue the powers exercisable in accordance with Article 78 of Geneva IV but inconsistent with Article 5 of the ECHR" and "to intern those suspected of conduct creating a serious threat to security in Iraq." *Id.* at 475 (referencing Al Jedda v. Secretary of State for Defense, [2005] EWHC (Admin) 1809, (Eng), 92–93).

[387] Koh, *supra* note 4, at 1480 n.1 (quoting ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995)).

humanitarian law only through a process of state consent. Furthermore, regulating armed conflict solely through a human rights regime, without reference to military necessity, is dangerous for warfighters. Therefore, the United States needs to continue to maintain that humanitarian law alone regulates armed conflict, and to act to halt the expansion of human rights law. The United States owes the men and women who fight its wars clear, workable standards for the use of force and protection from prosecution for their lawful actions on the battlefield.

A MATTER OF DISCIPLINE AND SECURITY: PROSECUTING SERIOUS CRIMINAL OFFENSES COMMITTED IN U.S. DETENTION FACILITIES ABROAD

MAJOR PATRICK D. PFLAUM*

A detainee who has assaulted [*Guantanamo Bay*] *guards on over 30 occasions, has made gestures of killing a guard and threatened to break a guard's arm. . . .* [*Another detainee*] *told the MPs that he would come to their homes and cut their throats like sheep.*[1]

I. Introduction

It was 1 November 2000 at the Metropolitan Correction Center in New York City.[2] Prison Guard Louis Pepe was escorting Mamdouh Mahmud Salim from a recreation room back to his prison cell.[3] Salim was suspected as an aide to the notorious Osama Bin Laden and had been meeting with his attorneys.[4] With the assistance of his cellmate, Khalfan Khamis Mohamed, Salim overwhelmed the almost 300-pound Pepe, threw hot sauce in his eyes, tied him up, and demanded the keys to the cells.[5] When Pepe refused to give them the keys, Salim stabbed Pepe in

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[1] U.S. Dep't of Defense, JTF-GTMO Information on Detainees 5–6 (Mar. 4, 2005), http://www.defenselink.mil/news/Mar2005/d20050304info.pdf [hereinafter JTF-GTMO Information on Detainees].

[2] Phil Hirschkorn, *Bin Laden Aide Sentenced to 32 Years in Prison for Jail Stabbing*, CNN, May 3, 2004, http://edition.cnn.com/2004/LAW/05/03/attacks.prison.stabbing/index.html; Jonah Goldberg, *Gitmo By Any Other Name . . .*, NAT'L REV. ONLINE, June 15, 2005, http://www.nationalreview.com/goldberg/goldberg200506150748.asp.

[3] Hirschkorn, *supra* note 2.

[4] *Id.*

[5] *Id.*

the eye with a comb that had been sharpened into a knife-like shank.[6] The weapon sank three inches into Pepe's eye socket.[7] Mohamed and Salim then began to beat him severely.[8] Thinking that they had killed him, Salim and Mohamed then used Pepe's own blood to paint a cross on the guard's torso.[9] Pepe spent twenty-eight months in the hospital and he is permanently injured.[10] He has no left eye and he has only 40% of the vision in his right eye.[11] He is significantly paralyzed on the right side of his body and needs therapy to help him regain his ability to speak.[12]

The attack on Louis Pepe is not the only instance where terror suspects have assaulted their guards while in the custody of the United States. Department of Defense (DOD) reports show that instances of violence are somewhat commonplace, even if not as severe as the attack on Louis Pepe.[13] Guards at Guantanamo Bay routinely endure acts of violence, including punches, scratches, and stabs.[14] Guard personnel have seized weapons of all types, including "a billy club fashioned from MRE wrappers, an intricate trash-bag garrote, and a variety of crude shanks."[15] Detainees assault guards with other "weapons" as well. In 2006 alone, guards endured more than 400 assaults with bodily fluids, including urine and feces.[16] In May of 2006, the detainees at Guantanamo Bay drew media attention when they rioted in the detention facility.[17] One prisoner staged a suicide attempt while several others made the floor slippery with human waste and soapy water.[18] As the

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[6] *Id*; Goldberg, *supra* note 2.
[7] Hirschkorn, *supra* note 2; Goldberg, *supra* note 2.
[8] Goldberg, *supra* note 2.
[9] *Id.*
[10] Hirschkorn, *supra* note 2.
[11] *Id.*
[12] *Id.*
[13] John Solomon, *Gitmo Guards Often Attacked by Detainees*, Aug. 1, 2006, http://www.boston.com/news/world/europe/articles/2006/08/01/gitmo_guards_often_attacked_by_detainees?mode=PF.
[14] *Id.*
[15] Sergeant Jim Greenhill, *GITMO Guardians*, SOLDIERS, Mar. 2007, at 8, 12.
[16] Kathleen T. Rhem, *New Guantanamo Facility Safer for Guards, More Comfortable for Detainees*, ARMED FORCES INFO. SERV., Jan. 11, 2007, http://www.defenselink.mil/news/ http://www.defenselink.mil/news/NewsArticle.aspx?ID=2665.
[17] James Bone, *Riot at Guantanamo as Torture Watchdog Calls for Its Closure*, TIMES ONLINE, May 20, 2006, http://www.timesonline.co.uk/printFriendly/0,,1-10889-2188705-10889,00.html; Associated Press, *Three Detainees Commit Suicide at Guantanamo Bay*, FOXNEWS.COM, June 10, 2006, http://www.foxnews.com/printer_friendly_story/0,3566, 199001,00.html [hereinafter Associated Press, *Three Detainees Commit Suicide*].
[18] Bone, *supra* note 17.

guards responded to prevent the suicide, the detainees "assaulted the guards with broken light fixtures, fan blades, and bits of metal."[19] A five-minute fight ensued and, while no guards were hurt, six detainees suffered minor injuries.[20] In January of 2008, during the sentencing proceedings for his terrorist activities, it was revealed that Mohammed Mansour Jabarah had plotted to kill his law enforcement handlers while held in a federal facility at Fort Dix, New Jersey.[21]

Salim's assault on Louis Pepe occurred in a federal facility and he was tried, convicted, and sentenced in federal district court in New York.[22] But what if the incident had happened at the detention facility at Guantanamo Bay, and the victim had been one of the guards there? What if a detainee had killed a guard during the May 2006 riot? What if a detainee murdered a fellow detainee for testifying against him in a military commission or for providing incriminating information to an interrogator? With a population of about 290 detainees now at Guantanamo Bay[23] and "increasing displays of defiance from the prisoners," a serious issue arises: how should incidents of serious post-capture criminal misconduct be prosecuted to ensure the safety, the good order, and the discipline in the detention facility?[24]

Under current U.S. policy, pre-capture offenses—that is, those offenses that led to the detention of these individuals in the current War on Terror—will be tried by military commission under the Military Commissions Act of 2006.[25] The prosecution of post-capture

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[19] *Id.*
[20] *Id.*
[21] Josh White & Keith B. Richburg, *Terror Informant for FBI Allegedly Targeted Agents; Once-Trusted Jabarah Sentenced to Prison*, WASH. POST, Jan. 19, 2008, at A1 (believed to be a low security threat, Jabarah was given significant freedoms and he collected a cache of rope, steak knives, instructions on bomb-making, maps of Fort Dix, and names of prosecutors and investigators; he was sentenced to life in prison for his terrorist activities).
[22] Hirschkorn, *supra* note 2.
[23] Carol Rosenberg, *Milestone: Gitmo Captive Census Drops Below 300*, MIAMI HERALD, Dec. 13, 2007, *available at* https://www.us.army.mil/suite/earlybird/Dec2007/e20071213567285.html (quoting Pentagon officials as stating that the number of detainees at Guantanamo Bay as of 12 December 2007 was "approximately 290").
[24] Associated Press, *Three Detainees Commit Suicide*, *supra* note 17.
[25] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3, 120 Stat. 2600 (codified as amended at 10 U.S.C.S. §§ 948a–950w (LexisNexis 2008)); U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS (Jan. 18, 2007) [hereinafter MANUAL FOR MILITARY COMMISSIONS]; Military Order of November 13, 2001, 3 C.F.R. tbl. 3 (2002) [hereinafter Military Order]. The term "War on Terror" is used throughout this

misconduct, however, is an open issue. From the Salim case, it appears that detainee misconduct in a detention facility on U.S. soil would be handled in federal district court.[26] Under the Uniform Code of Military Justice (UCMJ) and the Military Commissions Act of 2006, enemy POWs and "lawful enemy combatants" may be tried by court-martial for offenses that they commit while detained.[27] At this point, though, there is no clear mechanism for prosecuting serious misconduct in the Guantanamo Bay detention facility when committed by a class of detainees termed "alien unlawful enemy combatants."[28] As there is no definitive legal mechanism for prosecuting these post-capture offenses, three options exist for prosecuting post-capture misconduct by alien unlawful enemy combatants in U.S. detention facilities abroad. Those three options are: military commissions, courts-martial, and U.S. federal district courts.[29] This article analyzes these three options and proposes a forum that is most appropriate for the prosecution of these offenses.

In analyzing this issue, Part II provides the fundamental background principles. This part first traces the historical development of international law with respect to handling and prosecuting crimes committed in prisoner of war (POW) camps. Part II then outlines the current U.S. policy governing the classification of detainees and concludes with a discussion of the critical distinction between offenses that require camp disciplinary procedures and offenses requiring judicial punishment. Part III provides an overview of the three primary options available for prosecuting misconduct in detention facilities, outlining their jurisdictional foundations and describing their procedural

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article to refer to the U.S. military operations against terrorism. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516–21 (2004); COALITION INFORMATION CENTERS, WASHINGTON, U.S.A., LONDON, U.K., ISLAMABAD, PAKISTAN, THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS 12 (2001) [hereinafter COALITION INFORMATION CENTERS], *available at* http://www.whitehouse.gov/news/releases/2001/12/100dayreport.pdf.

[26] Hirschkorn, *supra* note 2.

[27] *See* UCMJ art. 2(a)(9) (2008) (extending UCMJ jurisdiction over "Prisoners of war in the custody of the armed forces."); 10 U.S.C.S. § 802(a)(13) (extending UCMJ jurisdiction over "Lawful enemy combatants . . . who violate the law of war."); sec. 4(a)(1), 120 Stat. 2600, 2631 (adding Article 2(a)(13) to the UCMJ).

[28] *See* § 948a(1), (3) (defining the terms "alien" and "unlawful enemy combatant").

[29] While host-nation criminal courts offer a potential forum for certain types of criminal misconduct in detention facilities in certain combat theaters, no such forum exists in Cuba and therefore, the viability and wisdom of selecting a host-nation forum for the prosecution of post-capture offenses is beyond the scope of this article. *See, e.g.*, U.S. DEP'T OF DEFENSE, MEASURING SECURITY AND STABILITY IN IRAQ 7–9 (Nov. 30, 2006), *available at* http://www.defenselink.mil/pubs/pdfs/9010Quarterly-Report-20061216.pdf (discussing developments and improvements to the Iraqi criminal justice system).

highlights. Finally, Part IV proposes one particular forum after considering the quality of the jurisdictional reach, the practical implications of the forum, and the important policy considerations in prosecuting post-capture detainee misconduct in each forum.

Of the three options that exist, should the need arise, trial by court-martial offers the most attractive forum for the prosecution of post-capture criminal misconduct. However, based on the current state of U.S. detention policy, it is trial by military commission that provides the most secure means to prosecute those serious offenses committed by alien unlawful enemy combatants held in U.S. detention facilities. A complete resolution of the question, however, requires a statutory solution from Congress that establishes more airtight jurisdiction over crimes in a detention facility when committed by alien unlawful enemy combatants. With more detainees becoming depressed, despondent, and desperate, government officials, commanders, and Judge Advocates must be prepared to try these cases as necessary to maintain good order and discipline in the confinement facility, and to punish those detainees who commit serious criminal offenses in U.S. detention facilities abroad.[30]

II. Fundamental Principles Governing the Prosecution of Detainees

In selecting the most appropriate forum for prosecuting alien unlawful enemy combatants for post-capture misconduct, some fundamental background principles are critical to framing the issue. First, international treaties have continually developed the law of war over the past one hundred years, and the treatment of those in detention has always occupied a significant portion of these treaties.[31] Second, in the ongoing War on Terror, the United States has determined that certain detainees do not qualify as "prisoners of war," as defined in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and therefore determined that these individuals lack the

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[30] While this article focuses primarily on Guantanamo Bay, Cuba, most of the principles remain the same should detainee misconduct occur in any facility located outside the United States.

[31] *See, e.g.*, Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, annex, arts. 4–20, 36 Stat. 2295, 2296–2301, 1 Bevans 631, 644–47 [hereinafter Hague IV]; Convention Relative to the Treatment of Prisoners of War § V, ch. 3, July 27, 1929, 47 Stat. 2021, 2046–53, 2 Bevans 932, 948–53 [hereinafter 1929 GPW]; Geneva Convention Relative to the Treatment of Prisoners of War art. 83, Aug. 12, 1949, 6 U.S.T. 3316, 3382, 75 U.N.T.S. 135, 200 [hereinafter GC III].

protections afforded to POWs under international law.[32] The current term for these individuals who do not fit the definition of POW is "enemy combatant," and the classification of detainees has significant bearing on the rights to which they are entitled, including how their misconduct may be tried.[33] Third, if an individual commits a crime while detained, not all offenses justify punishment imposed through a judicial process.[34] Some minor offenses may warrant basic camp disciplinary procedures. In an effort to provide the fundamental background principles for prosecuting post-capture misconduct by those who are alien unlawful enemy combatants, this part will trace the historical development of the law regarding the prosecution of misconduct by POWs, outline the current U.S. policy concerning the status of those detained at Guantanamo Bay, and describe the principles that distinguish those offenses that warrant a judicial disposition from those that warrant a minor disciplinary disposition.

A. Historical Development of the Criminal Punishment of Prisoners of War

From the beginning of the formal regulation of modern warfare, the drafters of the treaties that govern warfare have recognized the importance of maintaining good order and discipline in POW camps. General Orders No. 100 (Lieber Code), drafted in 1863 during the U.S. Civil War by Francis Lieber, is generally recognized as the first codification of the law of modern warfare.[35] Article 75 of the Lieber

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[32] GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40; 10 U.S.C.S. § 948b(g); Memorandum, President of the United States, to the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff, subject: Humane Treatment of Al Qaeda and Taliban Detainees (7 Feb. 2002) [hereinafter Humane Treatment of Al Qaeda and Taliban Detainees Memo], *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[33] *See* GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40 (providing the categories of personnel entitled to POW status); 10 U.S.C.S. § 948d (describing the jurisdiction of military commissions and providing that lawful enemy combatants may be tried by courts-martial); UCMJ art. (2)(a)(9) (2008); U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DEP'T OF DEFENSE DETAINEE PROGRAM para. E2.1.1 (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].

[34] *See* discussion *infra* Part II.C.

[35] FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) [hereinafter LIEBER CODE], *reprinted in* THE LAWS OF ARMED

Code provides that "Prisoners of War are subject to confinement or imprisonment such as may be deemed necessary on account of safety."[36] Article 77 mandates that, while an escape attempt is not a crime, a conspiracy to escape that is discovered "may be rigourously punished, even with death; and capital punishment may be also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow prisoners, or other persons."[37] In his classic treatise on military law, first published in 1886, Colonel William Winthrop acknowledged that "[p]risoners of war must conform to the law, regulations and orders in force in the enemy's army, or country . . . and for insubordinate or contumacious conduct must expect disciplinary measures."[38] Colonel Winthrop's treatise is limited in its application, though, because it only addresses disciplinary sanctions against prisoners for misconduct in the camp, and refers to the trial of prisoners only when discussing those offenses committed prior to their capture.[39]

As the international agreements regarding POWs became more formalized, the rules for the punishment of POWs for post-capture acts of misconduct did not become much more specific than the basic guidelines provided by Francis Lieber and Colonel Winthrop.[40] In the Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, held at the Hague in 1907, Article 8 stated the following regarding treatment of misconduct in POW camps: "Prisoners of war shall be subject to the laws, regulations, and orders in force in the army

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CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed.1988); *see also id.* ("The Lieber Instructions represent the first attempt to codify the laws of war").

[36] LIEBER CODE, *supra* note 35, at 13 (art. 75).

[37] *Id.* at 13–14 (art. 77).

[38] COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 792–93 (William S. Hein & Co., Inc. 2000) (1920).

[39] *See id.* at 793 (citing Article 59 of the Lieber Code and stating, "For any material violation of the laws of war committed before his capture, a prisoner of war is amenable to trial and punishment after his capture.").

[40] *See, e.g.*, Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, arts. 23, 28, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 35, at 25, 30–31 ("Art. 23. . . . Any act of insubordination justifies the adoption of such measures of severity as may be necessary. . . . Art. 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are."); Inst. of Int'l Law, The Laws of War on Land arts. 62, 67 (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 35, at 35, 43 ("Art. 62. [Prisoners of War] are subject to the laws and regulations in force of the army of the enemy. . . . Art. 67. Any act of insubordination justifies the adoption towards them of such measure of severity as may be necessary.").

of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary."[41] Prisoners of war are military personnel held for military purposes, therefore, it is appropriate that they be "subject to the same penal and disciplinary legislation as members of the armed forces of the Detaining Power, and liable to the same punishment for similar actions, except" for escapes.[42]

The experiences of World War I revealed that this "strict assimilation of prisoners of war with the armed forces of the Detaining Power" could lead to abuses.[43] Therefore, the drafters of the treaty adopted in the Convention Relative to the Treatment of Prisoners of War held in Geneva in 1929 (1929 Convention) sought to "lay down certain rules in order to ensure a more precise penal and disciplinary system for prisoners of war."[44] Chapter 3 of Section V of the 1929 Convention specifically addressed penal sanctions against POWs.[45] One important concept in this chapter is the distinction between disciplinary and judicial punishments.[46] These two dispositions are distinguishable in three ways: the amount of due process, the entity with the power to impose punishment, and the maximum punishment.[47]

First, prisoners facing judicial punishment receive more due process, including the right to an advocate of their choosing, the right to have the protecting power notified of the proceedings, and the right to appeal.[48] Second, the imposition authority distinguishes disciplinary measures from judicial measures. Under Article 59, "[d]isciplinary punishments may only be awarded by an officer vested with disciplinary powers in his capacity as commander of the camp."[49] Article 63 prescribes that

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[41] Hague IV, *supra* note 31, art. 8, 36 Stat. at 2297, 1 Bevans at 645.
[42] *See* 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 406 (Jean S. Pictet ed., 1960) [hereinafter GC III COMMENTARY].
[43] *Id.*
[44] *See* 1929 GPW, *supra* note 31, § 5, ch. 3, 47 Stat. at 2046–53, 2 Bevans at 948–53; GC III COMMENTARY, *supra* note 42, at 407.
[45] *See* 1929 GPW, *supra* note 31, § 5, ch.3, 47 Stat. at 2046–53, 2 Bevans at 948–53.
[46] *See id.* (distinguishing between disciplinary and judicial sanctions).
[47] *See* 1929 GPW, *supra* note 31, arts. 54–59, 60–67, 47 Stat. at 2049–53, 2 Bevans at 951–53.
[48] *See* 1929 GPW, *supra* note 31, arts. 60–67, 47 Stat. at 2051–53, 2 Bevans at 951–53. "A Protecting Power is . . . a State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third Power (known as the detaining Power)." GC III COMMENTARY, *supra* note 42, at 93.
[49] *See* 1929 GPW, *supra* note 31, art. 59, 47 Stat. at 2051, 2 Bevans at 951.

judicial sanctions may be imposed only "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[50] While the Convention does not specifically mention courts-martial, the necessary implication is that if courts-martial are used to impose judicial-type sentences (meaning death or significant confinement) against the forces of the detaining power, then courts-martial must be used to impose the same sentences upon POWs.[51] Finally, the most critical distinction between disciplinary and judicial sanctions is the amount of punishment that may be imposed. The maximum punishment authorized under disciplinary proceedings is imprisonment for not more than thirty days, while any appropriate punishment, including death, may be imposed under judicial proceedings.[52]

The 1929 Convention remained in force through the Second World War, and it "became apparent to those who benefited from it as well as those who had to apply it, that the 1929 Convention needed revision on a number of points because of changes in the conduct and consequences of war and even in human living conditions."[53] The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 made significant amendments to the 1929 Convention.[54] With these amendments, the rules regarding penal and disciplinary sanctions against POWs were expanded to provide greater protections to POWs, including several important changes regarding the punishment of prisoners for misconduct during detention. The first important expansion was that the 1949 Convention directed the detaining powers to "ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary, rather than judicial measures" when punishing POWs.[55] There was a similar provision in the 1929 Convention, but it was primarily directed at punishing escapes and attempted escapes.[56] The drafters expanded this principle of leniency for two reasons.[57] First, in addressing misconduct, detaining powers must understand that POWs

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[50] *Id.* art. 63.
[51] *See id.*
[52] *See id.* arts. 54 & 66.
[53] GC III COMMENTARY, *supra* note 42, at 5–6 (describing the impetus for the revision of the 1929 Convention).
[54] *See* GC III, *supra* note 31.
[55] GC III, *supra* note 31, art. 83, 6 U.S.T. at 3382, 75 U.N.T.S. at 200.
[56] *See* 1929 GPW, *supra* note 31, art. 52, 47 Stat. at 2049, 2 Bevans at 950; GC III COMMENTARY, *supra* note 42, at 411.
[57] GC III COMMENTARY, *supra* note 42, at 411.

have no allegiance to the detaining power.[58] Second, the detaining power must consider the "honourable motives which prompted the prisoner of war to act in that manner."[59] Resistance and escape are considered the duty of the captive soldier, and therefore should not be punished as harshly as the same or similar offenses committed by a member of the detaining power's own forces.[60] In addition to these two reasons, the drafters also recognized that POWs are subject "more than anyone else to the influences which are generally recognized as extenuating circumstances: extreme distress, great temptation, anger or severe pain."[61] Therefore, the drafters favored leniency—rather than harsh punishment in the name of good order and discipline in the camp—as the guiding principle in addressing POW misconduct.[62]

Along with the preference for disciplinary rather than judicial proceedings, Article 84 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War mandates, as a general rule, that POWs be tried by military court, rather than a civilian court.[63] While there is an exception for those jurisdictions where only civilian courts have jurisdiction to try certain offenses, the drafters deliberately chose to have military courts try POWs because of the courts' expertise in trying military-specific offenses.[64] Article 102 of the 1949 Convention further clarifies Article 84.[65] Article 102 states:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts

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[58] *Id.* at 410.
[59] *Id.* (internal quotations removed) (citations omitted).
[60] *See* WINTHROP, *supra* note 38, at 793 n.27 (citations omitted). *See generally* GC III COMMENTARY, *supra* note 42, at 406–07 (providing justification for the general preference for leniency toward POWs, as contrasted with the typically harsh punishments under the military penal code for military personnel who commit misconduct).
[61] GC III COMMENTARY, *supra* note 42, at 411.
[62] *Id.* at 410–11.
[63] GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382, 75 U.N.T.S. at 200–02. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 66 & 117, Aug. 12, 1949, 6 U.S.T. 3516, 3558–60, 3596, 75 U.N.T.S. 288, 328–330, 366 [hereinafter GC IV]; 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 339, 476 (Jean S. Pictet ed., 1960) [hereinafter GC IV COMMENTARY].
[64] *See* GC III COMMENTARY, *supra* note 42, at 412.
[65] GC III, *supra* note 31, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; GC III COMMENTARY, *supra* note 42, at 476.

> according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.[66]

Just as Article 63 of the 1929 Convention required, POWs are to be treated in judicial matters in the same manner as the detaining power's own forces.[67] But, this is not without limits. Article 84 expressly forbids the trial of POWs before courts that do not provide "the essential guarantees of independence and impartiality."[68] Under Article 105, the court must also provide, at a minimum, an assistant, advocate, or counsel, and an interpreter.[69] Finally, the military penal code must be consistent with the protections of Chapter III of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Articles 82 through 108), which provide substantial due process to an accused POW.[70] As stated in the Commentary, these obligations "outweigh national legislation and the States party to the Convention must modify their own legislation if necessary, and in particular their military penal code, in order to respect [these] minimum standards."[71]

After the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, the next major international treaty to address the status and treatment of POWs was the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 (Additional Protocol I).[72] This treaty did not address the trial of a POW

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[66] GC III, *supra* note 31, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[67] 1929 GPW, *supra* note 31, art. 63, 47 Stat. at 2052, 2 Bevans at 952; GC III, *supra* note 31, arts. 63 & 102, 6 U.S.T. at 3364–66, 3394, 75 U.N.T.S. at 182–84, 212; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[68] GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382, 75 U.N.T.S. at 200–02; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[69] GC III, *supra* note 31, art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214 ("The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter."); *see also* GC III COMMENTARY, *supra* note 42, at 476.

[70] GC III, *supra* note 31, § 6, ch. III, 6 U.S.T. at 3382–3400, 75 U.N.T.S. at 200–18; GC III COMMENTARY, *supra* note 42, at 476.

[71] GC III COMMENTARY, *supra* note 42, at 476.

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The United States signed, but did not ratify

in the hands of a detaining power.[73] Thus, the 1949 Convention represents the culmination of the efforts to establish a system for the trial of POWs for post-capture misconduct. Shortly after the conclusion of the 1949 Convention, the United States implemented the provisions related to the trial of POWs when Congress passed the Uniform Code of Military Justice, which provided for court-martial jurisdiction over enemy POWs.[74] For POWs, then, the laws are well-established. Unfortunately, as the next section will explain, very few—if any—of those detained in the War on Terror qualify as "enemy prisoners of war" according to U.S. law and policy.

B. The Legal Classification of Those Detained by the United States

President George W. Bush called the September 11th terrorist strikes against the World Trade Center and the Pentagon "acts of war,"[75] and began a global effort to "eradicate the evil of terrorism."[76] According to President Bush, "Our war on terror begins with al Qaeda, but it . . . will not end until every terrorist group of global reach has been found, stopped, and defeated."[77] On 14 September 2001, without going so far as to actually declare war, Congress passed a joint resolution authorizing military action against "those nations, organizations, or persons" responsible for the terrorist attacks on September 11th, as well as those

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Additional Protocol I. *See* Int'l Comm. of the Red Cross, State Signatories of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S (last visited Feb. 22, 2008). For the articles in Additional Protocol I that the United States generally considers to be customary international law, see Memorandum, W. Hays Parks et al., to John H. McNeill, Assistant General Counsel (International), Office of the Secretary of Defense, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986) (on file with author).

[73] *See* Additional Protocol I, *supra* note 72, arts. 43–47, 1125 U.N.T.S. at 23–25.

[74] Act of May 5, 1950, Pub. L. No. 81-506 ch. 169, § 1, art. 2(a)(9), 64 Stat. 109.

[75] Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda, and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 541, 543 (2005) (citations omitted).

[76] *See* President George W. Bush, Radio Address of the President to the Nation (Sept. 14, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/20010915.html ("We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism."); President George W. Bush, Address to a Joint Session of Congress and the American People, Washington, D.C. (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html [hereinafter President Bush, Address to a Joint Session of Congress] (referring to the "war on terror").

[77] *Id.*

that "harbored such organizations or persons."[78] That same September, the United Nations Security Council "adopted two resolutions which (1) identified the attacks on the United States as a threat to international peace and security, and (2) mandated that states 'deny safe haven to those who finance, plan, support, or commit terrorist acts.'"[79] After clear warnings to the Taliban government in Afghanistan,[80] strikes began against terror training camps and Taliban military installations in Afghanistan on 7 October 2001.[81]

As a part of the military strategy against al Qaeda and the Taliban, the United States sought to capture or kill senior al Qaeda and Taliban officials.[82] On 13 November 2001, President Bush issued an order authorizing the detention of al Qaeda members and certain others for trial by military commission.[83] By the end of December 2001, the allied coalition had detained almost 7000 individuals thought to be part of

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[78] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The joint resolution became law on 18 September 2001. Wallach, *supra* note 75, at 544.

[79] *Id.* (quoting S.C. Res. 1368, U.N. Doc S/RES/1368 (Sept. 12, 2001) and S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)).

[80] *See* President George W. Bush, Address to a Joint Session of Congress, *supra* note 76. In the address, President Bush said:

> [T]he United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

Id.

[81] *See* President George W. Bush, Presidential Address to the Nation, Washington, D.C. (Oct. 7, 2001), http://www.whitehouse.gov/news/releases/2001/10/print/20011007-8.html ("On my orders, the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.").

[82] *See* COALITION INFORMATION CENTERS, *supra* note 25, at 11–12.

[83] Military Order, *supra* note 25.

either al Qaeda or the Taliban.[84] With these detentions, serious questions arose regarding the status of these detainees.[85]

Applying international law in cases where detainee status is in doubt, the Commander of the U.S. Central Command issued an order on 17 October 2001 stating that all detained personnel would receive treatment in accordance with the "traditional interpretation" of the Geneva Conventions and "would be screened to determine whether or not they were entitled to prisoners of war status."[86] In early 2001, the United States began transporting a number of those detained to the Naval Base at Guantanamo Bay, Cuba.[87]

On 19 January 2002, Secretary of Defense Donald Rumsfeld issued a memorandum to the Chairman of the Joint Chiefs of Staff declaring that "Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."[88] Less than a month later, President Bush issued a memorandum declaring, among other things, that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party."[89] The memorandum also announces that "the Taliban detainees are unlawful combatants and,

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[84] Wallach, *supra* note 75, at 544 (citing *US Questions 7,000 Taliban and al-Qaida Soldiers*, GUARDIAN UNLIMITED, Dec. 21, 2001, http://www.guardian.co.uk/afghanistan/story/0,1284,623701,00.html).

[85] *See, e.g.*, Memorandum, Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Defense, subject: Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002) [hereinafter Bybee Memo], *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 81–117 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[86] U.S. DEP'T OF DEFENSE, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 80 (Aug. 2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf; *see also* GC III, *supra* note 31, art. 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42; Wallach, *supra* note 75, at 544.

[87] Wallach, *supra* note 75, at 544–45; Rasul v. Bush, 542 U.S. 466, 470 (2004).

[88] Memorandum, Secretary of Defense, to the Chairman of the Joint Chiefs of Staff, subject: Status of Taliban and Al Qaida (19 Jan. 2002), *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf; *see also* Message, 211933Z Jan 02, CJCS Washington D.C., subject: Status of Taliban and Al Qaida Detainees, *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc2.pdf.

[89] Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134.

therefore, do not qualify as prisoners of war under Article 4 of Geneva."[90]

The first Supreme Court review of the U.S. detention policy came in April of 2004, in the case of *Hamdi v. Rumsfeld*.[91] In that case, Justice O'Connor concluded that detention of unlawful combatants as a means of preventing them from returning to battle in the War on Terror was a valid exercise of the "necessary and appropriate force" that Congress authorized in the 18 September 2001 Authorization for the Use of Military Force.[92] The Supreme Court held, however, that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[93] After this case, on 7 July 2004, Deputy Secretary of Defense Paul Wolfowitz published an order establishing Combatant Status Review Tribunals to determine the appropriate classification of detainees at Guantanamo Bay.[94] This memo included a definition of "enemy combatant," as well as the procedures for the tribunals.[95] The

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[90] *Id.*

[91] 542 U.S. 507 (2004).

[92] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The authorization states:

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

[93] *Hamdi*, 542 U.S. at 533.

[94] *See* Memorandum, Deputy Secretary of Defense, to the Secretary of the Navy, subject: Order Establishing Combatant Status Review Tribunal (July 7, 2004).

[95] *Id*. This memo defined "enemy combatant" as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners . . . includ[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id.

memo also provided a mechanism for release of those not properly detained.[96]

After Congress passed the Detainee Treatment Act of 2005,[97] the DOD changed the procedures for the Combatant Status Review Tribunals.[98] Then, in 2006, the DOD detainee policy changed again. After the Supreme Court decided *Hamdan v. Rumsfeld*,[99] the DOD published DOD Directive 2310.01E.[100] The purpose of this directive was to revise the DOD detention policy and provide a "solid foundation upon which to build future detention operations policy."[101] This directive establishes two important policies. First, it sets minimum standards for the treatment of detainees in the custody of the United States, regardless of their status, incorporating Common Article 3 to the 1949 Geneva Conventions as well as certain additional protections for detainees.[102] In addition to these minimum standards, the policy also acknowledges that the law of armed conflict provides certain categories of detainees, like enemy POWs, more protections than the minimum standards articulated.[103] Second, the policy establishes a definite set of legal classifications for the various categories of personnel detained by the United States. The directive modifies, once again, the definition of "enemy combatant," now defining an "enemy combatant" as "a person engaged in hostilities against the United States or its coalition partners

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[96] *Id.* Should the Combatant Status Review Tribunal determine that an individual is not an enemy combatant, the Secretary of State is to be informed so that the Secretary of State may "coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States." *Id.*

[97] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

[98] *See* Memorandum, Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy, subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006) [hereinafter Implementation of Combatant Status Review Tribunal Procedures Memo].

[99] 126 S. Ct. 2749, 2796–97 (2006) (holding, *inter alia*, that Common Article III applies to those, like Hamdan, detained in the conflict with al Qaeda).

[100] DOD DIR 2310.01E, *supra* note 33.

[101] Cully Stimson, Deputy Assistant Sec'y of Defense for Detainee Affairs and Lieutenant General John Kimmons, Deputy Chief of Staff for Intelligence, U.S. Army, DOD News Briefing with Deputy Assistant Secretary Stimson and Lt. Gen. Kimmons from the Pentagon, Washington D.C. (Sept. 6, 2006) (transcript available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3712).

[102] DOD DIR 2310.01E, *supra* note 33, at 2; GC III, *supra* note 31, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38.

[103] DOD DIR 2310.01E, *supra* note 33, at 2.

during an armed conflict."[104] The directive further distinguishes between "lawful enemy combatants," who meet criteria established in Article 4(a)(2) and (3) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, and "unlawful enemy combatants [who] are persons that are not entitled to combatant immunity, who engage in acts against the United States and its coalition partners in violation of the laws and customs of war during an armed conflict."[105] The directive also expressly includes in the definition of unlawful enemy combatant, "an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[106] While U.S. policy maintains several categories of "detainee," this directive clearly defines each possible status and outlines the standards of detention applicable to each.

Based on the current DOD detention policy established in DOD Directive 2310.01E, detained personnel fall into three distinct categories. First, there are those who are actual "prisoners of war" as defined by Article 4 of the Geneva Conventions of 1949 Relative to the Treatment of Prisoners of War.[107] These individuals are held until the end of hostilities.[108] These individuals would be properly tried by court-martial for any post-capture misconduct under Article 2(a)(9) of the UCMJ, as well as Articles 84 and 102 of the Geneva Conventions of 1949 Relative to the Treatment of Prisoners of War. The next category is "lawful enemy combatant."[109] While DOD Directive 2310.01E makes "lawful enemy combatant" a separate status, they receive the same treatment as POWs under U.S. policy.[110] The final classification of individuals is "unlawful enemy combatant."[111] They receive the minimum standard of treatment under Common Article 3 and DOD Directive 2310.01E, are held for the duration of hostilities, and may be subject to trial by military commission.[112] Should there be a need to prosecute any post-capture misconduct, it is this last category of detainees who are most problematic

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[104] *Id.* at 9.
[105] *Id*; GC III, *supra* note 31, art. 4(a)(2–3), 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40.
[106] DOD DIR 2310.01E, *supra* note 33, at 9.
[107] *See* GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40.
[108] *See* GC III, *supra* note 31, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224; Hamdi v. Rumsfeld, 542 U.S. 507, 520–521 (2004).
[109] DOD DIR 2310.01E, *supra* note 33, at 9.
[110] *See id.*
[111] *See id.*
[112] *See id.* at 2, 9; Military Commissions Act of 2006, 10 U.S.C.S. § 948c (LexisNexis 2008).

under current U.S. policy. Fortunately, as the next section will explain, the class of offenses that warrant judicial punishment is narrow.

C. Honorable Motive or Malice Aforethought: Selecting Camp Disciplinary Procedures or Judicial Means to Prosecute Post-Capture Misconduct

Aside from status, there is another consideration in handling post-capture misconduct. Not every offense a camp commander may need to punish in order to ensure camp discipline is worthy of judicial punishment. Some offenses are minor and require no more than disciplinary procedures established by the camp commander. As described in the last section, Chapter III of Section VI of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War distinguishes between disciplinary proceedings and judicial proceedings, and mandates a preference for disciplinary measures.[113] The key distinction is that prisoners serving disciplinary sentences must be released along with the other POWs at the end of hostilities, regardless of whether they have completed their disciplinary punishment, while those serving judicial sentences remain in the custody of the capturing power until their sentence is complete.[114]

Army Regulation (AR) 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, implements these tenets of international law in U.S. detention operations and applies to detention operations in the War on Terror.[115] In accordance with Chapter III of Section VI of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, AR 190-8 establishes a regime that differentiates between camp discipline and judicial measures, and establishes a preference for the former.[116] Paragraph 3-7f of AR 190-8 states that escape attempts and related offenses that are "committed by

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[113] *See* GC III, *supra* note 31, arts. 82, 83, 6 U.S.T. at 3382, 75 U.N.T.S. at 200.

[114] *See* GC III, *supra* note 31, arts. 115, 119, 6 U.S.T. at 3404, 3406–08, 75 U.N.T.S. at 222, 224–26; R.C. HINGORANI, PRISONERS OF WAR 181 (1982); *see also* GC III COMMENTARY, *supra* note 42, at 534.

[115] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES paras. 1-1, 1-5 (1 Oct. 1997) [hereinafter AR 190-8]; *see also* Human Rights First, Human Rights First Analyzes DOD's Combatant Status Review Tribunals, http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Jan. 16, 2007). *See generally* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006) (discussing AR 190-8).

[116] *See* AR 190-8, *supra* note 115, paras. 3-6, 3-7.

detainees with the sole intent of making their escape easier and that do not entail any violence against life or limb will warrant disciplinary punishment only."[117] Aside from these specified offenses and others that clearly warrant judicial punishment, like murder, aggravated assault, and rape, there is a gray area where a commander will have to decide whether disciplinary or judicial punishment is warranted.

In deciding what system of punishment is most appropriate for those offenses in the gray area, commanders are not without guidance. Besides the preference for disciplinary over judicial punishment in international law and AR 190-8, Rule for Courts-Martial (RCM) 306(b) and its discussion provide a valuable tool for commanders and their Judge Advocates in selecting disciplinary or judicial measures for handling detainee misconduct.[118] First, RCM 306(b) mandates that allegations of misconduct "should be disposed of in a timely manner at the lowest appropriate level of disposition."[119] Next, the discussion to RCM 306(b) outlines several other considerations. First, the discussion cites various factors for commanders to consider in determining a proper disposition, including "the nature of the offenses, any mitigating and extenuating circumstances, . . . [and] the interest of justice."[120] Further, the discussion articulates the desired goal: "a disposition that is warranted, appropriate, and fair."[121] The discussion concludes with a list of additional factors for the commander to consider in determining a proper disposition.[122] Even if the case is not being tried by court-martial, these rules provide helpful guidelines in distinguishing between disciplinary and judicial punishment for a particular offense.

In addition to the considerations set out in the Geneva Conventions, AR 190-8, and the *Manual for Courts-Martial* (*MCM*), there are three

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[117] *Id.* para. 3-7f. This is taken almost verbatim out of Article 93 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. *See* GC III, *supra* note 31, art. 93, 6 U.S.T. at 3388, 75 U.N.T.S. at 206.

[118] GC III, *supra* note 31, art. 83, 6 U.S.T. at 3382, 75 U.N.T.S. at 200 ("In deciding whether proceedings . . . shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures."); AR 190-8, *supra* note 115, para. 3-7c ("When possible, disciplinary rather than judicial measures will be taken for an offense."); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(b) (2008) [hereinafter MCM].

[119] MCM, *supra* note 118, R.C.M. 306(b).

[120] *Id.* R.C.M. 306(b) discussion.

[121] *Id.*

[122] *Id.*

other important factors in determining an appropriate disposition of offenses. First, in the case of unlawful enemy combatants, one of the arguments for leniency—that misconduct is often driven by "honorable motives"—may not apply.[123] A number of those detained are alleged to have participated in some part of the War on Terror as unlawful combatants, and may be seeking to continue their unlawful activities.[124] A detainee's escape and subsequent reunion with hostile forces may have more consequence, considering the nature of the War on Terror. There are several documented cases of released detainees continuing hostile activities against U.S. or coalition forces.[125] Second, the leniency rationale for escape attempts does not necessarily apply either.[126] Considering that he was detained for conduct that is considered illegal under international law, an alien unlawful enemy combatant escaping from the detention facility at Guantanamo Bay is more akin to a prisoner escaping from a federal penitentiary, rather than a POW escaping from a POW camp. Again, a detainee's escape and continued aggression as an unlawful combatant may be of more consequence, considering the unconventional nature of the War on Terror. Third, it is logical that a disciplinary punishment, like the loss of a comfort item or a privilege, may have more of an impact on a detainee facing indefinite detention or serving a lengthy military commission sentence, rather than continued

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[123] *See* GC III COMMENTARY, *supra* note 42, at 411.

[124] *See generally* Implementation of Combatant Status Review Tribunal Procedures Memo, *supra* note 98 (outlining the procedures for Combatant Status Review Tribunals that ensure that detainees are "properly classified as enemy combatants").

[125] Bryan Whitman, Pentagon Spokesman, and Senior Defense Officials, U.S., Dep't of Defense, Press Briefing: Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable, to Senior Defense Officials, Washington, D.C. (Mar. 6, 2007), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902. On 6 March 2007, a senior defense official stated:

> We have had individuals that have . . . persuaded us that they were an innocent bystander, and as soon as they were released, they returned to the fight. . . . [W]e have confirmed 12 individuals have returned to the fight, and we have strong evidence that about another dozen have returned to the fight.

Id.; *see also* U.S. Dep't of Defense, Former Guantanamo Detainees Who Have Returned to the Fight (July 12, 2007), http://www.defenselink.mil/news/d20070712formergtmo.pdf (stating that there are thirty documented cases of former Guantanamo detainees who have taken part in "anti-coalition militant activities after leaving U.S. detention," and providing seven anecdotes).

[126] *See* GC III, *supra* note 31, art. 93, 6 U.S.T. at 3388, 75 U.N.T.S. at 206; GC III COMMENTARY, *supra* note 42, at 411, 452–54.

confinement adjudged as a judicial punishment. In deciding which punishment is appropriate, many considerations may often conflict.

The three previous sections present the fundamental principles underlying the issue of punishing detainee misconduct. There has been substantial development in the international law and U.S. policy governing the trial of enemy POWs for misconduct in the hands of the detaining power. Even if the law does not expressly protect a detained person in a particular conflict, the principles that those laws express are worthy of consideration. Also, under current U.S. policy detainees fall into three basic categories, and their status governs the protections and rights they receive. Finally, not all post-capture offenses are worthy of judicial punishment; some offenses warrant mere camp discipline. In addressing post-capture misconduct, these principles should govern the decision to try a detainee for a particular offense and will assist in determining the most appropriate forum for a trial of an alien unlawful enemy combatant for crimes committed in a detention facility.

III. Options Available for Prosecuting Post-Capture Misconduct

Should an alien unlawful enemy combatant commit a crime warranting judicial punishment, it appears that U.S. law and policy offer three primary options for a trial. Those three options are trial by military commission, trial by court-martial, and trial in U.S. federal court. All three options have distinct jurisdictional limits and different procedural rules that impact their utility for trying alien unlawful enemy combatants for post-capture misconduct.

A. Prosecuting Post-Capture Offenses in Military Commissions

Based on current U.S. policy, the most obvious forum for a trial of a detainee is the military commission.[127] Military commissions have existed, in some form, since the earliest days of this country,[128] and in the

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[127] Military Commissions Act of 2006, 10 U.S.C.S. § 948c (LexisNexis 2008); Military Order, *supra* note 25.

[128] *See* Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19, 26; Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 41; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118

Military Order of November 13, 2001, President Bush directed that any person detained pursuant to the order, "when tried, be tried by military commission for any and all offenses triable by military commission."[129] Initial attempts to bring detainees to trial by military commissions resulted in the Supreme Court decision in *Hamdan v. Rumsfeld*, where the Court held that the military commissions, as then constructed, violated Article 36 of the UCMJ.[130] After *Hamdan*, Congress passed the Military Commissions Act of 2006, outlining new procedures and implementing certain minimum due process safeguards for the trial of detainees by military commission.[131] In early 2007, the Secretary of Defense published the *Manual for Military Commissions*, a "comprehensive Manual for the full and fair prosecution of alien unlawful enemy combatants by military commissions, in accordance with the Military Commissions Act of 2006."[132] The *Manual for Military Commissions* explains that the Military Commissions Act "amends both Articles 21 and 36 [of the Uniform Code of Military Justice] . . . to permit greater flexibility in constructing procedural and evidentiary rules for trials of alien unlawful enemy combatants by military commission . . . [with s]everal key provisions . . . accommodat[ing] . . . military operational and national security considerations."[133] Later in 2007, the DOD promulgated the *Regulation for Trial by Military Commissions*, implementing the provisions of the Military Commissions Act of 2006 and the *Manual for Military*

HARVARD L. REV. 2047, 2132 (2005) *(*"Historically, the United States has used military commissions for three basic purposes: to try enemy belligerents for crimes triable under the laws of war, to administer justice in territory occupied by the United States, and to replace civilian courts where martial law has been declared."). *See generally* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775–76 (2006) (describing past practice for military commissions).

[129] Military Order, *supra* note 25; *see also Hamdan*, 126 S. Ct. at 2749.

[130] *See Hamdan*, 126 S. Ct. at 2792–93; *see also* UCMJ art. 36 (2008). The primary operating documents that comprised the trial procedures for the version of military commission that the Court examined in *Hamdan* were Military Commission Order Number 1 and the Detainee Treatment Act of 2005. *See* U.S. Dep't of Defense, Military Commission Order No. 1, Aug. 31, 2005, *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf [hereinafter Military Commission Order No. 1]; Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

[131] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; H.R. REP. NO. 109-664, pt. 1, at 29, 69 (2006); 152 CONG. REC. S10,251–53 (daily ed. Sept. 27, 2006)..

[132] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, foreword.

[133] *Id.* at I-1; *see also* U.S. DEP'T OF DEFENSE, REG. FOR TRIAL BY MILITARY COMMISSIONS foreword (Apr. 27, 2007) [hereinafter REGULATION FOR TRIAL BY MILITARY COMMISSIONS].

Commissions.[134] These three resources establish the current procedural rules for any trial by military commission.

1. Personal Jurisdiction under the Military Commissions Act

The jurisdiction of the military commission is narrow. The only persons subject to the jurisdiction of military commissions are alien unlawful enemy combatants. According to the Military Commissions Act, a military commission has "jurisdiction to try any offense made punishable by [the Act] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."[135] Title 10 U.S.C. § 948a provides definitions for both "alien" and "unlawful enemy combatant."[136] First, an "alien" is, quite simply, any "person who is not a citizen of the United States."[137] Under the Military Commissions Act of 2006, an "unlawful enemy combatant" is:

> [A] person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or . . . a person who, before, on, or after the date of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or other competent tribunal established under the authority of the President or the Secretary of Defense.[138]

From these key definitions, there are three important principles to note. First, military commissions lack jurisdiction over U.S. citizens. Second, military commissions lack jurisdiction over "lawful enemy combatants" as defined in the Act.[139] Third, once a Combatant Status Review

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[134] REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133.
[135] 10 U.S.C.S. § 948d(a).
[136] *Id.* § 948a.
[137] *Id.*; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 103(1).
[138] 10 U.S.C.S. § 948a(1); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 103(24).
[139] *See* 10 U.S.C.S. § 948a(1)(ii); Implementation of Combatant Status Review Tribunal Procedures Memo, *supra* note 98 (outlining the procedures for Combatant Status Review Tribunals).

Tribunal or a similar competent authority establishes that an individual is an "unlawful enemy combatant," that status determination is "dispositive for purposes of jurisdiction for trial by military commission."[140] If an individual is deemed to be an alien unlawful enemy combatant, the next issue is subject matter jurisdiction, or jurisdiction over the particular criminal offense.

2. Subject Matter Jurisdiction under the Military Commissions Act of 2006

Individuals subject to trial by military commission may be tried for offenses established by the Military Commissions Act of 2006 or the law of war.[141] The Military Commissions Act sets out two important preliminary points. First, the Act specifically states that it codifies "offenses that have been traditionally triable by military commissions . . . [and] does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission."[142] One of the major points of disagreement among the justices in *Hamdan* was whether "conspiracy to violate the law of war," as charged in that case, was a violation of the law of war and a proper charge for trial by military commission.[143] In essence, Congress has determined that certain offenses violate the law of war and are therefore appropriate for trial by military commission. It does not appear to limit, however, any other offenses that may also violate the law of war but are not specifically listed.[144]

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[140] *See* 10 U.S.C.S. § 948d(c); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 202(b); Implementation of Combatant Status Review Tribunal Procedures Memo, *supra* note 98 (outlining the procedures for Combatant Status Review Tribunals).

[141] 10 U.S.C.S. § 948d(a); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 203.

[142] *See* 10 U.S.C.S. § 950p(a).

[143] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2777–856 (2006). Justice Stevens concludes that "conspiracy to violate the law of war" is not itself a violation of the law of war and therefore not a proper charge for trial by military commission. *Id.* at 2785. Justice Thomas, on the other hand, concluded that conspiracy to violate the law of war is a crime properly triable by military commission. *Id.* at 2831 (Thomas, J., dissenting).

[144] *See* 10 U.S.C.S. § 948b; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 203 ("Military commissions may try any offense under the M.C.A. or the law of war."); MacDonnell, *supra* note 128, at 26–33 (discussing historical military commission jurisdiction).

Second, the Military Commissions Act of 2006 specifically states that the statute is retroactive; that is, it allows trial for crimes that occurred before its enactment because it does not enact new law, but is rather "declarative of existing law."[145] With this provision, Congress has minimized the likelihood of success of any motion that these offenses violate the Ex Post Facto Clause of the Constitution.[146]

In establishing the offenses punishable by military commission, the Military Commissions Act of 2006 codifies the common criminal law concepts of principals, accessory after the fact, attempts, and solicitation.[147] The Act then establishes twenty-eight substantive offenses that are proper for trial by military commission when committed by alien unlawful enemy combatants.[148] Finally, the Act establishes perjury, contempt, and obstruction of justice as additional crimes that may be tried by military commission.[149]

Part IV of the *Manual for Military Commissions* provides additional information regarding the substantive offenses in the Military Commissions Act.[150] First, the *Manual for Military Commissions* provides the elements of each offense.[151] One element in nearly every offense is that the crime "took place in the context of and was associated with armed conflict."[152] "Armed conflict" is not defined anywhere in the Military Commissions Act of 2006, nor is it defined in the *Manual for Military Commissions*.[153]

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[145] *See* 10 U.S.C.S. § 950p(b).

[146] U.S. CONST. art. I, § 9 ("No . . . ex post facto Law shall be passed."). "Ex post facto" means "having retroactive force or effect." BLACK'S LAW DICTIONARY 601 (7th ed. 1999).

[147] *See* 10 U.S.C.S. § 950q–u.

[148] *See id.* § 950v(b).

[149] *See id.* § 950w.

[150] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV.

[151] *See id.*

[152] *See, e.g., id.* pt. IV, ¶ 6(13)b (providing as an element of Intentionally Causing Serious Bodily Injury, "(5) The conduct took place in the context of and was associated with armed conflict"). This is no doubt intended to stave off challenges to the subject matter jurisdiction of the military commissions. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006) ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.").

[153] *See generally* Military Commissions Act of 2006, 10 U.S.C.S. §§ 948a–950w (LexisNexis 2008) (not defining "armed conflict"); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25 ("not defining "armed conflict"). Also, neither Common Article 2 nor Common Article 3 defines "armed conflict." *See, e.g.*, GC III, *supra* note

In addition to the elements of the substantive offenses, the *Manual for Military Commissions* establishes the maximum punishment for each offense.[154] It does not cite any authority as a source for the maximum punishments, and the Military Commissions Act is silent as to maximum punishments for each of the offenses, stating only that individuals convicted of offenses by the commission "shall be punished as a military commission under this chapter shall direct."[155] Further, the Act states that the "punishment which a military commission . . . may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense."[156] By this language, it appears that the DOD is free to assign maximum punishments as it deems appropriate.

The Military Commissions Act provides an expansive set of crimes that are subject to trial by military commission and the *Manual for Military Commissions* establishes the elements and the sentences for those offenses. As there is no caselaw yet on any of the language in these offenses, there is still some question as to the exact limits of what constitutes an offense under the law of war as well as a question as to the exact meaning of the element "took place in the context of and was associated with armed conflict."[157] Nevertheless, there must be subject matter jurisdiction before a commission can reach the procedural aspects discussed below.

3. Overview of Procedure in Trial by Military Commission

Once it is determined that a military commission may try an alien unlawful enemy combatant, the Military Commissions Act, the *Manual for Military Commissions*, and the *Regulation for Trial by Military*

31, arts. 2 & 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (providing an example of Common Articles 2 and 3). The Commentaries, on the other hand, provide some criteria for assessing whether armed conflict exists for the purposes of triggering their application. *See* GC III COMMENTARY, *supra* note 42, at 35–36.

[154] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV.

[155] 10 U.S.C.S. § 950v(b)(3). Although this section of the Military Commissions Act refers to the crime of attacking civilian objects, the quoted language is common to all offenses.

[156] *Id.*

[157] 10 U.S.C.S. § 948b; *see, e.g.*, MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV, ¶ 6(13)b (providing an example of this element in Intentionally Causing Serious Bodily Injury, "(5) The conduct took place in the context of and was associated with armed conflict.").

Commissions provide the procedural rules for the trial.[158] As a tribunal crafted to handle the exigencies of the current War on Terror while maintaining due regard for the rights of an accused, the military commission's procedural rules differ from other courts and govern its utility for post-capture misconduct.[159]

The military commission is very similar to the court-martial in terms of the general procedural framework. There are, however, several key differences between a court-martial and a trial by military commission. First, there is no requirement for a pre-trial investigation.[160] Under the current rules, the Convening Authority appears to have only three options: (1) dismiss any or all of the charges, (2) dismiss any or all of the specifications, or (3) refer any or all of the charges and the specifications to a military commission.[161] Second, cases are referred to military commission by either the Secretary of Defense or the Convening Authority for Military Commissions.[162] The Convening Authority falls under the DOD.[163] The Convening Authority "reviews and approves charges against persons determined to be alien unlawful enemy combatants, . . . appoints military commissions members, and reviews military commissions' verdicts and sentences."[164]

Next, there is no statutory right to a speedy trial in the Military Commissions Act of 2006.[165] Despite the lack of a statutory speedy trial right, Rule for Military Commission (RMC) 707 still provides some

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[158] *See generally* 10 U.S.C.S. §§ 948a–950w; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pts. II, III; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133.

[159] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Executive Summary.

[160] *See* 10 U.S.C.S. § 948b(d)(C); *cf.* UCMJ art. 32 (2008); MCM, *supra* note 118, R.C.M. 305.

[161] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 407(a).

[162] *See* 10 U.S.C.S. § 949h; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, para. 4-1.

[163] REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, para. 4-1; *see also* News Release, U.S. Dep't of Defense, Seasoned Judge Tapped to Head Detainee Trials (Feb. 7, 2007), http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10493 [hereinafter News Release, U.S. Dep't of Defense, Seasoned Judge Tapped].

[164] News Release, U.S. Dep't of Defense, Seasoned Judge Tapped, *supra* note 163; *see also* REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, para. 4-1b.

[165] *See* 10 U.S.C.S. § 948b(d)(A) (stating that Article 10 of the UCMJ along with any RCM related to speedy trial does not apply to military commissions); *cf.* UCMJ art. 10 (2008); MCM, *supra* note 118, R.C.M. 707. It appears that the Sixth Amendment speedy trial right does not apply to military commissions either. *See* U.S. CONST. amend. VI.

protections for an accused.[166] Subject to certain exceptions and continuances, an accused must be arraigned within thirty days of the service of charges, and the military commission must be assembled within 120 days of the service of charges.[167]

The rules for compulsory self-incrimination are also different. The Military Commissions Act specifically states that Article 31 (a), (b), and (d) of the UCMJ do not apply.[168] In general, these three provisions prohibit compulsory self-incrimination, require warnings, and exclude evidence obtained by compulsion.[169] In place of the Article 31 protections, the Military Commissions Act substitutes new rules. First, the Act states that "[n]o person shall be required to be a witness against himself at a proceeding of a military commission."[170] Next, the Act prohibits the use of statements obtained by torture.[171] Finally, the Act distinguishes between statements obtained by coercion before the passage of the Detainee Treatment Act of 2005 and statements obtained by similar means after that act was passed.[172] The Detainee Treatment Act of 2005 prohibits interrogation methods that amount to "cruel, inhuman, or degrading treatment," and statements obtained using these methods are not admissible.[173] However, statements obtained using these methods prior to the Detainee Treatment Act of 2005 may be admissible if the judge makes certain findings.[174]

As for rules of evidence, the Military Commissions Act of 2006 gives the Secretary of Defense, in consultation with the Attorney General, the authority to draft the rules of evidence for military

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[166] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 707.
[167] *See id.*; *cf.* UCMJ art. 10; MCM, *supra* note 118, R.C.M. 707.
[168] *See* 10 U.S.C.S. § 948b(d)(B).
[169] *See* UCMJ arts. 31 (a), (b), (d).
[170] 10 U.S.C.S. § 948r(a).
[171] *Id.* § 948r(b).
[172] *Id.* § 948r(c), (d).
[173] *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739–40 (codified as amended at 42 U.S.C. § 2000dd); 10 U.S.C.S. § 948r(d)). The Military Commissions Act also contains a provision prohibiting cruel, inhuman, or degrading treatment. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 6(c), 12 Stat. 2600, 2635 (codified as amended at 42 U.S.C.S. 2000dd-0 (LexisNexis 2008)). The *Manual for Military Commissions* incorporates these rules against self-incrimination in Rule 301 of the Military Commission Rules of Evidence. *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, MIL. COMM. R. EVID. 301.
[174] 10 U.S.C.S. § 948r(d) (outlining the findings that the judge needs to make in order to admit statements obtained by some manner of coercion prior to 30 December 2005).

commissions.[175] The Act, however, directs that certain provisions be a part of the evidentiary rules.[176] First, an accused must be permitted to present evidence, cross examine witnesses, and examine and respond to most of the evidence presented against him.[177] Further, the accused must be permitted to be present (unless excluded for cause) at all stages of the proceedings (except deliberations or voting), must receive the assistance of counsel, and must be permitted to represent himself at trial.[178]

The Military Commissions Act also permits the Secretary of Defense to adopt certain other evidentiary provisions, including a relaxed rule of admissibility for evidence, a rule allowing the introduction of evidence seized without a warrant, and a rule allowing the introduction of evidence obtained by coercion or compulsory self-incrimination.[179] In addition, the Military Commissions Act permits the introduction of hearsay that is not otherwise admissible according to the Federal Rules of Evidence (FREs) or the Military Rules of Evidence (MREs), subject to certain disclosure requirements, unless the defense can make a showing of unreliability or lack of probative value.[180] In the *Manual for Military Commissions*, the Secretary of Defense adopted nearly every one of these relaxed rules for military commissions authorized by Congress.[181]

Another major difference in the procedures for military commissions is the procedure for appellate review. Instead of using any of the service courts of criminal appeals, the Military Commissions Act established a new scheme for review of commission cases. Cases decided by military commission are first subject to review by the "Court of Military

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[175] 10 U.S.C.S. § 949a(a). In fact, the Secretary of Defense must consult with the Attorney General in crafting any procedural rules for the military commissions.
[176] *Id.* § 949a(b).
[177] *Id.* §§ 949a(b)(A), 948r(d). The accused is not permitted to view classified evidence. *See id.* § 949j(c).
[178] *Id.* §§ 948r(d), 948a(b)(B–D). *See generally* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 506, 701, 703, 804 (providing the procedural rules implementing these congressional mandates).
[179] *See* 10 U.S.C.S. § 949a(b)(2).
[180] *See id.* § 949a(b)(2)(D).
[181] The only "relaxed rule" that was not adopted explicitly in the current Rules for Military Commissions is 10 U.S.C.S. § 949a(b)(2)(B), authorizing the admission of evidence obtained without a warrant or other search authorization. *See id.* § 949a(b)(2)(B); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 101(a) ("(a) *Purpose.* These rules are intended to provide for the just determination of every proceeding relating to trial by military commissions. (b) *Construction*. These rules shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.").

Commission Review."[182] From there, detainees may appeal their cases to the U.S. Court of Appeals for the District of Columbia Circuit.[183] After the Court of Appeals for the District of Columbia Circuit has rendered a final judgment, the U.S. Supreme Court may review this decision by writ of certiorari.[184] This differs significantly from courts-martial, which are appealed first to a service court of criminal appeals, like the Army Court of Criminal Appeals (ACCA), then to the Court of Appeals for the Armed Forces (CAAF), and then, by writ of certiorari, to the Supreme Court.[185]

The Military Commissions Act of 2006 allows military commissions to prosecute alien unlawful enemy combatants for crimes punishable under the Act that occurred "before, on, or after September 11th, 2001."[186] The procedural rules for military commissions are designed to "ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people."[187] Whether military commissions are available, and if so, whether they are the best choice for the judicial prosecution of post-capture misconduct, are questions that Part IV will seek to answer.

B. Prosecuting Post-Capture Offenses in Military Courts-Martial

In considering the issue of prosecuting post-capture misconduct in detention facilities, another option is the court-martial. For POWs who commit misconduct while in the hands of the United States, international

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[182] 10 U.S.C.S. § 950f(2)(D); *see also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 1201; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, paras. 25-1 & 25-2.

[183] 10 U.S.C.S. § 950g. *See also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 1205(a).

[184] 10 U.S.C.S. § 950g(d); 28 U.S.C. § 1257 (2000) (providing that a final judgment from the "highest court of a State" may be reviewed by the Supreme Court by writ of certiorari" and "the term 'highest court of a State' includes the District of Columbia Court of Appeals."); *see also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 1205(b).

[185] *See* UCMJ arts. 66, 67, 67a (2008); 28 U.S.C. § 1259 (2000); *see also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 101(a).

[186] 10 U.S.C.S. § 948d(a).

[187] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Executive Summary (quoting the operable language contained in Common Article 3).

law, the UCMJ, and AR 190-8 direct that they be tried by military court-martial.[188] It is an established system that has been refined through continual assessment by Congress, appellate courts, and the President.[189] Like any other court, however, there are jurisdictional requirements, as well as unique procedural rules, which must be considered when assessing its value as a tool for handling post-capture offenses by alien unlawful enemy combatants in U.S. detention facilities.

1. Personal Jurisdiction under the Uniform Code of Military Justice

Unlike the Military Commissions Act of 2006, the personal jurisdictional sweep of the court-martial is broad. Article 2 of the UCMJ provides the extensive list of individuals subject to the UCMJ.[190] There are three categories of interest to this discussion. The first category includes those who are "[p]risoners of war in the lawful custody of the armed forces" who are subject to the UCMJ under Article 2(a)(9).[191] The second category includes "lawful enemy combatants who violate the law of war," who are subject to the UCMJ under Article 2(a)(13).[192] The third category includes those who are "alien unlawful enemy combatants." Under current U.S. policy, those persons categorized as alien unlawful enemy combatants are neither "prisoners of war" nor "lawful enemy combatants,"[193] and are to be tried by military

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[188] *See* GC III, *supra* note 31, art. 83, 6 U.S.T., at 3382; UCMJ art 2(a)(9); AR 190-8, *supra* note 115, para. 3-7b.

[189] *See, e.g.*, H.R. REP. NO. 109-664, pt. 1, at 86 (2006) (dissenting view of Rep. McKinney) ("[Since World War II, military commissions have been] based legally and in form on the Military Rules of Evidence and the Manual for Courts Martial procedures that have developed over decades under the UCMJ and in military court decisions or civilian court appeals and reviews."); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (2005) (2005 Amendments to the Manual for Courts-Martial, United States).

[190] UCMJ art. 2.

[191] *Id.* art. 2(a)(9).

[192] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a)(1), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a)(13) (LexisNexis 2008)) (extending UCMJ jurisdiction over "Lawful enemy combatants . . . who violate the law of war.").

[193] *See* GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40; *see also* GC III COMMENTARY, *supra* note 42, at 51–65; DOD DIR. 2310.01E, *supra* note 33, para. E2.1.1; Memorandum, Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy, subject: Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006) [hereinafter Implementation of Administrative Review Procedures Memo]; Implementation of Combatant Status Review Tribunal Procedures Memo, *supra*

commission for their acts against the United States.[194] Historically, though, one reason for having POWs subject to the UCMJ is to subject them to trial by courts-martial for misconduct within the camp.[195]

Article 2(a)(12) contains another category of individuals subject to the UCMJ that may support an argument that alien unlawful enemy combatants are subject to the UCMJ for post-capture offenses.[196] This article provides jurisdiction over, subject to some exceptions, "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside of the United States."[197] The original intent of this section was to ensure that the armed forces had jurisdiction over foreign nationals who entered military property overseas and committed offenses on the property.[198] There are not any reported cases of this provision being used to court-martial civilians for misconduct on a military installation outside of the United States.[199] Nevertheless, the United States leases the forty-five square miles of land on which the Naval Base at Guantanamo Bay sits under a lease agreement signed in 1903 between the governments of the United States and Cuba.[200] Pursuant to a treaty signed in 1934, the lease continues as long as the United States does not

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note 98; Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134; Bybee Memo, *supra* note 85.

[194] *See* Military Commissions Act of 2006, 10 U.S.C.S. § 948b(a) (LexisNexis 2008); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2777–85, 2791 (2006); Military Order, *supra* note 25.

[195] *See* 1929 GPW, *supra* note 31, arts. 45, 63, & 64, 47 Stat. 2046, 2052, 2 Bevans at 948, 952; COLONEL FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 41 (2nd prtg. 1951) ("[Article 2(a)(9)] is consistent with articles 45 and 64 of the Geneva Convention on Prisoners of War . . . in that prisoners of war are subject to this code . . . .") (citations omitted).

[196] UCMJ art. 2(a)(12).

[197] *Id.* For brevity, the two exceptions were excluded from the quotation in the main text. Those two exceptions are (1) "Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law" and (2) "which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." *Id.* It appears that neither one of these exceptions would apply to detainees held at the U.S. Naval Base at Guantanamo Bay, Cuba.

[198] *See* H.R. REP. NO. 81-491, at 9 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (William S. Hein & Co. 2000) (1949).

[199] Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 134 (1995).

[200] *See* Rasul v. Bush, 542 U.S. 466, 480 (2004) (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T. S. No. 418).

abandon the base.[201] As the Supreme Court said in *Rasul v. Bush*, "the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."[202] From the plain language of the article, it appears that personal jurisdiction should extend over individuals, including detainees, who commit crimes on Guantanamo Bay.

Once it is determined that an individual is subject to the UCMJ, that individual is subject to trial by court-martial by operation of Article 17.[203] As an important corollary, Article 21 provides that several other courts may have concurrent jurisdiction, including military commissions.[204] Therefore, the UCMJ does not deprive any other court of jurisdiction that may properly have personal jurisdiction over an accused, including military commissions, just because an individual is subject to trial by court-martial.[205] Once personal jurisdiction attaches, however, the next inquiry is subject matter jurisdiction.

2. Subject Matter Jurisdiction under the Uniform Code of Military Justice

In order for a court-martial to have jurisdiction over a particular offense, the offense must be a crime under the UCMJ.[206] The range of offenses under the UCMJ is broad, covering offenses that are common law crimes, like murder, as well as offenses that strictly pertain to the military, like disrespect of a superior commissioned officer.[207] As applied to detainees, there are numerous crimes in the UCMJ that cover the range of misconduct that one might anticipate from a prisoner. For example, considering the attack on Louis Pepe in Manhattan, Mamdouh Salim could have been charged with, at a minimum, Aggravated Assault

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[201] *See id.* at 480 (citing Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat 1683, T.S. No. 866).
[202] *Id.* (quoting Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat 1683, T.S. No. 866) (internal quotations omitted).
[203] UCMJ art. 17(a) (2008) ("Each armed force has court-martial jurisdiction over all persons subject to this chapter.").
[204] *Id.*
[205] *Id.*
[206] *See* MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW 2 (1999). *But see* UCMJ art. 18 ("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.").
[207] *See* UCMJ arts. 92, 118.

under Article 128 and Conspiracy under Article 81.[208] Finding subject matter jurisdiction over detainee misconduct under the UCMJ is a rather simple task. The more difficult task, as outlined in Part II.C., is determining which offenses are worthy of judicial punishment as opposed to mere camp disciplinary measures.

3. Procedural Rules Unique to Military Courts-Martial

As stated in the Preamble to the *MCM,* "[t]he purpose of military law is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[209] Thus, courts-martial have procedures that differ from civilian trials or a military commission. While the differences are many, this section will highlight several that may impact a trial of a detainee.

The first significant procedural right guaranteed to an accused in the military justice system is the "pretrial investigation."[210] Article 32 of the UCMJ, as implemented in RCM 405, guarantees that every accused facing a general court-martial receives an independent investigation of the charges by an officer to ensure that the evidence supports the charges and that a general court-martial is an appropriate disposition of the offenses.[211] Once the Article 32 is complete, the investigating officer makes a non-binding recommendation to the command as to the disposition of the offenses.[212] As an additional right, the accused and his counsel are able to participate in the investigation, including calling and cross-examining witnesses.[213]

Second, Article 31 provides an accused broad protection against self-incrimination; indeed, its provisions informed the Supreme Court's landmark decision in *Miranda v. Arizona.*[214] No person may be compelled to incriminate himself or to answer any question which may

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[208] *See id.* arts. 81, 128(4).
[209] MCM, *supra* note 118, pt. I, ¶ 3.
[210] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[211] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[212] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[213] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[214] UCMJ art. 31; MCM, *supra* note 118, MIL. R. EVID. 304, 305; Miranda v. Arizona, 384 U.S. 436, 489 (1966).

tend to incriminate him.[215] Further, before any "official questioning," an accused must be advised of the nature of the offenses of which he is suspected, be advised that he does not have to make a statement, and be advised that any statement may be used against him.[216] Finally, Article 31 directs that no statement obtained in violation of the rule, or obtained through coercion, unlawful influence, or unlawful inducement, may be received into evidence against him in a trial by court-martial.[217]

Third, the MREs govern the admissibility of evidence at courts-martial. These track the FREs very closely. In fact, changes to the FREs apply to the MREs unless affirmative action is taken to preclude the automatic adoption of a rule.[218] Among other things, these rules are specifically designed to "filter out evidence . . . that may cause a panel to improperly convict . . . [and] evidence that is not sufficiently trustworthy."[219] One recent Supreme Court decision that has significantly affected all American trials—including courts-martial—is the recent Supreme Court ruling in *Crawford v. Washington*.[220] The Court's interpretation of the Sixth Amendment's Confrontation Clause, as well as the rest of the hearsay rules contained in the MREs, would play a significant role in a trial of a detainee by military court-martial for post-capture offenses.[221]

Two final differences in the court-martial are the referral process and the appellate process. First, cases are "referred" to a court-martial by an officer appointed as the "convening authority."[222] Individuals become convening authorities either by their position, their level of command, or by special appointment.[223] Second, after cases are referred, completed at the trial level, and approved by the convening authority, cases may be appealed. They are appealed first to a service court of criminal appeals, like the ACCA or the Navy-Marine Corps Court of Criminal Appeals (N-MCCA).[224] Once the service court has rendered a final decision, cases

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[215] UCMJ art. 31(a).
[216] *Id.* art. 31(b).
[217] *Id.* art. 31(d).
[218] MCM, *supra* note 118, MIL. R. EVID. 1102(a) (2005).
[219] DAVIDSON, *supra* note 206, at 59.
[220] 541 U.S. 36 (2004).
[221] *See generally* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36 (2004); MCM, *supra* note 118, MIL. R. EVID. 801–807.
[222] MCM, *supra* note 118, R.C.M. 601(a).
[223] *See generally* UCMJ arts. 22–24 (2008) (outlining who may convene the various levels of courts-martial).
[224] *See* UCMJ art. 66; MCM, *supra* note 118, R.C.M. 1203.

may then be appealed to the CAAF.[225] After the CAAF has rendered a final decision, cases may then be appealed, via writ of certiorari, to the Supreme Court.[226] Although judges at the CAAF are civilians, cases never leave the military justice system until they are appealed to the Supreme Court.[227]

The court-martial is a tool that has been available to military commanders since the earliest days of our nation's military.[228] In general, the military justice system exists "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[229] It is an established system that, in many ways, provides a model of due process protections.[230] Whether the court-martial is available, and if available, whether it is the best choice of forum for the judicial prosecution of post-capture detainee misconduct, are questions that Part IV will seek to answer.

C. Prosecuting Post-Capture Offenses in U.S. Federal Courts

United States federal district court is the third and final forum for consideration in prosecuting post-capture misconduct in detention facilities. Several terror suspects, including Timothy McVeigh, Zacarias Moussaoui, and Mamdouh Mahmud Salim have been tried in U.S. federal district court recently, and many others have sought habeas relief there.[231] As long as jurisdiction exists, the criminal code and criminal procedures are well-defined and well-established.[232]

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[225] *See* UCMJ art. 67; MCM, *supra* note 118, R.C.M. 1204.
[226] *See* UCMJ art. 67a; 28 U.S.C. § 1259 (2000); MCM, *supra* note 118, R.C.M. 1205.
[227] *See generally* UCMJ arts. 141–145.
[228] *See* WINTHROP, *supra* note 38, at 47.
[229] MCM, *supra* note 118, Pt. I, ¶ 3.
[230] 152 CONG. REC. S10,381 (daily ed. Sept. 27, 2006) (Letter to Sen. Frist from the Association of the Bar of the City of New York).
[231] Hirschkorn, *supra* note 2; *The McVeigh Trial: After 28 Days of "Overwhelming Evidence," the Jury Speaks: Guilty*, CNN.COM, http://www.cnn.com/US/9706/17/mcveigh.overview/ (last visited Feb. 25, 2008); Phil Hirschkorn, *Jury Spares 9/11 Plotter Moussaoui*, CNN, May 3, 2006, http://www.cnn.com/2006/LAW/05/05/moussaou.verdict/index.html; Carol Rosenberg, *Funds Requested to Help Prosecute Accused Detainees*, MIAMI HERALD, Feb. 6, 2007, at A15 ("The Justice Department . . . has for nearly five years been fending off hundreds of habeas corpus petitions filed by Guantánamo captives in the federal courts.").
[232] *See* 18 U.S.C. §§ 2–6005 (2000); FED. R. CRIM. P. 1–60; FED. R. EVID. 101–1103.

1. Personal Jurisdiction for U.S. Federal Courts

All of the suspects detained in the War on Terror who are destined for long-term detention and trial by military commission are brought to Guantanamo Bay, Cuba.[233] Should the Government contemplate trying in U.S. federal district court an alien unlawful enemy combatant detainee for a serious offense committed while at Guantanamo Bay, the first question is whether there is personal jurisdiction over him.

There is no "common law criminal jurisdiction in the federal courts."[234] Federal courts "are created by Congress and they possess no jurisdiction but what is given them by the power that creates them."[235] In considering whether a federal court has jurisdiction over conduct that occurs outside of the United States, the critical question related to conduct at Guantanamo Bay is "whether the United States has the power to reach the conduct in question under traditional powers of international law."[236]

International law allows nations to prohibit and punish "conduct that, wholly or in substantial part, takes place within its territory."[237] This principle is called a "link of territoriality."[238] It extends the jurisdiction of the United States over foreign nationals, as long as the conduct occurs in an area that can properly be considered the territory of the United States.[239] There are several U.S. laws that proscribe conduct "within the special maritime and territorial jurisdiction of the United States."[240] Title

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[233] *See* Sergeant Sara Wood, *Guantanamo Still Important, Relevant, Official Says*, ARMED FORCES INFO. SERVICE, Jan. 10, 2007, http://www.defenselink.mil/News/NewsArticle.aspx?ID=2642; Rhem, *supra* note 16.

[234] *See* Gibson, *supra* note 199, at 134 (quoting Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812)).

[235] *Id.* at 135 (quoting Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812)) (internal quotations omitted).

[236] *Id.* (quoting United States v. Noriega, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990)).

[237] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

[238] *Id.* § 402 cmt. a.

[239] *See id.* ("Territoriality and nationality are discrete and independent bases of jurisdiction . . . ."); *see, e.g.*, United States v. Lee, 906 F.2d 117 (4th Cir. 1990) (Jamaican national prosecuted in U.S. federal court for sexually abusing a child at Guantanamo Bay, Cuba). This is, of course, subject to a principle of reasonableness under international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[240] *See* Gibson, *supra* note 199, at 135; 18 U.S.C. § 7 (2000); United States v. Erdos, 474 F.2d 157, 159 (4th Cir. 1973).

18 U.S.C. § 7 provides an extensive definition of this term of art.[241] If conduct occurs outside of the United States but "within the special maritime and territorial jurisdiction of the United States," federal courts will, in most cases, have jurisdiction over the conduct in question.

2. Criminal Code and Procedural Rules for U.S. Federal Courts

Once jurisdiction is established, prosecuting a detainee in federal court for post-capture misconduct simply involves the application of Title 18 of the U.S. Code.[242] The U.S. criminal code "cover[s] most common felonies such as assault, theft, robbery, murder, and manslaughter."[243] There are also several provisions that directly govern prison behavior, like possession of contraband, mutiny and riot, escape, and fleeing to avoid prosecution.[244]

Aside from the criminal code, U.S. criminal procedure, including both the Federal Rules of Criminal Procedure and the FREs, will apply in federal court.[245] Assistant United States Attorneys try the cases, although Judge Advocates may sometimes assist as Special Assistant U.S. Attorneys.[246] Further, should a public defender be necessary, he or she would be provided by the federal district court public defender program.[247] Finally, choice of venue is governed by 18 U.S.C. § 3238.[248] For cases arising out of Guantanamo Bay, Cuba, it is most likely that the charges would be filed in the District of Columbia.[249]

As long as jurisdiction exists and the conduct is proscribed by federal law, U.S. federal court offers a viable forum for the trial of criminal

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[241] 18 U.S.C. § 7.
[242] *Id.* §§ 2–6005.
[243] *See* Gibson, *supra* note 199, at 135.
[244] *See* 18 U.S.C. §§ 751, 1073, 1791, 1792.
[245] *See* FED. R. CRIM. P. 1(a); FED. R. EVID. 101.
[246] *See generally id.* FED. R. CRIM. P. 1(b)(1) (defining "Attorney for the government"); 28 U.S.C. § 543 (2000) (allowing for the appointment of Special Attorneys by the Attorney General); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-3 (16 Nov. 2005) (describing the appointments of Special Assistant U.S. Attorneys).
[247] *See generally* 18 U.S.C. § 3006A (2000) (directing district courts to establish a method for appointing public defenders).
[248] 18 U.S.C. § 3238 (2000).
[249] *See* 18 U.S.C. § 3238 (allowing a criminal information to be filed in the District of Columbia if the crime occurs outside of a district and the last known residence of the offender or joint offenders is not known).

suspects. The system is well-known and well-established, and many detainees have sought redress in U.S. federal court through habeas petitions.[250] Part IV will weigh the procedural and practical strengths and weaknesses of federal district court as a forum for the prosecution of post-capture detainee misconduct.

Over the course of its history, the American legal system has handled the prosecution of POWs, spies, war criminals, and terrorists.[251] Alien unlawful enemy combatants are a new category of individuals, and the selection of the best forum for prosecuting them for crimes that occur completely within the context of their detention at Guantanamo Bay or another detention facility abroad presents a challenge. As there is no express law or policy governing post-capture misconduct by alien unlawful enemy combatants at Guantanamo Bay, the United States may be forced to select a forum for a trial should there be an instance of serious criminal misconduct in the detention facility.

IV. Selecting the Best Forum for the Prosecution of Post-Capture Misconduct

The preceding discussion demonstrates that no clear choice exists for an appropriate forum to try post-capture misconduct. International law suggests that the court-martial is the most appropriate forum; current U.S. policy suggests that the military commission is the most appropriate forum; and the trial of Mamdouh Mahmud Salim suggests that federal district court may be the most appropriate forum.[252] In selecting the best forum for trying this type of criminal misconduct, there are four basic criteria to consider. The first is personal jurisdiction. Without personal jurisdiction over an individual, the forum simply cannot hear the case. The next consideration is subject matter jurisdiction over the offense. There is a different slate of offenses available for each potential forum for trial. Third, there are practical issues that must factor into the decision, including the ease of charging, the location of the trial, and the availability of the parties. Finally, there are policy issues that surround each forum, including the current U.S. detainee policy and the

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[250] *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 470 (2004).
[251] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Ex Parte* Quirin, 317 U.S. 1 (1942); Hirschkorn, *supra* note 231.
[252] *See supra* Part II.A; Military Order, *supra* note 25; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Hirschkorn, *supra* note 2.

pragmatism of certain actions considering the U.S. position in the world community. This part will analyze each of the three available forums using these four criteria to assess their potential as a forum for prosecuting alien unlawful enemy combatants for post-capture misconduct, and conclude with a recommendation for those confronted with this issue.

A. Trial of Post-Capture Misconduct by Military Commission

Under current U.S. policy, alien unlawful enemy combatants will be tried by military commission for the crimes that led to their capture, specifically, those terrorist acts or other violations of the law of war for which they were detained.[253] The Military Order of November 13, 2001 states, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ."[254] After the Supreme Court decision in *Hamdan*, Congress overhauled the military commissions system with the Military Commissions Act of 2006.[255] The DOD has implemented this legislation with the *Manual for Military Commissions* and the *Regulation for Trial by Military Commissions*.[256] With nearly constant review and change, trying these individuals by military commission has proven arduous. More than six years have passed since the September 11th terrorist attacks and the Military Order of November 13, 2001, and only one case has proceeded to a conviction.[257]

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[253] *See* 10 U.S.C.S. § 948b(a) (LexisNexis 2008).
[254] *See* Military Order, *supra* note 25.
[255] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.
[256] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pmbl.; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133.
[257] This is the David Hicks case that concluded in March 2007. In return for a favorable pretrial agreement, David Hicks pled guilty to one charge. *See* News Release, U.S. Dep't of Defense, *Detainee Convicted of Terrorism Charge at Guantanamo Trial* (Mar. 30, 2007), http://www.defenselink.mil/releases/release.aspx?releaseid=10678 [hereinafter Press Release, U.S. Dep't of Defense, Detainee Convicted]; Rosenberg, *supra* note 23; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2761 (2006); Carol D. Leonnig & Julie Tate, *Some at Guantanamo Mark 5 Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A01; Desiree N. Williams, *Guantanamo Prosecutor Expects New Charges Against Detainees by February*, JURIST, Jan. 6, 2007, http://jurist.law.pitt.edu/paperchase/2007/01/guantanamo-prosecutor-expects-new.php; Amnesty Int'l, Close Guantanamo: Guantanamo in Numbers (Dec. 2006), http://web.amnesty.org/library/Index/ENGAMR511862006?open&of=ENG-381 [herein after Amnesty Int'l, Guantanamo in Numbers] (on file with author).

For the trial of post-capture offenses, the viability of the military commission, as established under the Military Commission Act and implemented by the *Manual for Military Commissions*, depends first on whether the individual is subject to trial by military commission in the first place. The only individuals subject to trial by military commission are "alien unlawful enemy combatants."[258] A finding that an individual is an unlawful enemy combatant by a Combatant Status Review Tribunal, or similar competent authority, is dispositive for jurisdictional purposes.[259] If an individual is deemed to be a lawful enemy combatant, the military commission lacks jurisdiction and any offenses would be tried by court-martial.[260] If an individual is deemed to be a POW, the military commission lacks jurisdiction and any offenses would also be tried by court-martial.[261] If they are not aliens, but are U.S. citizens, the military commission lacks jurisdiction and any offenses would be tried in federal court.[262] Alien unlawful enemy combatants are the only persons that may be tried by a military commission.[263]

If the accused is an alien unlawful enemy combatant, personal jurisdiction attaches. The next question is whether the post-capture offense is a crime that may be tried by military commission. The Military Commissions Act of 2006 specifies the offenses for which an accused may be tried by military commission and the *Manual for Military Commissions* provides the elements for those offenses.[264] The offenses must be enumerated in the Act or must otherwise violate the law of war.[265] These are the only offenses that may be tried by military

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[258] *See* 10 U.S.C.S. §§ 948c, 948d(a).

[259] *See* 10 U.S.C.S. §§ 948d(a), (c); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 202(b); DOD DIR. 2310.01E, *supra* note 33, at 9. Unfortunately, many CSRTs simply categorized detainees as "enemy combatants" rather than "unlawful enemy combatants." *See* United States v. Khadr, No. 07-001 (U.S. Ct. Mil. Comm. Rev. Sep. 24, 2007).

[260] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4, 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)).

[261] *See* UCMJ art. 2(a)(9) (2008).

[262] *See* 10 U.S.C.S. §§ 948a, 948c (defining "alien," "unlawful enemy combatant," and specifying those persons subject to trial by military commissions); United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); Gibson, *supra* note 199, at 135.

[263] *See* 10 U.S.C. S. § 948c.

[264] *Id.* § 950v; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV.

[265] 10 U.S.C.S. §§ 948b, 948d(a); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006) ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.").

commission.[266] Furthermore, there are no provisions similar to Article 134 of the UCMJ that are intended to address those offenses that are prejudicial to good order and discipline.[267]

The next relevant inquiry is whether the crimes specified in the Military Commissions Act are intended to address only pre-capture law of war violations, or whether the crimes may include certain offenses committed post-capture. There are a few offenses that address "post-capture" misconduct, namely contempt, obstruction of justice, and perjury.[268] These three crimes, however, are in a separate section from the other substantive crimes, and are distinctly related to the investigation and trial of pre-capture offenses.[269] Aside from these three offenses, the rest seem to address terrorism or battlefield-type law of war violations.[270]

The *Manual for Military Commissions* provides the elements of these offenses and appears to answer the question of which offenses may be tried.[271] Aside from conspiracy, every offense listed in paragraph 950v of the Military Commissions Act contains an element that the conduct at issue "took place in the context of and was associated with armed conflict."[272] The term "armed conflict" is not defined anywhere in the Military Commissions Act of 2006 or the *Manual for Military Commissions*.[273] The best analogy for "armed conflict" appears to be the

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[266] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 203.
[267] *See* 10 U.S.C.S. §§ 950p–w; *cf.* UCMJ art. 134 (2008) ("Though not specifically mentioned . . . , all disorders and neglects to the prejudice of good order and discipline . . . shall be taken cognizance of by a general, special, or summary court-martial, . . . and shall be punished at the discretion of that court.").
[268] 10 U.S.C.S. § 950w.
[269] *See id.* ("A military commission . . . may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, and obstruction of justice related to military commissions under this chapter."); *cf.* 10 U.S.C.S. § 950v (demonstrating that contempt, perjury, and obstruction of justice are in a separate section from the other offenses in the Military Commissions Act).
[270] *See* 10 U.S.C.S. § 950v(b) (providing the list of substantive offenses under the Military Commissions Act).
[271] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.
[272] *See id.*
[273] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25.

type of conflict contemplated in Common Articles 2 and 3 of the 1949 Geneva Convention.[274]

This element has two prongs. The first prong is that the offense took place "in the context of . . . armed conflict." [275] Even using Common Articles 2 and 3, determining whether a state of "armed conflict" exists at any given point may be difficult due to the nature of the current War on Terror.[276] Fortunately, the Supreme Court simplified this task in two recent detainee cases. First, in *United States v. Hamdi*, the Supreme Court recognized the "unconventional nature" of the conflict in the War on Terror and held that "[t]he United States may detain, for the duration of . . . hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States."[277] The Court further held that as long as "United States troops are still involved in active combat in Afghanistan, . . . detentions are part of the exercise of necessary and appropriate force, and are therefore authorized by the [Authorization for the Use of Military Force]."[278] Under the Court's reasoning, armed conflict continues as long as "active combat operations . . . are ongoing in Afghanistan," and detentions may continue as long as hostilities continue.[279] Second, in 2006, the Supreme Court held in *United States v. Hamdan* that Common Article 3 applies in the current conflict with al Qaeda.[280]

Even if it is clear that a state of armed conflict exists, there is still the second prong. Crimes with this element must be "associated with armed conflict."[281] As a general principle, Common Article 3 of the Geneva Conventions refers to those in detention as "hors de combat."[282] It is

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[274] *See, e.g.*, GC III, *supra* note 31, arts. 2 & 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (providing an example of Common Articles 2 and 3).
[275] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.
[276] *See, e.g.*, GC III, *supra* note 31, arts. 2 & 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (providing an example of Common Articles 2 and 3). *But see* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796 (2006) ([T]he scope of [Article 3] must be as wide as possible." (quoting GC III COMMENTARY, *supra* note 42, at 36 n.63)).
[277] United States v. Hamdi, 542 U.S. 507, 520 (2004) (internal quotations omitted).
[278] *Id.* at 521 (internal quotations omitted).
[279] *Id.* at 520–21.
[280] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793–97 (2006).
[281] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.
[282] GC III, *supra* note 31, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38. "Hors de combat" means "out of combat." *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 27 (Aug. 2006) [hereinafter OPERATIONAL LAW HANDBOOK].

commonly accepted, however, that a person who is out of the fight may, by their actions, place themselves back into action.[283] Whether a detainee has placed himself back into the "armed conflict" by committing a violent crime against a guard or another detainee will vary with each case. Consider the following statements from detainees at Guantanamo Bay:

> A detainee who has assaulted GTMO guards on numerous occasions and crafted a weapon in his cell stated that he can either go back home and kill as many Americans as he possibly can, or he can leave [Guantanamo Bay] in a box; either way it's the same to him. . . . [Another detainee stated] "I will arrange for the kidnapping and execution of [U.S.] citizens living in Saudi Arabia. . . . U.S. citizens will be kidnapped, held, and executed. They will have their heads cut off."[284]

These statements indicate that these detainees intend to continue hostilities to the extent they are able. But consider two other statements:

> [One detainee stated,] "Americans are very kind people . . . If people say that there is mistreatment in Cuba with the detainees, those type speaking are wrong, they treat us like a Muslim, not a detainee.' . . . [Another detainee stated, 'These people take good care of me. . . . The guards and everyone else is fine."[285]

These two passages demonstrate that the subjective view of the detainees as to whether armed conflict exists can be vastly different.[286] Whether conduct while in detention meets the element of "in the context of armed conflict" is a question of fact and will almost certainly vary with each case.

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[283] *Cf.* GC III COMMENTARY, *supra* note 42, at 39 (describing those who have laid down their arms) ("The important thing is that the man in question will be taking no further part in the fighting"); OPERATIONAL LAW HANDBOOK, *supra* note 282, at 27 ("[M]ost agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.").

[284] JTF-GTMO Information on Detainees, *supra* note 1, at 5.

[285] *Id.*

[286] With no caselaw on this subject, it remains to be seen whether this element is a subjective one, an objective one, or has both subjective and objective components.

Based on these two prongs, if the conduct occurs while active hostilities are continuing in the War on Terror and is an effort to continue hostilities, then it appears that the conduct will likely meet the "armed conflict" element.[287] As one example, Mohammed Mansour Jabarah's hoarding of weapons and identification of targets while held in a Fort Dix facility were determined to be a clear effort to continue hostilities against U.S. officials.[288] More difficulty arises in addressing a murder in the course of an escape attempt, or a murder of a fellow detainee. Based on the facts, it may not be clear that the crimes are "associated with armed conflict," and there may be cases where it may be impossible to prove that element beyond a reasonable doubt. [289]

The next issue with subject matter jurisdiction is the nature of the charges subject to trial by military commission. In considering crimes within detention facilities, there appear to be definite limits to the substantive offenses enumerated under the Military Commissions Act.[290] While crimes like murder in violation of the law of war, intentionally causing serious bodily injury, rape, and taking hostages are available in the Act, others, like rioting and escape, are not.[291] This, however, may not be a serious issue. Considering the effort in convening a military commission, the level of appellate scrutiny, and the potential political ramifications for the United States on a national and global scale, perhaps it is prudent that only those crimes that are truly *malum in se* be tried by judicial means.[292] Minor disciplinary infractions and nonviolent escape attempts can be handled easily through the established camp disciplinary measures.[293] More serious post-capture crimes, like

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[287] *See, e.g.*, MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.

[288] White & Richburg, *supra* note 21 (According to federal prosecutors, Mohammed Mansour Jabarah's writings "make clear that [he] had secretly disavowed cooperation and was affirmatively planning further jihad operations, including in all likelihood the murder of government officials in some sort of suicide operations.").

[289] *See id.*; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21; *see also* Military Commissions Act of 2006 10 U.S.C.S. § 949l (LexisNexis 2008) (providing an instruction to the commission that offenses must be proven beyond a reasonable doubt).

[290] *See* 10 U.S.C.S. §§ 950p–w.

[291] *See id.*

[292] *Malum in se* means "[a] crime or an act that is inherently immoral, such as murder, arson, or rape." BLACK'S LAW DICTIONARY, *supra* note 146, at 971. This is contrasted with *malum prohibitum*, or "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Id.*

[293] *See* Greenhill, *supra* note 15, at 12 ("If you break a camp rule or fail to follow the guard's instructions, you becomes a 'noncompliant' detainee, in which case you lose what are considered comfort items . . . ."); AR 190-8, *supra* note 115, para. 3-7c (outlining disciplinary measures available to camp commanders). Withdrawal of

aggravated assault, murder, or rape, are available under the Military Commissions Act, as long as the evidence satisfies the "armed conflict" element.[294]

As long as jurisdiction exists over the detainee and the offense, there are several practical benefits to trying detainees for post-capture misconduct in a military commission. First, as stated earlier, it is clear that under the current U.S. policy, alien unlawful enemy combatants are to be tried by military commission.[295] Second, the post-capture offenses can be tried, in most cases, at the same time as the pre-capture offenses.[296] Third, as outlined in Part III.A, the procedural rules that govern trial by military commission are more relaxed than those that govern trial by court-martial or trial in federal court, while still endeavoring to ensure a fair trial.[297] Fourth, as of now, the military commissions will convene at Guantanamo Bay, making it simple to ensure the presence of the accused.[298] Lastly, the crimes contemplated here would have occurred at the detention facility at Guantanamo Bay, making it easy to obtain the presence of the guards and other detainees who are witnesses, as well as most of the other evidence in the case.

There are, however, at least two practical drawbacks to trying post-capture offenses by military commission. As noted already, only one commission has made it to a verdict.[299] In prosecuting post-capture offenses, it seems very likely that the evidence will be present, the crimes

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privileges is an authorized punishment for a breach of camp discipline, but withdrawal of rights is not. *See* GC III, *supra* note 31, arts. 88, 90, 6 U.S.T. at 3384–86, 75 U.N.T.S. at 202–04.

[294] *See* 10 U.S.C.S. §§ 950p–w; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Part IV, at 3–21.

[295] *See* 10 U.S.C.S. §§ 948b, 948c; Military Order, *supra* note 25.

[296] However, not all detainees will be tried by military commission. It appears that only about one-quarter of those detained will face trial. *See* Jim Garamone, *Bush Says Military Commissions Act Will Bring Justice*, ARMED FORCES INFO. SERV., Oct. 17, 2006, http://www.defenselink.mil/news/newsarticle.aspx? id=1633 (stating that only about seventy-five detainees will face trial by military commission); *see also* Carol Rosenberg, Pentagon Still Plans 80 Trials at Guantanamo, MIAMI HERALD, Nov. 14, 2007, *available at* https://www.us.army.mil/suite/earlybird/Nov2007/e20071114561200.html (stating that as of November 2007, only eighty of the 305 detainees will likely face trial for war crimes).

[297] *See* 10 U.S.C.S. § 949a.

[298] Kathleen T. Rhem, *Military Commissions Proceedings to Resume This Week at Guantanamo Bay*, ARMED FORCES INFO. SERV., Jan. 9, 2006, http://www.defenselin.mil/news/newsarticle.aspx?id=14655; Rosenberg, *supra* note 23.

[299] *See* Press Release, U.S. Dep't of Defense, Detainee Convicted, *supra* note 257.

will be apparent, and the need to try the individual for the offenses in a speedy manner will be paramount. The deterrence impact of the trial and punishment of a serious crime will be lessened as the time between the offense and the trial increases.[300] Trying post-capture offenses by military commission may simply take too long to be an effective tool for protecting the good order and discipline in the camps.

The other practical drawback is the nature of the convening authority and the prosecutors for the military commissions. Charges are normally sworn by an official in the Office of the Chief Prosecutor of the Office of Military Commissions.[301] All of the evidence must go to the Convening Authority at the DOD Office of Military Commissions for referral to military commission.[302] This swearing and referral process may take time and will have national-level implications.[303] As a consequence of the significant separation between the facility and those responsible for convening the military commissions, it is foreseeable that those in command of the facility will lack any measure of real control over whether a case of post-capture misconduct goes before a military commission. It is also foreseeable that, on any particular case, the views of the chief prosecutor, the Convening Authority (considering the political and national views of the case), and the commander of the facility (considering the impact of the case on the good order of the facility and morale of the guards) may be divergent.

While these practical drawbacks are important, the policy issues generate the most significant concern with trying post-capture misconduct by military commission. Trying detainees by military commission for terrorist acts or other violations of the law of war has

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[300] Alan M. Dershowitz, Background Paper, *in* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 69, 72 (1976) ("The severity of the penalty may be less important than such factors as the certainty and promptness of its infliction on all who commit the crime . . . ."). One may question, however, the deterrence value of certain punishments considering the indefinite nature of detention at Guantanamo Bay.

[301] REGULATION FOR MILITARY COMMISSION, *supra* note 134, paras. 4-1, 4-3.

[302] *See* 10 U.S.C.S. § 948h; REGULATION FOR MILITARY COMMISSION, *supra* note 134, paras. 4-1 & 4-3; *see also* News Release, U.S. Dep't of Defense, Seasoned Judge Tapped, *supra* note 164; U.S. Dep't of Defense, Susan J. Crawford, Convening Authority for Military Commissions: Biography, http://www.defenselink.mil/news/d20070207crawford.pdf (last visited Feb. 7, 2008).

[303] The time factor may be only a minor issue, as the Office of the Chief Prosecutor of the Office of Military Commissions is also located at the Department of Defense in Washington, D.C.

proven time-consuming and difficult. On a national level, the procedures have faced intense scrutiny and revision.[304] The U.S. detainee policy has also received criticism on a global level.[305] Additionally, pre-capture offenses often require proof that is difficult to obtain. But post-capture and pre-capture offenses are vastly different. Punishing serious post-capture crimes committed in a U.S. detention facility should not be overly controversial and the crimes should not be very difficult to prove. To maintain safety and discipline in the facility, it is essential that the facility commanders have the ability to address those cases of serious criminal misconduct that occur within the facility. Using the controversial military commission system and combining post-capture misconduct with pre-capture misconduct, however, may cause some to question the legitimacy of the prosecution of the post-capture misconduct by military commission, even though it may not be otherwise challenged or criticized if tried in a court-martial or a federal district court. Additionally, trying the pre-capture offenses with the post-capture offenses may unduly delay and complicate what would otherwise be relatively straightforward trial.

In conclusion, the only individuals who may be tried by military commission are alien unlawful enemy combatants, and the only crimes that may be tried are those in the Military Commissions Act or acts that are crimes under the law of war. Offenses listed in the Military Commissions Act are subject to the requirement that the offenses occur "in the context of and [be] associated with armed conflict."[306] This will

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[304] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786–98 (2006) (analyzing and criticizing the procedures for the military commissions established in Military Commission Order No. 1, *supra* note 130); *Recorded Version: Statement by Major General Scott C. Black Before the Armed Services Comm. of the U.S. H. Rep.*, 109th Cong. 1 (2006) ("Current military commission procedures reflect a good start, but we can make the system better.") (addressing the Supreme Court decision in *Hamdan*, 126 S. Ct. at 2749, and the need to amend the military commission procedures created in Military Commission Order No. 1, *supra* note 130).

[305] *See* Press Release, United Nations, UN Expert On Human Rights and Counter Terrorism Concerned That Military Commissions Act is Now Law in United States (Oct. 27, 2006), http://www.unhchr.ch/hurrican.nsf/view01/13A2242628618D12C12572140030A8D9?opendocument [hereinafter United Nations Press Release] (on file with author) ("[T]he [Military Commissions Act of 2006] contains a number of provisions that are incompatible with the international obligations of the United States under human rights law and humanitarian law."); Amnesty Int'l, Guantánamo's Military Commissions, *supra* note 257 ("On 17 October 2006 President Bush signed the Military Commissions Act, which codifies in US law a substandard and discriminatory system of justice for those held in Guantánamo Bay, Afghanistan, and elsewhere.").

[306] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.

require a fact-specific determination in each case that may sometimes prove problematic. Further, while there are some practical benefits with trying these offenses by military commission, there are also issues with commingling pre-capture and post-capture offenses that may compromise the legitimacy of the post-capture charges. With these caveats, it seems that the military commission offers a viable forum for prosecuting certain categories of post-capture misconduct.

B. Trial of Post-Capture Misconduct by Court-Martial

The UCMJ, U.S. policy, and international law governing the treatment of POWs provide that the court-martial is the legal mechanism for trying enemy POWs and lawful enemy combatants.[307] For alien unlawful enemy combatants, though, the law is less clear. Whether an alien unlawful enemy combatant is subject to trial by court-martial for post-capture offenses depends on both the personal jurisdiction portion and the substantive offense portions of the UCMJ. Finally, there are other significant practical and policy issues that impact the decision to prosecute post-capture misconduct by court-martial.

First, for POWs, Article 63 of the 1929 Convention directed that judicial sanctions be imposed "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[308] Article 102 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War added significant procedural safeguards to Article 63 of the 1929 Convention.[309] The Geneva Conventions also established a definite preference for the trial of POWs by military court, rather than a civilian court.[310]

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[307] *See* UCMJ art. 2(a)(9) (2008); Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)) (amending Article 2(a) to include "lawful enemy combatants . . . who violate the law of war" in the list of persons subject to the UCMJ); *see also supra* Parts II.A, III.B.1..

[308] 1929 GPW, *supra* note 31, art. 63, 47 Stat. at 2052, 2 Bevans at 952.

[309] GC III, *supra* note 31, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[310] GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382–84, 75 U.N.T.S. at 200–02; MacDonnell, *supra* note 128, at 31. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* GC IV, *supra* note 63, arts. 66, 117, 6 U.S.T. at 3382–84, 75 U.N.T.S. at 328–330, 366; GC IV COMMENTARY, *supra* note 63, at 339–41, 476–77. However, as stated earlier, the

Military courts typically try violations of the military laws and regulations, and have expertise in handling military-specific offenses.[311] Article 2(a)(9) of the UCMJ implements these principles of international law, stating that "prisoners of war in the custody of the armed forces" are subject to UCMJ jurisdiction and may be tried by court-martial.[312] Army Regulation 190-8 also implements this provision.[313] Paragraph 3-7b of AR 190-8 states, "Judicial proceedings against [enemy POWs] . . . will be by courts-martial or by civil courts"[314] and the Military Commissions Act provides for court-martial jurisdiction over "lawful enemy combatants . . . who violate the law of war."[315]

Whether alien unlawful enemy combatants are subject to trial by court-martial remains an open question. Unlike POWs and lawful enemy combatants, alien unlawful enemy combatants are not mentioned at all in Article 2 of the UCMJ.[316] By a plain reading of the statute, it appears that alien unlawful enemy combatants have been deliberately excluded from court-martial jurisdiction. This is supported by the fact that the Military Order of November 13, 2001 specifically directs that those detained pursuant to the order "be tried by military commission for *any and all offenses* triable by military commission."[317] There is no express exclusion for post-capture offenses in either the Military Commissions

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Bush Administration has not applied this convention to detainees in the War on Terror. *See, e.g.*, Bybee Memo, *supra* note 85 (applying only GC III and only collaterally referencing GC IV); Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134 ("[N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party.").

[311] *See* GC III COMMENTARY, *supra* note 42, at 412.

[312] *See* UCMJ arts. (2)(a)(9), 17 (2008).

[313] *See* AR 190-8, *supra* note 115, para. 1-1.

[314] *See id.* para. 3-7b.

[315] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)) (amending Article 2(a) to include "lawful enemy combatants . . . who violate the law of war" in the list of persons subject to the UCMJ); *see also* UCMJ art. 17. One point that remains unclear is the scope of this jurisdiction. A plain reading of the statute indicates that lawful enemy combatants are subject to court-martial jurisdiction only if they violate the law of war. However, a more reasonable reading of this provision is that detained lawful enemy combatants who commit offenses in detention are subject to trial by court-martial regardless of whether the offenses in the facility constitute a technical law of war violation.

[316] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)); UCMJ art. 2(a)(9).

[317] Military Order, *supra* note 25 (emphasis added).

Act or the *Manual for Military Commissions*.[318] Section 948d of the Military Commissions Act states that "[a] military commission . . . shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant."[319] This section also states, "Military commissions . . . shall not have jurisdiction over lawful enemy combatants."[320] Finally, while Article 21 of the UCMJ states that court-martial jurisdiction is not exclusive, the Military Commissions Act contains no similar provision.[321]

Together, these provisions imply that military commissions are the exclusive forum for the trial of alien unlawful enemy combatants, regardless of whether the offense is pre-capture or post-capture, as long as the offense is one of those enumerated under the Act.[322] Applying the canon of statutory construction *expressio unius est exclusio alterius*, military commissions are the exclusive forum for the trial of alien unlawful enemy combatants.[323] By specifically providing for court-martial jurisdiction over lawful enemy combatants and not alien unlawful enemy combatants, it appears that Congress excluded alien unlawful enemy combatants from court-martial jurisdiction.

Thus, applying Articles 2(a)(9) and 2(a)(13) of the UCMJ, §§ 948c and 948d of the Military Commissions Act, and the Military Order of November 13, 2001, it appears that courts-martial lack personal jurisdiction over alien unlawful enemy combatants.[324] However, that exclusion is not an express one, leaving a tenuous argument that, should no other forum exist, a court-martial may hear the case.[325] Neither the

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[318] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25.

[319] Military Commissions Act of 2006, 10 U.S.C.S. § 948d(a) (LexisNexis 2008); UCMJ art. 2(a)(9).

[320] 10 U.S.C.S. § 948d(b); UCMJ art. 2(a)(9).

[321] UCMJ art. 21; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

[322] *See* 10 U.S.C.S. § 948d.

[323] *Expressio unius est exclusio alterius* is a canon of statutory construction meaning that "to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY, *supra* note 146, at 602.

[324] UCMJ arts. 2(a)(9); 10 U.S.C.S. §§ 948c, 948d; sec. 4(a)(1), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)); Military Order, *supra* note 25.

[325] *See generally* UCMJ art. 2; 10 U.S.C.S § 950v.

UCMJ nor the Military Commissions Act specifically divest alien unlawful enemy combatants of court-martial jurisdiction.[326] Also, the Military Commissions Act appears to focus on pre-capture offenses that constitute war crimes or other violations of the law of war.[327] As such, there is a tenuous argument that, should no other forum exist, a court-martial may hear the case. Advancing the argument one step further, as discussed in Part III.B., Article 2 has one paragraph that offers a potential jurisdictional basis for the trial of alien unlawful enemy combatants. Article 2(a)(12) provides for UCMJ jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside of the United States."[328] The original intent of this section was to ensure that the armed forces had jurisdiction over foreign nationals who entered military property overseas, and committed offenses on the property.[329] Although, there is not a single reported case of this authority being used,[330] this provision appears to extend personal jurisdiction over foreign persons present on Guantanamo Bay. While the arguments outlined in the previous paragraph strongly suggest that the military commission is the exclusive forum for the trial of alien unlawful enemy combatants, the plain language of Article 2(a)(12) seems to provide for court-martial jurisdiction over alien unlawful enemy combatants for their post-capture offenses committed on the installation, especially if a another forum lacks jurisdiction over the case.

The caselaw regarding detainee habeas corpus rights further supports the notion that Article 2(a)(12) should provide for jurisdiction over post-capture offenses on Guantanamo Bay. As Supreme Court Justice Anthony Kennedy said in his concurring opinion in *Rasul v. Bush*, "Guantanamo Bay is in every practical respect a United States

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[326] *See generally* UCMJ art. 2; 10 U.S.C.S § 948c.
[327] *See* discussion *supra* Part III.A.2.
[328] UCMJ art. 2(a)(12). For brevity, the two exceptions were excluded from the quotation in the main text. Those two exceptions are: (1) "Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law" and (2) "which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." *Id.* It appears that neither one of these exceptions would apply to detainees held at the U.S. Naval Base at Guantanamo Bay, Cuba.
[329] *See* H.R. REP. NO. 81-491, at 9 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (William S. Hein & Co, Inc. 2000) (1949); Gibson, *supra* note 199, at 134.
[330] Gibson, *supra* note 199, at 134.

territory."[331] As discussed in the next section, Section 7 of the Military Commissions Act of 2006 deprives any court of jurisdiction to receive a writ of habeas corpus on behalf of an alien detained as an enemy combatant at Guantanamo Bay.[332] However, the Supreme Court held in *Rasul* that the United States "exercises complete jurisdiction and control" over Guantanamo Bay, and therefore, "[the detainees] are entitled to invoke the federal courts' [habeas corpus] authority . . . ."[333] As aliens present on Guantanamo Bay could invoke their right to file writs of habeas corpus in federal court (before the passage of the Military Commissions Act of 2006), even if present there against their will, it would be logical that they would also be subject to court-martial for crimes committed on the military base under the plain language of Article 2(a)(12). As there is not a single reported case of this authority being exercised, this argument remains a theoretical one.[334]

From the foregoing, it appears that personal jurisdiction is the most significant roadblock for the trial of alien unlawful enemy combatants by court-martial. Article 2(a)(12), at this point, offers the most promise, although it is not immune from the risk of an unfavorable interpretation by a military judge or appellate court. Subject matter jurisdiction, though, is not an issue at all. The UCMJ provides numerous options for charging criminal misconduct in a detention facility. The punitive articles of the UCMJ include the major felony offenses, like murder, sexual assault, and aggravated assault.[335] These articles also cover misconduct specifically related to prisons, like rioting, escape, and "misconduct as a prisoner."[336] Finally, the UCMJ covers a wide range of offenses involving military discipline, including disrespect and failure to follow orders.[337] All in all, the UCMJ offers perhaps the best coverage of criminal misconduct in a military detention facility.

Provided that personal and subject matter jurisdiction exist, there are several practical advantages to trying post-capture misconduct by courts-martial. The first is that the military is experienced at trying courts-martial. The court-martial is the forum by which servicemembers are

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[331] Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).
[332] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)).
[333] *Rasul*, 542 U.S. at 480.
[334] Gibson, *supra* note 199, at 134.
[335] *See* UCMJ arts. 118, 120, 128.
[336] *See id.* arts. 95, 105, 116.
[337] *See id.* arts. 89–92.

prosecuted around the world nearly every day. It is recognized as a model of due process protections[338] and it has been continually refined through assessment by appellate courts, Congress, and the President.[339] In addition, as Guantanamo Bay is a military installation, courts-martial have been tried there and will likely continue to be tried there.[340] In stark contrast, military commissions have faced numerous challenges and have only reached a conviction in one case.[341] As courts-martial are a familiar system, cases are likely to move to trial much faster, even with such substantial due process requirements as the Article 32 investigation and the referral process.[342]

Furthermore, the issues that justify military commissions for pre-capture offenses do not exist for crimes that might occur in a detention facility. When proving an offense in a detention facility, it is very likely that there will be witnesses and perhaps even video surveillance evidence. Most witnesses who are guards or detainees will be readily available, and there should be little or no need for classified evidence, hearsay, or a statement obtained through any sort of intelligence-gathering mechanism.[343] Finally, transporting the accused to a trial by

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[338] *See, e.g.*, H.R. REP. NO. 109-664, pt. 1, at 86 (2006); 152 CONG. REC. S10,410 (daily ed. Sept. 28, 2006) (Letter from Air Force Judge Advocate General Major General Jack Rives to Sen. McCain).

[339] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a)(1), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)) (amending Article 2(a) to include "lawful enemy combatants . . . who violate the law of war" in the list of persons subject to the UCMJ); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (2005) (2005 Amendments to the Manual for Courts-Martial, United States).

[340] *See* e-mail from Major Michelle Hansen, Assistant Staff Judge Advocate, JTF-GTMO, to the author (Jan. 11, 2008, 07:22:00 EST) (on file with author) (stating that there were three Army and two Navy courts-martial tried on the Guantanamo Bay military installation in 2007); e-mail from Homan Barzmehri, Management Program Analyst, Office of the Clerk of Court, U.S. Army Court of Criminal Appeals, to the author (Jan. 11, 2008, 12:40:00 EST) (on file with author) (stating that there were two Army courts-martial tried on the Guantanamo Bay military installation in 2005 and two in 2003); *see also* United States v. Elmore, 56 M.J. 533 (N-M. Ct. Crim. App. 2001); United States v. Johnson, 1 M.J. 1104 (N.M.C.M.R. 1987); United States v. Suter, 16 C.M.R. 422 (N.M.B.R. 1954).

[341] Once again, this is the Hicks case, concluded in March 2007. *See* Press Release, U.S. Dep't of Defense, Detainee Convicted, *supra* note 257. For examples of criticism and challenge, see Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2791 (2006); Leonnig & Tate, *supra* note 257.

[342] *See* UCMJ art. 32 (2008); MCM, *supra* note 118, R.C.M. 405.

[343] *See Hamdan*, 126 S. Ct. at 2791; Military Order, *supra* note 25; 152 CONG. REC. H7533–35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); *Concerning the Supreme Court's Decision in* Hamdan v. Rumsfeld*: Hearing Before the H. Comm. on*

court-martial on the installation should not be any more of a challenge than transporting him to a trial by military commission.

As described earlier, there is also significant legal and historical precedent for trying military prisoners by court-martial. During World War II, U.S. forces convened 119 general courts-martial and forty-eight special courts-martial against 326 enemy POWs held in the United States, where the results ranged from acquittal to the death penalty.[344] In one example, five German POWs were tried and executed for the murder of another German POW at a POW camp in Oklahoma.[345] Both the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and AR 190-8 mandate trial by court-martial or civilian courts for offenses committed by POWs, civilian internees, and retained personnel.[346] As the United States has drawn harsh criticism for its use of military commissions,[347] providing detainees with the complete due process protections of the UCMJ in a trial for post-capture misconduct will build important goodwill with our coalition allies and other world organizations.[348]

Armed Services, 109th Cong. (Sept. 7, 2006) (statement of Steven G. Bradbury, Acting Assistant Att'y Gen. for the Office of Legal Counsel, U.S. Dep't of Justice), *available at* http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf.

[344] DAVIDSON, *supra* note 206, at 5.

[345] *Id.* For other examples, see Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA L. REV. 52, 58–59 (1946).

[346] *See* GC III, *supra* note 31, arts. 63, 84, 102, 6 U.S.T. at 3364–66, 3382–84, 3394, 75 U.N.T.S. at 182–84, 200–02, 212; AR 190-8, *supra* note 115, para. 3-7b. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* GC IV, *supra* note 63, arts. 66, 117, 6 U.S.T. at 3558–60, 3596, 75 U.N.T.S. at 328–330, 366; GC IV COMMENTARY, *supra* note 63, at 339–41, 476–77. However, for a number of reasons, the Bush Administration has not applied this convention to detainees in the War on Terror. *See, e.g.*, Bybee Memo, *supra* note 85 (applying only GC III and only collaterally referencing GC IV); Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134 ("[N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party.").

[347] *See, e.g.*, United Nations Press Release, *supra* note 305 ("[T]he [Military Commissions Act of 2006] contains a number of provisions that are incompatible with the international obligations of the United States under human rights law and humanitarian law."); Amnesty Int'l, Guantánamo's military commissions, *supra* note 257 ("On 17 October 2006 President Bush signed the Military Commissions Act, which codifies in US law a substandard and discriminatory system of justice for those held in Guantánamo Bay, Afghanistan, and elsewhere.")

[348] *See also* 152 CONG. REC. S10,256 (daily ed. Sept. 27, 2006) (statement of Sen. Leahy) ("Talk to anyone who travels around the world anywhere, even among some of our closes

There are still drawbacks to using courts-martial. First, as pre-capture offenses would be tried by military commission, any post-capture offenses would be tried separately from the pre-capture offenses. This would likely add an additional burden on the judicial system. This may also force a need for separate counsel for each trial, or at least force some counsel to prepare for two separate proceedings with somewhat different rules. Second, as a policy matter, trying alien unlawful enemy combatants by court-martial for post-capture offenses may weaken the arguments for trying them by military commission for pre-capture misconduct. The Executive Branch has proffered that the difficulties in proof for prosecuting alien unlawful enemy combatants for their law of war violations necessitate trial by military commissions.[349] The difficulties in producing witnesses, the classified nature of certain evidence, and the problems in overcoming certain hearsay issues do not make a court-martial a viable alternative for the pre-capture offenses.[350] But if alien unlawful enemy combatants were tried for *post-capture* misconduct in a court-martial, it may intensify the clamor for *all* offenses to be tried by courts-martial.[351] While a trial for an offense in a detention facility and a trial for a law of war violation on the battlefield are completely different, trying a detainee by court-martial for any offense

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allies, our best friends. We are asked, What are you doing? Have you lost your moral compass?"); 152 CONG. REC. H7554 (statement of Rep. Jackson-Lee) ("[I]f American personnel blithely toss aside our international treaty obligations to uphold standards in the detention and interrogation of wartime prisoners, America will alienate our long-time allies who are crucial partners in the fight against terrorism."); 152 CONG. REC. H7554 (statement of Rep. Cardin) ("[The Military Commissions Act of 2006 . . . will make it harder to work with our allies to build an effective coalition to defeat terrorism.").

[349] *See, e.g.*, Military Order, *supra* note 25; 152 CONG. REC. H7533–35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2791 (2006); *Concerning the Supreme Court's Decision in* Hamdan v. Rumsfeld*: Hearing Before the H. Comm. on Armed Services*, 109th Cong. (Sept. 7, 2006) (statement of Steven G. Bradbury, Acting Assistant Att'y Gen. for the Office of Legal Counsel, U.S. Dep't of Justice), *available at* http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf; David S. Cloud & Sheryl Gay Stolberg, *White House Bill Proposes System to Try Detainees*, N.Y. TIMES, July 26, 2006, at A1 ("[C]ivilian lawyers from the Departments of Defense and Justice . . . had said that they believed the military code was inappropriate for prosecuting terror suspects . . . .").

[350] *See* Military Order, *supra* note 25; 152 CONG. REC. H7533–35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); *Hamdan*, 126 S. Ct. at 2791.

[351] *See, e.g.*, Cloud & Stolberg, *supra* note 349 ("[T]he administration was circulating the measure with the intention of winning over Republican senators who have led the calls for using court-martial procedures . . . .").

may cause critics, and perhaps the courts, to question the need for military commissions.[352]

From the foregoing, the benefits to trying alien unlawful enemy combatants by court-martial, even when contrasted with the potential drawbacks, are significant. The court-martial is an established, available forum that is widely accepted for prosecution of criminal misconduct. It is the proper tribunal for lawful enemy combatants and POWs—other detainees who are somewhat similarly situated. Finally, the court-martial provides substantial due process protections for those accused of post-capture misconduct. As the problems of proof should not be an issue for post-capture misconduct, there is little justification for deviating from the due process protections afforded in courts-martial. Nevertheless, personal jurisdiction is a significant roadblock to the actual availability of this forum for the prosecution of post-capture misconduct. Either a liberal interpretation of Article 2(a)(12) or a legislative amendment to Article 2 providing for jurisdiction over alien unlawful enemy combatants for offenses committed while detained by U.S. armed forces would pave the way for the trial by court-martial of misconduct by alien unlawful enemy combatants in a detention facility.

C. Trial of Post-Capture Misconduct in Federal Court

The final forum for consideration is the U.S. federal district court. The case mentioned at the beginning of this article, *United States v. Salim*, was tried in the federal district court in the Southern District of New York.[353] While Salim was physically present in the United States when the crime occurred, it was, nonetheless, post-capture misconduct by an individual who would be, in any other circumstance, an alien unlawful enemy combatant.[354] Whether a detainee at Guantanamo Bay is subject to trial by federal court for post-capture offenses depends first on whether the individual is subject to the personal jurisdiction of a federal court, then on whether Title 18 of the U.S. Code allows for the prosecution of the misconduct alleged. Finally, as with courts-martial,

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[352] *See, e.g.*, *Hamdan*, 126 S. Ct. at 2786–98 (criticizing the military commissions process).

[353] Hirschkorn, *supra* note 2.

[354] Military Commissions Act of 2006, 10 U.S.C.S. § 948a (LexisNexis 2008); Hirschkorn, *supra* note 2.

there are practical and policy issues that impact trying these cases in federal district court.

First, it appears that U.S. federal courts have jurisdiction over crimes that occur at Guantanamo Bay. International law allows nations to prohibit and punish "conduct that, wholly or in substantial part, takes place within its territory."[355] The definition of "territory" is broad. Lands that are characterized as within the "special and maritime jurisdiction of the United States" under 18 U.S.C § 7 include "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."[356] The U.S. Naval Base at Guantanamo Bay, Cuba is subject to the exclusive jurisdiction and control of the United States, as well as its criminal laws.[357] Additionally, in 2001, the USA Patriot Act added some more definitive language to 18 U.S.C. § 7.[358] Section 804 of the Patriot Act provides for U.S. federal criminal jurisdiction over crimes committed against U.S. nationals on "the premises of United States diplomatic, consular, military, or other United States government missions or entities in

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[355] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

[356] 18 U.S.C.S. § 7(3) (LexisNexis 2001).

[357] *See* Rasul v. Bush, 542 U.S. 466, 480 (2004) ("By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base . . . ."); *id.* at 483 ("No party questions the District Court's jurisdiction over [the detainees'] custodians."); *see also* Gherebi v. Bush, 374 F.3d 727, 737 (9th Cir. 2003) ("We subject persons who commit crimes at Guantanamo to trial in United States courts. . . . [I]t is apparent that the United States exercises exclusive territorial jurisdiction over Guantanamo and that by virtue of its exercise of such jurisdiction, habeas rights exist for persons located at the Base."); Haitian Ctrs. Council, Inc., et al. v. Sale, 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993); Haitian Ctrs. Council, Inc., et al. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992) (citing United States v. Lee, 906 F.2d 117, 117 & n.1 (4th Cir. 1990); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975).

> The United States Naval Base at Guantanamo Bay was obtained through a leasing agreement in 1903. By the lease, Cuba agreed that the United States should have complete control over criminal matters occurring within the confines of the base. It is clear to us that under the leasing agreement, United States law is to apply.

Id.

[358] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, sec. 804, 115 Stat. 272, 377 (codified as amended at 18 U.S.C.S. § 7 (LexisNexis 2008)).

foreign States . . . ."[359] This language appears to capture crimes by detainees against U.S. military guards or other U.S. personnel on Guantanamo Bay, but would exclude crimes against third-country nationals present on the installation. For crimes against third-country nationals, jurisdiction would have to rest on a finding that the crime occurred within the special and maritime jurisdiction of the United States. In sum, 18 U.S.C. § 7 appears to provide federal courts with personal jurisdiction over those present on the military base at Guantanamo Bay, including detainees, who violate those U.S. federal laws that are applicable within the "special maritime and territorial jurisdiction of the United States" or who otherwise commit crimes against U.S. nationals on the premises of certain U.S. missions overseas.[360]

Next, subject matter jurisdiction should exist over most crimes that an Assistant U.S. Attorney might seek to punish in federal court; however, this will have to be determined case-by-case and crime-by-crime. Title 18 of the U.S. Code covers most serious criminal offenses with which a detainee may be charged, but not all federal crimes apply within the special and maritime jurisdiction of the United States.[361] There are also several crimes that apply to misconduct that might occur in a federal prison facility like possession of contraband, mutiny, riot, escape, and fleeing to avoid prosecution, but there may be issues in applying these crimes to an overseas detention facility.[362] There may also be an issue in addressing serious military-specific offenses should the need arise.[363] Just like the Military Commissions Act, Title 18 does not include military-specific disciplinary offenses.[364] Once again, though, these issues may not present a serious problem.[365] Considering the effort and expense in convening a federal trial, and the global media exposure that such a trial may generate, it is most likely that an Assistant U.S. Attorney will wish to prosecute only those offenses that are truly *malum in se*.[366] Minor infractions can be handled through camp

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[359] *See* 18 U.S.C.S. § 7(9) (LexisNexis 2008).
[360] *See id.* §§ 7(3), (9); *Lee*, 906 F.2d at 117 & n.1; Gibson, *supra* note 199, at 134.
[361] *See* 18 U.S.C.S. Pt.1 (LexisNexis 2008); Gibson, *supra* note 199, at 135.
[362] *See* 18 U.S.C.S. §§ 751, 1073, 1791, 1792.
[363] Some examples of military offenses include disrespect, failure to follow orders, and conduct prejudicial to good order and discipline. *See* UCMJ arts. 89, 90, 91, 92, 134 (2008).
[364] *See* 18 U.S.C.S. Pt. I.
[365] *See supra* Part IV.A.
[366] *See supra* Part IV.A and note 292.

disciplinary procedures, and Title 18 covers almost any major offense, including sexual assault, homicide, and assault, that may need to be punished through judicial means.

As long as there is personal and subject matter jurisdiction, detainees may be tried for post-capture misconduct in federal district court. Doing so has several advantages. The substantive crimes and criminal procedures are well-established. Additionally, trying these cases in federal court may build some goodwill with our coalition partners, and perhaps the rest of the world.[367] In criticizing the military commissions, some have called for terrorism charges to be tried in federal court.[368] In addition, detainees have been seeking redress in federal court since the implementation of the U.S. detainee policy.[369] Providing detainees with the complete due process protections of the federal court system in a trial for their post-capture misconduct may enable the United States to regain some "political capital" with our coalition allies and other world organizations.[370]

The drawbacks to trying these cases in federal district court, though, are significant. First, as a practical matter, the venue for these cases will almost definitely be the District of Columbia.[371] Unless the detainee were to waive personal appearance, the detainee would have to be brought from Guantanamo Bay to Washington, D.C. for every

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[367] *See* Interview with Lieutenant Colonel Thomas A. Wagoner, Professor and Vice-Chair, International and Operational Law Department, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Feb, 28, 2007) [hereinafter Wagoner Interview].

[368] *See* United Nations Press Release, *supra* note 305; Amnesty Int'l, Guantánamo's Military Commissions, *supra* note 257.

[369] *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 71 (2004) ("In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at [Guantanamo Bay].").

[370] *See* 152 CONG. REC. S10,256 (daily ed. Sept. 27, 2006) (statement of Sen. Leahy) ("Talk to anyone who travels around the world anywhere, even among some of our closes allies, our best friends. We are asked, What are you doing? Have you lost your moral compass?"); 152 CONG. REC. H7554 (statement of Rep. Jackson-Lee) ("[I]f American personnel blithely toss aside our international treaty obligations to uphold standards in the detention and interrogation of wartime prisoners, America will alienate our long-time allies who are crucial partners in the fight against terrorism."); 152 CONG. REC. H7554 (statement of Rep. Cardin) ("[The Military Commissions Act of 2006 . . . will make it harder to work with our allies to build an effective coalition to defeat terrorism.").

[371] *See* 18 U.S.C. § 3238 (2000) (allowing a criminal information to be filed in the District of Columbia if the crime occurs outside of a district and the last known residence of the offender or joint offenders is not known).

appearance and the trial.[372] In addition, the Sixth Amendment right of confrontation would apply, requiring the personal appearance of every detainee and guard who were witnesses in the case.[373] Finally, all of the evidence would have to be brought from Guantanamo Bay to Washington, D.C. This is a significant administrative burden on the system for a trial, especially when there are other forums available.[374]

Another issue influencing the selection of a trial in federal court over a trial by court-martial or military commission is the international law in this area. As described earlier, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War mandates that POWs be tried by military court, rather than a civilian court.[375] While there is an exception for places like the United Kingdom where only civilian courts had jurisdiction to try certain offenses, the drafters deliberately chose to have military courts try POWs because it is generally the military courts that have the expertise in military-specific offenses.[376] In addition, under AR 190-8, paragraph 3-7b, a POW "will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried."[377] Article 21 of the UCMJ does not preclude the trial of a U.S. servicemember in federal court where both a court-martial and federal court have jurisdiction, and servicemembers may be tried in federal court for crimes punishable there.[378]

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[372] *See* FED. R. CRIM. P. 43.
[373] *See* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36 (2004).
[374] This practical drawback could easily be eliminated if the federal district court were to travel to Guantanamo Bay. It is unclear whether the district court rules allow for the court to travel to hear a case, especially one on a military base in a foreign country. *See* Wagoner Interview, *supra* note 367.
[375] *See* GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382–84, 75 U.N.T.S. at 200–02. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* GC IV, *supra* note 63, arts. 66 & 117, 6 U.S.T. at 3558–60, 3596, 75 U.N.T.S. at 328–330, 366; GC IV COMMENTARY, *supra* note 63, at 339–41, 476–77. However, for a number of reasons, the Bush Administration has not applied this convention to detainees in the War on Terror. *See, e.g.*, Bybee Memo, *supra* note 85 (applying only GC III and only collaterally referencing GC IV); Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134 ("[N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party.").
[376] *See* GC III COMMENTARY, *supra* note 42, at 412.
[377] AR 190-8, *supra* note 115, para. 3-7b.
[378] UCMJ art. 21 (2008).

However, under current U.S. law, alien unlawful enemy combatants are not POWs, and they only have the protections of Common Article 3, not the full-blown protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Common Article 3 only requires trial by a "regularly constituted court, affording all of the guarantees which are recognized as indispensable by civilized peoples."[379] There can be no doubt that Title 18 provides those protections. Nonetheless, there appears to be a clear preference for trying prisoner misconduct in military courts, providing an argument, by analogy, that these post-capture misconduct cases belong in a military commission or court-martial rather than federal court.

Another significant policy barrier for the trial of detainees in federal court is the effort thus far to limit detainees' rights to file writs of habeas corpus in federal courts. After two Supreme Court opinions held that detainees had a constitutional right to challenge their detention in U.S. federal courts through writs of habeas corpus, Congress responded.[380] Section 7 of the Military Commissions Act of 2006 deprives any court of jurisdiction to receive a writ of habeas corpus on behalf of an alien detained as an enemy combatant.[381] The section further provides that, subject to two exceptions, courts lack "jurisdiction to hear or consider any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States."[382] Those two exceptions are: (1) the United States Court of Appeals for the District of Columbia Circuit has jurisdiction to review a decision related to a detainee status rendered by the Combatant Status Review Tribunal, and (2) the United States Court of Appeals for the District of Columbia Circuit also has jurisdiction to review decisions rendered by a military commission.[383] This language is definitive and has been upheld by the Federal District Court for the District of Columbia as well as the U.S.

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[379] GC III, *supra* note 32, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38.

[380] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2763–2770 (2006); Rasul v. Bush, 542 U.S. 466, 483 (2004); *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)).

[381] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)).

[382] *Id.*; Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, 2742–43.

[383] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)); Detainee Treatment Act of 2005, § 1005(e)(3).

Court of Appeals for the District of Columbia Circuit.[384] Quite simply, according to the Military Commissions Act of 2006, federal courts lack jurisdiction to hear writs of habeas corpus or any other claims by detainees against the United States, unless the court is the United States Court of Appeals for the District of Columbia Circuit hearing appeals of cases decided by the Combatant Status Review Tribunal or a military commission.[385]

Despite this clear statutory language, bringing a detainee into the United States to face trial in a federal district court would likely eviscerate arguments supporting a denial of habeas rights.[386] One of the primary bases for denying the right to seek habeas relief for several German prisoners in the 1950 Supreme Court decision in *Johnson v. Eisentrager*[387] was that the prisoners were held outside of U.S. territory.[388] The Court held that the "Constitution does not confer rights on aliens without property or presence in the United States."[389] Applying this principle from *Eisentrager*, the D.C. Circuit upheld the statutory suspension of habeas rights to detainees held at Guantanamo Bay in *Boumediene v. Bush*.[390] Bringing a detainee into the United States for the purpose of a criminal trial would undoubtedly have the collateral effect

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[384] *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005); Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 2078 (2007) (affirming both *In re Guantanamo Detainee Cases* and *Khalid*); Sergeant Sara Wood, *Federal Court Rules Against Guantanamo Detainee*, ARMED FORCES INFO. SERV., Dec. 14, 2006, http://www.defenselink.mil/news/newsarticle.aspx?id=2420. The Supreme Court heard oral arguments in the Boume dien e case in December 2007.

[385] *See* Military Commissions Act § 7 (2006); Detainee Treatment Act of 2005, § 1005(e)(3).

[386] *See* Vikram Amar & Whitney Clark, *Enemy Combatants: Does the Military Commissions Act of 2006 Violate the Suspension Clause*, 35 PREV. U.S. SUP. CT. CAS. 126–33 (2007). There is already some clamor in Congress to re-visit the issue of detainee habeas corpus rights. *See* Josh White, *Bill Would Restore Detainees' Rights, Define "Combatant*," WASH. POST, Feb. 14, 2007, at A08 (describing the Restoring the Constitution Act of 2007 that "would restore habeas rights to all detainees in U.S. custody").

[387] 339 U.S. 763 (1950).

[388] *Id.* at 776 (stating that the "nonresident enemy alien" does not have even "qualified access" to U.S. courts).

[389] Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 2078 (2007).

[390] *Id.* at 987–88.

of resurrecting the detainee's right to challenge the underlying basis for his detention.[391]

Additionally, trying a detainee in federal court for post-capture misconduct may open the door to collateral claims related to the propriety of the detention, treatment, or conditions of confinement, in the course of the criminal trial. It is likely that a detainee facing trial in criminal court for post-capture misconduct may challenge the conditions and propriety of his detention in order to challenge jurisdiction, make a case in extenuation or mitigation, or seek sentence credit.

In sum, federal courts should have personal and subject matter jurisdiction over detainees, including alien unlawful enemy combatants, who commit certain types of crimes while in detention at Guantanamo Bay. In addition, no one can question the due process afforded to an accused in federal court. However, a trial in federal court will entail significant effort to transport the accused, witnesses, and evidence to the trial. Also, this option may also have severe collateral effects on the overall U.S. detainee prosecution policy. If it is determined that military commissions or courts-martial are unavailable, federal district courts provide a viable forum for the prosecution of post-capture misconduct. But the drawbacks to trying a detainee in federal court are substantial, and it should therefore be a choice of last resort.

D. Choosing the "Least Bad" Option[392]

From the foregoing, it should be evident that the handling of alien unlawful enemy combatants who commit misconduct in the post-capture context presents a challenge. While three distinct forums exist for the prosecution of post-capture misconduct, there is no direct path to any one of them under current law. At this point, though, the military commission appears to offer the most secure option. While courts-martial have historical precedent, a basis in international law, and practical advantages for trying post-capture misconduct, personal jurisdiction over alien unlawful enemy combatants is questionable at

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[391] *See Eisentrager*, 339 U.S. at 776–78; *Boumediene*, 476 F.3d at 990; Amar & Clark, *supra* note 386, at 129–30.

[392] Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4 (quoting former Secretary of Defense Donald Rumsfeld as calling Guantanamo Bay the "least bad" option for holding those captured in the War on Terror).

best. Article 2(a)(12) offers a colorable argument that jurisdiction exists, but it appears that alien unlawful enemy combatants have been deliberately excluded from court-martial jurisdiction in an effort to protect the viability of the military commission. While there is precedent and jurisdiction to prosecute most types of post-capture misconduct in federal courts, bringing detainees into the United States for trial in a federal district court has tremendous practical hurdles and policy consequences. Moving detainees and witnesses to a trial in the continental United States would be time-consuming and costly, and the security risk and the potential for renewed habeas challenges present additional difficulties. It should be the option of last resort.

As of now, the military commission provides the best forum for prosecuting crimes committed by alien unlawful enemy combatants while in detention. The Military Commissions Act provides express personal jurisdiction over alien unlawful enemy combatants. In addition, the practicality of trying pre-capture and post-capture offenses together in the same forum cannot be matched by either the court-martial or trial in federal court. Adding the post-capture offenses to the document charging the pre-capture offenses should be very straightforward. But, there remains an element of risk in trying post-capture offenses by military commission. There is still some question whether offenses committed in the detention facility qualify as "in the context of and . . . associated with armed conflict," and an adverse ruling at the trial level or appellate level could result in delay, if not complete dismissal, of the charges.[393] Considering the issues surrounding the other two options, charging and trying offenses under the Military Commissions Act of 2006 is, as of now, the best means available for prosecuting post-capture crimes by alien unlawful enemy combatants while in detention.

V. Charting the Course Forward

If any of the U.S. detention policies contemplate prosecuting detainees at Guantanamo Bay for serious post-capture criminal misconduct in a U.S. detention facility, it is not evident from any of the documents creating their legal basis. Riots, assaults, and other violent acts are not infrequent at Guantanamo Bay. Serious criminal misconduct in the detention facility worthy of judicial punishment is not only

[393] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, at IV-11 (listing the elements for Intentionally Causing Serious Bodily Injury).

foreseeable—it is imminent. Considering that this issue arises out of a gap in the statutory provisions of the Military Commissions Act of 2006 and the UCMJ, the ultimate solution requires a change in the law. There are two changes that would solve this problem. First, to the extent that the military commissions lack subject matter jurisdiction over post-capture offenses, Congress can amend the Military Commissions Act of 2006 to include the language necessary to make clear that military commissions can prosecute instances of post-capture misconduct in U.S. detention facilities. Second, Congress can amend the UCMJ to provide for court-martial jurisdiction over alien unlawful enemy combatants who commit offenses while in the custody of the armed forces. As the court-martial provides the best combination of historical precedent, due process protections, crimes available, and practical simplicity, this solution offers the most promise.

Until any of these long-term solutions are adopted, however, the military commission appears to be the best mechanism for handling post-capture misconduct, consistent with the intent of the Military Commissions Act of 2006 and the Military Order of November 13, 2006. Should Congress revisit the issue of prosecuting detainees for their crimes, a statutory solution is absolutely necessary to close this gap in the U.S. criminal jurisdictional framework to provide the tools necessary to seek justice should an attack like that on Louis Pepe occur in the military detention facility at Guantanamo Bay or any other foreign detention facility.[394]

[394] While it appears that Guantanamo Bay will remain the detention facility for terror suspects captured outside of the United States for the foreseeable future, the possibility of its closure remains. *See, e.g.*, Waxman, *supra* note 392 (describing the discomfort of President Bush and former Secretary of Defense Donald Rumsfeld with the detention facility at Guantanamo Bay and proposing a plan to close the facility). If it is indeed closed and re-opened in another location outside of the United States, the issues identified in this article remain as long as there is not a viable host nation criminal justice system available to prosecute the misconduct.

"I WAS ONLY TWELVE—IT DOESN'T COUNT": WHY ADOLESCENT SEX OFFENSES ARE NOT LEGALLY RELEVANT IN PROSECUTIONS OF ADULT SEX OFFENDERS AND WHY MILITARY RULES OF EVIDENCE 413 & 414 SHOULD BE AMENDED ACCORDINGLY

MAJOR CHARLES A. KUHFAHL JR.*

Misconstruction of the underlying reasons that adolescents engage in crime as well as overestimation of their decision-making capacities trap the criminal [*justice*] *system in a cycle that has little to do with justice* [*and more to do with vengeance*].[1]

I. Introduction

Until 1994, a majority of the country's criminal jurisdictions, to include the federal government, abided by the mantra that individuals should be convicted based solely on evidence pertaining to the acts alleged and not simply because they were bad people. Such was the reason for the existence of Federal Rule of Evidence (FRE) 404(b) and similar state statutes.[2] This almost universally-held belief was dealt a

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[1] Kim Taylor-Thompson, *Children, Crime, and Consequences: Juvenile Justice in America: States of Mind/States of Development* (Children, Crime, and Consequences), 14 STAN. L. & POL'Y REV. 143, 156 (2003).

[2] FED. R. EVID. 404. Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

significant blow, however, when Congress amended the Federal Rules of Evidence to specifically allow the introduction of "propensity" evidence in cases involving either sexual assault of any kind or sexual molestation of a child.[3]

In accordance with Military Rule of Evidence (MRE) 1102(a), the amendments to FRE 413 and 414 became applicable to the military on 6 January 1996.[4] On 27 May 1998, the President signed Executive Order 13,086, officially amending the MRE by adding MRE 413 and 414.[5] Notwithstanding the flawed rationale behind the amendments, federal courts have consistently rejected constitutional challenges to the rules, both facially and as applied to the individual defendants.

Recently the Court of Appeals for the Armed Forces (CAAF) began chipping away at the inflexibility of these rules, specifically MRE 414. In a series of cases, beginning with *United States v. McDonald*[6] and continuing with *United States v. Berry*,[7] the CAAF has ruled that adolescent sex offenses committed by service members have no legal relevance in later prosecutions of those same service members as adults. These rulings are supported by recent studies in the field of psychology and neurology, which indicate that an adolescent's thought processes are not the same as an adult's, i.e., they do not commit crimes for the same reasons. Relying on the aforementioned studies, the CAAF now seems unwilling to unilaterally accept the general "propensity" arguments proffered by the Rules' proponents in Congress,[8] at least when the evidence concerns adolescent sex offenses. While the CAAF has not declared an outright prohibition against the introduction of such evidence, the requirements the Government must satisfy prior to offering such evidence are so onerous that the CAAF has implicitly created a de facto prohibition against the admission of adolescent sex offenses under

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Id.

[3] *Id.* FED. R. EVID. 413–414; *see infra* notes 9, 10.

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102(a) (2008) [hereinafter MCM]. Rule 1102(a) provides: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President."

[5] MCM, *supra* note 4, MIL. R. EVID. 1102. Rule 1102(a) states: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the president."

[6] United States v. McDonald, 59 M.J. 426 (2004).

[7] United States v. Berry, 61 M.J. 91 (2005).

[8] *See* discussion *infra* sec. III.

either MRE 413 or 414. To ensure that the maximum amount of fairness is afforded to military accused, and to eliminate any remaining ambiguity in this area, the time has come to explicitly amend the MRE to reflect the CAAF's implicit intent.

In order to provide a historical backdrop to the issue presented in this paper, Part II will address the reasons Congress originally decided to amend the FRE and the unorthodox methods it used to do so. Part III will review the early challenges to the new rules and discuss the rationale proffered by the courts to preserve the constitutionality of both FRE 413 and 414. Part IV will examine the aforementioned psychological studies as well as studies into the low recidivism rates of adolescents which further support the *McDonald* and *Berry* rulings. Part V will provide an in-depth analysis of the CAAF's reasoning in both *McDonald* and *Berry* and will lay the groundwork for this paper's overall position. Part VI will discuss the high standards of proof now facing government counsel and what affect that will have for future military prosecutions. Lastly, this paper will argue that the time is at hand to amend the MRE to prohibit the admission of evidence concerning single incidents of adolescent sexual misconduct in later adult prosecutions. Part VII provides recommended amendments to both MRE 413 and 414, which should eliminate any confusion that may still exist in this field.

II. History and Purpose of Federal Rules of Evidence 413 & 414

It can hardly be said that FRE 413[9] and 414[10] were the result of years of research in the field of criminology, careful consideration of the effects that the amendments would have on future defendants, or months of intense debate in Congress.[11] Indeed, both rules were added to the

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[9] FED. R. EVID. 413. Rule 413(a) provides in relevant part: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

[10] *Id.* FED. R. EVID. 414. Rule 414(a) provides in relevant part: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

[11] While this article briefly discusses the congressional history of FRE 413 and 414, as well as the reasoning behind the amendments, it is not designed to be a primer on the legislative process. For a more detailed analysis of how and why the present Rules were attached to the Violent Crime Control and Law Enforcement Act of 1994, see Michael S.

Violent Crime Control and Law Enforcement Act of 1994 (Crime Control Act)[12] as "a last minute effort to gain bipartisan support for the Act."[13] All told, a mere twenty minutes of debate took place on the floor of Congress for all three rules—413, 414, and 415.[14] One would think that such sweeping changes to decades of established case law in the field of propensity evidence[15] would mandate at least cursory discussion for one entire day. However, "as one house democrat noted, '[i]t is very difficult to argue against something that would suggest that in some way [Congress is] going to make it easier for child molesters or sexual abusers to walk.'"[16]

Notwithstanding the political wrangling[17] and administrative shortcomings[18] concerning the attachment of the rules to the Crime

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Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998).

[12] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701–14223 (2000)).

[13] Major Francis P. King, *Rules of Evidence 413 and 414: Where Do We Go from Here*, ARMY LAW., Aug. 2000, at 5.

[14] *Id.*

[15] *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948).

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Id.

[16] THE EVIDENCE PROJECT, ART. IV, RELEVANCY AND ITS LIMITS COMMENTARY [hereinafter THE EVIDENCE PROJECT], http://www.wcl.american.edu/pub/journals/evidence/commentary/a4r413c.html (last visited Feb. 11, 2008).

[17] *See* D. Brooks Smith, U.S. Dist. Ct. Judge, W. Dist. Pa., The Federalization of Criminal Law, Address Before Federalist Society's 1997 National Convention, *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/cl020104.htm (last visited Feb. 11, 2008) ("Suffice it to say that these rules were sponsored in the House by a back-bench member of Congress—better known lately for her TV star quality—and would probably never have seen the light of day, but for the last minute scramble by the Crime Bill's principals to obtain 218 votes for passage in the House. . . .").

[18] Congress specifically circumvented the requirements of the Rules Enabling Act. 28 U.S.C. § 2072 (1994). Under the Rules Enabling Act, a Judicial Reviewing Conference

Control Act, the sponsors' stated purpose in attaching the amendments was clear: to combat the perceived high recidivism rates of persons who commit sex offenses in general and sex offenses against children in particular.[19] The fact that this perception differed greatly from reality was apparently not a major concern of the federal legislature. For example, according to one Bureau of Justice study involving sex offenders released from prisons in fifteen states during 1994, recidivism rates for sex offenders ranged only from 2.5% to 5.3%.[20] While these rates vary slightly depending upon the study, overall recidivism rates for sex offenders are consistently lower than those of the general criminal population.[21] (This disconnect between perception and reality concerning recidivism rates will be discussed in more detail in section IV.) The true reason the Rules were implemented, at least according to the bill's co-sponsor, Senator Robert Dole, was to help the Government obtain convictions it possibly would not be able to obtain otherwise.[22]

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is usually given an opportunity to review "proposed" congressional legislation and assist in the drafting of the eventual law. Instead of allowing the Judicial Reviewing Conference to review the legislation *before* it was passed, Congress instead passed the legislation but delayed enactment in order to allow for Judicial Conference Review. Notwithstanding tremendous opposition to the amendments by the Judicial Reviewing Conference, Congress forwarded the bill to the President for signature without change. *See* Ellis, *supra* note 11, at 969–70.

[19] *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("The enactment of this reform is first and foremost a triumph for the public—for women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice.").

[20] PATRICK A. LANGAN, ET AL., BUREAU OF JUSTICE STATS., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (Nov. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[21] CENTER FOR SEX OFFENDER MANAGEMENT, MYTHS AND FACTS ABOUT SEX OFFENDERS (Aug. 2000) [hereinafter MYTHS AND FACTS], *available at* http://www.csom.org/pubs/mythsfacts.pdf.

[22] *See* 140 CONG. REC. S10276 (daily ed. Aug. 4, 1994) (statement of Sen. Dole).

> Ask any prosecutor, and he or she will tell you how important similar-offense evidence can be. In a rape case, for example, disclosure of the fact that the defendant has previously committed other rapes is often crucial, as the jury attempts to assess the credibility of a defense claim that the victim consented and the defendant is being falsely accused. Similar-offense evidence is also critical in child molestation cases. These cases often hinge on the testimony of the child-victims, whose credibility can be readily attacked in the absence of other corroborating evidence. In such cases, it is crucial that all relevant evidence that may shed some light on the credibility of the charge be admitted at trial. [I]t is this

In addition to the unsupported claims of recidivism, other reasons cited for enacting the new rules included:

> (1) the need to admit all possible evidence because there are few witnesses to sexual assaults; (2) the need to rebut defenses of consent in rape cases; (3) the need to corroborate children's testimony in child molestation cases; (4) the fact that victims often do not come forward until they hear that another person has been assaulted; and (5) the danger to the public if a rapist or child molester remains at large.[23]

Notwithstanding the Judicial Conferences Committee's strong objections to the rules,[24] Congress submitted the bill to the President on 12 September 1994 and he signed it into law the next day. After the Crime Control Act became law, MRE 413 and 414 were adopted through Executive Order 13,086 on 27 May 1998.[25] Whether or not Congress was correct in enacting FRE 413 and 414 has been, and continues to be, fertile ground for commentators both for and against the amendments.[26]

> Senator's view that this evidence should be admitted at trial without a protracted legal battle over what is admissible and what is not.

Id.

[23] THE EVIDENCE PROJECT, *supra* note 16.

[24] *See* Memorandum from the Administrative Office of the United States Courts to Standing Committee (Dec. 2, 1994) [hereinafter Administrative Office Memorandum] (on file with author) (Reported objections to Congress fell into one of six categories: (1) Congress's circumvention of the Rules Enabling Act; (2) constitutional concerns; (3) insufficient data on the actual propensity of sex offenders to recidivate; (4) unfairness of the rules; (5) lack of necessity, because FRE 404 and 405 could be amended accordingly; and (6) negative impact on Native Americans.).

[25] MCM, *supra* note 4, app. 25, at A25-40 to A25-42.

[26] *See, e.g.*, Tamara Larsen, Comment, *Sexual Assault is Unique: Why Evidence of Other Crimes Should be Admissible in Sexual Assault and Child Molestation Cases*, 29 HAMLINE L. REV. 177 (2006); R. Wade King, Comment, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather Than Guilt?*, 31 TEX. TECH L. REV. 1167 (2004); Joyce R. Lombardi, Comment, *Because Sex Crimes are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Acts*, 34 U. BALT. L. REV. 103 (2004); Jeffrey Waller, Comment, *Federal Rules of Evidence 413–415: Laws Are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil*, 30 TEX. TECH L. REV. 1503 (1999); Joseph A. Aluise, Note, *Evidence of Prior Misconduct in Sexual Assault and Child Molestation*

Other than a few superficial changes,[27] the President incorporated FRE 413 and 414 into the Manual for Courts-Martial on 27 May 1998.[28]

III. Treatment of FRE 413/414 in Federal, State, and Military Courts

Since their implementation, attacks against FRE 413 and 414, at least in the federal civilian sector, have been based in large part on the alleged unconstitutionality of the statute, both on its face and as applied to the individual defendants. To date, the Supreme Court has not specifically ruled on the constitutionality of FRE 413 and 414, or for that matter, even addressed the constitutional concerns raised not only by the individual defendants but by the Judicial Conference Committee prior to enactment of the rules.[29] As such, all of the substantive analysis of the constitutionality of the statute has been undertaken by the courts in the federal circuit. Of those, the Eight and Tenth Circuits have taken the lead in setting the de facto standard of analysis. Constitutional attacks on FRE 413 and 414 have generally rested on two arguments: violations of the defendants' rights to equal protection and due process.[30]

A. Supreme Court and Federal Circuits

In one of the first cases to challenge the constitutionality of the new rules, the Tenth Circuit wasted little time in rejecting the equal protection argument as it pertained to FRE 414, and arguably by inference to FRE 413, going so far as to call the argument "meritless."[31] While some

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Proceedings: Did Congress Err in Passing Federal Rule of Evidence 413, 414, and 415?, 14 J.L. & POL. 153 (1998).

[27] Federal Rule of Evidence 415 was rejected in its entirety because it applied only to civil proceedings. Rules 413 and 414 were wholly incorporated except for changing the notice requirement from fifteen days to five days; adding definitional sections in (e), (f), and (g), and adding the phrase "without consent" to paragraph (d)(1) to specifically exclude the introduction of evidence of sodomy and adultery. MCM, *supra* note 4, MIL. R. EVID. 413–414, at A22-37 (analysis).

[28] MCM, *supra* note 4, at A25-30 (U.S. Historical Executive Orders).

[29] *See* Administrative Office Memorandum, *supra* note 24 (The Judicial Conference's Advisory Committee on Evidence Rules actually recommended against implementation of Rules 413–415 out of "concern that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases . . . .").

[30] King, *supra* note 13, at 7 (citing United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998)).

[31] United States v. McHorse, 179 F.3d 889, 897 (10th Cir. 1999).

commentators have noted the disproportionate number of Native Americans that have been convicted based on evidence introduced only because of the amendments to the Federal Rules of Evidence, the courts have yet to be swayed by the statistical impact on Native American defendants. Instead, courts have relied on the general principle that a statute "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[32] Absent a discriminatory purpose, the courts apply a rational basis test to the statute and consistently find that the amendments pass constitutional muster with ease.[33]

The more compelling argument is that an individual defendant, as opposed to a class of defendants, is denied the due process of a fair trial when the Government is allowed to introduce not only convictions, but mere *allegations* of past sexual misconduct. The obvious danger is that "when a jury hears evidence of the bad character of a person . . . the jury will render harsh decisions against that person not because the person is responsible in the situation at issue, but simply because she is bad."[34] As with the equal protection argument before it, the Tenth Circuit in *United States v. Enjady*[35] wasted little time holding that FRE 413 does not violate the due process rights of a defendant. While the court conceded that "Rule 413 raises a serious constitutional due process issue,"[36] it nonetheless found the rule to be constitutional based in large part on the application of FRE 403[37] prior to the admission of any evidence under FRE 413.[38] In essence, unless the proffered evidence so unfairly prejudiced the accused that he could not receive a fair trial, the evidence would be admitted without invoking constitutional concerns.

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[32] *Id*. (citing United States v. Easter, 981 F.2d 1549, 1559 (10th Cir. 1992)).
[33] *Id*. ("Congress' objective of enhancing effective prosecution of child sexual abuse is a rational basis for Rule 414(a).").
[34] David P. Leonard, *Perspectives on Proposed Federal Rules of Evidence 413–415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 312 (1995).
[35] *Enjady*, 134 F.3d at 1433.
[36] *Id*.
[37] FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
[38] *Enjady*, 134 F.3d at 1433 ("Nevertheless, without the safeguards embodied in Rule 403 we would hold the rule unconstitutional.").

Shortly after deciding *Enjady*, the Tenth Circuit addressed FRE 414 and similarly held in *United States v. Castillo* that "Rule 414 does not violate the Due Process Clause."[39] The argument presented in *Castillo* was identical to the one made in *Enjady*—that the "evidence is so prejudicial that it violates the defendant's right to a fair trial," thereby resulting in a due process violation.[40] Not surprisingly, the court's holding in *Castillo* was identical to that of *Enjady*: that the trial court's application of FRE 403 "should always result in the exclusion of evidence that has such a prejudicial effect," thereby eliminating any constitutional concerns. [41] Since those initial decisions, federal courts across the country have applied the same analysis and allowed the Government to consistently admit prior allegations of sexual misconduct against defendants.[42]

1. Treatment of Old Offenses

In addition to the general constitutional arguments, many of the challenges to FRE 413 and 414, especially in the due process arena, have been based on the admission of evidence concerning misconduct that occurred several years in the past.[43] From the initial challenges to FRE 413 and 414, one of the central questions has been, "How old is too old"? Obviously the severity of the prejudice, and the subsequent effect on due process, increases as the age of the uncharged misconduct increases. The older the offense, the more likely that the Government will rely entirely on the testimony of the alleged victim and the less likely the defendant will be able to obtain independent evidence to contradict that testimony. It has not been unusual to find defendants contesting allegations that were decades old and consisted of nothing more than the testimony of the alleged victim, who often was a young child at the time of the offense. The courts, however, have thus far failed to recognize or appreciate the

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[39] United States v. Castillo, 140 F.3d 874 (10th Cir. 1998).
[40] *Id*. at 883.
[41] *Id*.
[42] *See, e.g.*, United States v. Edward, 106 Fed. Appx. 833 (4th Cir. 2004); United States v. Drewry, 365 F.3d 957 (10th Cir. 2004); United States v. Sioux, 362 F.3d 1241 (9th Cir. 2004); United States v. Gabe, 237 F.3d 954 (8th Cir. 2001).
[43] *See, e.g.*, United States v. Drewry, 365 F.3d 957 (twenty-five-year gap between charged offense and allegation of prior sexual misconduct); United States v.Gabe, 237 F.3d 954 (8th Cir. 2001) (twenty-year gap between charged offense and allegation of prior sexual misconduct); United States v. Henry, 115 F.3d 1488 (10th Cir. 1997) (thirty-year gap between charged offense and allegation of prior sexual misconduct).

significance of any gap in time between the charged offense and the prior sexual misconduct.[44]

One such case where the court had to address this issue of possible "staleness" is *United States v. Meachum*.[45] In *Meachum*, the Government wanted to introduce evidence that Meachum had sexually molested his two stepdaughters thirty years prior to the charged offense.[46] The court in *Meachum* looked to the historical notes and legislative history of the statute to come to the conclusion that "there is no time limit beyond which prior sex offenses by a defendant are inadmissible. No time limit is imposed on the uncharged offenses for which evidence may be admitted."[47] Such a finding is not surprising, considering it is verbatim to the sponsor's language during the very limited debate on the amendments.[48] The effect of the courts' findings on potential defendants is clear: regardless of the length of time between offenses, courts will allow admission of the prior allegation if it is probative to the resolution of the charged offense, i.e., similar to the charged offense. While one might be comfortable arguing that multiple sex offenses committed by an adult (even if separated by twenty years or more) demonstrate an inherent level of propensity, that level of comfort should decrease when the earlier sexual misconduct was committed while the accused was an adolescent.

2. Treatment of Adolescent Offenses

Courts having to deal with the issue of admissibility of prior *adolescent* sexual misconduct have been few and far between. Perhaps that is not surprising, considering the low recidivism rates of sexual offenders mentioned earlier.[49] The lone case identified on the federal

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[44] Temporal proximity is one of the stated factors that the court in *United States v. Guardia* mandated that trial judges consider when conducting a Rule 403 balancing test. 135 F.3d 1326, 1331 (10th Cir. 1998). However, such a consideration in itself has rarely if ever resulted in the exclusion of the proffered evidence.

[45] United States v. Meachum, 115 F.3d 1488 (10th Cir. 1997).

[46] *Id*. at 1490.

[47] *Id*. at 1492.

[48] *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charge offense and offenses.").

[49] MYTHS AND FACTS, *supra* note 21.

level addressing the admissibility of prior adolescent sex offenses is *United States v. Lemay*.[50] The case originated in the Tenth Circuit and, as expected, the court found the evidence to be admissible.[51] The fact that the prior sexual misconduct occurred while the defendant was an adolescent was but a tangential consideration of the court.

The defendant in *Lemay* was a twenty-four year old Native American who was accused of sexually molesting his five and seven year old nephews.[52] At trial, the Government attempted to admit evidence of Lemay's prior juvenile rape conviction, which had occurred eleven years prior to the alleged misconduct.[53] At the time of the prior allegation, Lemay was only twelve years old.[54] The court's analysis of the admission of the prior sexual misconduct under FRE 414 centered on the FRE 403 balancing test and followed a typical pattern with the expected result. The court did, however, recognize that one factor played in favor of Lemay: that he was only twelve years old at the time of the offense.[55] Unfortunately, the court did not expound on the significance of this fact or explain why it played in Lemay's favor. One has to wonder, given the court's acknowledgement of Lemay's adolescent status at the time of the prior misconduct, if the time between offenses had been greater than eleven years, would the court have ruled differently? In the end, however, the court relied, as with most of the cases involving FRE 413 and 414, on the similarities between the charged offense and the prior sexual misconduct. As the court stated, "[t]he relevance of the prior act evidence was in the details."[56] This is a consistent theme in all courts' FRE 413 and 414 analyses: the more similarity between the charged offense and the prior sexual misconduct, the greater the probative value and the lower the danger of unfair prejudice under FRE 403.

B. State Court Application

Unlike defendants prosecuted in the federal courts, defendants prosecuted in state jurisdictions are subject to the provisions of the federal rules only to the extent that those rules have been adopted and

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[50] United States v. Lemay, 260 F.3d 1018 (10th Cir. 2001).
[51] *Id*. at 1031.
[52] *Id*. at 1022.
[53] *Id*.
[54] *Id*. at 1022–23.
[55] *Id*. at 1029.
[56] *Id*.

promulgated within each state. Fortunately (at least from the individual defendant's perspective), not all states have taken the congressional hint[57] to model and conform their state rules of evidence to the federal rules. State jurisdictions generally fall into one of three categories: (1) those that have accepted the premise of FRE 413 and 414 and modeled or amended their state rules accordingly; (2) those that follow the strict provisions of FRE 404(b)[58] but provide for either a judicially or legislatively created "lustful disposition" exception; and, (3) those that have rejected FRE 413 and 414 and continue to follow a strict 404(b) analysis in determining whether to admit previous acts of sexual misconduct.

1. States that Have Enacted Legislation Similar to FRE 413/414

In addition to the previously-cited justifications for the implementation of FRE 413 and 414,[59] it was also the hope of the federal legislature that the states would take the hint from their federal counterpart and implement identical rules of evidence at the state level.[60] The FRE have limited reach, usually applying only to exclusive federal jurisdictions such as tribal reservations or military installations, or in cases implicating the Commerce Clause.[61] Therefore, since most prosecutions are conducted at the state level, the full force and effect of the rules which Congress envisioned would only come to fruition if the states followed Congress's lead.

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[57] *See* 140 CONG. REC. S10,276 (daily ed. Aug. 4, 1994) (statement of Sen. Dole)

> Mr. President, I am aware that even if my proposal became law, it would affect only Federal cases. State cases would still be governed by State rules of evidence. Nonetheless, the Federal Government has a leadership role to play in this area. Once the Federal rules are amended, it's possible—perhaps even likely—that the States may follow suit and amend their own rules of evidence as well.

Id.

[58] FED. R. EVID. 404.

[59] *See* discussion *supra* sec. II.

[60] 140 CONG. REC. S10,276 (statement of Sen. Dole).

[61] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

States that have accepted Congress's rationale, and followed its lead, have generally done so in one of two ways: by enacting separate but similar rules of evidence that encompass FRE 413 or 414,[62] or by simply modifying their existing rule 404(b) to provide an exception to the usual exclusion of propensity evidence.[63] States which fall into the latter category include Alaska, Arizona, California, Colorado, Florida, Illinois, Missouri, Texas, and Wisconsin. Interestingly, not a single state that has accepted Congress's invitation to amend its respective rules of evidence has adopted FRE 413 or 414 in its entirety. Instead, these states have only modified their existing rules of evidence. The states that have been

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[62] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.37 (2006) which states in part:

> Sec. 2. Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:
>
> (1) the state of mind of the defendant and the child; and
>
> (2) the previous and subsequent relationship between the defendant and the child.

Id.

[63] *See, e.g.*, ALASKA R. EVID. 404(b) which states in part:

> (2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses
>
> (i) occurred within the 10 years preceding the date of the offense charged;
>
> (ii) are similar to the offense charged; and
>
> (iii) were committed upon persons similar to the prosecuting witness.
>
> (3) In a prosecution for a crime of sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible if the defendant relies on a defense of consent. In a prosecution for a crime of attempt to commit sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible.

Id.

minimally willing to expand their propensity rules have generally followed the original suggestion of the Rules Advisory Committee (which Congress summarily ignored) by amending their respective Rule 404(b) to achieve the desired affect.[64] Regardless of the method employed, however, two things are clear: (1) state court decisions from these jurisdictions are identical to those at the federal level, and (2) there is a complete absence of cases involving the admission of evidence concerning adolescent sex offenses.

Perhaps the lack of cases involving the admission of evidence concerning adolescent sex offenses is best explained by the existence of the states' equivalent to FRE 609.[65] While this explanation is completely theoretical, it should be remembered that, "[u]ntil recently, state laws and judicial norms were established with the understanding that the preservation of the privacy of juveniles adjudicated in the juvenile court

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[64] The Rules Conference Committee had originally recommended that Congress simply amend FRE 404 to encompass the desired effect of the proposed Rules 413–415. The suggested amendment to FRE 404 read in part:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (4) Character in sexual misconduct cases. If otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation, evidence of another act or sexual assault or child molestation, or evidence to rebut such proof or inference there from.
>
> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith except as provided in subdivision (a).

Id.

[65] FED. R. EVID. 609. Rule 609(d) provides in relevant part:

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." *Id.* Military Rule of Evidence 609(d) is identical to its federal counterpart other than substituting "military judge" for "the court.

Id.

is a critical component of the youth's rehabilitation."[66] As such, many states also followed a practice of either automatically, or through application, sealing juvenile court records, thereby preventing the Government from using those offenses in a later criminal prosecution. [67] And the existence of FRE 609, and similar state statutes,[68] indicates, at least to a degree, the recognition that adults should not be branded for life because of adolescent indiscretions. Recently, however, "courts on both the Federal and State levels have held that there is no constitutional confidentiality right for an alleged or adjudicated delinquent"[69] offense. Additionally, the implementation of FRE 413 and 414 seems to indicate, at least at the federal level, that the legislature is no longer willing to give juvenile offenders the benefit of the doubt.[70]

2. Lustful Disposition States

Certain states, while choosing not to amend their rules of evidence to specifically allow for sexual propensity evidence, have nonetheless allowed for the admission of such evidence under the Common Law exception of "lustful disposition." While most states apply the exception through judicial application some states have created a legislative

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[66] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994–1996, JUVENILE PROCEEDINGS AND RECORDS, http://ojjdp.ncjrs.org/PUBS/reform/ch2_i.html (last visited Feb. 22, 2008).

[67] *See, e.g.*, ARIZ. REV. STAT. § 8-349 (2007); VA. CODE ANN. § 16.1-306 (2007).

[68] *See, e.g.*, ARIZ. R. EVID. 609(d), which states:

> Juvenile adjudications. Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Id.

[69] *Id.*

[70] Indeed, at least under FRE 609, there is an absolute prohibition against using any juvenile offense against the accused, and the "witness" must have originally been "adjudicated" (equivalent of being found guilty) in order for the Government to use the offense for impeachment purposes against that individual. Under FRE 413 and 414, the evidence pertains exclusively to the accused and there is no requirement for a prior finding of guilt on any level. As discussed earlier, this often leads to an accused defending against a bare-bones, decades-old allegation.

"lustful disposition" exception.[71] States which utilize this approach in some fashion include Arkansas, Georgia, Louisiana, Maryland, Nebraska, North Carolina, Oregon, Pennsylvania, and West Virginia.[72]

It should be remembered that one of Congress's initial goals was to have individual states enact legislation that mirrored FRE 413 and 414.[73] Ironically, however, states that rejected that suggestion and instead applied their own "lustful disposition" exception actually seem to implement more effectively the congressional intent of FRE 413 and 414, i.e., to punish propensity. For example, in *Cook v. State*,[74] the court held it was not error for the state of Georgia to admit evidence of a prior child sexual assault against the defendant because the prior assault "was appropriate for showing Cook's lustful disposition toward molesting young girls."[75] Similarly, in *State v. Patterson*,[76] the Louisiana appellate court held that the state of Louisiana could introduce evidence of the defendant's prior rape conviction in a subsequent rape case because it was "highly relevant to show the defendant's lustful disposition toward teenage girls [and i]t also shows his propensity to sexually assault teenage girls . . . ."[77] Indeed, like the federal courts before it, the Louisiana appellate court found that the legislature "saw a need to lower the obstacles to admitting propensity evidence in sexual assault cases"[78] and as such readily admitted pure propensity evidence that would have previously been excluded under a strict rule 404(b) analysis.

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[71] *See, e.g.*, LA. CODE EVID. ANN. art. 412.2 (2006), which states in part:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

Id.

[72] *See* ARK. RULE EVID. 404 (2006); ORIG. CODE GA. § 24-2-2 (2006); LA. CODE EVID. ANN. art. 412.2 (2006), MD. RULE EVID. 5-404 (2006); R.R.S. NEB. § 27-404 (2006); N.C. GEN. STAT. § 8C-1, RULE 404 (2006); O.R.S. § 40.170, RULE 404 (2006); PA. RULE EVID. 404 (2006).

[73] *Supra* notes 10, 11.

[74] Cook v. State, 276 Ga. App. 803 (Ga. Ct. App. 2005).

[75] *Id*. at 810.

[76] State v. Patterson, 922 So. 2d 1195 (La. Ct. App. 2006).

[77] *Id*. at 1204.

[78] *Id*.

3. Strict 404(b) Interpretation States

As can be seen from the relatively small number of states that have followed Congress's informal dictate, most state legislatures have either never considered or outright refused to enact similar rules pertaining to the admission of propensity evidence. The courts in a majority of states have also refused to rely on exceptions such as "lustful disposition," choosing instead to rely on a strict interpretation of Rule 404(b). This is not to say that "propensity type" evidence which would ordinarily be admitted under FRE 413 or 414 is automatically excluded in these strict interpretation states. On the contrary, in many cases the very same evidence is admitted.[79] In strict interpretation states, however, the Government must still meet the dictates of Rule 404(b) and demonstrate to the court that the proffered evidence is relevant for some purpose other than proving propensity, i.e., to "prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[80]

Examples of admissible "propensity type" evidence even under a strict interpretation of Rule 404(b) can be seen in many of the states that have refused to enact rules similar to FRE 413 and 414. In *State v. Clark*,[81] appellant was charged with performing oral sex on a twelve-year-old boy. At trial, the state of Ohio was allowed to introduce testimony from appellant's stepson that the appellant had similarly molested and raped him years earlier.[82] The court allowed this evidence not for propensity reasons but because it tended to demonstrate the appellant's motive and intent.[83] Similarly, in *People v. Sabin*,[84] the State of Michigan was allowed to introduce evidence that appellant had previously sexually assaulted his former stepdaughter in a case where he was charged with sexually assaulting his thirteen-year-old biological daughter. Because the acts were so similar, the Michigan Supreme Court affirmed the decision of the trial court to admit the testimony under the theory of common plan.[85]

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[79] *See infra* notes 81, 84.
[80] FED. R. EVID. 404.
[81] State v. Clark, 2006 Ohio App. LEXIS 1059 (Ohio Ct. App.).
[82] *Id*. at 1070.
[83] *Id*. at 1072-73.
[84] People v. Sabin, 463 Mich. 43 (Mich. 2000).
[85] *Id*. at 50.

There are, however, an equal number of examples of evidence excluded under Rule 404(b) which would have been admitted in states following a Rule 413, Rule 414, or lustful disposition analysis. In *State v. Mitchell*,[86] appellant was charged with fondling his girlfriend's twelve-year-old daughter. The Government was allowed to admit testimony that appellant had also fondled two of his daughter's friends without identifying a specific exception under Iowa's Rule 404(b).[87] In finding that the trial court had erred in admitting the testimony of his daughter's friends, Iowa's appellate court reasoned that "such testimony spoke to no legitimate fact besides Mitchell's propensity to abuse young girls."[88] Similarly, in *Richmond v. State*,[89] the appellate court held that the trial court erred when it allowed the State of Nevada to admit pure propensity evidence. Like *Mitchell*, the appellant in *Richmond* was charged with sexual misconduct involving a minor female.[90] During trial, the Government was allowed to introduce testimony from a different minor female that appellant had also molested her.[91] The Nevada appellate court held that the district court had abused its discretion, because the evidence "was not relevant under any of the other exceptions to NRS 48.045," the Nevada equivalent to FRE 403.[92] In so holding, the court noted that it had previously "repudiate[d] the legal proposition . . . that evidence showing an accused possesses a propensity for sexual aberration is relevant to the accused's intent."[93]

These cases, and others like them, demonstrate not only how strict construction states require that the dictates of Rule 404(b) be satisfied for any "other acts" evidence, but also how many states are adamant about rejecting the propensity exception created by Congress. It is just as

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[86] State v. Mitchell, 633 N.W.2d 295 (Iowa 2001).
[87] IOWA R. EVID. 404(b) states in relevant part:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

IOWA R. EVID. 404(b) (2006).
[88] *Mitchell*, 633 N.W.2d at 300.
[89] Richmond v. State, 118 Nev. 924 (Nev. 2002).
[90] *Id*. at 926.
[91] *Id*. at 927.
[92] *Id*. at 934.
[93] *Id*. at 928 (citing Braunstein v. State, 118 Nev. 68 (Nev. 2002)).

important to recognize, however, that the strict-interpretation states' approach to prior sexual misconduct does not create an outright prohibition against "propensity type" evidence. Prior sexual misconduct can still be admitted against an accused; just not for the sole purpose of alleging propensity. These states seem to have accomplished that which Congress could not: striking a balance between the rights of the accused and the rights of society at large.

C. Military Application

Military installations are one of the few places where federal law applies, and as such the military has witnessed its fair share of issues relating to rules 413 and 414. As with the initial challenges in the federal circuit courts,[94] the first challenges to the military application of MRE 413 and 414, [95] were also based on constitutional grounds. In the seminal case for military application of "FRE 413 and 414 type" rules, the CAAF ruled in *United States v. Wright*[96] that MRE 413 (and by necessary implication MRE 414) did not violate either the Due Process or Equal Protection clause of the U.S. Constitution.[97]

To reach this conclusion, the CAAF followed a path similar to its brethren on the federal circuit. As in *Castillo* and *Enjady*, the court in *Wright* immediately looked to the legislative history for the purpose behind the enactment of the rules. Specifically, the CAAF highlighted the testimony of the House proponent, Congresswoman Susan Molinari:

> This includes the defendant's propensity to commit sexual assault . . . and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense. In other respects, the general standards of the rules of evidence will continue to apply, including . . . the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect. . . . The practical effect of the new

[94] *See* discussion *supra* sec. III.A.
[95] Military Rules of Evidence 413 and 414 are the military equivalent of FRE 413 and 414. Both rules were adopted with only minor changes. *See supra* notes 9, 10.
[96] United States v. Wright, 53 M.J. 476 (2000).
[97] *Id.* at 483.

> rules is to put evidence of uncharged offenses in sexual assault . . . cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission.[98]

While the court ultimately acknowledged that unless the new rules were unconstitutional it was bound to follow and apply them, it also made an unsolicited concession that none of the federal circuit courts would: that "the scientific community is divided on the question of recidivism for sexual offenders."[99] This was one of the primary rationales behind the enactment of the rules in the first place. While such a concession was mere dicta in *Wright*, it did represent the first chink in the armor of MRE 413 and 414 applicability. The court's apparent lack of support for the congressional rationale behind the enactment of the new rules[100] would be paramount four years later when it decided *United States v. Berry*.[101]

Notwithstanding the court's apparent unease with the rationale behind the rules, it nonetheless followed the federal circuit's lead. In fact, the CAAF cited to *Mound*,[102] *Castillo*,[103] *Larson*,[104] *LeCompte*,[105] and a majority of the other significant cases decided in each of the federal circuits which had addressed the constitutionality of the new rules.[106] At least as it applied to the due process claim, the CAAF held that so long as the trial court applied an MRE 403 balancing test to the proffered evidence, admission would be constitutionally permissible.[107] As to the equal protection argument, the court wasted little time finding that "the reasoning in *Mound* . . . and *Castillo* . . . provides ample

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[98] *Id*. at 480.
[99] *Id*. at 481.
[100] *Id*. at 486 (Gierke, J., dissenting) (In addition to the aforementioned quote Judge Gierke in his dissent rebuked his fellow justices by pointing out that "[o]ur charter is to interpret and apply Rule 413, not to justify the wisdom of its promulgation.").
[101] United States v. Berry 61 M.J. 91 (2005).
[102] United States v. Mound, 149 F.3d 799 (8th Cir. 1998).
[103] United States v. Castillo, 140 F.3d 874 (10th Cir. 1998).
[104] United States v. Larson, 112 F.3d 600 (2d Cir. 1997).
[105] United States v. LeCompte, 131 F.3d 767 (8th Cir. 1997).
[106] United States v. Wright, 53 M.J. 476, 482 (2000).
[107] *Id*. (The CAAF specifically cited to *Enjady* and *Guardia* for the "factors" that a trial judge must consider when conducting the 403 balancing test. These factors later became known as the "Wright factors".).

justification for rejecting the equal protection claim."[108] Therefore, after *Wright*, all federal courts (absent the U.S. Supreme Court which has yet to address this issue) were of one opinion: so long as the trial judge conducts a Rule 403 balancing test to ensure that the probative value is not substantially outweighed by the potential unfair prejudice to the defendant, the rules are constitutional and the propensity evidence is admissible.

IV. Myth vs. Reality

When it comes to understanding the adolescent sex offender, there are many misconceptions which have led to the nationwide trend of providing less protection to juvenile offenders and making them more responsible for their actions.[109] Some of those misconceptions which are pertinent to this issue are: adolescent sex offenders will become adult sex offenders; adolescent sex offenders require long-term intensive therapy; and adolescent sex offenders are similar in most ways to adult sex offenders.[110] In actuality, "adolescent sex offenders are different from adult sex offenders in that they have lower recidivism rates [than adult sex offenders], engage in fewer abusive behaviors over shorter periods of time, and have less aggressive sexual behavior."[111] Furthermore, adolescent sexual offenders are often successfully treated in short treatment programs, and current studies and literature do not show that adolescent sex offenders naturally progress to adult sex offenders.[112] The importance of such studies is obvious; if adolescent sex offenders can be successfully treated, one cannot logically argue that an individual has a propensity to engage in sexual misconduct as an adult simply because he engaged in similar misconduct as a child.

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[108] *Id*. at 483.

[109] *See* Taylor-Thompson, *supra* note 1, at 145–48 (providing a more detailed discussion on juvenile justice trends).

[110] Bonner et al., *Adolescent Sex Offenders: Common Misconceptions vs. Current Evidence*, NAT'L CENTER ON SEXUAL BEHAVIOR OF YOUTH FACT SHEET, July 2003.

[111] *Id*. (citing A.O. Miranda & C.L. Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile and Adult Sexual Offenders: Preliminary Results*, SEXUAL ABUSE: J. RESEARCH & TREATMENT 12, 179–88 (2000)).

[112] *Id*. (citing Association for the Treatment of Sexual Abusers (ATSA), *The Effective Legal Management of Juvenile Sex Offenders*, *available at* http://www.atsa.com/pp juvenile.html).

1. Studies Comparing Adolescent Behavior to Adult Behavior

"Adolescence is, by definition, a period of transition during which individuals experience dramatic changes, intellectually, emotionally, and physically."[113] Congress, however, failed to take this into account when it amended the Federal Rules of Evidence to include FRE 413 and 414. By failing to put any limitation on the age of offenses that can potentially be admitted against an accused, Congress implicitly sanctioned the admission of adolescent sex offenses in later adult prosecutions.[114] While such a result may not have been the intent of the legislature, it is the reality of the situation.

One of the main differences between adolescent and adult offenders is that "[a]n adolescent's poor choice to engage in unlawful conduct is different from an adult's poor decision."[115] An adolescent's decision making ability is quite different from an adult's because an adolescent's ability is naturally limited by experience and developmental facts, both of which change and increase with maturity.[116] Because of the growth factors inherent in the maturation process, "a critical development gap exists between adults and adolescents."[117] Recent studies in the field of developmental psychology also suggest that an adolescent's choice about engaging in misconduct is often the "product of cognitive and psychological immaturity."[118] Some researchers even suggest that because of this psychological maturity process, "individuals [should] not be expected to display consistently mature judgment until the age of eighteen, at the earliest."[119] "If youthful choices to offend are based on

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[113] Kim Taylor-Thompson, *supra* note 1, at 156.

[114] It may very well be that none of the amendment's supporters ever envisioned adolescent offenses being admitted several years later in adult prosecutions. In fact, the lack of a bright-line rule concerning temporal proximity of the offenses seems to be judicially created more so than congressionally mandated. Indeed, Sen. Dole was quoted as saying, "If [the sex offense] had not happened for 10 years, it probably would not have any value." Similarly, Sen. Hatch seemed incredulous that anyone would even suggest using an old or adolescent offense under FRE 413 or FRE 414 when he stated, "Does that amount to letting somebody put in some allegation 13 years ago into evidence? Of course not." THE EVIDENCE PROJECT, *supra* note 16.

[115] Kim Taylor-Thompson, *supra* note 1.

[116] *Id.*

[117] *Id.* at 144.

[118] *Id.* at 150 (citing Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 139 (1997)).

[119] Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 734 (2005)

diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened."[120] Such a position makes it hard to justify using adolescent offenses to demonstrate a propensity to engage in similar adult criminal conduct when the adolescent was not psychologically developed to such an extent that he understood the wrongfulness of his conduct.

In addition to psychological studies demonstrating the differences between adults and adolescents, recent studies in the field of neurology indicate that a person's brain is actually "re-wired" during his teenage years.[121] The brain goes through many such stages of development through adolescence and into adulthood. As one researcher stated about the neurological development of an adolescent's brain:

> As the brain develops—in children and, science is now learning, in teenagers—it is this very inhibition machinery that is being fine-tuned . . . . What can we expect of adolescents if that inhibition machinery, the prefrontal cortex, is not yet fully tuned? Children, including teenagers, may simply not be as capable as adults at inhibiting behavior. There is also evidence that this same lesser development of the same region of the brain makes it less likely that children will recognize the consequences of their acts.[122]

Propensity arguments rely upon the premise that an individual will commit similar acts of misconducts for similar reasons, i.e., one commits multiple acts of sexual molestation of a child because he is depraved and enjoys that type of activity. While such a theory stands the test of reason when all of the acts are committed by an adult, what happens to the reliability of the theory if one of the acts was committed when the person was a minor? The above studies would indicate that the theory is potentially flawed because there is, arguably, limited rational correlation between acts committed as a child and acts committed as an adult based

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(quoting Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1778 (1995)).

[120] *Id*. at 737.

[121] *Id*. at 711.

[122] *Id*. at 712 (internal quotations omitted) (citing BARBARA STRAUCH, THE PRIMAL TEEN: WHAT THE NEW DISCOVERIES ABOUT THE TEENAGE BRAIN TELL US ABOUT OUR KIDS (2003)).

on a child's lack of societal experience and the re-wiring of the brain which occurs during adolescence.

2. Studies of Recidivism Rates for Adolescent Sex Offenders

Given the original reasons authored by the congressional proponents of FRE 413 and 414, it should not come as a surprise that scientific data, has become the proverbial white elephant in the middle of the room. One of the major problems is that there is no agreement as to the actual recidivism rate for sex offenders. The reasons for this are many: differences in the definition of recidivism (i.e. arrest versus conviction); use of "reported" crimes versus "unreported" crimes; definition of sex offense (i.e. rape versus indecent exposure); and length of the study are but a few.

In a recently completed study of recidivism rates for sex offenders released from prison in 1994 (the same year as the enactment of FRE 413 and 414), the Bureau of Justice Statistics reported that "[w]ithin 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of the released sex offenders were rearrested for a sex crime."[123] Similarly, "[w]ithin the first 3 years following release from prison in 1994, 3.3% (141 of 4,295) of released child molesters were rearrested for another sex crime with a child."[124] A 5.3% and 3.3% recidivism rate would not seem to call for the drastic changes to the evidentiary law that Congress implemented. And it should be pointed out that these rates are based on "re-arrest" and not conviction, which could conceivably lower those stated rates. Of course, proponents of the law would probably argue that basing recidivism rates on re-arrest is misleading since most sex offenses against children are drastically under reported.[125] Regardless of the validity of each side's argument, one of the overall conclusions of the study was: "[c]ompared to non-sex offenders released from State prison,

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[123] LANGAN ET AL., *supra* note 20, at 1.
[124] *Id.*
[125] *See, e.g.*, Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1741 (citing PAT GILMARTIN, RAPE, INCEST, AND CHILD SEXUAL ABUSE: CONSEQUENCES AND RECOVERY 48–49 (1994)).

sex offenders had a lower overall rearrest rate."[126] Indeed, studies and findings such as this are typical.[127]

The difference between those who argue that the amendments were needed to protect society from a mass of repeat offenders, and those who argue that they were not, basically comes down to interpretation of those statistics. For example, while opponents to the amendments claim the low recidivism rates do not justify congressional action, those in support of using propensity evidence point to those same studies and percentages (i.e., 5.3%) and argue, accurately, that sex offenders are "4 times more likely to be rearrested for a sex crime"[128] than released non-sex offenders.[129] Furthermore, proponents of the rule argue that sex offenses are severely under-reported and that "courts and legislators need to be aware that clinical experience suggests that sex offenders have committed many more offenses than the number for which they have been arrested."[130] At least as far as adult sex offenders are concerned, the data can be interpreted to support whichever position one favors. Luckily, there does not seem to be the same type of disagreement in the area of recidivism for adolescent sex offenders. This, again, probably has to do with the studies showing that most juvenile offenders respond to treatment very favorably.[131]

"According to the Federal Bureau of Investigation, juveniles were arrested for approximately 12.4% of all forcible rapes committed in 2001."[132] This is consistent with other studies suggesting that

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[126] *Id*. at 2.

[127] Joseph A. Aluise, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153 (1998) (Two separate U.S. Dept. of Justice studies showed rearrest rates for convicted rapists varied between 2.9% and 7.7%.).

[128] LANGAN ET AL., *supra* note 20, at 1.

[129] The same can be said for the studies referenced in footnote 110 where "rapists were 10.5 times more likely to be rearrested for rape than were individuals who had been previously convicted of other crimes." Bonner, et al., *supra* note 110.

[130] Tamara Larson, Comment*: Sexual Violence is Unique: Why Evidence of Other Crimes Should be Admissible in Sexual Assault and Child Molestation Cases*, 29 HAMLINE L. REV. 177, 207, (2006) (citing Dean G. Kilpatrick, Christine N. Edmunds & Anne Seymour, *Rape in America: A Report to the Nation* 1 (Nat'l Victim Ctr., Crime Victims Research & Treatment Ctr. 1992)).

[131] Bonner et al., *supra* note 110 (citing Ass'n for the Treatment of Sexual Abusers (ATSA), *The Effective Legal Management of Juvenile Sex Offenders*, *available at* http://www.atsa.com/ppjuvenile.html) (last visited Feb. 6, 2008).

[132] Joel T. Andrade et al., *Juvenile Sex Offenders: A Complex Population*, 51 J. FORENSIC SCI. 1 (Jan. 2006).

adolescents are responsible for one-half of all reported child molestation cases.[133] No one is arguing, however, that adolescents are not engaging in sexual misconduct. The question to be answered is: are they engaging in *repeated* sexual misconduct, during future adolescent years and into adulthood, which would justify the use of propensity evidence? If they aren't, the propensity argument, at least as applied to adolescent sex offenders, becomes a fallacy.

The raw numbers indicate that the recidivism rate for adolescent sex offenders is generally between 5% and 14%.[134] Studies further indicate that this low recidivism[135] rate is due in large part to the success of treatment programs for adolescent sex offenders in reducing or eliminating future sex offenses.[136] The end result is that adolescent sex offenders are fundamentally different from adult sex offenders and the assumption that an adolescent sex offender will naturally become an adult sex offender is not supported by quantifiable evidence.[137] It is this absence of quantifiable evidence that the CAAF cited to in *Wright* that would signal the court's progression to its ultimate ruling in *Berry*.

V. Ripples in the Pond

Four years after *U.S. v. Wright*, the CAAF for the first time specifically addressed, in *United States v. McDonald*, whether prior adolescent sex offenses could be used in the same manner as prior adult sex offenses in military prosecutions. While *McDonald* was decided on the basis of MRE 404(b) and not MRE 413 or 414, it did represent the proverbial "shot across the bow" in military propensity jurisprudence. It also foreshadowed the beginning of the end for the admission of propensity evidence concerning offenses committed by an accused when he was an adolescent.

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[133] JOHN A. HUNTER, UNDERSTANDING JUVENILE SEX OFFENDERS: RESEARCH FINDINGS AND GUIDELINES FOR EFFECTIVE MANAGEMENT AND TREATMENT (2000).
[134] Bonner et al., *supra* note 110.
[135] General recidivism rates have been about 40% historically since 1980. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, PRISONER RELEASES (June 2001), *available at* http://www.gao.gov/new.items/d01483.pdf.
[136] HUNTER, *supra* note 133.
[137] Bonner et al., *supra* note 110.

A. *United States v. McDonald*

The accused in *McDonald* was charged with various sexual improprieties against his adopted daughter when she was twelve years old.[138] During its case in chief, the Government introduced evidence that twenty years earlier, when the accused was thirteen, the accused had engaged in various sexual improprieties with his stepsister, who was eight at the time.[139] The Government offered this testimony, over defense objection, as evidence of the accused's "intent, plan, and scheme regarding his offenses with" his adopted daughter twenty years later.[140] In overruling the trial court's decision, the CAAF concentrated primarily on the fact that the accused was an adolescent at the time of the uncharged misconduct.[141]

After dispensing with the Government's theories of admissibility concerning plan and scheme, the CAAF turned its attention to the Government's primary theory of admission: intent. The court was unconvinced that an adult's intent to commit a crime (mens rea) could simply be proven by the existence of a similar act committed by that same person when he was an adolescent. Specifically, CAAF stated, "[a]bsent evidence of that 13-year-old adolescent's mental and emotional state, sufficient to permit meaningful comparison with Appellant's state of mind as an adult 20 years later, the military judge's determination or relevance on the issue of intent was fanciful and clearly unreasonable."[142] While not outright articulated, the CAAF's ruling in essence refuted the belief that an adult's intent to engage in one type of misconduct can be demonstrated simply by the commission of similar acts when that person was a child. Yet this is exactly the premise upon which MRE 413 and 414 rests: if you did it once before, you are likely to do it again. The significance of this opinion would not be fully seen until the CAAF was presented with the case of *United States v. Berry*. [143]

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[138] United States v. McDonald, 59 M.J. 426, 427 (2004).
[139] *Id*. at 428.
[140] *Id*.
[141] *Id*. at 430.
[142] *Id*.
[143] United States v. Berry, 61 M.J. 91, 93 (2005).

B. *United States v. Berry*

One year after *McDonald* the CAAF decided *United States v. Berry*, which specifically addressed what type of evidence could be offered under MRE 413. *Berry* represented the first time the CAAF addressed either MRE 413 or 414 since its opinion in *Wright*. As in *McDonald*, the CAAF was called upon to decide whether acts committed as a juvenile could be admitted as substantive evidence to prove that an accused committed similar acts as an adult. This time, the avenue of admission was not MRE 404(b) but instead MRE 413 which, under congressional interpretation, is a rule of inclusion and not a rule of exclusion like Rule 404(b).[144]

The accused in *Berry* was charged with engaging in oral sodomy with another male soldier while that soldier was physically incapacitated due to intoxication.[145] The Government admitted evidence that eight years earlier, when Berry was thirteen, he coerced a six year old boy to engage in oral sodomy with him.[146] The Government's theory of admissibility was that "it is relevant to Sergeant Berry's propensity to sexually assault those who are in a position of vulnerability," (i.e., MRE 413 evidence).[147] Like in *McDonald*, the CAAF's opinion centered on the fact that the uncharged misconduct that the Government wanted to introduce was misconduct committed while the accused was an adolescent. The court first noted that while temporal proximity has never been an overriding consideration for the court in the past,[148] "[a] similar finding is not readily made where a prior incident is between children or adolescents."[149] The court then specifically cited its previous decision in *McDonald* and noted "that there is no evidence suggesting that Berry's mens rea at twenty-one was the same as it was when he was a child of thirteen."[150]

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[144] United States v. Wright, 53 M.J. 476, 482–83 (2000).
[145] *Berry*, 61 M.J. at 93.
[146] *Id.*
[147] *Id.*
[148] *See* United States v. Dewrell, 55 M.J. 131, 137–38 (2001) (finding acts occurring seven to ten years earlier admissible); United States v. Bailey, 55 M.J. 37, 41 (2001) (finding acts occurring three and one-half and ten years earlier admissible).
[149] *Berry*, 61 M.J. at 96.
[150] *Id.*

It is this difference between children and adults that gives the court its greatest pause. The CAAF cited a 2003 law review article in support of this difference:

> Between the ages of twelve and seventeen, adolescents undergo a critical period of transition during which they experience rapid transformations in emotional, intellectual, physical, and social capacities. Even older adolescents, whose raw intellectual capacities may rival those of adults, have less experience on which to draw in making and evaluating choices. In short, adolescents are not simply miniature adults.[151]

It is for this reason alone that the CAAF believes even an otherwise unremarkable eight-year span between offenses can become such a significant gap in time that it would warrant exclusion of the uncharged misconduct. The CAAF further cautioned military judges:

> When projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child, military judges must take care to meaningfully analyze the different phases of the accused's development rather than treat those phases as being unaffected by time, experience, and maturity.[152]

As was started in *McDonald*, the CAAF had clearly thrown the gauntlet down in *Berry* as it relates to the Government's ability to use adolescent offenses to demonstrate propensity in adult prosecutions. This stance is in direct contradiction to the rest of the federal judiciary, which has yet to place any limits on the admission of propensity evidence under FRE 413 and 414 other than requiring a Rule 403 balancing test. Such a stance, however, is not unprecedented for the CAAF, especially of late. In the case of *United States v. Martinelli*,[153] the CAAF held that § 2252A of the Child Pornography Prevention Act[154] did not have extra-territorial applicability, thereby placing an untold number of previously obtained military convictions in jeopardy, even though no other federal circuit court or lower service court had

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[151] *Id*. at 97 (quoting Kim Taylor-Thompson, *supra* note 1, at 152–53).
[152] *Id*.
[153] United States v. Martinelli, 62 M.J. 52 (2005).
[154] 18 U.S.C.S. § 2252A (LexisNexis 2008).

previously held so.[155] Clearly, the CAAF has shown that it can be a model for judicial independence, and it has done so again in *McDonald* and *Berry*.

VI. Ramifications of Decision

A. What Now?

Notwithstanding the CAAF's decision to "stray from the pack," generally speaking, the CAAF's ruling in *Berry* is consistent with the rationales expressed by other federal courts; it is the *outcome* which is different. The CAAF clearly recognized that "[f]rom strictly a propensity viewpoint, the evidence does show that Berry had participated in similar conduct in the past."[156] The CAAF also underscored the almost universally held opinion that "[t]he length of time between the events alone is generally not enough to make a determination as to the admissibility of the testimony."[157] Indeed, up to this point in the CAAF's analysis, the *Berry* opinion was no different than those from the federal circuits. However, when the temporal proximity between those events constitutes a period of time between adolescence and adulthood, that specific period of time will be considered, at least under the CAAF interpretation, a "notable intervening circumstance" requiring exclusion of the proffered evidence.[158] The question the CAAF left unanswered, however, is what effect *Berry* will have on the future of military jurisprudence as it pertains to the use of adolescent misconduct.

While the CAAF clearly carved out a small exception to MRE 413, it did so for the same reason other federal courts have excluded non-adolescent offenses in other cases: the proffered testimony failed the MRE 403 balancing test.[159] In so doing, however, the CAAF arguably has created an almost unattainable standard for the Government to meet before a military judge will be authorized to admit adolescent offenses

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[155] *See, e.g.*, United States v. Corey, 232 F.3d 1166, 1183 (9th Cir. 2000), United States v. Cream, 58 M.J. 750, (N-M. Ct. Crim. App. 2003). *See generally* Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992).
[156] *Berry*, 61 M.J. at 95.
[157] *Id.* at 96.
[158] *Id.*
[159] *Id.* at 97 (In addition to the temporal proximity factor, the CAAF also found that admission of the evidence in question would be a distraction to the fact-finder and create a mini-trial on a collateral issue.).

for propensity reasons. In future cases, "[w]here a military judge finds that the prior 'sexual assault' acts of a child or adolescent are probative to an act later committed as an adult, such a determination *must be supported in the record by competent evidence*."[160]

The CAAF made clear in *Berry* that, in the court's opinion, children were not simply "miniature adults."[161] It also cautioned military judges to "meaningfully analyze" the "different phases" of development and basically ensure that those phases were not affected by "time, experience, and maturity."[162] Only after the military judge makes such findings is the proffered evidence then admissible. Furthermore, those findings must be "supported in the record by competent evidence."[163] How can the Government ever be expected to meet that threshold for admissibility? The simple answer is, it probably cannot. Conceivably, the only way to satisfy the requirements of *Berry* is for the Government to present medical and/or psychological testimony as a condition precedent to the admission of the uncharged misconduct. Furthermore, the medical and/or psychological evidence presented would have to be specific to the accused's state of mind at the time he engaged in the adolescent misconduct, as well as the time period during which he engaged in the adult misconduct. Obviously, adolescent state of mind evidence will be the most difficult, if not impossible, to obtain. Yet it is precisely this evidence which the CAAF has dictated is most relevant. Only by having the "dated" medical and/or psychological evidence will the court be able to meaningfully compare the adolescent's mental and emotional state to that of the accused's state of mind as an adult.[164] And only by finding a similar state of mind will the proffered propensity evidence be legally relevant, and therefore admissible.

With such a high standard in place, it should be obvious that, whether or not it was the CAAF's intent, the Government will never be able to satisfy its burden. It can and should be argued that the CAAF has created a de facto rule against the admission of adolescent offenses for propensity reasons. For all intents and purposes, adolescent sex offenses are no longer admissible under MRE 413 or 414 to demonstrate an adult's propensity to engage in similar misconduct. Even if one is not

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[160] *Id*. (emphasis added).
[161] *Id*. (quoting Kim Taylor-Thompson, *supra* note 1, at 152–53).
[162] *Id*.
[163] *Id*.
[164] *Id*.

willing to make that conclusion, however, "[c]oupled with . . . the *McDonald* case, it is fair to say that uncharged adolescent sexual misconduct is presumptively inadmissible under the [Military Rules of Evidence]."[165]

B. *United States v. Bare*

The first case to use the aforementioned argument was *United States v. Bare*.[166] *Bare* represented the next step, and to date the only step, in the military application of MRE 414 and the possible use of adolescent offenses. [167] Appellant in *Bare* was charged with several specifications of sexual molestation of both his biological daughter and his stepdaughter.[168] The Government sought to offer testimony from appellant's sister that he had similarly molested her between seventeen and nineteen years earlier.[169] At the time of the allegations, appellant was between the ages of sixteen and nineteen and his sister was between the ages of seven and eleven.[170] At trial, the evidence was offered and admitted under MRE 404(b); however, the Air Force court did not state which exception to MRE 404(b) the Government relied upon. Furthermore, because the Air Force court unilaterally found that the evidence could have been admitted under MRE 414, which is a rule of inclusion, it declined to address appellant's MRE 404(b) argument. In finding that the evidence was admissible under MRE 414, the Air Force court found that the facts of appellant's case were distinguishable from the facts in *Berry*. Specifically, the Air Force court found that the

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[165] Major Christopher W. Behan, *"The Future Ain't What It Used to Be": New Developments in Evidence for the 2005 Term of Court*, ARMY LAW., Apr. 2006, at 10.
[166] United States v. Bare, 63 M.J. 707 (A.F. Ct. Crim. App. 2006).
[167] The granted issue on appeal from the U.S. Air Force Court of Criminal Appeals (Air Force court) was:

> WHETHER IN LIGHT OF *UNITED STATES V. BERRY*, 61 M.J. 91 (C.A.A.F. 2005) AND *UNITED STATES V. MCDONALD*, 59 M.J. 426 (C.A.A.F. 2004), EVIDENCE OF UNCHARGED SEXUAL ACTS BETWEEN APPELLANT, WHEN HE WAS AN ADOLESCENT, AND HIS SISTER WAS IMPROPERLY ADMITTED AND MATERIALLY PREJUDICED APPELLANT.

United States v. Bare, No. 35863, 2006 CAAF LEXIS 1453 (Nov. 22, 2006).
[168] *Bare*, 63 M.J. at 709–710.
[169] *Id.* at 708.
[170] *Id.*

evidence in *Berry* "involved only a single prior incident of sexual misconduct, [whereas] the evidence in this case reflects numerous examples of similar conduct occurring under similar circumstances."[171] In dismissing the appellant's argument that his prior adolescent misconduct was inadmissible after the CAAF's rulings in *McDonald* and *Berry*, the Air Force court found that "[i]n the final analysis, the appellant appears to have sexually molested his vulnerable female relatives whenever the opportunity presented itself [and t]his is the exact sort of behavior contemplated by Mil. R. Evid. 414."[172] The court's decision that the evidence relating to appellant's sister could have nonetheless been admitted under MRE 414 formed the basis of the appeal before the CAAF.

Based on the Air Force court's analysis of the issue in *Bare*, one of four outcomes was possible when the aforementioned issue was appealed to the CAAF. The CAAF could have: (1) affirmed the Air Force court's opinion finding that *Bare* is distinguishable from *Berry* because the appellant in *Bare* was not a true adolescent when he committed his prior offenses; [173] (2) found that the evidence was improperly admitted but that the error was harmless (because of the Government's other incriminating evidence); (3) retreated from its earlier positions taken in *McDonald* and *Berry* in affirming the Air Force court's decision; or (4) reinforced its previous rulings and concluded that the evidence was inadmissible under MRE 414 and could have further spelled out, in detail, exactly what the Government must do prior to offering adolescent sex offenses as propensity evidence under MRE 413 or 414.

In short, the CAAF chose option number one. In affirming the Air Force court's opinion, the CAAF was "persuaded the facts [in Bare's case were] distinguishable from those in *Berry* in several significant

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[171] *Id*. at 712.
[172] *Id.*
[173] Because the appellant in *Bare* engaged in continuous misconduct between the ages of sixteen and nineteen, during oral argument several members of the court were concerned about the age at which an individual should no longer be considered an adolescent, an issue that was not present in *Berry*. Judge Ryan pointed out that the crux of the issue was why Bare should be treated as a child instead of an adult between the ages of sixteen and nineteen. Judge Baker was even more specific when he stated, "One of the issues here as to whether *Berry* is distinguishable or not . . . is whether this appellant should be treated as an adult . . . at the age of 19 or some time before or after; so age is important." Audio recording: Oral Argument, United States v. Bare, Court of Appeals for the Armed Forces (Feb. 28, 2007), *available at* http://www.armfor.uscourts.gov/CourtAudio/20070228.wma.

respects."[174] Of note were the facts that the appellant in *Bare* "was older than Berry at the time the uncharged misconduct occurred" and that the "[a]ppellant was an adult as well as an adolescent" at the time of the uncharged misconduct.[175] Furthermore, the court highlighted the fact that "the alleged incidents [in *Bare*] were not a one-time event, but occurred regularly for a period of about two or three years." [176]

This last acknowledgement by the court is especially important considering that the court specifically relied upon the differences in the mens rea between an adolescent and an adult when it issued its opinion in *Berry*. No such difference, however, could be relied upon or, indeed, even identified in *Bare*. As the Air Force court pointed out, "the abuse [alleged by Bare] was frequent and extended over many years with each" victim.[177] As such, there was not a clear line of demarcation, upon which the court could rely, between the adolescent mens rea and the adult mens rea.

One of the fundamental holdings in *Berry* seemed to be that "[w]here a military judge finds that the prior 'sexual assault' acts of a child or adolescent are probative to an act later committed as an adult, such a determination *must be supported in the record by competent evidence*."[178] *Berry* seemed to create an affirmative responsibility on the part of the Government to present evidence demonstrating a similar mens rea between the accused as an adolescent and as an adult before the Government would be allowed to introduce propensity evidence involving alleged adolescent sexual misconduct. The fundamental reasoning of the CAAF in *McDonald* and *Berry* is that propensity evidence is *legally* relevant only if the Government presents competent evidence of the "adolescent's mental and emotional state, sufficient to permit meaningful comparison with"[179] the accused's state of mind many years later. Without a clear line of demarcation in *Bare* between the appellant's adolescent and adult mental state, the question left unanswered is whether the court's opinion in *Bare* reinforces or detracts from the court's previous opinions in *McDonald* and *Berry*. Furthermore, military practitioners still have to ask: "Has the CAAF truly created, in essence, a de facto, per se rule against the admission of

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[174] United States v. Bare, 65 M.J. 35, 37 (2007).
[175] *Id.*
[176] *Id.*
[177] *Bare*, 63 M.J. at 712.
[178] United States v. Berry, 61 M.J. 91, 97 (2005) (emphasis added).
[179] *Id.* at 96 (citing United States v. McDonald, 59 M.J. 426, 430 (2004)).

adolescent sex offenses, and if so, how should the military proceed from here?" Notwithstanding the opinion in *Bare*, the CAAF has created such a rule for some adolescent sex offenses, and the military needs to amend MRE 413 and 414 to explicitly state that which is already an implicit reality.

VII. Argument and Recommendation

Given the above-referenced data, the research into adolescent psychology, and the CAAF's most recent ruling in *Bare*, it can hardly be stated that the CAAF is being unreasonable or has become an example of "judicial activism."[180] If anything, given the number of states that have refused to adopt FRE 413 and 414 and apply a strict interpretation of Rule 404(b) instead, the CAAF's approach is arguably more in line with the majority of jurisdictions than the federal circuit courts. The court's approach is certainly more in line with the rationale behind MRE 609 and the use of adolescent offenses of all kind under that rule. What the CAAF has done is provide balance and a measure of fairness to the application of MRE 413 and 414.

As presently constructed, and as historically applied, MRE 413 and 414 provide no limit to what may be admitted in terms of propensity evidence (assuming that the proffered evidence concerns a prior sex assault or child molestation offense). In order to bring the rule into congruence with the implicit and explicit consequences of the CAAF's decisions, MRE 413 and 414 should be amended to *specifically* exclude the introduction of single incidents of sexual assault and child molestation offenses committed by an accused while an adolescent. The key, as identified and emphasized by the court in *Bare*, is to determine exactly when one crosses that line between adolescence and adulthood. The suggested wording of the amendment to MRE 413 would read as follows:

> (i) Exception. Evidence of a single act of <u>sexual assault</u> (i.e. sexual contact or sexual act) committed by the accused prior to the accused attaining the age of

[180] The theory of judicial behavior that advocates basing decisions not on judicial precedent, but on achieving what the court perceives to be for the public welfare, or what the court determines to be fair and just on the facts before it. Answers.com, http://www.answers.com/topic/judicial-activism (last visited, Feb 11, 2008).

> eighteen, which would ordinarily be admissible under this rule, shall be inadmissible unless such evidence is also admissible under the provisions of Military Rule of Evidence 404(b).[181]

For MRE 414, the wording would be almost identical:

> (i) Exception. Evidence of a single act of child molestation (i.e. sexual contact or sexual act) committed by the accused prior to the accused attaining the age of eighteen, which would ordinarily be admissible under this rule, shall be inadmissible unless such evidence is also admissible under the provisions of Military Rule of Evidence 404(b).

The effect of this amendment would be minimal in application, but necessary nonetheless. In the end, very few cases would actually be affected by the amendment. Indeed, even the court's decision in *Bare* would have remained unchanged, since the appellant was alleged to have engaged in multiple acts of misconduct prior to attaining the age of eighteen. As this article demonstrates, since the enactment of FRE 413 and 414 only three reported cases have addressed the issue of adolescent offenses being used as strict propensity evidence in adult prosecutions: *Lemay*,[182] *Berry*,[183] and now *Bare*.[184] Such a situation is to be expected, however, given the low recidivism rates and "aging out" phenomenon[185]

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[181] MCM, *supra* note 4, MIL. R. EVID. 404. Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Id.

[182] United States v. Lemay, 260 F.3d 1018 (10th Cir. 2001).

[183] *Berry*, 61 M.J. 91.

[184] United States v. Bare, 65 M.J. 35, 37 (2007).

[185] Kim Taylor-Thompson, *supra* note 1, at 156 (citing John H. Laub & Robert J. Sampson, *Understanding the Desistance from Crime*, 28 CRIME & JUST. 1 (2001) (proving an overview of qualitative research on desistance from crime); Terrie E. Moffitt, *Adolescent-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675–77 (1993); Neal Shover & Carol Y. Thompson, *Age, Differential Expectations, and Crime Desistance*, 30 CRIMINOLOGY 89 (1992) (finding support for direct and indirect effects of age on desistance)).

of adolescent sex offenders discussed earlier.[186] Furthermore, given that current regulations[187] would probably prohibit the accession into the military of individuals that had multiple prior juvenile adjudications involving sex offenses, admission of adolescent sex offenses under MRE 413 and 414 would be reserved to those rare cases of unproven and non-adjudicated accusations—hardly the type of cases where inclusion and veracity of the evidence should be presumed. Additionally, and more importantly, the exclusion would apply only to those situations where there was a single act of adolescent misconduct. Situations like the one in *Bare* would be exempt from the statutory exclusion, because the multiple allegations of adolescent sexual misconduct blur the line between his adolescent mens rea and his adult mens rea.

The proposed amendments would not result in countless future accused service members receiving a "get out of jail free" card through enactment of the amendment, nor would the Government necessarily "lose" convictions it ordinarily would have been able to secure. Even in cases where the proffered evidence is statutorily excluded from admission under MRE 414, the evidence would still be admissible under MRE 404(b) so long as the Government could demonstrate that the purpose for admitting the evidence is something *other than propensity* (and it can meet the foundational requirements outlined in *McDonald* if offered under plan or intent). Furthermore, the amendment would simply memorialize that which has already been implicitly created by the CAAF's rulings in *McDonald* and *Berry* and would create the bright line rule that the CAAF was searching for in *Bare*.

VIII. Conclusion

Voltaire stated, "It is better to risk saving a guilty man than to condemn an innocent one."[188] Such a position is also one of the fundamental building blocks of our criminal justice system, and indeed, our Constitution. Because of misplaced public outcry and ever-present political considerations, Congress forgot these foundations when it enacted FRE 413 and 414. While protection of society arguments may

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[186] *See* discussion *supra* sec. IV.

[187] U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND ARMY RESERVE ENLISTMENT PROGRAM para. 4-24(f) (16 May 2005).

[188] Quotes by Voltaire at Find Quotations, http://findquotations.com/quote/by/Voltaire (last visited Feb. 22, 2008).

hold some validity when the issue relates to career sexual predators, that same argument falls to the wayside when the issue relates to adolescent offenders and their offenses.

Recent studies in the fields of psychology and neurology indicate that adolescents engage in misconduct for reasons wholly separate from those of their adult counterparts.[189] In essence, research indicates that an adolescent's intent when he engages in misconduct is affected by a multitude of factors. This begs the question: If the reason, or the intent, or the mens rea, of an adolescent is the not the same as an adult's, how can the courts justify admitting adolescent offenses under a propensity argument? The answer is, they cannot. The propensity argument relies on the theory that individuals who engage in sexual misconduct are "predisposed" to engage in that misconduct. The extension of that argument is that prior sexual offenses "prove" the predisposition. However, if the mens rea of the adolescent offender and the adult offender are not the same due to psychological or neurological considerations, what relevance does the prior adolescent offense have towards that alleged disposition? Again, the answer is none.

Yet the courts have continuously upheld the constitutionality of FRE 413 and 414 and have ignored the medical and statistical evidence before them. "[S]ome of the refusal to recognize the differences between adults and children or adolescents may be the result of . . . judges' unwilling[ness] to accept the psychological evidence"[190] presented, and an inherent skepticism of the psychological research. The CAAF, however, has clearly recognized this problem in the propensity argument as it relates to adolescent offenses, and has decided to take corrective measures. While the CAAF did affirm the Air Force court's holding in *Bare*, it did not retreat from its previous opinions and rationale in either *McDonald* or *Berry*. The time is at hand to eliminate any remaining doubt concerning the admission of adolescent offenses in adult prosecutions and amend the Military Rules accordingly.

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[189] Kim Taylor-Thompson, *supra* note 1 (juvenile misconduct is the "product of cognitive and psychological immaturity" whereas adult misconduct is the product of conscious choice and intent).

[190] Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 738 (2005).

HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR[1]

REVIEWED BY MAJOR GEOFFREY S. DEWEESE[2]

"Did they mislead us, or did they simply get it wrong? Whatever the answer is, it is not a good answer."[3]

Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War is an engaging, yet sobering account of how the Bush administration used weak, faulty, and erroneous intelligence to sell the case for the Iraq War. The main goal of the book by journalists Michael Isikoff[4] and David Corn[5] is to demonstrate that the quality of the intelligence did not matter to the administration. As they state it, "Bush and his aides were looking for intelligence not to guide their policy on Iraq, but to market it. The intelligence would be the basis not for launching a war but for selling it."[6]

Aside from its value as a national after action review, *Hubris* provides leaders with an important lesson in the dangers of evaluating facts only in light of whether they support a preconceived result. However, *Hubris* falters by not providing a more complete context for its own positions. This review will focus first on these failures before turning back to the lessons learned from Isikoff and Corn's account.

Hubris asserts that the Iraq War was a "faith-based war—predicated on certain ideological and geopolitical views."[7] The authors owe the reader a balanced analysis of what those views were, as well as the

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[1] MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL AND THE SELLING OF THE IRAQ WAR (2006).

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[3] ISIKOFF & CORN, *supra* note, 1 at 328 (quoting Sen. Jay Rockefeller).

[4] Michael Isikoff is an investigative correspondent for *Newsweek* magazine. His last book was *Uncovering Clinton: A Reporter's Story* (1999), recounting his work in exposing the Monica Lewinsky scandal in the Clinton administration. *See* Meet Newsweek, http://www.msnbc.com/m/nw/nwinfo_isikoff.asp (last visited Jan. 23, 2008).

[5] David Corn is the Washington editor of *The Nation* magazine. His last book was *The Lies of George W. Bush: Mastering the Politics of Deception* (2003). *See* DavidCorn.com, http://www.davidcorn.com/author.php (last visited Jan. 23, 2008).

[6] ISIKOFF & CORN, *supra* note 1, at 16.

[7] *Id.*

historical and contemporary context for their development. Unfortunately, what little historical background Isikoff and Corn provide is not developed and put into context. For instance, the authors note that "Saddam's military ambition had been effectively constrained by the problematic but still-in-place sanctions imposed after the first Gulf War and by the previous UN weapons inspections,"[8] but they do not touch on why the sanctions were problematic or why weapons inspections were still going on over a decade after the first Gulf War.

Isikoff and Corn do not discuss the creation of the no-fly zones in northern and southern Iraq and the continued efforts to patrol these areas with American air power.[9] There is no mention made of the military strikes of Operation Desert Fox in 1998.[10] This engagement, consisting of four nights of aerial and naval attacks with bombs and cruise missiles, was a direct result of Iraq's ongoing defiance of UN-mandated weapons inspections.[11] Finally, there is no serious examination of the massive human rights violations in Iraq and their effect on the decision to oust Saddam, other than passing mention that Saddam "had gassed his enemies in the 1980s"[12] and that inspectors found mass graves after the invasion.[13]

In addition to glossing over the historical background to the conflict, the authors fail to address meaningful contemporaneous events fully. This failure is apparent in the authors' discussion of David Kay, one of the UN weapons inspectors who had aggressively attempted to enforce the inspections in the early 1990s.[14] Kay and his team had been able to verify through inspections that Iraq had been trying to develop a nuclear bomb prior to the first Gulf War, though they had to endure a standoff with armed Iraqi soldiers who attempted to confiscate the evidence.[15] The documents he eventually got out of Iraq proved that the Iraqi government had lied about the extent of their program.[16] According to Isikoff and Corn, in 2002 Kay briefed national Democratic leaders that

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[8] *Id.* at 26.
[9] *See* THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 12–15 (2006).
[10] *See id.* at 18–19.
[11] *See id.*
[12] ISIKOFF & CORN, *supra* note 1, at 17.
[13] *See id.* at 221.
[14] *See id.* at 126.
[15] *See id.*
[16] *See id.*

> [T]he U.S. government couldn't really trust the Iraqis to come clean. . . . The only guaranteed way of disarming Saddam, and making sure he never got a nuclear bomb, was regime change. . . . Anything else, including relying on UN inspections, would entail risk and might not be sufficiently effective.[17]

Kay was not alone in believing that Iraq was not cooperating with inspections. After the UN Security Council passed a resolution in November 2002 which gave Iraq a final chance to cooperate with inspections and fully disarm,[18] Iraq submitted a reply that chief UN Inspector Hans Blix called "not enough to create confidence."[19] Unfortunately, *Hubris* provides no examination as to why Blix felt that way.

Further, Isikoff and Corn devote scant attention to the positive results from the search for weapons of mass destruction that occurred after the invasion, merely noting evidence showed that "[c]learly, Iraq had been working on prohibited missiles."[20] While having prohibited missiles may not pose the same threat as having weapons of mass destruction, the fact that Iraq was hiding prohibited weapons of any type demonstrates the degree of obstruction the inspectors encountered in Iraq. Unfortunately, *Hubris* does not fully explore these factors, leaving the reader to wonder to what degree Iraq's lack of cooperation in the inspections program supported and informed the view of those who felt war was necessary.

Had the authors provided a more detailed analysis of the historical and contemporary context for the war, they would have been in a better position to evaluate the basis for the "ideological and geopolitical views"[21] of those who supported the war. Yet they fail in this respect as well. This is apparent in the book's discussion of three key figures—President George W. Bush, Vice President Dick Cheney, and Deputy Secretary of Defense Paul Wolfowitz.

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[17] *Id.*
[18] *See id.* at 158.
[19] *Id.* at 163.
[20] *Id.* at 309.
[21] *See supra* note 6 and accompanying text.

On 1 May 2002, President Bush was speaking with two aides when one of them told the President that a reporter at that day's press conference had asked about possible reasons to go to war with Iraq.[22] Isikoff and Corn relate that the President "grew grim and determined—steely."[23] The President is quoted as asking the aide, "Did you tell her I don't like motherf[***]ers who gas their own people? . . . Did you tell her I don't like assholes who lie to the world? . . . Did you tell her I'm going to kick his sorry motherf[***]ing ass all over the Mideast?"[24] According to the book's dust jacket, the President's "angry, expletive-laden outbursts at Saddam Hussein drove administrative decision making."[25] Isikoff and Corn argue that on that day, the President had already determined the nation needed to go to war and he was concerned about demonstrating "moral clarity" and "strong and decisive leadership" in order to "stand[] tall against an evil tyrant."[26] Unfortunately, they fail to follow up and explain what led the President to feel so strongly about the need to remove Saddam Hussein from power.

Similarly, the authors zero in on Vice President Cheney's personal involvement in reviewing intelligence[27] and claim that the Vice President had "long standing and firm views on Saddam Hussein that went back to when he had served as secretary of defense during the first Persian Gulf War."[28] Yet again, they provide no analysis or explanations as to why the Vice President felt war was necessary other than to simply state, "Cheney seemed obsessed with Iraq. He was sure that Saddam was a grave threat to the United States. . . ."[29]

The assertion that Vice President Cheney's views on Iraq were either long standing or firm is not borne out when examining other sources. In his book *Fiasco: The American Military Adventure in Iraq*, author Thomas E. Ricks quotes then-Secretary of Defense Cheney as stating shortly after the Persian Gulf War, "[T]he idea of going into Baghdad . . . or trying to topple the regime wasn't anything I was enthusiastic about."[30] According to Ricks, the former Secretary of Defense did not

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[22] *See* ISIKOFF & CORN, *supra* note 1, at 1–2.
[23] *Id.* at 3.
[24] *Id.*
[25] *Id.* at front, inside dust cover flap.
[26] *Id.* at 20.
[27] *See id.* at 3–4.
[28] *Id.* at 4.
[29] *Id.*
[30] RICKS, *supra* note 9, at 6.

seem overly concerned about Saddam Hussein's continued threat: "Saddam is just one more irritant, but there's a long list of irritants in that part of the world."[31] The failure of *Hubris* to examine how Cheney's views changed, and why, is a significant detriment to any thorough examination of the motivations of those who supported war in Iraq.

The closest Isikoff and Corn come to examining why the members of the Bush Administration believed war with Iraq was necessary is in their look at the influence of a "rumpled-looking,"[32] "oddball and offbeat academic"[33] named Laurie Mylorie.[34] Mylorie advocated a theory that "Saddam was the mastermind behind much of the world's terrorism."[35] Isikoff and Corn contend that Mylroie's theories greatly influenced Deputy Secretary of Defense Paul Wolfowitz, who they maintain was "enamored of Mylroie's anti-Saddam work."[36] *Hubris* addresses a chapter to discount Mylroie as a conspiracy theorist,[37] yet its theory that her work was a foundation for the pro-war beliefs of Wolfowitz and others comes across as hyperbole.

In looking at the genesis of Wolfowitz's views, Ricks provides another, more plausible explanation.[38] In 1991, Wolfowitz was Under Secretary of Defense for Policy and was the senior-most official in the first President Bush's administration to advocate for intervention in support of Shiite minorities in post-Gulf War Iraq.[39] American forces pulled back from Iraq and stood by as Saddam's forces killed thousands of Shiites who had begun an uprising originally supported by the United States.[40] The United States turned instead to a policy of containment and established no-fly zones in northern and southern Iraq, while leaving

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[31] *Id.* at 6–7.
[32] ISIKOFF & CORN, *supra* note 1, at 67.
[33] *Id.* at 75.
[34] According to the biography posted on the website LaurieMylroie.com, Mylroie has a doctorate in government from Harvard and has taught at Harvard and the Naval War College in addition to publishing books and articles relating to Iraq and Saddam Hussein. It does not state where she currently is employed. *See* LaurieMylroie.com, http://www.lauriemylroie.com/ (last visited Jan. 23, 2008). According to Isikoff and Corn, she was also a fellow at the American Enterprise Institute in 2001. *See* ISIKOFF & CORN, *supra* note 1, at 67. She is no longer listed as a fellow or scholar with the AEI on their website. *See* http://www.aei.org (last visited on Jan. 23, 2008).
[35] ISIKOFF & CORN, *supra* note 1, at 66.
[36] *Id.* at 66–67.
[37] *See id.* at 67.
[38] *See* RICKS, *supra* note 9, *passim*.
[39] *See id.* at 6.
[40] *See id.*

Saddam in power.[41] Wolfowitz opposed the policy of containment, which he believed "was profoundly immoral, like standing by and trying to contain Hitler's Germany."[42] While Wolfowitz may have been receptive to someone like Mylroie, Ricks, unlike Isikoff and Corn, actually explains *why* he may have held such views to begin with. Once put into context, Wolfowitz's support for the second Iraq war becomes more understandable.

The authors devote chapters to the investigation of why and how clandestine CIA operative Valerie Plame's identity was leaked to the press.[43] Isikoff and Corn connect this to the war because Plame's husband, former ambassador Joe Wilson, had become a vocal critic of the administration after the war.[44] He had accused the administration of lying about intelligence, specifically intelligence that indicated Iraq was attempting to obtain uranium from Niger—a claim that Wilson had personally investigated for the CIA and found lacking.[45] While interesting, this aspect of the book is a rabbit trail leading away from the critical issue of the use of intelligence before the war. Isikoff and Corn would have crafted a better and more powerful book had they used these chapters to establish more fully the context for the war and the reasons for the strongly-held beliefs of its supporters. Nonetheless, a wealth of otherwise interesting and well-researched material makes *Hubris* a worthy read.

Isikoff and Corn cite twelve examples of the misuse of intelligence to justify the war.[46] Without a doubt, the United States failed regarding pre-war intelligence. In June 2003, after the invasion was over, David Kay, the former weapons inspector who had been so sure of the dangers Iraq posed,[47] agreed to lead the search for the missing weapons of mass destruction.[48] In January 2004, shortly after leaving that post, Kay testified to the Senate Armed Services Committee: "We were almost all

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[41] *See id.* at 12.
[42] *Id.* at 16. Ricks notes that Wolfowitz "lost most of his Polish extended family in the Holocaust," which clearly impacted his views on this matter. *Id.*
[43] *See generally* ISIKOFF & CORN, *supra* note 1, at 255–79 (Chapter 14, *Seven Days in July*); 317–43 (Chapter 17, *The Investigation Begins*).
[44] *See id*. at 252–54; *see also id.* at 344–68 (Chapter 18, *The Prosecutor versus the Press*); 369–98 (Chapter 19, *The Final Showdown*).
[45] *See id.*
[46] *See id.* at 209.
[47] *See supra* note 16 and accompanying text.
[48] *See* ISIKOFF & CORN, *supra* note 1, at 233.

wrong—and I certainly include myself here."[49] The next month President Bush established an independent commission to examine the intelligence failures relating to Iraq's weapons of mass destruction programs.[50] The commission's conclusion, released in March 2005, stated that "the Intelligence Community was dead wrong in almost all of its pre-war judgments about Iraq's weapons of mass destruction. This was a major intelligence failure."[51]

The President's commission, however, was not charged with examining how policymakers used the intelligence provided.[52] *Hubris* stands out by providing this background. Further, it imparts to military leaders an important lesson on the danger of only seeking intelligence and information that supports their preferred actions and discounting anything that does not support such actions.

On 1 October 2002, the CIA delivered a national intelligence estimate (NIE) to Congress.[53] This NIE, as Isikoff and Corn put it, "came to symbolize the entire WMD foul-up."[54] It included "some points with scary specifics"[55]—Iraq had tons of chemical weapons, had unmanned aerial vehicles designed to deliver biological weapons, and was attempting to buy uranium for nuclear weapon production.[56] While the NIE did include some dissenting views, it strongly supported the view that Iraq was a serious threat.[57] Isikoff and Corn concede that two investigations "would later conclude there had been no 'political pressure' from the White House to alter the intelligence community's conclusions";[58] however, they essentially maintain that this conclusion ignores the reality of how political pressure worked. They point to the

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[49] *Id.* at 348.
[50] *See id.* at 349 n.; *see also* Press Release, Office of the Press Secretary, Executive Order Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Feb. 6, 2004, *available at* http://www.wmd.gov/exec_order.pdf (providing the text of the President's executive order establishing the commission).
[51] ISIKOFF & CORN, *supra* note 1, at 382 (quoting the commission's report). *See also* REPORT OF THE PRESIDENT OF THE UNITED STATES, THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, Mar. 31, 2005, *available at* http://www.wmd.gov/report/index.html
[52] *See* ISIKOFF & CORN, *supra* note 1, at 383.
[53] *See id.* at 133.
[54] *See id.* at 134.
[55] *Id.*
[56] *Id.*
[57] *See id.* at 133–34.
[58] *Id.* at 135.

experience of one analyst who stated, "You were never told what to write. . . . But you knew what assessments administration officials would be receptive to—and what they would not be receptive to."[59] Essentially, few analysts felt encouraged to defy the administration's assumption. In the case of this analyst, when he voiced disagreement, he found himself bumped from trips and uninvited to meetings.[60]

Another intelligence officer, Paul Pillar of the CIA, wrote about his similar conclusion in *Foreign Affairs* magazine.[61] His sobering assessment was that "the Bush administration would frown on or ignore analysis that called into question a decision to go to war and welcome analysis that supported such a decision."[62] In Pillar's view, "Intelligence analysts . . . felt a strong wind consistently blowing in one direction. The desire to bend with such a wind is natural and strong, even unconscious."[63] Pillar's view, endorsed by Isikoff and Corn, was that the NIE was a product of this environment. Specifically, they argue that this explains why the shaky claim that Iraq was trying to obtain uranium from Niger was included in the NIE even though the intelligence community had serious doubts about it.[64] They had "bent with the wind."[65]

Isikoff and Corn argue that by expecting certain results rather than seeking genuine analysis of the issues, the administration created an environment where analysts thought it was more important to support the administration's views than to support the facts.[66] Their depiction of how flawed intelligence such as the NIE came to exist and be used provides a warning to leaders. By seeking a specific result and creating an environment that is not conducive to debate and disagreement, true analysis cannot occur. Ignoring facts that do not support a specific desired conclusion will lead to grave errors.

Despite its flaws, *Hubris* makes a powerful case that better leadership and a willingness to hear all sides of the issues could have

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[59] *Id.* at 136 (quoting Bruce Hardcastle, Defense Intelligence Agency Analyst for Near East Affairs).
[60] *See id.*
[61] *See id.*
[62] *Id.* (quoting Pillar); *see* Paul Pillar, *Intelligence, Policy and the War in Iraq*, FOREIGN AFF., Mar./Apr. 2006, *available at* http://www.foreignaffairs.org/20060301faessay85202-p0/paul-r-pillar/intelligence-policy-and-the-war-in-iraq.html.
[63] ISIKOFF & CORN, *supra* note 1, at 136.
[64] *See id.*; *see also supra* note 43 and accompanying text.
[65] ISIKOFF & CORN, *supra* note 1, at 133.
[66] *See id.* at 410–11.

fostered an intelligence environment that would not have failed so miserably in the lead up to the Iraq War. In the Army, virtually every position is subordinate to another, and there are many levels of leadership from the Chief of Staff down to a squad leader. Both leaders and subordinates must be mindful of the dangers of an environment where there is a tendency to "bend with the wind." For the Judge Advocate, it is important to remember that our value to commanders is in providing honest advice. It may sometimes take personal courage to tell a commander, especially one who is in that Judge Advocate's rating scheme, "No," but ultimately if that is the right and legally sound answer, our honor demands no less.[67]

[67] *See, e.g.*, James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 2D 439 (2007). Mr. Comey served as Deputy Attorney General of the United States from 2003 to 2005. He states, "It is the job of a good lawyer to say 'yes.' It is as much the job of a good lawyer to say 'no.' 'No' is much, much harder. 'No' must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. 'No' is often the undoing of a career. And often, 'no' must be spoken in competition with the voices of other lawyers who do not have the courage to echo it." *Id.* at 444.

THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE[1]

REVIEWED BY MAJOR JOSEPH J. JANKUNIS[2]

The CNN commentator was gleefully boasting that Iraqis were free at last—they were performing a ritual that the audience in the West did not understand but that had been forbidden to the Shia for decades. What Americans saw as Iraqi freedom, my hosts saw as the blatant display of heretical rites that are anathema to orthodox Sunnis. Iraqis were free—free to be Shias, free to challenge Sunni power and the Sunni conception of what it means to be a true Muslim; free to reclaim their millennium-old faith.[3]

I. Introduction.

10 September 2001. Looking across the Islamic world, Sunni regimes dominate the landscape. From Afghanistan to Egypt, evidence of the "Sunni ascendancy" abounds. Even majority Shia countries, such as Iraq and Bahrain, are ruled by Sunnis. It is with this Sunni majority that America is familiar. Some are even our allies. In contrast, encircled to the north of this Sunni ring lies the center of the "other Islam," Shia

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[1] VALI NASR, THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE (2007).

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[3] NASR, *supra* note 1, at 19.

Islam. Outside of being infamous for the Iran hostage crisis, spawning of Hezbollah, and virulent anti-Americanism, this is a group largely unknown to most Americans. From the 1979 Iranian Revolution through 10 September 2001, America had few ties with this "other Islam." With its revolutionary fury spent during the Iran-Iraq War, Iran and Shia populations within Sunni dominated countries remained largely cut-off from the United States and the broader Sunni Islamic world. Operation Enduring Freedom, and more dramatically Operation Iraqi Freedom, shattered this façade of Sunni dominance. The "other Islam," unencumbered and empowered by the initial U.S. success in Afghanistan and Iraq, began to awaken. The "Shia revival" had begun.[4]

The Shia Revival provides a powerful, vivid, and ultimately unnerving account of the Shia revival and Sunni backlash resulting from the U.S. occupation of Iraq and its imposition of a democratic system. The United States invaded Iraq with the intent "of changing the region's politics for the better."[5] Instead, U.S.-led military actions rubbed raw the millennium long rift, at times visceral and violent, between Sunni and Shia Muslims and precipitated a broad and dynamic power struggle that has been dramatically reshaping the Islamic world.[6]

Casting a wide net over the Islamic world, the book provides a broad framework for understanding the origin and direction of the Sunni-Shia conflict. The framework broadly outlines the political, historical, economic, religious, and cultural interface between Sunnis and Shias from the birth of Islam to the present. An understanding of this framework alone makes the book well worth reading. However, the book's true strength lies in the application of this broad framework to specific historical, political, cultural, and religious friction points to show why the "Sunni ascendancy" in the late twentieth century has been forced to respond to the painful birth pangs of a region-wide "Shia revival."[7] Vali Nasr persuasively brings the reader to an understanding of where the Islamic world has been, where it is heading, and the

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[4] *See generally id.* This initial paragraph serves as a backdrop to the book. The facts and inferences contained in the paragraph are either directly stated or clear inferences from Nasr's work as a whole. The goal is to give the reader a broad perspective of the Islamic world as it existed prior to United States and coalition military operations. This perspective enables the reader to better understand how United States and coalition operations affected dramatic change in the Islamic world.

[5] *Id*. at 22.

[6] *Id*. at 22, 28.

[7] *Id.*

implications for the United States in its future relationships with the Islamic world as a result of the recent "Shia revival."[8] In accomplishing this task, Nasr makes *The Shia Revival* a must read for military professionals.

This review begins with an in-depth overview of the book. A discussion of democracy as a U.S. policy goal at the time it invaded Iraq to contextualize Nasr's assessment of U.S. policy flaws follows. Finally, the book's relevance to Judge Advocates is highlighted.

II. In-Depth Overview

In *The Shia Revival*, Nasr weaves countless swatches of cultural, religious, historical, and political fabric from across the entire Islamic world into a complex but intelligible tapestry that transcends time and geographic location. The breadth and richness of the tapestry is truly remarkable and clearly woven by a master in Middle Eastern affairs.[9] Consistently relating past to present, Nasr highlights how different conceptions of the role of government, forms of worship and religious practices, intrusions from the non-Muslim world, and ebbs and flows in power have impacted Sunni-Shia relations and serve as a predictive model for future behavior.[10] One need only consider Nasr's treatment of Sunni and Shia reactions to various Ashoura festivals throughout the book to appreciate his skill in making the past relevant to and partially predictive of the future.[11] He uses this predictive model to discuss the current power brokers in the Islamic world, to include various extremist groups, stretching from Lebanon to Afghanistan.[12] By the end of the book, the reader is left with a broad history-based understanding of the way ahead for the United States in its relations with the Middle East.

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[8] *Id*. at 28.

[9] Vali R. Nasr, Curriculum Vitae (n.d.), http://www.cfr.org/content/bios/Nasr%20CV%20-%20June%202007_3.pdf.

[10] NASR, *supra* note 1.

[11] *E.g*., *id*. at 31–61.

[12] *See id*. at 147–273 (discussing the competing interests of post-Iranian Revolution politicians, sectarian groups, and countries in the context of their impact on the outcome of the Shia revival). Nasr actually goes beyond simply comparing the Shias and Sunnis. He also dissects how various components of each group interact among themselves and with outsiders. For example, his discussion of the interrelationships of Iranian religious and political figures, Hezbollah, Syria, Ali al-Husayni Sistani, and various Shia factions within Iraq exemplifies Nasr's approach. NASR, *supra* note 1.

The war in Iraq is ancillary to Nasr's purpose in writing *The Shia Revival*.[13] He treats it initially as a causal mechanism, and ultimately as an effect of dynamic and (from the U.S. perspective) unexpected regional change.[14] Nasr's purpose in writing this book is more complex. He writes to explain the resurgent conflicts between Sunni and Shia that the "war and its aftermath have unleashed and how those conflicts will shape the future."[15] His conclusion is chilling—the Iraq war marked the end of a period of "Sunni ascendancy" and empowered Shias within Iraq and concomitantly across the entire Islamic world.[16] Nasr labels this empowerment the "Shia revival."[17] Overnight, Iraq transformed from a Sunni bulwark against Iranian (Persian) Shiism into a Shia dagger wedged in the heart of the Sunni Arab world.[18] Iran greatly benefited from this change. Formerly hemmed in by Sunni neighbors, it was freed to pursue regional ambitions without fear of significant intervention from the United States.[19] The United States was preoccupied with a growing, and somewhat unexpected, counter-insurgency.[20] The nearly instantaneous reversal of long-settled Sunni-Shia fortunes has resulted in violent power struggles "as the old order gives place to a new one and Shias and Sunnis adjust to the new realities."[21]

This reversal of fortunes is not limited to Iraq. Using the "one man, one vote" example of Iraq, Shias across the Islamic world came to appreciate the liberalizing effect of elections as a means to power they would otherwise be unable to attain.[22] For example, Hezbollah willingly participated in elections in Lebanon to seize a share of the power.[23] Similarly, Shias in Sunni dominated countries began to demand more rights and recognition, demands which these established governments had no alternative but to partially grant as part of a political balancing act.[24] For example, in Saudi Arabia the Shia now had a new Shia Iraq and an empowered Iran to the north to buttress their claims. Growing numbers of Sunni extremists within Saudi Arabia increasingly viewed

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[13] *Id*. at 28.
[14] *Id*. at 20–22, 28.
[15] *Id*. at 28.
[16] *Id*. at 20–29, 170.
[17] *E.g*., *id*. at 169–84.
[18] *Id*. at 20–29, 170, 222.
[19] *Id*. at 211–26, 268–71.
[20] *See id*. at 20–28, 169–84, 268–71.
[21] *Id*. at 253.
[22] *Id*. at 231–40.
[23] *Id*. at 231–34. A plurality of Lebanon's population is Shia. *Id*.
[24] *Id*. at 236–40.

the government as unrepresentative of true Islam due to collaboration with the United States. Lastly, the United States was exerting pressure on its ally to ameliorate the condition of the Shias within Saudi Arabia in an attempt to preclude a further-reaching sectarian conflict.[25] Taken together, the outlook for some of these bastions of Sunni power is uncertain as they attempt to balance demands by the West to mitigate extremism while recognizing that these same extremists may represent their best means to restore Sunni regional power.[26]

According to Nasr, the short term forecast is bleak—sectarian conflict and extremism will increase, seemingly well-established Sunni governments such as those in Saudi Arabia and Bahrain will struggle, and Iran will further antagonize the United States as it seeks to exert its influence across the Islamic world and become a regional power.[27] An odd confluence of trends may make this forecast potentially more dismal. Historically, when the Islamic world was confronted with an unwanted outside influence, it consolidated. But today, anti-Americanism and Sunni and Shia extremism are both on the rise, and the extremist tendencies are directed at both one another and at America.[28]

How is the United States to respond to the Shia revival and political upheaval within and among Islamic countries? Nasr concludes that the United States must remain committed to democracy in the Middle East, a democracy that is not restricted to a "small clique of authoritarian [(Sunni)] rulers" but one which reaches out to all the ethnic and religious groups in the region.[29] This will be a difficult task for the United States. On the one hand, it will have to reacquaint itself with Shias, something it has not done since the Iranian Revolution.[30] On the other, it will have to balance these overtures to the Shias with ongoing support to the Sunni establishment "as it contends with the Shia challenge and the Sunni

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[25] *Id*. at 236–73.
[26] *Id*. at 236–47.
[27] NASR, *supra* note 1.
[28] *Id*. at 27, 245–46 ("War on America is now war on Shiism, and war on Shiism is war on America.").
[29] *Id*. at 27.
[30] *Id*. at 20–21, 271–72. Nasr advocates that the United States embrace the Shia more closely than the Sunni. The Shia are emerging from a period of extremism, while the Sunni are entering a period of increased extremism and anti-Americanism. *Id*. at 250–51. Also, while Shia governments have been very anti-American, the Shia "streets" have not. The opposite is true in Sunni countries. *Id*. at 271–72. This point is somewhat speculative. It anticipates the "street" in Iran and Lebanon will overcome their highly anti-American governments in the foreseeable future.

backlash to it."[31] "Over time the Shia-Sunni conflict can be brought under control only if the distribution of power and resources reflects the demographic realities of the region."[32] Ultimately, "[w]hen the dust settles, the center of gravity [of the Islamic world] will no longer lie with the Arab Sunni countries but will be held by the Shia ones."[33]

III. A Lesson Learned: The U.S. Policy Objective to Democratize Iraq

The United States invaded Iraq with the policy objective of establishing a viable democracy that respected its citizens and interacted peacefully with other countries. The objective was implicit in the President's 2002 National Security Strategy,[34] and forcefully stated in the President's 2006 National Security Strategy.[35] This policy objective is distinct from the legal justification for the use of force.[36] The legal justification merely permitted the use of military force as an instrument of national power to achieve the end state—a viable democracy.

Without much discussion, Nasr takes as fact that one of the U.S. policy objectives in invading Iraq was to establish a viable democracy.[37] Nasr then caveats this policy objective. Influenced by a Sunni bias in its understanding of the Middle East, Nasr concludes that the United States

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[31] *Id*. at 252; *see also id*. at 236–52.
[32] *Id*. at 252.
[33] *Id*.
[34] OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA pmbl. (2002) (stating that there is "a single sustainable model for national success: freedom, democracy, and free enterprise"); *see also* Address to the Nation on Iraq from the U.S.S. *Abraham Lincoln*, 1 PUB. PAPERS 410, 412 (May 1, 2003) [hereinafter Address] ("The advance of freedom is the surest strategy to undermine the appeal of terror in the world. Where freedom takes hold, hatred gives way to hope. When freedom takes hold, men and women turn to the peaceful pursuit of a better life.").
[35] OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (2006) ("Because democracies are the most responsible members of the international system, promoting democracy is the most effective long-term measure for strengthening international stability; reducing regional conflicts; countering terrorism and terror supporting extremism; and extending peace and prosperity.").
[36] *See* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (explaining the U.S. legal justification for the use of force against Iraq).
[37] *See, e.g.*, NASR, *supra* note 1, at 22.

wrongly believed that "changing the regions politics for the better" simply entailed "democratizing the old Sunni-dominated Middle East."[38]

The origin of the U.S. bias resided in its then existing relationships with regional governments. Since the Iranian Revolution in 1979, U.S. allies in the region tended to be the Sunni dominated governments of the Arab world.[39] The Revolution, marked by vitriolic rhetoric and actions toward the United States, created a U.S. worldview devoid of significant Shia input from 1979 through 2003.[40] This void in communication between the Shia world and the United States caused the United States to envision the future of the Middle East through a set of Sunni blinders. As a result, the United States did not fully appreciate Shia history and the extent to which that history was marked by Sunni domination.[41] When the United States liberated Iraq, the long-repressed Shia took to the streets, "holding their faith and their identity high for all to see."[42] "Americans saw [this] as Iraqi freedom,"[43] Sunnis saw it as a direct challenge to their hegemony in the Arab world.[44] Shias saw it as an opportunity to gain a share of the power.[45] From the American perspective at the time, President George W. Bush's declaration of an end to major hostilities in May 2003 is therefore intelligible.[46]

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[38] *Id*.
[39] *Id*. at 20–23, 250–54.
[40] *Id*.
[41] *Id*. While I generally agree with Nasr's assessment that the United States did not fully anticipate the breadth or depth of the resurgent Sunni-Shia conflict, Nasr places too great a weight on the degree to which U.S. cultural blindness toward the Shia since the 1979 Iranian Revolution has contributed to the current instability in Iraq. Even if the United States fully appreciated the difficult post-occupation task that lay ahead, it likely lacked sufficient organization and coordination between the instruments of national power (for example, the Departments of Defense and State) to successfully impose the rule of law in any post-conflict heterogeneous society marked by a history of repression and conflict. Therefore, while a more complete foreknowledge of the depth and breadth of the Sunni-Shia conflict may have caused the United States to reconsider the wisdom of military action in the first instance, once committed to military action, the result likely would not have been substantively very different. *See* JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 364–67 (2006) (discussing how the lack of U.S. interagency coordination prior to its occupation of Iraq greatly contributed to the post-intervention chaos and advocating greater interagency coordination to successfully implement the rule of law).
[42] NASR, *supra* note 1, at 19.
[43] *Id*.; *see also* Address, *supra* note 34, at 411 ("In the images of celebrating Iraqis, we have also seen the ageless appeal of human freedom.").
[44] NASR, *supra* note 1, at 19–29.
[45] *Id*.
[46] Address, *supra* note 34.

America's leaders simply did not fully appreciate the depth of the Sunni-Shia conflict, and its promise of years of future conflict, as the formerly oppressed were now vested with the reigns of power. As Nasr puts it, "[t]he lesson of Iraq [for the United States] is that trying to force a future of its liking will hasten the advent of those outcomes that the United States most wishes to avoid."[47]

IV. Relevance to Judge Advocates

The Shia Revival should be required reading for all Judge Advocates in today's operational environment. Effective lawyers and counselors need to know their client's business. Right now, our client's business is attempting to end the insurgencies in Iraq and Afghanistan with the ultimate goal of building institutions and developing cultural norms capable of balancing the competing interests of Sunnis and Shias in a stable, law-abiding democratic society.[48] Achieving this end state is a daunting task involving rule of law, stability and reconstruction, and counterinsurgency operations.[49] Necessarily, to be a truly effective counselor in each of these situations—a counselor that advises not only on the legality of a given course of conduct but also on the operational advisability of that course of conduct—one must understand the society in which they are operating. As recognized by rule of law scholars, any attempt to successfully impose the rule of law requires an acute

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[47] NASR, *supra* note 1, at 250.

[48] Clearly this ultimate goal must encompass other ethnic and religious groups, such as the Kurds in Iraq. However, as the book predominantly limited itself to a discussion of the Sunnis and Shias, this review does the same.

[49] Secretary of Defense Robert M. Gates, *Beyond Guns and Steel: Reviving the Nonmilitary Instruments of American Power* 2, 4, MIL. REV. Jan.-Feb. 2008.

> One of the most important lessons of the wars in Iraq and Afghanistan is that military success is not sufficient to win: economic development, institution-building and the rule of law, promoting internal reconciliation, good governance, providing basic services to people, training and equipping indigenous military and police forces, strategic communications, and more—these, along with security, are essential ingredients for long-term success.

Id. To respond to these complex challenges, Secretary Gates proposed the creation of a "civilian response corps" and a "dramatic increase in spending in the civilian instruments of national security—diplomacy, strategic communications, foreign assistance, civic action, and economic reconstruction and development." *Id.* at 7-8.

understanding of the society in which you are seeking to establish it.[50] In the context of Iraq and Afghanistan, Nasr's book serves as an excellent starting point to bridge this gap between legal tactician and counselor.

The Shia Revival provides a predictive framework to educate ourselves about where the Sunni-Shia conflict has been and where it is going. In a sense, it is akin to a detailed after-action report. It explains the U.S. goals in entering Iraq, delineates how U.S. actions led to unintended consequences, and then provides a generalized outline for future success, to include a description of the goals of the relevant power brokers in the region. For example, should the United States continue to court Sunnis in Anbar Province given Nasr's assessment that Shia patience with the United States is wearing thin?[51] Even if one disagrees with Nasr's ultimate conclusions, the book remains an invaluable read if only for the vast amount of information on Shia and Sunni culture, religion, politics, and history.

V. Conclusion

The Shia Revival is a must-read for anyone with a professional or personal interest in the Islamic world. But before running out to the bookstore, three words of caution are in order. First, the book is somewhat anticlimactic. The reader arrives at the conclusion expecting something great, such as a real-world application of how the United States should navigate the shoals of the Sunni-Shia conflict in Iraq. Instead, all you get is a framework of general application to the entire Islamic world. Perhaps this is an unfair critique, but it's one Nasr created in providing an otherwise unobstructed window into the Sunni-Shia conflict. Second, if you are looking for a detailed analysis of Sunni culture, politics, and history, this book is not for you. The book predominantly discusses the Shia perspective on these matters, elaborating on similar Sunni events only where the two intersect or conflict. As a reader, I often questioned how the Sunni version of various events would rival that presented by Nasr. Lastly, while Nasr's intended audience is the layperson, this book may not be for everyone.

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[50] *See, e.g.*, STROMSETH ET AL., *supra* note 41, at 9–10 ("[T]here is no 'one size fits all' template for rebuilding the rule of law in post-conflict settings: to be successful, programs to rebuild the rule of law must respect and respond to the unique cultural characteristics and needs of each post-intervention society.").

[51] NASR, *supra* note 1, at 261–66.

The hundreds of names, places, political groups and figures, and religious practices from a culture alien to most Americans are difficult to digest. The first two chapters are particularly vexing. The end prize, however, is well worth the effort. Whether you are contextualizing the nightly news or performing rule of law operations in Iraq, this book will make you better at it.

MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR[1]

REVIEWED BY MAJOR DOUG J. CHOI[2]

The First Thanksgiving is an image of peace, cooperation, and friendship between the Pilgrims and the Native Americans. In *Mayflower: A Story of Courage, Community, and War*, Nathaniel Philbrick[3] takes us beyond this popular image. The relationship between the Pilgrims and the Native Americans did not develop out of friendly curiosity or acts of kindness. Instead, it was motivated by self interest and a desire for power. Philbrick gives us a detailed look at the Pilgrims' history and shows us how diplomacy played into their success.

Mayflower tells the story of the Pilgrims from their escape from England through the end of King Philip's War. It opens with a description of the transatlantic voyage and follows the lives of those who were aboard. *Mayflower*, however, does not end with the events that surround the ship. Instead, it continues to tell the story of the next generation of Pilgrims who seemingly distanced themselves from the purpose for which the Mayflower set sail.

Courage, community, and war are the themes that Philbrick uses to identify the Pilgrims during their first fifty-six years in New England. Philbrick transitions from one theme to the next in chronological order. In the first half of the book, Philbrick provides us with images of the Pilgrims' courage as they struggle to survive over sea and land. The death toll during the first year was catastrophic. The Pilgrims arrived at Plymouth in the fall of 1620 and quickly faced the difficulties of winter.[4] "By the spring, 52 of the 102 who had originally arrived at Provincetown were dead."[5]

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[1] NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR (2006).

[2] U.S. Army. Presently assigned as Chief of Operational Law, Eighth Army, U.S. Army Garrison Yongsan, Republic of Korea. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] Philbrick is a resident of Nantucket Island and an author of maritime literature. Nathaniel Philbrick, Life at a Glance, http://www.nathanielphilbrick.com/about/bio.html (last visited Jan. 22, 2008).

[4] PHILBRICK, *supra* note 1, at 34.

[5] *Id*. at 90.

From this struggle arose a successful permanent settlement. The increase in the English population, however, significantly changed the dynamics of the Pilgrims' relationship with the Native Americans. When they first arrived at Plymouth, the Pilgrims were able to survive because the Native Americans "had come to the Pilgrims' rescue."[6] However, as the English population began to grow, the Native Americans were seen as an obstacle toward their expansion.[7] The Native American response was an attempt to regain what was once theirs, and this eventually led to King Philip's War.

As Philbrick takes us through their history, he highlights both the Pilgrims' successes and their failures. Philbrick attributes their successes to the Pilgrims' diplomatic efforts and their willingness to work with others. The Pilgrims were Separatists, and their purpose in sailing to America was to establish a religious community isolated from government interference.[8] However, they displayed an attitude that was far from isolationist.

The Pilgrims were not alone aboard the Mayflower. Although they may have been a majority, many of those aboard were non-Separatists.[9] The Pilgrims referred to them as "Strangers,"[10] and their purpose for embarking on that same voyage was very different. For the Strangers, their goal was to establish a settlement that would be financially profitable.[11] Despite these differences in their purposes, the Pilgrims and the Strangers understood that their mutual successes depended on their ability to work together.[12] Even before they set foot on land, the men aboard the ship signed the Mayflower Compact which created a single government that unified the Pilgrims and the Strangers.[13]

Philbrick believes that the Mayflower Compact was a response to the mutinous attitude displayed by some of the Strangers when they arrived at Plymouth.[14] They had secured a patent that only authorized a

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[6] *Id*. at 120.
[7] *See id.* at 206–07.
[8] *Id*. at 4–5.
[9] *Id*. at 42.
[10] *Id*. at 22.
[11] *Id*. at 40.
[12] *Id*.
[13] *See id*. at 41. "Only nine adult males did not sign the compact—some had been hired as seamen for only a year, while others were probably too sick to put pen to paper." *Id*. at 43.
[14] *Id*. at 39.

settlement in Virginia. Settling at Plymouth might cause a complete financial loss.[15] Philbrick praises the Mayflower Compact as "a remarkable act of coolheaded and pragmatic resolve."[16] He argues that the Pilgrims could have "looked to their military officer, Miles Standish, and ordered him to subdue the rebels. Instead, they put pen to paper and created a document that ranks with the Declaration of Independence and the United States Constitution as a seminal American text."[17] According to Philbrick, diplomacy was the key to the Pilgrims' success.

Philbrick again highlights this point when the Pilgrims faced the Native American threat. When the Pilgrims first arrived, they had "alienat[ed] and anger[ed] every Native American they happened to come across."[18] After the first winter, however, the Pilgrims made contact with the Pokanokets and eventually arranged a meeting with Massasoit, their leader.[19] The Pilgrims took this opportunity to secure a treaty with Massasoit, "who, as far as they could tell, ruled [that] portion of New England."[20] Philbrick explains, "Placing their faith in God, the Pilgrims might have insisted on a policy of arrogant isolationism. But by becoming an active part of the diplomatic process in southern New England . . . they had taken charge of their own destiny in the region."[21]

As it turned out, Massasoit was not as powerful as the Pilgrims were led to believe.[22] The Pokanokets were devastated by disease, and they were struggling to survive as an autonomous tribe.[23] Philbrick writes,

> There were profound differences between the Pilgrims and the Pokanoket to be sure—especially when it came to technology, culture, and spiritual beliefs—but in these early years, when the mutual challenge of survival dominated all other concerns, the two people had more in common than is generally appreciated today.[24]

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[15] *Id*.
[16] *Id*. at 42.
[17] *Id*.
[18] *Id*. at 119.
[19] *Id*. at 97.
[20] *Id*. at 100.
[21] *Id*. at 119.
[22] *Id*. at 111.
[23] *See id.* at 48–49.
[24] *Id*. at 119.

As they had done with the Strangers, the Pilgrims had again joined forces with the Pokanokets to achieve success.

Philbrick also suggests that the scale of King Philip's War could have been drastically reduced if the Pilgrims would have again answered with diplomacy. Benjamin Church was a second generation Pilgrim who lived among the Sakonnets, a neighboring tribe to the Pokanokets.[25] Church understood that his own future in that region depended on his relationship with the Sakonnets.[26] Although a generation had passed, Church had placed himself in a situation similar to that faced by the first Pilgrims.[27] His key to survival was also the same. Church developed a strong friendship with the leader of the Sakonnets.[28]

When Church learned that Philip[29] was attempting to draw the Sakonnets into a war against the English colony, Church quickly answered with diplomacy. When the Sakonnets expressed a willingness to side with the English colony, Church told them that he would travel to Plymouth and would return with a treaty.[30] By the time Church reached Plymouth, however, King Philip's War had already begun.[31] If Church had been permitted to pursue diplomacy to its end, the Sakonnets and other Native Americans in that region would have most likely stayed out of the war.[32]

Even after the war's outbreak, Church did not give up on his hopes of winning the Sakonnets over to the English side.[33] However, it was not until months later that Church was able to secure the governor's approval for a treaty with the Sakonnets.[34] Church was then able to form "his own company of Indians"[35] and achieved unparalleled military success by "routinely bringing in more Indians than all of Plymouth's and

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[25] *Id*. at 233.
[26] *Id*. at 235.
[27] *Id*. at 233.
[28] *Id*. at 235.
[29] Philip, who was Massasoit's son, led an alliance of Native American tribes against the English in King Philip's War. *Id.* at xiv–xv.
[30] *Id*. at 235.
[31] *Id*. at 236.
[32] *See id.* at 246.
[33] *Id*.
[34] *Id*. at 317.
[35] *Id*.

Massachusett Bay's companies combined."[36] Philbrick provides this explanation for Church's success:

> Instead of loathing the enemy, try to learn as much as possible from him; instead of killing him, try to bring him around to your way of thinking. First and foremost, treat him like a human being. For Church, success in war was about coercion rather than slaughter, and in this he anticipated the welcoming, transformative beast that eventually became—once the Declaration of Independence and the Constitution were in place—the United States.[37]

Diplomacy again prevailed. This time, however, the choice had not been between diplomacy and isolationism. The choice had been between diplomacy and war.

Philbrick attempts to make the lesson simple. Diplomacy should be pursued as middle ground between isolationism and war. Philbrick writes:

> For peace and for survival, others must be accommodated. The moment any of them gave up on the difficult work of living with their neighbors—and all of the compromises, frustration, and delay that inevitably entailed—they risked losing everything. It was a lesson that Bradford[38] and Massasoit had learned over the course of more than three long decades. That it could be so quickly forgotten by their children remains a lesson for us today.[39]

Philbrick draws what appears to be a logical conclusion based on the history of the Pilgrims. However, his lesson is too simple.

Philbrick attempts to be true to history based on his thorough research. He provides us with fifty pages of "notes" to justify his

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[36] *Id*. at 324.
[37] *Id*. at 358.
[38] William Bradford was the governor of Plymouth from 1621 to 1656 except for five years within that time period. Dorothy Honiss Kelso, Pilgrim Hall Museum, America's Museum of Pilgrim Possessions, William Bradford (July 14, 1998), http://www.pilgrim hall.org/bradfordwilliam.htm.
[39] PHILBRICK, *supra* note 1, at 348.

writing.[40] Philbrick, nonetheless, is forced to rely exclusively upon the written works of the Pilgrims and their descendants.[41] It is from this perspective that Philbrick writes, and it is from this perspective that he draws his conclusions. He views the Pilgrims as the "Americans" and measures success by their achievements. When he draws conclusions about the use of diplomacy, he fails to realize his own bias.

As a result of King Philip's War, "the Native American population of southern New England had sustained a loss of somewhere between 60 and 80 percent."[42] Philbrick is unable to explain the root cause of this war.[43] However, it can be argued that Massasoit bears some responsibility. He did exactly what Philbrick praises. Massasoit engaged the Pilgrims in diplomacy. Yet, it was his willingness to support a permanent English settlement that eventually destroyed the Native Americans during King Philip's War and thereafter.

When Massasoit first learned of the Pilgrims at Plymouth, he had other options. "Massasoit's first impulse was not to embrace the English but to curse them."[44] Massasoit could easily have attacked the Pilgrims as he had done against Thomas Dermer's English expedition about a year earlier.[45] The Pilgrims were able to establish a permanent settlement only because of Massasoit's willingness to support them. "With the exception of Jamestown, all other attempts to establish a permanent English settlement on the North American continent had so far failed. And Jamestown, founded in 1607, could hardly be counted a success."[46]

From the Native American perspective, diplomacy was a failure. While many view the First Thanksgiving as a symbol of diplomatic success, some Native Americans who would disagree. Philbrick even points out that "[i]n 1970, Native activists declared Thanksgiving a National Day of Mourning."[47] The First Thanksgiving may mark the

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[40] *Id*. at 363–413.
[41] Philbrick admits that "it is true that we must rely almost wholly on documents written by the English" and that "we will obviously never know as much about the Native point of view as we do the English." Nathaniel Philbrick, Mayflower: An Interview with Nathaniel Philbrick, http://www.nathanielphilbrick.com/mayflower/interview.html (last visited Jan. 22, 2008).
[42] PHILBRICK, *supra* note 1, at 332.
[43] *See id*. at 215–16.
[44] *Id.* at 95.
[45] *Id*.
[46] *Id*. at 5.
[47] *Id*. at 355–56.

dawn of the English settlement in North America, but it can also be viewed as the eve of an oppressive era for the Native Americans. One Native American captured this sentiment in a poem that reads, "Our many nations once stood tall and ranged from shore to shore but most are gone and few remain and the buffalo roam no more. We shared our food and our land and gave with open hearts. We wanted peace and love and hope, but all were torn apart."[48]

Philbrick is correct when he says that the Pilgrims succeeded through the use of diplomacy. However, diplomacy does not always achieve success. It certainly did not do so for the Native Americans. The lesson that Philbrick tries to teach in *Mayflower* may be flawed by its simplicity, but *Mayflower* is still a book worth reading. Philbrick begins *Mayflower* by writing, "We all want to know how it was in the beginning,"[49] and he provides us with exactly that. Philbrick gives us a vivid account of a time period that significantly reshaped America for Native Americans and Pilgrims alike.

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[48] TOMMY FLAMEWALKER MANASCO, WHERE WILL OUR CHILDREN LIVE..., http://www.nativeamericans.com/ (last visited Jan. 22, 2008).
[49] PHILBRICK, *supra* note 1, at xiii.